

**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 THE STATE DEFENDANTS', SUMMIT
COUNTY DEFENDANTS', AND MONTGOMERY 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 this list of disputed facts, together with designations concerning where in the record the Court will find evidence that negates the proposed factual findings jointly submitted by State Defendants, Summit County Defendants, and Montgomery County Defendants (Doc. 210). 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.

I. Facts Demonstrating a Violation of Section Two of the Voting Rights Act

1. Plaintiffs agree with the first sentence of ¶ 1 that Plaintiffs are registered voters in the State of Ohio who claim to have cast a ballot in the 2000 election. However, Plaintiffs disagree with the assertion that Plaintiffs were not denied the right to vote, which states a legal conclusion and not a fact. As explained in Plaintiffs briefs, they have been denied the right to have their vote counted on an equal basis with those who use actual notice voting technology.
2. Plaintiffs disagree with the allegations of ¶ 2. Official records of ballots cast in Hamilton, Montgomery, and Summit Counties and in the State of Ohio as a whole indicate that voters using punch card technology in the 2000 presidential election were at a disproportionate risk of greater disfranchisement due to overvoting and undervoting. State of Ohio HAVA State Action Plan (Doc. 115-1), at 14-16.
3. Plaintiffs disagree with the allegations of ¶ 3. At no point did Plaintiffs allege that Ohio did not ratify the Fifteenth Amendment on January 27, 1870. They merely stated that the State of Ohio itself did not affirmatively remove the restriction on African Americans participating in the franchise from the express provisions of the Ohio Constitution until 1923. Plaintiffs' Memorandum in Opposition to Defendants MSJ (Doc. 187-0) at 13 n.6.
4. Plaintiffs agree with the allegations of ¶ 4. However, as set forth in Plaintiffs' summary judgment briefs, evidence showing a recent history of voting-related discrimination is unnecessary and therefore irrelevant to their claim under Section Two of the Voting Rights Act. Plaintiffs' Memorandum in Opposition to Defendants MSJ (Doc. 187-0) at 7-13.
5. Plaintiffs agree with the allegations of ¶ 5. However, as set forth in Plaintiffs' summary judgment briefs, evidence concerning "overt or subtle racial appeals" in Ohio political campaigns is unnecessary and therefore irrelevant to their claim under Section Two of the Voting Rights Act. Plaintiffs' Memorandum in Opposition to Defendants MSJ (Doc. 187-0) at 7-13.
6. Plaintiffs agree with the allegations of ¶ 6. However, as set forth in Plaintiffs' summary judgment briefs, evidence concerning the failure of Ohio voters to elect African Americans to public office is unnecessary and therefore irrelevant to their claim under Section Two of the Voting Rights Act. Plaintiffs' Memorandum in Opposition to Defendants MSJ (Doc. 187-0) at 7-13.
7. Plaintiffs disagree with the allegations of ¶ 7. Dr. Richard Engstrom has provided uncontroverted evidence, based on the best social science methodologies available, of the estimated percentage of African American voters in Hamilton County, Montgomery

County, and Summit County who either intentionally or unintentionally failed to vote for president in the year 2000. Dr. Engstrom estimates that the rate of *overvoting* among African Americans in Hamilton County ranged between 2.48% and 3.04%; and, in Summit County, it ranged between 2.88% and 4.83%. In Hamilton County, the *undervoting* rate ranged between 1.10% and 1.66%; in Summit County, it ranged between 4.76% and 6.86%. In Montgomery County, the *combined over and undervote* percentage for African Americans ranged between 5.33% and 5.54%. Engstrom Report (Doc. 171-42) at ¶¶ 10, 12, and 14.

8. Plaintiffs agree with the allegation of ¶ 8 that they have introduced census data from Hamilton, Montgomery, and Summit counties. But Plaintiffs dispute Defendants' assertion in the second sentence that Plaintiffs have not demonstrated that any precincts containing residual votes in the 2000 presidential election actually bore any of the effects of past discrimination. As an initial matter, precinct-based evidence of the effects of past discrimination is unnecessary and therefore irrelevant to the Plaintiffs' claim under Section Two of the Voting Rights Act, and Defendants have presented no authority to show that such evidence is required. Furthermore, contrary to Defendants' allegations, Plaintiffs have presented precinct-based evidence, which would support a finding of the effects of past discrimination on precincts that experienced high levels of residual ballots in this election. This evidence takes the form of an electronic database, which was presented to the State Defendants in response to their First Request for Interrogatories and Production of Documents. Hamilton County Data File (Doc. 211-4); Montgomery County Data File (Doc. 211-5); Summit County Data File (Doc. 211-6).
9. Plaintiffs agree with the allegations of ¶ 9, but submit that this fact does not support Defendants' motion for summary judgment. Contrary to Defendants' assumption, Plaintiffs' Voting Rights Act claim does not depend upon punch cards being "only used in minority-majority precincts." Instead, this claim rests on evidence showing that the use of punch cards results in intra-county racial disparities, in Montgomery, Summit and Hamilton Counties. See generally Engstrom Report (Doc. 171-42).
10. Plaintiffs agree with the allegations of ¶ 10, but they submit that these statistics do not support Defendants' motion for summary judgment and are not relevant. Contrary to Defendants' assumption, Plaintiffs do not claim that African Americans are the only voters to cast undervotes and overvotes with punch card voting systems. Their Voting Rights Act claim instead rests on the undisputed fact that the use of punch card voting results in intra-county racial disparities in Montgomery, Summit, and Hamilton counties. See generally Engstrom Report (Doc. 171-42). The statistics submitted by Defendants show that nine counties with relatively small African American populations have substantial residual vote percentages. These statistics do not alter the fact that,

within the three subject counties, the use of punch cards results in the disproportionate denial of African-American citizens' votes.

11. Plaintiffs agree with the allegations of ¶ 11, but submit that this fact does not support Defendants' motion for summary judgment and is irrelevant for the reasons set forth in response to ¶¶ 9 and 10.
12. Plaintiffs disagree with the allegations of ¶ 12. In his comparison of the top 10% of wards by black population with the top 10% of wards by white population, Dr. John Lott, the Defendants' expert, found that non-voted ballot rates in the presidential elections of 1992-2000 were virtually identical (2.82% for blacks and 2.85% for whites). In down-ballot elections, he found that blacks cast more non-voted ballots than whites in the U. S. Senate elections (8.50% and 5.53% respectively) and state senate elections (15.68% to 11.91% respectively). Lott Report (Doc. 171-35) at Table 4. The only electoral contest that departs from this pattern is the Congressional category, in which 7.69% of voters in the top 10% black wards cast non-votes, compared to 8.23% of voters in the top 10% white wards. Id.

In his deposition, Dr. Lott admitted that according to his own research, the black population in Ohio exhibited higher levels of non-voted ballots than whites:

Q. So the bottom line is, Doctor, the black population is exhibiting higher levels of non-voted ballots down the ballot compared to the top ten percent whites and the 100% white wards, is that correct?

A. That's right.

Lott Depo. (Doc. 171-35) at 195: 12-17.

13. Plaintiffs disagree with the allegations of ¶ 13. Dr. Engstrom's statement expressly refers to the *differences* between the undervotes of African Americans and non-African Americans in Hamilton and Franklin County, not to the *overall* levels of undervoting. Engstrom Report (Doc. 171-42) at ¶ 12; Engstrom Depo. (Doc. 171-31) at 73: 13-25.
14. Plaintiffs agree with the allegations of ¶ 14 insofar as they reflect the findings of the Ecological Inference (EI) methodology, but based on the other two methodologies, the difference between undervoting among African Americans in Summit and Franklin Counties is somewhat lower. In the case of ecological regression (ER) analysis, the gap in Summit County is approximately five (5) times as large, and using homogeneous precinct (HP) analysis, it is about four (4) times as large. Engstrom Report (Doc. 171-42) at ¶ 12.

15. Plaintiffs agree with the allegations of ¶ 15. In fact, based on Dr. Engstrom's findings, non-African Americans in Summit County are approximately five (5) times as likely to undervote as their counterparts in Hamilton County. Engstrom Report (Doc. 171-42) at ¶ 12.

16. Plaintiffs disagree with the allegations of ¶ 16. Except in the superficial sense that all counties in Ohio have a majority of white residents, this statement is factually inaccurate and therefore disputed. According to the Defendants' own official report, there were a total of 90,532 residual ballots in Ohio in the 2000 presidential election. The combined total of residual ballots in the following punch card counties, all of which are 5% or more black, is 47,852, which is more than half of all residual ballots cast statewide in this election: Cuyahoga (15,691 residual ballots), Summit (7,413), Hamilton (6,437), Montgomery (6,593), Stark (3,217), Lorain (2,300), Butler (2,255), Clark (1,317), Greene (1,320), and Richland (1,309). State of Ohio HAVA State Action Plan (Doc. 115-1) at 14-16. For statistics on the racial composition of these counties, see U.S. Census Bureau, Census 2000, <http://quickfacts.census.gov/qfd/states/3900.html>.

Additionally, Plaintiffs submit that the alleged facts, even if assumed true, do not support Defendants' motion for summary judgment and are irrelevant, for the reasons stated above and in Plaintiffs' summary judgment briefs. Because Plaintiffs' Voting Rights Act claim rests on intra-county racial disparities within the three subject counties, what is or is not occurring in other counties in Ohio is immaterial.

17. Plaintiffs agree with the allegations of ¶ 17. However, the racial composition of Cuyahoga County does not support Defendants' motion for summary judgment and is irrelevant to Plaintiffs' claim that the use of punch cards results in intra-county racial disparities in Summit, Montgomery and Hamilton Counties.

18. Plaintiffs agree with the allegation in ¶ 18 that Cuyahoga County used punch cards in the 2000 presidential election. Plaintiffs likewise agree that they are seeking a statewide remedy in the present case, but they disagree with the Defendants' construction of what evidence is needed to establish a violation of the Voting Rights Act. Plaintiffs' Voting Rights claim arises out of intra-county racial disparities in overvotes and undervotes in three Defendant Counties (Hamilton, Montgomery, and Summit). The subclass of African American Plaintiffs is bringing suit on behalf of all African Americans in Ohio who use punch card technology. A motion for certification of their class action currently is pending before the Court.

II. Facts Demonstrating a Violation of Plaintiffs' Equal Protection and Due Process Rights

In the introductory sentence to Section II of their Supplemental Brief, the Defendants assert that the Fourteenth Amendment is not violated, because the State of Ohio does not require voting equipment with error notification. Plaintiffs submit that this assertion misstates their theory of the case. Plaintiffs assert that Defendants have violated the Fourteenth Amendment because they have authorized, maintained, and operated a dual voting system, in which some counties use non-notice voting equipment that is relatively inaccurate, while other counties use more accurate voting equipment that does provide voters with actual notice of errors. This dual voting system disadvantages voters on the basis of their place of residence, thereby violating equal protection and the fundamental right to vote.

19. Plaintiffs agree with the allegation in ¶ 19 that the perfect voting system does not exist, but submit that this fact does not support Defendants' motion for summary judgment. The question is not whether there is a perfect voting system, but whether Defendants are violating the Fourteenth Amendment by "allow[ing] the use of different types of voting systems with substantially different levels of accuracy." Black v. McGuffage, 209 F. Supp. 2d 889, 898 (N.D. Ill. 2003).
20. Plaintiffs agree with the allegations of ¶ 20 insofar as it is undisputed that Dr. Asher did, in fact, make this statement. This statement, however, does not support Defendants' motion for summary judgment, since Dr. Asher's statement does not relate to the subject matter of this lawsuit – in particular, it does not concern the problems with punch card and other non-notice voting equipment. Dr. Asher's statement instead relates to two positive features of elections in Ohio: (1) the nearly universal absence of the butterfly ballot; and (2) the practice of ballot rotation (altering the order of the candidates' names on the ballots). Immediately following these observations, Dr. Asher stated: "When we get rid of the punch card ballot, we will have a better system." Asher Depo. (171-35) at 66 and 68, ln. 17-19.
21. Plaintiffs are unaware of any factual evidence in the record that establishes this fact, and the Defendants point to none. Plaintiffs further submit that this fact, even if true, does not support Defendants' summary judgment motion and is irrelevant to Plaintiffs' claims. The asserted fact regarding the Ohio

Attorney General Election in 1990 has nothing to do with the question whether the use of different voting systems with different levels of accuracy violates the Fourteenth Amendment.

22. Plaintiffs agree with the allegations of ¶ 22, but submit that this evidence does not support Defendants' motion for summary judgment. The demographics of Delaware County and Franklin County are radically different.¹ Appendix A to Plaintiffs' Reply to Opposition to Motion for Summary Judgment by Defendants (Doc. 197-2). As explained in Plaintiffs' reply brief, these demographic differences account for the fact that Franklin County had only a slightly lower residual vote rate than Delaware County. Plaintiffs' Reply to Opposition to Motion for Summary Judgment by Defendants State of Ohio, Hamilton County, Montgomery County, and Summit County, at 5-6, 10 (Doc. 197). In addition, Plaintiffs submit that these statistics are irrelevant to Plaintiffs' Fourteenth Amendment claim, which rests on *statewide* disparities in overvotes and undervotes arising from non-notice punch card and optical scan voting equipment. (Doc. 187, App E.)
23. Plaintiffs agree with Defendants' assertion regarding the residual vote rates of Franklin and Delaware Counties set forth in ¶ 23, but submit that these statistics do not support Defendants' motion for summary judgment and are irrelevant to Plaintiffs' Fourteenth Amendment claim. As explained above and in Plaintiffs' summary judgment briefs, Plaintiffs' equal protection claim is based on the statewide disparities arising from the use of punch card voting machines. Demographic differences account for the fact that Franklin County had only a slightly lower residual vote rate than Delaware County. Plaintiffs' Reply to Opposition to Motion for Summary Judgment by Defendants State of Ohio, Hamilton County, Montgomery County, and Summit County, at 5-6, 10 (Doc. 197).
24. Plaintiffs disagree with the allegations of ¶ 24 for several reasons and submit that these asserted facts do not support Defendants' summary judgment motion. First, as a matter of simple mathematics, Delaware County had 2,356 residual *votes* in the 2000 U.S. Senate race, compared with Franklin County's

¹ Defendants accuse Plaintiffs of arbitrarily comparing Hamilton, Montgomery, and Summit County to Franklin County, for purposes of their Voting Rights Act claim. Defendants' Supplemental Brief in Support of Their Motion for Summary Judgment, at 6 n.1. This accusation is false, and demonstrates a failure to understand the substance of Plaintiffs' claims. Plaintiffs have furnished this evidence in support of their Voting Rights Act claim, to demonstrate that intra-county racial disparities arise from the use of punch card voting equipment – and that these disparities are mitigated by more reliable voting technology such as that used in Franklin County. There are two reasons why Defendants are wrong to assert that the choice of these four counties is arbitrary. First, on the basis of four crucial variables -- the percentage of African American voters in the county, median household income, the percent of persons living in poverty, and educational attainment -- the counties the Plaintiffs compare are quite similar. Appendix A to Plaintiffs' Reply to Opposition to Motion for Summary Judgment by Defendants (Doc. 197-2). Second, because Defendants have a duty to comply with applicable federal laws in *every* election and in *every* jurisdiction in the State of Ohio, they necessarily must comply with them in the locations, electoral contests, and timeframes that are the subject matter of the Plaintiffs' complaint.

25,059. This is not the equivalent of a 50% reduction. Second, to the extent that the Defendants mean to compare the *percentages* of residual ballots in these two counties, their math again is in error. The purported reduction, based on residual vote percentages of 6.00% and 4.21% for Franklin and Delaware County, respectively, is .3%, not .5%. Finally, because the demographic composition of these two counties is so fundamentally different, this evidence does nothing to refute Plaintiffs' equal protection claim. Senate Vote Data, Exhibit B, Defendants' Memorandum Contra Plaintiffs' Motion for Summary Judgment (Doc. 186-6); Appendix A to Plaintiffs' Reply to Opposition to Motion for Summary Judgment by Defendants (Doc. 197-2). As set forth above, Plaintiffs' equal protection claim is based on the *statewide* disparities in overvotes and undervotes arising from non-notice punch card and optical scan voting equipment. (Doc. 187, App E.)

25. Plaintiffs agree with the allegations of ¶ 25, but submit that this fact does not support Defendants' motion for summary judgment and is irrelevant to Plaintiffs' claims. The question in this case is *not* whether Ohio has a standard for what constitutes a valid vote. As set forth above, the question is whether question is whether it violates the Fourteenth Amendment to "allow the use of different types of voting systems with substantially different levels of accuracy." Black v. McGuffage, 209 F. Supp. 2d 889, 898 (N.D. Ill. 2003).
26. Plaintiffs disagree with the allegations of ¶ 26. The Secretary of State has acknowledged that an analysis of overvoting and undervoting in Ohio "clearly demonstrated that punch card voting was unreliable to the extent votes cast by thousands of Ohioans were not being counted in the final election tabulation." HAVA State Action Plan (Doc. 115-1) at 14. The Secretary of State has also signed a report acknowledging a "vast body of information ... documenting the higher rate of error for punch cards compared to other systems, and highlighting the benefits of second-chance precinct-count voting systems" Transmittal Letter of Secretary of State Blackwell and Report of Final Recommendations of the Election Study Committee, November 8, 2001 (Doc. 206-1-a) at 16.

Defendants' own official tabulations of voting results indicate on their face that thousands of Ohioans in specifically enumerated precincts were disfranchised in the 2000 presidential election due to overvoting and undervoting. Likewise, these results establish that voters using punch card and other non-notice equipment were far more likely to encounter disfranchisement than those using notice equipment. Summit County Board of Elections Report (Doc. 206-4); Hamilton County Board of Elections Report (Doc. 206-5); Montgomery County Board of Elections Report (Doc. 206-6); State of Ohio HAVA State Action Plan Doc. (115-1) at 14-16. Voters using non-notice punch card and optical scan systems had higher residual vote rates than voters using other voting equipment. App. E to Plaintiffs' Opposition to Defendants' Motion for Summary Judgment (Doc. 187) (compiling data

provided by Secretary of State's office). The Secretary of State's Director of Election Reform has admitted that "there [is] a lesser rate of voter error on the DRE technology and other second chance technologies than there is with punch card technology." Walch Depo. (Doc 171-8-2a), at 46-47. He also conceded that the most likely source of residual votes with punch cards is problems with the machine rather than voter intent. *Id.* at 52.

In further support of their disagreement with Defendants' allegation, Plaintiffs incorporate by reference the evidence referred to in Part B of Plaintiffs' Supplemental Brief Identifying Undisputed Facts in Support of Their Motion for Summary Judgment (Doc. 207), at 4-14.

III. Facts Related to Ohio's Implementation of the Help America Vote Act

- 27 – 30. Plaintiffs agree with the facts alleged in ¶¶ 27-30, but submit that these facts do not support Defendants' motion for summary judgment and are irrelevant to Plaintiffs' claims. Plaintiffs have alleged violations of Section Two of the Voting Rights Act, and of the Equal Protection and Due Process Clauses of the Fourteenth Amendment, not a violation of the Help America Vote Act. Moreover, as set forth in Plaintiffs' summary judgment briefs, Plaintiffs do not seek to compel the Defendants to implement any particular form of voting technology.
31. Plaintiffs are unaware of any factual evidence in the record that establishes the facts alleged in ¶ 31, and the Defendants point to none. In any event, these facts even if true provide no support to Defendants' summary judgment motion and are irrelevant to Plaintiffs' Fourteenth Amendment and Voting Rights Act claims. Plaintiffs' Memorandum in Opposition to Defendants MSJ (Doc. 187-0) at 16-18, 32-33.
- 32-33. Although Plaintiffs agree with the facts alleged in ¶¶ 32-33, for reasons discussed in items 27-30, they submit that these facts do not support Defendants' summary judgment motion and are irrelevant to Plaintiffs' claims.
34. Although Plaintiffs agree with the allegations of ¶ 34, they note that the 31 counties referenced do not include Hamilton, Montgomery, or Summit Counties. In fact, all three counties will continue to use punch cards in the upcoming 2004 presidential election. Moreover, there is no evidence that any or all of the 31 counties will in fact replace their voting systems by the 2004 election. In fact, Secretary of State Blackwell himself recently stated: "Sixty-four counties will use [punch-card] equipment that is unfit, unreliable, and unfair to the disabled." Fritz Wenzel, "Blackwell: Ohio Will Be Watched in November," *Toledo Blade*, May 27, 2004 (available at <http://www.toledoblade.com/apps/pbcs.dll/article?AID=/20040527/NEWS09/405270486/-1/NEWS.>)

35. Plaintiffs disagree with ¶ 35, to the extent that this paragraph sets forth any allegations of facts at all. 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 supported by any evidence in the record, and Defendants cite no facts in support of this assertion.

Conclusion

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

Respectfully submitted,

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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.

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