

Election Observers

Tucker v. Hosemann

(W. Allen Pepper, Jr., N.D. Miss. 2:10-cv-178)

A federal complaint filed thirteen days before the 2010 general election alleged that election practices discriminated against Black voters. According to the presiding judge, “Though it was unclear from their pleadings the exact nature of the relief sought by the plaintiffs, the court was able to pinpoint the issue during the [temporary-restraining-order] hearing [held six days after the complaint was filed].” The judge concluded that the practice by offices of Mississippi’s secretary of state and attorney general of sending observers to federal and state elections held in Mississippi was not a new practice requiring preclearance pursuant to section 5 of the Voting Rights Act.

Subject: Voting procedures. *Topic:* Section 5 preclearance.

Thirteen days before the 2010 general election, four voters filed a federal complaint in the Northern District of Mississippi against state election officials, alleging election practices that discriminated against Black voters.¹ With their complaint, the plaintiffs filed a motion for a temporary restraining order (TRO).² Four days later, the plaintiffs moved to expedite the case to save on expenses.³

Judge W. Allen Pepper, Jr.’s chambers responded to the plaintiffs’ telephone request for a hearing date, set a hearing for October 26, and provided the defendants with notice on October 22.⁴

Judge Pepper determined that the motion to expedite the case was presented improperly but ultimately moot.⁵

Essentially, this motion sought to convert their motion for temporary restraining order to a final trial on the merits. First, Rule 65(a)(2) requires a pending motion for preliminary injunction, as opposed to one for a temporary restraining order, to convert to a trial on the merits. Since the plaintiffs did not move for preliminary injunction, conversion is premature. Second, the motion should be denied because it was filed only two days before the TRO hearing set for October 26, 2010 and a mere four days after the plaintiffs filed the complaint. To have converted the hearing to a full trial with less than a week’s notice to the defendants would have denied the State due process. Third, since plaintiffs’ counsel stated near the end of the hearing

1. Complaint, *Tucker v. Hosemann*, No. 2:10-cv-178 (N.D. Miss. Oct. 20, 2010), D.E. 1.

2. Temporary-Restraining-Order Motion, *id.* (Oct. 20, 2010), D.E. 2.

3. Motion, *id.* (Oct. 24, 2010), D.E. 6.

4. Opinion, *id.* (Oct. 26, 2010), D.E. 16, 2010 WL 4384223; *see Minutes, id.* (Oct. 26, 2010), D.E. 12.

Judge Pepper died on January 24, 2012. Federal Judicial Center Biographical Directory of Article III Federal Judges, www.fjc.gov/history/judges.

5. Opinion, *supra* note 4, at 1–2.

that after the court ruled on the motion for TRO there would be no more outstanding issues, the motion to convert to a final trial is essentially moot.

...

Though it was unclear from their pleadings the exact nature of the relief sought by the plaintiffs, the court was able to pinpoint the issue during the TRO hearing. The court confirmed with plaintiff counsel on the record that the sole issue for which the plaintiffs seek specific relief involves the practice of the Secretary of State's office and the Attorney General's office of sending observers to federal and state elections held in Mississippi.⁶

Judge Pepper concluded that Mississippi's observer practice was not a new practice requiring preclearance pursuant to section 5 of the Voting Rights Act.⁷

The appeal was dismissed for failure "to timely order transcripts and make financial arrangements with court reporter."⁸

6. *Id.*

7. *Id.* at 2–6; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination).

8. Order, *Tucker v. Hosemann*, No. 10-60859 (5th Cir. Jan. 20, 2011).