

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Judy Lindsay,

Complainant,

vs.

Katie Nadeau and the Joyce Peppin
Volunteer Committee,

Respondents.

FINDINGS OF FACT,
CONCLUSIONS, ORDER
AND MEMORANDUM

The above-entitled matter came on for hearing on December 3, 2004, before a panel of three Administrative Law Judges: George A. Beck (Presiding Judge), Barbara L. Neilson and James A. Cannon.^[1] The hearing record closed on February 4, 2005, upon receipt of the final written submission.

Matthew P. Franzese, Esq. of the Leuthner Law Office, 218 Third Avenue East, Suite 102, Alexandria, MN 56308, appeared representing the Complainant, Judy Lindsay. Matthew W. Haapoja, Esq. of the firm of Trimble & Associates, Ltd., 10201 Wayzata Boulevard, Suite 130, Minneapolis, MN 55305, appeared representing the Respondents Katie Nadeau and the Joyce Peppin Volunteer Committee.

NOTICE

This is the final decision in this case, as provided for by Minn. Stat. § 211B.36, subd. 5. A party aggrieved by this decision may seek judicial review as set out in Minn. Stat. § § 14.63 to 14.69.

STATEMENT OF ISSUE

Did the Respondents violate Minn. Stat. § 211B.06 by making false statements in a letter that the Respondents knew were false or communicated to others with reckless disregard of whether the statements were false?

The panel concludes that the Respondents did not violate Minn. Stat. § 211B.06.

Based upon the entire record, the panel makes the following:

FINDINGS OF FACT

1. The events described below occurred during the campaign for State Representative in House District 32A, which concluded with the election of Joyce Peppin on November 2, 2004. Ms. Peppin was the endorsed candidate of the

Republican party in this election. Her campaign manager was Katie Nadeau.^[2] Former State Representative Arlon Lindner ran as an independent candidate in the election for House District 32A.^[3] The Complainant, Judy Lindsay, was his campaign manager.^[4]

2. In the six elections prior to 2004, Mr. Lindner was the Republican endorsed candidate for House District 32A, and he served six terms as State Representative. In 2004, Mr. Lindner lost the Republican Party's endorsement to Ms. Peppin.

3. During the November 2004 election, Lindner campaign workers would stop at homes in the district that had Peppin lawn signs and inform the homeowners that Lindner was running as an independent candidate. After discussing issues with the homeowner, the Lindner campaign workers would attempt to convince the homeowners to change their Peppin sign to a Lindner sign.^[5]

4. Lindner campaign volunteer Daniel Jaeger is a resident of Maple Grove who does not reside in District 32A, but does reside in Senate District 32.^[6] He has known former Representative Lindner for some 15 years.^[7] Mr. Jaeger has served on the Republican Senate District Executive Committee in the past and has been involved in previous Lindner campaigns.^[8]

5. On October 12, 2004, Mr. Jaeger drove up to the home of Lauren and Bill Adams in Maple Grove, and parked his car in their driveway.^[9] Mr. Jaeger had observed the Peppin lawn sign in their front yard.^[10] Although Mr. Jaeger knows Bill Adams, he was not aware that it was Mr. Adams' residence when he pulled into the driveway.^[11]

6. Mr. Jaeger arrived at the Adams' residence at about 7:30 p.m., as it was getting dark.^[12] He went to the Adams' front door and rang the doorbell.^[13] There was no answer.^[14] Mr. Jaeger then heard voices at the side of the house and proceeded toward the voices to see if the residents might be outside.^[15] He encountered the Adams' next-door neighbors and chatted with them for about ten or fifteen minutes.^[16]

7. Mrs. Lauren Adams was home when Mr. Jaeger rang the doorbell. She heard the doorbell ring, but was late getting to the door to answer.^[17] Mrs. Adams was unable to see anyone outside of her house but did observe a car she did not recognize in the driveway.^[18] Because the car remained in her driveway for a period of time, Mrs. Adams called the Maple Grove Police Department and asked them to check on the situation.^[19]

8. A Maple Grove police officer arrived shortly after Ms. Adams called and pulled into the Adams' driveway alongside Mr. Jaeger's car.^[20] Mr. Jaeger saw the police car pull into the driveway and returned to the Adams' residence from the neighbor's yard.^[21] The police officer asked Mr. Jaeger what he was doing there and Mr. Jaeger told him that he was a Lindner campaign worker.^[22] The police officer asked to see Mr. Jaeger's drivers license and took down his address and phone number.^[23]

9. When the police officer was talking to Mr. Jaeger, Mrs. Adams came out of her house through the garage door.^[24] Mr. Jaeger explained to her that he was a

Lindner campaign worker.^[25] Mrs. Adams asked him if he had seen their Peppin lawn sign.^[26] Mr. Jaeger said yes but that he still wanted to ask her if she had any questions.^[27] Mr. Jaeger then asked Mrs. Adams what her name was, whether she was affiliated with the City of Maple Grove, and whether she was actively involved with the Peppin campaign.^[28] The police officer told Mrs. Adams that she did not have to answer the questions.^[29] The police officer then said to Mr. Jaeger, "You can leave now."^[30] Mr. Jaeger then proceeded to his automobile and left.^[31]

10. As Mr. Jaeger was leaving, Bill Adams pulled into the driveway.^[32] He saw his wife talking to the police officer and was concerned. Mr. Adams walked over to his wife and the police officer and Mrs. Adams told him what had just transpired.^[33]

11. The police officer filed an incident report in which he noted that Mr. Jaeger had stated that he was on a political campaign. The officer indicated that the matter had been cleared and that there were "no problems."^[34]

12. That evening Bill Adams called Joyce Peppin to tell her what had occurred with Mr. Jaeger.^[35] Mr. Adams told Ms. Peppin that Mr. Jaeger had been asked to leave by the police officer.^[36]

13. After talking to Mr. Adams, Ms. Peppin called her campaign manager, Katie Nadeau, and told her about the incident.^[37] Ms. Peppin either said that Mr. Jaeger had been "asked to leave," or that he had been "escorted off" the premises.^[38]

14. On October 16, 2004, Ms. Nadeau called Arlon Lindner to tell him about the incident at the Adams' home. Ms. Nadeau said specifically that she thought Dan Jaeger was the campaign worker involved.^[39] She also complained that Mr. Jaeger was telling people that Ms. Peppin was "pro-choice" on the issue of abortion when in fact Ms. Peppin is "pro-life."^[40] Representative Lindner told Ms. Nadeau that she should call Mr. Jaeger and talk to him.^[41]

15. In addition to the Adams' incident with Mr. Jaeger, Ms. Peppin and Ms. Nadeau had been advised that another Peppin supporter, a Mrs. Quansrud, had felt uncomfortable with Mr. Jaeger being at her house.^[42] And the Republican Senate District Co-chair advised Ms. Peppin that she had received a complaint from a homeowner who felt intimidated by a Lindner campaign worker who came to her house.^[43]

16. Ms. Nadeau decided, on her own, to send a letter to the approximately 350 people who had put up lawn signs for Joyce Peppin.^[44] The letter was drafted and mailed by Ms. Nadeau on October 17, 2004.^[45] The second paragraph of the letter read as follows:

Unfortunately, as a number of you have discovered, making such a public statement of support for Joyce can result in an uncomfortable and even harassing confrontation from our opponent Arlon Lindner's campaign personnel. We have received multiple calls from Peppin supporters who have been pressured at their

homes by a Lindner supporter asking them to defend their decision to support Joyce. *One of these exchanges resulted in Mr. Lindner's worker being escorted off the property by a police officer.*^[46]

17. The letter then advised the recipients to contact local authorities if they felt threatened and to contact Ms. Nadeau. The fourth paragraph of the letter stated as follows:

In hopes of putting a stop to this behavior, I have personally spoken to Mr. Lindner regarding this issue. *Unfortunately, he is taking no responsibility for such actions of his workers and I was led to conclude that he authorizes such activity.*^[47]

18. Joyce Peppin did not authorize or review the letter before it was sent.^[48] A draft of the letter was emailed to Ms. Peppin's husband, Gregg Peppin, but he did not respond to it.^[49] A draft was also emailed to another Peppin supporter, Mike Amery, who did respond and suggested that Ms. Nadeau make the letter stronger. At this suggestion, Ms. Nadeau added the language concerning a Lindner worker being "escorted off the property" and former Representative Lindner "taking no responsibility" for his workers' actions.^[50]

19. Ms. Nadeau did not call Mrs. Adams to ask her directly what had occurred at her home.^[51] Nor did she attempt to secure a copy of the police incident report.^[52]

20. On October 29, 2004, Ms. Lindsay filed a complaint with the Office of Administrative Hearings alleging that Katie Nadeau and the Joyce Peppin Volunteer Committee violated Minn. Stat. § 211B.06 by making two false statements in the letter Nadeau prepared and disseminated on October 17, 2004. Ms. Lindsay also alleged in her complaint that Joyce Peppin and Gregg Peppin violated Minn. Stat. § 211B.07, which prohibits the use or threat of harm or loss of employment to compel an individual to vote for or against a candidate.

21. After finding that the complaint set forth prima facie violations of Minn. Stat. § 211B.06 and 211B.07, Administrative Law Judge Steve Mihalchick held a probable cause hearing on the matter on November 8, 2004. On November 12, 2004, Judge Mihalchick issued a decision wherein he found that there was probable cause to believe that Ms. Nadeau and the Joyce Peppin Volunteer Committee violated Minn. Stat. § 211B.06 by making two false statements in the October 17, 2004 letter. Judge Mihalchick also found there was no probable cause to believe that Joyce Peppin or Gregg Peppin violated Minn. Stat. § 211B.07, and he dismissed that Complaint as to them.

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

CONCLUSIONS

1. The Administrative Law Judge Panel has jurisdiction in this matter under Minn. Stat. § 211B.35.

2. The Complainant alleges that two statements in the October 17, 2004 letter, set out at Findings of Fact Nos. 16 and 17, are false.

3. Minn. Stat. § 211B.06, subd. 1 provides as follows:

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.

4. The burden of proving the allegations in the Complaint is on the Complainant.^[53]

5. The standard of proof of a violation of Section 211B.06, relating to false statements in paid political advertising or campaign material, is clear and convincing evidence.^[54]

6. Minn. Stat. § 211B.01, subd. 2 defines “campaign material” to mean “any literature, publication or material that is disseminated for the purpose of influencing voting at a primary or other election, except for news items or editorial comments by the news media.”^[55]

7. The October 17, 2004 letter is campaign material.

8. The Complainant has proved by clear and convincing evidence that the statement that a Lindner campaign worker was “escorted off the property by a police officer” was false.

9. The Complainant has not proved that Ms. Nadeau knew that the statement was false or that she communicated it with reckless disregard of whether it was false.

10. The Complainant has not proved by clear and convincing evidence that the statement in the October 17, 2004 letter that Representative Lindner was “taking no responsibility for such actions of his workers” was false and that the Complainant knew that it was false or communicated it with reckless disregard of whether it was false.

11. Under Minn. Stat. § 211B.35, subd. 2, the Panel is authorized to impose a civil penalty of up to \$5,000 for a violation of Chapter 211B.

12. These Conclusions are reached for the reasons set forth in the Memorandum below. That Memorandum is hereby incorporated in these Conclusions.

Based upon the record in this matter, and for the reasons set out in the following Memorandum, the Panel of Administrative Law Judges makes the following:

ORDER

IT IS HEREBY ORDERED that the Complaint is DISMISSED.

Dated this 17th day of February, 2005

S/ George A. Beck

GEORGE A. BECK
Administrative Law Judge

S/ Barbara Neilson

BARBARA NEILSON
Administrative Law Judge

S/ James F. Cannon

JAMES F. CANNON
Workers Compensation Judge

Reported: Taped.
Transcript Prepared (Brennan & Associates.)

MEMORANDUM

The complaint in this matter concerns a letter Ms. Nadeau prepared and disseminated on October 17, 2004, on behalf of the Joyce Peppin Volunteer Committee. The complaint was filed on October 29, 2004, and alleged that two statements in the Nadeau letter were false and that Ms. Nadeau and the Joyce Peppin Volunteer Committee knew they were false or communicated them with reckless disregard of whether they were false in violation of Minn. Stat. § 211B.06. The two statements are: (1) that Arlon Lindner's campaign worker (Daniel Jaeger) was "escorted off the property by a police officer"; and (2) that Arlon Lindner "is taking no responsibility for such actions of his workers and I was led to conclude that he authorizes such activity."

At the hearing and in her post-hearing submissions, the Complainant argued that a third statement in the Nadeau letter was also false. Because this statement was not identified in the complaint and was not considered by Judge Mihalchick in making his

prima facie and probable cause determinations, it is outside the scope of this hearing and will not be considered by the panel.

Minn. Stat. § 211B.06 prohibits the preparation and dissemination of false campaign material. In order to be found to have violated this section, a person must participate in the preparation or dissemination of false campaign material that the person knows is false or communicates with reckless disregard of whether it is false. Here, Ms. Nadeau concedes that the letter she prepared and disseminated on October 17, 2004, is campaign material. Ms. Nadeau denies, however, that the statements at issue are factually false, and she maintains that they were not made with knowledge of their falsity or with reckless disregard for the truth.

The term “reckless disregard” is not defined in the statute. When considering the predecessor to this statute, the Minnesota Court of Appeals, in *State v. Jude*,^[56] rejected the argument that section 211B.06 could constitutionally create an ordinary or gross negligence standard. At that time, § 211B.06 made it a crime to prepare or disseminate campaign material that a person knows “or has reason to believe is false.” The court found that extending criminal liability to those who have only a “reason to believe” the campaign material is false made the statute unconstitutionally overbroad.

Instead, the court in *Jude* held that a criminal sanction could not be imposed for political speech that does not meet the “actual malice” standard of *New York Times Co. v. Sullivan*.^[57] That is, the statement must be made with knowledge that it is false or with reckless disregard of whether it is false or not. The court explained further that the phrase “reckless disregard” involved a subjective element of “actual conscious disregard of the risk created by the conduct.” The court pointed out that when a challenged statute regulates “core political speech” it must be examined with exacting scrutiny.^[58]

Following the *Jude* decision, the Minnesota Legislature amended Minn. Stat. § 211B.06 in 1998 by replacing the “reason to believe” language with the “reckless disregard” language. Therefore, it appears that the legislature intended, in accordance with *Jude*, to require that the Complainant show by clear and convincing evidence that the statements are false and that Respondent either knew they were false or acted with actual conscious disregard of whether they were false or not, in order to establish a violation of Minn. Stat. § 211B.06.

The Complainant urges that *Jude* be distinguished because it is a criminal case. She suggests that the interpretation of reckless disregard applied in an administrative attorney discipline case^[59] is more appropriate here. However, because attorney disciplinary proceedings are *sui generis* and because *Jude* specifically interprets § 211B.06, subd. 1, the panel will not substitute a negligence standard for the higher standard set out by the Court of Appeals, absent further direction from the legislature or the courts.

Statement #1: “One of these exchanges resulted in Mr. Lindner’s worker being escorted off the premises by a police officer.”

The Complainant argues that this statement is false because Mr. Jaeger was not escorted off the Adams’ property by a police officer. Instead, Mrs. Adams called the

police to report an unfamiliar car in her driveway. Once the police officer talked to Mr. Jaeger and checked out his driver's license identification, he told Mr. Jaeger that he "could leave now" and he noted on the incident report "no problems."^[60] Complainant maintains that the police officer's statement to Mr. Jaeger that he could leave now was not an order for him to leave the property, but an indication that the police officer was done talking with Mr. Jaeger and that Mr. Jaeger was free to go.

The Complainant contends that, by stating falsely that the police escorted Mr. Jaeger off the property, Ms. Nadeau implied that Mr. Lindner's staff was engaging in some sort of criminal activity that warranted police intervention. According to the Complainant, Ms. Nadeau acted in a reckless manner by failing to obtain the police report to verify the story. The Complainant insists that Ms. Nadeau's conduct is sufficient to establish a violation of section 211B.06. The Respondents maintain that Ms. Nadeau wrote and disseminated the statement based on information she received from Ms. Peppin who had spoken directly to the Adams about the incident at their home. And the Respondents insist that the Complainant has failed to show that Ms. Nadeau acted with reckless disregard for the truth.

Mr. Jaeger was not escorted (accompanied) off the Adams' property by a police officer. The statement in the Nadeau letter is therefore false. However, in order to establish a violation of section 211B.06, the Complainant must show that Ms. Nadeau either knew the statement was false or acted with reckless disregard of whether it was false. The Complainant has put forward no evidence to show that Ms. Nadeau knew this statement was false. Thus, the question is, did Ms. Nadeau act with reckless disregard of its falsity or, as stated in *Jude*, did she act with "actual conscious disregard of the risk created" by her conduct.

Ms. Nadeau drafted the October 17th letter relying on Ms. Peppin's account of what happened at the Adams' home. Complainant's position would impose a duty on a person who prepares or disseminates campaign material to investigate or verify the accuracy of third party information. The case law indicates that, due to First Amendment concerns, no such duty exists.^[61] Ms. Nadeau's conduct in disseminating the false statement may have been negligent, but the Complainant has failed to show by clear and convincing evidence that it was done with reckless disregard of whether it was false. The evidence does not show that Ms. Nadeau had an actual conscious disregard of the risk created. Rather, it appears that she believed Mr. Jaeger was in fact escorted off the Adams' property based on what Ms. Peppin told her.

Moreover, this case can be distinguished from *Bauman v. House Republican Campaign Committee*.^[62] In that case, a staff person with the House Republican Campaign Committee prepared campaign material that was false. All parties agreed that the word "re-elect" used in brochures for four candidates who were not incumbents was false. In addition, because the staff person knew the four candidates were not incumbents, she knew the word "re-elect" was false. Therefore, unlike the case at hand, the Complainant in *Bauman* established that the statement was false and that the person preparing the material knew it was false. However, because the staff person was simply filling in a computer template when creating the brochures and overlooked the word "re-elect" when it came to the four non-incumbent candidates, the question for the panel was whether the person must consciously be aware at the time they prepared

the material that the statement was false. The panel found the statute to be ambiguous and determined that the intent of the statute was to prohibit even those knowingly false statements that are not the result of an intent to deceive, but rather an oversight.

Statement #2: “Unfortunately, he [Arlon Lindner] is taking no responsibility for such actions of his workers and I was led to conclude that he authorizes such activity.”

This statement in Ms. Nadeau’s letter refers to a conversation she had with Arlon Lindner on October 16, 2004, regarding the incident at the Adams’ home. Both parties agree that the conversation took place, but Mr. Lindner denies that Ms. Nadeau specifically identified Mr. Jaeger as the campaign worker involved. Instead, Mr. Lindner testified that he told Ms. Nadeau that he did not believe that any of his staff would engage in harassing behavior and that she should take her concerns directly to whomever she thought was involved. The Complainant urges the panel to find Mr. Lindner’s version of the conversation more credible, and to find that this statement falsely implied that Mr. Lindner ignored complaints from Ms. Nadeau about the behavior of his campaign workers.

When interpreting the prohibition against false statements in a predecessor statute, the Minnesota Supreme Court observed that the statute was “directed against the evil of making false statements of fact and not against criticism of a candidate or unfavorable deductions derived from the candidate’s conduct.”^[63] In that case, *Kennedy v. Voss*,^[64] a candidate used an incumbent’s “no” vote on a county budget vote to imply that the incumbent did not support any of the individual items in that budget. In fact, the incumbent did support a number of the individual items, but voted “no” because the budget included an additional \$18,000 appropriation, which the incumbent opposed. The Minnesota Supreme Court held that inferences based on *fact* (in this case, the incumbent’s “no” vote) did not come within the purview of the statute even if the inferences are “extreme and illogical.” The Court pointed out that the public is protected from such extreme inferences by the candidate’s ability to rebut remarks during the campaign process.

The panel found Ms. Nadeau’s version of the conversation with Mr. Lindner to be more accurate, given her more specific recollection of the conversation. Moreover, the panel concludes that Ms. Nadeau’s statement that Arlon Lindner was not taking responsibility for his workers’ actions and that Ms. Nadeau was led to conclude that he “authorizes such activity,” was an opinion and not a statement of fact. As in *Kennedy v. Voss*, Ms. Nadeau’s inferences and unfavorable deductions based on her conversation with Mr. Lindner do not come within the purview of Minn. Stat. § 211B.06. The Complainant has failed to show by clear and convincing evidence that this statement was false and that Respondents knew it was false or communicated it with reckless disregard of whether it was false. Therefore, the complaint against the Respondents is dismissed in its entirety.

In light of this decision, the panel sees no need to discuss the parties’ arguments regarding Complainant’s request for an award of attorney’s fees.

G.A.B., B.L.N., J.F.C.

^[1] Judge Cannon is a workers' compensation judge, who is appointed to this panel pursuant to Minn. Stat. § 14.48, subd. 3(c).

^[2] T. 126.

^[3] T. 88.

^[4] T. 19.

^[5] T. 35-38.

^[6] T. 34.

^[7] T. 33.

^[8] T. 33, 52.

^[9] T. 39-40, 66.

^[10] T. 40.

^[11] T. 45.

^[12] Ex. 2.

^[13] T. 40, 70.

^[14] T. 40.

^[15] T. 40-41.

^[16] T. 41.

^[17] T. 67.

^[18] T. 67.

^[19] T. 67.

^[20] T. 41-42.

^[21] T. 41-42.

^[22] T. 42, 68.

^[23] T. 42-43.

^[24] T. 42.

^[25] T. 43.

^[26] T. 43.

^[27] T. 43.

^[28] T. 68, 167.

^[29] T. 68.

^[30] T. 68.

^[31] T. 44.

^[32] T. 69.

^[33] T. 74.

^[34] Ex. 2.

^[35] T. 75.

^[36] T. 100.

^[37] T. 100-01.

^[38] T. 100, 129-130.

^[39] T. 131-32.

^[40] T. 132.

^[41] T. 132.

^[42] T. 116-19, 138.

^[43] T. 123-24, 138.

^[44] T. 127-28.

^[45] T. 129.

^[46] Ex. 1 (emphasis added.)

^[47] Ex. 1 (emphasis added.)

^[48] T. 128-29.

^[49] T. 146.

^[50] T. 147-48.

^[51] T. 138.

[52] T. 138-39.

[53] Minn. Stat. § 211B.32, subd. 4.

[54] Minn. Stat. § 211B.32, subd. 4.

[55] Minn. Laws 2004, Ch. 293, Art. 3, Sec. 1.

[56] 554 N.W.2d 750 (Minn. App. 1996).

[57] 376 U.S. 254, 279-80, 84 S.Ct. 710, 726, 11 L.Ed.2d 686 (1964).

[58] 554 N.W.2d at 754, *citing*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347, 115 S.Ct. 1511, 1519, 131 L.Ed.2d 426 (1995).

[59] *In re Graham*, 453 N.W.2d 313, 322 (Minn. 1990) (reckless disregard standard is an objective one dependent on what the reasonable attorney would do in the same or similar circumstances.)

[60] Ex. 2.

[61] *St. Amant v. Thompson*, 390 U.S. 727, 730-31 (1968) (candidate in defamation action could not be found to have acted with reckless disregard simply because he made a false statement based solely on information from a third party without verifying its accuracy); *State of Minnesota v. Rebecca Otto*, Washington County District Court File No. 82-K5-03-5032 (December 12, 2003).

[62] OAH file no. 7-0320-16264-CV (November 19, 2004).

[63] *Kennedy v. Voss*, 304 N.W.2d 299, 300 (Minn. 1981).

[64] 304 N.W.2d 299 (Minn. 1981).