

**In The United States District Court
For The Northern District Of Ohio
Eastern Division**

Effie Stewart, et al.,

Plaintiffs,

v.

**J. Kenneth Blackwell,
Ohio Secretary of State, et al.,**

Defendants.

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Case No: 5:02CV-2028

Judge Dowd

Magistrate Judge Gallas

**Defendants’ Reply Brief In Support
Of Their Motion For Summary Judgment**

I. Introduction

Even though the Plaintiffs’ own experts have admitted that Ohio has a very good elections system that would never function the way Florida did in 2000, they continue to ask this Court to federalize and micro-manage the entire elections system, from the race for President to every local race in Ohio. Despite seeking this unprecedented federal intrusion into the Ohio electoral system, the Plaintiffs claim that they really are not seeking any remedy at all, merely an order that Ohio’s elections system violates the Voting Rights Act and the Constitution of the United States and they would leave it up to the State of Ohio to “fix” their “very good” elections system. They ask for this while presenting no admissible evidence whatsoever that Ohio’s use of

punch cards violates either the Voting Rights Act or the Equal Protection Clause. They ask for this unprecedented action while mentioning that the State should be left free to craft their own remedy.

Of course, the State has already announced its plans to comply with the Help America Vote Act (“HAVA”) by the statutory deadline. Plaintiffs have voiced not a single complaint about Ohio’s progress nor introduced any evidence disputing Ohio’s intentions to comply with HAVA. It is, therefore, curious why Plaintiffs seek to dictate how Ohio fulfills its obligations under HAVA. Before the Plaintiffs can seek to dictate how Ohioan cast their votes, they have an obligation to create a genuine issue of material fact about whether Ohio’s current voting system violates either the Voting Rights Act or the United States Constitution. Plaintiffs have failed to overcome this hurdle and the Defendants are entitled to summary judgment in this case.

II. Since The Plaintiffs Have Failed To Introduce Any Evidence whatsoever That The State Of Ohio Or Its Political Subdivisions Have Denied African-Americans The Right To Vote, The Defendants Are Entitled To Summary Judgment On The Plaintiffs’ Voting Rights Act Claim.

As the Plaintiffs correctly note in their Memorandum Contra Summary Judgment, there are two types of possible claims a person can bring under § 2 of the Voting Rights Act – a “vote dilution” claim and a “vote denial” claim. A “vote denial occurs when a state ... employs a ‘standard, practice, or procedure’ that results in the denial of the right to vote on account of race.” *Burton v. City of Belle Glade*, 178 F.3d 1175, 1197-98 (11th Cir. 1999) quoting 42 U.S.C. § 1973(a); see also *Baker v. Pataki*, 85 F.3d 919, 924 n.6 (2d Cir. 1996) (en banc). On the other hand, a “vote dilution” claim occurs when “a voting practice diminishes ‘the force of minority votes that were duly cast and counted.’” *Baker*, 85 F.3d at 924 n.6 quoting *Holder v. Hall*, 512 U.S. 874, 896 (Thomas, J., concurring). The Plaintiffs specifically state they are not bringing a vote dilution case. (Plaintiffs’ Memo Contra at 6). Since the Plaintiffs have failed to

introduce any evidence that the State or its subdivisions have denied African-Americans the right to vote, the Defendants are entitled to summary judgment on the Voting Rights Act claim as a matter of law.

1. The Plaintiffs have failed to create any genuine issue of material fact that any of the Defendants denied African-Americans the right to vote and have also incorrectly applied the law to their claims.

As mentioned above, the Plaintiffs have claimed that they are bringing their § 2 Voting Rights Act claim merely as a vote denial claim. The Plaintiffs have misstated the legal requirements for a vote denial claim and have also failed to introduce any admissible evidence creating a genuine issue of material fact showing that the Defendants have denied African-Americans the right to vote in Ohio.¹

In order to state a “vote denial” claim, it becomes the legal obligation of the Plaintiffs to actually prove that they have been *denied the right to vote on the basis of their race*. 42 U.S.C. § 1973(a). Furthermore, in order to show a claim, the Plaintiffs must demonstrate that they were denied the right to vote based upon the totality of the circumstances. *See, e.g., Johnson v. Florida*, 353 F.3d 1287, 1304 n. 22 (11th Cir. 2003) *citing Farrakhan v. Washington*, 338 F.3d 1009, 1015 n.11 (9th Cir. 2003) (applying the totality of circumstances to a vote denial claim for felon disenfranchisement) and *Mississippi State Chapter, Operation PUSH v. Allain*, 674 F. Supp. 1245, 1263 (N.D. Miss. 1987) (applying the totality of the circumstances test to a vote denial claim for dual registration for voting that had been specifically designed to disenfranchise African-Americans). The Plaintiffs’ claim, therefore, that they do not need to show any of the totality of the circumstances is simply incorrect. (Plaintiffs’ Memo Contra at 13).

¹ The Defendants have been unable to locate and the Plaintiffs have failed to cite to any reported or unreported decision anywhere in the Sixth Circuit that has been brought as a vote denial case under § 2 of the Voting Rights Act.

a. The Totality Of The Circumstances Show That The Plaintiffs In This Case Have Not Been Denied The Right To Vote.

Underlying the basic flaw in the Plaintiffs case is that none of them were *denied the right to vote*. The Plaintiffs are registered voters in the State of Ohio and claim to have cast a ballot in the 2000 election. They were not, therefore, denied the right to vote. They simply speculate that because they used punch card technology, their votes may not have been counted – a claim sounding in vote dilution, yet a claim that they are not advancing. Despite what the Plaintiffs assert, they are still obligated to show, based upon the totality of the circumstances, they have been denied the right to vote.

Although the Plaintiffs inform this Court that it should ignore or loosely apply the totality of circumstances factors, such a claim is inconsistent with court precedent. *See, e.g., Johnson*, 353 F.3d at 1304 n. 22. The Plaintiffs have failed to even articulate in their memorandum contra summary judgment how they have met any of the totality of the circumstances factors. Instead, they ask this Court to take judicial notice of some statistics in order to “prove” their case. (Plaintiffs’ Memo Contra at 13 n.6). For example, although the Plaintiffs claim that the Ohio constitution of 1851 prohibited African-Americans from voting and that the provision remained in the Constitution until 1923, they failed to inform the Court that Ohio ratified the Fifteenth Amendment on January 27, 1870. *see* <http://www.nps.gov/malu/documents/amend15.htm>. The Fifteenth Amendment became effective on February 3, 1870 and that constitutional provision superseded the 1851 constitution.

The Plaintiffs also attempt to introduce some census data from Hamilton, Summit, and Montgomery counties. (Plaintiffs’ Memo Contra at 13 n.6). However, they do not demonstrate any precincts that contained residual votes in the 2000 presidential election actually bore any of the effects of past discrimination. Although the Plaintiffs’ counsel selectively chose the counties

and election in this litigation to correspond to an academic paper he is writing concerning the 2000 presidential race in Ohio, such selectivity without a basis in actual testimony cannot serve as the basis to deny the Defendants' properly constituted summary judgment motion. (Plaintiffs' Memo Contra at 7 n.2).

The result is that the Plaintiffs have failed to produce any admissible evidence whatsoever that they have met any of the necessary elements of a vote denial case. This failure begins with their inability to show they were actually denied the ability to vote and continues with their failure to show any of the *Gingles* "typical factors" that are to be examined in a § 2 Voting Rights Act case. Because of this failure, the Defendants are entitled to summary judgment on this claim.

b. The Plaintiffs have failed to bring forth any statistical evidence to prove that they have been denied the right to vote.

As has been previously demonstrated, the Plaintiffs bear the burden of proving, through statistical evidence, they have been denied the right to vote by the State and its political subdivisions. They have failed in that endeavor.

The Plaintiffs' memorandum contra, which is heavy in rhetoric but light in evidence, merely repeats their refrain that punch card ballots are obviously bad. Their memorandum contra fails to address the fact that the Plaintiffs' own witnesses demonstrated that whites in Franklin County and African-Americans in Hamilton County undervoted in the 2000 Presidential election at an identical rate. Engstrom Depo. at 73. They fail to address the fact that their own expert clearly demonstrated that whites in Summit County were more than twice as likely to undervote in the 2000 Presidential election as African-Americans in Hamilton County. Engstrom Expert Report at 8. Furthermore, the Plaintiffs have failed to introduce any reliable evidence whatsoever showing that *any* of the residual ballots in Ohio in the 2000 Presidential

race were anything other than intentional. Although the Plaintiffs have attempted to circumvent this obvious problem by introducing a national study that may or may not have actually talked to a couple of Ohio voters, this study does not create a material issue of fact for the Plaintiffs. The Plaintiffs have asked this Court to simply assume that because a national exit poll says that a certain percentage of people intentionally did not cast a vote for President in the 2000 election, that rate *has to be identical* for every single precinct in Ohio – and by extension every single precinct in the country. Such an argument is false on its face and such a study is not admissible evidence creating a genuine issue of material fact.²

Likewise, the Plaintiffs have failed to bring any admissible evidence before this court showing that punch card ballots systemically exclude African-Americans from voting. The Defendants have proven through the Plaintiffs' own expert that the highest residual vote rates in the State of Ohio are in eight Appalachian counties, Holmes County, and Summit County, while not technically part of Appalachia has a substantial Appalachian community. Instead of addressing their own evidence, the Plaintiffs merely argue – without any support in the law – that they do not have to address these inter-county issues because they are bringing a claim for intra-county disparity. Such an intra-county comparison might be useful in a vote dilution claim because it would show how African-American votes were diluted in a local race. It is not useful in a vote denial claim where African-Americans have not been denied the right to register or to vote, especially when one considers the incontrovertible fact that the counties with the highest residual vote rate contain a very small African-American population.³

² Apparently recognizing the problems with the Kropf study, the Plaintiffs have argued that no Ohio specific study on intentionally non-voted ballots exists. However, since the Plaintiffs bear the burden of proof in this lawsuit and are bound by the Federal Rules of Evidence, it is their obligation to prove what that rate is. If they needed to commence such a study in order to meet the requirements of proof in this case, such an expense is simply a burden of litigation.

³ The Plaintiffs' argument on Page 9 of their memorandum contra shows exactly how confused the Plaintiffs are over the difference between a vote denial and a vote dilution case. By arguing that some voters in certain counties

c. The Plaintiffs fail to comprehend the import of a decision denying a motion to dismiss.

Many of the Plaintiffs' legal arguments revolve around the case of *Black v. McGuffage*, 209 F. Supp. 2d 889 (N.D. Ill. 2003). They imply in both their Voting Rights Act claim and their constitutional claim that, because the district court denied a motion for judgment on the pleadings, the plaintiffs in this case are entitled to summary judgment as a matter of law. (Memo Contra at 10, 23). The Plaintiffs apparently do realize, when a court denies a motion to dismiss, it merely determines that when taking every fact alleged by plaintiffs as true and also drawing every inference in favor of the Plaintiffs, they have stated enough to make out a legal claim. *Bovee v. Coopers & Lybrand, C.P.A.*, 272 F.3d 356, 360 (6th Cir. 2001). Thus, when the Plaintiffs, in this case, state that the *Black* court "did not apply the Senate factors" they are actually misrepresenting what the court did and why. The *Black* court stated that "the 'totality of circumstances' ... analysis under Section 2 cannot be fully ascertained in this case except through discovery...." *Black*, 209 F. Supp. 2d at 897. Thus, the *Black* court simply determined that based upon the allegation in the Plaintiffs' complaint, it could not at that time determine if a Voting Rights violation had occurred.

III. Since The Plaintiffs Have Failed To Demonstrate Any Genuine Issue Of Material Fact Exists For Their Constitutional Claims, The Defendants Are Entitled To Summary Judgment On That Claim As Well.

Much as the Plaintiffs have been unable to demonstrate any genuine issue of material fact existed in their Voting Rights Act claim, they have similarly failed to articulate a genuine issue of material fact in their constitutional claim. As a result, the Defendants are entitled to summary judgment on that issue.

do not have votes counted in the same number as others in that county, they are merely alleging that the majority in those counties instituted a practice that would allow them to *dilute* the vote of the minority – not simply exclude the minority from registering to vote or from showing up to cast a ballot on election day.

1. The State of Ohio has already begun the implementation of the Help America Vote Act.

The Help America Vote Act (“HAVA”) dictates that certain changes be made in the use of voting technology. On April 28, 2004, the Ohio Senate unanimously approved H.B. 262. See copy of H.B. 262 attached as Exh. A. This bill will allow 31 counties in the State of Ohio to purchase new electronic voting machines and have those machines in place for this year’s general election. See Section 3; see also <http://www.dispatch.com/news-story.php?story=dispatch/2004/04/29/20040429-C1-00.html>. Furthermore, as part of this bill, all 88 counties in Ohio will have new voting devices with paper verified receipts by 2006 unless the Help American Vote Act requires even swifter action. Section 3(E)(1)(a). It appears, therefore, that the State of Ohio has already resolved any issue whatsoever that the Plaintiffs may have concerning the use of punch card voting machines. Regardless of this, however, the Plaintiffs misunderstand the import of HAVA and the Defendants’ reliance upon that statute.

The Supreme Court and the Sixth Circuit have long recognized that some statutory schemes are so complete that they pre-empt the ability of plaintiffs to bring claims under 42 U.S.C. § 1983. See, e.g., *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 795 (6th Cir. 2000). HAVA details what type of voting systems must be in place nationally and sets a deadline for their introduction. 42 U.S.C. § 15481. HAVA also provides for a complete enforcement mechanism for violations of its requirements. 42 U.S.C. § 15511 *et seq.* It is this pre-emption to which the Defendants refer when they speak in terms of HAVA. Thus, Ohio is in compliance with HAVA and is in the process of passing legislation to have new voting technology in place for the 2004 election – well before the federal mandate requires. As such, the Plaintiffs are barred from even bringing this claim.

2. The Plaintiffs Have Failed To Prove A Constitutional Violation.

Much as the Plaintiffs have failed to prove there is a material issue of fact concerning their claims under the Voting Rights Act, they have not demonstrated a material issue of fact under their constitutional claims.⁴ First, the Plaintiffs are simply disingenuous in claiming that *Bush v. Gore*, 531 U.S. 98 (2000), requires the State to immediately discard the punch card ballot. The sole issue in *Bush* was “whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate.” *Id.* at 105. Because Florida had no objective standard for a legal vote cast with a punch card ballot, members of canvassing boards applied different standards to define a vote, changed the standards several different times during the recount, and refused to examine all ballots to determine if legal votes were missed. *Id.* at 107-08. Ohio, regardless of what the Plaintiffs wish to claim, could not possibly adopt a legal standard where votes are counted differently based upon the subjective view of a board. *See* R.C. § 3515.04 (requiring a punch card ballot to have at least two corners of a chad to be detached from a ballot in order for the vote to be legally cast). Thus, Ohio does not have a legally subjective standard for determining what constitutes a legal vote. Therefore, *Bush* as a general principle is inapplicable to the Plaintiffs’ claims.

a. The Plaintiffs Have Failed To Introduce Any Evidence Whatsoever That Ohio’s Elections System Violates Their Constitutional Rights.

Although the Plaintiffs may be correct in their general statement that different voting systems had different error rates in the 2000 Presidential election, such a claim does not prove that Ohio has violated the Plaintiffs constitutional rights. For example, the Plaintiffs evidence

⁴ In order to prevail on a constitutional claim under § 1983, the Plaintiffs must demonstrate willful and intentional discrimination, not merely a disparate impact. *See, e.g., Washington v. Davis*, 426 U.S. 229, 239-40 (1976); *Horner v. Kentucky High School Athletic Ass’n*, 43 F.3d 265, 276 (6th Cir. 1994).

shows that the punch card system in Delaware County and the electronic voting machines in Franklin County had a non-voted ballot rate of less than 1% for the Presidential election in 2000. (Defendants Memo Contra at 19-20). However, in the Senate race in 2000, Delaware County's punch card ballot system had almost 50% fewer residual ballots than Franklin County's electronic voting system. *Id.* Since the Plaintiffs have failed to introduce any evidence whatsoever that shows the use of punch card ballots in Ohio are arbitrary or unreasonable, they have failed to meet their burden at this stage of the litigation. The Defendants, therefore, are entitled to summary judgment on this claim.

b. The Plaintiffs have failed to present this Court with any evidence that the use of punch card ballots is irrational.

The Plaintiffs correctly argue that the Defendants have not attempted to justify the use of punch card ballots under a strict scrutiny basis. The reason for such an omission, of course, is that strict scrutiny is not the proper constitutional standard. Since the choice of voting systems is not a *denial* of the right to vote, it is merely a regulation and subject to rational basis review. *McDonald v. Board of Election*, 394 U.S. 804, 807 (1969). The use of punch cards in the 2000 election was imminently reasonable and rational. Furthermore, Ohio has previously gone through a statewide recount where the predominant voting technology at issue was the punch card ballot and with more than 3,000,000 votes cast in the race for Attorney General in 1990, a complete recount resulted in a change of only approximately 150 votes. *In re Election of November 6, 1990*, 58 Ohio St. 3d 103 (1991).

As the Plaintiffs experts freely admit, Ohio has instituted a “good elections system.”⁵ It is a system that objectively determines what constitutes a vote. It is a system that properly functioned under the glare of a complete statewide recount. It is a system that treats all voters

⁵ Asher Depo. at 66.

equally. As a result, the Defendants are entitled to summary judgment on the Plaintiffs' constitutional claim.

Conclusion

For the foregoing reasons, the Defendants respectfully request this Court grant them summary judgment on all counts.

Respectfully submitted,

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