

STORAGE NAME: h0451a.jud

DATE: April 16, 1999

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
JUDICIARY
ANALYSIS**

BILL #: HB 451

RELATING TO: Elections

SPONSOR(S): Representative Posey

COMPANION BILL(S): SB 174(I)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) ELECTION REFORM (PRC) YEAS 7 NAYS 1
 - (2) JUDICIARY YEAS 7 NAYS 1
 - (3)
 - (4)
 - (5)
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I. SUMMARY:

This bill provides that any person who willfully charges a candidate with a violation of the election code, when the person knows that such charge is false or malicious, commits a felony of the third degree. Such person is disqualified from holding office until the restoration of the person's civil rights.

The bill also provides that any person who makes or causes to be made any statement about a candidate which he or she knows, or reasonably should know, is false or was made in negligent disregard for the truth, commits a violation of the election code and shall be personally liable for damages.

This bill has an effective date of January 1, 2000.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Subsection (1) of s. 104.271, F.S., currently provides that a candidate who willfully charges an opposing candidate with a violation of the election code, which charge is known by the candidate making such charge to be false or malicious, commits a felony of the third degree and, after conviction, the candidate is disqualified from holding office.

Subsection (2) of s. 104.271, F.S., currently provides that a candidate who in any election, with actual malice makes or causes to be made any statement about an opposing candidate which is false commits a violation of the election code, subject to a civil penalty of up to \$5,000.

B. EFFECT OF PROPOSED CHANGES:

The bill amends subsection (1) of s. 104.271, F.S., to provide that any person who willfully charges a candidate with a violation of the election code, which charge is known by the person making such charge to be false or malicious, commits a felony of the third degree. In addition, upon conviction such person is disqualified from holding office until restoration of civil rights, as provided in s. 4, Art. VI of the State Constitution.

The bill also amends subsection (2) of s. 104.271, F.S., to provide that any person who in any election, makes or causes to be made any false statement about a candidate which he or she knows or reasonably should know is false or which was made in negligent disregard for the truth commits a violation of the election code, subject to a civil penalty of up to \$5,000. This subsection is also amended to provide that any person making or causing to be made such statement shall be personally liable for damages.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

Yes. The accuracy of statements of non-candidates about candidates will now be subject to determination in civil enforcement actions under the election code.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Expansion of the criminal civil portions of this section may increase the workload of the state attorneys and the Florida Elections Commission.

(3) any entitlement to a government service or benefit?

Yes. Candidates would receive protection from civil enforcement proceedings under the election code.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

Not applicable.

(2) what is the cost of such responsibility at the new level/agency?

Not applicable.

(3) how is the new agency accountable to the people governed?

Not applicable.

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

Candidates injured by false statements of non-candidates would not pay the cost of the civil enforcement.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/ associations to conduct their own affairs?

No.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Yes. The bill would impose civil sanctions on speech protected by the First Amendment under present case law, specifically false speech made with negligent disregard for the falsity thereof.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

Not applicable.

(2) Who makes the decisions?

Not applicable.

(3) Are private alternatives permitted?

Not applicable.

(4) Are families required to participate in a program?

Not applicable.

(5) Are families penalized for not participating in a program?

Not applicable.

b. Does the bill directly affect the legal rights and obligations between family members?

No.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

Not applicable.

(2) service providers?

Not applicable.

(3) government employees/agencies?

Not applicable.

D. STATUTE(S) AFFECTED:

This bill amends s. 104.271, F.S.

E. SECTION-BY-SECTION ANALYSIS:

Sub-part B, above concisely sets forth the substance of the bill.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

This bill provides that any person who knowingly and falsely accuses a candidate of violating the election code commits a felony of the third degree. Previously, this statute only applied to another candidate. The changes contemplated in this bill could result in additional prosecutions, with indeterminate fiscal impact.

The bill also provides that any person who makes or causes to be made a false statement about a candidate which he or she knows or reasonably should know is false or which was made in negligent disregard for the truth commits a violation of the election code and shall be personally liable for damages. Previously, this statute only applied to candidates who made false statements and required such false statements to be made with actual malice. Such a violation will be subject to a civil penalty of \$5,000. The changes contemplated by this bill could result in an increased number of prosecutions before the Florida Elections Commission, with indeterminate fiscal impact.

3. Long Run Effects Other Than Normal Growth:

See discussion under "Recurring Effects" this heading above.

4. Total Revenues and Expenditures:

See discussion under "Recurring Effects" this heading above.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

N/A

2. Direct Private Sector Benefits:

N/A

3. Effects on Competition, Private Enterprise and Employment Markets:

N/A

D. FISCAL COMMENTS:

The bill would create undetermined new costs and revenues arising out of the regulation of non-candidate speech.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

Election laws are exempt from the provisions of s. 18, Art. VII of the Florida Constitution.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

N/A

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

N/A

V. COMMENTS:

For the purposes of criminal and civil liability, the law divides up a person's state of mind when making a false statement into four categories. A false statement may be made (1) unknowingly, (2) negligently, (3) with reckless disregard of the truth, or (4) intentionally or knowingly. The bill imposes liability and civil penalties if any person makes a false statement about a candidate which the person either knows or reasonably should know is false or made with negligent disregard for the truth. "Negligence" is generally characterized by inadvertence, thoughtlessness, and inattention while "recklessness" is characterized by willfulness. This standard of culpability is less than the "actual malice" standard established in federal case law. The United States Supreme Court has struck down statutes which allow a person to be sued for an unintentional or negligent false statement.

The lead case in regulating the content of political speech is New York Times v. Sullivan, 376 U.S. 254 (1964). In New York Times, an elected official brought a libel suit against *The New York Times* for publishing an article which misrepresented the official's activities. The court held that in order to establish libel or slander against a public figure the plaintiff must not only prove that a false statement was made, but also that such statement was made with "actual malice." In order to show "actual malice" the public figure must prove that the defendant knew that his or her statement was false, or that the statement was made with reckless disregard as to its truth or falsity.

In 1968, the case of St. Amant v. Thompson, 390 U.S. 727 (1968), elaborated on the actual malice standard. In St. Amant, a candidate for political office falsely charged another public official with criminal conduct during a television interview. The court ruled that "reckless disregard cannot be shown by proof of mere negligence." To find reckless disregard, "there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for the truth and demonstrates actual malice."

The New York Times standard of "actual malice" was expanded to include state regulation of political campaign speech in Vanesco v. Schwartz, 401 F.Supp. 87, (S.D.N.Y. 1975), *summarily aff'd.*, 423 U.S. 1041 (1976).

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The U.S. Supreme Court has consistently applied the New York Times standard since 1964. See, Garrison v. Louisiana, 379 U.S. 64 (1964); Linn v. United Plant Guard Workers of America, 385 U.S. 53 (1966); Bond v. Floyd, 385 U.S. 116 (1966); Buckley v. Valeo, 424 U.S. 1 (1976); Herbert v. Lando; 441 U.S. 153 (1979); Bose Corp. v. Consumers Union of the U.S., Inc., 466 U.S. 485 (1984); McDonald v. Smith, 472 U.S. 479 (1985); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Hustler Magazine v. Falwell, 485 U.S. 46 (1988); Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989); and Masson v. New Yorker Magazine, 501 U.S. 496 (1991).

This bill seeks to lower the "actual malice" standard found in New York Times v. Sullivan, and progeny and is subject to constitutional challenge as an infringement on protected political speech.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

Amendment #1: Clarifies that a person found in violation by the Florida Elections Commission is personally liable for any assessed penalty.

VII. SIGNATURES:

COMMITTEE ON ELECTION REFORM:

Prepared by:

R. Michael Paredes

Staff Director:

Dawn K. Roberts

AS REVISED BY THE COMMITTEE ON JUDICIARY:

Prepared by:

Don Rubottom

Staff Director:

Don Rubottom