UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

AMERICAN ASSOCIATION OF
PEOPLE WITH DISABILITIES et al.

Plaintiffs,

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

vs.

GLENDA E. HOOD, et al.

Defendants,
_____/

DEFENDANTS HOOD AND KAST'S RESPONSE TO PLAINTIFFS' SUPPLEMENTAL MEMORANDUM

Defendants, Glenda E. Hood in her official capacity as Secretary of State for the State of Florida, and Edward C. Kast in his official capacity as Director for the Division of Elections, in response to Plaintiffs' Supplemental Memorandum of Law in Opposition to Defendants' Motion to Dismiss or for Summary Judgment say:

I. THE FEDERAL FINANCIAL ASSISTANCE RECEIVED BY THE DEPARTMENT OF STATE DOES NOT SUPPORT A REHABILITATION ACT CLAIM

The federal financial assistance referred to by the plaintiffs and by Hal Lench in his deposition was limited to specific grants that were provided to specific divisions within the Department of State. The terms of the grants either precluded the various departments from allocating those funds somewhere else or strictly limited their allocation. (Lench Dep. 25:9-22, 27:12-14, Ex.4,5,and 6). The six million dollars in federal funding that was provided by the U.S. Department of Defense for an Internet pilot program in Okaloosa and Orange Counties was for the exclusive use of military personnel and their dependants who were deployed oversees. (Craft

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Dep. 225:11-25). It was not run by the Division of Elections. (Craft Dep.226:13-14). Additionally, the federal assistance referred to by the plaintiffs, which consists of providing assistance to increase voter registration as provided by the National Voter Registration Act, consists of just that. (Kast Dep.38:4-22). The Division of Elections has no authority over these armed forces recruitment offices. (Kast Dep.19-21). Plaintiffs have not demonstrated that the State can use any of these monies for any other purpose, much less to purchase "accessible" voting equipment.

The cases cited by plaintiffs are inapplicable to the facts as described. Also, there is no indication that the Division of Elections had any intent to be subject to the Rehabilitation Act by accepting limited federal assistance as required by the National Voter Registration Act. This does not "comport with community standards of fairness." *Garrett v. The University of Alabama etc.*, 223 F.Supp 2d 1244,1251 (S.D. Ala. 2002). Additionally, plaintiffs have failed to demonstrate that they are the intended beneficiaries of the federal funds, that the state defendants were in a position to "accept or reject" the funds, and that the named defendants used their position to discriminate against the plaintiffs. *Huck v. Mega Nursing Services, Inc.*, 989 F. Supp 1462, 1464 (S.D. Fla. 1997).

II. THE ADA IS NOT AN ELECTION LAW

Plaintiffs' argument and their references to various portions of Katherine Harris' deposition do not transform her passion on behalf of voters with disabilities into enforceable rights. See,

Defendants Hood and Kast's Response to Plaintiffs' Supplemental Memorandum in Support of Motion for Reconsideration. The ADA is not an election law and the Secretary of State is not responsible to ensure statewide compliance with its provisions. See, *Lightbourn v. County of El Paso Texas*, 118 F.3d 421,430 (5th Cir. 1997).

III. PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THE STATE HAS FAILED TO CERTIFY "ACCESSIBLE" VOTING SYSTEMS

There is no provision in the ADA, the Rehabilitation Act, the Federal Statutes, the Florida Statutes, or in any case cited by the plaintiffs, that requires the State to certify voting systems that would enable voters, in Duval or any other county, to cast their votes in the same or similar manner as non-disabled voters. As more fully discussed in *Defendants' Smith and Kast's Motion to Dismiss or for Summary Judgment*, (Dkt.55) both the United States Congress and the Florida Legislature have recognized a need and have implemented requirements and a future time table. Plaintiffs contend that the State has failed to certify readily available voting equipment such as the Hart Intercivic eSlate and the Diebold touch screen systems.

To the contrary, the State has certified various systems that have complied with the State's Voting Standards. (Craft Dep.Ex.13-19) It is readily apparent that the certification process requires a series of interactions between the State and the provider to ensure that the voting system will operate as required. (Craft Dep. Ex.7) The process includes testing and modifications, when necessary. (Craft Dep.103:21-104:12; 128:25-129:21) If during that process, the

voting system does not function properly, the provider is then required to make the necessary modifications. If the provider fails to address the issues, the certification process stops. That is exactly what occurred with reference to the two systems referred to by the Plaintiffs. (Craft Dep. 148:22-152:16) Specifically, that is what occurred with the Diebold system despite requests from the State to complete the process. Apparently, Diebold was more interested in satisfying the State of Georgia, which had appropriated $58,000,000 to equip the entire state. (Cox Dep. 72:23-73:12; 81:5-7; Craft Dep. Ex.20) Moreover, it is immaterial whether various counties, municipalities, or private citizens attempt to have various voting systems, which are used in other states, certified in Florida. If the provider is not interested in providing a functioning system that complies with the voting standards and that accurately records the votes, the State is unable to certify the system for purchase in Florida.(Craft Dep. Ex.21). Plaintiffs cannot drive the certification process, and they do not even have standing to raise this issue.

IV. IMMEDIATE IMPLEMENTATION OF NEW TECHNOLOGY IS NOT REQUIRED AS A "REASONABLE ACCOMMODATION" FOR VISUALLY OR MANUALLY IMPAIRED VOTERS

Assuming that the plaintiffs have suffered "pervasive and real" injures, which they have not, the availability of new technology and the purchase of such more "accessible" voting systems by various Florida counties, does not require the State to only certify systems that can be used by disabled voters without assistance at the present time. "Reasonable accommodation", when applicable, requires

meaningful access, but does not guarantee equal results. *Alexander v. Choate*, 469 U.S. 287,304, 105 S.Ct. 712,722 (1985).

In an optimum environment, no individual would starve, no child would be abused, bad things would not happen to good people, and all individuals with visual or manual disabilities would be able to vote without assistance. Given the limited available resources and the various over-all needs and interests, Congress and the Florida Legislature have effectuated their priorities and have enacted legislation that will accommodate the plaintiffs' desires without creating undue hardships for the State and its numerous counties and municipalities. Plaintiffs have failed to provide any law, facts, or cogent reason why this Court should substitute its judgment for that of the legislators.

V. PLAINTIFFS HAVE FAILED TO DEMONSTRATE ANY PERVASIVE OR REAL INJURIES

Plaintiffs contend that voters with disabilities have been "excluded from full and equal participation in elections", "stigmatized", and "disenfranchised" by the Florida voting process. To support their allegations, plaintiffs rely upon various statements by former Secretary of State, Katherine Harris, and former State Representative, Larry Crow, both strong advocates and sponsors for the legislation that the Florida Legislature ultimately adopted. Their individual points of view and political advocacy do not constitute facts (except for the fact that they made the statements attributed to them). Plaintiffs' testimony reveals a different story.

In their answer to Plaintiffs' Interrogatory #2 propounded by the Court, the plaintiffs described their injuries and the specific acts or omissions by the defendant as follows (Dkt. 7):

> Through the action and inaction of the defendants that govern the voting process, voters with visual and manual disabilities have been denied their right to vote for the candidates of their choice in the free and unimpaired manner enjoyed by non-disabled citizens. They have been denied that right because the voting equipment certified, used and recently purchased by Defendants is not accessible to voters with visual or manual impairments. Defendants have discriminated against plaintiffs by subjecting them to a more burdensome and more intrusive voting process and by failing to make their services programs, or activities readily accessible.

When the same question was posed to the individual plaintiffs, their counsel objected on the basis that it calls for a legal conclusion. The plaintiffs then proceeded to give the same type of vague and illusory answers as set forth above. (O'Connor Dep.17:8-23:2; Bowen Dep.14:14-17:1; Bell Dep.14:13-17:17). Additionally, none of the inconveniences described by the individual plaintiffs prevented them from voting. (O'Connor Dep.16:20-17:7; Bowen Dep.14:3-13; Bell Dep. 13:11-15). These inconveniences are substantially the same as the individual plaintiffs face in their everyday routine. (O'Connor Dep. 15:16-16:11; Bowen Dep.22:10-29:18; Bell Dep.18:21-20:6). The plaintiffs' testimony shows they have not been disenfranchised or excluded from full and equal participation in the election process, and that they have not been stigmatized to any greater extent than they might be in the performance of their daily activities.

When the same question was posed to James Dickson, the Rule

30(B)(6) representative for the American Association of People With Disabilities, plaintiffs' counsel objected on the basis that the question called for a legal conclusions, was vague, ambiguous and compound. Mr. Dickson then proceeded to give a vague and conclusory answer without providing any specifics. (Dickson Dep.65:13-69:19). Additionally, when asked about the source of information learned about the actions or inactions of the state defendants prior to filing this lawsuit, after numerous objections, Mr. Dickson testimony reflects that he mainly relied upon statements from various individuals, including the individual plaintiffs (who had only joined the AAPD immediately prior to the suit being filed).(Dickson Dep. 33:20-43:12;O'Connor Dep.7:24-8:8;Bowen Dep.6:2-11; Bell Dep.6:4-12).

CONCLUSION

The circle is now complete. Plaintiffs had no facts to support an action against the State defendants when they filed this action and are still unable to provide any facts that would prevent the entry of summary judgment against them. In fact, the AAPD was aware of the state's election study commission and knew or should have known of the impetus being supplied by the Secretary of State and the Division of Elections to provide exactly what is sought in this action. (Dickson Dep.35:25-36:17). The plaintiffs were fully aware that the train was rolling when they jumped on board. They have not suffered any pervasive or real injuries and it is time they got off via the entry of summary judgment against them and a dismissal with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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