

Challenging Absentee-Ballot Procedures in Detroit During an Infectious Pandemic

Reed-Pratt v. Winfrey
(Robert H. Cleland, E.D. Mich. 3:20-cv-12129)
and *Davis v. Benson* (1:20-cv-915) and *Johnson v. Benson*
(1:20-cv-948) (Paul L. Maloney, W.D. Mich.)

During the global Covid-19 infectious pandemic, federal actions in Michigan challenged mailing out unsolicited absentee-ballot applications and counting absentee ballots received after election day. Recognizing the complexity of applying state law on the matters during the pandemic, district judges in each of Michigan's two districts stayed federal claims pending a related action in state court. The federal judges denied the plaintiffs immediate relief.

Subject: Absentee and early voting. *Topics:* Absentee ballots; Covid-19; matters for state courts; intervention; enforcing orders; primary election.

In the Eastern District

During the global Covid-19 infectious pandemic, a voter who voted in an August 4, 2020, primary election filed a federal complaint on August 9 in the Eastern District of Michigan against Detroit's election officials, alleging that it was illegal for the defendants to send the voter an unsolicited absentee-ballot application in June.¹ Among the complaint's claims was one for criminal contempt, an allegation that mailing the absentee-ballot applications violated a state-court order.²

Michigan's court of appeals ruled in 2007 that it was not proper for Detroit's election officials to mail out unsolicited absentee-ballot applications: "[I]t is clear that the city clerk has no powers concerning the distribution of ballot applications other than those that are expressly granted in the statute. And the power to mail unsolicited ballot applications to qualified voters is not expressly stated anywhere in this statute."³

On the day after she filed her complaint, the plaintiff filed a motion for a temporary restraining order or a preliminary injunction against the mailing of unsolicited absentee-ballot applications for the November general election.⁴

1. Complaint, *Reed-Pratt v. Winfrey*, No. 3:20-cv-12129 (E.D. Mich. Aug. 9, 2020), D.E. 1.

2. *Id.* at 13–20.

3. *Taylor v. Currie*, 277 Mich. App. 85, 743 N.W.2d 571, 577 (2007), *review denied*, 483 Mich. 907, 762 N.W.2d 169 (2009); *see also* *Taylor v. Currie*, 386 F. Supp. 2d 929 (E.D. Mich. 2005) (remand to state court by Judge Robert H. Cleland of the case, which was improperly removed to federal court); Docket Sheet, *Taylor v. Currie*, No. 2:05-cv-73148 (E.D. Mich. Sept. 2, 2005) (improperly removed case).

4. Motion, *Reed-Pratt*, No. 3:20-cv-12129 (E.D. Mich. Aug. 10, 2020), D.E. 2.

Judge Robert H. Cleland denied the plaintiff a temporary restraining order on August 11 and set the case for an August 19 videoconference hearing, posting contact information in the public record.⁵

Learning from the defendants' briefing, however, that similar claims were pending in state court, Judge Cleland canceled the August 19 hearing on August 13 and ordered briefing by August 31 on how and whether the federal court should proceed.⁶ In response to a motion for reconsideration and an amended complaint, both filed on Friday, August 14, Judge Cleland decided on August 17 to hold a telephone conference on August 18.⁷ Following the conference, Judge Cleland maintained a briefing deadline of August 31.⁸

On September 9, Judge Cleland decided to stay the plaintiff's federal claim and dismiss without prejudice the plaintiff's state claims.⁹ Whether Detroit election officials were authorized to mail unsolicited absentee-ballot applications during the global Covid-19 infectious pandemic was an issue that involved complex questions of state law.¹⁰

An appeal was dismissed on December 7 for failure to prosecute it.¹¹ On January 14, 2021, Judge Cleland ordered the plaintiff to notify the court of her intentions with the case,¹² and the plaintiff filed a notice on January 17 that she intended to proceed.¹³

In the Western District

Two voters, including the plaintiff in the pending state-court action, filed a federal complaint against state and Detroit election officials in the Western District of Michigan, which includes the state's capital, on September 17, 2020, challenging the mailing out of unsolicited absentee-voter applications for the upcoming November 3 general election.¹⁴ The court assigned the case to Judge Paul L. Maloney.¹⁵

On the following day, the plaintiffs filed an emergency motion for a summary declaratory judgment against the Detroit election officials,¹⁶ accompanied by a motion to expedite the summary-judgment motion.¹⁷

5. Order, *id.* (Aug. 11, 2020), D.E. 8, 2020 WL 6580621; Notice, *id.* (Aug. 11, 2020), D.E. 9.

6. Order, *id.* (Aug. 13, 2020), D.E. 17, 2020 WL 4700830; *see* Defendants' Brief at 5–6, *id.* (Aug. 11, 2020), D.E. 7.

7. Opinion, *id.* (Aug. 17, 2020), D.E. 22 (“The court will initiate the call.”); *see* Amended Complaint, *id.* (Aug. 14, 2020), D.E. 19; Reconsideration Motion, *id.* (Aug. 14, 2020), D.E. 18.

8. Order, *id.* (Aug. 19, 2020), D.E. 24.

9. Opinion, *id.* (Sept. 9, 2020), D.E. 29, 2020 WL 5491443.

10. *Id.*

11. Order, *Reed-Pratt v. Winfrey*, No. 20-1876 (6th Cir. Dec. 7, 2020), D.E. 21.

12. Order, *Reed-Pratt*, No. 3:20-cv-12129 (E.D. Mich. Jan. 14, 2021), D.E. 33.

13. Notice, *id.* (Jan. 17, 2021), D.E. 34; *see* Order, *id.* (Jan. 19, 2021), D.E. 35 (terminating the preliminary-injunction motion as moot and noting that the case remained stayed pending state-court litigation); Notice, *id.* (Sept. 23, 2021), D.E. 36 (“The mailing was made and the election has come and gone, leaving nothing to be enjoined.”).

14. Complaint, *Davis v. Benson*, No. 1:20-cv-915 (W.D. Mich. Sept. 17, 2020), D.E. 1.

15. Docket Sheet, *id.* (Sept. 17, 2020).

16. Motion, *id.* (Sept. 18, 2020), D.E. 5.

17. Motion, *id.* (Sept. 18, 2020), D.E. 7.

Michigan's court of appeals had ruled on September 16 that "the authority and discretion afforded the Secretary of State by the constitution and state law permit defendant to send unsolicited absent-voter ballot applications to all Michigan qualified registered voters."¹⁸ The ruling in 2007 did not apply, because that case involved mailings by a local election official who was also a candidate.¹⁹ Michigan's supreme court declined to review the appellate decision on December 28.²⁰

Noting that the state appellate decision should preclude the new federal case, the Detroit election officials moved on September 23 to dismiss the case or transfer it to the Eastern District.²¹ The plaintiffs filed an amended complaint six days later, which added a challenge to the counting of absentee ballots received after the closing of the polls,²² and the plaintiffs filed a motion for a temporary restraining order or preliminary injunction against Michigan's secretary of state one day after they filed the amended complaint.²³ The plaintiffs also renewed their motions for an emergency summary declaratory judgment against Detroit's election officials²⁴ and expedited briefing on the summary-judgment motion.²⁵

On Thursday, October 1, Judge Maloney denied the plaintiffs a temporary restraining order and set briefing on the preliminary-injunction motion to conclude on October 16.²⁶

On the previous Tuesday, three voters filed a federal complaint in the Western District to ensure that the secretary of state not allow the counting of absentee ballots received after election day.²⁷ On the next day, the plaintiffs filed a motion for a preliminary injunction.²⁸ Judge Maloney ordered briefing concluded by October 16.²⁹

Also on October 1, Judge Maloney set both cases for oral argument on October 20.³⁰ He later moved oral argument up one day³¹ and allowed intervention as defendants in the second case by a group of two individuals and two organizations.³²

18. *Davis v. Sec'y of State*, 333 Mich. App. 588, 605, 963 N.W.2d 653, 662 (2020).

19. *Id.* at 600–01, 963 N.W.2d at 660.

20. *Davis v. Sec'y of State*, 506 Mich. 1040, 951 N.W.2d 911 (2020).

21. Motion, *Davis*, No. 1:20-cv-915 (W.D. Mich. Sept. 23, 2020), D.E. 18.

22. Amended Complaint, *id.* (Sept. 29, 2020), D.E. 24.

23. Motion, *id.* (Sept. 30, 2020), D.E. 25.

24. Motion, *id.* (Sept. 30, 2020), D.E. 27.

25. Motion, *id.* (Sept. 30, 2020), D.E. 29.

26. Order, *id.* (Oct. 1, 2020), D.E. 33.

27. Complaint, *Johnson v. Benson*, No. 1:20-cv-948 (W.D. Mich. Sept. 29, 2020), D.E. 1.

28. Motion, *id.* (Sept. 30, 2020), D.E. 4.

29. Order, *id.* (Oct. 1, 2020), D.E. 6.

30. Order, *id.* (Oct. 1, 2020), D.E. 7.

31. Order, *id.* (Oct. 6, 2020), D.E. 15; Order, *Davis*, No. 1:20-cv-915 (W.D. Mich. Oct. 6, 2020), D.E. 36; *see Minutes, Johnson*, No. 1:20-cv-948 (W.D. Mich. Oct. 19, 2020), D.E. 38; *Minutes, Davis*, No. 1:20-cv-915 (W.D. Mich. Oct. 19, 2020), D.E. 56.

32. Order, *Johnson*, No. 1:20-cv-948 (W.D. Mich. Oct. 6, 2020), D.E. 13; *see Motion, id.* (Oct. 2, 2020), D.E. 9.

On October 2, Judge Maloney denied the motion for expedited briefing in the first case, because the ballots had already been mailed and the election would not moot declaratory judgment.³³ A week later, he again denied the plaintiffs a temporary restraining order.³⁴

On the day of the hearings, Judge Maloney decided to hold the second case in abeyance pending the secretary's preparation of new guidance to local election officials concerning absentee ballots.³⁵ On the next day, he denied in the first case a preliminary injunction on counting absentee ballots.³⁶ Toward the end of the month, he dismissed the declaratory-judgment claim in the first case.³⁷ The parties in the second case stipulated dismissal on November 23.³⁸ On September 22 of the following year, Judge Maloney dismissed the first case.³⁹

Final Resolution

The parties in the Eastern District case stipulated an October 5, 2021, dismissal.⁴⁰

33. Order, *id.* (Oct. 2, 2020), D.E. 35.

34. Order, *Davis*, No. 1:20-cv-915 (W.D. Mich. Oct. 9, 2020), D.E. 45.

35. Order, *Johnson*, No. 1:20-cv-948 (W.D. Mich. Oct. 19, 2020), D.E. 37.

36. Opinion, *Davis*, No. 1:20-cv-915 (W.D. Mich. Oct. 20, 2020), D.E. 59.

37. Opinion, *id.* (Oct. 30, 2020), D.E. 68.

38. Stipulated Dismissal, *Johnson*, No. 1:20-cv-948 (W.D. Mich. Nov. 23, 2020), D.E. 48.

39. Opinion, *Davis*, No. 1:20-cv-915 (W.D. Mich. Sept. 22, 2021), D.E. 83; Opinion, *id.* (Sept. 22, 2021), D.E. 68.

40. Stipulated Order, *Reed-Pratt v. Winfrey*, No. 3:20-cv-12129 (E.D. Mich. Oct. 5, 2021), D.E. 37.