

Denied Complaint for Electronic Overseas Voting During a Global Pandemic

Harley v. Kosinski (Brian M. Cogan, E.D.N.Y. 1:20-cv-4664)

An action against election officials in seven states sought electronic voting for overseas voters during the global Covid-19 infectious pandemic. The district judge denied the plaintiffs immediate relief, and the plaintiffs dismissed their case.

Subject: Absentee and early voting. Topics: Covid-19; Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA); absentee ballots; class action.

A September 30, 2020, complaint against election officials in seven states filed in the Eastern District of New York alleged that the states were not doing enough to ensure enfranchisement of overseas voters during the global Covid-19 infectious pandemic.¹ The ten plaintiffs, “individually, and on behalf of all others similarly situated,” sought electronic acceptance of overseas ballots.² They alleged, “At present there is simply no mail service in many countries, while mail is extraordinarily slow returning from others.”³ The plaintiffs alleged the district a proper venue because “election officials in each State at issue here send thousands of ballots through John F. Kennedy International Airport (‘JFK’) to voters abroad, and thousands of ballots return through JFK.”⁴

Judge Brian M. Cogan set the case for oral argument by videoconference on October 13, adopting the plaintiffs’ suggested deadline of October 5 for a preliminary-injunction motion and posting contact information for the proceeding in the public docket sheet.⁵ Judge Cogan also ordered the plaintiffs to show cause why they should not bring separate cases against election officials in each state.⁶ The plaintiffs responded on October 2, “While the laws of seven different States are technically at issue, those laws all produce a single result: voters abroad cannot return a ballot except through physical mail—and amid the pandemic, that often means they cannot return a ballot at all.”⁷

An in-person hearing was out of the question.⁸ Many of the attorneys would have had to self-quarantine when they arrived in New York, because

1. Complaint, *Harley v. Kosinski*, No. 1:20-cv-4664 (E.D.N.Y. Sept. 30, 2020), D.E. 1. *See generally* Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. §§ 20301–20311; Robert Timothy Reagan, *Overseas Voting: The Uniformed and Overseas Citizens Absentee Voting Act* (Federal Judicial Center 2016).

2. Complaint, *supra* note 1, at 1, 28.

3. *Id.* at 2.

4. *Id.* at 4.

5. Docket Sheet, *Harley*, No. 1:20-cv-4664 (E.D.N.Y. Sept. 30, 2020); *see* Preliminary-Injunction Motion, *id.* (Oct. 5, 2020), D.E. 13; Letter Motion, *id.* (Oct. 1, 2020), D.E. 8.

Tim Reagan interviewed Judge Cogan for this report by telephone on October 30, 2020.

6. Docket Sheet, *supra* note 5.

7. Letter, *Harley*, No. 1:20-cv-4664 (E.D.N.Y. Oct. 2, 2020), D.E. 12.

8. Interview with Hon. Brian M. Cogan, Oct. 30, 2020.

of the pandemic.⁹ Judge Cogan found video hearings preferable to audio-only proceedings when arguments were likely to be pointed, so the judge could read the attorneys' facial expressions and the attorneys could read the judge's.¹⁰ Members of the public could listen in, and everyone was reminded not to record the hearing.¹¹

Election officials for Kentucky and Georgia argued that Kentucky's absentee ballots' possibly passing through JFK was speculative and incidental.¹² Ohio's secretary of state and Wisconsin's election commissioners argued lack of personal jurisdiction as they were not the ones who sent out absentee ballots even if the ballots did pass through JFK.¹³ Texas's secretary of state argued that even if she did send absentee ballots through JFK, that would be insufficient contact with New York for personal jurisdiction.¹⁴ Pennsylvania's election officials referred the court to Wisconsin's personal-jurisdiction argument.¹⁵ New York's election officials argued that the two plaintiffs who were New York voters did not have standing to bring the suit because they received their absentee ballots.¹⁶

At the hearing, following a pause, Judge Cogan denied the plaintiffs immediate relief.¹⁷ Allegations that the ballots traveled through the New York airport were both speculative and insufficient to provide the court with personal jurisdiction over the out-of-state defendants.¹⁸ Claims that overseas New York voters' ballots would not be counted also were speculative.¹⁹

The plaintiffs voluntarily dismissed their action.²⁰

9. *Id.*

10. *Id.*

11. *Id.*

I also want to mention that under the rules of this court, it is strictly forbidden to make any recording of this argument. That goes for the people who are participating as lawyers for the parties. It also goes for the public who may be listening in on this. There are severe consequences for video or audio recording of this proceeding. If you want a copy of the transcript, that's certainly something that can be purchased by you so don't hesitate to contact the court.

Transcript at 6, *Harley*, No. 1:20-cv-4664 (E.D.N.Y. Oct. 13, 2020, filed Apr. 9, 2021), D.E. 55 (remarks by Judge Cogan).

12. Georgia Brief at 10–11, *Harley*, No. 1:20-cv-4664 (E.D.N.Y. Oct. 9, 2020), D.E. 47; Kentucky Brief at 4–5, *id.* (Oct. 9, 2020), D.E. 36.

13. Wisconsin Brief at 8, *id.* (Oct. 9, 2020), D.E. 37; Ohio Brief at 1, *id.* (Oct. 9, 2020), D.E. 31.

14. Texas Brief at 2–3, *id.* (Oct. 9, 2020), D.E. 32.

15. Pennsylvania Brief at 5, *id.* (Oct. 9, 2020), D.E. 48.

16. New York Brief at 2, *id.* (Oct. 9, 2020), D.E. 38.

17. Transcript, *supra* note 11, at 36–49.

At the hearing, the plaintiffs' attorney asked the court reporter to identify the attorney in the transcript with the honorific "Mx." *Id.* at 3.

18. *Id.* at 38–42.

19. *Id.* at 44.

20. Docket Sheet, *supra* note 5.