

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES

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In the Matter of the Complaint )  
Against SENATOR SHARON ESTRADA )

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**SUMMARY OF FACTS AND STATEMENT OF FINDINGS**

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Representative John Bohlinger, candidate for Senate District No. 7, filed a complaint against his opponent, Senator Sharon Estrada. Bohlinger alleges that Estrada violated Montana Code Annotated § 13-35-234 by making a false statement concerning his "stance on important political issues." He alleges Estrada represented that he is "for abortions."

**SUMMARY OF FACTS**

1. Estrada spoke with Tim Wiesner at a yard sale. Tim Wiesner invited Estrada to call Wiesner's father to request permission to place a yard sign in the elder Wiesner's yard.

2. Estrada telephoned Gene Wiesner, Tim Wiesner's father. Gene Wiesner advised Estrada that he had promised Bohlinger he could place a campaign sign in his yard. During the conversation the issue of abortion came up. Following the conversation Wiesner was left with the impression that Estrada had indicated Bohlinger was in favor of abortions.

3. Following his conversation with Estrada, Gene Wiesner telephoned Bohlinger and questioned him regarding his stance on abortion. Bohlinger stated his position, which he has summarized in his letter of complaint:

. . . I have never stated I was for abortions. . . . [A]bortion is a poor choice, . . . we should prevent the pregnancy or work for adoption. The abortion question does not belong in the Montana Legislature, because the United States Supreme Court has ruled that in this country, abortions are legal. In spite of what we may personally think about the question, the Montana Legislature will not be able to overturn a Supreme Court decision. . . .

4. After his conversation with Bohlinger, Wiesner telephoned Estrada and described Bohlinger's position on abortion. Estrada apologized for any misunderstanding that may have resulted from her initial telephone conversation with Wiesner.

5. Estrada denies that she stated Bohlinger is in favor of abortions, and states that she would never describe Bohlinger's position in that manner. She states that she typically does not bring up her opponent's position when campaigning by telephone or door-to-door. If the issue comes up she states that Bohlinger is "pro choice," based on a Billings Gazette news article about Bohlinger that she has read.

6. Gene Wiesner is sure he was left with the impression that Bohlinger is in favor of abortions following the first telephone conversation with Estrada. However, he cannot be certain Estrada stated that Bohlinger is "for abortions." He states that it is just as possible his impression resulted from Estrada's use of "pro choice" language in describing Bohlinger's position.

### STATEMENT OF FINDINGS

Montana Code Annotated § 13-35-234 provides:

**Political criminal libel - misrepresenting voting records.** (1) It is unlawful for any person to make or publish any false statement or charge reflecting on any candidate's character or morality or to knowingly misrepresent the voting record or position on public issues of any candidate. A person making such a statement or representation with knowledge of its falsity or with a reckless disregard as to whether it is true or not is guilty of a misdemeanor.

(2) In addition to the misdemeanor penalty of subsection (1), a successful candidate who is adjudicated guilty of violating this section may be removed from office as provided in 13-35-106 and 13-35-107.

This is a criminal statute. In the context of the facts in this case, a violation can be established only if the evidence supports a finding that Estrada knowingly misrepresented Bohlinger's position on a public issue. Montana Code Annotated § 13-35-101 states that the "penalty provisions of the election laws of this state are intended to supplement and not to supersede the provisions of the Montana Criminal Code." Montana Code Annotated § 45-2-101(34) defines "knowingly" as follows:

. . . [A] person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when the person is aware of the person's own conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when the person is aware that it is highly probable that the result will be caused by the person's conduct. When knowledge of the existence of a particular fact is an element of an offense, knowledge is established if a person is aware of a high probability of its existence. Equivalent terms, such as "knowing" or "with knowledge", have the same meaning.

Applying this definition, to establish a violation it would be necessary to prove that Estrada was "aware of a high probability" that any statements she made describing Bohlinger's position on abortion were false.

A violation of the statute can also be proved if there is evidence that a person acted with "reckless disregard". The Compiler's Comments to Mont. Code Ann. § 13-35-234 note that the source of the "standard" in subsection (1) of the statute is "apparently drawn from New York Times v. Sullivan, 376 U.S. 254 (1964)". That case involved a civil libel action filed by a public official against a newspaper. The Supreme Court held that recovery would only be allowed if the public official could prove that the alleged libelous statement was made with "actual malice;" that is, with "knowledge that it was false or with reckless disregard of whether it was false or not." Sullivan, 376 U.S. at 279-280.

In a later case, Herbert v. Lando, 441 U.S. 153 (1979), the Supreme Court, citing Sullivan, stated that "reckless disregard for truth" means that the defendant "in fact entertained serious doubts as to the truth of his publications." The Court noted that such "subjective awareness of probable falsity" may be found if "there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." Herbert, 441 U.S. at 156-57.

Other cases have held that "reckless disregard" is "more than mere negligence," Major v. Drapeau, 507 A.2d 938, 941 (R.I. 1986);

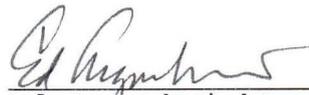
and that "a failure to investigate is not sufficient in itself to establish reckless disregard," Bartimo v. Horsemen's Benevolent and Protective Association, 771 F.2d 894, 898 (5th Cir. 1985). In Green v. Northern Publishing Co., Inc., 655 P.2d 736, 742 (Alaska 1982), the Court observed:

Reckless disregard, for these purposes, means conduct that is heedless and shows a wanton indifference to consequences; it is conduct which is far more than negligent. [Citation omitted]. There must be sufficient evidence to permit the inference that the defendant must have, in fact, *subjectively entertained serious doubts as to the truth of his statement.* [Italics in original].

Applying these principles to the facts in this case, the evidence does not support a finding that Montana Code Annotated § 13-35-234 was violated by Sen. Estrada. She denies stating that Rep. Bohlinger is "for abortions." Gene Wiesner, the only other witness who heard her statements, is unsure of the exact language she used during the telephone conversation. Moreover, he conceded that she may have characterized Bohlinger's position as pro choice, which does not appear to be inconsistent with the position described by Bohlinger in his letter of complaint.

Based on the preceding facts and findings, there is insufficient evidence to conclude that Montana Code Annotated § 13-35-234 was violated.

Dated this 20<sup>th</sup> day of May, 1998.



Ed Argenbright, Ed.D.  
Commissioner of Political Practices