

**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' Supplemental Brief In Support
Of Their Motion For Summary Judgment**

Introduction

This Court, in a May 6, 2004 Order, directed all parties to file a supplemental brief, identifying the undisputed facts which support their motions for summary judgment. The facts below demonstrate that the State of Ohio and its Political Subdivisions have not denied African-Americans the right to vote, and thus, defendants are entitled to summary judgment on the plaintiffs' Voting Rights Act claim. These facts also show that Ohio's election system is constitutionally sound, and because Ohio is in compliance with the Help America Vote Act, plaintiffs are barred from bringing their 42 U.S.C. §1983 claim. Because these facts demonstrate

that plaintiffs voting rights and constitutional claims are devoid of merit, this Court should grant the defendants' motion for summary judgment.

I. Facts Demonstrating That The State Of Ohio And Its Political Subdivisions Have Not Denied African-Americans The Right To Vote, And Consequently The Defendants Are Entitled To Summary Judgment On The Plaintiffs' Voting Rights Act Claim.

The facts below demonstrate that plaintiffs have failed to introduce any evidence that the State or its subdivisions have denied African-Americans the right to vote, and thus the defendants are entitled to summary judgment on plaintiffs' voting rights act claim as a matter of law.

Facts Demonstrating That The Totality of Circumstances Show That Plaintiffs In This Case Have Not Been Denied The Right To Vote.

1. 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. (R. at 171, Plaintiffs' Motion for Summary Judgment Exh. (1b) M. Sommerville's Dep. Tr. at 18, lines 2-3; Exh. (1c) E. Stewart's Dep. Tr. at 25, line 1; and Exh. (1d) H. Tolley's Dep. at 14, line 25; and at 15, line 1.)
2. Plaintiffs simply speculate that because they used punch card technology, their votes may not have been counted. (R. at 171, Plaintiffs' Motion for Summary Judgment Exh. (1c) E. Stewart's Dep. Tr. at 34, lines 18-24.)
3. 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.)
4. In another §2 Voting Rights Act case, Dr. Herb Asher, Plaintiffs' expert in this case, testified, "there was, in fact, no such recent history of voting-related discrimination [in Ohio]." *See Mallory v. Ohio*, 38 F. Supp. 2d 525, 541 (S.D. Ohio 1997) *aff'd* 173 F. 3d 377 (6th Cir. 1999).
5. Plaintiffs have not raised or offered any evidence that any political campaigns in Ohio or Ohio's political subdivisions have been characterized by overt or subtle racial appeals.

6. Plaintiffs have not raised or offered any evidence that Ohio has a history of failing to elect African-Americans to public office. And the elections of Plaintiff Marco Sommerville, an African-American and Summit County third ward representative for almost 17 years, (R. at 171, Plaintiffs' Motion for Summary Judgment Exh. (1b) M. Sommerville Dep. at 10, lines 13-14) and Defendant J. Kenneth Blackwell, an African-American and two-term Ohio Secretary of State and former Ohio Treasurer, further show that Ohio does not have a history of failing to elect African-Americans to public office.
7. Plaintiffs have not produced any evidence that demonstrates that African-Americans or Ohioans in general either intentionally or unintentionally failed to vote for president at a specific rate in the 2000 presidential election.
8. Plaintiffs have also attempted to introduce census data from Hamilton, Summit, and Montgomery counties. (R. at 187, 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*.
9. There is no allegation, nor is there any proof, that punch card machines are only used in minority-majority precincts, and Dr. Herb Asher, Plaintiffs' expert, testified that of the ten counties with the highest residual vote rates, eight of the counties were Appalachian counties, one was Holmes County, and the last one was Summit County. (R. at 171, Plaintiffs' Motion for Summary Judgment Exh. (5e) H. Asher's Dep. at 83-84.)
10. The following table shows the population information on nine of the ten counties that Dr. Asher noted as being counties with the highest residual ballot rate for the State and compares that information to the Defendant counties in this case.

County	Total Population	White Population	African-American Population	Total Votes Cast	Total Presidential Votes Cast	Total Residual Votes	Residual Vote Percentage
Adams	27,330	26,721	48	10,727	10,235	492	4.59
Gallia	31,069	29,596	839	13,203	12,776	427	3.23
Holmes	38,943	38,564	127	9,937	9,145	792	7.97
Jackson	32,641	31,953	193	12,918	12,490	428	3.31
Meigs	23,072	22,850	159	10,228	9,795	433	4.23
Monroe	15,180	15,079	40	7,377	7,115	262	3.55
Noble	14,058	13,010	940	6,210	5,899	311	5.01
Pike	27,695	26,786	246	11,084	10,560	524	4.73
Vinton	12,806	12,560	45	5,184	4,946	238	4.59
Summit	542,899	453,336	71,608	232,252	224,839	7,413	3.19
Hamilton	845,303	616,487	198,061	384,336	377,899	6,437	1.67
Montgomery	559,062	428,084	111,030	237,580	230,987	6,593	2.78
Sandusky	61,792	56,974	1,650	26,441	25,744	697	2.64
Cuyahoga	1,393,978	938,863	382,634	590,473	574,782	15,691	2.66

11. Dr. Herb Asher testified that for many of the counties with the highest residual vote rates, the black population is so small that it could not be responsible for the residual votes. (R. at 171, Plaintiffs' Motion for Summary Judgment Exh. (5e) H. Asher's Dep. at 91.) The table above supports Dr. Asher's contention by showing that Adams County, which has a total of 48 African-Americans living in the entire county, had 492 residual votes for President in the 2000 Presidential Election. Similarly, Holmes County, which has 127 African-American residents, had 792 residual ballots in the 2000 Presidential election. In fact, Jackson County, Meigs County, Monroe County, Pike County, and Vinton County also had more residual

votes for President in the 2000 election than African-Americans living in the jurisdiction.

12. Dr. John Lott, Defendants' expert, demonstrated that the residual ballot rate of the most heavily concentrated white wards in Ohio is higher than the residual ballot rate of either the most heavily concentrated African-American or Hispanic wards. (R. at 171, Plaintiffs' Motion for Summary Judgment Exh. (6b) J. Lott Dep. at 192.)
13. Dr. Richard Engstrom, another of Plaintiffs' experts, in comparisons between Franklin County and Hamilton County, determined that there was no difference whatsoever in the rates of undervotes between those two counties. (R. at 171, Plaintiffs' Motion for Summary Judgment Exh. (5b) R. Engstrom Dep. at 73.)
14. Dr. Richard Engstrom further noted that blacks in Summit County were more than six and one half times more likely to undervote for president than blacks in Hamilton County. (R. at 171, Plaintiffs' Motion for Summary Judgment Exh. (5b) R. Engstrom Dep. at 75.)
15. Likewise, Dr. Engstrom determined that whites in Summit County were more than twice as likely to undervote on a punch card system than blacks in Hamilton County. (R. at 171, Plaintiffs' Motion for Summary Judgment Exh. (4n) R. Engstrom Expert Report at 8.)
16. Plaintiffs' evidence offered so far shows that most of the residual votes from punch card machines occur in counties that are substantially white. (R. at 171, Plaintiffs' Motion for Summary Judgment Exh. (5e) H. Asher's Dep. at 88-93.)
17. African-Americans make up 27.4% of the population of Cuyahoga County, and there are more African-Americans living in Cuyahoga County than there are people in 83 of Ohio's 88 Counties. (R. at 186, Ex. A (U.S. Census Data) Attached to Defs.' Memorandum Contra Plaintiffs' Motion for Summary Judgment.)
18. In the 2000 Presidential Election, Cuyahoga County used punch cards, however, Plaintiffs, who are seeking a statewide remedy, did not demonstrate whether African-American precincts in Cuyahoga County had a higher residual vote rate than whites did in Cuyahoga County.

II. Facts Demonstrating That The State Of Ohio Has Not Violated The Plaintiffs' Constitutional Rights To Due Process Or Equal Protection.

Through prior briefings, the defendants have established that as a matter of law the Due Process and Equal Protection Clauses are not violated because the state does not require the use

of voting systems that do not include error notification. The facts below demonstrate that the defendants have not violated any of the Plaintiffs' constitutional rights.

19. Plaintiffs' experts concede that the perfect voting system does not exist. (R. at 171, Plaintiffs' Motion for Summary Judgment Exh. (5c) R. Saltman's Dep. at 34; R. at 171, Plaintiffs' Motion for Summary Judgment Exh. (5e) H. Asher's Dep. at 129.)
20. Plaintiffs' expert, Dr. Herb Asher has testified that Ohio has instituted a "good elections system." (R. at 171, Plaintiffs' Motion for Summary Judgment Exh. (5e) H. Asher's Dep. at 66.)
21. The State of Ohio has previously undergone a statewide recount where punch card ballots were the predominant voting technology and with more than 3,000,000 votes cast in the race for Ohio Attorney General (in 1990), and a complete recount of the entire State of Ohio resulted in a change of only approximately 150 votes. See *In re Election of November 6, 1990*, 58 Ohio St. 3d 103 (1991).
22. Delaware County, Ohio uses punch cards while Franklin County uses electronic voting machines, and in the 2000 elections, Delaware County had 55,959 total votes cast and 55,403 votes cast for President for a residual vote total of 556 votes or 0.99% while Franklin County had 417,800 total votes cast and 414,074 votes cast for President for a residual vote total of 3,726 votes or 0.89%. (R. at 186, (Elections Data), Attached as Exh. B. to Defs.' Memorandum Contra Plaintiffs' Motion for Summary Judgment.)¹
23. The following table illustrates that the punch card system in Delaware County performs equally as well as the electronic machines in Franklin County in the 2000 Presidential race with residual vote rates of 0.99% and 0.89%, respectively, while the punch card system in Delaware County produces a much lower residual vote rate for both the Senatorial and House elections. (R. at 186, (Elections Data), Attached as Exh. B. to Defs.' Memorandum Contra Plaintiffs' Motion for Summary Judgment.)

¹ The Plaintiffs will no doubt claim that the comparison between Franklin County and Delaware County is arbitrary and cannot be used to show how punch cards perform relative to other voting technologies. Yet this selection is no more arbitrary than the Plaintiffs decision to compare Hamilton, Montgomery, Summit, and Sandusky County to Franklin County. Nor is it any more arbitrary than the Plaintiffs' decision to only focus on the Presidential election of 2000 as opposed to using the Presidential Races from 1992-2000 or for looking at all elections that took place in those years to truly determine how punch card machines operate in comparison to other types of voting technology.

County	Total Votes	Presidential Votes	Residual Votes	Residual Vote %	Senate Votes ²	Residual Votes	Residual Vote %
Delaware	55,959	55,403	556	0.99%	53,603	2,356	4.21%
Franklin	417,800	414,074	3,726	0.89%	392,741	25,059	6.00%
County	Presidential Votes	Senate Votes	Residual Votes ³	Residual Vote %	House Votes	Residual Votes ⁴	Residual Vote %
Delaware	55,403	53,603	1,800	3.2489%	54,151	(548)	(1.022%)
Franklin	414,074	392,741	21,333	5.1520%	388,881	3,860	0.98284%

24. 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. (R. at 186, (Elections Data), Attached as Exh. B. to Defs.' Memorandum Contra Plaintiffs' Motion for Summary Judgment)
25. The State of Ohio has a legally objective and statutorily enacted standard on what constitutes a valid vote. *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.) Florida, on the other hand in 2000, had a completely subjective standard that changed from county to county and ballot to ballot with the same elections officials using different standards at different times during recount.
26. Plaintiffs have not produced any evidence and no facts exist showing that residents of any precinct in Ohio intentionally or unintentionally failed to vote for President in 2000 at a certain rate.

² Residual Votes for Senate are calculated by the number of total votes minus the number of votes cast in the senate race.

³ Residual Votes in this column are calculated by the number of votes cast for President minus the number of votes cast in the senate race.

⁴ Residual Votes in this column are calculated by the number of votes cast for the U.S. Senate race minus the number of votes cast in the House Race. Negative Numbers are indicated by parenthesis.

III. Facts Showing That The State Of Ohio Has Already Begun The Implementation Of The Help America Vote Act.

The facts below demonstrate that because Ohio is in compliance with HAVA, plaintiffs are pre-empted from bringing claims under 42 U.S.C. § 1983.

27. Shortly after the effective date of the Help America Vote Act (HAVA), Ohio Secretary of State J. Kenneth Blackwell reconfigured his office and required many of his senior staff to focus on implementing HAVA in the State of Ohio. (R. at 173, (January 23, 2003 Press Release), Attached as Exh. A. to Defs.' Motion for Summary Judgment.)
28. In May of 2003, Secretary Blackwell's Office finalized Ohio's HAVA Plan and published the document for the public's review. (R. at 173, (May 12, 2003 Press Release), Attached as Exh. B. to Defs.' Motion for Summary Judgment.)
29. In September 2003, the Secretary of State's Office qualified the following four vendors to offer voting devices in Ohio: 1) Sequoia Voting Systems, 2) Diebold Elections Systems, 3) Election Systems & Software, and 4) Maximus/Hart Intercivic/DFM Associates, pending a security review for all prospective voting devices. (R. at 173, (September 10, 2003 Press Release), Attached as Exh. C. to Defs.' Motion for Summary Judgment.)
30. The security reviews revealed that there were 57 potential security risks within the software and hardware for prospective voting devices, and, in December 2003, the Secretary of State ordered the qualified voting device vendors to resolve the identified security concerns. (R. at 173, (December 2, 2003 Press Release), Attached as Exh. D. to Defs.' Motion for Summary Judgment.)
31. In January 2004, the U.S. Congress passed the Omnibus Appropriations Act that guaranteed the State of Ohio the full monies necessary to implement its HAVA plan. P.L. 108-199.
32. The Ohio Secretary of State's Office submitted a request to the State's Controlling Board for release of monies to begin the process of replacing the State's existing voting technologies, and the request was temporarily delayed. The Ohio General Assembly created a House-Senate Ballot Security committee to ensure that all replacement machines will provide accurate, reliable and tamper-proof results. (R. at 173, (article entitled *Controlling Board puts off decision on money for new voting machines*, AP State and Local Wire, March 8, 2004), Attached as Exh. E. to Defs.' Motion for Summary Judgment.)
33. On May 7, 2004, Governor Bob Taft signed H.B. 262 into law. (R. at 198, (copy of H.B. 262), Attached as Exh. A. to Defs.' Reply Brief In Support of Their Motion for Summary Judgment.)

34. H.B. 262 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. (R. at 198, Attached as Exh. A. to Defs.' Reply Brief In Support of Their Motion for Summary Judgment, (See Section 3 of H.B. 262); *see also* <http://www.dispatch.com/news-story.php?story=dispatch/2004/04/29/20040429-C1-00.html>.)
35. In addition, as a part of H.B. 262, all 88 counties in Ohio will have new voting devices with paper verified receipts by 2006 unless the Help America Vote Act requires even swifter action. (R. at 198, Attached as Exh. A. to Defs.' Reply Brief In Support of Their Motion for Summary Judgment (Section 3(E)(1)(a) of H.B. 262.))

Conclusion

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

Respectfully submitted,

Jim Petro
Attorney General

/s/ Holly J. Hunt

Richard N. Coglianese (0066830)
Assistant Attorney General
E-mail: rcoglianese@ag.state.oh.us
Arthur J. Marziale, Jr. (0029764)
Senior Deputy Attorney General
E-mail: amarziale@ag.state.oh.us
Darrell M. Pierre, Jr. (0067012)
E-mail: dpierre@ag.state.oh.us
Holly J. Hunt (0075069)
E-mail: hhunt@ag.state.oh.us
Assistant Attorneys General
Constitutional Offices Section
30 East Broad Street, 17th Floor
Columbus, OH 43215-3428
(614) 466-2872
(614) 728-7592 (facsimile)
Counsel for State Defendants

/s Anita L. Davis

Anita L. Davis (0012849)
Assistant Prosecuting Attorney
Summit County Prosecutor's Office
53 University Avenue
Sixth Floor
Akron, Ohio 44308
E-mail: davis@prosecutor.summitoh.net
330-643-2800
330-643-2137 (facsimile)
Counsel for Summit County Defendants

/s Victor T. Whisman

Victor T. Whisman (0008033)
Assistant Prosecuting Attorney
Montgomery County Prosecutor's Office
301 West Third Street
P.O. Box 972
Dayton, Ohio 45422
E-Mail: whismanvt@mcoho.org
937-225-5760
937-225-4822 (facsimile)
Counsel for Montgomery County Defendants

Certificate of Service

I hereby certify that on May 21, 2004, a copy of the foregoing *Defendants' Supplemental Brief In Support Of Their Motion For Summary Judgment* was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. Copies will also be mailed to the following:

Scott T. Greenwood
American Civil Liberties Union
1 Liberty House
P.O. Box 54400
Cincinnati, OH 45254-0400
Laughlin McDonald
American Civil Liberties Union
2725 Harris Tower
233 Peachtree Street NE
Atlanta, GA 30303

Richard Saphire
Professor of Law
University of Dayton
300 College Park
Dayton, OH 45469-2772
Daniel P. Tokaji
Moritz College of Law
55 W. 12th Avenue
Columbus, OH 43210

/s Holly J. Hunt _____
Holly J. Hunt
Assistant Attorney General