

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Effie Stewart, et al.,)	
Plaintiffs)	CASE NO. 5:02CV2028
)	
v.)	Judge Dowd
)	
J. Kenneth Blackwell, et al.,)	Magistrate Judge Gallas
)	
Defendants)	

**PLAINTIFFS’ RESPONSE TO SANDUSKY COUNTY DEFENDANTS’
ALLEGATIONS OF UNDISPUTED FACT**

In its Order of May 6, 2004, the Court directed the parties to respond to the supplemental brief of the opposing party, either agreeing or disagreeing with the statements of undisputed facts contained therein. In response to the Court’s Order, Plaintiffs submit his list of disputed facts, together with designations concerning where in the record the Court will find evidence that negates Sandusky County’s proposed factual findings (Doc. 209). In addition, pursuant to this Court’s May 6 order, Plaintiffs briefly explain why Defendants’ asserted facts, even if true, are insufficient to justify summary judgment in Defendants’ favor.

A. Sandusky County’s Use of Optical Scan Ballots

1 – 3. Plaintiffs agree with the allegations of ¶¶ 1-3, but submit that these facts do not support Defendants’ summary judgment motion and are irrelevant to Plaintiffs’ claims. As set forth below, the non-notice optical scan system used by

Sandusky County can and does result in substantial numbers of unintentional non-votes.

4. Plaintiffs disagree with the allegations of ¶ 4. According to Barbara Tuckerman's own testimony, there are times when the Board of Election cannot agree on what the voter's intent was, and in the event of a tie vote, the ballot is simply discarded:

Q. So wait. If they couldn't agree, which is to say if you can't get a consensus of the three of them as to what the situation is, you don't call the Secretary of State. You just throw it (the ballot) back in the machine?

A. Yes.

Q. But I thought the Secretary of State broke ties?

A. I have a feeling. I don't think I wanted to call the Secretary of State to break a tie in that instance. ...

Q. You have had circumstances because you can't come to a consensus they put it back through the machine?

A. Yes. ...

Q. I see. Is that true with both punch cards and optical scan technology?

A. Yes.

Depo. of Barbara Tuckerman (Doc. 171-11) at 98:13 – 99:10.

5. Plaintiffs disagree with the allegations of ¶ 5. The central tabulation system does not permit the individual voter to verify that his ballot accurately reflects his intent. As Plaintiffs' expert Roy Saltman has documented in his report, voters in the 15 counties using central count optical scan systems in Florida's 2000 election experienced a higher rate of non-votes than those in 26 precinct count optical scan counties. Saltman Report (Doc. 171- 28) at 11-12.

Saltman also noted how it is possible for voters using optical scan equipment to make mistakes:

Q. If a voter correctly follows the directions set forth on an optical scan ballot, is there a risk that that voter will have unintentionally cast a nonvote?

A. Well, if a voter were also to blacken in a candidate of a different party for the same race and the requirement was to only vote for one, that would be a situation of no vote.

Saltman Depo. (171-33) at 188:13 – 20.

In these situations, members of the Board of Election must infer the voters' intent from the way the ballot is marked, a process that necessarily will contain error. Thus, the adoption of new legislation notwithstanding, discretionary problems in determining what is a vote in fact will continue in Ohio. Tuckerman Depo. (Doc. 171-11) at 70 – 72 and 98:13 - 99:10.

6. Plaintiffs disagree with the allegations of ¶ 6. On the basis of Barbara Tuckerman's own words, as quoted in ¶ 4, *supra*, situations where board members cannot determine the intent of the voter continue to take place, and the votes of such voters are not counted. Tuckerman Depo. (Doc. 171 - 11) at 98:13 – 99:10.
7. Plaintiffs disagree with the allegations of ¶ 7. As indicated in the testimony quoted in ¶ 4, *supra*, Barbara Tuckerman's remarks are inconsistent on this point. There have been instances, under both punch cards and optical scan technology, in which the board has been unable to come to consensus and the invalid ballot is simply run back through the tabulator without being corrected. Tuckerman Depo. (Doc. 171-11) at 99: 2-10.
8. Plaintiffs agree with the allegations of ¶ 8, but submit that these facts do not support Defendants' summary judgment motion and are irrelevant to Plaintiffs' claims.
9. Plaintiffs agree with the allegations of ¶ 9, but submit that these facts do not support Defendants' summary judgment motion and are irrelevant to Plaintiffs' claims.

B. The Claims of Sandusky County Plaintiff Linda See

10. Plaintiffs disagree with the allegations of ¶ 10. In her deposition, Linda See testified that she learned about the percentage of punch card ballots that were being discarded from persons in the American Civil Liberties Union, but none of these persons are her attorneys in the present action:

Q. What is it that brought you to this lawsuit?

A. I became aware through the ACLU that Sandusky County was regularly discarding about 20 to 30 percent of the ballots cast because of the system that was used. That's what I was told. ...

Q. Where did you obtain this understanding ... of the problems of what you said were the discarded ballots in Sandusky County?

A. That information came through reports given to me at the ACLU board. I heard them and reports of the ACLU actions.

Q. You heard these at board meetings?

A. Yes.

Q. What board is that?

A. Northwestern Ohio ACLU. ...

Q. What names can you recall from the legal community or the state board that discussed Sandusky voting issues?

A. The discussion that I heard was more in regard to the general action in Ohio and the two people that spoke most often were Sue Carter and Lee Pissimenti.

See Depo. (Doc. 171-2) at 14 – 17.

Neither Sue Carter nor Lee Pissimenti is an attorney in this action, and none of the Plaintiffs' attorneys are members of the Northwestern Ohio Chapter of the American Civil Liberties Union.

C. Sandusky County's Reasons for Using an Optical Scan Ballot

11 – 14. Plaintiffs agree with the allegations of ¶¶ 11 - 14, but submit that these facts do not support Defendants' summary judgment motion and are irrelevant to Plaintiffs' claims.

D. Ms. Linda See and Ballot Directions

15. Plaintiffs disagree with the allegations of ¶ 15. On its face, the testimony of Roy Saltman that Defendants quote indicates that machine malfunction is one reason why Ms. See's ballot may not be counted, notwithstanding her ability to follow directions.

Q. If a voter follows the directions completely and fully on an optical scan ballot there is no risk that you know of that voter unintentionally casting a nonvote?

A. Except for a machine malfunction.

Q. So the answer is yes, except for a machine malfunction?

A. Yes.

Saltman Depo. (Doc. 171-33) at 189.

16. Plaintiffs disagree with the allegations of ¶ 16. While it is true that *according to Barbara Tuckerman*, the only complaints that Sandusky County officials have received concern pollworkers giving unnecessary instructions to voters, in fact there are other complaints, including those of Linda See that have given rise to the present litigation. See Second Amended Complaint (Doc. 119), ¶¶ 82, 83, 84, 85, 86, 87, and 88.
17. For several reasons, Plaintiffs disagree with the allegations of ¶ 17. First, the Complaint asks the Court to require equal access to actual notice voting technology, not an order requiring that all voters use electronic touchscreen equipment. See Second Amended Complaint (Doc. 119) at 29. Second, as Dr. Asher's deposition makes clear, there are significant differences between a message from objective tabulating equipment that there is a possible mistake on a voter's ballot and a subjective examination of the ballot that is conducted by the voter himself. The relevant portion of Dr. Asher's deposition is quoted below:

Q. Now, I wanted to ask you about optical scans with central precinct counting. Would you consider that method to have any sort of error notification?

A. No. No.

Q. In a sense, all the voter can do is look at his or her optical scan ballot and see if they have filled in each oval for each race?

A. Yeah. ...

Q. And isn't that pretty similar to the flashing light error notification that you just described in Franklin County?

A. It's – actually, probably, Franklin County is a little bit more direct because literally, I mean you are standing there and this damn light keeps flashing. ...

And, again, one of the differences between Franklin County and, let's say, Sandusky, is that, again, overvoting is pretty much not possible in Franklin County while overvoting is possible with optical scan or punch card, yeah.

Asher Depo. (Doc. 171- 35) at 111 – 112.

Dr. Asher’s testimony also makes the critical point that in precinct tabulation systems, the tabulating machines “tell the voter” there is an error on the ballot. As he phrased it:

... I think when I use the term then, telling the voter – ... that it would be to really say you have made a mistake here.

Asher Depo. (Doc. 171- 35) at 109: 2-4.

17. Plaintiffs agree with the allegations of ¶ 18, but submit that these facts do not support Defendants’ summary judgment motion and are irrelevant to Plaintiffs’ claims.
19. Plaintiffs agree with the allegations of ¶ 19, but they note that Dr. Asher described the frequency of this kind of voter error as “limited.” Asher Depo. (Doc. 171- 35) at 110: 11.

F. Problems with Optical Scan / Central Tabulation Voting Systems

- 20 – 30. Plaintiffs agree with the allegations of ¶¶ 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, and 30, but submit that these facts do not support Defendants’ summary judgment motion and are irrelevant to Plaintiffs’ claims.
31. While Plaintiffs agree with the allegations of ¶ 31, they note that the election in question was a special election held in May 2003, in which there was only one issue on the ballot, with the exception of one district that had two issues on the ballot. Tuckerman Depo. (171- 11) at 99: 14-18.
32. Plaintiffs agree with the allegations of ¶ 32, but they note that the relevant statistics on the U.S. Senate race come from Appendix E of the Plaintiffs’ Memorandum in Opposition (Doc. 187-6), not Appendix G.
33. Plaintiffs agree with the allegations of ¶ 33, but these allegations contain several omissions that, taken together, mean that these allegations do not warrant summary judgment for Defendants. First, as Defendants themselves note, some precincts in Hancock County used central tabulators while others used precinct tabulators in the 2000 general election. This makes their data unsuitable for purpose of comparisons. Second, Defendants’ list of four counties with residual ballot rates below 1.2% omits the six counties using the same voting technology that had residual ballot rates in excess of this figure. They include:
 - a. Clermont County (1.8%)

- b. Coshocton County (1.5%)
- c. Erie County (2.3%)
- d. Mahoning County (2.4%)
- e. Miami County (1.6%)
- f. Washington County (2.1%)

Appendix E to Plaintiffs' Memorandum in Opposition to Motion for Summary Judgment by Defendants State of Ohio, Hamilton County, Montgomery County, and Summit County (Doc. 187-6).

34 – 36. Plaintiffs agree with the allegations of ¶¶ 34, 35, and 36, but submit that these facts do not support Defendants' summary judgment motion and are irrelevant to Plaintiffs' claims.

G. The Help America Vote Act

37. Plaintiffs disagree with the allegations of ¶ 37. The contents of this paragraph contain assertions of law, not allegations of fact, and they therefore are inappropriate in this context. Additionally, elements one, two, and three of ¶ 37 are misleading in that they are subject to Section 301 (a) (1) (B) of the Help America Vote Act, which provides:

“A State or jurisdiction that uses a paper ballot voting system, a punch card voting system, or a central county voting system may meet the requirements of subparagraph (A) (iii) by –

- (i) establishing a voter education program specific to that voting system that notifies each voter of the effect of casting multiple votes for an office; and
- (ii) providing the voter with instructions on how to correct the ballot before it is cast and counted (including instructions on how to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error.)

42 U.S.C. § 15481(a)(1)(B).

38. Plaintiffs agree with the allegations of ¶ 38, but submit that these facts do not support Defendants' summary judgment motion and are irrelevant to Plaintiffs' claims.

39. Plaintiffs disagree with the facts alleged in ¶ 39. Section 3(E)(1)(a) of H.B. 262 merely requires counties to use voter verified paper receipts *if they select DRE equipment*, and nothing in H.B. 262 or in the Help America Vote Act requires counties to use actual notice balloting equipment. Moreover, the assertion in sentence one that all 88 counties in Ohio “*will have*” new voting devices by 2006 is not contained in the record, and Defendants cite no facts in support of their assertion.

Section 3(E)(1)(a) of H.B. 262.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny the Defendants’ Motion for Summary Judgment and grant instead Plaintiffs’ Motion for Summary Judgment on all counts.

Respectfully submitted,

/s/Meredith Bell

Meredith Bell (0072917)
ACLU Voting Rights Project
2725 Harris Tower
233 Peachtree Street, NE
Atlanta, GA 30303
Telephone (404) 523-2721
Telecopier (404) 653-0331
MBell@aclu.org

Attorneys for the Plaintiffs

/s/Paul Moke

Paul Moke (0014099)
Professor of Social and Political
Science; Wilmington College
1252 Pyle Center
Wilmington, OH 45177
Telephone (937) 382-6661
Telecopier (937) 382-7077
Paul_Moke@Wilmington.edu

OF COUNSEL

RICHARD SAPHIRE (0017813)

Professor of Law
University of Dayton
300 College Park
Dayton, Ohio 45469-2772
Telephone 937-229-2820
Telecopier 937-229-2469
saphire@udayton.edu

DANIEL TOKAJI

Assistant Professor of Law
The Ohio State University
Moritz College of Law
55 W. 12th Ave.
Columbus, Ohio 43210
Telephone 614-292-6566
Telecopier 614-688-8422
Dtokaji@aol.com

SCOTT T. GREENWOOD (0042558)
General Counsel, American Civil
Liberties Union of Ohio Foundation, Inc.
1 Liberty House, P.O. Box 54400
Cincinnati, Ohio 45202
Telephone 513-943-4200
Telecopier 513-943-4800
scottgreenwood@earthlink.net

LAUGHLIN McDONALD
Director, ACLU Voting Rights Project
2725 Harris Tower
233 Peachtree St., NE
Atlanta, GA 30303
Telephone 404-523-2721
Telecopier 404-653-0331
LMcDonald@aclu.org

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This is to certify that a copy of the foregoing was served upon all counsel of record via electronic filing on this 4th day of June, 2004.

/s/Paul Moke

Paul Moke (0014099)

Professor of Social and Political
Science; Wilmington College

1252 Pyle Center

Wilmington, OH 45177

Telephone (937) 382-6661

Telecopier (937) 382-7077

Paul_Moke@Wilmington.edu