

Casting a Provisional Ballot Because the Absentee Ballot Never Arrived

White v. Blackwell (David A. Katz, N.D. Ohio 3:04-cv-7689)

On the morning of a general election, a voter who never received the absentee ballot she applied for filed an action to compel the state to accept her provisional ballot cast on election day. The court determined that the Help America Vote Act compelled relief for the plaintiff, and the judge ordered that all counties in the state accept provisional ballots from voters who did not receive absentee ballots that they applied for. A year later, for a special election, the judge was called upon to provide the same relief. He determined that the plaintiff was entitled to attorney fees, and the parties settled on an amount of \$225,000.

Subject: Absentee and early voting. *Topics:* Absentee ballots; provisional ballots; Help America Vote Act (HAVA); 42 U.S.C. § 1983; enforcing orders; attorney fees.

At 10:37 a.m. on the day of the 2004 general election, a voter in Lucas County, Ohio, filed a federal action in the Northern District of Ohio’s Toledo courthouse against the county’s board of elections and Ohio’s secretary of state, complaining that the plaintiff was denied the right to cast a provisional ballot although she never received the absentee ballot she had requested.¹ The plaintiff also filed a motion for a temporary restraining order and a preliminary injunction.²

The complaint was signed by a Toledo attorney, listing two other attorneys at his firm as co-counsel.³ Also listed as co-counsel, with pending motions to appear pro hac vice, were five California attorneys, two of whom worked at the Lawyers’ Committee for Civil Rights of the San Francisco Bay Area.⁴

The court assigned the case to Judge David A. Katz,⁵ whose chambers had the clerk’s office send up the plaintiffs’ attorneys.⁶ Judge Katz wanted the state represented at the table as well, so he called the local office for the attorney general and asked that the office be represented in chambers in five

1. Complaint, *White v. Blackwell*, No. 3:04-cv-7689 (N.D. Ohio Nov. 2, 2004), D.E. 1; *White v. Blackwell*, 418 F. Supp. 2d 988, 989–90 (N.D. Ohio 2006).

2. Motion, *White*, No. 3:04-cv-7689 (N.D. Ohio Nov. 2, 2004), D.E. 2.

3. Complaint, *supra* note 1.

4. *Id.*; see Lawyers’ Committee for Civil Rights of the San Francisco Bay Area, www.lccr.com/index.php.

5. Docket Sheet, *White*, No. 3:04-cv-7689 (N.D. Ohio Nov. 2, 2004).

Tim Reagan interviewed Judge Katz for this report by telephone on July 20, 2012. Judge Katz died on July 26, 2016. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

6. Interview with Hon. David A. Katz, July 20, 2012.

minutes' time, ten minutes at the most.⁷ They arrived approximately one hour later.⁸

Judge Katz recalled considerable disapproval of the plaintiff's large and multistate legal team waiting until the morning of the election to bring the action.⁹ After hearing from both sides,¹⁰ Judge Katz issued a temporary restraining order at 3:01 p.m.¹¹ He held that pursuant to the Help America Vote Act (HAVA),¹² "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."¹³ He ordered Lucas County's board of elections to

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.¹⁴

Judge Katz ordered Ohio's secretary of state to issue a similar order to all other county boards of elections within thirty minutes of his receiving Judge Katz's order.¹⁵

Ohio continued to violate HAVA for a special election on August 2, 2005, to fill a seat in the U.S. House of Representatives.¹⁶ On January 19, 2006, Judge Katz determined that the plaintiff was entitled to a permanent injunction and, pursuant to 42 U.S.C. § 1983, attorney fees.¹⁷

On October 27, 2005, Ohio's governor signed legislation that mooted the case by specifying the right of a voter to cast a provisional ballot when the

7. *Id.*

8. *Id.*

9. *Id.*

10. Minutes, *White*, No. 3:04-cv-7689 (N.D. Ohio Nov. 2, 2004), D.E. 5.

11. Temporary Restraining Order, *id.* (Nov. 2, 2004), D.E. 4; *White v. Blackwell*, 418 F. Supp. 2d 988, 990 (N.D. Ohio 2006); see Brief Supporting Motion to Amend Complaint at 2, *White*, No. 3:04-cv-7689 (N.D. Ohio Nov. 18, 2004), D.E. 12 (stating the time of the order); see also Mark Niquette, *Lawsuits Focus on Provisional Balloting*, Columbus Dispatch, Nov. 3, 2004, at 9A; *Voting Issues Keep Courts Busy Up to Last Minute*, Cleveland Plain Dealer, Nov. 2, 2004, at S9.

12. Pub. L. No. 107-252, 116 Stat. 1666 (2002), as amended, 52 U.S.C. §§ 20901–21145. See generally Marie Leary & Robert Timothy Reagan, *The Help America Vote Act* (Federal Judicial Center 2012); Symposium, *HAVA @ 10*, 12 Election L.J. 111 (2013).

13. Temporary Restraining Order, *supra* note 11, at 3–4; see Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 Geo. Wash. L. Rev. 1206, 1230–31 (2005); Daniel P. Tokaji, *HAVA in Court: A Summary and Analysis of Litigation*, 12 Election L.J. 203, 207–08 & n.45 (2013).

14. Temporary Restraining Order, *supra* note 11, at 4.

15. *Id.*; see Brief Supporting Motion to Amend Complaint, *supra* note 11, at 2 (stating that the secretary issued his order seventy-nine minutes after Judge Katz issued his order).

16. *White v. Blackwell*, 409 F. Supp. 2d 919, 921 (N.D. Ohio 2006).

17. *Id.* at 922–25.

voter requested but did not cast an absentee ballot,¹⁸ but the plaintiff was still entitled to attorney fees.¹⁹ The parties agreed to a payment of \$225,000.²⁰

18. Ohio Rev. Code § 3509.09; *White v. Blackwell*, 418 F. Supp. 2d 988, 990–91 (N.D. Ohio 2006).

19. *White*, 418 F. Supp. 2d at 991–93.

20. Order, *White v. Blackwell*, No. 3:04-cv-7689 (N.D. Ohio Dec. 27, 2006), D.E. 76.