Should Law Schools Bar Student Organizations From Inviting the Military to Campus for Recruitment Purposes?

Joan Schaffner

Introduction

In September 2006, the George Washington University Law School (GW) was presented with a question of first impression. To what extent should student organizations be bound by the regulations that govern the GW placement office/Career Development Office (CDO) regarding military recruitment?

What happened was this:

The National Security Law Association (NSLA) hosted a program on employment opportunities in the national security law area—essentially a career fair—at the GW law library. Several employers were invited to attend, including two military employers that adhere to the Don't Ask/Don't Tell (DADT) policy that expressly discriminates against openly gay persons. The NSLA advertised the event but failed to include the required disclaimer that informs attendees that these military employers discriminate on the basis of sexual orientation in violation of the GW nondiscrimination policy. By expressly inviting the military and failing to include the disclaimer, the group violated the regulations that govern the law school CDO.

The GW Lambda Law group was outraged. They demanded that the military be uninvited or, at least, that all materials be replaced with those including the disclaimer. The administration met with the two student groups and their faculty advisors and reached a compromise: The military would be able to attend since they had already been invited. The disclaimer would be posted at the event and Lambda would have a small table outside the event to provide literature on the military's discriminatory DADT policy to

Joan Schaffner is an associate professor of law at the George Washington University Law School and the faculty advisor to Lambda Law. This paper was presented at the Sexual Orientation and Gender Identity Section's panel entitled "Accepting the Court's Invitation" at the Association of American Law School's Annual Conference, Washington D.C., January 3, 2007. Professor Schaffner may be reached at jschaf@law.gwu.edu.

Journal of Legal Education, Volume 57, Number 2 (June 2007)

those attending so long as Lambda did not disrupt the event in any manner. Lambda protested outside the event with no disruption.

The question remains whether student groups hosting a career event should be allowed to invite the military. While my remarks focus on this specific question, the question can arise in other contexts and thus transcends DADT and military recruitment. In general, must student groups comply with regulations that implement law schools' nondiscrimination policies?

GW's Situation

Like many law schools, GW is committed to nondiscrimination on the basis of sexual orientation and also is closely affiliated with the military through ROTC programs and federal research grants. The debate concerning military recruitment on campus has been intense. In 2003, those in support of nondiscrimination persuaded the law school to join the Forum for Academic and Institutional Rights (FAIR), an association of law schools, to challenge the Solomon Amendment.[1] FAIR ultimately lost the case, but the symbolic importance of GW joining FAIR continues to signal GW's commitment to nondiscrimination.

The Supreme Court in *Rumsfeld v. FAIR* invited law schools to speak their minds. The Court stated:

> Law schools remain free under the [Solomon] statute to express whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds. [The] Solicitor General acknowledg[ed] that law schools "could put signs on the bulletin board next to the door, . . . engage in speech, . . . organize student protests." [Solomon] affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*.[2]

Law schools are free to take the position that they are providing equal access under duress, and they may accompany that access with speech.

At GW, regulations to implement the nondiscrimination policy promulgated by the law school faculty govern the administration, specifically the CDO. All GW recruitment materials that refer to a military employer subject to the DADT policy must contain the disclaimer that the military discriminates on the basis of sexual orientation and thus violates the spirit of the nondiscrimination policy. Moreover, while GW must provide equal access under Solomon, GW should refrain from affirmatively inviting the military to campus for recruitment purposes.

The Court in *FAIR* distinguished between equal treatment and equal access. Amici argued that Solomon is satisfied if the law school applies the same *policy*

1. 10 U.S.C.A. § 983 (2004).

2. Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 60 (2006).

to the military that it applies to all employers.[3] The Court expressly rejected this interpretation and held that Solomon refers to *access* and not *treatment*.[4] Thus, GW must provide equal access but need not provide equal treatment to the military.[5]

The Arguments

The argument in support of Lambda's position that all student organizations are bound by GW's implementing regulations is that:

(1) The law school has a nondiscrimination policy prohibiting discrimination on the basis of sexual orientation and faculty-mandated regulations designed to implement that policy.

(2) The NSLA is an officially recognized law school organization.

(3) Because it is officially recognized, the law school provides various funding and other resources to the group.

(4) The event is being held on the law school campus.

(5) The event is a recruitment event because its purpose is to provide information on career opportunities.

(6) Thus, the NSLA is bound by the same policies and regulations as the law school administration and CDO.

The argument in support of the NSLA's position that student groups are not bound by the regulations is that:

(1) The NSLA is not an official law school actor.

(2) The NSLA has independent rights as a private organization to free speech and expressive association, as well as an important interest in pursuing all employment opportunities related to their professional interests.

(3) The event is not a recruitment event because no formal interviews are being conducted.

3. *Id.* at 56.

4. *Id.* at 57.

5. GW is a private institution and thus is not bound by the first or fourteenth amendments of the Constitution. GW is subject to various statutes, including the D.C. Human Rights Act, which expressly prohibits discrimination on the basis of sexual orientation, as well as federal statutes that prohibit discrimination on the basis of race, sex, disability, and other grounds. DC Stat. § 2-1402.11 (2001). See, e.g., 20 U.S.C. § 1681 (Title IX); 42 U.S.C. § 2000d (Title VI), 42 U.S.C. § 12112(a) (The Americans with Disabilities Act (ADA)), 29 U.S.C.A. § 794 (section 504 of the Rehabilitation Act), and 42 U.S.C. 6100-6103 (nondiscrimination on the basis of age). The laws that directly bind GW suggest the possibility that all official student groups must abide by the school's nondiscrimination policy and implementing regulations, especially if the student organization's actions could be attributed to the law school.

   But as an institution of higher learning, GW has a compelling interest in protecting students' first amendment rights. Of course, public schools as state actors are bound by the Constitution, as well as bound by the nondiscrimination statutes. Thus, the following analysis will treat GW as if it were a public university bound by the Constitution.

(4) The NSLA is not directly violating the school's nondiscrimination policy but merely an implementing regulation that is not necessary to the enforcement of the policy.

(5) Thus, they should be free to invite whomever they wish to the law school without the law school restricting their choice.

Who is right?

The Precedent

A few cases have raised similar situations, but none directly address the situation here. First, the most relevant case to address the nature of the NSLA's interests here is *Rumsfeld v. FAIR*. The Court found that the law schools' recruitment activities–hosting interviews and recruiting receptions–were not speech, nor was their conduct in preventing the military from recruiting sufficiently expressive because the conduct required accompanying speech to express the message.[6] Furthermore, since the military recruiters are outsiders who come to campus for a limited purpose and time, Solomon does not require that the schools "associate" with them but merely interact with them, imposing little burden on their right to expressive association.[7]

The district court in *Christian Legal Society v. Kane* addressed the relationship between a law school and its student organizations.[8] The Christian Legal Society (CLS) challenged Hastings' non-recognition of their student group because of the CLS' selective membership and leadership rules that discriminate on the basis of sexual orientation and religion. Judge Jeffrey White, ruling on a motion for summary judgment, held that the law school did not violate the constitutional rights of the Christian students by requiring that their membership rules conform with Hastings' nondiscrimination policy.[9] Judge White stated that nondiscrimination policies regulate conduct and not speech and thus tthat he policy does not suppress CLS's ability to express the view that "homosexuality is not Christian."[10] He continued by observing that even if the conduct is expressive, Hastings may impose its policy because (1) it furthers an important (in fact compelling) interest–prohibiting discrimination on the basis of religion and sexual orientation, (2) the regulation is not directed at expression but rather at conduct, and (3) the "incidental burden on speech is no greater than essential...[in that] Hastings' interest in eradicating discrimination would certainly be achieved less effectively without a policy which prohibits the harmful conduct."[11] Finally, while the "regulation forces the group to accept

6. *Rumsfeld*, 547 U.S. at 63-65.

7. *Id.* at 68.

8. 2006 WL 997217 (N.D. Cal., 2006).

9. *Id.* at *5.

10. *Id.* at *8.

11. *Id.* at *9.

members it does not desire,"[12] such forced acceptance does not significantly impair the groups' mission "to maintain a vibrant Christian Fellowship on the school's campus." Finally, the judge held that even if it did, because the infringement is slight, "Hastings' interest in protecting its students from discrimination provides sufficient justification."[13]

The First Circuit in *Gay Student Organization (GSO) v. Bonner* held that the University of New Hampshire (UNH) went too far when it prevented the GSO from holding "social events" because of the community's disapproval of the group.[14] The court determined that even a ban on social events alone was an impermissible infringement on the group's first amendment rights because (1) it is difficult to distinguish social events from other events, (2) social events are critical to the GSO's purpose, and (3) the regulation was not a proper time, place, and manner restriction because the restriction related to the content of the GSO's speech.[15]

How do these cases inform the decision at issue here? Should all student organizations be bound by the law school policies and regulations implementing the nondiscrimination policy and thus be prohibited from inviting a discriminatory employer to any career or recruitment event, or should they be free to invite any employer they wish?

The Analysis

Is a Fundamental Right of the NSLA Implicated?

The NSLA could argue that imposing the law school's regulation that prevents it from inviting the military to a career event infringes on its first amendment rights.

Speech

Is the NSLA "speaking" when it hosts a career fair? A career fair allows students to meet with employers in a casual setting and obtain information about employment opportunities. The Court in *FAIR* distinguished between hosting a career fair and organizing a parade.[16] A parade is a form of expression, not just movement, and the choice of participants affects the

12. *Id.* at *20.

13. *Id.* at *22-23.

14. 509 F.2d 652, 660-61 (1st Cir. 1974).

15. *Id.* at 659, 661, 662.

16. 547 U.S. at 64 ("Unlike a parade organizer's choice of parade contingents, a law school's decision to allow recruiters on campus is not inherently expressive. Law schools facilitate recruiting to assist their students in obtaining jobs. A law school's recruiting services lack the expressive quality of a parade; ...its accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school.").

message conveyed.[17] A career fair, in contrast, is not inherently expressive.[18] It provides a forum for students to obtain information on a variety of employment opportunities independent of the organizing host. Thus, the career event is not a platform for expression by the NSLA.

Expressive Conduct

Does the presence or absence of an employer itself send a message from the NSLA? In *FAIR*, the Court held that the law schools' desire to prevent access to the military did not constitute expressive conduct because the conduct had to be accompanied by speech to inform the viewer of the rationale behind their conduct.[19] Similarly here, the failure to invite the military does not send a message—perhaps the NSLA is complying with the regulation, perhaps they did not wish to invite the military in the first place. Moreover, the NSLA does not support the DADT policy of the military but believes students should have the opportunity to speak with military employers nevertheless. Their purpose in inviting the military is not to make a statement but rather to learn about employment opportunities.

Expressive Association

Does preventing the NSLA from inviting the military affect their associational interests? Again, the Court in *FAIR* stated that an employer invited to a career fair is an outsider with which the groups interact—not associate.[20] Thus, whether one is forced to include them, or forced not to invite them, does not infringe on the NSLA's associational rights.

Right to Receive Information

Does prohibiting military employers from the fair affect the student's right to receive information? A corollary of a right to speak is the right to hear or receive information.[21] The Court has explained that the right to receive "flows ineluctably from the *sender's* First Amendment right to send them . . . [and] is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom."[22] The NSLA has a right to receive information from the military employers. The information received is directly related to their members' interest in obtaining employment. Thus, NSLA could argue that a constitutional right to receive information is implicated here. However, "the denial of access to ideas inhibits one's own acquisition of

17. *Id.* at 64.

18. *Id.* at 64-65.

19. *Id.* at 65.

20. *Id.* at 66.

21. See Stanley v. Georgia, 394 U.S. 557, 564 (1969).

22. Board of Education, Island Trees Union Free School District v. Pico, 457 U.S. 853, 867 (1982).

knowledge only when that denial is relatively complete. If the denied ideas are readily available from the same source in other accessible locations, the benefits to be gained from exposure to those ideas have not been foreclosed by the State."[23] Because the students could easily access the employment information from the military via the web and/or by visiting their local offices the school is not denying them access to the information and their right to receive the information has not been foreclosed by GW.

In sum, the only first amendment right arguably implicated here is the right to receive information and this right has not been foreclosed by GW because the information is easily accessible through other avenues. Imposing GW's regulation on the NSLA would therefore be justified as long as it were rationally related to a legitimate school goal. The goal to eradicate discrimination is legitimate and the regulation preventing discriminatory employers from recruiting on campus is rationally related to that goal, as the military's discrimination expressly prohibits gay GW law students from employment with the military.

Extent of the Burden on the NSLA's Interest

But, even if the first amendment interests of the NSLA are not implicated, how onerous is the burden imposed by not allowing it to invite the military to a career fair?

Arguably, the burden here is slight. In *Christian Legal Society*, imposing the law school nondiscrimination policy on the CLS directly affected its membership and leadership. In contrast, this regulation has no such effect on the NSLA. The group's composition is unaffected, as is the desirability of group membership.

Second, in *Gay Student Organization*, the University of New Hampshire prevented the GSO from holding any social events, events which the Court found central to their purpose, whereas here GW is merely not allowing two employers to be invited to a career fair, an event that is only related to one of three broad purposes of the organization. The GSO's primary purpose was to promote the recognition of gay people on campus and provide a forum through which they may express themselves and effect social change.[24] The

23. *Id.* at 912 (Rehnquist, J. dissenting).

24. 509 F.2d at 653 n.1.
"1) The primary purpose of the UNH Gay Students Organization is to promote the recognition of gay people on campus and to form a viable organization through which bisexual and homosexual people may express themselves.
2) Through this organization social functions will be organized in which both gay and straight people can learn about the others' thoughts and feelings concerning sexuality and sexual roles.
3) In an effort to educate the public about bisexuality and homosexuality, this organization will attempt to affect social changes through public relation measures such as guest lecturers, free literature, films, newspaper articles and radio programs.
4) Not the least important reason for establishing a gay organization is to give bisexual and homosexual members of the college community a place to communicate with each other and

court held that the ability to socialize was fundamental to the group's primary purpose.[25] The NSLA describes as its purposes:

> (a) To foster interest in, and understanding of, the legal aspects and ramifications of national security by sponsoring speakers and programs concerning the many issues covered by this umbrella.
>
> (b) To aid members in their pursuits of careers in these fields.
>
> (c) To contribute to the development of national security law.[26]

One purpose involves "pursuits of careers," but there are many ways to aid members as they pursue careers. The career fair, while related to this one purpose, is not fundamental to the overall goals of the organization.

Moreover, UNH prohibited *all* GSO social events. In contrast, GW is merely limiting the types of recruiters that may be invited to a recruitment event. Not all recruiters are prohibited, only those that discriminate in their hiring policies. Many employers (even in the national security field) are not bound by the DADT policy and are more than welcome. In fact, the military represented only two of several employers at the event. Further, to the extent students want, it is easy to obtain employment information about the military without inviting representatives physically to campus. Indeed, since this was not an event where actual interviews were taking place, a visit to the respective web sites suffices.

Finally, while defining what qualifies as a recruitment event may sometimes be difficult, it is not as difficult or as far-reaching as defining an event as social. The regulation at issue governs the recruitment practices of the GW CDO. By definition, CDO activities relate to recruitment. What type of student event would or should trigger the regulation? The NSLA argued that its event was not a recruitment event because no formal interviews were taking place.

Must actual interviews take place for the regulation to apply? Arguably not. The problem GW has with the military is that the DADT policy prevents gay students from obtaining military employment. It is logical for the regulation to govern whenever the military's presence on campus implicates the DADT policy, i.e., whenever the military's presence is career-related. The purpose and nature of the event should be analyzed to determine if it is sufficiently career-oriented to qualify. The NSLA career fair's *sole* purpose was to provide career information to students. Moreover, the nature and format of the event–tables at which representatives sat to answer questions and provide information–further support the finding that the event was a recruitment event. Perhaps a closer

---

form discussion groups so that a healthy gay consciousness can evolve among students."

25. *Id.* at 659-60.

26. George Washington University National Security Law Ass'n, George Washington University National Security Law Ass'n Constitution, Preamble, Sec. 2, (2006).

situation would arise if the NSLA invited panelists to speak on military careers, addressing, for example, what it is like to be in the JAG Corps. Here the format would be more like a speaking engagement. Nevertheless, if a primary purpose of the event is to provide information about career opportunities expressly denied to gay students, the event should qualify as recruitment, because the goal of the nondiscrimination policy and regulation is to address this very discrimination.

GW's Purpose–How Substantial Is It?

One could argue that GW has a compelling purpose to prevent discrimination against a class of its own students. However, unlike the CLS, which prevented gays from joining their organization in direct violation of the Hastings' nondiscrimination policy, the NSLA was not directly discriminating. Anyone could attend the career fair. The only discrimination was that gay students would find speaking with the military useless because of the military's (not the NSLA's) DADT policy. Nevertheless, gay students could take advantage of the other employers' materials.

However, the NSLA did violate a regulation designed to aid enforcement of the GW nondiscrimination policy. Because it is an indirect violation of the policy, GW's purpose in enforcing the regulation likely is not compelling, but it is important. By allowing the NSLA to invite the military (rather than allowing the military access to campus as mandated by the Solomon Amendment and *FAIR*), one could reasonably imply endorsement of the DADT policy by the NSLA. Moreover, since the law school officially recognizes and supports the NSLA, if GW allows the NSLA to invite the military (when not legally required to do so) one could imply endorsement of the military's discriminatory policies by the law school itself.

The Nature of the Regulation: What is GW Targeting?

The regulation targets conduct and not speech. The law school is telling the NSLA what it must not *do*–invite the military to a recruitment event–not what it may or may not *say*. The reason behind the regulation is a disagreement with the DADT policy, but GW is not targeting the NSLA's viewpoint. Here the incidental burden–the inability to invite discriminatory employers to the GW campus for recruitment–is essential to GW's purpose in expressing its disagreement with employment discrimination against its gay students, because serving that purpose would be less effective without the ability to prevent student groups from inviting such employers to campus. Finally, even if GW were burdening speech, the regulation is a reasonable time, place, and manner restriction that is not unduly burdensome. The NSLA may invite any employer to a recruitment event, so long as that employer does not discriminate. And, finally, if the NSLA wishes to invite the military, it may do so, off campus and without law school funds.

Conclusion

This is a difficult issue because important interests of law students conflict. On the one hand, gay students are targeted as "unfit" by the military and deprived of employment opportunities with the military because of their sexual orientation, a characteristic irrelevant to their ability to serve. This is one of the last remaining laws that *requires* an employer—the military—to discriminate and violates a fundamental principle in our society, equal protection under the law. The presence of this employer on campus demeans our gay students as they are directly confronted with an entity that refuses to hire them because of invidious discrimination. This harms them emotionally and financially.

On the other hand, NSLA students are interested in pursuing all possible employment opportunities, and the fact that this employer discriminates is neither the students' fault nor should it deprive them of employment opportunities with the military. At bottom, however, GW's choice is between following its policy of non-discrimination and protecting gay students from direct confrontation with discrimination, and providing an additional employment opportunity to other students. The student interest in equal protection outweighs the student interest in employment. Moreover, students can easily seek employment opportunities with the military (especially in the District of Columbia) without the military being invited to campus. Thus, the better choice here is to require that all official GW student organizations follow the rules and regulations governing the institution that implement the GW non-discrimination policy.