

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Patrick Ciliberto,
Complainant,

vs.

ORDER OF DISMISSAL

James Terwedo,

Respondent.

This matter came before Administrative Law Judge Eric L. Lipman for a probable cause hearing on August 18, 2014.

Patrick Ciliberto, the Complainant, appeared on his own behalf. James Terwedo, the Respondent, appeared on his own behalf.

On August 11, 2014, Mr. Ciliberto filed a campaign complaint with the Office of Administrative Hearings. The Complaint alleged that Mr. Terwedo violated Minn. Stat. § 211B.06 during the course of Mr. Terwedo's campaign to be elected the Scott County Attorney. Specifically, the Complaint maintains that Mr. Terwedo circulated campaign material which asserted that Ronald Hocevar (another candidate for Scott County Attorney) "benefitted when the previous county attorney sued Scott County residents for a wage increase."

On August 14, 2014, the undersigned Administrative Law Judge determined that the Complaint set forth enough facts that, if credited, would amount to a violation of Minn. Stat. § 211B.06.

Based upon the contents of the hearing record and for the reasons set forth in the Memorandum below:

IT IS ORDERED:

Mr. Ciliberto's Complaint is **DISMISSED**.

Dated: August 21, 2014

s/Eric L. Lipman

ERIC L. LIPMAN

Administrative Law Judge

NOTICE OF RECONSIDERATION RIGHTS

Minnesota Statutes section 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 for reconsideration, 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

Ronald Hocevar and James Terwedo are candidates for election to the office of Scott County Attorney. They will face the voters during the November 2014 balloting.¹

The Complainant, Mr. Ciliberto, is the incumbent Scott County Attorney and is not seeking re-election to that post. Mr. Hocevar is the Chief Deputy Scott County Attorney.²

In December of 2010, the Scott County Board of Commissioners, as part of the ordinary budgeting process, set the salary for the County Attorney and the heads of the

¹ See, COMPLAINT, OAH 8-0325-31770, at 2.

² *Id.* at 2 and Attachment 2.

divisions in the Office of the County Attorney. The salary set for the County Attorney for calendar year 2011 was the same amount that was set for 2010.³

Dissatisfied with this result, Mr. Ciliberto filed a salary appeal under Minn. Stat. § 388.16, subd. 6.⁴

Because County Attorneys are elected separately from County Commissioners, Minn. Stat. § 388.16 confers upon these office-holders the opportunity to obtain review from the district court if they are “dissatisfied with the action of the county board in setting the amount of the county attorney's salary or the amount of the budget for the office of county attorney”⁵

Mr. Ciliberto's appeal, denominated as *Ciliberto v. Scott County Board of Commissioners*, Case No. 70-CV-10-31056, asserted that the Board's action was arbitrary and capricious. As part of the appeal, Mr. Ciliberto also sought court review of “the budget for his office, and specifically the salaries of his Chief Deputy, First Assistant and Criminal Division”⁶

In an Order dated September 22, 2011, the District Court for Scott County upheld Mr. Ciliberto's appeal with respect to his salary – directing that a new, higher salary be paid to him in 2011 – but denied upward adjustments in the salaries of the Chief Deputy, First Assistant and Criminal Division Head.⁷

Mr. Terwedo became aware of the District Court's Order shortly after it was issued, reviewed the Order, and discussed the same with Scott County Commissioner Joseph Wagner.⁸

In July of 2014, as part of his campaign to become the Scott County Attorney, Mr. Terwedo circulated campaign material that asserted that his “opponent, who with his boss, benefitted when the previous county attorney sued Scott County residents for a wage increase.”⁹

A challenge to the claims in this brochure was filed by Mr. Ciliberto under the Fair Campaign Practices Act.

³ *Id.*

⁴ *Id.*

⁵ Minn. Stat. § 388.16.

⁶ COMPLAINT, *supra*, at Attachment 2.

⁷ *Id.*

⁸ Testimony of J. Terwedo, DIGITAL RECORDING, OAH 8-0325-31770 (August 18, 2014).

⁹ COMPLAINT, *supra*, at Attachment 1.

Legal Standards Regarding False Literature Claims

Minn. Stat. § 211B.06 prohibits the preparation and dissemination of false campaign material.

The prohibition has two elements: (1) A person must intentionally participate in the preparation or dissemination of false campaign material, “with respect to the personal or political character or acts of a candidate”; and (2) the person developing or disseminating the material must know that the item is false, or act with reckless disregard as to whether it is false.

As to the first element of the statute, the test is objective: The statute is directed against false statements of fact. The statute does not proscribe criticism of candidates that is merely incomplete, unfair or uncharitable.¹⁰

Indeed, the Fair Campaign Practices Act is set against the backdrop of the First Amendment; which assures Americans in the public square sufficient “breathing space” to assemble data, construct arguments and present conclusions to their fellow citizens.¹¹ The false claims statute does not punish poorly reasoned arguments, but instead relies upon voters to weigh the merits of claims made in campaign brochures.

With respect to the second element of the statute – namely, the speaker’s awareness of the truth of the claims – the test is subjective: OAH inquires into whether 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.¹²

In this respect, section 211B.06 closely tracks the standard for actual malice.¹³ Actual malice can be shown if the statement was fabricated by the respondent, was the

¹⁰ *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).

¹¹ See, *Boos v. Barry*, 485 U.S. 312, 322 (1988), (“[I]n public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate ‘breathing space’ to the freedoms protected by the First Amendment”); compare also, *State v. Machholz*, 574 N.W.2d 415, 422 (Minn. 1998) (“Commenting on matters of public concern is a classic form of speech that lies at the heart of the First Amendment, and speech in public arenas is at its most protected on public sidewalks, a prototypical example of a traditional public forum”) (citing *Schenck v. Pro-Choice Network of Western N. Y.*, 519 U. S. 357, 377 (1997)).

¹² *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. Ct. App.) review denied (Minn. 2006).

¹³ See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (defining “actual malice” as acting “with knowledge that [the statement] was false or with reckless disregard of whether it was false or not”); *Fitzgerald v. Minn. Chiropractic Ass’n, Inc.*, 294 N.W.2d 269, 270 (Minn. 1980) (defining “actual malice” as “either actual knowledge of the falsity of the publication or reckless disregard of whether it is false or not”).

product of the respondent's imagination or was based upon an unverified source.¹⁴ As the U.S. Supreme Court explained in *St. Amant v. Thompson*:

Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications, as well as true ones....

Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.¹⁵

The Specific Claims in the Terwedo Brochure

Mr. Ciliberto maintains that the claims made in the Terwedo brochure are false in three respects: (1) Mr. Ciliberto, and not his predecessor, filed the salary appeal in *Ciliberto v. Scott County Board of Commissioners*, Case No. 70-CV-10-31056; (2) the salary appeal named the Scott County Board of Commissioners, and not "Scott County residents," as the respondents in the case; and (3) Mr. Hocevar did not benefit from the outcome of the appeal. Moreover, Mr. Ciliberto asserts that Mr. Terwedo was reckless when he made contrary claims in his brochure.

1. The Appellant in *Ciliberto v. Scott County Board of Commissioners*

Mr. Terwedo acknowledges that the suit referenced in his campaign brochure is *Ciliberto v. Scott County Board of Commissioners*, that this appeal was filed by Mr. Ciliberto and was not filed by "the previous County Attorney." Mr. Terwedo maintains that the reference to "the previous County Attorney" was a typographical error.¹⁶

While erroneous, the reference to the identity of the appellant in *Ciliberto v. Scott County Board of Commissioners* in Mr. Terwedo's brochure is not actionable under Minn. Stat. § 211B.06. Statements as to the identity of the appellant, in this context, are

¹⁴ *Chafoulias v. Peterson*, 668 N.W.2d 642, 654-55 (Minn. 2003) ("[A] 'highly slanted perspective' . . . is not enough by itself to establish actual malice"); accord, *Stokes v. CBS, Inc.*, 25 F. Supp. 2d 992, 1004 (D. Minn. 1998).

¹⁵ See, *St. Amant v. Thompson*, 390 U.S. at 732.

¹⁶ Test. of J. Terwedo.

not claims “with respect to the personal or political character or acts of a candidate.” No comment is made as to the acts or character of Mr. Hocevar by this claim.

2. The Respondents in Ciliberto v. Scott County Board of Commissioners

With respect to the identity of the respondents to the salary appeal, Mr. Terwedo maintains that the reference to “Scott County residents” is accurate. He argues that local residents would bear the additional costs of any higher salaries given to officials in the County Attorney’s office following a successful appeal.¹⁷

In the view of the Administrative Law Judge, the reference to “Scott County residents” as the respondents to the salary appeal is likewise not actionable under Minn. Stat. § 211B.06.

The burden of proving the falsity of a claim made in campaign literature 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.¹⁸ 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.¹⁹

In this case, the difference between a suit against the residents of Scott County, and a suit that names their elected agents on the County Board, is a claim where the “sting” of Mr. Terwedo’s critique is true even if “the statement is not literally true in every detail.”²⁰

3. The Benefit of the Salary Appeal to Mr. Hocevar

The core of Mr. Ciliberto’s Complaint is the critique of Mr. Hocevar by Mr. Terwedo. Mr. Ciliberto asserts that because the District Court declined to make any salary adjustment in favor of Mr. Hocevar during the 2011 salary appeal, it is false and reckless to assert that Mr. Hocevar “benefitted when the ... county attorney sued Scott County residents for a wage increase.”²¹

For his part, Mr. Terwedo acknowledges that Mr. Hocevar did not receive more wages following the salary appeal, but maintains that Mr. Hocevar benefitted from the litigation all the same. Mr. Terwedo argues that because the duties of the County Attorney and the Chief Deputy are so similar, that Mr. Ciliberto’s court victory in 2011 confers upon Mr. Hocevar a much stronger argument for a wage increase in the

¹⁷ *Id.*

¹⁸ *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. 1986).

¹⁹ *Id.*

²⁰ *See, id.*

²¹ COMPLAINT, *supra*, at 2.

future.²² This better bargaining position, continues Mr. Terwedo, is “beneficial” to Mr. Hocevar in the broad sense of that term. In that view, Commissioner Wagner agrees.²³

It is all but certain that the ordinary reader of the campaign brochure would not read the word “benefitted” as broadly as Mr. Terwedo intends. The ordinary reader would undoubtedly read the word “benefitted” to mean that Mr. Hocevar received higher pay following the salary appeal. And, clearly, Mr. Hocevar did not receive more pay.

Yet, Minn. Stat. § 211B.06 does not employ an ordinary reader test.

As noted above, the false literature statute does not prevent criticism of a candidate’s actions or their character, merely because that criticism is unfair. The statute does not, for example, prohibit incomplete and uncharitable characterizations of past events, even those that are genuinely misleading. The statute prohibits only false statements of specific fact.²⁴

The Minnesota Supreme Court’s discussion of this standard in *Kennedy v. Voss* is instructive here.²⁵ 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.”²⁶ 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 did not come within the purview of the statute – even if the inferences were “extreme and illogical.”²⁷ The Court pointed out that the public is protected from such extreme inferences by the campaign process itself – namely, the opportunity of other candidates to rebut the critiques during their own outreach to voters.²⁸

²² Test. of J. Terwedo.

²³ Testimony of Joseph Wagner.

²⁴ See *Kennedy v. Voss*, 304 N.W.2d 299, 300 (Minn. 1981); *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (statements telling only one side of the story, while unfair and unjust, were not untrue and therefore not actionable under predecessor statute).

²⁵ *Kennedy v. Voss*, *supra*.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* (“The public is adequately protected from such extreme inferences by the campaign process itself. For example, in this case, respondent distributed two flyers rebutting appellant’s remarks. The voters of Dakota County had every opportunity to judge for themselves what inferences could properly be drawn from the record of the candidates.”).

In the view of the Administrative Law Judge, the claim that Mr. Hocevar “benefitted when the ... county attorney sued Scott County residents for a wage increase,” is uncharitable and unfair, but does not violate Minn. Stat. § 211B.06. Dismissal of the complaint is the appropriate result.

E. L. L.