

**BEFORE THE SECRETARY OF STATE
STATE OF COLORADO**

CASE NO. OS 2008-0028

ORDER DENYING DEFENDANT'S MOTION FOR ATTORNEY FEES

**IN THE MATTER OF THE COMPLAINT FILED BY COLORADO ETHICS WATCH
REGARDING ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY
SENATE MAJORITY FUND, LLC AND COLORADO LEADERSHIP FUND, LLC.**

This matter is before the Administrative Law Judge (ALJ) upon motion of defendant Senate Majority Fund (SMF) for attorney fees.¹ Complainant Colorado Ethics Watch (CEW) opposes the motion. SMF's motion to permit a reply is granted and the reply is accepted for filing.

Background

In September 2008, CEW filed a complaint with the Secretary of State alleging that SMF violated Colorado's fair campaign practice and finance laws by producing advertisements advocating the election of a slate of Republican candidates for state office in the November 2008 general election. Copies of the offending advertisements were attached to CEW's complaint. CEW alleged that SMF's advertisements amounted to "expenditures" as that term is defined by Colo. Const. art. XXVIII, § 2(8)(a) because they "expressly advocated" the election of specifically identified candidates. In CEW's view, the advertising expenditures made SMF a "political committee" subject to the registration and reporting requirements of § 1-45-108(3), C.R.S. of the Fair Campaign Practices Act (FCPA), and subject to the contribution limits and independent expenditure requirements of Colo. Const. art. XXVIII, §§ 3(5) and 5. CEW asked that SMF be fined for these violations.

SMF, while not denying that it produced the advertisements in question, nonetheless moved to dismiss CEW's complaint on the grounds that the advertisements did not expressly advocate the election or defeat of any candidate, and therefore were not expenditures subject to regulation. The parties agreed to stay hearing of the complaint pending briefing of SMF's motion to dismiss. Briefing was completed November 21, 2008, and on November 26, 2008 the ALJ entered an Agency Decision granting SMF's motion and dismissing CEW's complaint.

SMF now moves for an award of attorney fees upon grounds that CEW's complaint was both frivolous and vexatious. CEW denies these allegations. For the reasons explained below, the motion for fees is denied.

¹ Colorado Leadership Fund initially joined SMF's motion for fees, but subsequently withdrew from the motion.

Discussion

Section 1-45-111.5(2), C.R.S. of the FCPA provides that a party defending a substantially frivolous, groundless or vexatious complaint is entitled to recover reasonable attorney fees and costs under the following circumstances:

A party in any action brought to enforce the provisions of article XXVIII of the state constitution or of this article shall be entitled to the recovery of the party's reasonable attorney fees and costs from any attorney or party who has brought or defended the action, either in whole or in part, upon a determination by the office of administrative courts that the action, or any part thereof, lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct ... Notwithstanding any other provision of this subsection (2), no attorney fees may be awarded under this subsection (2) unless the court or administrative law judge, as applicable, has first considered the provisions of section 13-17-102 (5) and (6), C.R.S. For purposes of this subsection (2), "*lacked substantial justification*" means *substantially frivolous, substantially groundless, or substantially vexatious*.

*Italics added.*²

A claim or defense is frivolous if the proponent can present no rational argument based on the evidence or the law to support it. Similarly, a claim or defense is groundless if the proponent's allegations, while sufficient to survive a motion to dismiss for failure to state a claim, are not supported by any credible evidence at trial. *W. United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1069 (Colo. 1984); *Brown v. Silvern*, 141 P.3d 871, 875 (Colo. App. 2005), *cert. denied*. A vexatious claim or defense is one brought or maintained in bad faith. *Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 992 P.2d 1188, 1198 (Colo. App. 1999), *aff'd in part and rev' in part*, 17 P.3d 797 (Colo. 2001). Bad faith may be evidenced by conduct that is arbitrary, vexatious, abusive, or stubbornly litigious, including conduct that is aimed at unwarranted delay or is disrespectful of truth and accuracy. *W. United Realty, supra*. The fee claimant has the burden of proving the claim by a preponderance of the evidence. *Remote Switch Systems, Inc. v. Delangis*, 126 P.3d 269, 275 (Colo. App. 2005).

CEW's complaint was not substantially frivolous or groundless

Any group of two or more persons that makes "expenditures" in excess of \$200 to support or oppose the nomination or defeat of one or more candidates is a "political committee" as defined by Colo. Const. art. XXVIII, § 2(12)(a), C.R.S. Section 2(8)(a) of the constitution, in turn, defines "expenditure" to mean any payment "for the purpose of expressly advocating the election or defeat of a candidate." CEW argued that SMF's

² Sections 13-17-102(5) and (6) relate to circumstances not applicable here.

advertising expressly advocated the election of the Republican candidates mentioned in the advertising, and therefore SMF was a political committee.

Whether political advertising designed to support the election or defeat of a candidate should be subject to regulation is a contentious issue spawning litigation in Colorado and nationwide. At issue is the tension between the desire to reduce the potential for corruption in political campaigns on the one hand, and the need to protect freedoms of speech and association on the other. See *Alliance for Colorado's Families v. Gilbert*, 172 P.3d 964, 969 (Colo. App. 2007) (“The law relating to campaign finance reform is in a state of flux as courts attempt to balance the desire of Congress and the states to enact legislation that will reduce the potential for corruption and the appearance of corruption in political campaigns, against contributors’ First and Fourteenth Amendments’ guarantees of freedom of speech and political association.”)

Based upon the parties’ extensive briefing, the ALJ agreed with SMF that Colo. Const. art. XXVIII, § 2(8)(a) limits regulation of political advertisements to those advertisements that include words or phrases expressly advocating the election or defeat of a clearly identified candidate. Although SMF’s advertising as demonstrated by the attachments to CEW’s complaint was clearly supportive of Republican candidates, the advertisements did not use express words of advocacy, and therefore were not “expenditures” as defined by § 2(8)(a). In making this decision, the ALJ substantially relied upon the rationale of *League of Women Voters v. Davidson*, 23 P.3d 1266 (Colo. App. 2001). SMF now argues that because the law is clear, CEW had no rational argument to support its complaint, and therefore the complaint was substantially frivolous and groundless. The ALJ does not agree.

Although *League of Women Voters v. Davidson* and other case law discussed in the Agency Decision led the ALJ to find in SMF’s favor, the conclusion was not as clear as SMF contends. First, neither *League of Women Voters v. Davidson* nor any subsequent Colorado appellate case has interpreted the phrase “expressly advocating” as it is used in Colo. Const. art. XXVIII, § 2(8)(a). *League of Women Voters v. Davidson* interpreted an earlier version of the FCPA in effect in 1988, before article XXVIII was adopted by the electorate. Although the court’s rationale is instructive in interpreting the subsequently adopted constitutional provision, it is not binding and left room for CEW to argue that the subsequently adopted constitutional provision should be interpreted differently.

Second, *League of Women Voters v. Davidson* was not reviewed by the Colorado Supreme Court, and the Supreme Court has not yet addressed the issue in any other case. The present case therefore provided CEW with a proper platform to argue that the holding of *League of Women Voters v. Davidson* should be modified, extended or reversed.

Third, *League of Women Voters v. Davidson* substantially relied upon the rationale of *Buckley v. Valeo*, 424 U.S. 1 (1976) regarding what forms of political advertising were subject to regulation. CEW argued that since the time of *Buckley*, U.S. Supreme Court case law has evolved, moving away from *Buckley*’s narrow rule in favor of a broader rule permitting regulation of the “functional equivalent” of express

advocacy. According to CEW, Colorado jurisprudence should follow suit. Because SMF's advertising was the functional equivalent of express advocacy, it should be subject to regulation. Although the ALJ rejected CEW's argument, see Agency Decision pp. 6-7, the argument was not frivolous but was a good faith attempt to modify or extend the law in Colorado.

In sum, though CEW's arguments were not successful they were not without merit. Meritorious actions that prove unsuccessful and good faith attempts to extend, modify, or reverse existing law are not frivolous. *City of Aurora ex rel. Utility Enterprise v. Colo. State Engineer*, 105 P.3d 595, 620 (Colo. 2005)(citing *W. United Realty, supra.*)

CEW's complaint was not substantially vexatious

SMF argues that CEW is a political partisan with a long history of harassment against SMF and its associates. It says CEW's complaint was substantially vexatious because it "fits within an overall pattern that shows extensive behavior ... designed to 'inflict damage'" upon SMF. *Request for Attorneys Fees*, pp. 7-8. SMF further contends that, "CEW's harassment campaign against SMF is part of its overall effort to attack Republican candidates and groups that tend to support Republican candidates" (*Request for Attorneys Fees*, p. 9), and that CEW brings legal cases "to embarrass and distract Republican candidates and organizations" for the purpose of "publicity and political advantage." *Reply in Support of Request for Attorney's Fees*, p. 6. Relying upon *Mitchell v. Ryder*, 104 P.3d 316 (Colo. App. 2004), SMF asks permission to inquire into CEW's motivation for bringing the lawsuit so that it can prove CEW's conduct was vexatious. SMF says the inquiry should include an opportunity to conduct discovery followed by a hearing.

In the ALJ's opinion, SMF's argument is a bid to expand what has hitherto been a narrow and efficiently litigated issue into a broad inquiry of its opponent's political behavior. SMF clearly views CEW as a political gadfly to be suppressed; but this is not the proper forum for that effort. In *Mitchell v. Ryder*, a child custody proceeding, the court of appeals upheld the trial court's finding that the plaintiff's conduct was "a vindictive and vituperative effort to continue to inflict damage on [father]," and was therefore vexatious litigation meriting an adverse fee award. The fact that motivation may have been a proper inquiry under the circumstances of *Ryder* does not mean it is a proper inquiry here. This case arises in the context of a constitutional provision that permits "any person who believes that a violation of [the campaign practice laws] has occurred" to file a complaint with the secretary of state. Colo. Const. art. XXVIII, § 9(2)(a). In essence, § 9(2)(a) makes anyone a private attorney general entitled to pursue violations of the campaign practice laws. The General Assembly's preference for "strong enforcement" of the campaign laws, expressed in § 1-45-102 of the FCPA, suggests meritorious complaints are to be encouraged. Realistically, the persons most willing to shoulder the burden of filing such complaints are those motivated to ensure their political opponents strictly abide by the campaign practice laws. Nothing in either article XXVIII or the FCPA discourages such motivation. Indeed, if political partisans were barred from filing complaints, very few complaints would ever be filed.

The key fact here is that CEW's complaint, though unsuccessful, was not substantially frivolous or groundless. That being the case, the complaint does not become "vexatious" simply because CEW may have been politically motivated. Indeed, to allow SMF to seek retribution against CEW for pursuing a non-frivolous but politically motivated claim threatens CEW's right under the First Amendment "to petition the government for a redress of grievances." See *Concerned Members of Intermountain Rural Electric Ass'n v. District Court*, 713 P.2d 923, 924 (Colo.1986)(First Amendment immunizes a petitioning party from an abuse of process claim even though the petition was intended to harass, unless the petition was devoid of factual support or had no cognizable basis in law).


Therefore, under the unique circumstances of an alleged violation of the fair campaign practice laws, a complaint that is not frivolous or groundless does not become vexatious simply because the complainant is politically motivated.

A hearing is not required

SMF does not request a hearing as to its allegation that the complaint was frivolous or groundless, but only as to the allegation that the complaint was vexatious. *Request for Attorney's Fees*, p. 11. A fee hearing, however, is not required where the existing record is sufficient to determine the merits of the fee claim. *Padilla v. Ghuman*, 183 P.3d 653, 662-63 (Colo. App. 2008); *Christian v. Westmoreland*, 809 P.2d 1105, 1106 (Colo. App. 1991)("If, by virtue of evidence admitted at trial, the trial court is able to conclude that a claim or defense, even though it was not accepted by the trier of fact, was not facially frivolous or groundless, then it is difficult to see how a further evidentiary hearing could demonstrate the contrary.") Given the ALJ's finding, supported by the existing record, that CEW's complaint was not substantially frivolous or groundless, discovery and a hearing to explore CEW's motivation is neither necessary or warranted.

WHEREFORE, SMF's motion for attorney fees is denied.

Done and Signed
January 7, 2009



ROBERT N. SPENCER
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the above **ORDER DENYING DEFENDANT'S MOTION FOR ATTORNEY FEES** by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

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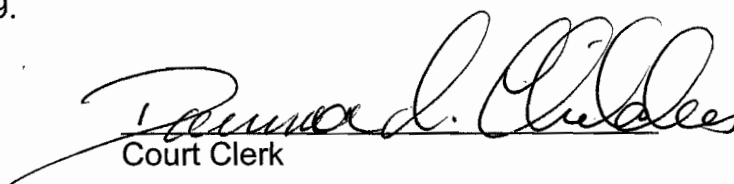
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on this 9th day of January 2009.


Court Clerk