THE MAKE MICHIGAN PARTY, Complainant

v.

THE TEAM PARTY &
GABBY BONGIORNO, Respondents

Appearances:
Rick Stepanovic & Rachel Jankowski, Counsel for the Make Michigan Party
Sarah Brenner, Counsel for the Team Party & Ms. Bongiorno

Heard Before: BECKER, Election Director (ex officio), KOZIARA, Backup Election Director (ex officio), REESE, and GEORGE, Commissioners.

Commissioners LAWTON and DICKSTEIN did not participate in the consideration of this complaint.

FINAL OPINION & ORDER

Commissioner REESE delivers the opinion of an undivided Commission.

This matter comes before the University Elections Commission (“the Commission”) on the complaint of Complainant, The Make Michigan Party (“Complainant”), against the above captioned Respondents for violations of Article VI of the CSG Compiled Code (“the Election Code”). Complainant alleges that Respondent committed a campaign finance violation when one of its volunteers influenced a voter while voting in violation of §B(7)(f)(iv) of the Election Code, which provides:

ii. Influencing a Student While Voting Prohibited. No candidate may actively influence any student while the student is voting. The mere presence of a candidate in the vicinity of a voter while voting shall not constitute a violation of this rule.

CSG Compiled Code, art. VI § (B)(7)(f)(iv). The complaint was filed with the Election Director on March 27, 2015. Respondents were advised of the complaint on the same day and given twenty-four hours time to file a response. A hearing on this matter was held on March 28, 2015. Respondents elected not to file a reply brief in this matter and instead elected to rest on its arguments and submissions at hearing. The parties do not contest the basic facts as set forth in this opinion, and so the Commission treats them as proven beyond a reasonable doubt.
Preliminarily, the Commission has no jurisdiction to assess demerits or determine the guilt or innocence of any actors other than parties or candidates. As Ms. Bongiorno is neither, we have no authority enter a judgment binding on her and Complainant’s complaint as to her is DISMISSED for want of jurisdiction.

Of course, if Ms. Bongiorno violated the Election Code, the Team may still be liable for her conduct despite the Commission’s inability to punish her individually. The sole question before the Commission, therefore, is whether the evidence submitted by the Complainant is sufficient to fulfill the elements necessary to hold the Team liable under the theory of respondeat superior as established by § (B)(8)(e). We conclude that it does not.

The first element that must be proven beyond a reasonable doubt in order to hold Respondent liable for the actions of a non-candidate requires us to determine whether, if the actions at issue had been committed by a candidate, we would consider it a violation of the Election Code. CSG Compiled Code, art. VI § (B)(8)(e)(i). Here, we conclude that Ms. Bongiorno’s actions would constitute a violation of the Code if she had been a candidate.

We have interpreted the beyond a reasonable doubt standard contained in the Election Code to mean that “in a case before the UEC, a petitioner bears the burden of producing evidence sufficient to evoke in a majority of the commissioners an abiding conviction of the respondent’s guilt, such as they would be willing to act upon it in the most significant of their own affairs.” Keeney v. Garthus, UEC-2014-W-009, 2 (March 13, 2014). The uncontested evidence in this case suggests that Ms. Bongiorno took a phone from a voter’s hand while that voter was trying to vote and performed the voting procedure for him. Particularly troubling is the following exchange:

Voter to Team: “I actually don’t know how to vote” - 0:04-0:05
Voter to Team: “Ok, so the team?” - 0:16 - 0:17
Voter to Team: “Wait, so it’s the team.” 0:25-0:26
Voter to Team: “Ok, so I’m voting for Fidel, I mean I know Fidel” - 0:28
Team: Grabs phone while Voter’s hands are still on phone - 0:29
Voter to Team: “He’s the only person I know” - 0:30-0:31
Team: Phone is entirely in Team’s hand - 0:30-0:31
Voter to Team: “The team? Is that who I’m supposed to vote for?” - 0:32
Team to Voter: “Yes!” - Phone still in Team hands
Voter to Team: “Thanks! Wow!” - Phone back in Voter’s hands
In fairness to Ms. Bongiorno, the Commission recognizes that the voter had asked for help and that, as she was not a candidate or volunteer,\(^1\) she likely was not familiar with the intricacies of the Code or the proper way to help students while voting. In short, we do not believe that Ms. Bongiorno operated with any malicious intent in this case.

But, the Code establishes a system of strict liability offenses; it does not ask or allow us to plumb the sub-conscious of a Respondent in search of \textit{mens rea}. We cannot say that, given the obvious confusion the voter displayed in the exchange quoted above, that we have any real doubt that Ms. Bongiorno’s actions influenced his decision to vote for the Team—or at least to vote a straight party-line ticket as the video seems to suggest that he did. We therefore \textbf{FIND} that Ms. Bongiorno’s actions, had they been conducted by a candidate would constitute a violation of the Election Code. CSG Compiled Code, art. VI § (B)(7)(f)(iv).

\textbf{II}

Second, Complainant must demonstrate, beyond a reasonable doubt, that the non-candidate (here Ms. Bongiorno) worked “with or at the request of a candidate or party.” CSG Compiled Code, art VI § (B)(8)(e)(ii). Complainant has not met that burden here.

The essential purpose of this element is to determine whether or not the non-candidate falls within the class of persons for whom parties and/or candidates may justly be held responsible. The most obvious members of that class are those the party/candidate “request” to do something on its/his/her behalf. This provision clearly brings official campaign volunteers within the statute’s scope. But, the Code does not limit liability purely to official campaign volunteers, it also applies the doctrine of \textit{respondeat superior} to those working “with” a party. To “work with” someone implies some degree of coordination or mutual understanding between actors or at least the knowing acquiescence of one actor in the actions of another. The code thus creates a somewhat broad class of persons for whom parties are responsible, but not an unlimited one. Parties and candidates are not vicariously liable for the actions of any person on campus merely because it impedes the efforts of their opponents. Whether a non-candidate works with or at the request of a candidate or party is to be determined under the totality of the circumstances, and may be proven by circumstantial evidence. \textit{See Make Michigan v. The Team I}, 2015-UEC-W-003 (March 27, 2015).

\(^1\) We discuss this point further in Part II, \textit{infra}.
The evidence presented in this case is insufficient to establish this burden. Ms. Bongiorno’s use of an “I’m on the Team” Facebook profile picture as opposed to an “I voted the Team” profile picture is not persuasive to the Commission. First, the “I vote the Team” picture was not even available for use at the time Ms. Bongiorno adjusted her profile picture. Second, Ms. Bongiorno testified that she generally avoids involvement in campus elections, and the Commission finds this statement highly credible. It is thus a little unrealistic to believe that she explored all of the available the Team profile picture options before selecting one. Finally, the Commission credits Ms. Bongiorno’s assertion that she selected this photo merely to show generalized support for the Team and particularized support for her roommate, because she had seen other people change their profile picture to this one.

We further credit the testimony of the Team’s representatives that Ms. Bongiorno was never a volunteer for the team, never attended campaign meetings hosted by the Team, and never paid any dues to the team. While the lack of these official means of affiliation is not dispositive—the Code does not limit non-candidate liability merely to volunteers, they are significant factors in the totality of the circumstances analysis required by this element of the Code’s respondeat superior test.

It is true that Ms. Bongiorno did attend a campaign speech by the Team’s presidential candidate at her sorority, and that she testified that this speech was the source of her generalized support for the Team. But, listening to a campaign speech can hardly be sufficient to affiliate a student with a candidate or party for the purposes of §(B)(8)(e)(ii). Such an interpretation would expand the breadth of vicarious liability so far as to, for all intents and purposes, bring most students on campus into its ambit. Since the purpose of the “with or at the request” element is to narrow the class of persons for whom parties are responsible, we decline to adopt this interpretation.

It is perhaps helpful to contrast this case with Make Michigan v. The Team I, where we found the “with or at the request” element satisfied. In that case, the evidence showed (1) that the Team was out chalking on the night the destruction occurred, (2) that the destruction was orchestrated in such a way as to preserve unscathed the areas where the Team would like to place its own materials, (3) that the effort required to conduct the destruction—including the carrying of a rather impressive amount of water onto the Diag—suggested the involvement of someone with strong support for the Team, and (4) that the area in question was
a prime advertising space, making the preservation of room for the Team’s advertisements even more
suspicious. This evidence is, of course, circumstantial, but direct and circumstantial evidence are equally
probative in the eyes of the law. Taken together these circumstances, suggested a strong degree of
coordination or at least a mutual understanding between the unidentified perpetrators and the Team.

The evidence in the case sub judice, however, suggests only the most attenuated of connections
between Ms. Bongiorno and the Respondent. Under the totality of the circumstances, the Commission cannot
say that it lacks a reasonable doubt as to whether or not Ms. Bongiorno worked with or at the request of the
Respondent. Accordingly, the Commission FINDS that the Complainant has failed to meet its burden on this
element.

III

The final element that must be satisfied under §(B)(8)(e) is that the non-candidate must have been
acting within the “scope of coordination” when he/she violated the Election Code. CSG Compiled Code, art.
VI, § (B)(8)(e)(iii). The Election Code defines “scope of coordination” as “what the candidate or party
requested the non-candidate to contribute to the campaign.” Id. Even assuming, arguendo, that Complainant
had shown that Ms. Bongiorno had been within the class of persons for whom the Respondent is responsible,
Complainant has failed to prove this final element beyond a reasonable doubt.

This portion of the Code contemplates that, even where a non-candidate is within the class of persons
for whom a party or candidate is normally liable, those persons may sometimes exceed what is requested of
them in a way that makes it unfair to impose liability via respondeat superior. In Make Michigan v. The Team
I, UEC-2015-W-003, we declined to define “request” narrowly; that is, we rejected the idea that a party or
candidate must explicitly tell those working with them or at their request to “go forth and commit Election
Code violations.” Thus, if a candidate tells Volunteer A to go and chalk the Diag, the candidate is liable if, in
the course of doing so, that volunteer commits a violation of the Code—e.g. by chalking over another party’s
advertisements, etc. Id.

We further stated that a generalized warning given to volunteers not to commit violations, or even a
specific warning given long before the event in question, was not sufficient to absolve the party or candidate
from vicarious liability. Id. In order to determine whether or not the actions of a non-candidate working with
or at the request of a party/candidate are attributable to that party/candidate under the Code’s respondeat superior provisions, we held that the Commission must decide whether the non-candidate’s action was (A) exactly what the party requested, (B) a slight detour from that request, or (C) an autonomous frolic completely disregarding the candidate/party. Id.

A party is responsible for what is explicitly requested and slight detours from that request, but not responsible for frolics. Id. Whether an activity constitutes a detour or a frolic will depend on a variety of factors, including: (1) the nexus between the sort of activity requested and the activity performed,\(^2\) (2) whether the non-candidate was warned not to commit the violation in question, (3) the closeness in time between the warning and the violation, (4) the strenuousness with which the warning was conveyed, and (5) the presence or absence of supervision at the time of the violation. The first of these factors is arguably the most significant, because if the non-candidate performs a task completely different than that requested of him/her, the fact that the party/candidate did not instruct him how to do that different activity properly becomes much less significant.

Here there is absolutely no evidence that the Team ever requested anything of Ms. Bongiorno other than perhaps—via the campaign speech at her sorority and the candidacy of her roommate—to vote for the Team. For her to go out and actively seek to influence voters, or really to engage in any sort of active campaigning, is rather far from this request. Of course, her roommate and the speaker probably hoped that she would talk about the Team to her friends, but if that alone was enough to constitute a request, parties would have to devote a substantial portion of every campaign speech to training the audience how not to violate the Election Code. Aside from making for incredibly boring oratory, this is also far beyond anything the drafters of the Code could ever have intended and stretches the meaning of the word “request” beyond recognition.

We decline to impose such a nonsensical and onerous burden on candidates, parties, and (frankly) student listeners.

We therefore FIND—even assuming, arguendo, that Ms. Bongiorno was working with or at the request of the Respondent—that her actions were not within the scope of coordination, because no request

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\(^2\) For instance, liability is more likely if a candidate asks a non-candidate to chalk and the non-candidate chalks in a way that violates the code, than if the candidate asks the non-candidate to chalk and the non-candidate proceeds to go hang up fliers in a way that violates the code.
was ever made of her other than to vote for Respondent’s candidates. Any activities she undertook on the
Team’s behalf outside that request would therefore be a frolic for which they are not liable.

For the reasons stated above, we find the Respondent, THE TEAM PARTY, NOT GUILTY
of a violation of § (B)(7)(f)(iv) of the Election Code.

The Complaint filed against THE TEAM PARTY is therefore ORDERED dismissed with prejudice.

It is FURTHER ORDERED that the Complaint filed against GABBY BONGIORNO be dismissed for
want of jurisdiction.

It is so ordered.