

THE RIGHT TO SAY NO TO DISCRIMINATION: A COMMENTARY ON RUMSFELD V. FAIR

By Zachary Wolfe, Esq.*

According to the unanimous U.S. Supreme Court decision in *Rumsfeld v. Forum for Academic and Institutional Rights* (“FAIR”), handed down on March 6, 2006, the freedom of speech is not implicated in declaring that you and your educational institution abhor discrimination.¹ The FAIR decision rejected a First Amendment-based challenge to a federal law that compels colleges to allow military recruiting on campus. This decision reflects a fundamental misunderstanding of political speech advocating equality and thoughtlessly dismisses the implications of forcing an institution to accommodate and facilitate messages of discrimination.

Liberal commentary on this case has attempted to limit the decision’s importance and characterize it exclusively as an opportunity to invigorate protests against on-campus military recruiting. However, it is important to recognize that FAIR is one in a line of U.S. Supreme Court cases² that manipulated the issues at stake and set us back in the historic struggle to make our society reflect principles of equality. Moreover, the Justices’ inability or unwillingness to identify and take seriously the considerations that matter most provides another example of the difficulty in separating qualification from ideology, despite claims to the contrary in recent nomination hearings. A visceral understanding of discrimination and of what it means to speak out against discrimination is a prerequisite to expounding on Constitutional provisions that should promote equality and the freedom of speech necessary to advance societal understanding of the meaning of equality. However, in FAIR, no member of the Supreme Court stepped back from the Chief Justice’s opinion to recognize the absurdity of holding that nondiscrimination policies should not receive significant protection under the First Amendment. This phenomenon demonstrates a lack of understanding and valuation of speech and the ideals of social equality.

BACKGROUND

At issue in FAIR was the constitutionality of the Solomon Amendment,³ which threatens to deny federal funds to schools that take certain actions against military recruiting on campus.⁴ This was a particular issue for law schools, essentially all of which have non-discrimination policies that include sexual orientation and that require school-sponsored programs to be limited to organizations that comply with the school’s non-discrimination policy.⁵ Career recruiting on law school campuses involves the expenditure of a significant amount of university resources to support programs that the U.S. military wishes to use to recruit Judge Advocates General; but the military does not comply with law school policies against discrimination on the basis of sexual orientation.⁶ To punish any school that might adhere to its own nondiscrimination policy, Con-

gressman Gerald Solomon pushed through a provision in 1996 that threatened to deny all federal funds unless schools let in the military.⁷ The potential penalty was tremendous, including billions of dollars annually in National Institute of Health research grants alone.⁸ Although no money has been withheld to date, many schools gave in to the threat and allowed military recruiting on campus.⁹

The plaintiff institutions in this case, including the Forum for Academic and Institutional Rights and the Society of American Law Teachers, argued that the Solomon Amendment was in violation of the university’s First Amendment rights to freedom of speech and association.¹⁰ In a fitting and ironic twist, the Third Circuit relied heavily upon the Supreme Court opinion that allowed the Boston Saint Patrick’s Day Parade organizers to keep out gay organizations and that allowed the Boy Scouts to discriminate against its members and officers.¹¹ In both of these cases, the Supreme Court limited the reach of public accommodations laws, holding that requiring such institutions to allow lesbian, gay, bisexual and transgendered (“LGBT”) people and groups to participate in their programs would violate these organization’s First Amendment rights. Accordingly, reasoned the Third Circuit, requiring a university to allow employers that discriminate against LGBT students to participate in university-sponsored programs is be a violation of the university’s First Amendment rights. In its 2004 decision, the Third Circuit wrote that “the Solomon Amendment, by requiring law schools to open their fora to military recruiters when they would prefer to do so only for non-discriminating employers, requires them to use their own property to convey an antagonistic ideological message.”¹²

There is a compelling consistency here. If public accommodations laws cannot be used to compel private groups to allow LGBT people into their meetings and activities if they do not want them there, then the Solomon Amendment cannot be used to compel a private law school to allow discriminatory employers to participate in its programs if it does not want them there. However, a deeper understanding of this argument requires a basic recognition of the significance of nondiscrimination policies.

The ruling by the U.S. Supreme Court that rejected the Third Circuit’s logic rested upon the Supreme Court’s finding that the First Amendment is not implicated when an institution declares a policy against discrimination, nor when an institution is forced to allow a discriminatory employer to take part in its own programs.¹³ This reflects either ignorance or manipulation of the nature of the expressive activities at stake in this case.

NONDISCRIMINATION POLICIES MATTER AND DESERVE PROTECTION

Despite tremendous social progress, discrimination against LGBT people continues as a persistent societal barrier. Many people still view sexual orientation discrimination as acceptable. Horrific hate crimes continue to occur even in large “progressive” cities.¹⁴ Federal policy today *requires* discrimination against gays and lesbians in certain circumstances.¹⁵ In this current social climate, it is extremely significant when an institution announces that it will not tolerate discrimination on the basis of sexual orientation and it will not associate itself with individuals or organizations that do. Such gestures and statements are precisely what the First Amendment should protect.

Moreover, we need the First Amendment to allow this vital national dialogue to continue. It is clear that “equality” is historically an evolving concept. It has been a long, hard process to expand our understanding of who is entitled to “equal protection of the laws,” from the introduction of the clause to begin with (when it often was seen as addressing former slaves), to expansion to other forms of race discrimination and, much later, to sex discrimination. The way the nation acts upon these new understandings is also undergoing constant reexamination.

Progress in our understanding of social issues like equality begins with social discourse and advances to social protest. As the people develop and insist upon commitments to equality, institutions embrace these ideals or accede to constituent demands by adopting and modifying nondiscrimination policies. Only at the end of this process do we see our values reflected in the law. In the meantime, the role of the courts is to value free speech and keep government out of these movements for social progress.

The nation is currently engaged in rethinking both the acceptability of sexual orientation discrimination and our personal and institutional responsibilities upon encountering entrenched discrimination. Not long ago, most institutions had a nondiscrimination policy that only spoke to discrimination by the institution itself and only against classes of people named in civil

rights laws. As political movements effected social progress, those policies developed to include discrimination based on sexual orientation. The policies also articulated a belief that not only should the institution refuse to discriminate directly, but it also should not associate itself with anyone who does discriminate.

The *FAIR* decision allows the heavy hand of government to block social progress on this issue. Due to the holding in this case, universities are prevented from doing precisely what institutions traditionally do when understandings of principles of equality evolve -- reflect those new understandings by modifying and adhering to nondiscrimination policies. *FAIR* allows the government to interfere with the critical and vulnerable process of public discourse that seriously engages meaning of “equality.” The First Amendment protects this dialogue and activist speech.

Additionally, *FAIR* violates freedom of association principles. Members of the law school community have determined that they do not want discriminatory employers soliciting applications in the school’s publications and setting up tables in their facilities. But now, students will receive communications from their school administrators advertising an interviewing opportunity for an employer that only welcomes straight students. Universities will facilitate scheduling and even arrange for space for interested students, but gay students need not apply. It is patently offensive to require students, professors, and other members of the law school community to tolerate such messages from their own institutions.

Chief Justice Roberts claims no message is conveyed when the university supports an employer that openly and systematically discriminates against particular students. He finds that nondiscrimination policies are not deserving of First Amendment protection. We need Justices willing to identify and support equality. We need Justices who understand the opposition to discrimination that the university community is striving to advance and institutionalize. Such a Justice would have recoiled at the premise of the Chief Justice’s opinion.

ENDNOTES

* Zachary Wolfe, Esq. is the founder of the People’s Law Resource Center in Washington, D.C. and an attorney. Wolfe is also part-time faculty at The George Washington University. He submitted an *amicus curiae* brief on behalf of the National Lawyers Guild in the case discussed here. “Brief *Amicus Curiae* of National Lawyers Guild in Support of Respondents,” *Rumsfeld v. Forum for Academic and Institutional Rights*, U.S. Supreme Court, No. 04-1152, 2005 WL 2312117, 2005 U.S. S. Ct. BRIEFS LEXIS 618, *reprinted in* 62 *GUILD PRACTITIONER* 113 (2005).

¹ *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. ---, 2006 U.S. LEXIS 2025, 74 U.S.L.W. 4159 (Mar. 6, 2006).

² *Cf. Minor v. Happerset*, 88 U.S. 162 (1874)

³ 10 U.S.C. § 983.

⁴ The scope of actions that may implicate Solomon remains a contested issue.

⁵ See Bylaws of the Association of American Law Schools, § 6-3, *available at* http://www.aals.org/about_handbook_bylaws.php (requiring all member schools to adopt such policies); Executive Committee Regulations of the Association of American Law Schools, § 6-3.1, *available at* <http://www.aals.org/ecr> (requiring member schools to extend placement assistance or use of school facilities only to employers that comply with such nondiscrimination policies).

⁶ See Kathy Gilbert & Steve Collier, *A Decade of Don’t Ask Don’t Tell: The Military’s Policy on Homosexuals In the Service*, 18 *ON WATCH* 20 (2004), *available at* <http://www.nlg.org/mltf/Winter2004.pdf>.

⁷ Pub. L. No. 104-206, § 509, 110 Stat. 2984 (1996), *codified as amended at* 10 U.S.C. § 983.

⁸ See e.g., National Institutes of Health, “NIH Awards to Domestic Institutions of Higher Education by Rank, FY 2004,” *available at* <http://grants2.nih.gov/grants/award/trends/dheallinst04.htm>.

⁹ Lindsay Gayle Stevenson, *Note & Comment: Military Discrimination on the Basis of Sexual Orientation: “Don’t Ask, Don’t Tell” and the Solomon Amendment*, 37 *LOY. L.A. L. REV.* 1331, 1354-55 (2004).

¹⁰ *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004).

¹¹ *Id.*, *citing* *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 566 (1995).

¹² *Forum for Academic and Institutional Rights*, 390 F.3d at 239 (internal quotes and citations omitted).

¹³ *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. ---, 2006 U.S. LEXIS 2025, 74 U.S.L.W. 4159 (Mar. 6, 2006).

¹⁴ See e.g. Christopher Healy, *Marriage’s Bloody Backlash*, *THE ADVOCATE*, Apr. 27, 2004, at 38 (discussing increases in hate crimes nationwide).

¹⁵ See e.g. 10 U.S.C. § 983; Katherine Shrader, *Democrats Slam Revised Gay-Clearance Rules*, *ASSOCIATED PRESS*, March 16, 2006 U.S. General Accounting Office, GAO/NSIAD 95-21, *Security Clearances: Consideration of Sexual Orientation in the Clearance Process*, Mar. 1995, *available at* <http://archive.gao.gov/t2pbat1/153724.pdf>. In identifying such policies, author does not concede their Constitutionality.