

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

In the Matter of the)
Complaint Against)
AL BISHOP)

SUMMARY OF FACTS AND STATEMENT OF FINDINGS

Tom Towe, a candidate for Senate District 9 in the 1994 general election, filed a complaint against his opponent in the election, Al Bishop. In addition, Brad Martin, Executive Director of the Montana Democratic Central Committee, filed a complaint against Al Bishop containing the same general allegations. The complaints allege that Al Bishop violated Mont. Code Ann. § 13-35-234 by making false statements and misrepresenting voting records in campaign fliers. The complaints allege three separate violations of the statute:

Claim 1: The allegation that Al Bishop misrepresented Tom Towe's voting record concerning tax bills introduced during the 1993 session of the Montana Legislature;

Claim 2: The allegation that Al Bishop misrepresented his own voting record; and

Claim 3: The allegation that Al Bishop made false statements and misrepresented Tom Towe's voting record concerning Senate Bill 235, introduced during the 1993 session of the Montana Legislature.

SUMMARY OF FACTS

1. Al Bishop and Tom Towe were opponents for the seat in Senate District 9 in the November, 1994 general election. Tom Towe was the incumbent, serving as senator from 1991 through 1994. Al

Bishop held the senate seat from 1987 through 1990. Senator Bishop defeated Senator Towe in the election, and is currently serving as senator for the district.

Claim 1

2. During the campaign, Senator Bishop approved the use of a campaign flier which contained the following statement:

IN THE 1993 SPECIAL AND REGULAR SESSIONS OF THE LEGISLATURE, TOM TOWE VOTED FOR EVERY NEW TAX, TAX INCREASE, NEW FEE, AND FEE INCREASE (EXCEPT ONE) !!!!

Senator Towe contends that this statement is false, and constitutes a misrepresentation of his voting record. He states that he voted "no" on the following bills that were considered during the 1993 session of the Montana Legislature:

Senate Bill (SB) 299
SB 235
House Bill (HB) 504
SB 410
SB 376
SB 162
SB 437

3. The following is a summary of actions taken by Senator Towe on these bills during the 1993 session of the Montana Legislature:

SB 299 was "an act submitting to the qualified electors of Montana the question of whether or not the law imposing a statewide sales tax and use tax . . . should remain in effect", and provided that the question would be voted on at the general election held in November, 1994. Senator Towe voted in favor of adopting an adverse committee report on the bill, and the report was adopted.

SB 235 provided that the question of whether a four percent sales and use tax should be enacted would be submitted to a vote of the qualified electors of Montana at a special election. Senator Towe voted against the bill on second and third reading in the Senate.

Upon its return from the House, Senator Towe voted "yea" on a motion to not pass, but then voted "yea" to adopt the Free Conference Committee report. As a result of the adoption of the Free Conference Committee report, the bill was sent to the Governor and signed. The sales tax was voted down at the special election held on June 8, 1993.

HB 504 increased the employer payroll tax and imposed an employee wage tax to be applied to eliminate the State Compensation Insurance Fund's "old fund unfunded liability." On April 13, 1993, Senator Towe voted "yea" on a motion to adopt certain amendments to the bill. On April 14, 1993, on third reading Senator Towe voted "yea" that HB 504 be concurred in. The bill was then sent back to the House with amendments. On April 15, 1993, the House voted to reject the amendments, and the bill went to a Free Conference Committee.

Following adoption by the House of the Free Conference Committee report, the bill was sent back to the Senate. On April 24, 1993, Senator Towe voted "nay" on second reading, on a motion to adopt the Free Conference Committee report. The motion failed. On third reading, Senator Towe voted "nay" on a motion to adopt the report, and the report passed.

SB 410 increased the video gambling machine tax to fund increased retirement benefits under the Sheriffs' Retirement System. Senator Towe voted in favor of adopting an adverse committee report on the bill, and the report was adopted. However, on the same day Senator Towe voted "yea" on a motion to reconsider the Senate's action in adopting the adverse committee report. The motion failed.

SB 376 increased the gasoline and special fuels tax. The bill was referred to the Senate Taxation Committee, of which Senator Towe was a member. The bill was tabled on March 26, 1993, with Senator Towe voting to table.

SB 162 increased the tax rate on residences valued over \$200,000. The bill was referred to the Senate Taxation Committee. The bill was tabled on January 29, 1993, with Senator Towe voting to table.

SB 437 imposed a tax on certain transfers of real property. The bill was referred to the Senate Taxation Committee. The bill was tabled on March 26, 1993, with Senator Towe voting to table.

4. Senator Bishop obtained the information regarding Senator Towe's voting record from the State Republican Legislative Campaign Committee, paying \$100 for the information. Senator Bishop did not conduct any research to ascertain whether the information was accurate. He assumed he had the entire voting record of Senator Towe regarding bills involving taxes and fees.

The information packet Senator Bishop relied on contained information concerning Senator Towe's voting record on nineteen

taxation or fee bills considered during the 1993 session of the Montana Legislature. Of the seven bills listed by Senator Towe in support of his claim that he voted against more than one tax bill, only two were listed in the information packet relied on by Senator Bishop: SB 235 and HB 504. The information packet indicated that HB 504 was the only taxation or fee bill that Senator Towe voted against.

5. Senator Towe believed that Senator Bishop's campaign statements regarding Senator Towe's voting record referred to both committee and floor votes on bills. Senator Bishop stated that when making the claim he was referring only to floor votes, not "obscure committee votes". Senator Bishop continues to believe that the statements in his campaign literature regarding Senator Towe's voting record are accurate.

Claim 2

6. A campaign flier for Senator Bishop stated, in part:

. . . Unlike you, Mr. Towe, I have consistently opposed the sales tax because it hurts those least able to pay, and it's just another tax in addition to all the other taxes we have, and we don't need more taxes!!! [Emphasis in original].

Senator Towe contends the statement that Senator Bishop consistently opposed the sales tax is false, and constitutes a misrepresentation of Senator Bishop's own voting record. He claims that during the 1987 session of the Montana Legislature Senator Bishop voted in favor of SB 307, which would have established a 5% sales tax.

7. Senate Bill 307, introduced in the 1987 Montana Legislature, was a bill for a law entitled "An act to stimulate and encourage the growth of the Montana economy by means of the Montana Economic and Tax Reform Act of 1987". Included within its provisions was a 5% sales and use tax. Senator Bishop voted "yea" on both second and third reading of the bill. The bill did not pass.

8. Senator Bishop contends he has no recollection of SB 307, or of voting in favor of its passage. He also contends he was referring in his campaign literature to SB 235, not SB 307. He claims that he publicly spoke out against SB 235, and voted against it on June 8, 1993.

Claim 3

9. Senator Towe claims that Senator Bishop misrepresented his (Senator Towe's) voting record on SB 235, the sales tax bill introduced during the 1993 session of the Montana Legislature. Senator Bishop's campaign flier states that Senator Towe voted for SB 235 on April 24, 1993. The flier also states that Senator Towe's campaign statement that he consistently opposed the sales tax is therefore "a lie".

10. As noted above, SB 235 provided that the question of whether a four percent sales and use tax should be enacted would be submitted to a vote of the qualified electors of Montana at a special election. Senator Towe voted against the bill on second and third reading in the Senate. Upon its return from the House, Senator Towe voted "yea" on a motion to not pass, but then voted

"yea" to adopt the Free Conference Committee report. As a result of the adoption of the Free Conference Committee report, the bill was sent to the Governor and signed.

11. Senator Towe claims that his vote in favor of adopting the Free Conference Committee report was not a "critical vote" on SB 235. According to Senator Towe, "while a failure to pass second reading or a failure to pass third reading would be fatal to the bill, failure to approve the Free Conference Committee report . . . would not be fatal to passage of the bill." Based on the distinction Senator Towe drew between the two types of votes, he believes his statement that he voted against the sales tax is true, and that Senator Bishop's characterization of his (Senator Towe's) voting record on that issue is false.

STATEMENT OF FINDINGS

Mont. Code Ann. § 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.

Claim 1

The allegation that Senator Bishop misrepresented Senator Towe's voting record concerning tax bills introduced during the 1993 session of the Montana Legislature requires an examination of

the mental state requirement of Mont. Code Ann. § 13-35-234.

Criminal misrepresentation of voting records is committed only if the evidence supports a finding that a misrepresentation 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.

In determining whether a representation was made "with knowledge" of its falsity, it would be necessary to prove that Senator Bishop was "aware of a high probability" that the representation he made concerning Senator Towe's voting record 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 upon which Claim 1 is based, the evidence does not support a finding that Senator Bishop acted with the requisite knowledge or reckless disregard in making the representation regarding Senator Towe's voting record. Senator

Bishop relied on information he obtained from the State Republican Legislative Campaign Committee. He believed that the information accurately reflected Senator Towe's voting record, and he did not conduct any additional investigation to verify the accuracy of the information.

Senator Towe believed Senator Bishop was referring to all votes (both committee and floor) on all tax bills considered by the 1993 Legislature. Thus, he believed that Senator Bishop had mischaracterized his (Senator Towe's) voting record by claiming that Senator Towe had only voted against one tax bill. Senator Towe voted to table SB 162, SB 376, and SB 437, which were all bills which would have imposed or increased taxes. Senator Towe therefore believed that he had not "voted for" these tax bills, and that Senator Bishop's contention in his campaign literature that he (Senator Towe) had voted for every new tax or tax increase "except one" was untrue.

Senator Bishop, however, states that he was referring only to floor votes, not committee votes. Of the four bills referred to by Senator Towe that made it to the floor (SB 299, SB 235, HB 504, and SB 410), Senator Towe only consistently opposed SB 299 throughout the entire journey of the bill through the Legislative process. Senator Towe's votes on SB 235, HB 504 and SB 410 at various stages of the process could be construed as votes in favor of those bills.

In any event, the evidence establishes that Senator Bishop was, for the most part, referring to different bills than those referred to by Senator Towe, when he represented Senator Towe's

voting record. The information Senator Bishop relied on did not include Senator Towe's voting records on SB 299, SB 410, SB 376, SB 162, or SB 437. Senator Bishop's failure to investigate further, however, is insufficient to establish reckless disregard. Bartimo v. Horsemen's Benevolent and Protective Association, 771 F.2d 894, 898 (5th Cir. 1985).

Under these circumstances, there is not sufficient evidence that when Senator Bishop made the representation regarding Senator Towe's voting record he was "aware of a high probability" that the representation was false, or that he "subjectively entertained serious doubts" as to the truth of the representation.

Claim 2

It does not appear that an allegation that a candidate misrepresented his own voting record can establish a violation of the statute. The statute prohibits "any person" from knowingly misrepresenting the voting record of "any candidate". The choice of language by the Legislature suggests an intention to prohibit the misrepresentation of a candidate's voting record by a person other than the candidate. Had the Legislature intended to also specifically prohibit a candidate from misrepresenting his own voting record, it could easily have included express language to that effect in the statute. Its failure to do so supports a conclusion that the statute does not apply to this situation.

Mont. Code Ann. § 13-35-234 is a penal statute, which must be strictly construed and may not be extended by construction. Montana Automobile Association v. Greely, 193 Mont. 378, 389, 632

P.2d 300, 306 (1981); Shipman v. Todd, 131 Mont. 365, 368, 310 P.2d 300, 302 (1957). Court will not apply penal statutes to cases which are not within the obvious meaning of the language employed by the Legislature, even though they may be within the mischief intended to be remedied. State v. Aetna Banking & Trust Co., 34 Mont. 379, 382, 87 P.2d 268, 269 (1906). See also State ex rel. Penhale v. State Highway Patrol, 133 Mont. 162, 165, 321 P.2d 612, 613-14 (1958).

Claim 3

There is also insufficient evidence of a violation by Senator Bishop with respect to Claim 3. Senator Towe contends that Senator Bishop misrepresented Senator Towe's voting record and made false statements concerning SB 235, considered by the 1993 Legislature. SB 235 would have submitted the question of whether a four percent sales and use tax should be enacted to a vote of the qualified electors of Montana at a special election. Senator Towe voted against the bill on second and third reading in the Senate. Upon its return from the House, Senator Towe voted "yea" on a motion to not pass. However, Senator Towe then voted "yea" to adopt the Free Conference Committee report. As a result of the adoption of the Free Conference Committee report, the bill was sent to the Governor and signed.

Senator Bishop's representations and statements concerning Senator Towe's voting record with respect to SB 235 were not a clear violation of Mont. Code Ann. § 13-35-234. Senator Bishop's interpretation of Senator Towe's final vote on the bill obviously

differs from Senator Towe's interpretation. Each interpretation is arguably correct. Senator Towe did oppose the bill up until his vote on the Free Conference Committee report. Yet his vote to accept the report could be construed as a vote in favor of the bill in its modified form. Under these circumstances, there is not sufficient evidence that when Senator Bishop made the representation regarding Senator Towe's voting record on SB 235 he was "aware of a high probability" that the representation was false, or that he "subjectively entertained serious doubts" as to the truth of the representation.

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

DATED this 12th day of January, 1995.



ED ARGENBRIGHT
Commissioner of Political Practices