

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

CASE NO. OS 2006-0026

**ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT and
AGENCY DECISION**

**IN THE MATTER OF THE COMPLAINT FILED BY AARON FINK REGARDING
ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY TRAILHEAD
GROUP, LLC.**

This matter is before the Administrative Law Judge (ALJ) upon motion of Trailhead Group, LLC (Trailhead) to dismiss the complaint, or alternatively for summary judgment. The motion and supporting affidavits were filed November 3, 2006. Complainant Aaron Fink (Fink) filed a response opposing the motion November 24, 2006. For reasons explained below, the ALJ GRANTS Trailhead's motion for summary judgment and vacates the hearing presently set for December 5 and 6, 2006.

Background

On September 12, 2006, Fink filed a complaint with the Secretary of State alleging that Trailhead violated Colorado's campaign and political finance laws by exceeding the contribution limits of Colo. Const. art. XXVIII, § 3. Fink alleges that Trailhead made contributions in excess of \$200 to political committees known as Friends of Mark Hillman, Beauprez for Governor, and the Colorado Republican Committee, and thus became a political committee itself, subject to the contribution limits. According to Fink's complaint, the contributions took the form of shared "information, analysis, or strategies" that inevitably must have resulted from Trailhead's and the political committees' use of the same commercial consulting services.

Trailhead does not deny that it used some of the same consulting services used by the political committees, but asserts in its motion for summary judgment that there was no sharing of work product between Trailhead and the political committees. In support of its motion, Trailhead provides affidavits from executives of each of the consulting services attesting to the fact that their companies did not share or coordinate any of their work-product among their clients.

In opposing Trailhead's motion, Fink acknowledges that in light of the supporting affidavits the burden shifts to him to establish the existence of a genuine issue of material fact as to his allegation that there has been sharing of information, analysis or strategies. Fink argues, however, that summary judgment would be "precipitous and premature" before he has had the opportunity to take the depositions necessary to support his theories. He therefore asks the ALJ to exercise discretion under C.R.C.P. 56(f) to deny the motion for summary judgment pending the necessary discovery.

Standard Applicable to Motions for Summary Judgment

Trailhead has filed a combined motion to dismiss pursuant to C.R.C.P. 12(b)(5) for failure to state a claim upon which relief may be granted, and a motion for summary judgment pursuant to C.R.C.P. 56. However, if a motion to dismiss under C.R.C.P. 12(b)(5) presents matters outside the pleadings that are not excluded by the court, the motion should be treated as one for summary judgment. C.R.C.P. 12(b). Because Trailhead supports its motion with affidavits that present matter outside the pleadings, the ALJ will treat Trailhead's motion solely as one for summary judgment.

Summary judgment is proper when the pleadings, affidavits, depositions, or admissions show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c). The burden of establishing the nonexistence of a genuine issue of material fact is on the moving party, *Continental Airlines, Inc. v. Keenan*, 731 P.2d 708 (Colo. 1987); *Schultz v. Wells*, 13 P.3d 846 (Colo. App. 2000); and the nonmoving party is entitled to the benefit of all favorable inferences that may reasonably be drawn from the undisputed facts. *Peterson v. Halsted*, 829 P.2d 373 (Colo. 1992); *Van Alstyne v. Housing Authority of City of Pueblo*, 985 P.2d 97 (Colo. App. 1999).

However, once the movant has met its initial burden, the burden shifts to the nonmoving party to establish there is a triable issue of fact. *Civil Service Commission v. Pinder*, 812 P.2d 645 (Colo. 1991); *Schultz v. Wells, supra*. The purpose of summary judgment is to save the time and expense of trial when, as a matter of law, based upon the undisputed facts, one party could not prevail. *Peterson v. Halsted, supra*; *DuBois v. Myers*, 684 P.2d 940 (Colo. App. 1984). When the opposing party does not muster sufficient facts to make out a triable issue of fact, the moving party is entitled to summary judgment as a matter of law. *Keenan, supra*.

Findings of Fact

1. Trailhead's motion is supported by four affidavits meeting the requirements of C.R.C.P. 56(e) as to personal knowledge of a competent affiant setting forth facts under oath as would be admissible in evidence. Fink filed no affidavits, depositions, or other documents contradicting the content of Trailhead's affidavits.

2. The following facts are drawn from Trailhead's affidavits.

a. From the Affidavit of Phase Line Strategies, LLC President and CEO, Sean R. Tonner: Phase Line has business relationships with Trailhead, Mark Hillman for State Treasurer, and with the Colorado Republican Party.¹ Phase Line provides Trailhead with access to its voter history databases. It has contracts with Mark Hillman for State Treasurer to perform fund raising, and conducts "get out the vote" efforts for the Colorado Republican Party, but its work for Trailhead is unrelated to these contracts.

¹ Although the Phase Line affidavit's references to "Mark Hillman for State Treasurer" and "Colorado Republican Party" do not coincide with the names in the complaint, "Friends of Mark Hillman" and "Colorado Republican Committee," the ALJ assumes they refer to the same political committees.

Its has no communications transmitting to Mark Hillman for State Treasurer or the Colorado Republican Party any information that was developed for or paid for by Trailhead. Contrary to the allegation in paragraph 4 of the complaint, Trailhead did not pay Phase Line to develop radio commercials relating to and supporting the candidacy of Mark Hillman for Treasurer.

b. From the Affidavit of Pegasus Communications, LLC President Todd Gelhaar: Trailhead hired Pegasus to install communications systems in its offices. Beauprez for Governor also hired Pegasus to install its office communication systems. The work for these two entities was unrelated and none of Pegasus' work product or services for Trailhead were conveyed to Beauprez for Governor or any other client. Each client was billed and paid separately.

c. From the Affidavit of Tarrance Group founding partner Dave Sackett: The Tarrance Group performed polling services for Trailhead. It also performed unspecified services for Beauprez for Governor. Tarrance Group did not coordinate its efforts for these two entities and none of its work product, output or services for Trailhead was conveyed in any way to Beauprez for Governor. The Tarrance Group keeps the work it does for its clients separate and confidential. Each client was billed and paid separately.

d. From the Affidavit of FLS Connect Senior Vice President Rich Beeson: FLS Connect develops political telephone messages on behalf of its clients. Both Trailhead and Beauprez for Governor hired it to develop such messages in 2006. FLS Connect has a written policy ensuring that it does not convey information between clients or use information received from one client to assist another client. At no time did FLS Connect use information obtained from either Trailhead or Beauprez for Governor to assist the other. Each client was billed and paid separately.

3. Fink filed his complaint September 15, 2006. Hearing was initially scheduled for October 10, 2006, but was continued upon Fink's unopposed motion until December 5 and 6, 2006 to permit Fink time to take five depositions scheduled for October 23 to 26, 2006. The deponents included Trailhead, Beauprez for Governor, the Colorado Republican Committee, Pegasus Communications, LLC and Phase Line Strategies, LLC. In the order resetting the matter for hearing, the ALJ directed that all discovery be completed by November 28, 2006. On October 20, 2006, Trailhead filed a motion to suspend discovery pending the ALJ's ruling upon its motion for summary judgment. Significantly, Fink did not oppose the motion.

Discussion and Conclusions of Law

Under Colorado campaign finance law, a political committee includes any organization that has made contributions or expenditures in excess of \$200 to support or oppose the nomination or election of one or more candidates. Colo. Const. art. XXVIII, § 2(12)(a). Political committees are subject to strict limitations upon the amounts they may contribute to a candidate committee, and upon amounts they may accept from any person. Colo. Const. art. XXVIII, §§ 3(1), (3) and (5). Contributions include not only payments of money, gifts and loans, but also "anything of value given,

directly or indirectly, to a candidate for the purpose of promoting the candidate's nomination, retention, recall, or election." Colo. Const. art. XXVIII, § 2(5)(a)(IV). Violations of the contribution limits may subject a political committee to substantial fines. Colo. Const. art. XXVIII, § 10.

Fink alleges that by employing some of the same political consulting and service companies that were employed by Friends of Mark Hillman, Beauprez for Governor and the Colorado Republican Committee, Trailhead necessarily shared information, analysis or strategies that amounted to contributions to those political committees. This theory is encapsulated in the following paragraphs of the complaint:

10. The extensive coordination and common retention and unavoidable sharing of information, knowledge, analysis, and political consulting services by and among entities and persons retained and paid for by the Trailhead Group, and later or concurrently retained and utilized by the Colorado Republican Committee, Friends of Mark Hillman, and Beauprez for Governor, evidence a necessary and unavoidable provision by Trailhead Group "of value ... directly or indirectly, to a candidate for the purpose of promoting the candidate's nomination ... or election."

11. To the extent that ANY value whatsoever (by way of information, analysis, or strategies derived or developed there from) has flowed, directly or indirectly, from the consultant services paid for by Trailhead Group to either the Hillman or Beauprez candidacies, or to any other candidacy, Trailhead Group has by constitutional definition made a "contribution" to those candidates.

The affidavits attached to Trailhead's motion satisfy its initial burden of establishing the nonexistence of a genuine issue of material fact. Specifically, the affidavits show that the consulting organizations identified in the complaint performed services for Trailhead that were unrelated to the services performed for the political committees. Trailhead did not pay for or control the services provided to the political committees. Furthermore, the work product prepared for Trailhead was not shared with the political committees. The affidavits therefore establish the nonexistence of the material facts alleged in complaint paragraphs 10 and 11.

Once the movant has satisfied his burden of establishing the nonexistence of a genuine issue of material fact, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. *Civil Service Commission v. Pinder, supra; Schultz v. Wells, supra*. Fink has failed to do so. Merely asserting a fact, without any evidence to support it, cannot avoid a summary disposition. *Norton v. Dartmouth Skis, Inc.*, 147 Colo. 436, 364 P.2d 866, 868 (Colo. 1961).

Although Fink contends he needs more time to conduct discovery in order to meet his burden of showing a triable issue of fact, he has not supported that request with the requisite affidavit required by C.R.C.P. 56(f). Rule 56(f) states:

(f) When Affidavits are Unavailable. Should it appear *from the affidavits of a party* opposing the motion that the opposing party cannot for

reasons stated present by affidavit facts essential to justify its opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(*Italics added*).

Although a party opposing summary judgment may be granted additional time to gather evidence and thereby avoid a “precipitous and premature” entry of summary judgment, *Sundheim v. Bd. of County Comm’rs*, 904 P.2d 1337, 1352 (Colo. App. 1995), *affd* 926 P.2d 545 (Colo. 1996), Colorado courts have consistently held that an affidavit showing the need for additional discovery is required. *Card v. Blakeslee*, 937 P.2d 846, 848-49 (Colo. App. 1997)(in the absence of an affidavit as required by Rule 56(f), the court was without discretion to defer ruling on defendant’s summary judgment motion based upon plaintiff’s claimed need for additional discovery); *Colorado Depart. of Public Health & Environment v. Bethell*, 60 P.3d 779, 787 (Colo. App. 2002); *White v. Van Pelt*, 55 P.3d 823, 825-26 (Colo. App. 2002); *In re: Estate of Heckman*, 39 P.3d 1228, 1231 (Colo. App. 2001); *Raygor v. Board of County Commissioners*, 21 P.3d 432, 435 (Colo. App. 2000); *Colorado Interstate Gas Co. v. Chemco, Inc.*, 987 P.2d 829, 836 (Colo. App. 1999); *Perez v. Grovert*, 962 P.2d 996, 997-98 (Colo. App. 1998). Because Fink failed to support his Rule 56(f) request with the required affidavit, the ALJ is without discretion to grant the request.

However, even if Fink had provided the required Rule 56(f) affidavit, the ALJ’s ruling would not change. Colo. Const. art. XXVIII, § 9 places a heavy emphasis upon the expeditious disposition of complaints alleging violation of the political campaign finance laws. Specifically, § 9(2)(a) requires the ALJ to hold a hearing within fifteen days of the referral of the complaint from the Secretary of State. Although a defendant is to be given an automatic 30 days extension upon request, the complainant does not have a corresponding right.

In this case, trial was continued from October 10, 2006 to December 5, 2006 for the express purpose of allowing the parties time to conduct discovery. That discovery was to be completed by November 28, 2006. Complainant did, in fact, schedule a number of depositions for the end of October, but then voluntarily agreed to Trailhead’s request to postpone the depositions pending the ALJ’s ruling upon Trailhead’s motion to dismiss. Having failed to expeditiously pursue his opportunity for discovery, Fink is not now entitled to yet another extension of time to pursue it. Whatever merit a second request for extension of time to permit discovery might have in the context of routine civil litigation, it is unjustified in the context of the speedy hearing mandate of Article XXVIII, § 9.

In summary, Trailhead’s unrebutted affidavits establish the absence of a genuine issue of material fact, and therefore summary judgment is appropriate pursuant to C.R.C.P. 56. Fink’s request pursuant to C.R.C.P. 56(f) for additional time to conduct discovery is not supported by the required affidavit and is otherwise unjustified. Trailhead’s motion for summary judgment is therefore granted.

The hearing scheduled for December 5 and 6, 2006 is vacated.

Agency Decision

Summary judgment is granted in favor of the Respondent, Trailhead Group, LLC. Because this ruling disposes of all issues raised by the complaint, the decision is subject to review by the Colorado Court of Appeals, pursuant to § 24-4-106(11), C.R.S. and Colo. Const. art. XXVIII, § 9(2)(a).

Done and Signed:

November 28, 2006

ROBERT N. SPENCER
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above **ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT and AGENCY DECISION** was sent by facsimile and also placed in the U.S. Mail, postage prepaid, at Denver, Colorado to:

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on this ___ day of April, 2007.

Technician IV