

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TRACIE HUNTER, et al. : CASE NO. 1:10-cv-820
Plaintiffs : Judge Susan J. Dlott
vs. :
HAMILTON COUNTY BOARD OF : DEFENDANT HAMILTON COUNTY
ELECTIONS, et al. : BOARD OF ELECTIONS' MOTION
Defendants : FOR SUMMARY JUDGMENT AND
: MEMORANDUM IN SUPPORT

Now comes the Defendant Hamilton County Board of Elections ("Board") by and through counsel, and respectfully moves for summary judgment. This motion is based upon the attached supporting memorandum.

Respectfully submitted,

JOSEPH T. DETERS
PROSECUTING ATTORNEY
HAMILTON COUNTY, OHIO
BY:

/s/ James W. Harper

James W. Harper

David T. Stevenson

Thomas Grossmann

Colleen McCafferty

Assistant Prosecuting Attorneys

Hamilton County, Ohio

230 E. Ninth Street, Suite 4000

Cincinnati, OH 45202

james.harper@hcpros.org

dave.stevenson@hcpros.org

tom.grossmann@hcpros.org

colleen.mccafferty@hcpros.org

MEMORANDUM IN SUPPORT

I. STANDARD OF REVIEW

Summary judgment is appropriate where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.Pro. 56(c). The moving party has the initial burden of showing the absence of a genuine issue of material fact as to an essential element of the non-moving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548 (1986). An issue of fact is “genuine” if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986). Determination of whether a fact is “genuine” requires consideration of the applicable evidentiary standard. *Id.*

“Once the moving party satisfies its burden, ‘the burden shifts to the nonmoving party to set forth specific facts showing a triable issue.’” *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 453, 2001 Fed.App. 0210P (6th Cir. 2001) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). Under Fed. R. Civ. Pro. 56(e), the nonmovant cannot rest on his/her pleadings alone, but instead must by affidavits, depositions, answers to interrogatories, and admissions “designate specific facts showing that there is a genuine issue for trial.” See *Celotex Corp* at 324. No issue for trial exists “unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.” *Anderson* at 249-250. Where the defendant demonstrates that after a reasonable period of discovery the plaintiff is unable to produce sufficient evidence beyond the bare allegations of the complaint to support an essential element of his or her case, summary judgment should be granted. *Celotex Corp.* at 322.

II. ARGUMENT

In support of its Motion for Summary Judgment, Defendant Board sets forth four arguments:

A. Hamilton County Board of Elections has Immunity

The Hamilton County Board of Elections is entitled to summary judgment based on its Eleventh Amendment Immunity. The Board gave notice of its right to assert and rely upon all of the defenses which may become available during the course of discovery or trial. Board Answer to Hunter Complaint, Doc. 56, p.6,7; Board Answer to NEOCH/ODP Complaint, Doc. 57, p.4. See also *S & M Brands, Inc. v. Cooper*, 527 F.3d 500, 515 (6th Cir. 2008) (immunity defense could be raised in a motion to dismiss). The Board asserts its right to Eleventh Amendment immunity as discussed herein.

1. The Board is an Arm of the State

The Eleventh Amendment provides that “[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. Amend. XI. Since the landmark case of *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), it has been held that the Eleventh Amendment also extends to suits against a State by citizens of such State.

The Hamilton County Board of Elections is a board created by statute. R.C. 3501.06. The Board is strictly an arm of the state government. See *State ex rel. Semik v. Cuyaboga County Bd. of Elections*, 67 Ohio St. 3d 334, 336, 617 N.E.2d 1120, 1122 (1993); “[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office,” i.e., against the State. *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). See also *Tronsen v. Lucas Cty. Bd. of Elections*, 2007 WL 978101, at *6 (N.D. Ohio, March 29, 2007) (holding that suit against Lucas County Board of Elections was barred under the

Eleventh Amendment); *Hulme v. Madison Cty.*, 2001 WL 1803690 (S.D.Ill August 29, 2001) (holding suit against state board of elections is barred by the Eleventh Amendment); *Casey v. Clayton Cty.*, 2007 WL 788943, at *8 (N.D. GA. March 14, 2007) (if the Court were to confine its inquiry to whether the Board acts as an arm of the state for purposes of conducting elections in general, there can be no doubt that Eleventh Amendment immunity would attach). As an arm of the State, the Board is immune as a matter of law from suit pursuant to the Eleventh Amendment of the United States Constitution.

2. The Board is Immune from Retroactive Injunctive Relief

While the Eleventh Amendment does not bar claims against individual defendants in their official capacities for prospective injunctive relief, the Eleventh Amendment does bar claims against a State for retroactive relief. See e.g. *Ex Parte Young*, 209 U.S. 123, 159-60, 28 S.Ct. 441 (1908). As explained by the 6th Circuit:

In *Ex parte Young*, 209 U.S. 123, 159-60, 28 S.Ct. 441 (1908), the Supreme Court carved out an exception to the States' constitutional immunity from suit, one that permits federal courts to enjoin state officials from the future enforcement of state legislation that violates federal law. Under the exception, "a federal court's remedial power ... is necessarily limited to prospective injunctive relief and may not include a retroactive award which requires the payment of funds from the state treasury."

Ernst v. Rising, 427 F.3d 351, 367-68 (6th Cir. 2005) (quoting *Edelman v. Jordan*, 415 U.S. 651, 677, 94 S. Ct. 1347, 1362 (1974)). See also *Quern v. Jordan*, 440 U.S. 332, 338, 99 S.Ct. 1139, (1979) (*Ex parte Young* exception does not, however, extend to any retroactive relief).

In this case, Plaintiffs brought suit against the Board and the Board members in their official capacities for retroactive injunctive relief, as opposed to prospective injunctive relief. Plaintiffs are seeking redress for a past election held in November, 2010 and the actions taken by the Board related to that Election only. Hunter Complaint, Doc. 1, p. 13,14; NEOCH/ODP Complaint, Doc. 8-1, p.5,6. The crucial distinction between retroactive and prospective relief was explained by the 6th

Circuit in the case of *S & M Brands, Inc. v. Cooper*, 527 F.3d 500, 509 (6th Cir. 2008). In *Cooper* the court reasoned that:

Plaintiffs are asking the federal court for relief for a past, one-time decision of the Attorney General that purportedly violated their federal constitutional rights. Whether the Attorney General's conduct is described as the breach of a "continuing obligation" to enforce the Escrow and Contraband Statutes or the "ongoing liability for past breach" of duty is immaterial; the Supreme Court has instructed courts to look to the substance of the legal claim, not its formal description. *Papasan*, 478 U.S. at 280, 106 S.Ct. 2932 ("The distinction between a continuing obligation on the part of the trustee and an ongoing liability for past breach of trust is essentially a formal distinction of the sort [the Court] rejected in *Edelman*."); *cf. Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 464, 65 S.Ct. 347, 89 L.Ed. 389 (1945) ("We have previously held that the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding."), *overruled on other grounds by Lapidus*, 535 U.S. at 623, 122 S.Ct. 1640.

Plaintiffs fail to pray for prospective injunctive relief. Plaintiffs fail to even allege that injunctive relief is warranted to prevent any future violation of voters' constitutional rights or the NEOCH Consent Decree. Instead, the injunctive relief sought in this case is solely to remediate a purported past violation of voters' Equal Protection and Due Process rights and a past violation of the NEOCH Consent Decree. See e.g. *S & M Brands* at 511 (no argument that the Attorney General violated federal due process for sales made today or in the future. Rather, their claim was the past-a *past* decision of the Attorney General on *past* sales of cigarettes which had an impermissible retroactive (*past*) effect.) The relief Plaintiffs seek is retroactive, rather than prospective, which is unavailable to them pursuant to the Eleventh Amendment. As such, the Board is immune from the injunctive relief Plaintiffs seek and, therefore, is entitled to summary judgment.

3. The Board is Immune from Retroactive Declaratory Relief

Plaintiffs seek declaratory relief that the Board's practices at issue in this case violated voters' constitutional rights and/or the Consent Decree. Specifically, Plaintiff Hunter requests a "Declaratory Judgment that the practices at issue violate the constitutional rights of Plaintiff." Hunter Complaint, Doc. 1, p.13. Plaintiffs NEOCH and ODP request "Declaratory relief in the form of a

declaration that Defendants have violated the Consent Decree, Directive 2010-74 and/or the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.” NEOCH/ODP Complaint, Doc.8-1, p. 4,5. However, Plaintiffs are not entitled to this relief because the Board’s Eleventh Amendment immunity bars the retroactive declaratory relief Plaintiffs seek. The Supreme Court held:

Where there is no claimed continuing violation of federal law or any threat of future violation, a declaratory judgment is inappropriate because its purpose could only be to provide a federal judgment on the issue of liability with the hope that it would be res judicata in state-court proceedings, leaving to the state courts only a form of accounting proceeding whereby damages or restitution would be computed. This would be an inappropriate exercise of federal judicial power because it would have much the same effect as an award of damages or restitution, which kinds of relief against States are prohibited by the Eleventh Amendment.

Green v. Mansour, 474 U.S. 64, 64-65, 106 S. Ct. 423, 424 (1985). Plaintiffs want the Court to retroactively declare that the Board’s actions in processing ballots from the November election on November 16, 2010 are unconstitutional, but they failed to claim that there is any continuing violation of federal law. Absent a continuing violation to be declared unconstitutional, the Eleventh Amendment is a bar to the relief sought. As such, the Board is immune from the declaratory relief requested in Plaintiffs’ respective Complaints and summary judgment should be granted.

4. Due Process Claims should be Dismissed

Fundamentally, Plaintiffs’ Due Process claims are that the poll workers failed to comply with R.C. 3505.181 when they did not inform voters that a ballot was being cast in the wrong precinct. There is no exception to the Board’s Eleventh Amendment immunity for this allegation. Federal supremacy is not implicated when a state official is acting contrary to state law only. *Papasan v. Allain*, 478 U.S. 265, 277, 106 S. Ct. 2932, 2940 (1986). The Supreme Court has held that when a state official has violated *state law*:

“the entire basis for the doctrine of *Young and Edelman* disappears. A federal court’s grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a

greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment. We conclude that *Young* and *Edelman* are inapplicable in a suit against state officials on the basis of state law.”

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106, 104 S. Ct. 900, 911 (1984). See also *S & M Brands* at 511 (sovereign immunity serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties and emphasizes the integrity retained by each State in our federal system). Accordingly, the Board is entitled to Eleventh Amendment immunity for all allegations that it violated state law during the November 2010 election.

Moreover, the actions of poll workers cannot support a § 1983 claim against the Board. The poll workers are not named defendants. There is no respondeat superior liability in actions under § 1983, and there is no evidence that a government custom or policy led to any adverse action against Plaintiffs. See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Scarborough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir.2006). In fact, the determination of whether a provisional voter is eligible to vote can only be made by the Board, not by the poll workers, and poll workers cannot refuse to allow a provisional voter to cast a ballot. See R.C. 3505.183(B). Therefore, the Board cannot be held liable for the actions of poll workers on Election Day.

B. Plaintiff Hunter Lacks Standing

In order to satisfy the standing requirements of Article III of the Constitution, a plaintiff must show:

(1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Emtth. Servs. (TOC), Inc., 528 U.S. 167, 80-81, 120 S.Ct. 693 (2000) (emphasis added). Plaintiff alleges unjust practices towards Hamilton County provisional voters who

voted in the wrong precinct. Hunter Complaint, Doc. 1. However, the alleged injury is not traceable to the candidate, but to the Hamilton County voters. Plaintiff Hunter failed to demonstrate standing in this case.

C. Plaintiff NEOCH Lacks Standing

Plaintiff Northeast Ohio Coalition for the Homeless (“NEOCH”) is a charitable organization operating in the City of Cleveland and allegedly has 40-50 members who are currently homeless. NEOCH/ODP Complaint ¶ 5, Doc. 8-1, p.2. The Board attempted to discern through discovery if, in fact, there are NEOCH members who were involved in the November 2, 2010 election held in Hamilton County, Ohio. NEOCH objected and responded to the Defendant’s Request for Admissions filed and served electronically on May 27, 2011 under Rule 36 of the Federal Rules of Civil Procedure. A copy of NEOCH’s Objections and Responses are attached hereto as Exhibit 1.

Requests for Admissions 1-6 asked NEOCH to admit or deny that, for purposes of the November 2, 2010 election, it had any members which resided in Hamilton County, were registered to vote in Hamilton County, voted in Hamilton County, or cast a provisional ballot in Hamilton County. NEOCH objected to Requests for Admissions 1-6. NEOCH objected to these Admissions by stating, for example, “[w]hether members of NEOCH voted in Hamilton County, Ohio, in the General Election held November 2, 2010 is not relevant to any issue presented by parties’ claims and defenses in this action, including but not limited to NEOCH’s standing to assert its claims against the Board and its members.” Response to Request for Admission 4. Whether NEOCH members have an interest in the outcome of the November election conducted in Hamilton County is not only relevant, but essential to the determination of whether NEOCH has standing to assert its claims.

NEOCH’s objection based upon relevance is insufficient because the answering party must fairly respond to the substance of the matter. See *Fisher v. Baltimore Life Ins. Co.*, 235 F.R.D. 617 (N.D.W. Va. 2006) (relevance was a prohibited general objection). Accordingly, pursuant to Fed. R.

Civ. P. 36(a)(6), the Board moves to determine the sufficiency of NEOCH's objections to Defendant's Requests for Admissions. Unless this Court finds that the objection is justified, it must order that an answer be served. *Id.*

NEOCH fails to satisfy the standing requirements in this case. An organization has standing to bring litigation on behalf of its members if the members "or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Warth v. Seldin*, 422 U.S. 490, 511 (1975). Plaintiffs allege that the Board deprived individual voters of their Equal Protection and Due Process rights and seek to have individual votes counted. NEOCH has not produced evidence to support an injury in this case. The claims that provisional voters voted in the wrong precinct due to poll worker error are not traceable to the members of NEOCH. NEOCH failed to plead that its members have an interest in the outcome of the November election and did not provide a substantive response to the Requests for Admissions. Therefore, NEOCH lacks standing in this case and NEOCH's claims that the rights of voters were violated should be dismissed.

D. Plaintiff ODP Lacks Standing

ODP alleged that it is a political party in the State of Ohio and a party to the Consent Decree. NEOCH/ODP Complaint, Doc.8-1, ¶ 6. ODP, however, failed to allege that it represents any voters who voted in the November 2, 2010 election in Hamilton County, Ohio. As discussed above with regard to NEOCH, Plaintiffs seek to have individual votes counted based upon violations of Equal Protection and Due Process. ODP has not alleged facts sufficient to support an injury in this case. The claims that provisional voters voted in the wrong precinct due to poll worker error are not traceable to the members of ODP. Therefore, ODP's claims that the Board violated the rights of any voters should be dismissed for lack of standing.

III. CONCLUSION

For the foregoing reasons, Defendants are entitled to summary judgment the Plaintiffs' claims. All such relief must be granted at Plaintiffs' cost and expense.

Respectfully submitted,

JOSEPH T. DETERS
PROSECUTING ATTORNEY
HAMILTON COUNTY, OHIO
BY:

/s/ James W. Harper

James W. Harper

David T. Stevenson

Thomas Grossmann

Colleen McCafferty

Assistant Prosecuting Attorneys

Hamilton County, Ohio

230 E. Ninth Street, Suite 4000

Cincinnati, OH 45202

ddn: (513) 946-3159 (Harper)

(513) 946-3120 (Stevenson)

(513) 946-3058 (Grossmann)

(513) 946- 3133 (McCafferty)

Fax: (513) 946-3018

james.harper@hcpros.org

dave.stevenson@hcpros.org

tom.grossmann@hcpros.org

colleen.mccafferty@hcpros.org

Attorneys for Hamilton County Board of Elections

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed on July 5, 2011 using the Court's CM/ECF system, which will transmit notice of the filing to all counsel of record in this case.

/s/ Colleen McCafferty

Colleen M. McCafferty

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