

STATE OF MINNESOTA

OFFICE OF ADMINISTRATIVE HEARINGS

Brian Tommerdahl,

Complainant,

vs.

Planned Parenthood of Minnesota, North
Dakota, South Dakota Action Fund,

Respondent.

**NOTICE OF DETERMINATION OF
PRIMA FACIE VIOLATION
AND
NOTICE OF AND ORDER FOR
PROBABLE CAUSE HEARING**

TO: Parties on the Attached Service List

On October 31, 2012, Brian Tommerdahl (“Complainant”) filed a Campaign Complaint with the Office of Administrative Hearings alleging that the Planned Parenthood of Minnesota, North Dakota, South Dakota Action Fund (“Respondent”) violated Minnesota Statutes § 211B.06 of the Fair Campaign Practices Act. The Complaint alleges that Respondent disseminated campaign material regarding Mark Uglem, a Republican-endorsed candidate for House District 36-A, that was false. Complainant also alleges that Respondent knew that the materials were false or communicated to others with reckless disregard of whether the materials were false when disseminating the brochure.

After reviewing the Complaint and attached exhibits, the undersigned Administrative Law Judge has determined that the Complaint sets forth *prima facie* violations of Minn. Stat. § 211B.06. This determination is described in more detail in the attached Memorandum.

THEREFORE, IT IS ORDERED AND NOTICE IS GIVEN that a probable cause hearing regarding the alleged violations of Minn. Stat. § 211B.06 shall be held by telephone before the undersigned Administrative Law Judge at **1:30 p.m.** on **Friday, November 9, 2012**. The hearing will be held by call-in telephone conference. You must call: **1-888-742-5095** at that time. When the system asks for your numeric pass code, enter **992-715-4908#** on your phone and you will be connected to the conference. The probable cause hearing will be conducted pursuant to Minnesota Statutes § 211B.34. Information about the probable cause proceedings and copies of state statutes may be found online at <http://mn.gov/oah> and www.revisor.leg.state.mn.us.

At the probable cause hearing, all parties have the right to be represented by legal counsel, by themselves, or by a person of their choice if that choice is not otherwise prohibited as the unauthorized practice of law. In addition, the parties have the right to submit evidence, affidavits, documentation and argument for consideration by the Administrative Law Judge. Parties should provide to the Administrative Law Judge all evidence bearing on the case, with copies to the opposing party, before the telephone conference takes place. Documents may be emailed to Judge O'Reilly at Ann.OReilly@state.mn.us or faxed to 651-361-7936.

At the conclusion of the probable cause hearing, the Administrative Law Judge will either: (1) dismiss the complaint based on a determination that the complaint is frivolous, or that there is no probable cause to believe that the violation of law alleged in the complaint has occurred; or (2) determine that there is probable cause to believe that the violation of law alleged in the complaint has occurred and refer the case to the Chief Administrative Law Judge for the scheduling of an evidentiary hearing. Evidentiary hearings are conducted pursuant to Minnesota Statutes § 211B.35. If the Administrative Law Judge dismisses the complaint, the Complainant has the right to seek reconsideration of the decision on the record by the Chief Administrative Law Judge pursuant to Minnesota Statutes § 211B.34, subdivision 3.

Any party who needs an accommodation for a disability in order to participate in this hearing process may request one. Examples of reasonable accommodations include wheelchair accessibility, an interpreter, or Braille, or large-print materials. If any party requires an interpreter, the Administrative Law Judge must be promptly notified. To arrange an accommodation, contact the Office of Administrative Hearings at P.O. Box 64620, St. Paul, MN 55164-0620, or call 651-361-7900 (voice) or 651-361-7878 (TDD).

Dated: November 2, 2012

s/Ann O'Reilly

ANN O'REILLY
Administrative Law Judge

MEMORANDUM

On October 31, 2012, the Complainant, Brian Tommerdahl, filed a Complaint with the Office of Administrative Hearings alleging that Respondent, Planned Parenthood of Minnesota, North Dakota, South Dakota Action Fund, violated Minnesota Statutes § 211B.06 of the Fair Campaign Practices Act by disseminating campaign material regarding Mark Uglem (“Uglem”), the Republican-endorsed candidate for House District 36A.¹ Complainant asserts that the campaign materials contain statements that are false and that Respondent knew were false or were communicated to others with reckless disregard of whether they were false.

Specifically, the Complaint alleges that Respondent prepared and disseminated a piece of campaign material urging Uglem’s defeat in the November election. The brochure states that Uglem:

Would vote to allow special interests to discriminate against women and deny women coverage for mammograms, maternity care and birth control.²

Directly beneath this statement, in very small font, appears a citation to Senate File 760 and House Journal 4640, dated May 18, 2011, as the basis for this claim.³

The Complaint asserts that prior to his candidacy for the Minnesota House of Representatives, Uglem served as Mayor of Champlin and never cast a vote or opined on the issues attributed to him in the campaign material.⁴ The Complaint further states that Uglem was not in the Minnesota Legislature when Senate File 760 was discussed, nor does his name appear in the 2001 House Journal at page 4640.⁵

The Complaint contends that the statements on the campaign materials are “patently false and were done intentionally,” “are completely fabricated and conjured from imagination,” and Respondent “either knew the statements to be false or acted with reckless disregard” for the truth in order to defeat Uglem in the general election.⁶ Complainant further asserts that Respondent “went to additional lengths to dress the allegations up as fact by citing to the official legislative record in an effort to mislead the public as to their veracity.”⁷

Legal Standard

To set forth a *prima facie* case that entitles a party to a hearing, the party must either submit evidence or allege facts that, if unchallenged or accepted as true, would

¹ Minnesota House District 36A is located in Dakota County is comprised mostly of the City of Lakeville.

² Complaint, Ex. A-2

³ *Id.*

⁴ Complaint at p. 2.

⁵ Complaint at p. 2-3.

⁶ Complaint at p. 3.

⁷ *Id.*

be sufficient to prove a violation of Minnesota Statutes Chapters 211A or 211B.⁸ “*Prima facie*” means “[s]ufficient to establish a fact or raise a presumption unless disproved or rebutted.”⁹ “*Prima facie* evidence” is “[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced.”¹⁰

For purposes of a *prima facie* determination, the tribunal must accept the facts alleged as true, and the allegations do not need independent substantiation.¹¹ A complaint must be dismissed if it does not include evidence or allege facts that, if accepted as true, would be sufficient to prove a violation of Minnesota Statutes Chapters 211A or 211B.¹²

Minnesota Statutes § 211B.06 (false campaign material)

Minnesota Statutes § 211B.06 prohibits the preparation and dissemination of false campaign material or paid political advertising with respect to the personal or political character or acts of a candidate that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to public office. In order to be found to have violated this section, a party must intentionally participate in the preparation, dissemination or broadcast of campaign material or advertising that is false, and that the party knows is false or communicates with reckless disregard of whether it is false.

The analysis of a complaint under Minn. Stat. § 211B.06 is two-fold: (1) determining whether the campaign material is false; and (2) determining whether the party knows the statement is false or communicates the statement with reckless disregard for the truth or falsity of the statement.

The term “reckless disregard” was added to the statute in 1998 to expressly incorporate the “actual malice” standard from *New York Times v. Sullivan*.¹³ Based on this standard, the Complainants have the burden at the hearing to show by clear and convincing evidence that the Respondent prepared or disseminated the advertisement knowing that it was false or did so with reckless disregard for its truth or falsity.¹⁴

As interpreted by the Minnesota Supreme Court, Minn. Stat. § 211B.06 is directed against false statements of specific facts, and not against criticism of a candidate or unfavorable deductions or inferences derived from the candidate’s conduct, even if the those deductions or inferences “may be considered extreme and

⁸ *Barry, et al., v. St. Anthony-New Brighton Independent School District, et al.*, 781 N.W.2d 898, 902 (Minn. App. 2010).

⁹ *Black’s Law Dictionary* (8th ed. 2004).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

¹⁴ *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). See also *Riley v. Jankowski*, 713 N.W. 2d 379 (Minn. App.) *review denied* (Minn. 2006).

illogical.”¹⁵ Likewise, “[e]xpressions of opinion, rhetoric, and figurative language are generally not actionable if, in context, the audience would understand the statement is not a representation of fact.”¹⁶

The First Amendment protects statements of opinion.¹⁷ It has been accepted in law that there is no such thing as a false opinion.¹⁸ Four factors are used to distinguish a protected statement of opinion from an actionable statement of fact: (1) a statement’s precision and specificity; (2) a statement’s verifiability; (3) the social and literary context in which the statement was made; and (4) a statement’s public context.¹⁹

Absent a citation to the Senate File or the House Journal, the statement at issue would not arise to a statement of fact. Rather, it would be an expression of opinion and rhetoric. The statement, itself, is directed at future conduct (i.e., “would vote to allow...”) that cannot, at this time, be verified or proven true or false. It is not precise or specific, and contains no verifiable claims. The inclusion of the citations to the official legislative record, however, changes the nature and context of the statement from one of opinion or rhetoric, to one that may be verifiable through a citation check.

Citation to the legislative record could be used to make an inference or deduction about a candidate’s voting history or prior official stance on a political issue, as was the case in *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981). In *Kennedy*, a candidate used a fact – an incumbent’s “no” vote on a county budget – to infer that the incumbent did not support any of the individual items in the budget; when, in fact, the incumbent supported various items in the budget but voted no because the budget included an appropriation with which the incumbent disagreed.²⁰ The Supreme Court held that inferences, even those that are “extreme and illogical,” do not come within the purview of the statute.²¹ The Court reasoned that a candidate’s ability to counter campaign materials, as well as the campaign process itself, provides voters with an opportunity to judge for themselves what inferences can properly be drawn from a candidate’s record.²²

Following the Court’s rationale in *Kennedy*, if Uglem had been in the Minnesota Legislature, voted for the legislation cited, or was named in the legislative record cited, the statement, as a whole, would arguably not be actionable under Minn. Stat. § 211B.06. Rather, the statement would be a subjective deduction or inference based upon Uglem’s official record, as was the case in *Kennedy*.

¹⁵ *Kennedy v. Voss*, 304 N.W.2d 299, 300 (Minn. 1981) (construing pre-2004 statute); See also, *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language); *Bank v. Egan*, 60 N.W.2d 257, 259 (Minn. 1953); *Hawley v. Wallace*, 163 N.W. 127, 128 (Minn. 1917).

¹⁶ *Jadwin v. Minneapolis Star & Tribune Co.*, 390 N.W.2d 437, 441 (Minn. Ct. App. 1986).

¹⁷ *Hunt v. University of Minnesota*, 465 N.W.2d 88, 93 (Minn. Ct. App. 1991).

¹⁸ *Fine v. Bernstein*, 726 N.W.2d 137, 144 (Minn. Ct. App. 2007), citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789 (1974).

¹⁹ *Fine*, 726 N.W.2d at 144, citing *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1302-03 (8th Cir. 1986).

²⁰ *Kennedy*, 304 N.W.2d at 299-300.

²¹ *Id.* at 300.

²² *Id.*

However, because Complainant alleges that Uglem has never been in the state legislature and took no part in the legislative record cited (facts which the ALJ must assume as true for a *prima facie* review), the statement cannot be construed as an inference or deduction from Uglem's own record. When read together in this context, the citation becomes its own verifiable statement of fact: Was Uglem connected to the legislative record cited?

The citation to the legislative record gives the impression to voters that Uglem was involved in the legislation or was part of the legislative record referenced. If he was not (a fact that is arguably subject to verification), the statement as a whole is subject to Stat. § 211B.06 and is not merely a misleading statement of opinion, deduction, or inference pursuant to *Kennedy*.

The inclusion of the legislative citation and the fact that Uglem has never served in the Minnesota Legislature, is sufficient to show, under the preliminary *prima facie* review, sufficient factual basis to claim a reckless disregard for the truth or falsity of the assertion. Accordingly, the Administrative Law Judge finds that the Complaint has alleged sufficient facts to support a *prima facie* violation of Minn. Stat. § 211B.06. At least a portion of the identified statement is capable of being proven true or false, it appears to concern the political acts of candidate Uglem, and it is designed to defeat Uglem for election to public office.

This matter will proceed to a probable cause hearing on the alleged violations of Minn. Stat. § 211B.06, as indicated in this Order.

A.C.O.