

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

In the Matter of the)	SUMMARY OF FACTS
Complaint Against)	AND
Jennifer Blossom)	STATEMENT OF FINDINGS

Jerry Schmidt filed a complaint against Jennifer Blossom, a candidate for Gallatin County Auditor in the 2002 election. The complaint alleges that Blossom violated Montana Code Annotated § 13-37-131(1) by misrepresenting her opponent's position on several matters that were relevant to the issues in the campaign.

SUMMARY OF FACTS

1. In 2002 Jennifer Blossom was a candidate for the position of Gallatin County Auditor. Her opponent in the election was Joyce Schmidt, the incumbent Auditor and running for reelection. Blossom won the election.

2. Jerry Schmidt is married to Joyce Schmidt. Jerry Schmidt's complaint alleges that, during the campaign, Blossom knowingly made several factually incorrect or misleading statements concerning Joyce Schmidt.

3. The complaint alleges four misrepresentations by Blossom:

- a) that Joyce Schmidt, as Gallatin County Auditor, was late paying vendors;
 - b) that Joyce Schmidt was "notorious" for working a 32-hour work week or "not working a full 40-hour work week;"
 - c) that Joyce Schmidt was responsible for the "motor vehicle distribution error;"
- and
- d) that Joyce Schmidt was unwilling to train on, and use, the county's computer software.

Late In Paying Vendors

4. Working with county departments, the Accounting Department of Gallatin County is responsible for payment to vendors (following approval by the Gallatin County Commission). The Auditor's office is required to review and approve all claims prior to payment of the claims by the Accounting Department.

5. During her campaign, Blossom made statements suggesting that the county paid a lot of money in late fees due to the method of claims' approval utilized by Auditor Joyce Schmidt. Blossom also contended that the auditing departments of other Montana counties pay their bills "more efficiently."

6. Joyce Schmidt used a claims' review process whereby all claims received by 5:00 p.m. every other Tuesday were reviewed and audited, beginning the next business day, with the goal of approval and recommendation for payment within five business days. During this investigation, Blossom provided copies of claims that were processed through Joyce Schmidt's office, showing that the five-business day goal for approval sometimes was not met.

7. Blossom also provided computer printouts listing numerous late charges and finance charges while Joyce Schmidt was serving as Auditor, charges that resulted from late payments by Gallatin County to vendors, including Wal-Mart, Wells Fargo, and Staples.

8. During this investigation, Joyce Schmidt admitted she caused two late payments to be made for charges incurred by the county Grants Department.

9. On October 31, 2000, the Gallatin County Commission passed a resolution permitting claims to be submitted to the Auditor on a weekly basis. Joyce Schmidt

disagreed with the resolution and continued to process claims using her bi-weekly claims' review procedure described in Fact 6.

10. According to Blossom, her claim that the auditing departments of other Montana counties pay their bills "more efficiently" was based on her discussions with officials from other counties who were charged with those responsibilities.

Less Than 40-Hour Work Week

11. In an October 31, 2002, guest editorial written by Blossom entitled: "I will do the auditor's job . . . all of it," she stated:

. . . In fact, the auditor is notorious for working a 32-hour work week and yet she has twice requested (and been denied) another full-time staff position at an additional \$43,000.

12. In a posting by Blossom on the League of Women Voters Democracy Net (DNet) website, she stated:

Since the current auditor took office in 1995, she has doubled the operating budget, added a second staff position . . . and since receiving a significant raise has been notorious for not working a full 40 hour work week.

13. Complainant Jerry Schmidt contends that Blossom's statements are a misrepresentation. He claims that, while Joyce Schmidt took an occasional day off during the final 18 months of her tenure, she never took a vacation or any extended time off while serving as Auditor.

14. During the investigation of this complaint, Joyce Schmidt provided spreadsheets showing the days she did not work during the two four-year terms she served as Auditor. Some of the days off are designated by Schmidt as sick days, some as personal days, and some have no designation. According to the spreadsheets,

during the eight years that Schmidt was in office she took 181 days off -- 68.25 during her first term and 112.75 during her second term.¹

15. Based on the spreadsheets provided by Joyce Schmidt, she worked a 32-hour work week or less during the following number and percentage of weeks in each calendar year in which she served as Auditor:

1995	7 weeks	13%
1996	12 weeks	23%
1997	14 weeks	27%
1998	16 weeks	31%
1999	14 weeks	27%
2000	23 weeks	44%
2001	22 weeks	42%
2002	22 weeks	42%

16. One former employee who worked for Joyce Schmidt recalled that Schmidt frequently took Wednesdays or Fridays off during her second term in office. Other former employees did not recall whether Schmidt took regular days off during the work week. The time records maintained by Joyce Schmidt show that, during Schmidt's second term, she took off 37 Wednesdays and 45 Fridays (not including holidays that may have fallen on a Wednesday or Friday).

Motor Vehicle Tax Distribution Error

17. During her campaign, Blossom stated that in 1999 Joyce Schmidt failed to audit the motor vehicle tax distribution, resulting in the inappropriate distribution by Gallatin County of nearly \$150,000. Blossom also stated that auditing of the motor vehicle tax distribution is a requirement of the Auditor's position and that Schmidt failed

¹ With two exceptions, the spreadsheets prepared by Schmidt do not reflect time taken off for holidays. County offices normally are closed on the ten recognized legal holidays in the state of Montana. See Montana Code Annotated §§ 1-1-216 and 7-4-102. For purposes of this analysis, however, a week that contains a holiday is considered a 40-hour work week, rather than a 32-hour work week, and days that Schmidt took off as holidays are not included in the calculations.

to comply with that requirement. Complainant Jerry Schmidt contends these statements by Blossom are misrepresentations.

18. In fiscal year 2000, more than \$150,000 in motor vehicle tax money was incorrectly diverted from the accounts of various Gallatin County school districts, rural fire districts, and other governmental entities, and distributed into the accounts of other governmental entities that were not entitled to the money. There also apparently had been a “problem” with the motor vehicle tax distribution in fiscal year 1999. According to independent audits subsequently conducted by an outside accounting firm, the audit of the motor vehicle distribution “is relied on as part of the internal control procedures for tax distributions.” The independent audit report noted that, because the internal audit was not completed by the county Auditor’s office for the fiscal year ending June 30, 1999, “a problem in the distribution was found, investigated, and corrected” by the county Treasurer’s office. The independent auditor attributed part of the problem to faulty computer software but also recommended that the county Auditor could have accomplished verification of the distribution through an internal audit, and this could have prevented the incorrect distribution.

19. Sherry Hoekema was the Gallatin County Auditor when Joyce Schmidt assumed the office in January, 1995. At the request of the Gallatin County Commission, Hoekema’s office completed an audit of the motor vehicle tax distribution in June, 1994. It is not clear whether the Gallatin County Commission issued a continuing request or order that the motor vehicle tax distribution audit be conducted annually or whether the audit only was requested in 1994. Kim Buchanan, an accountant in the office when Hoekema was the Auditor, continued to work in the office

after Joyce Schmidt became Auditor in 1995. Buchanan recalls performing the motor vehicle tax distribution audit in 1995, 1996, and 1997, while working for Schmidt. In 1998 Schmidt instructed Buchanan not to perform the audit because the previous year's audit had revealed no problems. Buchanan stated she was somewhat surprised and felt uncomfortable with the decision, but, as Schmidt was her supervisor, Buchanan followed instructions and did not perform the audit in 1998.

20. Buchanan stated that the error in the motor vehicle tax distribution first occurred during fiscal year 1998, but it was not discovered until 1999.

21. Joyce Schmidt stated she did not have the statutory responsibility to audit the motor vehicle tax distribution and that it was the county Treasurer's duty. Schmidt only recalls performing the audit in 1995, her first year in office; however, she stated that if Kim Buchanan recalled performing the audit in 1996 and 1997, then it must have been done in those years. Schmidt stated she would have continued to perform the audit after 1997 if the Gallatin County Commissioners had given her the necessary staff to complete the work.

Unwilling to Train on or Use County's Computer Software

22. During the campaign, Blossom made statements suggesting that Joyce Schmidt was reluctant to train on or use the county's new computer accounting software. Jerry Schmidt contends that this statement by Blossom is a misrepresentation.

23. Eden Inforum Gold is financial software used by multiple departments of Gallatin County. The Auditor's office uses the software to audit claims. In 1999 the Gallatin County Commission decided to update from the Eden Command Series

software to the Eden Inforum Gold version of the software. The new software would permit county employees to operate the software themselves and to utilize Eden's technology support for any problems.

24. In response to the complaint allegations, Blossom stated that the county purchased the new software and implemented it in the spring of 2001. She recalled attending several training sessions that were not attended by Joyce Schmidt. Blossom also recalled attending a training session that was attended by Schmidt. She recalled the trainer attempting to teach the participants how to use the module that pertains to decentralization of the claims process and Joyce Schmidt responding, "We're not ready to go there."

25. Blossom provided a list of attendees at Eden software training sessions over a two-year period. According to the list, Joyce Schmidt attended three sessions but was absent for two other training sessions.

STATEMENT OF FINDINGS

Blossom is accused of violating Montana Code Annotated § 13-37-131(1), which provides:

Misrepresentation of voting record -- political civil libel. (1) It is unlawful for a person to misrepresent a candidate's public voting record or any other matter that is relevant to the issues of the campaign with knowledge that the assertion is false or with a reckless disregard of whether or not the assertion is false.

To establish a violation of this statute, it would be necessary to prove that Blossom misrepresented a "matter that is relevant to the issues of the campaign," and that she either did so "with knowledge that the assertion is false" or "with a reckless disregard of whether or not the assertion is false."

The mental state requirement in the statute is derived from the seminal case of New York Times v. Sullivan, 376 U.S. 254(1964). In that case the United States Supreme Court held that a public official could not recover on a claim for defamation brought against a newspaper unless he proved “actual malice,” which the Court defined as “knowledge that [the statement] was false or with reckless disregard of whether it was false or not.” Id., 376 U.S. at 279-80. The Court based its decision on the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open” Id., 376 U.S. at 270. The high degree of First Amendment protection afforded by the New York Times rule is underscored by the requirement that actual malice must be proven with “convincing clarity.” Id., 376 U.S. at 285-86.²

In several later opinions, the Court applied the New York Times standard in libel actions brought by two candidates against newspapers that had printed allegedly defamatory statements about them. Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971); Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971). In Monitor Patriot Co. the Supreme Court stated:

And if it be conceded that the First Amendment was “fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people,” [citation omitted], then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.

Monitor Patriot Co., 401 U.S. at 271-72.

While the standard enunciated by the Supreme Court in New York Times and its progeny developed in libel actions, the standard also applies to statutes authorizing penalties for violation of election laws that limit campaign speech:

² In Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974), the Supreme Court noted that the New York Times rule calls for “clear and convincing proof that the defamatory falsehood was made with knowledge of a falsity or with reckless disregard for the truth.”

Although the state interest in protecting the political process from distortions caused by untrue and inaccurate speech is somewhat different from the state interest in protecting individuals from defamatory falsehoods, the principles underlying the First Amendment remain paramount.

Brown v. Hartlage, 456 U.S. 45, 61 (1982). In Vanasco v. Schwartz, 401 F. Supp. 87 (E.D.N.Y. 1975) (affirmed 423 U.S. 1041 (1978)), Riccio, a political candidate who lost an election to Ferris, complained to the New York State Board of Elections that Ferris had misrepresented Riccio's voting record in a handbill distributed prior to the election. The statute at issue, which was somewhat similar to Montana's, provided:

No person, . . . during the course of any campaign for nomination or election to public office . . . shall . . . engage in or commit any of the following:

Misrepresentation of any candidate's position including, . . . misrepresentation as to political issues or his voting record . . .

Vanasco, 401 F. Supp. At 101. The court found the statute unconstitutional because it did not include the New York Times "actual malice" mental state requirement. The court also noted that proof by "clear and convincing" evidence is a constitutional requirement, and a standard of proof requiring only "substantial evidence" would be insufficient. Vanasco, 401 F. Supp. At 99.

It is important to note that the "clear and convincing" standard of proof is a "more exacting measure of persuasion" than the standard burden of proof by a preponderance of the evidence in typical civil actions. John W. Strong, et al., *McCormick on Evidence* § 340 at 575 (4th Ed. 1992). Moreover, the "actual malice" standard requires application of a subjective, rather than an objective test. In St. Amant v. Thompson 390 U.S. 727 (1968), the Supreme Court considered a case where a political candidate (St. Amant) made allegedly defamatory statements about his opponent. The Louisiana Supreme Court applied an objective test of recklessness in finding that St. Amant had violated the "reckless disregard of the truth" standard when making his statements. Rejecting this analysis, the United States Supreme Court held that proof of actual malice requires

proof of “an awareness . . . of the probable falsity” of the statement. St. Amant, 390 U.S. at 732. As the Court explained, “reckless conduct is not measured by whether a reasonably prudent man would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.” Id., 390 U.S. at 731. See also Gertz v. Robert Welch, Inc., 418 U.S. 323, 334 n. 6 (1974).

Of course, the New York Times standard itself reflects the principle that not all speech made during the course of a political campaign is protected by the First Amendment. The Supreme Court made this clear in Garrison v. Louisiana, 379 U.S. 64, 75 (1964), when it stated:

The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. . . . That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of a known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which “are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .” Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

Thus, while there is no question that speech uttered during political campaigns is entitled to considerable protection under the First Amendment, it is equally clear that candidates are not entitled to deliberately lie or use “calculated falsehoods” in their campaigns.

The question for resolution in this case is whether the campaign statements made by Blossom meet the New York Times actual malice standard, thereby constituting a violation of Montana Code Annotated § 13-37-131(1). Upon review of the

summary of facts, there is not “clear and convincing evidence” that any of Blossom’s statements meet that standard.

Statements Regarding Late Payment of Vendors

During the campaign, Blossom stated that Gallatin County paid a lot of money in late fees due to the particular method of approval of claims used by Joyce Schmidt when she was the Auditor. Schmidt’s office reviewed claims on a biweekly basis, and this sometimes resulted in a delay in approval of claims. Blossom provided records showing that Gallatin County paid late charges and late fees to various vendors, and she attributed those fees in part to the biweekly claims’ approval process employed by Auditor Schmidt. Schmidt did not provide any information that disputes the claims made by Blossom, and there is no other evidence that would tend to show that Blossom’s statements are misrepresentations. Regarding Blossom’s claim that the auditing departments of other counties in Montana pay their bills “more efficiently,” she contends she relied on discussions with officials from other counties who were charged with those responsibilities. The general statement that “other counties” pay their bills “more efficiently” than Gallatin County cannot be either verified or refuted without conducting an in-depth comparison of the bill-paying system employed by Gallatin County with those of other counties; therefore, it would be difficult to characterize Blossom’s statement as a misrepresentation. More importantly there is no evidence that Blossom subjectively “entertained serious doubts” regarding the truth of her statement.

Statements Regarding Schmidt Working Less Than a 40-Hour Work Week

On several occasions during the campaign, Blossom claimed that Joyce Schmidt was “notorious” for working a 32-hour work week or “not working a full 40-hour work week.” The time records submitted by Schmidt reveal that, especially during her second term, she often worked 32 hours or less during a typical work week. One of Schmidt’s former employees recalled that Schmidt often took Wednesdays or Fridays off, and her time records support the employee’s recollection. Based on the facts

discovered during this investigation, the statements by Blossom cannot be characterized as misrepresentations. Moreover, there is no evidence that Blossom subjectively entertained serious doubts regarding the truth of the statements.

Statements Regarding the Motor Vehicle Tax Distribution Error

Blossom contended that Joyce Schmidt failed to audit the motor vehicle tax distribution, resulting in the inappropriate distribution by the county of some \$150,000. She also claimed that the motor vehicle tax distribution audit is a requirement of the county Auditor's job. There is no dispute that Schmidt did not perform the audit after 1997. The independent audit of the county's finances by an outside accounting firm attributed the problems with the motor vehicle tax distribution, at least in part, to the county Auditor's failure to perform the audit after 1997. Thus, Blossom's statement is not a misrepresentation, and there is no evidence that Blossom entertained serious doubts regarding the truth of the statement. Regarding the question of whether that particular audit is a statutory duty of the county Auditor, in support of her statement Blossom cited Montana Code Annotated § 7-2412, which states that the Auditor "shall also perform such other duties, clerical or otherwise, as he may be directed to perform by the county commissioners." Blossom's campaign materials note that in 1993 the Gallatin County Commission directed the Auditor to audit the motor vehicle distribution and that the audit was performed every year thereafter until 1998. This investigation confirmed Blossom's claims. Thus, Blossom's statements are not misrepresentations, and there is no evidence that Blossom entertained serious doubts regarding the truth of the statements.

Statements Regarding Joyce Schmidt Being Unwilling To Train on or Use the County's Computer Software

During the campaign Blossom made statements suggesting that Joyce Schmidt was reluctant to use the county's new accounting software. Blossom based this contention primarily on her recollection of a statement made by Schmidt during a

training session on the software. Blossom also provided software training session attendance information, showing that Schmidt was absent from two of five training sessions. Blossom's statement reflects her subjective interpretation of Schmidt's statement at the training session, and the software training session attendance records. There is no evidence that Blossom in fact entertained serious doubts regarding the truth of her statement.

As noted, several of the campaign claims or statements made by Blossom cannot be characterized as misrepresentations. Regarding Blossom's mental state, the evidence is considerably less than "clear and convincing" that she misrepresented a matter that was relevant to the issues in the campaign with knowledge that the assertion was false or with reckless disregard of whether or not the assertion was false. As noted previously, the standard for actual malice is subjective, and there is insufficient evidence that Blossom had an "awareness . . . of the probable falsity" of any of the campaign statements she made or that she "in fact entertained serious doubts as to the truth" of the statements. St. Amant, 390 U.S. at 731 and 732. Given the high bar established by the United States Supreme Court in New York Times and subsequent decisions and the Court's consistent recognition that First Amendment free speech rights are paramount in political campaigns, I have concluded that there is insufficient evidence in this case to prove a violation of Montana Code Annotated § 13-37-131(1).

CONCLUSION

Based on the preceding Summary of Facts and Statement of Findings, there is insufficient evidence to justify a civil prosecution based on allegations that Jennifer Blossom violated Montana campaign practices law.

Dated this 12TH day of January, 2004.

/s/ Linda L. Vaughey
Linda L. Vaughey
Commissioner