

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Cullen Sheehan, Campaign Manager,
Coleman for Senate,

Complainant,

vs.

Al Franken,

Respondent.

NOTICE OF DETERMINATION OF
PRIMA FACIE VIOLATION;

AND

NOTICE OF AND ORDER FOR
PROBABLE CAUSE HEARING

TO: Cullen Sheehan (Complainant), 680 Transfer Road, St. Paul, MN 55114; and David L. Lillehaug and Christopher A. Stafford, Fredrikson & Byron, P.A., 200 South Sixth Street, Suite 4000, Minneapolis, MN 55402-1425 (for Respondent Al Franken):

On October 30, 2008, Cullen Sheehan, Campaign Manager, Coleman for Senate, filed a Complaint with the Office of Administrative Hearings alleging the Respondent violated Minnesota Statutes § 211B.06 by preparing and disseminating false campaign material. After reviewing the Complaint and attached documents, the undersigned Administrative Law Judge has determined that the Complaint sets forth a *prima facie* violation of § 211B.06 with respect to one of the allegations made in the Complaint.

THEREFORE, IT IS ORDERED AND NOTICE IS GIVEN that this matter is scheduled for a probable cause hearing to be held by telephone before the undersigned Administrative Law Judge at **3:00 p.m. on Wednesday, November 5, 2008**. The hearing will be held by call-in telephone conference. You must call: **1-800-369-2180** at that time. Follow the directions and enter the code "**20021**" when asked for the meeting number. The probable cause hearing will be conducted pursuant to Minn. Stat. § 211B.34. Information about the probable cause proceedings and copies of state statutes may be found online at www.oah.state.mn.us and www.revisor.leg.state.mn.us.

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

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

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

Dated: November 3, 2008

/s/ Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge
651-361-7845

MEMORANDUM

The Complaint concerns the 2008 Minnesota U.S. Senate race. The Complaint alleges that Al Franken knowingly authorized and broadcast on television and radio false political advertising designed to injure or defeat the candidacy of Senator Norm Coleman. Transcripts of the advertisements were attached to the Complaint. The television advertisement at issue stated that Senator Coleman is “[r]anked the 4th most corrupt senator in Washington” by a “bipartisan watchdog group.” It also stated that Senator Coleman is “[l]iving almost rent free in the million dollar home of a Washington insider.” The radio advertisement similarly stated that “a bipartisan watchdog group has named Norm Coleman the fourth most corrupt Senator in America” and asserted that Senator Coleman is “living almost rent free in a million dollar home of a Washington insider connected to powerful lobbyists.”

The Complaint maintains that both of these statements are false. It asserts that the statements made in both advertisements are based on material found on a website (www.crewsmostcorrupt.org) operated by Citizens for Responsibility and Ethics in Washington (CREW). The Complaint alleges that the statement in the advertisements that Senator Coleman is included on CREW’s list of the “20 Most Corrupt Members of Congress” is false because he is not, in fact, included among the twenty members of Congress listed on CREW’s website. Instead, CREW identified Senator Coleman along with three Representatives on its list of “Dishonorable Mentions.”¹ All told, there are three senators identified on CREW’s list of the “20 Most Corrupt Members of Congress,” and one senator (Coleman) identified on CREW’s list of “Dishonorable Mentions.”

The Complainant further contends that CREW is a left-wing organization and not a “bipartisan watchdog group” as claimed in the advertisements. In support of this allegation, the Complaint states that Melanie Sloan, the Executive Director of CREW, has previously served in various staff positions for Democratic members of Congress and has made 50 separate appearances on Mr. Franken’s radio show; CREW board member Daniel Berger has contributed \$44,500 to the Democratic Senatorial Campaign Committee during this election cycle and donated the maximum amount permitted by federal law to the Franken for Senate campaign; CREW board member John Luongo has donated \$2,000 to the Franken for Senate campaign; and CREW board member Craig Kaplan has contributed \$5,000 to the Democratic Senatorial Campaign Committee. According to the Complainant, the Democratic Senatorial Campaign Committee has injected \$4 million into Minnesota media markets since October 10, 2008, to defeat Senator Coleman.

The Complainant also relies on several newspaper articles to further support his view that CREW is not a “bipartisan watchdog group.” The

¹ The Administrative Law Judge notes that the heading of CREW’s website is: “The 20 Most Corrupt Members of Congress (and 4 to watch).” Presumably, Senator Coleman and the three Representatives listed under the heading “Dishonorable Mentions” are the “4 to watch.”

Complainant alleges that the Capitol Hill newspaper *Roll Call* described CREW as “a liberal watchdog group” in a 2005 column and noted in a January 29, 2008, article that “[s]everal news stories—in this newspaper as well as in the Washington Post, the Wall Street Journal and others—have pointed out that much of CREW’s funding comes from liberal groups and big donors to Democratic candidates and causes. And all but a handful of its complaints against Members of Congress have targeted Republicans.” The Complaint asserts that a March 30, 2005, editorial published in *The Hill* (another Capitol Hill newspaper) stated that “[i]n the overwhelming majority of complaints and critiques detailed in news release [sic] posted on CREW’s website, Republicans or their allies are the targets.” Finally, the Complainant contends that a March 14, 2006, article in *The Hill* reported that CREW had “publicized four ethics complaints against Republican lawmakers since the beginning of this year [2006]” and questioned whether CREW’s political activities could violate IRS rules governing tax-exempt groups.

The Complainant also argues that “CREW does not state that Senator Coleman is ‘[l]iving almost rent free,’ as the Franken and Franken campaign radio and television ads falsely state.” Moreover, the Complainant asserts that there is no basis for the claim that Senator Coleman is “[l]iving almost rent free.”

Therefore, the Complaint claims that Mr. Franken knew or should have known that these statements were false and chose to broadcast the statements regardless in order to injure or defeat Senator Coleman.² At this stage of the proceeding, the presiding Administrative Law Judge is required to determine whether the Complaint, on its face, sets forth a prima facie violation of the statute.³

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.

² The Complainant filed additional exhibits with the Office of Administrative Hearings on Monday November 3, 2008. Exhibit C is a transcript of excerpts from a program on KSTP-Channel 5 that aired on October 29, 2008. Exhibit D is a copy of an article that was published in the *Star Tribune* on October 30, 2008. These exhibits may be offered as evidence at the probable cause hearing. It appears that the Complainant did not provide a copy of these exhibits to Respondent Franken or his counsel. The parties are reminded that they must provide a copy to the opposing party of any document they file with the Office.

³ The Administrative Law Judge notes that the Respondent filed a motion to dismiss. However, at this stage, review is limited to the complaint and its attachments. See, Minn. Stat. § 211B.33.

In order to be found to have violated this section, a person must intentionally participate in the preparation, dissemination or broadcast of false campaign material that the person knows is false or communicates with reckless disregard of whether it is false.

In *Kennedy v. Voss*,⁴ the Minnesota Supreme Court observed that the statute is directed against the evil of making false statements of fact and not against unfavorable deductions, or inferences based on fact - even if the inferences are “extreme and illogical.”⁵ The Court pointed out that the public is protected from such extreme and illogical inferences by the ability of other speakers to rebut these claims during the campaign process.⁶ 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.⁷

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.⁸ A statement is substantially accurate if its “gist” or “sting” is true, that is, if it produces the same effect on the mind of the recipient which the precise truth would have produced. Where there is no dispute as to the underlying facts, the question whether a statement is substantially accurate is one of law.⁹

The term “reckless disregard” was added to the statute in 1998 to expressly incorporate the “actual malice” standard from *New York Times v. Sullivan*.¹⁰ Based on this standard, the Complainant has the burden at the hearing to show by clear and convincing evidence that the Respondents prepared or disseminated the advertisement knowing that it was false or did so with reckless disregard for its truth or falsity. The test is subjective; the Complainant must come forward with sufficient evidence to prove the Respondents “in fact entertained serious doubts” as to the truth of the ad or acted “with a high degree of awareness” of its probable falsity.¹¹

For purposes of a prima facie determination, the Complainant must detail the factual basis to support a claim that the violation of law has occurred.¹²

⁴ 304 N.W.2d 299 (Minn. 1981).

⁵ *Id.* at 300.

⁶ *Id.*

⁷ *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).

⁸ *Jadwin*, 390 N.W.2d at 441.

⁹ *Id.*

¹⁰ *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

¹¹ *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). *See also Riley v. Jankowski*, 713 N.W. 2d 379 (Minn. App.) *review denied* (Minn. 2006).

¹² Minn. Stat. § 211B.32, subd. 3.

“Prima facie” means “[s]ufficient to establish a fact or raise a presumption unless disproved or rebutted.”¹³ “Prima facie evidence” is “[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced.”¹⁴ In determining whether a campaign complaint sets forth a prima facie violation of the statute, the Administrative Law Judge is required to credit as true all of the facts that are alleged in the Complaint, provided that those facts are not patently false or inherently incredible.

After reviewing the Complaint and its attachments, the Administrative Law Judge concludes that the Complaint sufficiently alleges a prima facie violation of Section 211B.06 with respect to the statements that Norm Coleman is “[r]anked the 4th most corrupt senator in Washington” by a “bipartisan watchdog group.” Whether Senator Norm Coleman or any other senator is corrupt is a matter of opinion. But whether Senator Coleman was ranked 4th most corrupt by a bipartisan watchdog group is a statement that may be demonstrated to be true or false. For the purpose of the prima facie determination, the Complainant has sufficiently alleged that this statement is false and that Al Franken, as the candidate who approved the advertisements, either knew it was false or communicated it “with a high degree of awareness” of its probable falsity.¹⁵

The Complaint fails, however, to allege a prima facie violation with respect to the statements that Senator Coleman is “living almost rent free in the million dollar home of a Washington insider.” The only portion of this statement challenged by the Complainant is the claim that Senator Coleman is “living almost rent free.” This statement reflects an opinion and is not a statement capable of being proven factually true or false.¹⁶ As such, it does not come within the purview of Minn. Stat. § 211B.06.

Because the Complaint has alleged a prima facie violation of Minn. Stat. § 211B.06 with respect to the statements that Norm Coleman is “ranked the 4th most corrupt senator in Washington” by a “bipartisan watchdog group,” this allegation will proceed to a probable cause hearing as indicated in the Order.¹⁷

B.L.N.

¹³ *Black’s Law Dictionary* 1228 (8th ed. 2004).

¹⁴ *Id.* at 598.

¹⁵ *See St. Amant*, 390 U.S. at 731; *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *see also, Riley*, 713 N.W.2d at 401.

¹⁶ *See, Fine v. Bernstein*, 726 N.W.2d 137, 144 (Minn. App. 2007).

¹⁷ The Complaint has requested injunctive relief. However, Administrative Law Judges lack authority to grant injunctive relief.