IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

American Association of People with Disabilities, et al.,

Plaintiff

v.

Glenda Hood, et al.,

Defendants.

Civil Action No. 3:01-CV-1275-J-Alley/HTS

PLAINTIFFS' OPPOSITION TO DEFENDANT STAFFORD'S MOTION FOR STAY PENDING APPEAL

Plaintiffs respectfully submit this opposition to Defendant Stafford's Motion For Stay Pending Appeal.

I. INTRODUCTION

Although cast as a motion for stay, Defendant Stafford's motion is little more than a plea for reconsideration of the issues he has lost no less than three times. The motion confuses the standards applicable to motions for stay, and then leaps to an exhaustive recitation of Defendant Stafford's familiar arguments that legally inapposite law and alleged facts somehow demonstrate that the Court's March 26, 2004 judgment was in error. Defendant Stafford's fourth bite at the apple adds nothing new, is inappropriate, and otherwise fails to address the salient issue before this Court – whether a stay pending appeal is justified. There simply is no basis for a stay.[1]

[1] Defendant Stafford concedes that he has no supporting precedent for his request to stay the part of the Court's March 26 judgment requiring him to present a plan for implementing the Court's requirements by April 12, 2004. (Motion to Stay at 11, n.16.) Indeed, in *Garcia-Mir v. Meese*, the Eleventh Circuit denied the Government's request for a stay of the part of the District Court's order requiring submission of a plan for implementation of the immigration hearings at issue in

222

Defendant Stafford's argument is divided into two parts. The first part simply re-argues *Nelson v. Miller* (and related issues) and concludes that the Court erred in entering its March 26 judgment. Defendant Stafford purchased an *entirely new voting system* at a time when fully accessible touch screen systems (with audio ballot) had been certified by the State of Florida. *American Assoc. of People With Disabilities v. Hood*, __ F. Supp. __, 2004 WL 626687 at *9 (M.D. Fla. March 24, 2004). This undeniable fact renders inapposite every one of the redundantly asserted legal and factual excuses for Defendant Stafford's failure to abide by the requirements of the ADA. It is not even a close call – this is the law of every jurisdiction involving *new facilities* and was the correct conclusion reached by this Court. *Id.*

The second part of Defendant Stafford's argument is a hodgepodge of excuses all based upon an unsupportable assertion that he lacks sufficient time to meet the requirements of the Court's judgment. This is not true – the only record evidence is that Pasco County and Hillsborough County, Florida fully implemented their touch screen systems in less than two months. (Plaintiffs' Post Trial Brief at 24-25 and citations therein.) Further, Diebold's trial testimony (Mr. Early) is uncontroverted that the training process can be completed in no more than a month. (*Id.* at 25 and citations therein.)

In any event, *if* Defendant Stafford lacks sufficient time to comply with the Court's judgment (for which there is no proof), he has only himself to blame. Since 2001 – prior to Defendant Stafford's purchase of an inaccessible voting system – Florida counties have had the option of purchasing certified, and rigorously tested, accessible voting systems. *AAPD*, 2004 WL 626687 at *2 (and citations therein.) At the end of trial, in September 2003, it was apparent that this Court would likely order Defendant Stafford to take some action to bring Duval County's election system into compliance with the ADA. (1/14/04 Tr. at 70:3-10 ("I don't think that should be any surprise, in view of the proceedings that we held in September").) On January 14,

---

that case. This did not stop Defendant Stafford from seeking such a stay of his obligation to submit a plan by April 12, 2004.

2004, Defendant Stafford was expressly advised by the Court's "tentative" ruling that he would be required to do so. (*Id.*) Finally, last month, Defendant Stafford was officially ordered to take action. His latest plea for more time is hollow, yet distressingly consistent with his uniform approach of missing every deadline related to meeting the needs of Duval County's disabled citizens.

Finally, Defendant Stafford's arguments have little to do with the issue before this Court. The issue is whether the Court's March 26 judgment should be stayed pending appeal. The United States Supreme Court has identified the relevant factors that must be addressed in evaluating a motion for stay, which it has categorized as truly extraordinary relief. Defendant Stafford's motion has little to say about these factors and fails to present any basis for granting such extraordinary relief. The motion for stay must be denied.[2]

II. ARGUMENT

A. Defendant Stafford Confuses The Applicable Legal Standards

"Because a stay pending appeal would interrupt the ordinary process of judicial review and postpone even further the final resolution of [the] litigation, it is considered 'extraordinary relief' for which the moving party bears a 'heavy burden.'" *Wyatt v. Sawyer*, 190 F.R.D. 685, 689 (M.D. Ala. 1999) (citing *Winston-Salem/Forsyth County Board of Educ. v. Scott*, 404 U.S. 1221, 1231, 92 S. Ct. 1236, 1241 (1971)); accord, *Johnson v. Mortham*, 926 F. Supp. 1540, 1542 (N.D. Fl. 1996). "Such motions are disfavored and granted only in exceptional circumstances." *Federal Trade Commission v. Jordan Ashley, Inc.*, 1994 WL 485793, at *1 (S.D. Fla. 1994) (citing *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986)). In determining whether to

[2] Scattered throughout Defendant Stafford's motion are references to the interest in saving taxpayers' money. Perhaps that issue should have been addressed before Defendant Stafford purchased an inaccessible voting system, lodged this two year fight, and potentially subjected Duval County to an attorneys' fees award in favor of the Plaintiffs. Indeed, this is especially true now that Defendant Stafford suggests that it would cost approximately $210,000 to comply with the Court's judgment. (Motion to Stay at 15.)

grant a stay pending appeal, the United States Supreme Court has determined that courts must examine the following factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776, 107 S. Ct. 2113, 2119 (1987). "The failure to satisfy one prong of the standard for granting a stay pending appeal 'dooms his motion.'" *In re Bilzerian*, 276 B.R. 285, 296 (M.D. Fla. 2002) (citing *Green Point v. Treston*, 188 B.R. 9, 12 (S.D.N.Y. 1995)). Defendant Stafford fails to meet any prong of the applicable standard.

In an attempt to evade the standard, however, Defendant Stafford argues that he need only show he "presented a substantial case on the merits." (Motion For Stay at 3.) In an apparent acknowledgement that he cannot make the required "strong showing that he is likely to succeed on the merits," he urges the Court to relax the Supreme Court's requirements. However, the leniency he seeks applies "only if the balance of the remaining three factors *weigh heavily* in favor of granting the stay." *Wyatt* at 689-90 (citing *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981), *cert. denied,* 460 U.S. 1042 (1983)) (emphasis added.) The remaining three factors militate decisively against granting a stay, and thus Defendant Stafford's required showing on the merits cannot properly be relaxed. Even if it were, he has not demonstrated a substantial case on the merits.

B. Defendant Stafford Has Neither Made a Strong Showing that He is Likely to Succeed on the Merits nor a Substantial Case on the Merits.

To demonstrate that he is likely to prevail on the merits of his appeal, Defendant Stafford must prove that the Court's orders from which he appeals were "clearly erroneous." *Wyatt* at 689. With two inconsequential exceptions, Defendant Stafford's only attempt to make this requisite showing is to re-assert the identical arguments this Court has rejected three times.

AAPD, 2004 WL 626687; *AAPD v. Hood*, 278 F. Supp.2d 1345 (M.D. Fla. 2003); *AAPD v. Smith*, 227 F. Supp.2d 1276 (M.D. Fla. 2002). In 2002, Defendant Stafford purchased an entirely new voting system at a time when fully accessible voting technology had been certified by the State of Florida. *AAPD*, 2004 WL 626687 at *9 (and citations therein.) Although ignored by Defendant Stafford for over two years, this fact alone renders inapposite every legal excuse and case he offers to justify his disregard for the requirements of the ADA. The compelling rationale for this conclusion is fully explained in Plaintiffs' opposition memoranda to the two motions to dismiss and motion for summary judgment as well as in Plaintiffs' Post-Trial Brief (and the Court's resulting orders), which are incorporated into this opposition by this reference. It would serve no meaningful purpose to repeat this rationale a fourth time.[3]

The first "new" argument raised by Defendant Stafford is that ordering the use of accessible voting technology in less than all of Duval County's polling places runs the risk of subjecting him to claims under the Equal Protection Clause. His theory is that those disabled citizens in Duval County assigned to polling places still burdened by third party assistance will be able to assert such claims. This excuse fails for a variety of reasons.

First, it is axiomatic that the "phasing in" of a remedy in the civil rights context cannot properly result in liability. *Acree v. County Bd. of Educ.*, 458 F.2d 486, 488 (5th Cir. 1972) (enforcing court order requiring school district to implement a desegregation plan in three phases, commencing with only certain schools); *Kemp v. Beasley*, 352 F.2d 14, 14-17 (8th Cir. 1965) (affirming three step transitional plan period of school desegregation whereby only certain grade levels were provided the benefits of the plan during initial periods). By December 31, 2006, HAVA will require Defendant Stafford to place at least one touch screen machine (with audio ballot) in every one of Duval County's polling places. While bringing Defendant Stafford into

[3] Defendant also relies on what he calls "persuasive ADA regulations" addressing potentially "disproportionate" alterations. (Motion For Stay at 16.) "Persuasive" must be a euphemistic synonym for "entirely inapposite" as these regulations have no relevance whatsoever to ADA discrimination cases involving entirely new facilities.

compliance with the ADA, the Court's judgment also has the practical affect of "phasing in" much needed relief consistent with the plans uniformly endorsed by Courts in the civil rights context.[4]

Second, the only "precedent" cited by Defendant Stafford for his Equal Protection argument is the United States Supreme Court's decision in ***Bush v. Gore,*** 531 U.S. 98, 121 S. Ct. 525 (2000). However, the Supreme Court made it clear that its "consideration [was] limited to the present circumstances" (*id.* at 109), calling into question its precedential value for the novel position asserted by Defendant Stafford (even if ***Bush*** supported that position, which it does not).

Third, if Defendant Stafford is truly concerned about the equal protection under the law of Duval County's disabled citizens, after nearly three years of "investigating" touch screen systems, maybe he should simply provide accessible voting machinery in all of Duval County's polling places. Countless other jurisdictions have done so. The admitted investment of less than $1 million dollars to place a touch screen machine (with audio ballot) *in every polling place* in Duval County (Motion for Stay at 15) pales in comparison to the County's $1.2 billion annual budget. *AAPD*, 2004 WL 626687 at *4 (and citations therein.) Perhaps part of this $1.2 billion budget could be devoted to meeting the rights of disabled voters, instead of to such lofty goals as installing blue lights on Jacksonville's bridges in time for the 2005 Super Bowl.[5] In order to address this concern, however, the Court certainly could expand its March 26 judgment to cover all of Duval County's polling places.

Finally, the second "new" argument raised by Defendant Stafford is a lament about this Court's alleged failure to certify a class. (Motion For Stay at 8.) However, in the civil rights

---

[4] Defendant Stafford argues that the harm caused to Plaintiffs by being forced to vote with third party assistance is "minimal or nonexistent." (Motion for stay at 17-18.) If this is the case (which it is not), then Defendant Stafford must agree that placing accessible voting machinery in less than all of Duval County's polling places could not possibly result in an Equal Protection claim.

[5] D. Baverlein, "JTA To Light Downtown Bridges," The Times-Union, Apr. 2, 2004, *available at* http://jacksonville.com/tv-online/stories/040204/met_15245974.shtml.

context, where only injunctive and declaratory relief is sought, class certification is unnecessary because "the very nature of the rights [the plaintiffs] seek to vindicate requires that the decree run to the benefit not only of the named plaintiffs but also for all persons similarly situated." *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, Florida*, 493 F.2d 799, 812 (5th Cir. 1974); *Bailey v. Patterson*, 323 F.2d 201, 206 (5th Cir. 1963), *cert. denied,* 376 U.S. 910 (1964). Indeed, here, as in *United Farm Workers*, "[e]ven with the denial of class action status, the requested injunctive and declaratory relief will benefit not only the named [plaintiffs] but also for all other persons similarly situated." *Id.* Discrimination on the basis of disability should be accorded the same treatment as race discrimination, which "is by definition *class* discrimination." *Id.* (citing *Huff v. N.D. Cass Co. of Alabama*, 485 F.2d 710, 713 (5th Cir. 1973) (en banc). *See also, Bresgal v. Brock*, 843 F.2d 1163 (9th Cir. 1987) (issuance of nationwide injunctive relief under Migrant & Seasonal Agricultural Worker Protection Act); *Int'l Union of Bricklayers and Allied Craftsmen v. Meese*, 616 F. Supp. 1387 (N.D. Cal. 1985).

Moreover, even if class certification was required, Defendant Stafford is not entitled to a hearing on this issue. *Grayson v. K-Mart Corp.*, 79 F.3d 1086,1099 (11th Cir. 1996) ("The failure to hold an evidentiary hearing, however, does not require reversal of the class certification unless the parties can show that the hearing, if held, would have affected their rights substantially") (citing *Burns v. Lang*, 44 F.3d 1031 (Table), 1994 WL 709329, *3 (D.C. Cir. 1994); *Dellums v. Powell*, 566 F.2d 167, 189 n. 56 (D.C. Cir. 1977), *cert. denied,* 438 U.S. 916 (1978)). Defendant Stafford could not possibly show that the failure to conduct a class certification hearing has "affected [his] rights substantially," as class certification consistent with the Court's March 26 judgment was a certainty. (See Plaintiffs' Motion For Class Certification, which is incorporated herein by this reference). This is especially true because "Rule 23 (b)(2) was specifically designed to allow for the class action mechanism in civil rights cases (See Advisory Committee's Note to 1966 Amendment to Rule 23, 39 F.R.D. 98, 102 (1966) ("the requirements of the rule are given a liberal construction in civil rights suits").) *Reproductive Health Services v. Webster*, 662 F. Supp. 407, 412 (W.D. Mo. 1987) (citing *Coley v. Clinton*, 635

F.2d 1364, 1378 (8th Cir. 1980)), *aff'd in part and rev'd in part on other grounds,* 851 F. 2d 1071 (8th Cir. 1988).

Finally, nothing stops the Court from certifying a class now – although it is unnecessary. See, e.g., *Larionoff v. United States*, 533 F.2d 1167, 1183 (D.C. Cir. 1976) (approving simultaneous entry of judgment and class certification), *aff'd,* 431 U.S. 864 (1977); *Jimenez v. Weinberger*, 523 F.2d 689, 697 (7th Cir. 1975) (stating that "in some cases the final certification need not be made until the moment the merits are decided"), *cert. denied,* 427 U.S. 912 (1976); see also *Gurule v. Wilson*, 635 F.2d 782, 788-90 (10th Cir. 1980) (allowing post-judgment class certification under Rule 23(b)(2)); *Marshall v. Kirkland*, 602 F.2d 1282, 1301 (8th Cir. 1979)(same); *Johnson v. Mathews,* 539 F.2d 1111, 1125 n. 23 (8th Cir. 1976) (same); *Alexander v. Aero Lodge No. 735*, 565 F.2d 1364, 1372 (6th Cir. 1977) (affirming post-judgment certification where there was a lack of prejudice).

C. Plaintiffs Will Be Irreparably Harmed By the Stay.

Defendant Stafford callously suggests, once again, that the Plaintiffs have nothing to complain about. Indeed, Defendant Stafford remains unpersuaded by the fact that forcing disabled citizens to vote in a manner *he admits* is materially different from the manner in which non-disabled voters vote is of any consequence. (Plaintiffs' Post Trial Brief at 3 & 4 and citations therein.) After all, to him "merely be[ing] required to disclose their votes to third parties" is hardly a big deal. (Motion For Stay at 17.) Fortunately, the Courts do not share Defendant Stafford's view:

> Plaintiffs will suffer significant and irreparable injury if the stay is granted. *Deprivation of a fundamental right, such as* ***limiting*** *the right to vote ... constitutes irreparable harm.*

Johnson, 926 F. Supp. at 1543 (citing *Harper v. Virginia Board of Elections*, 383 U.S. 663, 86 S. Ct. 1079 (1962); *Elrod v. Burns*, 427 U.S. 347, 373-74, 96 S. Ct. 2673, 2689-90 (1976)) (emphasis added.) Having admitted at trial that Plaintiffs are forced to vote in a more

burdensome and materially different manner than non-disabled voters (Plaintiffs' Post Trial Brief at 3 & 4), it is beyond dispute that staying the Court's judgment will limit (at a minimum) Plaintiffs' fundamental right to vote in the August 2004 primary election.

Moreover, Plaintiffs "will suffer [harm] in the form of inadequate treatment and conditions with every passing day of noncompliance with the [Court's] decree." *Wyatt* at 691. The harm to Plaintiffs is ongoing. Every day they are relegated to second class status in Duval County's election system they are harmed. As in *Wyatt*, this "court [should] refuse[] to prolong this harm any longer than necessary." *Id.*

Finally, a stay would "disempower the court to address emergency matters that have and might arise .... The plaintiffs' inability to obtain judicial relief in such matters would result in substantial harm." *Id.* at 692. Defendant Stafford is required to submit a plan for compliance with the Court's judgment by April 12, 2004. There is no basis for staying this requirement (see n. 1, *supra*), and if history tells us anything, there will need to be court intervention to supervise both Defendant Stafford's approach to and implementation of this plan. Further, the August 2004 primary election is approaching, and the procedural delays in obtaining relief as issues arise if a stay is granted could be tantamount to denying Plaintiffs' rights altogether in the primary.

D. Defendant Stafford Presents No Legally Cognizable Case of Substantial Injury If the Stay is Denied.

Defendant Stafford must make a showing that he will be substantially injured in the absence of a stay. He has failed to make this requisite showing.

First, Defendant Stafford argues that the Court's judgment constitutes a "judicially-compelled alteration to an existing voting system" (Motion For Stay at 10), and thus harm will result if a stay is not granted. He cites no authority for this proposition. Even if he did (or could), Defendant Stafford has only himself to blame. Once again, he alone purchased an entirely new inaccessible voting system at a time when accessible systems were certified and available for immediate purchase in the State of Florida. It is utter nonsense to argue that ordering

Defendant Stafford to "alter" a voting system that exists only because he inexcusably violated the law constitutes irreparable harm.

Second, Defendant Stafford argues that taxpayer dollars will be wasted and administrative burden will flow if the Court's judgment is not stayed. (Motion For Stay at 11.) Even if true (which it is not), such an alleged burden was caused by Defendant Stafford himself. Taxpayers' dollars were wasted when he alone purchased an inaccessible voting system and elected to engage in a two year court battle to evade his duties under the ADA.

Further, "the mere administrative inconvenience ... Florida elections officials will face ... simply cannot justify denial of Plaintiffs' fundamental rights" in the voting process. *Johnson*, 926 F. Supp. at 1542 (citing *Goldberg v. Kelly*, 397 U.S. 254, 266, 90 S. Ct. 1011, 1019 (1970)). In this regard, the "financial burdens of litigation on their own do not necessarily amount to 'irreparable harm' favoring a stay." *Wyatt*, 190 F.R.D. at 691. All that Defendant Stafford points to in support of his claim of irreparable harm falls into the category of quantifiable administrative and related expense. This does not constitute substantial injury – even if the alleged injury did not flow exclusively from Defendant Stafford's unilateral actions in violation of the ADA. [6]

Third, asserting his familiar argument, Defendant Stafford argues that he will be irreparably harmed because HAVA will "instantaneously antiquate" his preferred Diebold touch screen voting system. (Motion For stay at 12.) This argument was rejected by the Court in its August 18, 2003 and March 24, 2004 rulings. Moreover, at the January 14, 2004 hearing, the Court admitted into evidence the United States Department of Justice's pronouncement on this issue, which provides "although HAVA's voting system requirements do not go into effect until January 1, 2006, we encourage all jurisdictions to implement the requirements of Section 301 of

---

[6] Defendant Stafford's reliance on *Garcia-Mir* is misplaced. (Motion For Stay at 11.) He suggests that the court's finding in that case that "the not inconsiderable burden of actually conducting these [immigration] hearings" is the same as requiring him to comply with the ADA. To the contrary, here, the election will be conducted regardless of whether the Court's order is stayed. Different from the order in *Garcia-Mir*, this Court's judgment affects the method of the election not whether it will take place at all.

HAVA as soon as practicable, particular the disability provision, to help ensure that disabled voters are able to fully participate in the election process to the maximum extent feasible ... [t]his will ensure that disabled voters are provided access as soon as possible." (1/14/04 Hrg. Tr. Pl. Ex. A.) This should put an end to this red herring.

Fourth, Defendant Stafford argues that the Court's judgment calls for the "technologically impossible" blending of two vendors' systems. (Motion For Stay at 12.) Two pages later in his motion he admits that other jurisdictions in the United States have successfully blended systems. (*Id.* at 14.) Next, he argues that it is not impossible to blend voting systems at all, but that the true obstacle to blending is vendors' unwillingness to cooperate with one another. (Id.) Moreover, the record is devoid of any evidence that Defendant Stafford ever investigated the possibility of blending systems. These conflicting and ambivalent positions expose the true merit (or lack thereof) of Defendant Stafford's argument, and nothing more need be said.

Finally, Defendant Stafford concedes in his motion, just as he did at trial, that the true obstacle to him taking action is money. (Motion For Stay at 5; Trial Tr. Vol. 4, 157: 9-12.) Although belied by Duval County's $1.2 billion annual budget, it is axiomatic that such a remedy at law is inconsistent with a finding of irreparable harm.

E. The Public Interest Mandates Denial of the Stay.

Defendant Stafford fails to identify any interest of the public in having a stay granted. (Motion For Stay at 19-20). That is because the public interest overwhelmingly favors denial of the stay. As the Court held in *Johnson*:

> Finally, it is clear that the public interest is best served by denying the stay. In awarding or withholding immediate equitable relief, a court should consider the proximity of a forthcoming election ... and should correspondingly apply equitable principles.

Johnson, 926 F. Supp. at 1543 (citing *Reynolds v. Sims*, 377 U.S. 533, 585, 84 S. Ct. 1362, 1394 (1964)). Given the proximity of the August 2004 primary election, the imposition of a stay runs the real risk of resulting in the deprivation of the Plaintiffs' fundamental rights in that election.

In stark contrast, the record evidence is uncontroverted that Defendant Stafford can bring his conduct into compliance with the ADA by August 2004. (Plaintiffs' Post Trial Brief at 24-25.)

III. CONCLUSION

For all the reasons stated herein, Defendants Staffords' motion for stay pending appeal should be denied. Any other ruling would substantially jeopardize the Plaintiffs' fundamental rights in August 2004 primary election.

Respectfully submitted,

/s/ Douglas Baldridge / DRO

Douglas Baldridge
Trial Counsel
Florida Bar No. 0708070
HOWREY SIMON ARNOLD & WHITE, LLP
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 783-0800

Dated: April 9, 2004

Elaine Gardner
Co-Counsel
Washington Lawyers' Committee for Civil Rights and Urban Affairs
11 Dupont Circle N.W., Suite 400
Washington, D.C. 20036
(202) 319-1000

Of Counsel:

Alan M. Wiseman
Danielle R. Oddo
Vincent E. Verrocchio
Ari N. Rothman
HOWREY SIMON ARNOLD & WHITE, LLP
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 783-0800

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiffs' opposition to Defendant Stafford's motion for stay pending appeal was served by facsimile this 9th day of April, 2004, upon the following:

Ernst D. Mueller, Esq.
Scott D. Makar, Esq.
Office of General Counsel
117 West Duval Street
Suite 480
Jacksonville, FL 32202

J. Douglas Baldridge/DRO
J. Douglas Baldridge