FILED
005
01 DEC 26 AM 9:30
CLERK U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

AMERICAN ASSOCIATION OF
PEOPLE WITH DISABILITIES et al.

Plaintiff,

CASE NO. 3:01-CV-1275-J-21TJC

vs.

KATHERINE HARRIS, et al.

Defendant.
_______________________/

MOTION TO DISMISS OF DEFENDANTS HARRIS AND ROBERTS

Defendants, Katherine Harris, Florida Secretary of State, and L. Clayton Roberts, Director of the Division of Elections within the Florida Department of State, move to dismiss Plaintiff's Complaint pursuant to Fed.R.Civ.P. 12(b) for failure to state a claim upon which relief can be granted. Plaintiff fails to allege a "case or controversy" for purposes of Article III, Plaintiff thus lacks standing.

The essence of the complaint against defendants Harris and Roberts is that they have certified voting systems that are not accessible to voters with visual or manual impairments contrary to plaintiffs' request that they only certify voting systems that are accessible to persons with those impairments. Plaintiffs allege that by allowing counties to continue to purchase inaccessible voting systems, Harris and Roberts have denied plaintiffs their right to a direct and secret ballot and, thus, are discriminating

5

against the plaintiffs and others similarly situated based on their disabilities. This issue has already been decided against similarly situated plaintiffs in *Lightbourn v. County of El Paso, Tex.*, 118 F. 3d 421, (5th Cir. 1997).

In *Lightbourn* the plaintiffs alleged that the defendants discriminated against them by failing to ensure that persons with visual and mobility impairments have access to voting equipment that permitted them to vote without the assistance of an election worker or other person, thus, failing to ensure that they could vote with complete secrecy. Claims against El Paso and the local Democratic Party were settled, leaving the Secretary of State as the sole defendant in the lawsuit. After a bench trial and the subsequent remedies phase of the trial, the district court found that the Secretary had a duty to ensure that local election authorities comply with Title II of the ADA and that "[the] Secretary has joint responsibility with the state's local election authorities in assuring compliance with the ADA and Section 504 in conducting elections." The district court also determined that the Secretary had failed to take several possible actions to remedy discrimination against blind or mobility-impaired voters, such as encouraging the development of voting systems that enable blind voters to vote with complete secrecy.

The appellate court reversed holding that the Secretary has no duty under either Texas law, the ADA, or Section 504 of the Rehabilitation Act of 1973 to take steps to

ensure that local election officials comply with the ADA. The court also held that while the Secretary has a duty to approve certain voting equipment, the plaintiffs have failed to allege facts suggesting a breach of that duty and have failed to state a claim under the ADA against the Secretary. The Section 504 claim was also dismissed because the plaintiff failed to allege that the Secretary received federal financial assistance for such a program.

Similarly, in the instant case, the plaintiffs have alleged that defendants Harris and Roberts oversee elections, prescribe rules and regulations, ensure that all aspects of the election process comply with Florida law, and approve-certify all voting systems used in any state or federal election. Plaintiffs allege that section 101.5606(1), Fla. Stat. (2001), requires defendants Harris and Roberts to decline to approve a voting system unless it permits and requires voters to cast a secret ballot, and that by certifying voting systems that are inaccessible, they have denied plaintiffs the benefit of voting by direct and secret ballot. That statute sets forth twelve requirements for approval of systems the first of which requires that the system "permits and requires voting in secrecy." However, there is no specific mandate that the system meet the various requirements of disabled voters. Instead, section 101.051, Fla. Stat. (2001), sets forth the requirements and guidelines for electors with disabilities who require assistance to vote. It allows for assistance by a third party, either one chosen by the voter or two

election officers at the polling place. Although plaintiffs allege that pursuant to 28 C.F.R. §35.130 they are being denied the benefit of the services, programs, or activities of a public entity, it is not one for which the Secretary is responsible.

To establish a violation of Title II of the ADA, the plaintiffs must demonstrate: (1) that they are qualified individuals within the meaning of the act; (2) that they are being excluded from participation in, or being denied benefits of services, programs, or activities for which the Secretary is responsible, or are otherwise being discriminated against by the Secretary; and (3) that such exclusion, denial of benefits, or discrimination is by reason of their disability. *Lightbourn at pg. 428.* Pursuant to Florida's Electronic Voting Systems Act, the counties adopt and purchase their own voting system subject to the approval of the Department of State. §101.5604 Fla. Stat. (2001). Therefore, until such time that a particular county decides to purchase a system meeting the requirements suggested in the complaint herein, neither Harris nor Roberts would have an opportunity to approve or deny the use of such a system. Since the complaint has not alleged that the plaintiffs herein have presented any such voting machine to the defendants and that the defendants have failed to approve such a machine, the plaintiffs have not been denied the benefits of services, programs or activities for which the defendants are responsible, which renders this action premature. Plaintiffs have failed to allege or demonstrate the existence of a case or controversy

against defendants Harris and Roberts. Therefore, Counts One and Four should be dismissed.

Article III of the United States Constitution requires parties seeking to invoke the power of the federal courts to allege an actual case or controversy. O'Shea v. Littleton, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974). In order for a case to be ripe, the injury or threat of injury must be "real and immediate" and not "conjectural or hypothetical." Id. at 493-94. The ripeness doctrine does not require a litigant to have already suffered harm; however, it is sufficient if there is a reasonable probability of harm. In short, "[r]ipeness is a question of timing." City Communications, Inc. v. City of Detroit, 888 F.2d 1081, 1089 (6th Cir. 1989) (quoting Blanchette v. Connecticut Gen. Ins. Corps., 419 U.S. 102 (1974). "The central concern is whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." 13A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §3532.1 (1984). According to the court in City Communications,

> The [ripeness] doctrine dictates that courts should decide only existing, substantial controversies, not hypothetical questions or possibilities. [Citation omitted.] Ripeness becomes an issue when a case is anchored in future events that may not occur as anticipated, or at all. City Communications, 888 F.2d at 1089

Furthermore, even if a claim does present a case or controversy within the meaning of Article III, there may be prudential reasons to declare a case unripe. According to the Court in Brown v. Ferro Corp., 763 F.2d 798, 801 (6th Cir. 1985), cert. denied, 474 U.S. 947 (1985), the ripeness doctrine depends not only on the finding of a case or controversy, but also requires that the court exercise its discretion to determine whether judicial resolution would be desirable under all of the circumstances. See also O'Shea, 414 U.S. at 493-94. The rationale for the ripeness doctrine is evident.

> Defendants . . . may find themselves unable to litigate intelligently if they are forced to grapple with hypothetical possibilities rather than immediate facts. [Furthermore,] unnecessary lawmaking should be avoided, both as a matter of defining the proper role of the judiciary in society and as a matter of reducing the risk that premature litigation will lead to ill-advised adjudication.

C. Wright, A. Miller & E. Cooper, supra at §3532.1.

With respect to standing, this requirement is an aspect of the Article III "case or controversy" requirement. To have Article III standing, plaintiff, in seeking declaratory or injunctive relief, must demonstrate a likelihood of suffering future injuries, the likelihood of suffering such injury at the hands of the defendants; and that the relief sought will likely prevent such injury from occurring. In establishing the likelihood of suffering future injury, a plaintiff must present specific and concrete facts showing that the challenged action will result in a demonstrable, particularized injury to plaintiff so

that plaintiff personally will benefit in a tangible way from court action. Warth v. Seldin, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Moreover, the injury must be real and immediate and not conjectural or hypothetical. City of Los Angeles v. Lyons, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). Plaintiff must also establish a fairly traceable nexus between the threatened deprivation of the constitutional rights and the action of the defendant. Allen v. Wright, 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). The injury must be caused by defendant and be remediable by defendant. Wehunt v. Ledbetter, 875 F.2d 1558 (11th Cir. 1989), cert. denied, 494 U.S. 1027 (1990). Until such time as plaintiffs are able to allege and demonstrate that the Secretary and Division Director have considered any voting equipment that satisfies the various applicable requirements and then failed to permit its use, plaintiff's claims are insufficient to demonstrate standing for Article III purposes.

Instead, plaintiffs have alleged that by certifying voting systems that are inaccessible, or not designed and constructed to be readily accessible to and usable by voters with visual and manual impairments, defendants Harris and Roberts have denied plaintiffs the benefit of voting by direct and secret ballot and have not afforded the plaintiffs the opportunity to participate in the voting process as non-disabled voters. (para. 82, 88, 92 and 99). Section 15.13, Fla. Stat. (2001), provides:

> The Department of State shall have general supervision and administration of the election laws, corporation laws and such other laws as are placed under it by the Legislature and shall keep records of the same.

The ADA is not an election law. Therefore, the Secretary and the Division Director do not have the duty of ensuring that local election officials interpret and apply the ADA uniformly. *Lightbourn, supra,* at pg. 430. While these defendants have the discretion to adopt rules which establish minimum standards for electronic and electro mechanical voting systems, which would include plaintiffs' concerns, in the absence of such a duty, they cannot be held responsible for failure to exercise that discretion. *Lightbourn* at pg. 429. Therefore, plaintiffs' claims against these defendants do not demonstrate the existence of a case or controversy.

Plaintiffs have also alleged that by certifying machines that do not enable voters with visual and manual impairments to mark their own ballots without third party assistance, defendants Harris and Roberts violate the Rehabilitation Act of 1973, Section 504, 29 U.S.C. §794. (par. 115). They allege that "Defendants are an instrumentality of a local government that is a recipient of federal financial assistance." (par. 112). However, plaintiffs failed to allege that defendants Harris and Roberts (who are state officers and not local officials) receive federal financial assistance for election programs. Plaintiffs must allege that the specific program or activity with which they

are involved receives or directly benefits from federal financial assistance in order to state a §504 claim. *Lightbourn* at pg. 427. Therefore, Count Three should be dismissed.

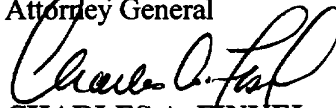
Count Two alleges that sections 101.051, 101.5606, and 101.28, Fla. Stat., (2001), violate Article VI, §1 of the Florida Constitution, and seeks to have them declared unconstitutional under the Florida Constitution. Due to the fact that the constitutionality of these statutes have not been ruled upon by the Florida court, this court should abstain from deciding this issue under the Pullman Abstention Doctrine, whereby the federal courts, 'exercising a wise discretion', should restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary. *Railroad Commission of Texas v. Pullman Co.,* 312 U.S. 496 (U.S. Tex. 1941). Assuming, as stated above, that the plaintiffs have failed to allege a case or controversy under the ADA or §504 of the Rehabilitation Act, there would be no reason for this court to assume jurisdiction of these defendants for the sole purpose of deciding issues governed by state law.

<u>CONCLUSION</u>

For the reasons set forth above defendants Harris and Roberts should be dismissed from this action.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



CHARLES A. FINKEL
Assistant Attorney General
Florida Bar No. 099390
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399-1050
(850)414-3300

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by facsimile and U.S. Mail to:

J. Douglas Baldridge
Howrey Simon Arnold & White
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Scott D. Maker
Office of General Counsel
117 West Duval Street, Suite 480
Jacksonville, FL 32202

Lois G. Williams
Washington Lawyer's Committee
for Civil Rights and Urban Affairs
11 Dupont Circle NW, Suite 400
Washington, D.C. 20036

on this 20th day of December, 2001.

CHARLES A. FINKEL

F:\USERS\STATE\Chuck\Cases\AAPWD\Mot.dismiss Harris.wpd