

Casting a Provisional Ballot Because the Absentee Ballot Never Arrived

White v. Blackwell

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

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 board of elections and Ohio's secretary of state, complaining that she 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 minutes' time, ten minutes at the most.⁷ They arrived approximately one hour later.⁸

Judge Katz recalls considerable disapproval of the plaintiff's large and multi-state 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 Judge Katz 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

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 <http://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.

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

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, *id.* (Nov. 18, 2004), D.E. 12 (stating time of 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, 42 U.S.C. §§ 15301–15545 (2012). 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).

people at the polling place or by the Board or Elections, shall be issued a provisional ballot.”¹³ Judge Katz ordered the Lucas County 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 30 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 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

13. Temporary Restraining Order, *supra* note 11, at 3–4; see 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 79 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.

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.