

Excerpt from Federal Election Commission RECORD December 1999 – starting on page 6

FEC v. Freedom’s Heritage Forum, et al.

On September 29, 1999, the U.S. District Court for the Western District of Kentucky at Louisville granted in part and denied in part a Motion to Dismiss made by the Freedom’s Heritage Forum (the Forum) and its treasurer, Frank G. Simon. The Motion applied to only a portion of the Commission’s complaint. Litigation will continue with respect to the remaining parts of the complaint.

Background

The Forum is a political committee that promotes pro-life and other social issues. In 1994, the Forum made expenditures in connection with the planning and holding of a political meeting and the mailing of four political flyers during the 1994 Republican primary in Kentucky.

The Commission alleged that the Forum had violated sections §§441(a)(1)(A), 434(b) and 441d(a) of the Federal Election Campaign Act (the Act) by making excessive contributions, failing to report contributions and failing to include disclaimers on its communications. The Forum had engaged in political activities supporting congressional candidate Tim Hardy during the Kentucky Republican primary. The Commission maintained that the Forum had made coordinated expenditures on behalf of Mr. Hardy that exceeded the Act’s contribution limits, and that the Forum had distributed communications containing express advocacy

that required disclaimers under the Act.

The court ruled that the Forum’s expenditures were permissible independent expenditures—not coordinated expenditures. The court also maintained that, of the Forum’s four communications, only one contained express advocacy and, thereby, required a disclaimer.

Coordination

The FEC had alleged that the expenditures supporting Mr. Hardy, totaling \$23,515.81, were not independent expenditures but coordinated expenditures, which resulted in excessive contributions to his campaign committee. 2 U.S.C. §441a(a)(1)(A).

The Act defines independent expenditure as an expenditure that expressly advocates the election or defeat of a clearly identified candidate and that is not made in concert with, or at the request or suggestion of, the candidate or the campaign. 2 U.S.C. §431(17).

FEC regulations elaborate on this definition. They add the following presumption:

“An expenditure will be presumed to be so made [in cooperation with the campaign] when it is based on information about the candidate’s plans, projects, or needs provided to the expending person by the candidate, or by the candidate’s agents, with a view toward having an expenditure made.” 11 CFR 109.1(b)(4)(i)(A).

The Commission alleged two instances of coordination. The first was a meeting between Dr. Simon and the representatives of Mr. Hardy’s campaign prior to Mr. Hardy’s entering the primary. The second took place

at a political event during which Mr. Hardy was present while Forum members planned strategies “on how to get Tim Hardy elected.” Following the event, the Forum made four separate direct mailings of campaign literature that supported the election of Mr. Hardy.

The court rejected the Forum’s assertion that actual coordination of a specific disbursement must be shown in order to consider it a “coordinated expenditure.” The court said, “This assertion finds no support in the statute, the regulations, or the case law.” Further, the court stated, “...we do not find any requirement that coordinated expenditures must contain ‘express advocacy’ in order for them to fall within the purview of the statute.”

Nevertheless, the court found that “the FEC has not sufficiently plead enough facts that allege that the expenditures made by the Forum were coordinated with the Hardy campaign.”

Regarding the first meeting, the court said that the FEC had not alleged that “Hardy actually informed Dr. Simon of his plans, projects, or needs *with a view toward having an expenditure made.*” As to the direct mailings of campaign literature, the court held that there were no allegations made that the mailings were at the request or suggestion of Mr. Hardy. The court stated that, “Hardy’s mere presence at the meeting, even if his presence was accompanied by the giving of a campaign speech, [was] insufficient to make these expenditures coordinated.”

Following its conclusion that there was no coordination,

the court dismissed the charges that the Forum had failed to report its expenditures as contributions.

Disclaimer and Express Advocacy

The Forum argued that its four mailings did not contain “express advocacy” and therefore did not constitute contributions to the Hardy campaign. The court disagreed. It said, “There is no requirement that a contribution as defined in 2 U.S.C. §441a must result in or from ‘express advocacy.’” The Forum further argued that it was not required to include disclaimers on the four mailings because none of the mailings included “express advocacy.” (Under 2 U.S.C. §441d(a), communications containing express advocacy must include certain disclaimers.) The court stated that, “although a communication does not have to contain ‘magic words’ [‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘reject’] to constitute express advocacy, it will ordinarily contain some sort of functional equivalent of an exhortation, directive, or imperative for it to expressly advocate the election or defeat of a candidate.”

The court agreed that all four of the Forum’s mailings clearly portrayed Mr. Hardy’s opponent in an unfavorable light and Mr. Hardy in a favorable light. Nevertheless, the court found that only one of the Forum’s four mailings contained express advocacy. That mailing included a sample ballot identifying candidates the Forum supported, including Mr. Hardy,

which stated, “*Please* take this sample ballot to the polls and vote on Tuesday.” It explicitly urged the reader to vote for the “pro-family” candidates identified, and it showed a vote for Mr. Hardy. The court held, therefore, that the flyer contained “the functional equivalent of an exhortation to vote for Hardy.”

With regard to another mailing that contained a request for volunteers and contributions, the court concluded that it sought “to persuade the reader to get involved in soliciting votes for Hardy and to contribute time and money to the Forum,” but it did not contain “...an express exhortation to the reader to elect Hardy, or to defeat [his opponent].” ♦

FEC v. Freedom’s Heritage Forum

On April 28, 2000, the U.S. District Court for the Western District of Kentucky granted in part and denied in part the Freedom’s Heritage Forum’s motion to dismiss certain portions of the FEC’s complaint against it.

Background

The Forum, a political committee that promotes pro-life and other social issues, made expenditures in connection with the planning and holding of a political meeting and the mailing of several political flyers during the 1994 Republican primary in Kentucky.

In its complaint, the Commission alleged that the Forum had violated sections §§441(a)(1)(A), 434(b) and 441d(a) of the Federal Election Campaign Act (the Act) by making excessive contributions, failing to report contributions and failing to include disclaimers on its communications. Specifically, the Commission maintained that the Forum had made coordinated expenditures (which are considered in-kind contributions) on behalf of a federal candidate that exceeded the Act’s contribution limits, and that the Forum had distributed communications (seven flyers) containing express advocacy without the required disclaimers.

On September 29, 1999, the court ruled that the Forum’s expenditures were permissible independent expenditures—not coordinated expenditures (not

contributions). The court also maintained that only one of the four flyers it reviewed (exhibit 2) contained express advocacy and, thereby, required a disclaimer.

For a summary of the decision, see the [December 1999 Record](#), p. 6. The statement was merely a “comment on the status of the election,” not express advocacy. Civil Action No. 3:98CV-549-S, U.S. District Court for the Western District of Kentucky at Louisville, April 28, 2000.

On February 4, 2000, the Court denied an FEC motion to reconsider its decision with respect to express advocacy and disclaimers.

Current Decision: Express Advocacy

The court’s most recent decision relates to the Forum’s motion to dismiss Count VII of the Commission’s Second Amended Complaint. In Count VII, the FEC had alleged that seven flyers the Forum had distributed in connection with the 1994 elections—including the four on which the court had already ruled—contained express advocacy, but lacked the disclaimers required by 2 U.S.C. §441d(a).

Having already ruled on four of the flyers, the court concluded that two of the three remaining flyers contained express advocacy and should have had disclaimers.

The first of them was a “Congressional Candidate Report” that compared one candidate’s positions on certain issues to those of his opponents. It contained in a highlighted box: “IMPORTANT! Registered Democrats and Republicans

can vote for [the named candidate] who actively opposes the liberal Clinton agenda. Vote November 8, 1994, 6 a.m. to 6 p.m.” The court found that this statement was an exhortation to vote for the named candidate and therefore was express advocacy.

The second express advocacy flyer was a sample ballot that readers were to take to the polls on election day. It “explicitly urge[d] the reader to vote for the ‘profamily’ candidates identified.”

The other flyer was an invitation that included the statement: “We have the Pro-Abortionists right where we want them, divided and fighting each other. Now [the named candidate] can win with only 40% of the vote!” Because the flyer lacked Lacking an explicit exhortation

to vote, the court concluded that the statement was merely a “comment on the status of the election,” not express advocacy.

Civil Action No. 3:98CV-549-S, U.S. District Court for the Western District of Kentucky at Louisville, April 28, 2000.

FEC v. Freedom's Heritage Forum et al.

On March 28, 2002, the U.S. District Court for the Western District of Kentucky at Louisville granted the Commission's motions for:

- Dismissal of portions of the complaint affected by changes in FEC regulations;
- Summary judgment on claims that the Freedom's Heritage Forum (the Forum) and its treasurer failed to include the required disclaimers on express-advocacy communications; and
- Dismissal of the defendants' counterclaims charging, among other things, that the Commission selectively enforced the Federal Election Campaign Act (the Act) against the defendants, thus depriving them of their Fourteenth Amendment rights to equal protection.

The court denied the Commission's request for summary judgment that former congressional candidate Timothy Hardy knowingly received a prohibited corporate contribution because certain of the facts were contested by the parties.

Background

The Forum is a political committee that promotes pro-life and other social issues. In response to an administrative complaint alleging that the Forum made coordinated expenditures on behalf of Mr. Hardy's 1994 Congressional

campaign, the Commission found that the Forum violated the Act's contribution limits, reporting and disclosure requirements and disclaimer provisions. 2 U.S.C. §§441a(a)(1)(A), 434(b), and (c) and 441d(a)(3). The Commission also found that Mr. Hardy accepted excessive contributions. 2 U.S.C. §441a(f). After failing to reach a conciliation agreement with the defendants, the commission filed a court complaint.

Coordination. The Commission alleged that the Forum's expenditures supporting Mr. Hardy, totaling \$23,515.81, were not independent expenditures but coordinated expenditures that resulted in excessive contributions to his campaign committee. 2 U.S.C. 441a(a)(1) (A).

Disclaimers and Express Advocacy. The Commission alleged that the Forum distributed seven flyers expressly advocating the election or defeat of a federal candidate and failed to include the required disclaimers. 2 U.S.C. §441d(a). In its September 29 decision, the court reviewed four flyers and found that one contained express advocacy and, thus, required a disclaimer. On April 28, 2000, the court ruled on three additional flyers, finding that two contained express advocacy. For a summary of these decisions, see the December 1999 *Record*, p. 6, and the June 2000 *Record*, page 8

Current Court Decision

New Coordination Regulations. The Commission asked the court to dismiss with prejudice several counts of its complaint because the FEC has promulgated new

coordination regulations. Under the new regulations, the defendants' activities, as described in these counts, are not violations. The Commission also asked the court to dismiss the defendants' counterclaims, which asked the court to declare one of the old regulations unconstitutional and to enjoin the Commission from enforcing the old regulation against the defendants. The court found that the defendants were not in danger of a second lawsuit based on these counts because the regulation had been repealed, and that the defendants' counterclaims were moot for the same reason. The court granted the Commission's motions on these points.

Disclaimers. Under the Act, whenever a person makes an independent expenditure, the communication must disclose both the name of the person who paid for the communication and the fact that the communication was not authorized by any candidate or candidate's committee. 2 U.S.C. §441d(a). Since the court had previously found that three of the Forum's flyers contained express advocacy, and none of them stated whether they were authorized by a candidate, the court granted the Commission summary judgment on its claims that the Forum violated 2 U.S.C. §441d(a). The court imposed a \$3,000 penalty—\$1,000 for each violation.

Acceptance of Corporate Contributions. The Commission also requested summary judgment on its claim that Mr. Hardy knowingly accepted corporate contributions in violation of 2 U.S.C. §441b(a).

During Mr. Hardy's campaign, a member of his staff received permission from Toby Tours, Inc., to send campaign mailings using its bulk mail permit. By using the permit, the campaign saved \$4,077.26 in postage, which, according to the Commission, resulted in an prohibited contribution from Toby Tours, Inc.

The court determined that the campaign staff member had knowingly accepted the illegal contribution; however, it also found the Commission had not shown that the staff member acted on Mr. Hardy's behalf. The court denied the Commission's request for summary judgment because a question of material fact remained as to whether the staff member was acting as Mr. Hardy's agent, and a legal question remained about whether Mr. Hardy could be personally charged with the violation. This issue remains to be resolved by the court.

Selective Enforcement of the Act. In their counterclaims, the defendants alleged that the Commission's "unwarranted, selective, and lengthy proceedings" deprived them of their freedom of speech and associational rights under the First and Fourteenth amendments. The court granted the Commission's motion to dismiss this claim, agreeing that the claim was moot because the administrative proceedings in question had concluded.

The defendants also claimed that the Commission violated their rights to equal protection under the Fourteenth Amendment by selectively enforcing the Act against them because of their politically-

The defendants had argued that the FEC was enjoined from enforcing the regulation defining express advocacy "against any . . . party in the United States of America." However, the Fourth Circuit court of appeals vacated this injunction, finding that the district court "abused its discretion by issuing a nationwide injunction . . ." Virginia Society for Human Life, Inc. v. FEC, 263 F.3d 379, 393 (4th Cir. 2001).

conservative views. Under the Sixth Circuit's three-part test for evaluating a selective enforcement claim, the enforcement situation in question must: 1. Single out for prosecution a person belonging to an identifiable group (such as a group exercising constitutional rights) even though the enforcement official has in similar situations decided not to prosecute individuals not belonging to that group; 2. Be initiated with a discriminatory purpose; and 3. Have a discriminatory effect on the group to which the defendant belongs.

The defendants alleged, among other things, that the Commission did not prosecute any other group involved in the election, including a gay or lesbian organization that published an express advocacy communication for Mr. Hardy's opponent and did not include a disclaimer. The defendants also generally claimed that the Commission does not prosecute "liberal politicians and elected officials," and specifically pointed out that the Commission did not prosecute Toby Tours, Inc.

The court granted the Commission's motion to dismiss this counterclaim, finding that the

defendants had not provided sufficient supporting facts. For example, the court found that even if the gay or lesbian organization had violated the Act, the situation was not similar to the defendants' because they could not show that the Commission knew about the violation or that a complaint was filed. Similarly, the Commission's failure to prosecute Toby Tours, Inc., did not meet the test's criteria because the corporation was not part of an identifiable group. Finally, the court found that the defendants' general claims of FEC bias were not specific enough to withstand scrutiny under the selective enforcement test.

Defendants' Motions

On April 10, 2002, the Forum and its treasurer filed a motion to alter or vacate the court's order and a motion to allow the filing of counter claims. U.S. District Court for the Western District of Kentucky at Louisville, 3:98cv549-S. ♦

—Amy Kort

FEC v. Freedom’s Heritage Forum

On August 14, 2003, the U.S. District Court for the District of Kentucky at Louisville issued an agreed order regarding Timothy Hardy’s involvement in this case. Under the agreement Mr. Hardy, a Congressional candidate in the 1994 elections:

- Acknowledged that an inadvertent error by a campaign staff member caused his committee—without his knowledge or authorization—to violate 2 U.S.C. §441b by accepting an in-kind corporate contribution through the use of a corporate bulk mail permit;
- Agreed to pay the FEC \$250 within thirty days of the agreement pursuant to 2 U.S.C. §437g(a)(6)(B); and
- Agreed to make a good faith effort to establish procedures to prevent his campaign from accepting corporate contributions should he run for federal office in the future.

The Commission agreed that all of its remaining claims against Mr. Hardy are resolved by this agreement. See the May 2003 *Record*, page 5, and the August 2002 *Record*, page 2.

U.S. District Court for the District of Kentucky at Louisville, 3:98CV-549-S.

—Amy Kort