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

2003 APR 14 A 9:57

U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

_____)
American Association of People with)
Disabilities, et al.,)
)
Plaintiff)
)
v.)
)
Glenda Hood, et al.,)
)
Defendants.)
_____)

Civil Action No. 3:01-CV-1275-J-21TJC

Dispositive Motion

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT AGAINST DEFENDANT JOHN STAFFORD ON COUNT I
(ADA) OF THE AMENDED COMPLAINT**

Plaintiffs respectfully submit this memorandum of law in support of their Motion for Summary Judgment Against Defendant John Stafford on Count I (ADA) of the Amended Complaint. As no genuine issue of material fact exists regarding whether Defendant Stafford has violated the ADA, Plaintiffs are entitled to judgment as a matter of law against Defendant Stafford on Count I.

I. INTRODUCTION

Defendant Stafford acknowledges his duty to make Duval County's election system readily accessible to all voters to the "maximum extent feasible." He does not dispute that he has failed to do so. Indeed, he concedes that visually impaired voters and manually impaired voters in Duval County do not vote in the same or similar manner as non-disabled voters and face significant burdens based upon their disabilities. Mr. Stafford agrees that touch screen

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voting machinery is the “superior” way to address the needs of visually impaired and manually impaired voters. He acknowledges that such technology has a proven “track record” and has been successfully used in numerous other jurisdictions, including jurisdictions within Florida. To his credit, he offers no excuse for Duval County’s failure to purchase this technology, and he agrees that disabled voters have a “legitimate complaint” about its failure to do so.

As “chief election officer” in the State of Florida (Fla. Stat. § 97.012), former Secretary of State Katherine Harris summarized the problem in a single sentence:

When we relegate persons with disabilities to voting **only with assistance** or to voting by absentee ballot, we **stigmatize their disability** while causing them to **doubt whether their vote was properly cast.**

(Harris Dep. at 80:25-82:1 and Exhibit 6 thereto as DOE 6792) (*emphasis added*). As Secretary Harris determined, it is the “**ADA’s mission [to] forcefully address[] the exclusion of scores of persons with disabilities from full and equal participation in elections.**” (*Id.* at 84:10-85:12 and Exhibit 7 thereto at DOE 0807) (*emphasis added*). Mr. Stafford concedes that the “ADA’s mission” is failing in Duval County, and no genuine issue of material fact exists regarding whether the Duval County Voting System violates the ADA. Accordingly, Plaintiffs are entitled to judgment as a matter of law against Defendant Stafford on Count I of the Amended Complaint.

II. STATEMENT OF UNDISPUTED FACTS

A. Plaintiffs Are Qualified Individuals Under the ADA

Plaintiffs each have physical impairments that substantially limit one or more of their major life activities so as to be qualified individuals with disabilities under the ADA. (*See, e.g.*, Bowen Dep. at 12:9-12; O'Connor Dep. at 14:24-15:14; Bell Dep. at 12:9-21, 19:1-12.)¹ Plaintiff Bowen has been blind since birth due to glaucoma. (Bowen Dep. at 12:17-19, 19:1-4.) Plaintiff O'Connor lost his sight in 1991 due to Leber's hereditary optic neuropathy and is legally blind. (O'Connor Dep. at 14:16-23.) Plaintiff Bell was born without arms or legs due to congenital quadrarhyteamelia. (Bell Dep. at 12:9-21.) Plaintiff, the Association of People With Disabilities, is comprised of individuals with visual impairments or manual impairments, and has members that are visually impaired voters and manually impaired voters in Duval County. (*See, e.g.* Dickson Dep. at 70:6-12, 70:17-71:8; Bowen Dep. at 6:2-6; Bell Dep. at 5:19-6:5; O'Connor Dep. at 7:21-8:8.)²

¹ All depositions and exhibits thereto cited herein have already been filed with the Court. (*See, e.g.*, Plaintiffs' Notice of Filing Of Deposition Transcript Of John Lawton Stafford, Jr., In Further Support Of Their Opposition To Defendant Stafford's Motion to Dismiss Amended Complaint Or Alternatively For Summary Judgment; Plaintiffs' Notice Of Filing of Deposition Transcripts In Further Support Of Plaintiffs' Opposition To Defendant Stafford's Motion To Dismiss Amended Complaint Or Alternatively For Summary Judgment And Plaintiffs' Opposition To Defendants Smith And Kast's Motion To Dismiss Amended Complaint Or Alternatively For Summary Judgment.)

² The Court has previously acknowledged that there appears to be no dispute as to whether Plaintiffs are qualified individuals under the ADA. *Am. Ass'n. of People with Disabilities v. Smith*, 227 F. Supp. 2d 1276, 1290 (M.D. Fla. 2002). In this memorandum, the Court's decision will be cited as *AAPD*.

B. Duval County Purchased a New Optical Scan Voting System on October 3, 2002

On October 3, 2002, Duval County entered into a contract with Diebold Election Systems, Inc. (“Diebold”) to replace its punch card voting system with an optical scan voting system. (Stafford Dep. Ex. 19.) The optical scan system purchased by Duval County is a “completely new system,” which involves no retrofitting or other modifications to the pre-existing punch card voting equipment. (Stafford Dep. at 44:24- 45:18.)

Duval County voters with visual impairments or manual impairments cannot vote on optical scan voting systems in the same or similar manner as non-disabled voters vote. (*See, e.g.* Stafford Dep. at 54:10-55:12; Bell Dep. at 20:24-23:20; O’Connor Dep. at 13:25-14:15, 28:13-29:8; Bowen Dep. at 13:13-19; Dickson Dep. at 21:5-15.) To vote on the optical scan voting system, a voter fills in a bubble or otherwise marks a paper ballot with a pen or pencil, which is then fed through an optical scan ballot reader. (*See, e.g.*, Cox Dep. at 33:5-17.) This requires sight and manual capability. (*See, e.g.*, Bell Dep. at 20:24-23:20; O’Connor Dep. at 13:25-14:15, 28:13-29:8; Bowen Dep. at 13:13-19; Dickson Dep. at 21:5-15.) No auxiliary aids exist that would permit a visually or manually impaired voter to vote in the same or similar manner as non-disabled voters using an optical scan voting system. (Stafford Dep. at 79:25-80:6; Craft Dep. at 135:3-22.) Instead, such voters are “**forced** to rely on a third party to cast their votes.” (Stafford Dep. at 42:22-43:2 (*emphasis added*)).

By purchasing an optical scan voting system, Duval County has imposed upon voters with visual impairments and manual impairments a voting process that is fundamentally different than the process by which non-disabled voters vote. As John Stafford, Duval County’s Supervisor of Elections, and its Rule 30(b)(6) designee, admitted:

- “[T]he current optical scan system in place in Duval County requires visually or manually impaired voters to vote in a different manner than the way non-disabled voters vote in Duval County.” In fact, he admitted that voters with visual

impairments and voters with manual impairments vote in a “materially different” way than non-disabled voters vote in Duval County. (Stafford Dep. at 49:15-22.)

- “[T]he current optical scan system in place in Duval County requires visually or manually impaired voters to vote in a more intrusive and less secret manner...than a non-disabled voter in Duval County.” (Stafford Dep. at 50:11-16.)
- Visually impaired voters and manually impaired voters in Duval County must reveal their vote to a third party, and “a third party would see what [a voter with visual impairments or a voter with manual impairments is] voting. They have to tell them what they want them to vote for.” (Stafford Dep. at 51:6-10.) In contrast, “a non-disabled voter in Duval County would not have to reveal his or her vote to a third party.” (Stafford Dep. at 51:16-20.)
- The risk exists for third parties to attempt to influence the votes of visually or manually impaired voters in Duval County. This “risk is not a risk generally faced by non-disabled voters in Duval County.” (Stafford Dep. at 51:21-52:10.)³
- Attention is drawn to visually or manually impaired voters in Duval County when casting their votes that is not drawn to non-disabled voters. (Stafford Dep. at 52:11-53:3.)
- Visually or manually impaired voters are delayed in placing their votes at polling places in Duval County, particularly if “they didn’t bring someone with them” to assist them in voting. (Stafford Dep. at 53:4-20.)
- Visually impaired voters in Duval County are not able to confirm that their choices are properly reflected on an optical scan ballot – they must “put their trust in whoever is assisting them.” Non-disabled voters in Duval County are able to confirm independently the accuracy of their ballots. (Stafford Dep. at 54:17-56:7.)

³ The named Plaintiffs in this action have in fact experienced the material burdens to voting in Duval County as a result of their disabilities. (See, e.g., Bell Dep. at 13:11-14:12, 22:11-24:9, 25:9-27:19, 33:24-34:7; Bowen Dep. at 39:14-40:11; Bowen Decl. ¶13; O’Connor Dep. at 20:4-21:17, 37:24-41:4. See also Harris Dep. at 41:3-44:20, 46:1-47:3 (“my concern as raised by persons, for example, who are visually impaired, what they had told me was that they felt their civil rights violated or constitutional right in that they didn’t have the ability to vote in secret. Because when they went to the polling location, if they didn’t take a friend or relative, and they didn’t get to vote in secret and couldn’t even be certain that the vote cast was what they requested”).)

- Poll workers in Duval County have challenged the right of legally registered disabled voters to vote because the poll workers “didn’t think [the disabled voters] were mentally competent, by their appearance.” Similar situations have not occurred with respect to non-disabled voters in Duval County. (Stafford Dep. at 75:13-79:6.)⁴

Because of these material differences, Mr. Stafford admitted that visually impaired voters and manually impaired voters in Duval County have a “legitimate complaint” about not being able to vote in the same or similar manner as non-disabled voters. (Stafford Dep. at 67:10-19.)

C. Duval County Could Have Purchased a Different Voting System That Is Accessible to Voters with Manual Impairments and Voters with Visual Impairments

Duval County did not have to purchase the Diebold optical scan voting system. The County could have purchased a voting system that uses touch screen voting equipment, which enables visually impaired voters and manually impaired voters to vote independently and secretly. Indeed, Mr. Stafford admitted that touch screen technology is the superior way to address the needs of visually impaired voters and manually impaired voters. (Stafford Dep. at 38:25-39:10.)⁵

A touch screen system is similar to an ATM machine, and enables a voter to select a candidate by pressing on the candidate’s name on the screen. Auxiliary aids can be used with

⁴ Additional differences and related discrimination are imposed upon voters with manual impairments and voters with visual impairments as a result of Defendant Stafford’s desire to place only three touch screen voting machines, if ever certified, in the Supervisor of Elections’ office in downtown Jacksonville. *See infra* §II(E).

⁵ Mr. Stafford also admitted that “voting machinery technology is night-and-day different over the last ten years from roughly [1993] to present,” such that “what was not feasible in terms of voting machinery in 1993 ... might be feasible today.” (Stafford Dep. at 47:15-18, 48:2-4.) This necessarily means that the 1993 DOJ informal opinion upon which the defendants rely is inapplicable today. *See* Plaintiffs’ Consolidated Opposition to Defendants’ Motions to Dismiss Or For Summary Judgment, at 13-14.

these touch screen machines to make them accessible to visually impaired or manually impaired voters. An auxiliary audio component, which is often referred to as an audio ballot, assists visually impaired voters navigate through the ballot screens with pre-recorded instructions played through headphones. (Stafford Dep. at 56:20-25; Browning Dep. at 27:1-3, 43:11-44:11, 89:12-90:10.) Manually impaired voters can use a mouth stick or other device to press the screen.⁶ (Stafford Dep. at 57:9-16; Browning Dep. at 90:11-25.)

Touch screen voting systems with audio ballots have been certified in Florida since August 2001 – over a year before Duval County signed its contract with Diebold for the inaccessible optical scan voting system.⁷ For example, an Election Systems & Software (“ES&S”) touch screen voting system equipped with an audio ballot was certified by the State of Florida on August 16, 2001. (Browning Ex. 7 (Craft email identifying certification of ES&S with audio); Stafford Dep. Ex. 18 (Aug. 20, 2001 ES&S press release received by Stafford).) Other touch screen systems with audio ballots, such as those manufactured by Sequoia, were certified by the State of Florida on June 17, 2002, August 7, 2002, August 21, 2002, and October 31, 2002. (Craft Dep. Exs. 13, 14, 15, 16, 17, and 19.) No less than seven touch screen voting systems with audio components have been certified by the State of Florida for use by Florida counties. (Craft Dep. Exs. 13, 14, 15, 16, 17, 19; Browning Dep.

⁶ “Sip and puff” devices and “jelly switches” can also accommodate voters with severe disabilities. (Kaufman Dep. at 45:15-50:11).

⁷ Defendant Stafford’s suggestion that the terms of the contract with Diebold were reached in principal in February 2002 is irrelevant as Duval County is legally obligated to make its new voting system accessible to the “maximum extent feasible.” Moreover, February 2002 is *six months after* the State had certified a touch screen voting system with audio component. (See, e.g., Browning Ex. 7; Stafford Ex. 19.) Further, Mr. Stafford admitted that he continued to negotiate the terms of the contract until it was signed in October 2002, and that there are no legal barriers preventing Duval County from purchasing and using touch screen systems immediately. (Stafford Dep. at 95:4-19, 138:1-11.)

Ex. 7.) Mr. Stafford admitted that he knew that these other touch screen machines with auxiliary components had already been certified at the time Duval County signed the contract with Diebold in October 2002. (Stafford Dep. at 88:24-89:2 (admitting “there were certified touch screen machines with auxiliary components prior to October 1, 2002”); 103:6-9 (admitting that “as of October 2002, Duval County had the option of purchasing, in Florida, either the ES&S or the [Sequoia] AVC Edge with the auxiliary components”).)

Up until the contract was signed by Duval County with Diebold on October 3, 2002, Duval County could have negotiated its terms and procured accessible voting systems. (Stafford Dep. at 95:4-19.) Moreover, Mr. Stafford admitted that even after the contract was signed, Duval County could have purchased “the AVC Edge with the auxiliary component, the ES&S with auxiliary component, [gotten] Diebold certified, or [gotten] somebody else certified that has the accessibility component.” (Stafford Dep. at 103:6-104:3.) There are no legal barriers preventing Duval County from purchasing and using touch screen systems immediately. (Stafford Dep. at 138:1-11.) Yet, to date, Duval County has not purchased any voting technology that would enable manually or visually impaired voters in Duval County to vote in the same or similar manner as non-disabled voters in any certified election in Florida. (See, e.g., Stafford Dep. at 46:16-23, 49:15-22, 54:10-55:12.)⁸

D. Touch Screen Technology Has A Proven Track Record

Mr. Stafford admitted that touch screen voting systems have a proven track record in Florida. (Stafford Dep. at 83:10-12.) For example, Pasco County entered into a contract with ES&S for the purchase of touch screens with an auxiliary audio component in October 2001. (Browning Dep. 75:6-12, 77:22-78:3.) Pasco County purchased these ES&S touch screens,

⁸ Although Duval County has contracted for three touch screen machines, the County cannot use these machines in any election because they have not been certified by the Secretary of State. Fla. Stat. § 101.294 (2002).

in part, because they “accommodate[] the sight impaired with audio assisted voting.” (Browning Dep. at 72:22-73:21; Browning Dep. Ex. 9.) Pasco County purchased one ES&S touch screen with audio component for each polling place in Pasco County, and has used these accessible touch screens in three elections, including the September 2002 primary and November 2002 general election. (Browning Dep. at 78:6-22, 81:24-83:11.) According to Kurt Browning, Supervisor of Elections in Pasco County, Pasco County’s use of these ES&S voting machines has been a “huge success.” (Browning Dep. at 83:12-84:3, 85:4-14, 86:1-87:13; *see also* Browning Dep. Exs. 11 & 12.) In all, at least 29 counties have purchased and used touch screen voting systems since August 2001. (*See* “County Voting System Information,” *available at* <http://election.dos.state.fl.us/votemeth/systems/countysys.shtml>.)

Touch screen technology has also been used successfully outside of Florida. The ES&S and Sequoia systems, which are certified in Florida, have been used in California and Texas. (Browning Dep. at 34:2-36:14; *see also* Teal Dep. Ex. 6.) In 2002, Georgia installed touch screen voting equipment statewide. (Cox Dep. at 85:8-87:14.) Georgia purchased touch screens with the auxiliary audio components, in part, “so that a disabled voter, a visually disabled voter could read the ballot and vote in secrecy.” (Cox Dep. at 75:17-23.) Cathy Cox, Secretary of State of Georgia, testified in her deposition that she could not “say enough good things about how well the election went and how pleased voters were with [touch screen] machines...” (Cox Dep. at 85:8-87:14.)

E. Duval County’s Acquisition of Three Uncertified Touch Screen Machines Does Not Make Its Voting System Accessible to Voters with Manual Impairments or Voters with Visual Impairments

Duval County’s contract provides the County with three Diebold touch screen voting machines that include an auxiliary audio component. (Stafford Dep. at 20:3-10 and Ex. 19 attached thereto.) However, Duval County cannot use these Diebold touch screen voting

machines in a valid election because they have not been certified by the State of Florida. (Stafford Dep. at 20:3-10; Craft Dep. at 151:16-19.)⁹ Diebold withdrew its touch screen voting system from consideration for certification in the fall of 2002, and Paul Craft, Chief of the Bureau of Voting System Certification, testified that, currently, no Diebold touch screen voting system is being reviewed by his office for possible certification. (Craft Dep. at 150:20-153:2; Craft Dep. Ex. 21.)

Even if these three Diebold touch screen machines were certified and used in Duval County, visually impaired voters and manually impaired voters still would not be able to vote in a manner that is the same or similar as the manner in which non-disabled voters vote in Duval County. Mr. Stafford testified that Duval County will place these three (3) machines at Election Headquarters in downtown Jacksonville. (Stafford Dep. at 60:13-21.) To use these three (3) machines, visually impaired voters and manually impaired voters in Duval County – an estimated 40,000 voters – would be required to travel to Election Headquarters. (*Id.* at 60:22-61:10; *see also* Amended Cmplt. ¶ 56.) Mr. Stafford himself does not know how long it takes to get around on disabled transit in Duval County, the largest land-area city in America, how reliable disabled transit is, nor “what the time commitment a visually or manually impaired voter has to make to travel from the outer regions of the county to the [Supervisor of Elections’] headquarters.” (Stafford Dep. at 61:11-16, 65:21-66:10.)

Plaintiff Beth Bowen, who voted at the Office of Elections for the September 2002 primary, knows – it would take her, using disabled transit, a half a day (five hours) to go to the Office of Elections. (Declaration of Harriet Elizabeth Bowen In Opposition to Defendant’s Motion For Summary Judgment, submitted as Ex. 4 to Plaintiffs’ Supplemental 56(f) Opposition To

⁹ It is a violation of Florida law for a County to purchase, lease, rent, or otherwise acquire any voting system not certified by the Florida State Division of Elections. Fla. Stat. §§101.292, 101.294, 101.295 (2002).

Defendant Stafford's Motion To Dismiss Amended Complaint Or Alternatively For Summary Judgment (herein "Bowen Decl.") ¶ 13; *see also* Bowen Dep. at 22:7-9.) By contrast, Mr. Stafford admitted that "a non-disabled voter in Duval County would not have to travel away from their neighborhood polling place to cast their vote." (Stafford Dep. at 61:7-10.)

F. Duval County Received Specific Requests to Provide Voting Equipment with Auxiliary Aids for Voters with Visual Impairments and Voters with Manual Impairments

Prior to October 3, 2002, Duval County received specific requests from disabled voters to provide touch screen voting machines with audio ballot components. (Stafford Dep. at 39:24-41:22.) For example, several voters spoke with Mr. Stafford in his office and asked him to purchase touch screen voting machines. (*Id.*) Plaintiff Bowen and her husband, who is also blind, provided Mr. Stafford's office with information about accessible touch screen voting systems in January 2001. (*Id.*; Bowen Dep. at 60:4-61:15.) Ms. Bowen presented this information "before he purchased the equipment...to make his office aware that when purchasing the equipment he should consider whether or not it could be made accessible." (Bowen Dep. at 61:7-10; *See also* Bowen Decl. ¶ 14.) The Duval County Election Reform Task Force, which held public hearings in the spring of 2001, received similar requests. (*See, e.g.*, Teal Dep. Ex. 16 (transcript of Election Reform Task Force Meeting held on April 5, 2001); *see also* Teal Dep. Ex. 11 ("[s]ome of the issues the Task Force discovered which confronted voters on November 7, 2000 included the...inability for impaired voters to access the pools or accurately record their vote...").)

III. ARGUMENT

A. Applicable Law

To be entitled to summary judgment on their ADA claim (Count I), Plaintiffs must demonstrate that there is no genuine issue of material fact regarding the following elements:

That [plaintiffs are] . . . qualified individual[s] with a disability;
(2) that [plaintiffs were] excluded from participation in or . . .
denied the benefits of the services, programs, or activities of a
public entity or otherwise discriminated [against] by such
entity; (3) by reason of such disability.

AAPD v. Smith, 227 F. Supp. 2d at 1289 (quoting *Shotz v. Cates*, 256 F.3d 1077, 1079 (11th Cir. 2001)) (emphasis added; internal quotations omitted); see also 42 U.S.C. § 12132; 28 C.F.R. §35.130(a).

Thus, there are two distinct ways in which a defendant can violate the ADA. First, a defendant violates the ADA by excluding a qualified individual with a disability from participation in a service, program, or activity of a public entity by reason of the disability. Second, a defendant violates the ADA by otherwise discriminating against a qualified individual with a disability by reason of the disability. There is no genuine issue of material fact that Defendant Stafford has violated the ADA in both respects.¹⁰

B. Defendant Stafford Has Excluded Plaintiffs From Participation In The Program Of Voting

1. Program Exclusion

Section 35.149 of the Code of Federal Regulations provides:

¹⁰ It is undisputed that Plaintiffs are qualified individuals with disabilities (*see, e.g.*, Bowen Dep. at 12:9-12; O'Connor Dep. at 14:24-15:14; Bell Dep. at 12:9-21, 19:1-12), and that the defendants are public entities. (*See, e.g.*, Stafford Dep. Ex. 19, at DUVAL 2235 and 2264; Kast Dep. at 18:13-15.) The Court has previously acknowledged that these issues do not appear to be in dispute. *AAPD*, 227 F. Supp. 2d at 1290. Nor could they be in dispute. *See* §II(A), *supra*.

Except as otherwise provided in § 35.150, no qualified individual with a disability shall, because a **public entity's facilities** are inaccessible to or unusable by individuals with disabilities, 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 public entity.

(28 C.F.R. § 35.149 (2002) (*emphasis added*)). A "facility" is defined as "all or any portion of . . . equipment . . ." *AAPD*, 227 F. Supp. 2d at 1290 (*quoting* 28 C.F.R. § 35.104). As this Court has already held, voting machines are "equipment" within the meaning of the ADA. *Id.* at n.16. Therefore, if the voting machines used by Duval County are "inaccessible or unusable by individuals with disabilities," Defendant Stafford has violated the ADA.

In evaluating Defendant Stafford's actions (or inaction), it is highly material that Duval County's optical scan voting system was an entirely new acquisition, made to replace the old punchcard voting system. (Stafford Dep. at 44:24-45:18.) For this reason, its "accessibility" is subject to a heightened legal standard:

Alteration. Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, **to the maximum extent feasible**, be altered in such manner that the altered portion of the facility is **readily accessible** to and usable by individuals with disabilities, **if the alteration was commenced after January 26, 1992.**

AAPD, 227 F. Supp. 2d at 1290 (*quoting* 28 C.F.R. § 35.151(b)) (*emphasis added*). To pass muster under the ADA, the new optical scan voting system acquired by Duval County in 2002 must be readily accessible to visually impaired or manually impaired voters to the "maximum extent feasible." *Id.* Indeed, Mr. Stafford admits that Duval County is "legally obligated to provide an accessible voting environment for every Duval County voter" that is

accessible “to the maximum extent required by law.” (Stafford Dep. at 31:5-11.)¹¹ There is no dispute that it is not.

As a Rule 30(b)(6) representative, Mr. Stafford admitted that the new optical scan voting system purchased and used by Duval County in 2002 is not readily accessible to visually impaired or manually impaired voters to the maximum extent feasible. Specifically, Duval County’s new optical scan system requires visually impaired voters and manually impaired voters to vote in a materially different manner than the way non-disabled voters vote in Duval County. (Stafford Dep. at 49:15-22.) This is the current state of affairs in Duval County despite the undisputed fact that technology exists that would enable visually impaired or manually impaired voters in Duval County to vote in the same or similar manner as non-disabled voters. (Stafford Dep. at 56:20-25, 57:9-16; Craft Dep. at 128:8-130:4; Browning Dep. at 26:16-27:3, 43:11-44:11, 89:12-90:25.) Mr. Stafford further conceded that there simply are no legal barriers preventing Duval County from purchasing and using fully accessible voting systems immediately. (Stafford Dep. at 95:4-19.) In light of these admissions, there is no genuine issue of material fact that the new voting “facilities” used by Duval County violate the ADA.¹²

¹¹ As Duval County has purchased an entirely new voting system, the concept of “reasonable accommodation” is not applicable to this case. Indeed, *Nelson v. Miller*, on which Defendant Stafford relied in filing its Motion to Dismiss the Amended Complaint, is inapplicable as it dealt with an *existing* voting system, and did not involve a situation where an entity procured an entirely *new* voting system. 170 F.3d 641, 644 (6th Cir. 1999).

¹² Mr. Stafford also admitted that touch screen voting machines have a proven track record in Florida counties other than Duval County. (Stafford Dep. at 83:10-12; *see also* §II(D), *supra*.)

2. Effective Communications

It is also undisputed that Duval County has failed to provide “effective communications” to visually impaired voters and manually impaired voters. 28 C.F.R. § 35.160 provides:

(a) A public entity shall take appropriate steps to ensure that **communications** with applicants, participants, and members of the public with disabilities are as **effective** as communications with others.

(b)(1) **A public entity shall furnish appropriate auxiliary aids** and services where necessary to afford an individual with a disability an **equal opportunity** to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

(2) In determining what type of auxiliary aid and service is necessary, a public entity **shall give primary consideration to the requests of the individual[s] with disabilities.**

28 C.F.R. § 35.160 (2002)(*emphasis added*); *see also AAPD*, 227 F. Supp. 2d at 1292. It is undisputed that visually impaired voters and manually impaired voters in Duval County are not able to communicate in voting activities as effectively as non-disabled voters, and have not been provided available auxiliary aids that would afford them an equal opportunity to do so. (Stafford Dep. at 79:25-80:6 (admitting that there are no auxiliary aids that can be used to make Duval County’s *optical scan voting equipment* accessible to voters with manual impairments or visual impairments).) It is further undisputed that the requests of visually impaired voters and manually impaired voters for accessible voting systems have not been given primary consideration by the Defendant Stafford.

Auxiliary aids, such as audio features, exist that would enable visually impaired or manually impaired voters to participate in voting on an equal basis with non-disabled voters. (Stafford Dep. at 56:20-25, 57:9-16; Craft Dep. at 128:8-130:9; Browning Dep. at 27:1-3, 43:11-44:11, and 89:12-90:25.) It is equally undisputed that voters in Duval County have

made specific requests of Defendant Stafford to purchase and implement such auxiliary aids. (Stafford Dep. at 39:24-41:22.) Finally, it is undisputed that Duval County has not purchased and implemented such auxiliary aids despite the requests of visually impaired or manually impaired voters. (Stafford Dep. at 49:15-22 (admitting that Duval County's optical scan system requires visually impaired voters and manually impaired voters to vote in a materially different manner than non-disabled voters vote in Duval County); Stafford Dep. at 20:3-10 (explaining that Duval County has not been successful in making sure all Duval County voters vote in the same or similar manner because they cannot use the three uncertified Diebold touch screen machines).) Accordingly, there are no genuine issues of material fact that Defendant Stafford has violated 28 C.F.R. § 35.160 by failing to ensure "effective communications," "furnish appropriate auxiliary aids," and give primary consideration to the requests of visually impaired voters and manually impaired voters for such auxiliary aids.

C. Defendant Stafford Has Violated The "Generic Discrimination" Prohibition Of The ADA

The ADA "proscribe[s] more than such 'exclusion' and 'denial' . . . [it] in addition, more generically proscribe[s] disability 'discrimination' by the pertinent public entities." *AAPD*, 227 F. Supp. 2d at 1292. There is no genuine issue of material fact that Defendant Stafford has violated the "generic discrimination" proscription of the ADA.¹³

Specifically, Defendant Stafford admitted in his deposition that visually impaired voters and manually impaired voters do not vote in the same or similar manner as non-disabled voters in Duval County. (Stafford Dep. at 49:15-22.) He conceded that visually impaired voters and manually impaired voters in Duval County are **forced** to rely on third-

¹³ Again, it is important to note that *Nelson v. Miller* did not involve a claim under the generic discrimination prohibition under the ADA. 170 F.3d at 650.

party assistance to cast their votes. (Stafford Dep. at 42:22-43:2.)¹⁴ The newly-acquired optical scan system used by Duval County is inaccessible to visually impaired or manually impaired voters and requires them to vote in a materially different manner than the way non-disabled voters vote in Duval County. (*Id.*) This is precisely the type of “generic discrimination” prohibited by the ADA.

This discrimination imposes significant burdens on visually impaired voters and manually impaired voters in Duval County that are not imposed on non-disabled voters. Indeed, the optical scan system used by Duval County requires visually impaired voters and manually impaired voters to vote in a more intrusive and less secret manner than the way non-disabled voters vote in Duval County. (Stafford Dep. at 50:11-15.) Visually impaired voters and manually impaired voters in Duval County are *forced* to reveal their votes to a third party, whereas non-disabled voters do not have to reveal their votes to a third party. (*Id.* at 49:15-22.) The potential exists for third parties to influence the votes of visually impaired or manually impaired voters in Duval County – non-disabled voters in Duval County do not face this risk. (*Id.* at 51:21-52:10.) Attention is drawn to visually impaired or manually impaired voters in Duval County when casting their votes that is not drawn to non-disabled voters. (*Id.* at 52:11-53:3.) Visually impaired voters and manually impaired voters are delayed in placing their votes at polling places in Duval County, whereas non-disabled voters do not experience such delays. (*Id.* at 53:4-20.) Visually impaired voters cannot confirm that their candidate choices are properly reflected on an optical scan ballot – they must “put their trust in whoever is assisting them.” (*Id.* at 54:17-56:7.) Non-disabled voters are able to independently confirm the accuracy of their ballots. (*Id.* at 54:17-55:8.) This discrimination

¹⁴ The defendants consistently ignore the material difference between the availability of third-party assistance as an *option* for disabled voters and its existence as the *only* means for disabled voters to cast their votes. (See Amended Compl. ¶¶ 38, 82, Prayer For Relief.) This distinction was not lost on Secretary of State Katherine Harris. See Section IV, *infra*.

is significant, material, and inexcusable in light of the existence of technology that would enable visually impaired voters and manually impaired voters to vote in the same or similar manner as non-disabled voters in Duval County.

Duval County's purchase of three touch screen machines, which it intends to place in election headquarters, only exacerbates the discrimination imposed on visually impaired voters and manually impaired voters in Duval County. First, these three machines have not been certified by the Secretary of State of Florida, and therefore cannot be used in an election in Florida. (Stafford Dep. at 20:3-10; Craft Dep. at 151:16-19.) Second, if ever certified by the State of Florida, Duval County intends to place these three machines at election headquarters in downtown Jacksonville. (Stafford Dep. at 60:13-16.) The estimated 40,000 visually impaired voters and manually impaired voters in Duval County (Am. Cmpl. ¶ 56) would be required to travel to election headquarters to use these *three* machines. (Stafford Dep. at 60:22-61:10.) This is no small burden as not only are three accessible machines insufficient to meet the needs of approximately 40,000 disabled voters, but Jacksonville is also the largest land-area city in the United States. (Am. Cmpl. ¶ 56; Stafford Dep. at 61:11-16.) In the September 2000 election, plaintiff Beth Bowen traveled to Duval County election headquarters to vote on these touch screen machines.¹⁵ On available transit provided to the visually impaired, it would take her **five hours** to travel from her home to Duval County Election Headquarters to vote. (Bowen Dep. at 22:7-9; Bowen Decl. ¶ 13.) A non-disabled voter simply travels to his or her neighborhood polling place. (Stafford Dep. at 61:7-10.) Moreover, it is beyond belief (as well being a violation of the ADA) that Duval County would create a situation were potentially 40,000 disabled voters will be required to travel to election headquarters just to cast their votes.

¹⁵ The Plaintiffs understood that the machines would be available to use, or at least demonstrate, during the September 2002 election. (Bell Dep. at 25:5-28:7, Bowen Decl. ¶ 13.)

As the Eleventh Circuit made clear in *Shotz v. Cates*, 256 F.3d 1077, 1079-81 (11th

Cir. 2001):

[T]he ADA is not restricted to those situations in which “a disabled person is *completely prevented* from enjoying a service, program, or activity.” Rather the court said that “if the ramps are so steep that they impede a disabled person or if the bathrooms are unfit for the use of a disabled person, then it cannot be said that the trial is “readily accessible” *regardless whether the disabled person manages in some fashion to attend the trial.*


AAPD, 227 F. Supp. 2d at 1291 (*quoting Shotz*, 256 F.3d at 1080). The “ramp is steep” for disabled voters in Duval County as significant and humiliating burdens are imposed upon them as they attempt to exercise their fundamental right to cast their votes.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that their Motion be granted.

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Respectfully submitted,


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