

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Brett A. Corson,

Complainant,

ORDER OF DISMISSAL

vs.

Eric V. Herendeen,

Respondent.

On December 18, 2006, Brett Corson filed a Complaint with the Office of Administrative Hearings alleging that Eric Herendeen violated Minn. Stat. § 211B.06 (false campaign material). The Chief Administrative Law Judge assigned this matter to the undersigned Administrative Law Judge on December 18, 2006, pursuant to Minnesota Statutes § 211B.33. A copy of the Complaint and attachments were sent by United States mail to the Respondent on December 18, 2006.

After reviewing the Complaint and attached exhibits, the Administrative Law Judge has determined that the Complaint does not state prima facie violations of Minnesota Statutes § 211B.06. Therefore, Complaint is dismissed.

Based upon the Complaint and the supporting filings and for the reasons set out in the attached Memorandum,

IT IS ORDERED:

That the Complaint filed by Brett A. Corson against Eric V. Herendeen is DISMISSED.

Dated: December 21, 2006

/s/ Steve M. Mihalchick/kds
STEVE M. MIHALCHICK
Administrative Law Judge

NOTICE

Under Minn. Stat. § 211B.36, subd. 5, this order is the final decision in this matter and a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. § § 14.63 to 14.69.

MEMORANDUM

Brett Corson and Eric Herendeen were both candidates for Fillmore County Attorney in the November 7, 2006, general election. Mr. Corson was the incumbent. He received approximately 55 percent of the vote and was re-elected as Fillmore County Attorney. The Complaint alleges that Mr. Herendeen violated Minnesota Statutes § 211B.06 by placing two campaign advertisements in local newspapers prior to the election that contained false campaign material that Mr. Herendeen knew was false.

Campaign Advertisement concerning Semi-Trailers

The first advertisement at issue stated in part as follows:

Do you think the County Attorney should make backroom deals without consulting the County Board, the Board of Adjustments, or the people of Chatfield?

That's what happened when the county attorney allowed 31 trailers to be classified as a Rural Home Based Business in Chatfield.

Source: Fillmore County Journal, Jan. 16, 2006¹

Vote for Change. Vote Herendeen.²

This advertisement concerns semi-trailers that were stored at the residence of a Dan Moulton near Chatfield, a city in Fillmore County.³ Mr. Moulton, an attorney, apparently operates a business that involves the rental and sale of semi-trailers. He stores the trailers on land that abuts the City of Chatfield.⁴

The Complaint asserts that the campaign material is false because there was no "backroom deal" that allowed the 31 trailers to be classified as a Rural Home Based Business. Instead, according to the Complaint and its attachments, the Fillmore County Zoning Administrator notified Mr. Moulton in 2004 that the storage of semi-truck trailers on his property violated zoning ordinances. Mr. Moulton responded to the notice by applying for a Rural Home Based Business permit. The Zoning Administrator denied Moulton's request for a permit, and Mr. Moulton appealed the decision to the Fillmore County Board of Adjustment. On April 21, 2005, the Board of Adjustment denied Moulton's appeal by a vote of 4-0, and Mr. Moulton appealed the matter to District Court.⁵

¹ Source citation original

² Complaint Ex. 1.

³ The storage of the semi-trailers and a campaign advertisement placed by Mr. Corson are the subject of an on-going campaign complaint filed by Mr. Herendeen. That matter is scheduled for an evidentiary hearing to take place on Friday, January 5, 2007. See, *Herendeen v. Corson*, OAH Docket No. 4-6322-17617-CV.

⁴ Complaint Ex. 15.

⁵ Complaint Exs. 2-11.

Assistant Fillmore County Attorney Kevin Peterson represented the County in Moulton’s zoning appeal. On September 20, 2005, Mr. Moulton and Fillmore County entered into a settlement agreement wherein the County agreed to issue Mr. Moulton a Rural Home Based Business permit and to allow Mr. Moulton to temporarily park the semi-trailer trucks on his property subject to several conditions. The settlement agreement was signed by Mr. Moulton and Fillmore County Zoning Administrator Norm Craig.⁶

The Complainant argues that the entire process was a matter of public record and was handled by Assistant Fillmore County Attorney Kevin Peterson. According to the Complaint, members of the Board of Adjustment were consulted regarding the litigation. Moreover, the Complainant asserts that he was not obligated to consult with “the people of Chatfield.” The City of Chatfield has its own zoning and planning departments, and the County does not conduct zoning services for it. The Complainant does not state whether he or Mr. Peterson consulted with the County Board about the zoning appeal and settlement.

Campaign Advertisement concerning Sentencing Drug Offenders

The second advertisement at issue stated in part as follows:

Should methamphetamine manufacturers and cocaine dealers who poison our community merely be placed on probation?

See it for yourself in Fillmore County Court files K9-03-554 and CR-05-55.

Vote for Change. Vote for Herendeen.⁷

The Complainant argues that this campaign advertisement does not “accurately state the contents of those Court files.” The Complainant points out that in both files, there was a stay of execution of jail time for a period of 25 to 30 years. In addition, in both cases the defendants were placed on supervised probation, which, according to the Complainant, is substantially different than unsupervised probation. Finally, the defendants were required to pay fines and had additional conditions placed on their probation, such as chemical dependency treatment and random chemical testing.

Legal Standard

Minn. Stat. § 211B.06 prohibits a person from intentionally preparing or disseminating false 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. In *Kennedy v. Voss*,⁸ the Minnesota Supreme Court observed that the statute is directed against the evil of making false statements of fact and not against

⁶ Complaint Ex. 6.

⁷ Complaint Ex. 12.

⁸ 304 N.W.2d 299 (Minn. 1981).

unfavorable deductions, or inferences based on fact - even if the inferences are “extreme and illogical.”⁹ 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.¹⁰ 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.¹¹

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.¹² 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.¹³

If a statement is found to be false, the statute then requires that the Complainant establish by clear and convincing evidence that the person knew the statement was false or communicated the statement 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*.¹⁴ Based on that standard, a complainant must show that the respondent prepared or disseminated the campaign material knowing that it was false or did so with reckless disregard for its truth or falsity. The courts have indicated that the test is a subjective one—that a complainant must prove 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.¹⁵

After reviewing the Complaint and the attached exhibits, the Administrative Law Judge concludes that the Complainant has failed to allege a prima facie violation of Minn. Stat. § 211B.06 with respect to either of the campaign advertisements.

The first campaign advertisement, although written in a question and answer format, amounts to a statement that Mr. Corson engaged in a “backroom deal” regarding the settlement of Moulton’s zoning appeal “without consulting the County Board, the Board of Adjustment or the people of Chatfield” that resulted in 31 trailers being classified as a Rural Home Based Business. The Complainant maintains that this statement is false because Assistant Fillmore County Attorney Kevin Peterson did

⁹ *Id.* at 300.

¹⁰ *Id.*

¹¹ *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);

¹² *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d at 441.

¹³ *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d at 441.

¹⁴ *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

¹⁵ *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).

consult with members of the Board of Adjustment regarding the litigation with Mr. Moulton. The Complainant has attached to the Complaint copies of letters from Assistant Fillmore County Attorney Kevin Peterson to members of the Board of Adjustment regarding Mr. Moulton's zoning appeal. In the letters, Mr. Peterson informs the members that he has been assigned to handle the zoning appeal and he requests that they sign prepared affidavits regarding their role in the permit denial.¹⁶

The Complainant has also submitted the January 16, 2006, *Fillmore County Journal* article, which is cited as the source of the information in the first campaign advertisement. However, the information presented in the article is consistent with the campaign advertisement's claim. The article states that Mr. Corson drafted the settlement agreement but did not consult with the Board of Adjustments or the Fillmore County Board before entering into the settlement agreement with Mr. Moulton. The article indicates that members of the Board of Adjustment were upset that they were not consulted about the decision to negotiate a settlement. In addition, Fillmore County Board Chair Duane Bakke is quoted in the article as saying that he did not agree with the settlement and that the proposed settlement "should have been brought back to the county board for approval."¹⁷

As to the remainder of the claim in the advertisement that the Complainant did not consult with the County Board or the "people of Chatfield," the Complainant asserts only that he was not obligated to consult with the "people of Chatfield." The Complainant does not address whether he consulted with the County Board regarding the settlement.

Based on all of the submissions, and in particular the *Fillmore County Journal* article, it appears that the "gist" of statement in the first campaign advertisement is true. The Complainant has failed to allege any facts that tend to show that the statement that he did not consult with the County Board or the people of Chatfield about the settlement is false. The Complainant may not have been obligated to consult with "the people of Chatfield," but that does not render the statement false. And it appears that the Complainant in fact did not consult with the County Board about the settlement. Moreover, even if the claim that the Complainant did not consult with the County Board of Adjustment was false, the Complainant has failed to allege any facts to support a prima facie showing that the Respondent knew the statement was false or communicated the statement with reckless disregard of its falsity. Instead, given the newspaper article and the statements of the Board of Adjustment members, the statement appears to be true. Finally, the term "backroom deal" is opinion or figurative language and it does not come within the purview of section 211B.06.

Because the Complainant has failed to allege sufficient facts to state a prima facie violation of Minn. Stat. § 211B.06, the allegation regarding the first campaign advertisement is dismissed.

¹⁶ Complaint Exs. 7-11.

¹⁷ Complaint Ex. 15.

With respect to the second campaign advertisement, the Complainant has failed to identify any statement in this advertisement that is false. Instead, the Complainant argues that the advertisement fails to give all of the relevant information with respect to the sentences of the defendants in the two court files. Minn. Stat. § 211B.06 is directed at false statements of fact and not against unfavorable deductions or inferences based on fact.¹⁸ In order to be false, the statement must be factually inaccurate. The campaign advertisement suggests that the defendants in the two court files at issue were given unreasonably light sentences. This is an opinion. However, opinions do not come within the purview of Section 211B.06. In addition, there is no requirement that campaign material tell the whole story or “accurately state the contents of the Court files” as the Complainant asserts.¹⁹ Because the Complainant has alleged only that the campaign advertisement is factually incomplete rather than factually false, this allegation is dismissed.

The Complaint fails to allege a prima facie violation of Minn. Stat. § 211B.06 and is therefore dismissed.

S.M.M.

¹⁸ *Kennedy v. Voss*, 304 N.W.2d 299, 300 (Minn.1981).

¹⁹ *See, Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979).