

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Terry Sluss,

Complainant,

vs.

MCCL State PAC and the Senate
Victory Fund,

Respondents.

**FINDINGS OF FACT,
CONCLUSIONS, AND
ORDER**

The above-entitled matter came on for an evidentiary hearing on March 26, 2007, before a panel of three Administrative Law Judges: Beverly Jones Heydinger (Presiding Judge), Bruce H. Johnson and William R. Johnson. The hearing record closed on April 16, 2007, with the filing of the parties' legal memoranda.

Jay Benanav, Attorney at Law, Weinblatt & Gaylord, PLC, 111 East Kellogg Boulevard, Suite 300, St. Paul, MN 55101, represented the Complainant Terry Sluss.

James Bopp, Jr. and Barry A. Bostrom, Attorneys at Law, Bopp, Coleson & Bostrom, 1 South Sixth Street, Terre Haute, IN 47807, and Scott M. Lucas, Attorney at Law, Olson & Lucas, P.A., 7401 Metro Boulevard, Suite 575, Minneapolis, MN 55439, represented Respondent MCCL State PAC. Thomas M. Neuville, Attorney at Law, Grundhoefer, Neuville & Ludescher, P.A., 515 Water Street South, P.O. Box 7, Northfield, MN 55057-0007, represented Respondent Senate Victory Fund.

NOTICE

This is the final decision in this case, as provided in 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 ISSUES

Did Respondents violate Minn. Stat. § 211B.06 by intentionally participating in the preparation or dissemination of false campaign material that Respondents knew was false or communicated to others with reckless disregard as to whether it was false?

The panel concludes that the Complainant has failed to establish by clear and convincing evidence that the Respondents violated Minn. Stat. § 211B.06.

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

FINDINGS OF FACT

1. Terry Sluss is a former Crow Wing County Commissioner (3rd District). He was first elected County Commissioner in 1996 and was re-elected two more times. He finished his final term on December 31, 2006.^[1]

2. Mr. Sluss is also a special education teacher and is currently teaching at a high school in the Brainerd School District. He is licensed to teach children with emotional/behavioral disorders.^[2]

3. In 2006, Mr. Sluss was a candidate for the Minnesota Senate in District 12.^[3] Mr. Sluss identifies himself as “pro-life,” and throughout his campaign he consistently stated that he “supports life from conception to death by natural causes.”^[4]

4. In January 2006, Mr. Sluss proposed that Crow Wing County and other neighboring counties support a bonding project to finance a methamphetamine residential treatment center as part of the Brainerd Regional Treatment Center for pregnant women and women with young children who are addicted to methamphetamine. In an interview with the *Brainerd Dispatch*, Mr. Sluss explained that such a facility was needed in order to protect the unborn children and young children of addicted mothers.^[5]

5. Although his “pro-life” position put him at odds with the DFL Party platform, Mr. Sluss won the DFL Party endorsement for Senate District 12 in April 2006. His opponent in the November general election was Paul Koering, the incumbent Republican candidate.^[6]

6. In an April 3, 2006, article about Mr. Sluss’ endorsement by the DFL Party that appeared in the *Brainerd Dispatch* newspaper, Mr. Sluss identified himself as being “pro-life from conception to death.”^[7]

7. In June and July of 2006, MCCL mailed a “Candidate Questionnaire” to all candidates running for seats in the Minnesota Legislature. The questionnaire contained 36 questions. Each question asked candidates to indicate whether they would support specific “pro-life” legislative proposals. For example, question 2 asked candidates if they would vote for a law that would make abortions illegal, except in cases of “forcible rape” or to prevent the death of the mother. Question 3 asked candidates if they would vote for an amendment to the Minnesota Constitution that would “completely reverse the *Doe v. Gomez* decision, which created an absolute ‘right’ to abortion on demand,” and question 4 asked candidates if they would vote for legislation that would prevent the use of abortion as a means of birth control. The transmittal letter to the candidates explained that the purpose of the questionnaire was to provide citizens accurate information on candidates’ positions regarding “life

issues.” The letter also stated in bold print that endorsement by MCCL “is based on several factors including response to this questionnaire.”^[8]

8. Once MCCL received the completed questionnaires back from the candidates, it compiled the responses on a spreadsheet as part of its voting guide.^[9] If a candidate did not respond to the questionnaire, MCCL staff attempted to reach the candidate by telephone to ascertain whether the candidate intended to respond.^[10] MCCL noted the number of follow-up telephone calls it made to non-responsive candidates and the candidates’ responses, if any, on the spreadsheet.^[11]

9. Laura Gese was the Legislative Associate for MCCL from December of 2002, through October of 2006. In 2006, Ms. Gese oversaw MCCL’s Candidate Questionnaire mailing and coordinated the follow up calls to candidates who did not respond. According to Ms. Gese, the purpose of the questionnaire was to obtain both information and commitments from the candidates on issues important to MCCL.^[12]

10. Mr. Sluss did not fill out or submit a response to the MCCL questionnaire largely because MCCL had already endorsed his opponent, Paul Koering, in the primary and had run advertisements in the local newspapers in support of Koering’s campaign. In addition, Mr. Sluss generally does not fill out surveys for special interest groups because he is sensitive to voters’ concerns about the influence certain lobbying groups have with elected officials. Rather than make commitments to special interest groups to vote a certain way on specific legislation or proposals, Mr. Sluss’ general practice is to listen to all sides on an issue and to not commit until the moment he actually casts his vote. In explaining this practice to a reporter for the *Brainerd Daily Dispatch*, Mr. Sluss stated: “I have always kept an open mind up until voting. I don’t want to be hog-tied.”^[13]

11. Mr. Sluss did fill out 2006 candidate surveys from various environmental groups and labor union groups, including Education Minnesota, AFSME and AFL-CIO. Mr. Sluss responded to these surveys because he feels strongly about labor and environmental issues.^[14]

12. On or about June 20, 2006, an MCCL intern called Mr. Sluss to see if he would be responding to MCCL’s Candidate Questionnaire. Mr. Sluss told the MCCL intern that he was not filling out any PAC surveys because he “does not believe in it.”^[15]

13. Any candidate who refused to respond to the MCCL questionnaire was characterized in MCCL campaign materials as having “refused to commit to any legal protection for innocent unborn babies.” MCCL did not use any other information apart from its questionnaire in determining whether to characterize a candidate as not willing to commit to legal protection for unborn babies.^[16]

14. In October 2006, Jennifer Hoelscher of MCCL worked with Dan Miller of the Senate Victory Fund on a series of mailings for targeted races that addressed candidates' positions on abortion issues. One of the races MCCL targeted was the Senate District 12 race.^[17]

15. The Senate Victory Fund is an organization that works to elect Republican State Senators. In the summer and fall of 2006, Mr. Miller was the political director of the Senate Victory Fund's field staff and the manager of the Fund's campaign efforts for the 2006 election. As part of his duties, Mr. Miller oversaw and directed the efforts of the Fund in certain targeted races, including coordinating the mailings of independent expenditures. Mr. Miller coordinated the mailings of MCCL's campaign material in the Senate District 12 race.^[18]

16. In October 2006, MCCL staff, including Ms. Gese, designed and wrote the content for a campaign postcard that was targeted to voters in Senate District 12.^[19] The postcard compared the positions of candidates Terry Sluss and Paul Koering on "life issues." A scanned copy of the campaign postcard appears below:

Compare the candidates, Senate District 12

Paul Koering

- ★ Supports legal protection for innocent unborn babies.
- ★ Has a 100% pro-life voting record in the Minnesota Senate.
- ★ Co-authored Woman's Right to Know, a common-sense informed consent law.
- ★ Co-authored the Abortion Regulation Act to ban taxpayer funding of abortion.
- ★ Favors a common sense approach to pro-life legislation.

Terry Sluss

- Refused to commit to any legal protection for innocent unborn babies.
- Refused to respond to any question on life issues, including abortion on demand and taxpayer funding of abortion in the 2006 MCCL State Legislative Candidate Questionnaire.

Paul Koering is endorsed by Minnesota Citizens Concerned for Life State PAC.

Vote Paul Koering
Tuesday, November 7th

Prepared by MCCL State PAC, 4249 Nicollet Avenue, Mpls, MN 55409, www.mcclpac.org.
paid for by Senate Victory Fund, 1055 N Dale St, St Paul, MN 55117, in support of Paul Koering.

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17. MCCL was solely responsible for the preparation and content of the postcard. Dan Miller agreed, on behalf of the Senate Victory Fund, to pay for the printing and postage of the campaign postcard. The Senate Victory Fund paid for its dissemination but neither Mr. Miller nor anyone else connected with the Senate Victory Fund reviewed or approved it beforehand.^[20]

18. The Senate Victory Fund paid Wallace Carlson Company directly to print and prepare the mailing, and the Fund paid the postmaster directly for postage to mail out the literature.^[21]

19. A disclaimer at the bottom of the postcard stated that the postcard was prepared by MCCL State PAC, and was paid for by Senate Victory Fund.^[22]

20. On October 29, 2006, Mr. Sluss attended a church service on the sanctity of life and participated in a “Pro-Life Walk” that was organized by the church youth group.^[23]

21. In an article that appeared in the October 29, 2006, edition of the *Brainerd Dispatch*, Mr. Sluss again described himself as being “pro-life from conception to death.” He also stated that he was “inclined to support” legislation calling for a constitutional amendment to eliminate state funding for abortion.^[24]

22. In the same October 29th article, Mr. Sluss explained that he did not fill out the MCCL questionnaire because MCCL had already endorsed his opponent (Koering) and had taken out “big advertisements” for Koering. Mr. Sluss also stated that he often does not fill out surveys for special interest groups, because he keeps an open mind up until voting and because voters have serious concerns about the power of lobbyist groups in St. Paul.^[25]

23. The campaign postcard was mailed to residents of Senate District 12 in early November 2006.

24. MCCL did not research Mr. Sluss’ position or public statements on abortion or “pro-life” issues prior to creating and disseminating the campaign postcard. It based the statement that Mr. Sluss “refused to commit to any legal protection for innocent unborn babies” solely on Mr. Sluss’ decision not to fill out MCCL’s Candidate Questionnaire.^[26]

25. Mr. Sluss received the Respondents’ campaign postcard at his home on or about November 3, 2006.^[27]

26. In the November 7, 2006, general election, Mr. Sluss was defeated by Mr. Koering. Mr. Sluss received 14,260 votes (43%), and Mr. Koering received 18,241 votes (55%).

27. Mr. Sluss received at least one telephone call from a resident of Senate District 12 who said that he voted for Mr. Sluss’ opponent based on the MCCL campaign postcard.^[28]

28. Mr. Sluss filed this complaint with the Office of Administrative Hearings on January 8, 2007.

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

CONCLUSIONS

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

2. Campaign material is defined to mean “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, ...”^[29] The postcard^[30] prepared by MCCL and paid for by the Senate Victory Fund is campaign material within the meaning of that statute.

3. Minn. Stat. § 211B.06, subd. 1, provides, in part: “A person is guilty of a gross misdemeanor who intentionally participates in the preparation, [or] dissemination ... of ... campaign material 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 a public office ..., 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. The standard of proof of a violation of Minn. Stat. § 211B.06, relating to false campaign material, is clear and convincing evidence.^[31]

5. The Complainant has failed to demonstrate that the Respondents violated Minn. Stat. § 211B.06 because the evidence is insufficient to prove that the statement at issue, “[Terry Sluss] refused to commit to any legal protection for innocent unborn babies,” is false and that Respondents knew it was false or subjectively knew that it was probably false.^[32]

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

ORDER

IT IS ORDERED:

1. That the Complaint in this matter is DISMISSED.
2. That the Respondents’ request for attorney’s fees is denied.

Dated: April 19, 2007

/s/ Beverly Jones Heydinger
BEVERLY JONES HEYDINGER
Presiding Administrative Law Judge

/s/ Bruce H. Johnson
BRUCE H. JOHNSON
Administrative Law Judge

/s/ William R. Johnson

WILLIAM R. JOHNSON
Administrative Law Judge

MEMORANDUM

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 intentionally participate in the preparation or dissemination of campaign material that the person knows is false or communicates with reckless disregard of whether it is false.

The term “reckless disregard” was added to the statute in 1998 to expressly incorporate the “actual malice” standard from *New York Times v. Sullivan*.^[33] Based on this standard, the Complainant must show by clear and convincing evidence that the statement is false and that the Respondent either published the statement knowing it was false or published with reckless disregard for its truth or falsity. In *Riley v. Jankowski*,^[34] the Minnesota Court of Appeals interpreted the “reckless disregard” standard stated in Minn. Stat. § 211B.06, subd. 1, as requiring clear and convincing evidence that Respondent made the statement while subjectively believing that the statement was probably false.

As interpreted by the Minnesota Supreme Court, the statute is directed against false statements of fact. It is not intended to prevent criticism of candidates for office or to prevent unfavorable deductions or inferences derived from a candidate’s conduct.^[35] It does not reach criticism that is merely unfair or unjust. It does reach false statements of specific facts.^[36]

The statement at issue in this matter is, “Terry Sluss refused to commit to any legal protection for innocent unborn babies.” The Complainant argues that the statement is false because he has supported “pro-life” legislation and proposals while in public office, and he has consistently stated throughout his campaign that he “supports life from conception to death by natural causes.” The Complainant maintains that he has never refused to commit to legal protection for the unborn during his 10 years as a Crow Wing County Commissioner or while a candidate for Minnesota Senate District 12. Instead, he points out that he proposed measures as a County Commissioner designed to protect the unborn, such as the methamphetamine treatment center, and he stated on the record that he was inclined to support legislation calling for a constitutional amendment eliminating state funding for abortion. Given this background, the Complainant argues that it was unfair of the Respondents to publish the statement at issue based solely on his decision not to fill out MCCL’s Candidate Questionnaire.

Under cross-examination, the Complainant conceded that all of the questions in MCCL’s Candidate Questionnaire asked for “commitments” from candidates to support various “pro-life” related bills and legislation. The Complainant also conceded that it is reasonable for MCCL to ask candidates’ their positions on issues MCCL views as important. The Complainant explained,

however, that he chose not to fill out the questionnaire in part because it is his practice to listen to all sides of an issue and to not make a commitment until it is time to vote. As he stated in an October 2006 interview with the *Brainerd Dispatch*, he likes to keep an open mind on issues and he does not like to be “hog-tied.”^[37] Despite his practice of not wanting to commit to legislation until its time to vote, the Complainant maintains that it was unfair of the Respondents to publish the statement at issue because of his prior support of “pro-life” measures and his public statements.

Based on the record presented, the panel concludes that the statement, “[Terry Sluss] refused to commit to any legal protection for innocent unborn babies,” is not false. The Complainant chose to not fill out MCCL’s questionnaire, which asked for commitments from candidates to support specific pro-life legislation. It is reasonable to characterize his decision not to fill out the questionnaire as a “refusal.” An MCCL intern called the Complainant and asked him whether he was going to respond to the questionnaire and the Complainant replied that he was not going to respond because he does not believe in filling out PAC surveys. Further, because the questionnaire asked for commitments from candidates to support “pro-life” legislative proposals, it is fair to characterize the Complainant’s refusal to respond to the questionnaire as a refusal to commit to legal protection for the unborn. By his own admission, it is the practice of the Complainant to refuse to commit to legislation until it is time to vote. And his statement to a newspaper reporter that he was “inclined to support” certain “pro-life” legislation cannot fairly be characterized as a commitment. Given this, MCCL’s statement that the Complainant refused to commit to legal protection for innocent unborn babies is not false.

By declining to fill out the Candidate Questionnaire, the Complainant chose not to tell MCCL his position on various “pro-life” issues. Yet, he asserts that MCCL should have made an effort to research and find out his position on these issues based on his prior public service and statements made throughout the campaign. The Complainant asserts that his pro-life stance and the efforts he has made to protect the unborn were readily available “through an easy search of the public record.” Based on *Fine v. Bernstein*,^[38] the Complainant maintains that the Respondents’ decision to prepare and disseminate the postcard “without checking easily accessible facts from the public record, demonstrates reckless disregard and actual malice.”^[39]

In *Fine v. Bernstein*,^[40] a panel of Administrative Law Judges found that statements in a Minneapolis Park Board candidate’s flyer were false and that the Respondent knew they were false or communicated them with reckless disregard as to whether they were false. In particular, the panel found the statement that the Complainant did not support more funding for the removal of diseased trees to be a false statement of fact. The record established that the Complainant did support increased funding in 2004 and 2005. These were verifiable facts in the Park Board records and the Respondent testified that he had reviewed the Park Board records before preparing and disseminating the flyer. The OAH panel concluded that the statement was factually false and that the Respondent knew it

was false. The Court of Appeals agreed that the statement was an assertion of fact that the Respondent knew was false.

Unlike *Fine*, the Complainant in this matter has failed to show by clear and convincing evidence that the statement at issue is false. Instead, the record established that the Complainant did refuse MCCL's request to commit to legal protection for the unborn. And the Complainant stated that it is his general practice not to commit to any proposals or legislation prior to voting. The fact that the Complainant has consistently identified himself as "pro-life" and has advocated in the past for measures to protect the unborn does not render the statement a false factual assertion. In addition, contrary to the Complainant's claim, the reckless disregard standard under Minnesota Statutes § 211B.06 does not obligate the Respondents to investigate or research the Complainant's position prior to publishing.^[41] The Respondents are only prohibited from intentionally preparing or disseminating false campaign material. However, because the panel finds that the statement at issue is not false, it is not necessary to analyze whether the Respondents published the statement with knowledge or "reckless disregard" of the statement's falsity.

In general, the Complainant seems to be arguing that the statement at issue is unfair because it is based solely on his decision not to respond to the questionnaire and it does not credit his pro-life position or public statements.

The panel agrees that the Respondents' characterization of the Complainant's position is unfair and misleading, but unfair and misleading statements are not prohibited by the Fair Campaign Practices Act. Minn. Stat. § 211B.06 is directed against factually false statements; not unfavorable deductions or inferences derived from a candidate's conduct.^[42] Minnesota's appellate courts have repeatedly held that the statute is not broad enough to prohibit incomplete and unfair campaign statements, even those that are clearly misleading.^[43] Instead, prohibited statements must be proven to be factually false by clear and convincing evidence. The statement at issue in this matter may be unfair and misleading, but it is not false.

To this point, the Minnesota Supreme Court's discussion in *Kennedy v. Voss*,^[44] is instructive. In that case, an incumbent County Commissioner complained that his opponent disseminated literature which unfairly characterized his support for programs serving the elderly. The challenger, citing the incumbent Commissioner's vote against the entire County Budget, which included funding for programs serving the elderly as well as many other appropriations, asserted that the incumbent "is not a supporter of programs for the elderly."^[45] The incumbent maintained that there were other votes, not cited in the challenger's literature, which made the incumbent's support of the referenced programs clear. 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."^[46] The Court pointed out that the public is protected from such extreme inferences by the campaign process itself.^[47]

This case is similar. Although the Complainant had little opportunity to respond directly to the Respondents' postcard, there were numerous opportunities throughout the campaign for him to communicate his "pro-life" views. It was for the voters of Senate District 12 to decide whether the Respondents' characterization of the Complainant's position was fair. Because the statement is not false, the Complainant has failed to establish by clear and convincing evidence that the Respondents violated Minn. Stat. § 211B.06. The Complaint is therefore dismissed.

The Respondents have brought a motion for attorneys' fees. Pursuant to Minn. Stat. § 211B.36, subd. 3, the assigned panel may order a Complainant to pay the Respondents' reasonable attorney's fees and costs of the Office of Administrative Hearings if the judge or panel determines the complaint was frivolous. A frivolous claim is one that is without any reasonable basis in law or equity and could not be supported by a good faith argument for a modification or reversal of existing law.^[48] Here the complaint was found to state a prima facie violation of Minn. Stat. § 211B.06. The fact that the Complainant was not able to meet his burden of proving the case by clear and convincing evidence does not render his complaint frivolous. Therefore, Respondents' request for attorney's fees is denied.

B.J.H., B.H.J., W.R.J.

^[1] Testimony of Sluss.

^[2] *Id.*

^[3] Minnesota Senate District 12 is in central Minnesota and includes portions of Morrison and Crow Wing counties, as well as the cities of Little Falls and Brainerd.

^[4] Testimony of Sluss, Keeton and Leiser; Ex. 6.

^[5] Testimony of Sluss; Ex. 13.

^[6] Testimony of Sluss and Leiser.

^[7] Ex. 2.

^[8] Testimony of Gese; Exs. 35 and 37.

^[9] Ex. 37.

^[10] Testimony of Gese.

^[11] Ex. 37.

^[12] Testimony of Gese.

^[13] Testimony of Sluss; Ex. 3.

^[14] Testimony of Sluss.

^[15] Testimony of Gese; Ex. 37.

^[16] Ex. 20 at ¶ 8.

^[17] Ex. 70 at ¶ 4; Ex. 71 at ¶ 4.

^[18] Ex. 70 at ¶¶ 3 and 4.

^[19] Ex. 1.

^[20] Ex. 70 at ¶¶ 4 and 5.

^[21] Ex. 70 at ¶ 8.

^[22] Ex. 1.

^[23] Testimony of Sluss; Ex. 5.

^[24] Ex. 3; Testimony of Sluss.

^[25] Ex. 3.

^[26] Testimony of Gese.

[27] Testimony of Sluss.

[28] *Id.*

[29] Minn. Stat. § 211B.01, subd. 2.

[30] Ex. 1.

[31] Minn. Stat. § 211B.32, subd. 4.

[32] See, *Riley v. Jankowski*, 713 N.W.2d 379 (Minn. App. 2006), *rev. denied* (Minn. July 19, 2006).

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

[34] 713 N.W.2d 379 (Minn. Ct. App. 2006), *review denied* (Minn. July 19, 2006).

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

[36] *Hawley v. Wallace*, 137 Minn. 183, 186, 163 N.W. 127, 128 (1917); *Bank v. Egan*, 240 Minn. 192, 194, 60 N.W.2d 257, 259 (1953); *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language).

[37] Ex. 3.

[38] 726 N.W.2d 137 (Minn. App. 2007); OAH File No. 12-6326-16910-CV (Order Nov. 7. 2005).

[39] Complainant's Post-Hearing Memorandum at 12. The Complainant also cites to the decision in *Johnson v. Levitz, et al*, OAH File No. 22-6381-16304-CV (Order Feb. 18, 2005), which held that a Respondent's failure to ascertain accurate information before publishing a campaign flyer evidenced reckless disregard for the truth. Because the panel in this case finds that the statement is not false, it does not have to reach the issue of whether it was disseminated with reckless disregard.

[40] 726 N.W.2d 137 (Minn. App. 2007); OAH File No. 12-6326-16910-CV (Order Nov. 7. 2005).

[41] See, *St. Amant v. Thompson*, 390 U.S. 727, 729 (1968).

[42] *Kennedy v. Voss*, *supra* note 35.

[43] See, *Bundlie v. Christensen*, 276 N.W.2d at 71.

[44] *Kennedy v. Voss*, *supra* note 35.

[45] *Id.* at 300.

[46] *Id.*

[47] *Id.*

[48] *Maddox v. Department of Human Services*, 400 N.W.2d 136, 139 (Minn. App. 1987).