

ISSUED

2004 OCT 23 3 01

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

SARAH WHITE,

Plaintiff,

Case No. 3:04 CV 7689

-vs-

MEMORANDUM OPINION
AND ORDER

J. KENNETH BLACKWELL, et al.,

Defendant.

KATZ, J.

This action was commenced by the filing late this morning of a complaint seeking declaratory and injunctive relief and a motion for a temporary restraining order and preliminary injunction.

The Plaintiff alleges in an affidavit attached, which is uncontroverted at this time, that she applied for an absentee ballot in the Lucas County Board of Elections on or about October 1, 2004; that she failed to receive that ballot and made telephone inquiry with respect thereto; that she was advised by the Lucas County Board of Elections through an employee thereof that her course was to await the delivery of the ballot by mail; that the ballot was misdirected to the wrong address and that therefore she does not have the ability to cast her vote by absentee ballot. In short, the issue appears as the right of an elector to cast a provisional ballot when that prospective voter appears at the precinct and asserts his or her eligibility to vote under state law.

The Help America Vote Act ("HAVA"), 42 U.S.C. § 15482 was enacted and became law on October 29, 2002. The portion of that statute covering provisional voting states: "If an

individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot as follows * * *.” The Court of Appeals for the Sixth Circuit has recently had an occasion to consider that section and in an opinion in *Sandusky County Democratic Party, et al. v. J. Kenneth Blackwell, et al.* issued October 26, 2004 stated:

HAVA is quintessentially about being able to *cast* a provisional ballot. No one should be turned away from the polls, but the ultimate legality of the vote cast provisionally is generally a matter of state law. Any error by the state authorities may be sorted out later, when the provisional ballot is examined, in accordance with subsection (a)4 of section 15482. But the voter casts a provisional ballot at the peril of not being eligible to vote under state law; if the voter is not eligible, the vote will then not be counted. ***

The Court of Appeals went on to explain the primary purpose of HAVA in this context:

As we explained above, the primary purpose of HAVA was to prevent on-the-spot denials of provisional ballots to voters deemed ineligible to vote by poll workers. Under HAVA, the only permissible requirement that may be imposed upon a would-be voter before permitting that voter to cast a provisional ballot is the affirmation contained in § 15482(a): that the voter is a registered voter in the jurisdiction in which he or she desires to vote, and that the voter is eligible to vote in an election for federal office.

Clearly, that is the issue before this Court.

Under Federal Rule Civil Procedure 65, injunctive relief is an extraordinary remedy whose purpose is to preserve the status quo. Injunctive relief may be granted to effect preventative or protective relief. The factors considered in granting a TRO or a preliminary injunction are similar in nature. In the Sixth Circuit it is well settled that the following factors are to be considered in making this determination:

(1) Whether the movant has shown a strong or substantial likelihood or probability of success on the merits; (2) Whether the movant has shown irreparable injury; (3) Whether the issuance of a preliminary injunction [TRO] would cause substantial harm to others; and (4) Whether the public interest would be served by granting injunctive relief.

Mason County Med. Ass'n v. Knebel, 563 F.2d 256, 261 (6th Cir. 1977). The Sixth Circuit also advocates a balancing approach as to these factors:

It thus appears that the precise wording of the standard for the likelihood of success on the merits is not as important as a realistic appraisal of all of the traditional factors weighed by a court of equity. A balancing is required, and not the mechanical application of a certain form of words.

Roth v. Bank of the Commonwealth, 583 F.2d 527, 537-38 (6th Cir. 1978), *cert. dismissed*, 442 U.S. 925 (1979). *See also, In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985). The degree of proof necessary for each factor used in determining whether to grant a preliminary injunction depends on the strength of plaintiff's case on other factors. *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 657 (6th Cir.), *cert. denied*, 519 U.S. 807 (1996). The party seeking the injunctive relief carries the burden of persuasion on the above stated factors. *Stenberg v. Cheker Oil Co.*, 573 F.2d 921, 925 (6th Cir. 1978).

In the opinion of this Court, the movant has shown a strong or substantial likelihood of probability of success on the merits; has shown irreparable injury by deprivation of a right granted by Federal statute; the issuance of a temporary restraining order would not cause substantial harm to others; and the public's interest will be greatly served by granting the injunctive relief.

Since the Plaintiff clearly has standing before this Court to assert her right to a provisional ballot, the issue becomes the breadth of the order to be issued. The Court finds that HAVA is clear; that all those who appear at a polling place and assert their eligibility to vote irrespective of

the fact that their eligibility may be subject to question by the people at the polling place or by the Board of Elections, shall be issued a provisional ballot. Therefore, the Board of Elections of Lucas County shall immediately advise all precincts to issue provisional ballots to those voters who appear at the voting place and assert their eligibility to vote, including that the voter is a registered voter in the precinct in which he or she desires to vote, and that the voter is eligible to vote in an election for Federal office.

The Court further finds that the Defendant J. Kenneth Blackwell, Secretary of the State of Ohio, immediately (within 30 minutes of receipt of this order) shall advise all Boards of Elections in this State to advise precincts within their jurisdiction as provided in the paragraph immediately above, which advice shall be by facsimile and electronically.

This order shall take effect immediately and no bond is necessary.

The Court is mindful that it is late on election day but that it must take the within action to protect the rights of Ohio citizens to cast provisional ballots as provided by law. This Court is confident that the Defendants will immediately take steps to implement this order.

The issue of eligibility to vote and/or the counting of ballots cast provisionally in accordance with this order may be an issue of State law concerning which this Court has no jurisdiction. Those issues will be reserved for a later date.

IT IS SO ORDERED.



DAVID A. KATZ
U. S. DISTRICT JUDGE