

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Glen Posusta and Clint Herbst,

Complainants,
vs.

Susie Wojchouski and Fred Patch,

Respondents.

NOTICE OF DETERMINATION OF
PRIMA FACIE VIOLATION
AND
NOTICE OF AND ORDER FOR
PROBABLE CAUSE HEARING

TO: Glen Posusta, 2330 Eastwood Cir., Monticello, MN 55362, and Clint Herbst, 9801 Gillard Avenue NE, Monticello, MN 55362; and

Susie Wojchouski, 1111 Clubview Drive, Monticello, MN 55362 and Fred Patch, 82 80th St. NE, Monticello, MN 55362.

On October 25, 2006, Glen Posusta and Clint Herbst filed a Complaint with the Office of Administrative Hearings alleging that Susie Wojchouski and Fred Patch violated Minn. Stat. §§ 211B.06 and 211B.07. After reviewing the Complaint and attached exhibits, the undersigned Administrative Law Judge has determined that the Complaint sets forth prima facie violations of Minn. Stat. § 211B.06.

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 **3:30 p.m. on Monday, October 30, 2006**. The hearing will be held by call-in telephone conference. You must call: **1-888-677-3757** at that time. Follow the directions and enter the numeric pass code **"17601"** 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 that choice is 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 Administrative Law Judge Kathleen D. Sheehy at 612-349-2665.

At the conclusion of the probable cause hearing, the Administrative Law Judge will either: (1) dismiss the complaint based upon 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 presiding 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 100 Washington Avenue South, Suite 1700, Minneapolis, MN 55401, or call 612/341-7610 (voice) or 612/341-7346 (TTY).

Dated: October 27, 2006

/s/ Kathleen D. Sheehy
KATHLEEN D. SHEEHY
Administrative Law Judge

MEMORANDUM

The Complaint concerns a one-page flyer distributed anonymously in Monticello, Minnesota, concerning Glen Posusta and Clint Herbst. Glen Posusta is an incumbent city council member running for re-election; Clint Herbst is the incumbent mayor running for re-election. Susie Wojchouski is a candidate for election to the City Council; the Complaint alleges that she obtained much of the text for the flyer from Fred Patch, a former city employee, who has commenced a wrongful termination lawsuit against the City of Monticello. The Complaint alleges sufficient facts to conclude at this point that Wojchouski and Patch had some involvement in the preparation of and distribution of the flyer.

The flyer is captioned "**Re-elect the 'Good-OL-boys' to City Council?**" and continues "Voters should know that . . ." What follows is a list of ten bullet-point statements concerning the conduct of Posusta and Herbst. Posusta and

Herbst contend that all ten bullet points, which will be addressed below, contain false statements of fact. At the bottom of the page is the following statement:

Offensive juvenile behavior, half-truths, sign litter, misrepresentations, pay-backs, lies, hidden agendas, give-aways, retaliatory threats, hostility, bullying and an absence of support for Monticello Schools . . . tune in to their “reality show” on cable TV or attend a council meeting on the first or third Monday of the month at 7:00 p.m. Do they represent who we are? Can’t Monticello choose better representation?

THIS ELECTION THERE IS AN ALTERNATIVE TO THE “GOOD-OL-BOYS.” ASK YOURSELF WHAT CONSTITUENTS DO THEY LISTEN TO? VOTE FOR A DIFFERENT CANDIDATE TO REPRESENT YOU!

There is no disclaimer on the piece, but at the very bottom of the page it says “This is public information not paid for or endorsed by any candidate.”

Minn. Stat. §§ 211B.06 and 211B.07

The Complainant alleges that the flyer contained false statements of fact in violation of Minn. Stat. § 211B.06. Section 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*,¹ 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.”² 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.³ 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.⁴

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

¹ 304 N.W.2d 299 (Minn. 1981).

² *Id.* at 300.

³ *Id.*

⁴ *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);

immaterial.⁵ 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.⁶

Campaign material is “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election.”⁷ The flyer advocates voting against Posusta and Herbst and consequently appears to be campaign material.

The Complaint also alleged that the flyer in some way violated Minn. Stat. § 211B.07, which precludes a person from directly or indirectly using or threatening force, coercion, violence, restraint, damage, harm, loss, including loss of employment or economic reprisal, undue influence, or temporal or spiritual injury against an individual to compel the individual to vote for or against a candidate.

Bullet Point No. 1

Bullet Point No. 1 provides:

July 2004—at the Monticello Riverfest, Councilman Posusta’s buddies and families with children watched while he took off and sold his shirt and then his pants to his friends selling beer. Making his exit performance, he then paraded through the park in his underpants while under the influence. The Monticello Times had a photo of his nakedness but did not publish it.

The Complainants maintain this statement is false because there were no children or families in the park; instead, six to ten men were there. In addition, they maintain that Posusta did not “parade through the park,” but rather left along the edge of the park. They further maintain that Posusta was not naked but, as he recalls, was wearing his briefs and holding a box around himself as he exited.

Posusta does not contend that the basic underlying facts were untrue—that he removed his outer clothing and left the park in his underwear while under the influence. Even if there were no children in the park, and the only observers were adult men, as the Complainants allege, the “gist” of the statement appears to be substantially true. The references to him “parading through the park” and to his “nakedness” are permissible rhetoric based on these facts. The Administrative Law Judge concludes that this portion of the Complaint fails to state a prima facie violation of Minn. Stat. § 211B.06. This allegation is dismissed.

⁵ *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d at 441.

⁶ *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d at 441.

⁷ Minn. Stat. § 211B.01, subd. 2.

Bullet Point No. 2

Bullet Point No. 2 provides:

Election 2004—Your Mayor Herbst accepted substantial political contributions from his township cronies to pay for election expenses—including all his BIG SIGNS. After the election, Posusta, Herbst, Mayer and Perrault provided a little political pay-back by settling a lawsuit, awarding that resident nearly \$100,000! Of course, that same township resident remains a faithful campaign contributor this election, and the sign litter is there to prove it this campaign as well!

The Complainants vigorously dispute that the settlement of a lawsuit, apparently filed by Rebecca Young, was “political payback.” They contend that the City Council authorized the League of Minnesota Cities, which provided the insurance covering the claim, to defend the litigation and that counsel for the League of Minnesota Cities recommended settling the case at that amount. Although the characterization of the settlement as “political payback” is opinion, there is an underlying factual assertion that the agreement to settle the lawsuit was somehow connected to the plaintiff’s political contribution to Herbst. If the evidence at a hearing were to establish that the underlying factual assertion is not true and that Respondents knew it was false or communicated it with reckless disregard as to whether it was false, this would be sufficient to demonstrate a violation of Minn. Stat. § 211B.06.

Bullet Point No. 3

Bullet Point No. 3 provides:

November 30, 2004—According to a written report from the Minnesota State Auditor, your councilman Posusta had a conflict of interest when he purchased city property along Hwy 25 while he was seated on the City Council. From his council seat, he reduced the purchase price and wrongly benefited in thousands of dollars to buy prime Highway 25 frontage from the City in a closed sale.

The Complainants contend this statement is false because the state auditor concluded the transaction took place prior to Posusta’s election to the city council, not afterward. They maintain the closing was delayed because of title issues, that it was not a closed sale, and that the property was unbuildable and “was deemed best suited to Posusta, the adjacent land owner.” The facts here are not clear, but there is a sufficient basis for concluding the Complaint alleges a prima facie violation of § 211B.06.

Bullet Point No. 4

Bullet Point No. 4 provides:

January 10, 2005—At a Rotary meeting, newly elected Mayor Herbst kissed a local MALE attorney, Jim Agosto, which was totally unsolicited. In front of Rotarians after a comment that he “kissed babies” on the campaign trail. This inappropriateness was excused in the newspaper as being Herbst’s “no-nonsense style.” Herbst said he wanted to be “open” at that same meeting.

The Complainants allege that this incident was “twisted” to create an image of inappropriateness and tried to make Mayor Herbst sound as though he is homosexual and this was his “coming out of the closet” moment. Herbst does not dispute the basic facts described above. The alleged implication may be untrue, but Section 211B.06 is directed against false statements of fact, not false inferences or implications. The allegation fails to state a prima facie violation of Minn. Stat. § 211B.06. It is dismissed.

Bullet Point No. 5

Bullet Point No. 5 provides:

July/August 2005—Your councilman Posusta carelessly intruded into the Monticello Middle School girl’s locker room. Ladies in the locker room repeatedly asked Posusta to leave but he refused. The women followed him to his truck and took down his license plate number. The incident was investigated by the Wright County Sheriff and referred to the County Attorney who failed to prosecute.

The Complainants allege this statement is false because Posusta did not intrude, but waited in the locker room alcove inside the door for his nine-year-old daughter to finish her swimming lessons. It was not prosecuted because after the sheriff’s investigation it was concluded that no impropriety took place. Again, the Complainants do not dispute the basic underlying facts—that Posusta was inside the locker room, that some women in the locker room believed this was inappropriate and reported it to the Sheriff, but that after investigation the County Attorney failed to prosecute. The use of the phrase “carelessly intruded” does not turn this description of the incident into a false statement of fact that could violate Minn. Stat. § 211B.06. This allegation is dismissed.

Bullet Point No. 6

Bullet Point No. 6 provides:

Fall 2004/Winter 2005—This Council, lead by Herbst and Posusta all but gave away more than \$800,000 in taxpayer’s assets including land, building, a \$200,000 grant to the City, plus \$400,000 of your city cash reserves to fund a private school start-up for the Swan River Montessori School while not supporting the Monticello School District.

Complainants maintain this statement is false. They maintain the City Council turned the building over to Swan River Montessori to save the costs of demolition and improvements required to meet code requirements. They contend the \$400,000 payment was a one-time rental payment to permit the city to use the building after hours, which will be recovered through rent over the next 20 years. Whether these actions could reasonably be characterized as a “give-away” of taxpayer assets is a matter of opinion. Opinions do not come within the purview of Minn. Stat. § 211B.06. The allegations of the complaint are not sufficient to state a prima facie violation of Minn. Stat. § 211B.06.

Bullet Point No. 7

Bullet Point No. 7 provides:

Fall 2005—Posusta and Herbst concluded a bullying and retaliatory crusade by creating a new policy that ended in wrongful termination of a city employee, resulting in another dismal lawsuit against the City to the tune of approximately \$3 million taxpayer dollars. While the city does have insurance for such lawsuits, it is still a taxpayer expense to pay attorneys through the League of Minnesota Cities membership.

Complainants allege this bullet point concerns Fred Patch’s own lawsuit against the City. They allege the City Council terminated Patch because Patch failed to comply with a city ordinance requiring him to end his “part-time” job with three other cities. They have no idea where the “\$3 million taxpayer dollars” figure came from. Use of the phrase “a bullying and retaliatory crusade” to describe the new policy is permissible rhetoric and is not actionable as a false statement of fact. The text can, however, reasonably be read to say that the lawsuit has or will cost taxpayers \$3 million in attorney’s fees. The latter allegation can be proved true or false, and to that extent it states a prima facie violation of Minn. Stat. § 211B.06.

Bullet Point No. 8

Bullet Point No. 8 provides:

Winter 2005—At the Lions Club holiday party Herbst and one of his club mates participated in an explicitly sexual performance that was demeaning to women and offensive to nearly all Lions Club members, for which Mayor Herbst later wrote a letter of apology to

try to cover up his antics. At another local meeting, while discussing trees, Mayor Herbst made an inappropriate comment in front of females, referring to his own “woody.”

The Complainants allege these statements are false. They acknowledge that there was a Christmas party and that Herbst was one of four members in charge of the Christmas Program. Without describing exactly what the program involved, they maintain there were no explicit sexual acts and nothing was demeaning to women, although Herbst did in fact write a letter of apology for a joke about giving a birth control kit to a Lion’s Club member who had ten children. In addition, there were some blow-up dolls given as prizes, but, according to the Complainants, these were “not the kind you can have sex with.” They deny that Herbst used the term “woody” in a discussion concerning trees or anything else.

The Administrative Law Judge concludes that the characterization of the holiday program as explicitly sexual, demeaning to women, and offensive is protected opinion and is not actionable as a false statement of fact under § 211B.06.

Because Herbst denies making any comments in a public meeting concerning his “woody,” that allegation is sufficient to state a prima facie violation of Minn. Stat. § 211B.06.

Bullet Point No. 9

Bullet Point No. 9 provides:

September, 2006—Posusta’s campaign signs say “for low taxes.” Cutting the preliminary levy by \$600,000 will result in lower taxation, but taxpayers will now see new “fees” for such things as garbage pick up, higher utility bills, and a potential loss of the Community Center as an amenity, as reported in a Monticello Times September 20, 2006 article. We’re being Buffalo’d into thinking that a “fee” is not a “tax.”

The statement in this bullet point is based on comments made by Monticello City Administrator Rick Wolfsteller in an article that ran in the September 20, 2006, edition of the *Monticello Times* newspaper. In that article, Mr. Wolfsteller stated that because of budget cuts by the City Council, Monticello will need to come up with \$600,000 to cover projected cost increases to run the City. Mr. Wolfsteller also stated that if Monticello wanted to institute fees for water, sewer and garbage pick up, and eliminate the community center, it could have a lower tax levy like the City of Buffalo.

Complainants maintain this statement is false because the budget was cut only by \$450,000; the city council has not discussed fees for garbage pick-up; and the community center is not in any peril of closing.

The statement at issue is a description of what might happen in the future as a result of the budget cuts, based on the City Administrator's statements. It is a prediction, not a false statement of fact about anything the Complainants have done. The statement is not factually false and is accordingly insufficient to state a prima facie violation of Minn. Stat. § 211B.06.

Bullet Point No. 10

Bullet Point No. 10 provides:

September 29, 2006—Posusta accosted and battered a senior high school girl in front of the High School for moving one of his many political signs that are unlawfully located in the public right of way.

Complainants allege no girl was accosted or battered. They maintain Posusta observed two girls remove one of his lawn signs from the yard of a resident who had given permission to place it there. She folded the sign in half, threw it on the ground, and jumped on it. They say he approached the girls, questioned them, and then spoke with their track coach about the incident. The girls later apologized and offered to pay for the sign.

The allegation that Posusta “battered” a high school girl for moving an unlawfully placed sign contains statements of fact that can be proved true or false and is sufficient to state a prima facie violation of Minn. Stat. § 211B.06.

Conclusion

The Complaint does not identify any specific language that is alleged to violate § 211B.07, and the Administrative Law Judge is not able to identify in the flyer any direct or implied threat of harm that would compel anyone to vote for or against the Complainants. The claim that anything in the flyer violates § 211B.07 is dismissed.

The Administrative Law Judge finds the Complaint alleges prima facie violations of Minn. Stat. § 211B.06 with respect to certain statements contained in Bullet Point Nos. 2, 3, 7, 8, and 10. The remaining allegations are dismissed.

K.D.S.