

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATIONAL ASSOCIATION FOR THE : CIVIL ACTION
ADVANCEMENT OF COLORED PEOPLE, :
JEROME MONDESIRE, HARRIET GARRETTT :
and DONALD BIRTS :
 :
 :
v. :
 :
 :
PHILADELPHIA BOARD OF ELECTIONS, :
MARGARET TARTAGLIONE, ALEXANDER :
TALMADGE, and JOSEPH DUDA : NO. 97-7085

MEMORANDUM AND ORDER

Norma L. Shapiro, J.

June 15, 1998

Plaintiffs seek a declaratory judgment that the Voting Accessibility of the Elderly and Handicapped Act ("VAEH"), 42 U.S.C. § 1973ee-1 et seq., does not apply to state and local elections, and seek to enjoin defendants from using the alternative ballot procedures, required under the VAEH in federal elections, in non-federal elections. Now before the court are cross-motions for summary judgment; defendants' motion for summary judgment will be granted.

BACKGROUND

Defendants have instituted procedures regarding absentee ballots for certain electors outside the Commonwealth of Pennsylvania on election day, and alternative ballots for elderly and disabled voters. To vote by absentee ballot, a voter who will be absent from the county on election day may mail or deliver an absentee ballot to the county board of election by

5:00 p.m. the Friday before the election.¹ 25 Pa. Cons. Stat. Ann. § 3146.6 (West 1994). An absentee ballot received after that deadline is untimely, and is not included in the vote. 25 Pa. Cons. Stat. Ann. § 3146.8(a) (West 1994). A timely absentee ballot is delivered to the absentee voter's election district and included in the district's returns. Id.

An alternative ballot is now provided to any elector who states on the application form that the voter is handicapped or over 65 and assigned to an inaccessible polling place. An individual using the alternative ballot procedure may either mail the ballot to the county board of election, or return it in person. An alternative ballot received before 5:00 p.m. the Friday before the election is distributed to the polling place and counted on election day. An alternative ballot received after that deadline is presented during the central official canvass, at which time all interested parties have the opportunity to inspect and challenge it. An unchallenged alternative ballot is included in the official vote count.

Congress passed the VAEH in 1984 to protect the rights of the elderly and handicapped to vote in federal elections, and later enacted the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq., to eliminate discrimination against the disabled by any public entity. Subsequent to the enactment of

¹ The Commonwealth also extends the absentee ballot procedures to other electors. 25 Pa. Cons. Stat. Ann. § 3146.1 (West 1994)

the VAEH and the ADA, the Secretary of the Commonwealth, Brenda Mitchell, issued a directive on September 4, 1992, addressed to the county boards of election ("Mitchell directive") stating:

Based on advice of counsel, it is our opinion that the [VAEH] is in effect for all elections due to the passage of the Americans with Disabilities Act (ADA). As a result, in 1992, alternative ballots received up to the close of the polls must be counted for all offices (both state and federal). Previously alternative ballots received between 5:00 PM on the Friday preceding the election up to the close of the polls on election day were counted for federal offices only. In addition, polling places must now be accessible and alternative ballots must be made available in all elections.

Mitchell directive, p. 1. The Mitchell directive also stated that "[e]lderly electors and electors with a disability assigned to an inaccessible polling place are entitled to apply for an alternative ballot using the enclosed alternative ballot application." Id., p. 4. As opposed to absentee ballots, an alternative ballot allows an individual the opportunity to vote on election day, if the ballot is received at the central election office before the polls close.

Two procedures are used to protect against possible multiple voting. First, election judges check each alternative ballot declaration against the pollbook to ensure that the individual who submitted the alternative ballot did not also vote in person. An alternative ballot received before 5:00 p.m. the Friday before the election is checked at the polling place. An alternative ballot received after that time is checked at a central location during the official canvass. Second, each polling place is provided with copies of all alternative ballot applications by

voters assigned to that polling place. If an individual has requested an alternative ballot and appears to vote in person, that voter is required to sign the application copy and void the alternative ballot.

Plaintiffs seek a declaratory judgment that the VAEH cannot be applied to state and municipal elections, and an injunction against implementing the alternative ballot provisions in state and municipal elections. The issue properly before the court is whether the defendants' actions are prohibited by federal law, not whether the prescribed alternative ballot procedures violate the Pennsylvania Election Code, or the Pennsylvania Constitution. (See, N.T. 2/4/98, p. 4,6; Plaintiff's complaint ¶¶ 18, 19, 22). There is evidence that applying the alternative ballot procedures to state and local elections may violate Pennsylvania Election Code, but the court has jurisdiction only to decide whether it is contrary to federal law. Before the court are cross-motions for summary judgment.

DISCUSSION

Congress passed the VAEH in 1984 to "promote the fundamental right to vote by improving access for handicapped and elderly individuals to registration facilities and polling places for federal elections." 42 U.S.C.A. § 1973ee (West 1994). Under the VAEH, if no accessible polling places are available, chief election officers must "assure[] any handicapped or elderly voter assigned to an inaccessible polling place . . . will be assigned to an accessible polling place, or will be provided with an

alternative means for casting a ballot on the day of the election." 42 U.S.C.A. § 1973ee-1(b)(2)(B) (West 1994).

Plaintiff and defendant agree that the VAEH applies only to federal elections: "each political subdivision responsible for conducting elections shall assure that all polling places for Federal elections are accessible." 42 U.S.C.A. § 1973ee-1(a) (West 1994) (emphasis added). However, Congress recognized that mandating procedures for federal elections might affect accessibility and alternative ballot procedures for state and local elections held in conjunction with federal elections. The Senate committee report "acknowledge[d] that as a practical matter, State and Federal elections are handled under the same administrative procedures by State and Local election officials." Senate Rep. No. 98-590, p. 2 (1984), reprinted in 1984 U.S.C.C.A.N. 2801, 2802. Congress recognized and sought to "minimiz[e] the impact -- both in terms of cost and of administrative burden -- on State and local election administrators." House Rep. No. 98-852, p. 3.

Six years after passage of the VAEH, the Congress enacted the ADA, to prohibit discrimination by any public entity in the provision of "services, programs or activities." 42 U.S.C.A. § 12132 (West 1995). Congress found that "discrimination against individuals with disabilities persists in such critical areas as . . . voting, and access to public services," 42 U.S.C.A. § 12101(a)(3) (West 1995), and sought to "provide a clear and comprehensive national mandate for the elimination of

discrimination against individuals with disabilities." 42 U.S.C.A. § 12101(b)(1) (West 1995). As a remedial statute, the ADA should be construed broadly to eliminate discrimination against the disabled. Kinney v. Yerusalim, 812 F. Supp. 547, 551 (E.D. Pa.), aff'd 9 F.3d 1067 (3d Cir. 1993), cert. denied 511 U.S. 1033 (1994).

Title II of the ADA provides that

[N]o qualified individual with a disability shall, by reason of such disability be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C.A. § 12132 (West 1995). "Public entity" includes state and local governments, and any department, agency, or other instrumentality of a state or local government. 42 U.S.C.A. § 12131(1) (West 1995). The defendants, a county election board and its agents, are within the definition of a public entity, and are subject to the ADA's prohibition regarding discrimination against any "qualified individual with a disability." The term "qualified individual with a disability" means "an individual with a disability who, with or without reasonable modifications . . . meets the essential eligibility requirements for . . . the participation in programs or activities provided by a public entity." 42 U.S.C.A. § 12131(2) (West 1995).

The Attorney General is empowered to issue regulations to implement Title II. 42 U.S.C.A. § 12134 (West 1995). One such regulation provides:

A public entity shall make reasonable modifications in

policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

28 C.F.R. § 35.130(b)(7) (1991). Since the ADA applies to all public services, defendants are required to make reasonable modifications to avoid discrimination to any voter meeting the ADA definition of disabled.

Defendants argue that implementing the VAEH's alternative ballot procedures in non-federal elections "may well be required by the anti-discrimination provisions" of the ADA. (Def. Motion for Summary Judgment, p. 8). The VAEH deals only with federal elections. Congress could amend the VAEH to apply to non-federal elections, but has not chosen to do so.² See Superior Oil Co. v.

² At oral argument, defendants, citing Oregon v. Mitchell, 400 U.S. 112 (1970), suggested that Congress might not have the power under the United States Constitution to apply the VAEH to state and local elections. In Mitchell, the Supreme Court found that Congress did not have the power to enfranchise 18-year olds in non-federal elections, but did have the power to outlaw literacy tests. Mitchell, 400 U.S. at 133-4 (Black, J., announcing the judgments of the Court). Although the justices were divided on the basis of Congressional power, Mitchell suggests that "the Equal Protection Clause does service to protect the right to vote in federal as well as in State elections." Mitchell, 400 U.S. at 144 (opinion of Douglas, J., concurring in part and dissenting in part). Congress has broad remedial power under the Fourteenth Amendment to eliminate discrimination. See generally City of Boerne v Flores, --- U.S. ---, 117 S.Ct. 2157 (1997). Congress had the power under the Fourteenth Amendment of the United States Constitution to enact the ADA, see, e.g., Autio v. AFSCME, 140 F.3d 802 (8th Cir. 1998); Coolbaugh v. Louisiana, 136 F.3d 430 (5th Cir. 1998), and defendants do not challenge the constitutionality of applying the ADA to state and local elections. If Congress has the power under the Fourteenth Amendment to apply the ADA to state and local elections, it would also have the power to apply the VAEH to non-federal elections.

Andrus, 656 F.2d 33, 41 (3d Cir. 1981) (refusing to "ignore an express provision of a statute which Congress has enacted"). See also United States v. Great Northern Railway Co., 343 U.S. 562, 575 (1952) ("It is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written.").

The court must read these two statutes on related topics in conjunction with one another. United States v. Freeman, 44 U.S. (3 How.) 556, 564-65 (1845). The VAEH prohibits discrimination against the handicapped and elderly in federal elections, and the ADA prohibits discrimination against disabled persons, whether or not elderly, in all elections.

Under the ADA, defendants are required to make reasonable modifications when necessary to avoid discrimination on the basis of disability. Under the relevant regulation implementing the ADA, an individual is disabled if (s)he has a "physical or mental impairment that substantially limits one or more of the major life activities." 29 C.F.R. § 1630.2(g)(1). The definition of "physical or mental impairment" includes "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss." 29 C.F.R. § 1630.2(h)(1). Being over the age of 65 is not in and of itself an impairment, although medical conditions associated with age, such as osteoporosis, can be. Zatarain v. WDSU-Television, Inc., 881 F. Supp. 240, 242 n. 1 (E.D. La. 1995). The Commonwealth's extension of the alternative ballot procedures to any voter over the age of 65 is not required by the

ADA. The ADA requires reasonable modifications to accommodate only those actually disabled, which may or may not include the elderly.

Attempting to comply with the ADA, defendants chose to modify non-federal election procedures by applying the VAEH alternative ballot procedures authorized in federal elections. Defendants are not required to provide the specific procedures authorized under the VAEH, but the decision to do so is a reasonable modification to comply with the ADA and 28 C.F.R. § 35.130(b)(7). The defendants' provision of the alternative ballot procedures to qualified individuals with disabilities fulfills their obligation under the ADA, even though the defendants have chosen to provide the procedures to more individuals than required by the ADA, i.e. to those over the age of 65.

Applying the Commonwealth alternative ballot procedures to the non-disabled elderly when it is not required by the VAEH or the ADA may violate the Pennsylvania Election Code. Whether the Secretary of the Commonwealth has the authority to provide the alternative ballot procedures to the non-disabled elderly in state and local elections is a question of state law not properly before the court.

Plaintiffs seek a declaration not only that the VAEH does not apply to non-federal elections, but also that applying it to non-federal elections "contravenes federal law." Plaintiffs have provided no basis for finding that applying the VAEH to non-

federal elections violates federal law. The statute does not prohibit defendants from implementing its procedures in situations not covered by its terms. The VAEH addresses federal elections only, but does not prohibit states from applying the procedures to non-federal elections. "[I]f Congress had such an intent, Congress would have made it explicit in the statute." Chisom v. Roemer, 501 U.S. 380, 396 n. 23 (1991). See also Harrison v. PPG Industries, Inc., 446 U.S. 578, 602 (1980) (in determining what Congress means, courts generally "cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark"). The legislative history suggests the VAEH's possible effect on the conduct of state and local elections was recognized and the application to those elections was not prohibited. Nothing in the VAEH or its legislative history suggests that Congress intended to prohibit defendants from applying the VAEH to non-federal elections.

Plaintiffs argue that it is unlawful to apply the alternative ballot procedures to non-federal elections because it "creates the opportunity for fraud," (Plaintiff's Cross-Motion for Summary Judgment, p. 10); divisional election boards might not check if a voter has requested an alternative ballot, or return the pollbooks for the central official canvass. The possibility of fraud does not make the procedures violative of federal law. If the procedures do not violate federal law, the court cannot impose preferable fraud-proof alternative procedures. There is no federal legal impediment to implementing

the Commonwealth's procedures.

Plaintiffs really seek an injunction against the alternative ballot procedures because of the possibility for future fraud. However, Article III requires a federal court to decide only an actual case or controversy; a court may not decide abstract or hypothetical questions, see Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 297 (1979), or issue advisory opinions. See EPA v. Brown, 431 U.S. 99, 103-04 (1977). Claims must be ripe for judicial review, even for a declaratory judgment. "A claim is unripe when critical elements are contingent or unknown." Thomas v. Union Carbide Agricultural Prods. Co., 473 U.S. 568, 579 (1985). If anticipated events giving rise to an alleged injury are remote, the case is not ripe for present adjudication. See Hodel v. Virginia Surface Mining & Reclamation Act of 1977, 452 U.S. 264, 304 (1981); Behring Inter., Inc. v. Imperial Iranian Air Force, 699 F.2d 657, 664-65 (3d Cir. 1983). The result must affect the outcome of a real, not merely possible, dispute between the parties. Liebundgut v. Liberty Mut. Fire Ins. Co., 1997 WL 698176, at *2 (E.D. Pa. Nov. 6, 1997).

Plaintiffs have offered no evidence of actual fraud in the election they claim to have lost because of the alternative ballot procedures. When and if fraud is established, the appropriate remedy is an action to enjoin the fraudulently elected individual from exercising the powers of the elected office, certify a different candidate, or order a special election. See Marks v. Stinson, 19 F.3d 873, 886-890 (3d Cir.

1994).

CONCLUSION

Both parties concede that the VAEH does not apply to non-federal elections. The ADA precludes defendants from discriminating against disabled voters in either federal or non-federal elections. The VAEH procedures are a reasonable modification under the ADA to avoid discrimination based on disability. There is no federal legal impediment to implementing the VAEH procedures in non-federal elections.

An appropriate order follows.

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ORDER

AND NOW this 15th day of June, 1998, upon consideration of defendants' motion for summary judgment, and plaintiffs' cross-motion for summary judgment, it is **ORDERED** that:

1. Defendants' motion for summary judgment is **GRANTED**.
2. Judgment is entered in favor of defendants.
3. This case is marked administratively closed.

Norma L. Shapiro, J