

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Jay A. Brunner,

Complainant,

vs.

FINDINGS OF FACT,
CONCLUSIONS AND ORDER

House Republican Campaign
Committee,

Respondent.

The above-entitled matter came on for an evidentiary hearing on October 27, 2004, before a panel of three Administrative Law Judges: Allan W. Klein (presiding judge), George A. Beck, and Bruce H. Johnson. The hearing record closed on October 28, 2004, when all of the parties' post-hearing submissions were received.

The Complainant, Jay A. Brunner, 30 Oakridge Drive, Birchwood, MN 55110, appeared on his own behalf. Paul B. Kohls, Attorney at Law, Rider Bennett, LLP, 333 South Seventh Street, Suite 2000, Minneapolis, MN 55402, appeared on behalf of the Respondent, the House Republican Campaign Committee (HRCC).

NOTICE

Pursuant to Minn. Stat. § 211B.36, subd. 5, this is the final decision in this case. Under Minn. Stat. § 211B.36, subd. 5, a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

STATEMENT OF THE ISSUES

1. Did the HRCC violate Minn. Stat. § 211B.04 by preparing and disseminating campaign material, which was false with respect to the political character or acts of candidate Rebecca Otto and which was designed to injure or defeat her bid for election to a public office?

2. If so, what remedy, if any, is appropriate?

Based on the record in this matter and for the reasons set out in the attached Memorandum, a majority of the Administrative Law Judges conclude that the Respondent violated Minn. Stat. § 211B.06 by making a false statement in a piece of campaign material concerning Rebecca Otto, an incumbent legislator running for re-election in House District 52B. A fine of \$4,000 is imposed.

Based upon the record and the proceedings herein, the full panel of Administrative Law Judges makes the following:

FINDINGS OF FACT

1. In 2003, Shawn Otto acted as the manager of his wife Rebecca Otto's campaign in a special election for a seat in the Minnesota House of Representatives, District 52B. The election took place early in 2003.

2. Rebecca Otto won the special election.

3. In May of 2003, Shawn Otto made a presentation to the DFL Education Foundation called "Marketing Progressive Politics in the Suburbs." In the course of that presentation, Shawn Otto made the following statements, among others:

"GOP's ugly side is starting to show as the limits are being pushed:

1. Party of intolerance to blacks and some other minorities

* * *

4. Party of tax cuts past the point of responsibility

* * *

6. Party of secrecy and restriction of civil rights"¹

4. In October, 2004, during the course of Rebecca Otto's campaign for re-election to a seat in the Minnesota House of Representatives for District 52B, the HRCC produced and mailed a four-page color brochure to approximately 6,500 households.² A copy of that brochure is attached to this Order as Exhibit A and is incorporated by reference into these Findings of Fact.

5. More specifically, that brochure contained the following statements in sequence:

"In 2003, Rebecca Otto won a controversial special election in which she was indicted for unfair campaign practices."

"Shortly after that, her campaign manager husband bragged to a group of fellow Democrats that the way to defeat Republicans was to 'expose the[ir] hypocrisy and rotten moral core...'"

"Otto went on to define Republicans as people in a party . . ."

"... of intolerance to blacks and some other minorities"

"... of tax cuts past the point of responsibility"

"... of secrecy and restriction of civil rights"

¹ See Hearing Exhibit B.

² See Hearing Exhibit A.

"That's right. Just days after winning a controversial special election, Otto actually said Republicans were **intolerant to blacks**, and that the way to win elections was to "**educate and sow doubt**" about them."

6. On October 20, 2004, Jay Brunner filed a complaint under Minn. Stat. § 211B.32, alleging that statements in the brochure violated Minn. Stat. § 211B.06. On October 21, 2004, Administrative Law Judge Kathleen Sheehy found that the complaint stated a prima facie violation. On October 22, 2004, Judge Sheehy held a probable cause hearing on the allegations in Mr. Brunner's complaint. Both parties participated by telephone.⁴

7. By Order entered on October 25, 2004, Judge Sheehy found probable cause to believe that the HRCC violated Minn. Stat. § 211B.06 by making a knowingly false statement in campaign material.

8. On October 25, 2004, the allegations in the complaint were assigned to the undersigned panel of three Administrative Law Judges.

9. On October 27, 2004, an in-person evidentiary hearing was held, and both parties participated.

10. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

11. The Memorandum that follows explains the reasons for these Findings.

12. The Administrative Law Judges adopt as Findings any Conclusions that are more appropriately described as Findings.

Based upon the foregoing Findings of Fact, the majority makes the following:

CONCLUSIONS

1. Minn. Stat. § 211B.35 authorizes the Administrative Law Judges to consider this matter.

2. Minn. Stat. § 211B.01, subd. 2, amended in 2004, defines "campaign material" to mean "any literature, publication, or material that is disseminated for the

³ In the original, this sentence is in 8 point font, and the rest of the text size ranges from approximately 20-24 point font or larger.

⁴ See, Minn. Stat. § 211B.36, subd. 4, allowing hearings to be conducted by conference telephone call.

purpose of influencing voting at a primary or other election, except for news items or editorial comments by the news media.”⁵

3. The color brochure that the HRCC mailed to 6,500 households is campaign material within the meaning of Minn. Stat. § 211B.01, subd. 2.

4. Minn. Stat. § 211B.06, subd. 1, provides, in part:

A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or to promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

5. The House Republican Campaign Committee did violate Minn. Stat. § 211B.06, subd. 1. HRCC prepared and disseminated campaign material with respect to the acts of a candidate designed to injure or defeat a candidate, that was false, and that it knew was false by attributing to Rebecca Otto statements which were not made by her.

Based on the record herein, and for the reasons stated in the following Memorandum, the majority of the panel of Administrative Law Judges makes the following:

ORDER

IT IS HEREBY ORDERED: That the House Republican Campaign Committee is hereby assessed a civil penalty of \$4,000.

Dated this 29th day of October 2004.

/s/ Allan W. Klein
ALLAN W. KLEIN
Presiding Administrative Law Judge

/s/ George A. Beck
GEORGE A. BECK
Administrative Law Judge

⁵ Minn. Stat. § 211B.01, subd. 2; Minn. Laws 2004 ch. 293, art. 3, § 1.

MEMORANDUM

There is no dispute about the underlying facts of this matter. They have been proven by clear and convincing evidence. HRCC candidly admits to having prepared and mailed the brochure. It admits to having used Shawn Otto's presentation to the DFL Education Foundation (Exhibit B) as the basis for the quotes in the brochure.

HRCC does dispute, however, the appropriate interpretation of the statement at issue. That statement reads:

That's right, just days after winning a controversial special election, Otto actually said Republicans were *intolerant to blacks* and that the way to win the elections was to "*educate and sow doubt*" about them.

HRCC claims that Shawn Otto (who is the person who actually made those statements) can be said to have "won" the election because he was the husband and campaign manager of the candidate, Rebecca Otto. The majority of the panel cannot accept that position. The person who won the election was Rebecca Otto. She was not the person who made those statements. Attributing those statements to her is false.

The dictionary definition of "false" includes both "contrary to fact" as well as "intentionally deceptive."⁶

The dissent correctly distinguishes between "intentionally misleading" and "false." It acknowledges that the statement is intentionally misleading, but finds that it is not patently untrue. Our holding here is that the sentence at issue is patently untrue, not that it is merely intentionally misleading. We agree with the dissent that legislative attention to this distinction would be helpful, so that if the legislature desires to include the intentionally misleading statements within the ambit of the statute, it should make that intention clear by amending the statute.

Both parties submitted legal memoranda, and both acknowledged that the current statute has not been interpreted by our appellate courts. However, cases interpreting the predecessor to this statute are of assistance in interpreting those parts of the statute which have not changed. With respect to the issue of falsehoods, the Supreme Court held that the statute is "directed against the evil of making false statements of fact and not against criticism of a candidate or unfavorable deductions derived from a candidate's conduct." Kennedy v. Voss, 304 N.W. 2d 299, 300 (Minn. 1981). In another case, the Court held that "[i]t does not forbid criticism of a candidate, even though unfair and unjust, if based upon facts which are not false." Bank v. Egan, 240 Minn. 192, 194, 60 N.W. 2d 257, 259 (1953). The statement at issue in the Otto case goes beyond unfair or unjust criticism. Considering the entire brochure the statement is not only intentionally deceptive but also contrary to truth or fact. It is a "fact" that Shawn Otto, Respondent's husband and campaign manager, did make the statements at issue. But it is not a "fact" that Rebecca Otto made those statements. It

⁶ American Heritage College Dictionary (4th Ed. 2002).

is the attribution of those statements to Rebecca Otto that is false, and because HRCC knew the attribution was false and the attribution would tend to injure or defeat her, the statute has been violated.

Two other points raised by the dissent deserve a response. The majority does not believe that the use of the word “implying” relative to a false endorsement in Minn. Stat. § 211B.02, but not relative to a false statement in Minn. Stat. § 211B.06, has any bearing on this case. We believe the statement at issue is patently untrue, and there is no need to rely on any implication. We also conclude that the due process requirements for imposition of a civil penalty are less demanding than those for a criminal statute and, again, that there are no due process concerns regarding a patently untrue statement.

The statute directs the Administrative Law Judge panel to make at least one of several dispositions. The panel may dismiss the complaint, may issue a reprimand, may find a violation of Section 211B.06, may impose a civil penalty of up to \$5,000 for any violation of Chapter 211A or 211B, and may refer the complaint to the appropriate county attorney for criminal prosecution. In this case, the majority has elected to find that a statement made in campaign material did violate Chapter 211B.06, and impose a fine of \$4,000, but not to refer the matter for criminal prosecution. This choice is made because the violation was deliberate and intentional, done in a professional manner, and HRCC makes no apology for it. In addition, more than just one or a handful of voters have been potentially misled by it. It was mailed to 6500 households in mid-October. It is not easy to correct or counter. On the other hand, it does not rise to the level of a criminal referral, which the majority believes should be reserved for the most serious violations.

A.W.K., G.A.B.

DISSENT

I respectfully dissent from the conclusions and results reached by the majority. The outcome of this case turns on whether the following sentence in the brochure in question is “false” within the meaning of Minn. Stat. § 211B.06, subd. 1:

“Just days after winning a controversial special election, Otto actually said Republicans were intolerant to blacks, and the way to win elections was to ‘educate and sow doubt’ about them.

In this ALJ’s view, the wording of that sentence is sufficiently ambiguous to take it out of a category of “intentionally untrue” and to place it into a category of “intentionally misleading.” The major ambiguity in the sentence is the identity of the person named “Otto” to which the remainder of the sentence refers. The HRCC argues that preceding statements in the brochure all refer to Shawn Otto, the Respondent’s husband and campaign manager, so that one can logically infer that the “Otto” referred to in the above statement is Shawn Otto. The Complainant argues that linking the name “Otto”

with the clause, “Just days after winning a controversial special election,” can only refer to the Candidate Rebecca Otto because only she held an election certificate. But in a context like this, concluding that the term “winning” must necessarily refer to a person holding an election certificate ascribes too narrow a sense to the word “winning.” Clearly, a candidate is a “winner” in an election context. But ordinary speakers of English could also reasonably view a candidate’s campaign manager as a “winner” in an election contest, as well as the candidate. It is the same sense in which an attorney is seen as “winning” a lawsuit as much as the client. In short, this ALJ does not agree with the majority’s conclusion that the sentence in question is unambiguously false.

But that is not to say that the sentence is not intentionally misleading. Preceded by a qualifying sentence in all but unreadable 8 point type, the HRCC clearly intended to induce readers of the brochure to believe that it was candidate Rebecca Otto who had said that “Republicans were *intolerant to blacks*, and that the way to win elections was to *‘educate and sow doubt’* about them.” The HRCC all but concedes that. But, in this ALJ’s view, characterization of the statement as “intentionally misleading,” rather than as “intentionally untrue,” then poses an additional legal question—namely, whether in enacting Minn. Stat. § 211B.06, the legislature intended to impose punishment for disseminating statements found to be “intentionally misleading,” as well as those found to be “intentionally untrue.” For the reasons discussed below, this ALJ concludes that the legislature did not intend that result.

The statute expressly refers only to the word “false.” There is no express statutory reference to the word “misleading.” However, the *Merriam-Webster Online Dictionary*⁷ offers the following definition of the word “false,” as used in the context of Minn. Stat. § 211B.06:

2 a : intentionally untrue <*false testimony*> **b** : adjusted or made so as to deceive <*false scales*> <a trunk with a *false bottom*> **c** : intended or tending to mislead <a *false promise*>

In other words, the relevant dictionary definition indicates a continuum of senses ranging from simply “intentionally untrue,” on one end of the scale, to “tending to mislead,” on the other end. The primary question here is whether the legislature intended the statute to apply in cases involving all of those senses of the word false or whether it intended there to be a boundary for liability along some point in the continuum. A second question is whether there is any constitutional limit to where along the continuum a boundary can be established.

Unlike some statutory schemes, neither Chapter 211B nor Minn. Stat. § 211B.06 contains an explicit expression of legislative purpose or intent. And neither party has come forward with legislative history that might shed light on what senses of “false” the legislature intended the word to include when applying the statute to particular factual situations. But there are some things that do tend to shed light on legislative intent. First, “intentionally untrue” provides a relatively objective standard of legal liability. But

⁷ 2004 edition.

when one looks at the more expansive end of the spectrum of meaning, false in the sense of “tending to mislead” could in itself range from “extremely misleading” to “slightly misleading.” The problem is determining a standard for establishing how misleading a statement must be in order to be classified as a false statement for purposes of Minn. Stat. § 211B.06. It would seem that at some point along that part of the spectrum one runs into substantive Due Process vagueness problems, First Amendment speech problems, or both. Second, Minn. Stat. § 211B.06 provides, in part:

A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or to promote or defeat a ballot question, *that is false*, and that the person knows is false or communicates to others with reckless disregard of whether it is false. [Emphasis supplied.]

Minn. Stat. § 211B.04 provides

A person or candidate may not knowingly make, directly or indirectly, *a false claim stating or implying* that a candidate or ballot question has the support or endorsement of a major political party or party unit or of an organization. A person or candidate may not state in written campaign material that the candidate or ballot question has the support or endorsement of an individual without first getting written permission from the individual to do so. [Emphasis supplied.]

Both provisions were codified in substantially their current forms in 1975.⁸ By referring to “false implications,” Minn. Stat. § 211B.02 more clearly evidences a legislative intent to include “intentionally misleading” acts within that statute’s prohibitions than does Minn. Stat. § 211B.06, subd. 1, which lacks any reference to implicit falsity. Application of the canon of construction, *expressio unius est exclusio alterius* (“inclusion of one thing indicates exclusion of the other”),⁹ suggests that the legislature did not intend Minn. Stat. § 211B.06, subd. 1, to apply to implicitly false—i.e., intentionally misleading—statements. Finally, until the legislature created civil remedies for violations of sections of Chapter 211B in 2004, the chapter provided only for criminal remedies. Minn. Stat. § 211B.06, subd. 1, is framed as a gross misdemeanor. Another canon of construction, the Rule of Lenity, provides that laws whose purpose is to punish (usually by fine or imprisonment) must be construed strictly.¹⁰ The reasoning behind the rule is the principle of fair notice—that is, the state should not impose penalties upon people without clearly warning them about conduct that is considered unlawful and its

⁸ Minn. Laws 1975 ch. 284 §§ 2 and 4.

⁹ See, e.g., *Harris v. County of Hennepin*, 679 N.W.2d 728, 731 (Minn. 2004).

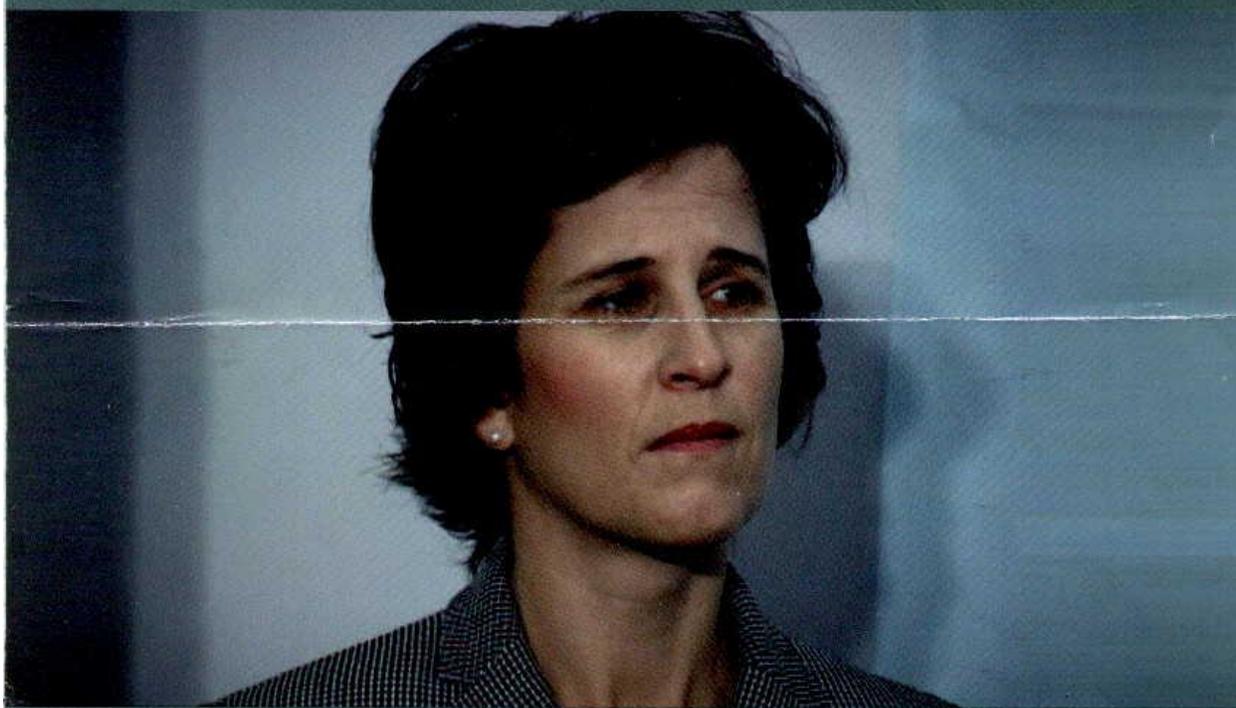
¹⁰ See, e.g., *In re the Welfare of C.R.M., child*, 611 N.W.2d 802, 805 (Minn. 2000).

consequences. Since there appear to be no court decisions construing Minn. Stat. § 211B.06, subd. 1, or its prior iterations broadly enough to include statements that are intentionally misleading, the better course in applying the principle of fair notice in this case is to find an absence of such legislative intent and to let the legislature clarify its intent in that regard if it chooses to do so. This ALJ would therefore dismiss the complaint.

B.H.J. /s/ Bruce H. Johnson

Exhibit A

Ex. 1
Rebecca Otto says
she's the candidate of
“balance and reason”



You be the judge.

In 2003, Rebecca Otto won a controversial special election in which she was indicted for unfair campaign practices.

Shortly after that, her campaign manager husband bragged to a group of fellow Democrats that the way to defeat Republicans was to “expose the[ir] hypocrisy and rotten moral core...”



On November 2, vote

Otto went on to define Republicans as people in a party...

“...of intolerance to blacks and some other minorities”

“...of tax cuts past the point of responsibility”

“...of secrecy and restriction of civil rights”

- "Marketing Progressive Politics in the Suburbs" as presented to the DFL Education Foundation on May 1, 2003 by Shawn Otto

That's right. Just days after winning a controversial special election, Otto actually said Republicans were *intolerant to blacks*, and that the way to win elections was to *"educate and sow doubt"* about them.

And now, Rebecca Otto is asking for your vote, claiming she is a candidate of "balance and reason."
Who is she kidding?



**REBECCA OTTO -
SHE'S NOT BALANCED.
SHE'S NOT REASONABLE.
SHE'S NOT ON OUR SIDE.**

NO on Rebecca Otto.

**Rebecca Otto says she's the candidate of
"balance and reason"**



You be the judge.

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