

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

In the Matter of the)
Complaint Against)
REPRESENTATIVE LIZ SMITH)

SUMMARY OF FACTS AND STATEMENT OF FINDINGS

Gary Beck, a candidate for House District 56, filed a complaint against his opponent, Representative Liz Smith. Candidate Beck alleges that Rep. Smith violated Mont. Code Ann. § 13-35-234 by misrepresenting candidate Beck's voting record.

SUMMARY OF FACTS

1. Candidate Beck and Rep. Smith are opponents for the seat in House District 56 in the upcoming election.

2. Rep. Smith approved the placement of a campaign advertisement in the Silver State Post newspaper (a Deer Lodge weekly). The ad, which ran on October 12, 1994 stated in part:

Former Rep. Gary Beck voted for . . . 13 major tax bills increasing income, property and gasoline taxes (MT Standard 10/18/92). [Emphasis in original].

3. The October 12, 1994 campaign ad referenced an ad that had been placed by United We Stand, America of Montana (United We Stand) in the October 18, 1992 Montana Standard newspaper in Butte. The October 18, 1992 ad listed the voting records of several Montana state legislators on selected house and senate bills during the 1991 legislative session. Included were the votes of a legislator identified as "Beck".

4. During the investigation of this complaint, Rep. Smith stated that the language pertaining to candidate Beck's voting

record included in her October 12, 1994 ad was derived from an ad from her 1992 campaign, which was also against candidate Beck. Her ad during that campaign ran in the Silver State Post on October 29, 1992, and contained the identical language concerning candidate Beck's purported voting record. The October 29, 1992 ad also cited as a source the October 18, 1992 Montana Standard ad placed by United We Stand.

5. The October 18, 1992 ad placed by United We Stand listed the voting record of Sen. Tom Beck, not that of former Rep. Gary Beck. As noted, however, the ad only identified the legislator as "Beck". In a press release issued on October 23, 1994, United We Stand stated that the legislative voting record in its 1992 ad "did not reflect Gary Beck's voting record." United We Stand also apologized "for any confusion or misunderstanding", and stated it was not the intention of United We Stand to mislead voters.

6. Rep. Smith stated that when she approved the ad that ran on October 12, 1994, she believed it accurately reflected the voting record of former Rep. Gary Beck. Rep. Smith had no involvement in the preparation of United We Stand's October 18, 1992 ad. She stated that she first learned the United We Stand ad contained the voting record of Sen. Tom Beck, rather than former Rep. Gary Beck on Saturday, October 22, 1994.

7. Both the October 29, 1992 and October 12, 1994 campaign ads for Rep. Smith were prepared by Helen Kellicut, a volunteer on Rep. Smith's campaign. Ms. Kellicut stated that when she prepared the October 29, 1992 ad she relied on the 1992 United We Stand ad,

and that she believed the voting record information was accurate. In particular, she believed the United We Stand ad reflected Gary Beck's voting record, because Sen. Tom Beck was not running for election in 1992.

8. During this investigation, Ms. Kellicut recalled that after the 1992 ad for Rep. Smith appeared, Kellicut received a telephone call from Rep. Smith's husband, Bill. Although she was not certain, Ms. Kellicut speculated that during the call Bill Smith may have discussed a conversation he had with Gary Beck regarding the 1992 ad, possibly concerning the voting record information set forth in the ad.

9. When Ms. Kellicut prepared the 1994 ad for Rep. Smith, she pulled the 1992 Rep. Smith campaign ad from her files and arranged it in a new format. At that time she had no recollection of the previous discussion with Bill Smith, which possibly involved the voting record information contained in the 1992 ad.

10. During this investigation, Rep. Smith stated that when the complaint was filed she had a vague "flashback" recollection that there may have been some discussion regarding the Gary Beck voting record information following the placement of her ad during the 1992 campaign. She could not, however, recall any specifics.

11. Candidate Beck stated that after the October 29, 1992 ad for Rep. Smith appeared in the newspaper, he publicly confronted Rep. Smith concerning the voting record information. He recalled that the confrontation occurred during a meeting with Louisiana Pacific Mill employees that was attended by both him and Rep.

Smith. Candidate Beck specifically recalled that during this meeting he referred to the ad and pointed out that the voting record was Sen. Tom Beck's, not his.

12. Tony Colter was present at the 1992 meeting with Louisiana Pacific Mill employees that was attended by candidate Beck and Rep. Smith. While he did recall the two candidates arguing about something during this meeting, he could not recall if candidate Beck's voting record was the subject of the argument. Mr. Colter believes that candidate Beck's voting record was an issue during the 1992 campaign, but he is not sure how the issue arose during that campaign.

13. Rep. Smith recalls the meeting at the Louisiana Pacific Mill, but she has no recollection of candidate Beck's voting record being discussed during the meeting. She recalls that she and candidate Beck engaged in a cordial exchange of political views during the meeting.

14. Other than his recollection of the public confrontation with Rep. Smith described above, candidate Beck does not recall any communication with anyone associated with Rep. Smith's campaign regarding the inaccuracy of the 1992 ad.

15. Rep. Smith denies that she intentionally or knowingly misrepresented candidate Beck's voting record.

STATEMENT OF FINDINGS

Mont. Code Ann. § 13-35-234, Montana's political criminal libel statute 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.

The evidence clearly supports a finding that Rep. Smith's campaign ad misrepresents candidate Beck's voting record. The voting record referred to in the ad was that of Sen. Tom Beck, rather than former Rep. Gary Beck. However, political criminal libel is committed only if the evidence supports a finding that the misrepresentation of a candidate's voting record is made "with knowledge of its falsity or with a reckless disregard as to whether it is true or not "

Mont. Code Ann. § 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." Mont. Code Ann. § 45-2-101(33) 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.

Mont. Code Ann. § 13-35-234 prohibits a misrepresentation made "with knowledge of its falsity". In determining whether a misrepresentation was made "knowingly" or "with knowledge", it would be necessary to prove that Rep. Smith was "aware of a high probability" that the representation was 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 of this case, the evidence does not support a finding that Rep. Smith acted with the requisite knowledge or reckless disregard in misrepresenting candidate Beck's voting record. When Rep. Smith approved the ad she believed it accurately reflected the voting record of former Rep. Gary Beck. Rep. Smith had no involvement in the preparation of United We Stand's October 18, 1992 ad. She first learned the United We Stand ad contained the voting record of Sen. Tom Beck, rather than former Rep. Gary Beck on Saturday, October 22, 1994.

While candidate Beck recalled he advised Rep. Smith, in a public forum, that she was misrepresenting his voting record during the 1992 campaign, Rep. Smith did not have a specific recollection of such a confrontation. In addition, Tony Colter, an observer during that event, also did not specifically recall a confrontation between candidate Beck and Rep. Smith on the issue of voting records.

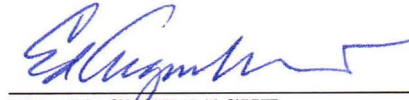
Helen Kellicut stated that when she prepared the 1994 campaign ad for Rep. Smith, she had no recollection of any discussions

during the 1992 campaign regarding the voting record information of former Rep. Beck.

Under the circumstances, there is not sufficient evidence that when Rep. Smith approved the 1994 campaign ad she was "aware of a high probability" that the representations contained therein were false, or that she "subjectively entertained serious doubts" as to the truth of the representations.

Based on the preceding, there is insufficient evidence to conclude that Rep. Smith violated Mont. Code Ann. § 13-35-234.

DATED this 3rd day of November, 1994.



ED ARGENBRIGHT
Commissioner of Political Practices