

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Judy Lindsay,

Complainant,

vs.

ORDER OF DISMISSAL

Minnesota DFL State Committee,

Respondent.

This matter came on for a probable cause hearing under Minn. Stat. § 211B.34, before Administrative Law Judge Manuel J. Cervantes on November 10, 2008, to consider a complaint filed by Judy Lindsay on October 31, 2008. The probable cause hearing was conducted by telephone and the record closed on that date.

Judy Lindsay appeared on her own behalf. Alan W. Weinblatt, Weinblatt & Gaylord, PLC, appeared for Respondent Minnesota DFL State Committee.

Based on the record and all of the proceedings in this matter, including the Memorandum incorporated herein, the Administrative Law Judge finds that there is not probable cause to believe that the Respondent violated Minn. Stat. § 211B.06.

**ORDER**

**IT IS HEREBY ORDERED** that there is not probable cause to believe that Respondent violated Minn. Stat. § 211B.06 as alleged in the Complaint and this matter is accordingly DISMISSED.

Dated: November 14, 2008

s/Manuel J. Cervantes

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MANUEL J. CERVANTES  
Administrative Law Judge

## NOTICE OF RECONSIDERATION AND APPEAL RIGHTS

Minn. Stat. § 211B.34, subd. 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 Minn. Stat. § 211B.35 within five business days after granting the petition.

If the Complainant does not seek reconsideration, or if the Chief Administrative Law Judge denies a petition for reconsideration, then this order is the final decision in this matter under Minn. Stat. § 211B.36, subd. 5, and a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

## MEMORANDUM

The Complainant is a candidate for State Representative in House District 37B. Complainant alleges that Respondent disseminated a campaign flyer that contained false campaign material. The flyer, attached to the Complaint, states in part:

Jobs and Health Care Don't Top Judy Lindsay's Narrow Agenda

What's at the top of Judy Lindsay's agenda? Not vanishing jobs...not the cost of health care...and not the education of our children.

What's on the top of her list? Removing sexual orientation from Minnesota's human rights laws.

Judy even stepped down from the school board to devote "more time to a nonprofit group she started" that is dedicated to striking anti-discrimination protections from state laws. (*Star Tribune*, 01/07/2004)

...

Say NO to Judy Lindsay

Complainant alleges that these statements are false for three reasons. First, she asserts that she has campaigned on the economy, jobs, health care and education, and that her website and the *Pioneer Press* voter guide make it clear that these issues are included in her platform. She asserts that it is a "lie" for Respondent to claim these issues are not part of her agenda and that Respondent is "purposefully trying to mislead the voters." Secondly, she asserts that she has never talked about or included "removing sexual orientation from the Minnesota human rights law" in her agenda.

Lastly, she asserts that Respondent “has purposefully and wrongful[ly] mischaracterized [her] nonprofit organization.” She claims that the nonprofit group she helped to start was not dedicated to striking anti-discrimination protections from state laws. She claims the group has not been in existence for “three to four years” and that its mission statement was:

In Defense of Innocence, A Legal Defense for Those Speaking Out for Biblical Family Values – In Defense of Innocence is a faith-based, nonprofit organization established to protect children’s innocence from exploitation. In Defense of Innocence will provide education, training, and support based on biblical truths and principles.

Complainant alleges Respondent has violated Minn. Stat. § 211B.06 by publishing these false statements about her.

During the probable cause hearing, Respondent introduced into evidence the *Star Tribune* article, dated January 7, 2004, which is cited in the flyer.<sup>1</sup> The article, entitled “Schools Hunt for Cash,” describes how local school boards have coped with recent budget cuts. The article quoted a number of school board members who had decided not to run for reelection in 2004 because of the fiscal challenges the school districts faced. Toward the end, the article said the following about Complainant:

Judy Lindsay, an eight-year member of the Rosemount-Apple Valley-Eagan school board, hopes the district improves its fiscal accountability measures.

She stepped down to devote more time to a nonprofit group she started that supports removing homosexuality as a protected behavior under state human rights laws.

During the probable cause hearing, Complainant admitted that she served on the Rosemount-Apple Valley-Eagan school board, and that she had once testified before the Minnesota Senate Judiciary Committee in support of the removal of sexual orientation protection from human rights laws. She also testified that in March 2004 she had written an editorial to the local newspaper in opposition to a school play on Matthew Shepherd. In the editorial she argued that the school was promoting a radical homosexual agenda.

## **Legal Analysis**

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.<sup>2</sup> The Office of Administrative Hearings looks to the standards governing probable cause determinations under Minn. R. Crim. P. 11.03 and by the Minnesota

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<sup>1</sup> Ex. A.

<sup>2</sup> Minn. Stat. § 211B.34, subd. 2.

Supreme Court in *State v. Florence*.<sup>3</sup> The purpose of a probable cause determination is to answer the question whether, given the facts disclosed in the record, it is fair and reasonable to require the respondent to go to hearing on the merits.<sup>4</sup>

Minn. Stat. § 211B.06 prohibits a person from intentionally participating in the preparation, dissemination, or broadcast of campaign material with respect to the personal or political character or acts of a candidate that is designed or tends to injure or defeat a candidate, and which the person knows is false or communicates to others 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 applicable to defamation cases involving public officials from *New York Times v. Sullivan*.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

To be found to have violated section 211B.06, therefore, 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.<sup>8</sup>

In *Kennedy v. Voss*, the incumbent initially voted in favor of the county budget funding a variety of programs, and later voted against it because he disagreed with one particular appropriation. His opponent circulated literature stating that the incumbent had voted against a variety of programs funded in the budget. The Supreme Court concluded that the inferences to be drawn from the true fact of the incumbent’s vote, as to whether he supported particular programs, did not fall within the purview of the statute. In the Court’s view, the public is adequately protected from any extreme or illogical inferences drawn from those facts by the campaign process itself.<sup>9</sup>

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<sup>3</sup> 239 N.W.2d 892 (Minn. 1976); see also Black’s Law Dictionary 1219 (7<sup>th</sup> ed. 1999) (defining “probable cause” as “[a] reasonable ground to suspect that a person has committed or is committing a crime.”)

<sup>4</sup> *State v. Florence*, 239 N.W.2d at 902.

<sup>5</sup> *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964); *State v. Jude*, 554 N.W.2d 750, 754 (Minn. App. 1996).

<sup>6</sup> 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).

<sup>7</sup> *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986).

<sup>8</sup> *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981); *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).

<sup>9</sup> *Kennedy*, 304 N.W.2d at 300.

The Administrative Law Judge concludes that the statements identified in the campaign flyer are not actionable under section 211B.06. First, the flyer's claim that jobs, health care, and education are not "at the top of Judy Lindsay's agenda," reflects an opinion as to Lindsay's priorities and is not capable of being proven factually true or false. As such, it cannot form the basis of a section 211B.06 violation. During the probable cause hearing Complainant testified about her 17 years of work on education and introduced other evidence of her positions supporting economic growth and lower cost health care. Though Lindsay has multiple items on her political agenda, the claim that jobs and health care are not her priorities is a statement of political rhetoric and no reader would interpret the statement to be a statement of fact.<sup>10</sup> The statement is unactionable under section 211B.06.

The flyer's additional claim that, if elected, Lindsay would work to strike anti-discrimination protections from state laws is an unfavorable deduction based on Lindsay's record and is therefore outside the purview of Minn. Stat. § 211B.06. The flyer references the non-profit organization, In Defense of Innocence, which Lindsay founded. Lindsay acknowledges that she started In Defense of Innocence, and she describes it as a nonprofit, faith-based organization established to provide education and training based on "biblical truths and principles."

The claim that Lindsay would work to strike anti-discrimination protections from state laws can be deduced from her previous nonprofit work, her testimony before the Senate Judiciary Committee and her letter to the editor. Even if the deduction is extreme and illogical, it is not actionable under the statute.<sup>11</sup> Likewise, the statement that removing anti-discrimination protections is at the "top of her agenda" is a statement of opinion or political rhetoric that a reader would not understand to be a representation of fact.<sup>12</sup> Minn. Stat. § 211B.06 is directed against false statements of fact; not opinions or inferences.<sup>13</sup>

Finally, Lindsay alleges in her Complaint that Respondent is attempting to "mislead the voters" and has "mischaracterized" her nonprofit organization. While the statements may be misleading and incomplete, they are not factually false and 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

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<sup>10</sup> See *Jadwin.*, 390 N.W.2d at 441, citing *Old Dominion Branch*, 418 U.S. at 284-86; *Greenbelt Coop. Publishing Assoc.*, 398 U.S. at 13-14; see also *Milkovich*, 497 U.S. at 16-17; *Diesen*, 455 N.W.2d at 451; *Hunter*, 545 N.W.2d at 706; *Deziel v. Freedom Club State PAC*, OAH Docket No. 15-0320-17641-CV (Nov. 13, 2006) (dismissing complaint for failure to state a prima facie violation of 211B.06 where complainant alleged respondents engaged in "false, wild and reckless interpretations" of her statements).

<sup>11</sup> *Kennedy*, 304 N.W.2d at 300.

<sup>12</sup> See *Jadwin.*, 390 N.W.2d at 441, citing *Old Dominion Branch*, 418 U.S. at 284-86; *Greenbelt Coop. Publishing Assoc.*, 398 U.S. at 13-14; see also *Milkovich*, 497 U.S. at 16-17; *Diesen*, 455 N.W.2d at 451; *Hunter*, 545 N.W.2d at 706; *Deziel v. Freedom Club State PAC*, OAH Docket No. 15-0320-17641-CV (Nov. 13, 2006) (dismissing complaint for failure to state a prima facie violation of 211B.06 where complainant alleged respondents engaged in "false, wild and reckless interpretations" of her statements).

<sup>13</sup> *Kennedy*, 304 N.W.2d at 300.

and unfair campaign statements, even those that are clearly misleading.<sup>14</sup> Accordingly, these statements are insufficient to state a violation of Minn. Stat. § 211B.06, and these allegations are dismissed.

**M. J. C.**

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<sup>14</sup> See *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statute with similar language).