

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

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| <b>TRACIE HUNTER, et al.,</b>                     | : | <b>Case No. 1:10-cv-820</b>              |
|   | : |  |
| <b>Plaintiffs,</b>                                | : |  |
|   | : | <b>Chief Judge Susan J. Dlott</b>        |
| <b>vs.</b>  | : |  |
|   | : |  |
| <b>HAMILTON COUNTY BOARD OF ELECTIONS, et al.</b> | : | <b><u>PLAINTIFF HUNTER’S</u></b>         |
|   | : | <b><u>MEMORANDUM IN OPPOSITION</u></b>   |
|   | : | <b><u>TO DEFENDANT BOARD’S FIRST</u></b> |
| <b>Defendants.</b>                                | : | <b><u>MOTION IN LIMINE MOTION</u></b>    |
|   | : | <b><u>FOR EXTENSION OF</u></b>           |

Defendant Board of Elections moves to exclude Plaintiffs from offering evidence of poll worker error through submission of the provisional envelopes, testimony of the voters and poll workers, and testimony about the wrong precinct/ right location ballots, the NEOCH ballots and the Caleb Faux analysis of 149 ballots. Defendant argues that the Board completed the investigation into this evidence. Plaintiff will present evidence at trial that the Board investigated only a few of the 849 ballots and then stopped its investigation December 28, 2011 before investigating all ballots equally.

The evidence the Board seeks to keep out is the very evidence it would have found if it had only finished its investigation. The Evidence is directly relevant to Plaintiff’s claim that the Board treated provisional ballots unequally and furthermore, used unequal investigation methods to investigate. Additionally, the method of the Board’s investigation will be shown to not comport with equal protection requirements. Furthermore, evidence of poll worker error is relevant to the Due Process claims: Plaintiffs must show that the Board members disenfranchised 849 voters whose ballots were miscast due to poll worker error. Finally, in order

to show the Board members failed to comply with the NEOCH consent decree, plaintiffs must demonstrate that poll worker caused NEOCH protected voters to be disenfranchised.

Defendants argue that the investigation was completed at the time of the appellate decision and that the Sixth Circuit held that the investigation met the requirements of *Bush v. Gore*. Defendants cite to page 30 of the opinion. While the Sixth Circuit held that the **objective criteria** the Board followed in conducting its review when it implemented the directives of the Secretary of State was equal and met the requirements of *Bush v. Gore*, the Court did not rule on whether the investigation was uniformly applied to all 849 ballots. Plaintiffs will show that the Board did not uniformly apply the Secretary of State objective investigation criteria to all 849 ballots. The Sixth Circuit concluded that it was up to the District Court how to direct the Board to proceed regarding the ballots:

We leave to the district court in the first instance, applying the uniformity requirement of *Bush v. Gore*, to direct the Board how to proceed regarding the 9 ballots unanimously determined by the Board to have been cast in the correct precinct, the 7 ballots unanimously determined by the Board to have been miscast because of poll-worker error, the 269 ballots cast in the correct location but the wrong precinct in which the determination of poll-worker error remains disputed, and pursuant to the NEOCH Consent Decree, the NEOCH ballots.

*Hunter v. Hamilton County Bd. of Elections*, 635 F.3d 219, 247 (2011).

Defendant also argues that evidence of poll worker error is not relevant even if it were found because the voter had an obligation to know her correct precinct. (Doc. 91 p.4). This argument is irrelevant to the existence of poll worker error when compared to the 31 ballots the Board counted without any investigation in to why or how the poll worker erred (looked up address wrong) or whether the voter bore any responsibility in the error (gave the wrong address).

Defendants argue that voter testimony is also irrelevant since the voter had a “duty” to and a responsibility to know where to vote, but cite to no authority for this duty. Ohio Revised Code § 3505.181(C) specifically allows a voter to vote in a precinct where the voter mistakenly believes he is eligible to vote but if he does, the poll worker must inform the voter his vote will not count if it is determined he voted in the wrong precinct. ORC § 3505.181(C)(1). Those voters who showed up in the right precinct fulfilled did all they needed to. Voters who showed up at what they thought was the right precinct and were assured by the poll workers they were in the right precinct and were not told their vote would not count if they voted there, have a right to rely on this assurance and not be disenfranchised because of it. Voters who showed up at wrong precinct but were told to vote provisionally and were not told their vote would not count, also have a right to rely on this assurance and not be disenfranchised because of it. Therefore, voter testimony is not only relevant, it may be the most efficient evidence of poll worker error with respect to both the equal protection and due process claims.

For these reasons, Plaintiffs request that Defendant’s motion be denied in full.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 16, 2011, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing pleading and the Notice of Electronic Filing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically.

/s/ Jennifer L. Branch