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

Joan Schaffner¹

I Introduction

In September 2006, the George Washington 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 GW, in the law library. Several employers were invited to attend the event, 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 for the military recruiters that informs attendees that these 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 NSLA refused. 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 room during the event to provide literature on the discriminatory DADT policy of the military to those attending so long as Lambda did not disrupt the event in any manner. Lambda did “protest” outside the event with no disruption.

However, the question remains whether student groups hosting a career event in the future 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

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general, must student groups comply with regulations that implement law schools' nondiscrimination policies?

II. 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. Over the past few years, the debate concerning military recruitment on campus has been intense. However, in 2003, those in support of nondiscrimination won a battle when the law school publicly joined the Forum for Academic and Institutional Rights (FAIR), an association of law schools, in the effort to challenge the Solomon Amendment.² FAIR ultimately lost the war, but the symbolic importance of GW joining FAIR continues to signal GW's commitment to nondiscrimination.

The Supreme Court in *FAIR* invited the 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 acknowledged that law schools could put up signs on the bulletin board next to the door, engage in speech, . . . [even] organize student protests. . . . Solomon affects what the law schools must do—afford equal access to military recruiters—not what they may or may not say.³

. . . .

Thus, 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 reference 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 non-discrimination policy. Moreover, while GW must provide equal access under Solomon, GW should refrain from affirmatively inviting the military to campus for recruitment purposes.

In fact, the Court in *FAIR* distinguished between equal treatment and equal access under Solomon—equal access is what is mandated. Amici in the case argued that Solomon is satisfied if the law school applies the same *policy* to the military as it applies to all employers.⁴ Of course,

² 10 U.S.C.A. § 983 (2005).

³ *FAIR v. Rumsfeld*, 126 S.Ct. 1297, 1307 (2006).

⁴ *Id.* at 1305-06.

that is what the law schools were doing—no discriminating employer could recruit on law school campuses, including the military. The Court expressly rejected this interpretation and held that Solomon refers to *access* not *treatment*.⁵ Thus, GW must provide equal access but need not provide equal treatment to the military.

GW is a private institution. Thus, GW is not bound by the first or fourteenth amendments of the Constitution. GW is, however, subject to various statutes, including the DC Human Rights Act⁶ that expressly prohibits discrimination on the basis of sexual orientation as well as federal statutes⁷ that prohibit discrimination on the basis of race, sex, disability, and other grounds. Thus the laws that directly bind GW would support the position that all official student groups abide by the school's nondiscrimination policy and implementing regulations, especially since it is possible that the actions of the student organization could be attributed to the law school.⁸

Nevertheless, as an institution of higher learning, most likely would agree that GW has a compelling interest to protect students' first amendment rights. Of course, public schools are bound by the constitution as state actors, as well as bound by the nondiscrimination statutes. Thus, the following analysis will treat GW as if it was a public university bound by the constitution.

III. The Arguments

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

- (1) The law school has a nondiscrimination policy prohibiting discrimination on the basis of sexual orientation and faculty-mandated regulations designed to implement the policy that govern the law school.
- (2) The NSLA is an officially recognized law school organization.
- (3) As such 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 the purpose of the event is to provide information on career opportunities.

⁵ *Id.* at 1306.

⁶ DC Stat. § 2-1402.11 (2001).

⁷ *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. Code 6100-6103 (nondiscrimination on the basis of age).

Stacy, *Enforcing a University's Non-Discrimination Provision for a Student Organization's Selection of its Members and Officers*, 34 J. LEGAL ED. 615, 624 (Oct 2005).

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

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

- (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.
- (4) The NSLA is not directly violating the school's nondiscrimination policy 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?

IV. The Precedent

A few cases have raised similar situations but none directly address the situation here.

First, the most relevant and recent case to address the nature of NSLA's interests here is *FAIR v. Rumsfeld*.⁹ FAIR challenged the Solomon Amendment that required them to allow access to military recruiters even though the military recruiters violate their nondiscrimination policies. By requiring access, the members of FAIR must treat the military differently (specially) than all other employers. The Court found that the law schools' recruitment activities—hosting interviews and recruiting receptions—were not speech¹⁰ nor was their conduct in preventing the military from recruiting sufficiently expressive because the conduct required accompanying speech to express the message.¹¹ 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.¹² Accordingly, the statute is constitutional.

⁹ 126 S.Ct 1297 (2006).

¹⁰ *Id.* at 1309.

¹¹ *Id.* at 1310.

¹² *Id.* at 1312.

Another recent case from the Northern District of California, addressed the relationship between a law school and its student organizations. In *Christian Legal Society v. Hastings*,¹³ 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 White, on motion for summary judgment, held that the law school violated no constitutional right of the Christian students by requiring that their membership rules conform with Hastings' nondiscrimination policy.¹⁴ In summary, Judge White stated that nondiscrimination policies regulate conduct not speech and thus the policy does not suppress CLS's ability to express that "homosexuality is not Christian."¹⁵ However, 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—discrimination—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."¹⁶ Finally, while the "regulation forces the group to accept members it does not desire,"¹⁷ such forced acceptance does not significantly impair the groups' mission "to maintain a vibrant Christian Fellowship on the school's campus." However, even if it did, because the infringement is slight, "Hastings' interest in protecting its students from discrimination provides sufficient justification."¹⁸

Finally, several decades ago, the First Circuit in *Gay Student Organization (GSO) v. Bonner*,¹⁹ held 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.²⁰ The court determined that even though the school banned only social events, this was an impermissible infringement on the group's first amendment rights because (1) it is difficult to distinguish social

¹³ 2006 WL 997217 (N.D. Cal. May 19, 2006).

¹⁴ *Id.* at *5.

¹⁵ *Id.* at *8.

¹⁶ *Id.* at *10.

¹⁷ *Id.* at *20.

¹⁸ *Id.* at 660-61.

¹⁹ 509 F.2d 652 (1st Cir. 1974).

²⁰ *Id.* at 660-61.

events from other events,²¹ (2) social events are critical to the GSO's purpose,²² and (3) the regulation was not a proper time, place, and manner restriction because the restriction was related to the content of the GSO's speech.²³

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 be prohibited from inviting a discriminatory employer to any career/recruitment event or should they be free to invite any employer they wish?

V. The Analysis

A. Is a Fundamental Right of the NSLA Implicated?

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

1. Speech

Is the NSLA "speaking" when it hosts a career fair? A career fair provides an opportunity for 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.²⁴ A parade is a form of expression, not just movement, and the choice of participants affects the message conveyed.²⁵ A career fair, in contrast, is not inherently expressive,²⁶ 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 NSLA.

²¹ *Id.* at 659.

²² *Id.* at 661.

²³ *Id.* at 662.

²⁴ 126 S.Ct. at 1309-10 ("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.").

²⁵ *Id.* at 1309.

²⁶ *Id.* at 1309-10.

2. Expressive Conduct

Does the presence or absence of an employer itself send a message of 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 as to the rationale behind their conduct.²⁷ Similarly, here no message is sent by the failure to invite the military – 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 they should have the opportunity to speak with them nevertheless. Thus their desire to invite the military is not to make a statement but rather to learn about employment opportunities.

3. 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.²⁸ Thus, whether one is forced to include them, or forced not to invite them, does not infringe on their associational rights.

4. The Real Interest

In fact, the real interest of the NSLA is the interest in employment. A law student certainly has an important interest in employment, especially given the enormous debt imposed by the law school, but it does not rise to a constitutional right.

In sum, no first amendment right necessarily is implicated here although an important interest in employment is. Of course, since that interest does not rise to a constitutional right, imposing GW's regulation on the NSLA would be justified so long as it was rationally related to a legitimate school goal, which is easily met. The goal to eradicate discrimination is more than legitimate and the regulation preventing discriminatory employers from recruiting on campus is rationally related to that goal as the military's discrimination expressly prohibits out gay GW law students from employment with the military.

B. Extent of the Burden on the NSLA's Interest

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

Arguable, the burden here is slight. First, unlike in *Christian Legal Society*, where imposing the law school nondiscrimination policy on the CLS affected the membership and leadership composition of the student group directly, this regulation has no affect on the membership of the

²⁷ *Id.* at 1310-11.

²⁸ *Id.* at 1312.

organization. The composition of the group is unaffected. Similarly, the desirability of group membership is unaffected.

Second, unlike in *Gay Student Organization*, where the University of New Hampshire prevented the GSO from having any social event, events which the Court found central to their purpose, GW merely is not allowing two employers to be invited to a career fair, an event not central to the NSLA's purpose. 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.²⁹ The court held that the ability to socialize was fundamental to the group's primary purpose.³⁰ By contrast, the NSLA's purpose has little to do with networking for jobs. Their purpose is to educate GW law students about national security issues and provide a forum for discussion of these issues that are now critical to the United States in the post-September 11th world.³¹ Although career networking events are listed among their programs, they are not fundamental to their goal.

Moreover, UNH prohibited *all* GSO social events. In fact, the court explained that virtually every event could be deemed a social event if any refreshments were served and thus found such an infringement overly burdensome.³² In contrast, GW merely is limiting the types of recruiters that may be invited to a recruitment event. First, *all* recruiters are not prohibited, only those that discriminate in their hiring policies—the military. Many employers (even in the national security

²⁹ 509 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 form discussion groups so that a healthy gay consciousness can evolve among students.”

³⁰ *Id.* at 659-60.

³¹ See NSLA Web site at <http://www.law.gwu.edu/Resources/Student+Organizations/>

[The+National+Security+Law+Association.htm](http://www.law.gwu.edu/Resources/Student+Organizations/The+National+Security+Law+Association.htm).

“In the post-September 11th world, national security issues affect nearly every area of law. The National Security Law Association (NSLA) was created to help educate GW Law's future lawyers about these issues and to provide a forum for discussion of such issues among students, practitioners, and faculty. NSLA sponsors panel discussions, keynote speakers, and career networking events. In addition, NSLA provides members with the opportunity each semester to attend a dinner with a practitioner of national security law. In the past year, NSLA has held panels on the International Criminal Court, the legal ramifications of the U.S. government employing private security contractors, and intelligence surveillance.”

³² 509 F.2d at 659.

field) are not bound by the DADT policy and are more than welcome to be invited. In fact, at the event, the military represented only two of several employers. Further, to the extent students want to obtain employment information about the military, it is easy to obtain without inviting the military physically to campus. Especially since this was not an event where actual interviews were taking place, a visit to their web site suffices.

Finally, while defining what qualifies as a recruitment event may be somewhat uncertain, it is not as uncertain 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. However, what type of student event would/should trigger the regulation? NSLA argued that its event was not a “recruitment” event because no formal interviews were taking place, the event was merely an informational event.

Must actual interviews take place for the regulation to apply? Arguably not. The problem GW has with the military is that gay students are prevented from employment because of the DADT policy. Thus it is logical for the regulation to govern whenever the military’s presence on campus implicates the DADT policy, e.g. whenever the military’s presence is career-related. Thus, 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/format of the event—tables at which representatives sat to answer questions and provide information— further supports the finding that the event was a “recruitment” event. Perhaps a closer situation would arise if the NSLA invited panelists to speak on military careers, for example, what is it like to be in the JAG corps? Here the format of the event is more like that of a speaking engagement. Nevertheless, if a primary purpose of the event is to provide career information about career opportunities expressly denied gay students, the event should qualify as “recruitment” because the goal of the nondiscrimination policy and regulation is to address this very discrimination.

C. GW’s Purpose— How substantial is it?

Turning now to GW’s purpose behind the regulation, 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 who 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 out gays would find speaking with the military useless because of the military’s (not the NSLA’s) DADT policy. Nevertheless, gay students could still 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 allow them access because legally required to do so as in *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 discriminatory policies by the law school itself.

D. The Nature of the Regulation: What is GW targeting?

Finally, what about the nature of GW's regulation? The regulation targets conduct 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*. Of course the reason behind the regulation is a disagreement with the DADT policy (viewpoint discrimination) but GW is not targeting the viewpoint of the *NSLA*. Moreover, the regulation would apply equally to *all* student groups, thus the NSLA is not being treated inequitably as compared to any other group. Here the incidental burden—the inability to invite discriminatory employers to the GW campus for recruitment—is essential to GW's purpose in expressing their disagreement with employment discrimination against their 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, they may do so, off-campus without law school funds.

VI. Conclusion

This is a difficult issue for GW because important interests of our law students are in conflict. On the one hand, our gay students are targeted as “unfit” by the military and deprived 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 mean that they are deprived an employment opportunity with the military. At bottom, however, the choice for GW is the choice between following our own policy of non-discrimination and protecting our 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 nondiscrimination policy.