

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

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| <p>Brian Melendez, Complainant, vs. Minnesotans for Employee Freedom, Employee Freedom Action Committee, King Banaian, Brian Worth, Mike Murphy, and Coalition for a Democratic Workplace, Respondents.</p> | <p>ORDER OF DISMISSAL</p> |
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The above-entitled consolidated matters came on for a probable cause hearing as provided by Minn. Stat. § 211B.34, before Administrative Law Judge Barbara L. Neilson at 1:00 p.m. and 3:00 p.m. on August 8, 2008, to consider complaints filed by Brian Melendez on August 1, 2008. The hearing was held by telephone conference call. The record closed on August 11, 2008, upon receipt of Respondents' post-hearing submission.

Alan W. Weinblatt, Attorney at Law, Weinblatt & Gaylord, PLC, appeared on behalf of Complainant Brian Melendez. Sam Hanson and Neal T. Buehe, Attorneys at Law, Briggs and Morgan, and Jan Witold Baran, Thomas W. Kirby, and Caleb P. Burns, Attorneys at Law, Wiley Rein, LLP, Admitted Pro Hac Vice, appeared for Respondents Employee Freedom Action Committee, Minnesotans for Employee Freedom, and the Coalition for a Democratic Workplace. There was no appearance by or on behalf of Respondents King Banaian, Brian Worth, or Mike Murphy.

Based on the record in this matter and for the reasons set out in the attached Memorandum, the Administrative Law Judge concludes that there is no probable cause to believe that Respondents violated Minn. Stat. § 211B.06.

ORDER

IT IS ORDERED:

That there is no probable cause to believe that Respondents violated Minn. Stat. § 211B.06 as alleged in the Complaints, and therefore the Complaints are DISMISSED.

Dated: August 18, 2008

/s/ Barbara L. Neilson
BARBARA L. NEILSON
Administrative Law Judge

Digitally recorded; no transcript prepared.

NOTICE OF RECONSIDERATION RIGHTS

Minnesota Statutes § 211B.34, subdivision 3, provides that the Complainant has the right to seek reconsideration of this decision on the record by the Chief Administrative Law Judge. A petition for reconsideration must be filed with the Office of Administrative Hearings within two business days after this dismissal.

If the Chief Administrative Law Judge determines that the assigned Administrative Law Judge made a clear error of law and grants the petition, the Chief Administrative Law Judge will schedule the complaint for an evidentiary hearing under Minnesota Statutes § 211B.35 within five business days after granting the petition.

MEMORANDUM

The Complaints in this matter concern the 2008 Minnesota U.S. Senate race. Complainant is the chair of the Minnesota Democratic-Farmer Labor Party (DFL). The Complaints allege that a television advertisement developed by Respondents Mike Murphy and Brian Worth, on behalf of the Coalition for a Democratic Workplace, and a newspaper advertisement produced and distributed by the Employee Freedom Action Committee, Minnesotans for Employee Freedom, and King Banaian contain false campaign material with respect to candidate Al Franken. The advertisements are directed at Mr. Franken's support of proposed federal legislation known as the Employee Free Choice Act (EFCA).

The Complaints were first filed on July 24, 2008. Administrative Law Judge Barbara Neilson dismissed the Complaints without prejudice on July 29, 2008, for failure to allege sufficient factual bases to support finding a violation of Minn. Stat. § 211B.06. Complainant filed the revised Complaints on August 1, 2008.

In an Order dated August 6, 2008, the ALJ found the Complainant had alleged prima facie violations of Minn. Stat. § 211B.06 as against Minnesotans for Employee Freedom, Employee Freedom Action Committee, and King Banaian with respect to the newspaper advertisement. In a separate Order also dated August 6, 2008, the ALJ found the Complainant had alleged a prima facie violation of Minn. Stat. § 211B.06 as against Brian Worth, Mike Murphy and the Coalition for a Democratic Workplace with respect to the television advertisement. The ALJ, however, dismissed the Complaint against Rhonda Bentz, Noah Rouen and Vincent Curatola for failure to allege any facts to support a claim that these persons participated in the preparation or dissemination of the ad, and/or that they knew or entertained serious doubts about the truthfulness of the statements made in the advertisement.

A probable cause hearing was held by telephone conference call on August 8, 2008. At the hearing, the parties agreed to consolidate the two Complaints because they concern the same Complainant, subject matter and alleged violations. By Order dated August 12, 2008, the Chief Administrative Law Judge directed the two Complaints be joined for disposition pursuant to Minn. Stat. § 211B.33, subd. 4.

Dismissal of Respondents King Banaian, Mike Murphy and Brian Worth

Chapter 211B requires that Complaints be filed on a form prescribed by the Office of Administrative Hearings.¹ The form requires the Complainant to provide the name and address of each Respondent. The Office is then required by statute to “immediately notify the respondent and provide the respondent with a copy of the complaint by the most expeditious means available.”² Typically, the Office mails a copy of the Complaint by U.S. mail. If the Complainant provides a fax number for a Respondent, the Office will send a copy of the Complaint via fax to the Respondent. Formal service of the complaint is not required.

In each Complaint in this matter, the Complainant listed only one address for the named Respondents. In the Complaint filed against Brian Worth, Rhonda Bentz, Noah Rouen, Mike Murphy, Vincent Curatola and the Coalition for a Democratic Workplace, the Complainant listed only the Coalition’s business address as the address for all of the Respondents. As noted above, Ms. Bentz, Mr. Rouen, and Mr. Curatola were dismissed at the prima facie stage. Neither Mr. Murphy, who allegedly designed the television ad and is a principal with a media-relations firm called “Navigators,” nor Brian Worth, who may work in some capacity for the Coalition, appeared for the probable cause hearing. Neither acknowledged receipt of the Complaint and no Notice of Appearance was filed on behalf of either of them. Likewise, in the Complaint filed against Minnesotans for Employee Freedom, Employee Freedom Action Committee, and King Banaian, the Respondent listed only the P.O. Box of Minnesotans for Employee Freedom as the address for all of the Respondents. Although the P.O. Box listed on the Complaint form was the same as the one printed in the newspaper advertisement, the Complaint and Notice of Hearing were returned to the Office of Administrative Hearings as undeliverable. Despite this fact, Minnesotans for Employee Freedom and the Employee Freedom Action Committed did appear and participate in the telephone probable cause hearing and were represented by counsel.³ King Banaian, however, who is a professor of economics at St. Cloud State University, did not appear at the probable cause hearing. He did not acknowledge receipt of the Complaint, and a Notice of Appearance form was not filed on his behalf.

At the probable cause hearing, Complainant moved for entry of default judgments against Respondents Murphy, Worth and Banaian for their failure to appear by telephone at the probable cause hearings. The Administrative Law Judge denied the motion because it could not be determined that Mssrs. Murphy, Worth or Banaian received notice of the Complaint. A fundamental tenet of procedural due process is adequate notice.⁴ Although U.S. mail is sufficient to give notice of a complaint under Chapter 211B, the document must be mailed to the correct address.⁵ In these

¹ Minn. Stat. § 211B.32, subd. 3.

² Minn. Stat. § 211B.32, subd. 6.

³ When questioned by the ALJ, counsel for Minnesotans for Employee Freedom and Employee Freedom Action Committee were unable to explain how their clients received notice of the complaint and hearing.

⁴ *Goldberg v. Kelly*, 397 U.S. 254, 268-69, 90 S.Ct. 1011, 1020, 25 L.Ed.2d 287 (1970).

⁵ *Walker v. City of Hutchinson*, 352 U.S. 112, 116, 77 S.Ct. 200, 202, 1 L.Ed.2d 178 (1956); *Kelley v. Moe*, 387 N.W.2d 664, 668 (Minn. App. 1986).

proceedings, it appears that the Complaint and Notice of Probable Cause Hearing were not mailed to the correct address for Respondents Murphy, Worth and Banaian. Because it appears that these Respondents were not provided adequate notice, the ALJ dismissed all three Respondents without prejudice. The ALJ ruled at the probable cause hearing that the Complainant may refile the Complaint against them if he provides the Office of Administrative Hearings with a proper address at which they can be provided a copy of the complaint.

Background

The two challenged advertisements concern a bill to amend the National Labor Relations Act (NLRA), which is pending before Congress. The bill, H.R. 800, is named the “Employee Free Choice Act” (EFCA). Al Franken supports the EFCA,⁶ and he states on his website, www.alfranken.com, that he would vote for or co-sponsor the EFCA if elected to the U.S. Senate.⁷

Under current law, workers or their employers may inform the National Labor Relations Board (NLRB or Board) that a labor union wishes to represent the workers in a proposed bargaining unit.⁸ If the NLRB determines that the proposed unit is appropriate and that “a question of representation exists, it shall direct an election by secret ballot and certify the results thereof.”⁹ Section 159(c) of the NLRA provides specifically:

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board –

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not

⁶ Testimony of Matthew Fuehrmeyer (Al Franken’s Campaign Research Director).

⁷ [Http://www.alfranken.com/pages/workers](http://www.alfranken.com/pages/workers) (last accessed August 15, 2008).

⁸ 29 U.S.C. § 159(c)(1).

⁹ *Id.*

make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

Thus, employees currently have the right to decide “a question of representation” by “an election by secret ballot.”¹⁰

The EFCA would amend existing law to provide that, if a union submits representation cards signed by a majority of unit employees, “the Board shall not direct an election, but shall certify” the union.¹¹ Section 2 of the EFCA, entitled “Streamlining Union Certification,” provides specifically:

(a) IN GENERAL – Section 9(c) of the National Labor Relations Act (29 U.S.C. 159(c) is amended by adding at the end of the following:

(6) Notwithstanding any other provision of this section, whenever a petition shall have been filed by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a majority of employees in a unit appropriate for the purposes of collective bargaining wish to be represented by an individual or labor organization for such purposes, the Board shall investigate the petition. If the Board finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative and that no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit, the Board shall not direct an election but shall certify the individual or labor organization as the representative described in subsection (a).

Thus, if 50 percent plus one of the bargaining unit employees sign authorization cards asking for recognition of their union, and the NLRB verifies their validity, the union will be certified and recognized without an election by secret ballot.

Legal Analysis

Complainant alleges the advertisements at issue are false because Mr. Franken has never said he wants to eliminate the secret ballot for workers or end worker privacy. In addition, the Complainant asserts that the advertisements intentionally misrepresent the EFCA and Mr. Franken’s support of it. According to the Complaint, the EFCA does not eliminate the right to a secret ballot. Rather, it provides a process for “streamlining union certification” where a majority of workers sign union authorization cards. According to the Complainant, the election process would remain available as an option if, for example, 30 percent of the bargaining unit signed cards or a petition asking for an

¹⁰ *Id.*

¹¹ EFCA § 2(a).

NLRB election.¹² Therefore, the Complaint claims that the statements in the ad that Al Franken (by supporting the EFCA) wants to eliminate the secret ballot for workers and end worker privacy are false, and that the Respondents knew the statements were false or communicated them with reckless disregard of whether they were false.

The purpose of a probable cause hearing is to determine whether there are sufficient facts in the record to believe that a violation of law has occurred as alleged in the complaint.¹³ The Office of Administrative Hearings looks to the standards governing probable cause determinations under Minn. R. Crim. P. 11.03 and by the Minnesota Supreme Court in *State v. Florence*.¹⁴ The purpose of a probable cause determination is to answer the question whether, given the facts disclosed by the record, it is fair and reasonable to require the respondent to go to hearing on the merits.¹⁵

Minn. Stat. § 211B.06, subd. 1, prohibits intentional participation:

... [i]n 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.

The two challenged advertisements are paid political advertising and meet the statutory definition of “campaign material.”¹⁶

To be found to have violated section 211B.06, two requirements must be met: (1) a person must intentionally participate in the preparation or dissemination of false campaign material; and (2) the person preparing or disseminating the material must know that the item is false, or act with reckless disregard as to whether it is 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.¹⁷ It does not reach criticism that is merely unfair or unjust. It does reach false statements

¹² See Report, 110-23 of the U.S. House of Representatives Committee on Education and Labor, dated February 16, 2007, (Library of Congress version supplied by Complainant) (hereinafter “EFCA House Committee Report”) at 20.

¹³ Minn. Stat. § 211B.34, subd. 2.

¹⁴ 239 N.W.2d 892 (Minn. 1976); see also Black’s Law Dictionary 1219 (7th ed. 1999) (defining “probable cause” as “[a] reasonable ground to suspect that a person has committed or is committing a crime.”)

¹⁵ *Id.*, 239 N.W.2d at 902.

¹⁶ Minn. Stat. § 211B.01, subd. 2. (“Campaign material” is defined in part as “any literature, publication or material that is disseminated for the purpose of influencing voting at a primary or other election.”)

¹⁷ *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981).

of specific facts.¹⁸ In addition, expressions of opinion, rhetoric, and figurative language are generally protected speech if, in context, the reader would understand that the statement is not a representation of fact.¹⁹

The term “reckless disregard” was added to the statute in 1998 to expressly incorporate the “actual malice” standard applicable to defamation cases involving public officials from *New York Times v. Sullivan*.²⁰ Based upon this standard, the Complainant has the burden at the hearing to prove by clear and convincing evidence that the Respondents either published the statements knowing the statements were false, or that they “in fact entertained serious doubts” as to the truth of the publication or acted “with a high degree of awareness” of its probable falsity.²¹ In addition, the burden of proving the falsity of a factual statement cannot be met by showing only that the statement is not literally true in every detail. If the statement is true in substance, inaccuracies of expression or detail are immaterial.²²

As discussed more fully below, the Administrative Law Judge concludes, after considering all of the evidence in the record and the arguments of the parties at the probable cause hearing, that the Complainant has failed to present sufficient facts to support finding probable cause that Respondents violated Minn. Stat. § 211B.06.

The Newspaper Advertisement

The text of the Minnesotans for Employee Freedom newspaper advertisement is as follows:

Al Franken wants to be elected using a private ballot vote. Incredibly, he supports a federal bill that would force Minnesota’s workers into labor unions by eliminating their right to the same private ballot vote.

Hard to believe? Tell Al Franken to support democracy at: EmployeeFreedom.org.

The Complainant asserts that the following statement in the newspaper advertisement is false: “Al Franken...supports a federal bill that would force Minnesota’s workers into labor unions by eliminating their right to [a] private ballot vote.”

¹⁸ *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).

¹⁹ *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986), citing *Old Dominion Branch No. 496, National Assoc. of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974); *Greenbelt Coop. Publishing Assoc. v. Bresler*, 398 U.S. 6, 13-14 (1970). See also *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990); *Diesen v. Hessburg*, 455 N.W.2d 446, 451 (Minn. 1990); *Hunter v. Hartman*, 545 N.W.2d 699, 706 (Minn. App. 1996);

²⁰ *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

²¹ See *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, 401 (Minn. App. 2006), rev. denied (Minn. July 20, 2006).

²² *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986).

It is true that Al Franken supports the EFCA.²³ The question is, whether the statement that the bill “would force Minnesota’s workers into labor unions by eliminating their right to a private ballot vote” is a false statement. As discussed, under current law workers or their employers may notify the NLRB that a labor union wishes to represent the workers in a proposed bargaining unit. The NLRB can then direct an election by secret ballot.²⁴ The EFCA would amend existing law to provide that, if a union submits representation cards signed by a majority of unit employees, the NLRB would certify the union without an election.²⁵ Thus, in the circumstance where a majority of employees sign representation cards, the private ballot vote will be eliminated.

Complainant argues that H.R. 800 was not drafted with the intent to eliminate NLRB elections. As evidence he points to Report 110-23 of the House of Representatives’ Committee on Education and Labor, dated February 16, 2007, in which the Committee explains that EFCA § 2(a) amends § 159(c) of the NLRA to “provide for a majority sign-up certification process for gaining union recognition.”²⁶ In its explanation of § 2(a) the Committee states:

Section 2(a) eliminates the employer’s prerogative to deny recognition on the basis of a majority sign-up with cards and eliminates the employer’s right to insist upon an NLRB election before recognizing a union. This Section does not eliminate the NLRB election process, which remains an option for employees as it is under current law. However, employees, individuals, or labor organizations may submit signed authorization cards to the NLRB, as part of a petition for certification, and gain recognition without undergoing the NLRB election process. Indeed, if a majority sign and submit valid authorization cards to the NLRB, notwithstanding any other provision in the NLRA, the NLRB must certify the union.²⁷

The Complainant contends that the EFCA simply proposes an alternative process for unionization in addition to the NLRB election process. The Complainant emphasizes that an editorial piece by union officials that ran in the *St. Paul Pioneer Press*, and an investigative report by a WCCO television reporter have suggested that it is false to claim that the EFCA would eliminate the right to a private ballot vote.²⁸

Respondents point out that according to the Minority Views portion of the Committee Report, the EFCA “Strips Workers of the Right to Private Ballot Elections.”²⁹ The minority Report explains that the EFCA “provides that if a union presents a majority of signed union authorization cards to the Board, the union must be certified, and the

²³ Testimony of Matthew Fuehrmeyer (Al Franken’s Campaign Research Director).

²⁴ 29 U.S.C. § 159(c)(1).

²⁵ EFCA § 2(a).

²⁶ EFCA House Committee Report at 22.

²⁷ *Id.*

²⁸ See, “Employee Free Choice Act Isn’t Misleading, But Sen. Coleman’s Argument Is,” Brad Slawson Jr. and Ray Waldron, *St. Paul Pioneer Press*, June 7, 2007; “Reality Check: New Ad On Unions Organizing Workers,” Pat Kessler, WCCO-TV. (Complainant’s Exs. D and E.)

²⁹ EFCA House Committee Report at 31.

right of employees to a private ballot election is immediately and absolutely extinguished.”³⁰ In addition to the minority House Report, Respondents provide evidence that certain newspaper columnists, editorial boards, and political commentators have recognized that the EFCA will eliminate a worker’s right to vote by secret ballot whether to support unionization in the event a union submits representation cards from a majority of bargaining unit employees.³¹ In an editorial published in the *Wall Street Journal* on August 8, 2008, former Senator George McGovern expressed his opposition to the EFCA explaining that, as a longtime friend of labor unions, he is opposed to the bill’s key provision that “strips working Americans of the right to a secret ballot election ...”³²

After reviewing the EFCA and how it will amend current law governing union organizing, the ALJ concludes that the record does not support finding probable cause that a violation of Minn. Stat. § 211B.06 has occurred. The statement “Al Franken...supports a federal bill that would force Minnesota’s workers into labor unions by eliminating their right to [a] private ballot vote” is not a false statement that is actionable under Minn. Stat. § 211B.06. Al Franken supports the EFCA and the EFCA will eliminate the private ballot vote in certain circumstances. Like the situation involved in *Kennedy v. Voss*,³³ the statement is an unfavorable deduction derived from a candidate’s conduct – in this case, Mr. Franken’s public support of the EFCA. While the statement may be misleading by not explaining that workers will still be able to vote secretly in other circumstances, it is not factually false. As such, it does not come within the purview of Section 211B.06. Moreover, there is no requirement that campaign material be thorough or complete. 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.³⁴

The Television Advertisement

Complainant also challenges certain statements included in the television advertisement. The script of the Coalition for a Democratic Workplace video advertisement is as follows:

Announcer: “Norm Coleman says keep the secret ballot for union organizing elections.”

Boss: “Guy’s a hero. I hate heroes.”

³⁰ *Id.*

³¹ See Respondents’ Response to Amended Complaints, pp. 5-7 and Exhibit C, citing *inter alia*, Lawrence Lindsey, “Card Check Caveat,” *Washington Post* (Jan. 24, 2008); *Wall Street Journal* editorial, Mar. 1, 2007; *Los Angeles Times* editorial Mar. 1, 2007; George Will, “An Assault on Corporate Speech,” *Washington Post*, Feb. 27, 2007; Tresa Baldas, “Bill Would Radically Alter Union Organizing,” *National Law Journal*, Feb. 26, 2007.

³² George McGovern, “My Party Should Respect Secret Union Ballots,” *Wall Street Journal*, August 8, 2008 (part of Respondents’ Exhibit C).

³³ 304 N.W.2d 299 (Minn. 1981).

³⁴ See, *Bundlie v. Christensen*, 276 N.W.2d at 71.

Announcer: "Al Franken, well, he sees it differently. Franken says eliminate the secret ballot for workers."

Boss: "My pal Al."

Announcer: "Call Al Franken. Tell him he's wrong to end worker privacy."

The Complaint contends that two statements in the television ad are false. The statements are: "Franken says eliminate the secret ballot for workers," and "Tell [Franken] he's wrong to end worker privacy." The Complainant is not challenging the statements based on a claim that Mr. Franken never spoke those precise words. Rather he argues that the statements intentionally misrepresent the purpose of the EFCA by falsely asserting that Al Franken wants to eliminate the secret ballot for workers and end "worker privacy."

As with the newspaper advertisement, the ALJ concludes that there are insufficient facts in the record to support probable cause that a violation of Section 211B.06 has occurred. The statement that Mr. Franken wants to eliminate the secret ballot is not factually false, since the EFCA will eliminate the secret ballot vote for union organizing elections where a majority of employees sign union authorization cards. Because Mr. Franken supports the EFCA, the statement, "Franken says eliminate the secret ballot for workers," is not false. It may be misleading and it certainly is incomplete, but it is not false within the meaning of § 211B.06. Similarly, the second statement is not factually false. Because the EFCA will eliminate private ballot elections in certain circumstances, it is not untruthful to characterize the bill's effect as "end[ing] worker privacy." Section 211B.06 does not regulate unfavorable deductions, inferences, unfair characterizations or misleading remarks.³⁵ As with the first statement, this statement is not "false" under the statute.

No Evidence Statements Were Communicated With Reckless Disregard of Falsity

Even if the statements in the newspaper and television advertisements were false, the Complaints would fail because Complainant put forward no evidence supporting a determination that there is probable cause to believe that the statements were made with knowledge that they were false, or with reckless disregard as to whether the statements were false.³⁶ "Reckless disregard" does not mean recklessness in the ordinary sense of extreme negligence. Rather it means the statement must be made with the subjective belief that it is probably false.³⁷ Section 211B.06 requires a complainant to allege facts showing that the respondent "in fact entertained serious doubts as to the truth of the publication or acted with a high degree of awareness of its probable falsity."³⁸

³⁵ *Sluss v. MCCL State PAC*, OAH Docket No. 15-0320-17790-CV (Apr. 19, 2007).

³⁶ Minn. Stat. § 211B.06; *New York Times*, 376 U.S. at 279-80 (1964).

³⁷ *Riley v. Jankowski*, 713 N.W.2d 379, 401 (Minn. App. 2006), *rev. denied* (Minn. July 20, 2006).

³⁸ *See 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, 401 (Minn. App. 2006), *rev. denied* (Minn. July 20, 2006).

The burden is on the Complainant to put forward some evidence at the probable cause stage that the Respondents knew the statements in the advertisements were false or that they communicated the statements while subjectively believing they were probably false. There is nothing in the record to support such a finding. Instead, the evidence in the record demonstrates that the effect of the bill is of great (and highly partisan) debate. Many editorial boards, political commentators, and the House Minority Report have drawn the same conclusion as the Respondents regarding the bill's effect. The Complainant's assertion in the Complaints that the Respondents "have the background, education, training and experience [to] show clearly and convincingly that [they] knew the statements were false or were made with reckless disregard for whether they were false," is factually insufficient to support a finding of probable cause.

Accordingly, the consolidated complaints are dismissed. Given this disposition, it not necessary to address the Respondents' further arguments that Minn. Stat. § 211B.06 is unconstitutional on its face or as applied,³⁹ and that it is preempted by federal law when applied to advertising regarding federal candidates.⁴⁰

Respondents' Request for Attorneys' Fees and Expenses

The Respondents have requested an award of their fees and expenses under Minn. Stat. § 211B.36(3). This statute allows the assigned Administrative Law Judge to order a complainant to pay the respondent's reasonable attorney's fees and costs of the Office of Administrative Hearings as a sanction if the judge 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.⁴¹ Minnesota Rules of General Practice 9.06(b)(3) defines "frivolous litigant" to include:

A person who institutes and maintains a claim that is not well grounded in fact and not warranted by existing law ... or that is interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigating the claim.

The Complaints in this matter, while insufficient to support findings of probable cause, had a reasonable basis in law and cannot be found to be frivolous.⁴² Moreover,

³⁹ Administrative Law Judges have authority to consider whether a statute is unconstitutional as applied. However, as a general rule, neither an Administrative Law Judge nor the head of an Executive Branch agency may declare a statute or rule "facially unconstitutional." The power to declare a law unconstitutional in all settings is vested with the judicial branch of state government. See, *Neeland v. Clearwater Memorial Hosp.*, 257 N.W.2d 366, 368 (Minn. 1977); *In the Matter of Rochester Ambulance Serv.*, 500 N.W.2d 495, 499-500 (Minn. App. 1993).

⁴⁰ In *State v. Jude*, 554 N.W.2d 750 (Minn. App. 1996), the Minnesota Court of Appeals held that the Minnesota Fair Campaign Practices Act is not preempted by federal law.

⁴¹ *Maddox v. Department of Human Services*, 400 N.W.2d 136, 139 (Minn. App. 1987).

⁴² *Block v. Target Stores, Inc.*, 458 N.W.2d 705, 713 (Minn. App. 1990), *review denied* (Minn. September 28, 1990) (complaint must be entirely unfounded before it is proper to award attorney fees based upon making a frivolous or bad faith claim.)

there is no evidence that the Complainant instituted the Complaints for improper purposes. Respondents' request for fees and expenses is denied.

B. L. N.