

No. 12-3224

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TRACIE HUNTER,

Plaintiff-Appellee,

NORTHEAST OHIO COALITION FOR THE
HOMELESS; OHIO DEMOCRATIC PARTY,

Intervenor-Appellees,

v.

HAMILTON COUNTY BOARD OF ELECTIONS;
ALEX TRIANTAFILOU; TIMOTHY BURKE;
CALEB FAUX; CHARLES GERHARDT, III,

Defendants-Appellants.

FILED***Apr 16, 2012***

LEONARD GREEN, Clerk

O R D E R

Before: MOORE, COLE, and ROGERS, Circuit Judges.

Plaintiff Tracie Hunter brought this action under 42 U.S.C. § 1983, challenging the manner in which the Hamilton County Board of Elections (“Board”) reviewed and counted certain provisional ballots cast in an election for judge of the Hamilton County Juvenile Court. The district court issued a preliminary injunction directing the Board to take certain actions, and in a prior decision, we agreed that the plaintiff had shown a strong likelihood of success on the merits of her equal-protection claim. *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219 (6th Cir. 2011). We remanded, however, for further proceedings to determine how the Board should proceed.

On remand, the district court conducted a lengthy evidentiary hearing. Subsequently, the court issued a judgment and order determining that the Board had violated provisional voters’ right

No. 12-3224

- 2 -

to equal protection when it considered evidence of the location where provisional ballots were cast for some, but not all, provisional ballots that were cast in the wrong precinct. The district court enjoined the Board from rejecting otherwise valid provisional ballots that were cast in the correct location, but in the wrong precinct, as a result of poll-worker error.

The Board appealed and moved the district court to stay its order pending this appeal. The district court denied that request, concluding that the Board had not demonstrated a strong likelihood of success on the merits or shown that it would be irreparably harmed in the absence of a stay. The Board now moves this court for a stay of the district court's judgment pending appeal. Hunter responds in opposition, and the Board replies in support of its motion.

In considering whether to grant a stay pending appeal, we apply the traditional test for injunctive relief and consider four factors: 1) whether the applicant has demonstrated a likelihood of success on the merits; 2) whether the applicant will suffer irreparable injury absent a stay; 3) whether the issuance of a stay will substantially injure the other interested parties; and 4) where the public interest lies. *Family Trust Found. of Ky., Inc. v. Ky. Judicial Conduct Comm'n*, 388 F.3d 224, 227 (6th Cir. 2004). The applicant for a stay "must demonstrate at least serious questions going to the merits and irreparable harm that decidedly outweighs the harm that will be inflicted on others if a stay is granted." *Id.* (quoting *Baker v. Adams Cnty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002)).

The Board has not shown a likelihood of success on the merits. Although it challenges the district court's determination that a violation of equal protection occurred, the district court's conclusions are supported by the factual findings. In view of those findings and the district court's conclusions, the Board's attempt to distinguish between the provisional ballots cast at its office and those cast in the neighborhood locations is unlikely to succeed. Further, the district court's remedy

No. 12-3224

- 3 -

appears to have been crafted in the least intrusive manner possible. The suggestion that certain ballots be uncouned remains an unsatisfactory remedy. *Hunter*, 635 F.3d at 245. Nor do the Board's other arguments made in support of a stay convince us of a likely success on the merits.

Additionally, the Board has not demonstrated that it will suffer an irreparable harm in the absence of a stay. The Board raises the possibility that its members risk sanctions from the Ohio Supreme Court if they follow the district court's directives. Although it suggests that its members are in an "untenable position" because the the district court's ruling is contrary to Ohio law, this is simply another expression of the Board's disagreement with the determination that a post-election violation of equal protection occurred in the treatment of the provisional ballots. As we previously noted, the equal-protection claim is a matter of federal law that did not rest with the state courts. *Id.* at 239. Also weighing in the balance of harms, and against a stay, is the interest of Hunter and the public in a resolution of this 2010 election.

For these reasons, the motion for a stay pending appeal is DENIED.

Judge Rogers would grant the stay.

ENTERED BY ORDER OF THE COURT

A handwritten signature in cursive script, likely of the court clerk, positioned above a horizontal line.

Clerk