

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION**

BEAUMONT BRANCH OF THE NAACP and
JESSICA DAYE,

Plaintiffs,

Civil Action No. 22 Civ. 488 (MJT)

v.

JEFFERSON COUNTY, TEXAS, JEFFERSON
COUNTY COMMISSIONERS COURT, ROXANNE
ACOSTA-HELLBERG, in Her Official Capacity as the
JEFFERSON COUNTY CLERK, and MARY BETH
BOWLING, in Her Official Capacity as the PRESID-
ING JUDGE OF THE JOHN PAUL DAVIS COMMU-
NITY CENTER,

Defendants.

Joint Rule 26 Conference Report

Pursuant to Fed. R. Civ. P. 26(f), Plaintiffs Beaumont Branch of the NAACP and Jessica Daye, and Defendants Jefferson County, Jefferson County Commissioners Court, Mary Beth Bowling, and Roxanne Acosta-Hellberg (collectively, the “Parties”) submit their Joint Rule 26 Conference Report as follows:

1. A brief factual and legal synopsis of this case.

Plaintiffs filed their Original Complaint (Dkt. 1) on November 7, 2022, the day before Election Day for the 2022 General Elections, alleging violations of Section 11(b) of the Voting Rights Act, 52 U.S.C. § 10307(b), and the Fourteenth and Fifteenth Amendments. In their Complaint, Plaintiffs described the conduct of Defendant Mary Beth Bowling and other White poll workers at the John Paul Davis Community Center throughout the early election period, including:

- (i) repeatedly asking, in aggressive tones, only Black voters and not White voters to recite their addresses, out loud within the earshot of other voters, poll workers, and poll watchers, even when the voter was already checked in by a poll worker;
- (ii) following Black voters and in some cases their Black voter assistants around the polling place, including standing two feet behind a Black voter and the assistant while the voter was at the voting machine; and

(iii) helping White voters scan their marked ballots into ballot scanning machines, but not similarly helping Black voters scan their ballots.

See, e.g., Dkt. 1 at ¶ 4. Plaintiffs alleged that this intimidating conduct caused, *inter alia*, Plaintiff Jessica Daye to leave the Community Center without voting. *Id.* at ¶ 15.

In light of the imminent election, Plaintiffs requested that the Court temporarily, preliminarily, and permanently enjoin Defendants from engaging in such intimidating conduct at any polling place in Jefferson County. *See* Dkt. 1 at 16-17; Dkt. 3 (Mot. for TRO). That evening, the Court held an emergency hearing at which Defendants Bowling and Former County Clerk Leister testified. *See* Dkt. 31-2 (TRO Hr'g Tr.). After hearing arguments from both parties, the Court denied Plaintiffs' motion with respect to Defendant Bowling, but granted Plaintiffs' motion with respect to the other requested relief, including prohibiting certain intimidating conduct by election workers and ordering Former County Clerk Leister to send notice of the order to all affected election judges, clerks, workers, volunteers, and watchers no later than 7:00 a.m. Central Time on November 8, 2022. Dkt. 14 (TRO). The Court's order terminated on November 9, 2022. *Id.* at 3.

On November 29, 2022, Defendants moved to dismiss the original complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), alleging lack of standing, mootness, and failure to state a claim upon which relief might be granted. *See* Dkt. 31. On December 13, 2022, Plaintiffs filed their First Amended Complaint, mooted Defendants' pending motion to dismiss. Dkt. 32 (First Amended Complaint); Dkt. 37 (Order Denying MTD as Moot). On December 20, 2022, Defendants re-filed their motion to dismiss, making substantially identical arguments. Dkt. 40. On January 3, 2023, Plaintiffs filed their opposition to Defendants' motion to dismiss. Dkt. 43. Briefing for the motion to dismiss finished on January 18, 2023.

2. Jurisdictional basis for this suit.

Plaintiffs' Position

Plaintiffs assert that this Court has subject matter jurisdiction of this action under 28 U.S.C. § 1331, as this case arises under the laws of the United States, and under 28 U.S.C. § 1343(a)(4), as this case seeks equitable and other relief pursuant to an Act of Congress providing for the protection of the right to vote, namely 52 U.S.C. § 10307(b). For the reasons set forth in its Opposition and Sur-Reply, Defendants' motion to dismiss for lack of subject matter jurisdiction should be denied. Dkts. 43, 48.

Plaintiffs assert that this court has personal jurisdiction over Defendants Bowling and Hellberg, who are sued only in their official capacities as officials serving in the State of Texas. Plaintiffs contend that this court has personal jurisdiction over Defendant Jefferson County, an entity created under the laws of the State of Texas, as well as Defendant Jefferson County Commissioners Court, the governing body of Jefferson County.

Defendants' Position

Plaintiffs claim voter intimidation due to black voters being asked "aggressively" to recite their address. Jefferson County allows its voters to vote at any polling location throughout the

county and not just in their specific precinct. Because of this, polling locations have to determine the address of each voter in order for the voter to receive their specific ballot to vote. Therefore, poll workers must ask every voter for their address because if they only asked the black voters for addresses, then a poll worker would not know which ballot to give all the non-black voters. Texas law requires the poll workers to verify a voter's address. Tex. Elec. Code Sec. 63.0011. Defendants, as governmental entities and officials are required to follow the law. Plaintiffs have failed to show that asking a voter for their address rises to the level of voter intimidation.

As stated in Defendants motion to dismiss and their reply, Defendants contend that this court lacks jurisdiction pursuant to Federal Rule 12(b)(1) and 12(b)(6). Plaintiffs Daye and the Beaumont Chapter of the NAACP lack standing to bring this suit because no one suffered an injury by Defendants. Asking a voter for their address for a legitimate government interest, securing the correct ballot for a voter, is not voter intimidation regardless how much a voter disapproves of the requirement or claims they were intimidated. Asking for a voter's address is a legal obligation by the poll worker. Bowling testified at the TRO hearing that state law requires them to verify the voter address upon checking in a voter. *See Exhibit 1 to Defendants 12(b) motion at P.56, L.9-P.57, L.16.* Leister, as the County Clerk at that time, testified that Texas law allows a poll worker to ask a voter their address. *Id.* at P.99, L.20-22.

Defendants further contend that any issues Plaintiff may bring are moot. Plaintiffs only contend Bowling was doing the acts of voter intimidation by asking voters to recite their entire address. This Court failed to grant relief in regards to Bowling and made no findings of any wrongdoing by Bowling. If there was no finding of wrongdoing in the past, it is improper to assume that there may be wrongdoing in the future. Not only does the restraining order made this issue moot, but Texas law also makes this issue moot. As stated above, Texas law requires the asking of voters their address. Tex. Elec. Code Sec. 63.0011. Poll workers must give the Jefferson County voter their correct ballot and to do this, because of county-wide voting capabilities, the poll workers has to know the voter's address to correspond with their getting the right ballot. There may be many ways to ask a voter for this information, but how the county clerk determines to fulfill her duty under Texas law is in her discretion. "When in a discretionary decision, such as here...was used; for the courts to fly in and substitute their judgment for that of an elected official would be said to undermine the very foundation of our political system." *Harper v. Best*, 493 S.W.3d 105, 109 (Tex.App.—Waco 2016)(citing *Harper v. Taylor*, 490 S.W.2d 227, 229-230 (Tex.App.—Beaumont 1972, no writ)). Therefore, "it is impossible for a court to grant any effectual relief" to Plaintiffs making their alleged claims moot.

A §1983 claim against the County Clerk or Bowling, in their official capacities, is the same as a claim against Jefferson County. Jefferson County's policymaker is the Jefferson County Commissioners' Court. Plaintiffs have failed to show the elements of a §1983 claim against Jefferson County as Plaintiffs fail to state an official policy and a violation of constitutional rights due to that policy. Plaintiffs have also failed to show a pattern of similar instances. There were 39 polling locations in Jefferson County for the November 2022 election. Plaintiffs complain of 1 person at 1 polling location. For these reasons, the Defendants' 12(b)(1) and 12(b)(6) motions should be granted.

3. Confirm that initial mandatory disclosures required by Rule 26(a)(1) and the Court's Order (Dkt. 41) have been completed.

Plaintiffs and Defendants made their Initial Disclosures on January 23, 2023.

4. **Proposed Scheduling Order deadlines. Explain any deviations from standard schedule. Now is the time to inform the court of any special complexities or need for more time before the trial setting. The standard schedule is planned so that there is time to rule on dispositive motions before parties begin final trial preparation.**

Plaintiffs' Position

Plaintiffs request that the Court enters the proposed scheduling order in attached Exhibit A.

Plaintiffs believe that the deadlines in the standard schedule should be modified so that: (1) expert discovery opens after the close of fact discovery and (2) the deadline for summary judgment and *Daubert* motions comes after the close of all discovery. Plaintiffs understand that this Court's standard schedule with respect to expert disclosures has two goals: (1) to encourage early disclosure of experts so that if one is struck, the party will have time to find another; and (2) to avoid the gamesmanship that has become common as parties attempt to disqualify experts with a Motion *in Limine* thus distracting opponents during final trial preparations and perhaps even blocking testimony required to establish a claim or defense. In this case, these goals are counter-balanced by the need for discovery and the parties' contentions to determine the extent to which, if at all, expert witnesses will be needed. The current schedule still prevents using Motions *in Limine* to disqualify an expert during final trial preparations.

Defendants' Position

Defendants do not agree with Plaintiffs and do not think this case that will need or turn on experts. Defendants do not agree to modify the scheduling order as proposed by Plaintiffs and are attaching their proposed scheduling order according to the parameters set forth in the Court's standard scheduling order. See Exhibit B.

5. **If the parties agree that mediation is appropriate, and the parties can agree upon a mediator, the name, address, and phone number of that mediator, and a proposed deadline should be stated. An early date is encouraged to reduce expenses. The court may appoint a mediator upon request.**

Plaintiffs' Position

Plaintiffs are open to resolving this case through mediation.

Defendants' Position

Defendants do not believe that mediation is appropriate for this case.

6. What changes, if any, should be made to the limitations on discovery imposed by the rules, including number of depositions and interrogatories.

The parties agree that no changes to the limitations on discovery imposed by Fed. R. Civ. P. 30 and 33 are warranted.

7. The identity of persons expected to be deposed.

a. Plaintiffs:

- (1) Laurie Leister
- (2) Roxanne Acosta Hellberg
- (3) Mary Beth Bowling
- (4) Jefferson County
- (5) Jefferson County Commissioners Court
- (6) Individuals or entities, including third parties, who have provided training to Jefferson County poll workers or poll watchers within the past two years
- (7) Any individuals identified in Defendants' initial disclosures
- (8) Any individuals identified during the course of fact discovery as having relevant information
- (9) Any expert designated by Defendants

b. Defendants:

- (1) Jessica Daye
- (2) Representative(s) of the Beaumont Branch of the NAACP
- (3) Wilburean Benard
- (4) Katherine Campbell
- (5) Wilmeretta Lowe
- (6) Airon Reynolds, Jr.
- (7) Joyce Roper
- (8) Any individuals identified in Plaintiffs' initial disclosures

- (9) Any individuals identified during the course of fact discovery as having relevant information
- (10) Any expert designated by Plaintiffs

8. Any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.

The Parties do not anticipate any issue with disclosure or with the production of electronically stored information or the form or forms in which it should be produced (other than the issues of privilege which may exist).

9. Any agreements or disputes relating to asserting claims of privilege or preserving discoverable information, including electronically stored information and any agreements reached under Federal Rule of Evidence 502.

The Parties do not identify any issues relating to privilege or preserving discoverable information, including electronically stored information, at this time other than a protective order discussed below.

10. Whether any other orders should be entered by the Court pursuant to Federal Rule of Civil Procedure 26(c) or 16(b), (c).

Plaintiffs' Position

Plaintiffs have proposed to Defendants a protective order regarding statutorily protected records of government employees and other confidential information under Rule 26(c). Plaintiffs do not believe that any other orders are necessary at this time, other than the Court's scheduling order. The Court may later issue a pretrial order, including directives regarding a pretrial conference.

Defendants' Position

Defendants do not believe a protective order is needed in this case. Defendants would request a Rule 16(c) pretrial conference to address the matters listed in Rule 16(c) (2)(A)-(P).

11. The expected length of trial and whether it will be to a jury or the bench.

The Parties anticipate the trial to last approximately five (5) days.

Plaintiffs' Position

A bench trial is the appropriate type of trial in this situation. Plaintiffs only seek equitable relief in this case—not monetary damages—based on the Voting Rights Act and § 1983 and did not request a jury trial in their complaints. In such situations, there is no Seventh Amendment

right to a jury trial even if a defendant requests it. *See, e.g., Tellis v. LeBlanc*, C.A. No. 18-cv-00541, 2020 WL 211410, at *2 (W.D. La. Jan. 13, 2020) (striking a defendants' jury demand in its answer to a § 1983 claim when a plaintiff only sought equitable relief and did not request a jury trial). Plaintiffs may file a motion to strike Defendants' jury demand to the extent it is included in Defendants' responsive pleading to Plaintiffs' First Amended Complaint after the Court decides the motion to dismiss.

Defendants' Position

Defendants respectfully request a jury trial.

12. The names of the attorneys who will appear on behalf of the Parties at the Management Conference (the appearing attorney must be an attorney of record and have full authority to bind the client).

a. Plaintiffs:

- (1) Jeff Homrig
- (2) Benjamin Behrendt

b. Defendants:

- (1) Kathleen M. Kennedy
- (2) Quentin Price

13. Any other matters that counsel deem appropriate for inclusion in the Joint Conference Report

On December 20, 2022, Defendants filed their motion to dismiss (Dkt. 40) Plaintiffs' First Amended Complaint (Dkt. 32). On January 3, 2023, Plaintiffs filed their opposition to Defendants' motion to dismiss (Dkt. 43). On January 11, 2022, Defendants filed their reply (Dkt. 44) and Plaintiffs filed their sur-reply on January 18 (Dkt. 48).

Dated: January 25, 2023

/s/ Kathleen Keneedy (with permission)

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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2023, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF, which will send notification of such filing to all registered participants.

/s/ Jeff Homrig

Jeff Homrig (Bar No. 24129988)

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