IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

American Association of People with Disabilities, et al.,	
Plaintiffs,	Civil Action No. 3:01-CV-1275-J-21TJC
v.	
Glenda Hood, et al.,	
Defendants.	

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

Plaintiffs respectfully file this supplemental memorandum in opposition to Defendants Smith and Kast's Motion to Dismiss Amended Complaint or Alternatively for Summary Judgment ("Motion").[1] In their Supplemental Rule 56(f) Opposition to Defendants Smith and Kast's Motion to Dismiss Amended Complaint or Alternatively for Summary Judgment ("Rule 56(f) Motion"), Plaintiffs advised the Court that they intended to supplement their opposition upon the close of discovery.[2] Discovery closed on April 3, 2003, and it is now more clear than ever that the State's Motion must be denied.

[1] The current defendants are Florida Secretary of State Glenda Hood and the Director of the Florida Division of Elections Edward Kast, referred to herein as the "State."

[2] Because Plaintiffs' Rule 56(f) request has not been ruled upon, in an abundance of caution, Plaintiffs have filed a motion seeking leave to submit this memorandum. Additionally, Plaintiffs incorporate herein all arguments set forth in their Consolidated Opposition to Defendants' Motion to Dismiss or for Summary Judgment ("Consolidated Opposition").

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I. THE STATE RECEIVES FEDERAL FINANCIAL ASSISTANCE

Discovery has revealed two additional reasons for denial of the State's request that Plaintiffs' Rehabilitation Act claim (Count II) be dismissed. First, contrary to the State's only specific defense to Plaintiffs' Rehabilitation Act claim, the law is clear that receipt of federal financial assistance by any division of a state governmental department subjects all divisions of that department to the requirements of the Rehabilitation Act. *Lussier v. Dugger*, 904 F. 2d 661 (11th Cir. 1990) (receipt of federal funds by the Florida Department of Corrections sufficient to subject the Department's Division of Medicine to the guidelines of the Rehabilitation Act even though that Division received no federal funds). *See also, Jim C. v. United States*, 235 F.3d 1079, 1082 (8th Cir. 2000); *Lightbourn v. County of El Paso*, 118 F.3d 421 (5th Cir. 1997); *Schroeder v. City of Chicago*, 927 F. 2d 957, 962 (7th Cir. 1991); *Leake v. Long Island Jewish Med. Ctr.*, 869 F. 2d 130, 131 (2d Cir. 1989); *Huber v. Howard County,* 849 F. Supp. 407, 415 (D. Md. 1994), *aff'd mem.*, 56 F.3d 61 (4th Cir. 1995). It is undisputed that the Florida Department of State receives federal financial assistance. (Lench Dep. at 12:18-20, 15:3-7 ("three divisions [of the Florida Department of State]...receive federal funds"); *see also*, Lench Dep. Ex. 4; Lench Dep. Ex. 6.)[3] Therefore, the Division of Elections and all election related activities must comply with the strictures of the Rehabilitation Act.

Second, even if, as the State argues, the law requires "program specific" financial assistance (which it does not), the State's contention that "the Department of State has not received federal funding for use by the Division of Elections, or use in election related functions" (Motion at 18), is simply inaccurate.[4] The Federal Government provided six million dollars in

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[3] All depositions and exhibits thereto cited herein have been previously filed with the Court.

[4] Federal financial assistance need not be actual funding or grants. (Lench Dep. at 19:12-20:6, 69:2-9.) An entity receives federal financial assistance if it "benefit[s] in its dealings with the [federal] government to a greater extent than if it were dealing with another party." *Jacobson v. Delta Airlines, Inc.*, 742 F. 2d 1202, 1209 (9th Cir. 1984); *see also, DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F. 2d 1377, 1382 (10th Cir. 1990)("an entity receives [federal] financial assistance when it receives a subsidy").

"federal funding" for an Internet pilot program that enabled Florida citizens to vote via the Internet in the November 2000 Florida election. (Roberts Dep. at 47:10-25; Craft Dep. at 223:1-227:3.) Moreover, the Federal Government subsidizes Florida voter registration by training federal employees to register Floridians to vote, paying federal employees to register Florida voters, and paying postage to mail Florida voter registration forms to the appropriate elections officials. (Kast Dep. at 38:23-39:2, 39:20-41:21, 42:1-8, 74:25-76:18; *see also*, Stafford Dep. at 124:1-12.) Clearly, the State receives federal financial assistance for its election programs, because it "benefit[s] in its dealings with the [federal] government to a greater extent than if it were dealing with another party." (*see*, n. 4, *supra.*)

II. THE ADA IS AN ELECTION LAW

The State, for purposes of this litigation only, contends that the ADA is not an election law and, therefore, it has no duty to ensure that local election officials comply with the ADA. (Motion at 17-18; *see also,* Consolidated Opposition at 15.) However, Katherine Harris, in her role as "chief election officer" of Florida responsible for interpretation of election laws,[5] disagrees:

> **We must advance the ADA's mission by forcefully addressing the exclusion of scores of persons with disabilities from full and equal participation in elections**

(Harris Dep. at 47:4-16; Harris Dep. Exs. 3-5; Harris Dep. at 73:9-74:13, 128:18-130:16 (emphasis added); *see also*, Harris Dep. at 80:25-82:6; Harris Dep. Ex. 6 at DOE6791 ("[a]nd what is very important now is that we are very much focused on the Americans with Disabilities Act which reinforces the need for accessibility in all areas, and especially in voting rights....The ADA in its 11th year has made an incredible difference in the lives of persons with disabilities

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[5] Fla. Stat. Ann. § 97.012(1) (West 2002); *see also*, Kast Dep. at 28:5-29:7. Secretary Harris admitted that all of her public statements regarding elections were made in her capacity as "chief elections officer," and that Florida voters had the right to rely on her statements. (Harris Dep. at 33:2-34:1, 101:14-23.)

and we should lead the way to ensure that this includes voting accessibility); Harris Dep. at 80:25-82:6, 51:17-23; Harris Dep. Ex. 7 at DOE0807; 84:10-85:12.) All the evidence indicates that the State considered the ADA fully applicable to the Florida election process -- that is, until this lawsuit was filed.

III. THE STATE FAILED TO CERTIFY ACCESSIBLE VOTING SYSTEMS

Discovery has revealed that the State violated the ADA and the Rehabilitation Act by, among other things, failing to certify voting systems that would enable voters in Duval County with either visual impairments or manual impairments to cast their votes in the same or similar manner as non-disabled voters. It is undisputed that readily available voting equipment, such as Hart Intercivic's eSlate which utilizes "sip and puff" technology, jelly switches and head movement switches, would enable even voters with severe mobility impairments to vote in the same or similar manner as non-disabled voters. (Kaufman Dep. at 45:15-50:11; Shaw Dep. at 91:15-92:4.) Although used successfully in numerous jurisdictions, the State has not certified these technologies for use in Florida. (Kaufman Dep. at 13:20-14:15, 54:20-55:9, 57:2-11; Craft Dep. at 146:13-147:3.)

Moreover, the State has not certified even the Diebold touch screen system, which Defendant Stafford purchased and intends to use in Duval County on a very limited basis at some undetermined time in the future. (Plaintiffs' Memorandum in Support of Partial Summary Judgment against Stafford at § II (E) ("Plaintiffs' Summary Judgment Motion").) This is the case even though other jurisdictions, including Georgia, have certified the Diebold touch screen system and have used it with great success in their elections. (Cox Dep. at 85:8-87:14, 77:22-78:11.)[6]

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[6] Duval County's purchase and plan to place three Diebold touch screen machines in the Supervisor of Elections' office to serve the 40,000 disabled voters in Duval County does not meet the County's obligations under the ADA or the Rehabilitation Act. (Plaintiffs' Summary Judgment Motion at § II (E).)

IV. TECHNOLOGY IS THE "REASONABLE ACCOMMODATION" FOR VISUALLY OR MANUALLY IMPAIRED VOTERS

Because this case involves new voting systems, the facts must be analyzed using the "accessible to the maximum extent feasible" standard. (Oct. 16, 2002 Order at 16, 25-26.) Even under the less stringent (and inapplicable) "reasonable accommodation" standard apparently urged by the State, the State still has not complied with the ADA or the Rehabilitation Act. It is undisputed that technology, unavailable only a few years ago, now exists and is readily available to enable disabled voters to vote on equal footing with non-disabled voters. (Crow Dep. at 32:8-33:6, 40:21-41:5, 61:14-63:9; Stafford Dep. at 47:15- 48: 4; B. O'Connor Dep. at 13:6-14:7, 30:18-23, 34:6-36:6; Kaufman Dep. at 18:17-19:2.) Jurisdictions across the country, including many of Florida's own counties, have purchased and used successfully various iterations of accessible voting systems in actual elections. (Browning Dep. at 72:22-73:21, 77:22-78:22, 81:24-84:3, 85:4-14, 86:1-87:13; Browning Dep. Exs. 9, 11 & 12; Cox Dep. at 85:8-87:14, 75:17-76:4, 77:22-78:11; Kaufman Dep. at 13:20-14:15, 54:20-55:2, 57:2-11; B. O'Connor Dep. at 15:3-20, 19:21-21:5; B. O'Connor Dep. Exs. 2, 4; Haskell Dep. Ex. 3.) Even under the State's inaccurate view of the law, these readily available, accessible voting systems are the only "reasonable accommodation" for disabled voters.

V. THE INJURIES TO VISUALLY IMPAIRED VOTERS AND VISUALLY IMPAIRED VOTERS ARE PERVASIVE AND REAL

The State contends that the injuries alleged by the Plaintiffs are "isolated" or "speculative." (Motion at 11, 16.) Discovery revealed otherwise. (Harris Dep. at 52:4-53:17 and Harris Dep. Ex. 3 at Doe11298; Harris Dep. Ex. 7 at DOE0807 (persons with disabilities have been "**exclu[ded]...from full and equal participation** in elections" and the Florida voting process that relegates persons with disabilities to voting only with assistance or by absentee ballot "**stigmatize[s] their disabilities**") (emphasis added); Harris Dep. Ex. 6 at DOE6792; Harris Dep. Ex. 10 at DOE10266-67; Harris Dep. at 94:6-22; Harris Dep. Ex. 11 at DOE11067-68; ; Crow Dep. at 30:2-15, 54:1-21 (voters with disabilities are **"disenfranchised"** by the

Florida voting process), 33:19-34:5, 35:21-36:17; 47:4-25, 57:15-58:1 and Crow Dep. Ex. 7 at DOE12016, 12021 (there "are significant, severe and pervasive obstacles that have been placed in the path of Florida's voters with disabilities" including lack of "alternative" voting methods, insensitivity of election officials and poll workers, and the inability of disabled voters to vote in the same or similar manner as non-disabled voters); Bell Dep. at 22:11-24:9, 25:9-27:19, 33:24-34:7; Bowen Dep. at 39:11-40:11, 51:13-53:23 (disabled voters cannot vote in the same or similar manner as individuals with similar impairments who live in nearby counties); Bowen Decl. ¶13; D. O'Connor Dep. at 20:4-21:17, 37:24-41:4; Shaw Dep. at 82:20-83:24, 92:18-93:1; 93:12-95:11; Plaintiffs Summary Judgment Motion at § II (B).) Equally important, it is undisputed that the Florida voting process provides no way for Plaintiffs to verify that their choices have been correctly marked on the ballot or even whether their ballot has been cast. (Harris Dep. at 46:1-47:3, 55:17-56:25; Harris Dep. Ex. 7 at DOE0807 (relegating disabled voters to voting with assistance or by absentee ballot "caus[es] them to doubt whether their vote was properly cast and counted"); Harris Dep. Ex. 6 at DOE6792; Harris Dep. Ex. 10 at DOE10266; D. O'Connor Dep. at 16:20-17:1, 20:4-21:17; Bell Dep. at 13:11-14:12; Shaw Dep. at 91:5-14.) These injuries are hardly speculative, hypothetical or isolated.

Clearly, the discriminatory acts here far exceed the "diminution of the benefits [Plaintiffs] would otherwise receive from the program" or activity, required to establish injury under the ADA or Rehabilitation Act. *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1232 (7th Cir. 1980); *Sullivan v. City of Pittsburgh,* 811 F. 2d 171, 182 n.12 (3d Cir. 1987). The Plaintiffs suffer real, non-speculative injuries due to the discrimination they face each and every time they vote.

For these reasons, and those stated in the Consolidated Opposition, the State's motion for summary judgment must be denied.

Dated: April 28, 2003

Respectfully submitted,

J. Douglas Baldridge
Trial Counsel
Florida Bar No. 0708070
HOWREY SIMON ARNOLD & WHITE, L.L.P.
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 783-0800

Lois G. Williams
Co-Counsel
Washington Lawyers' Committee for Civil Rights and Urban Affairs
11 Dupont Circle NW, Suite 400
Washington, D.C. 20036
(202) 319-1000

Attorneys for Plaintiffs

Of Counsel:

Alan M. Wiseman
Danielle R. Oddo
Vincent E. Verrocchio
Ari N. Rothman
HOWREY SIMON ARNOLD & WHITE, L.L.P.
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 783-0800

CERTIFICATE OF SERVICE

I hereby certify that, on this 28th day of April, 2003, true copies of the foregoing *Plaintiffs' Motion for Leave to File Supplemental Memorandum of Law in Opposition to Defendants' Motion to Dismiss or for Summary Judgment* and *Plaintiffs' Supplemental Memorandum of Law in Opposition to Defendants' Motion to Dismiss or for Summary Judgment* were served by facsimile and first class United States mail, postage prepaid, upon each of the parties listed below:

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

Charles A. Finkel, Esq.
Assistant Attorney General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050

Ari N. Rothman