

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STEPHEN B. BURBANK, <i>et al.</i>	:	CIVIL ACTION
Plaintiffs,	:	
	:	
v.	:	
	:	
DONALD H. RUMSFELD,	:	
SECRETARY OF DEFENSE,	:	NO. 03-5497
in his Official Capacity,	:	
Defendant.	:	

MEMORANDUM AND ORDER

Fullam, Sr. J. July , 2004

University of Pennsylvania Law School full-time faculty members, students, and a student organization bring this suit against the Secretary of Defense to challenge the Department of Defense interpretation and enforcement of the Solomon Amendment against the University of Pennsylvania Law School (“the Law School”).

The Solomon Amendment provides in pertinent part the following:

(b) Denial of funds for preventing military recruiting on campus. No funds described in subsection (d)(2) may be provided by contract or by grant (including a grant of funds to be available for student aid) to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents--

(1) the Secretary of a military department or Secretary of Homeland Security from gaining entry to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting; or

(2) access by military recruiters for purposes of military recruiting to the following information pertaining to students (who are 17 years of age or older) enrolled at that institution (or any subelement of that institution):

(A) Names, addresses, and telephone listings.

(B) Date and place of birth, levels of education, academic majors, degrees received, and the most recent educational institution enrolled in by the student.

(c) Exceptions. The limitation established in subsection (a) or (b) shall not apply to an institution of higher education (or any subelement of that institution) if the Secretary of Defense determines that--

(1) the institution (and each subelement of that institution) has ceased the policy or practice described in that subsection; or

(2) the institution of higher education involved has a longstanding policy of pacifism based on historical religious affiliation.

10 U.S.C. § 983 (2004). The relevant Department of Defense regulation follows:

(a) Under 108 Stat. 2663 and 110 Stat. 3009, no funds available under appropriations acts for any fiscal year for the Departments of Defense, Transportation (with respect to military recruiting), Labor, Health and Human and Human Services, Education, and Related Agencies may be provided by contract or by grant (including a grant of funds to be available for student aid) to a covered school if the Secretary of Defense determines that the covered school has a policy or practice (regardless of when implemented) that either prohibits or in effect prevents the Secretary of Defense from obtaining, for military recruiting purposes, entry to campuses, access to students on campuses, or access to directory information on students (student recruiting information).

* * *

(c) The limitations established in paragraph (a) of this section, shall not apply to a covered school if the Secretary of Defense determines that the covered school:

(1) Has ceased the policies or practices defined in paragraph (a) of this section;

(2) Has a long-standing policy of pacifism based on historical religious affiliation;

(3) When not providing requested access to campuses or to students on campus, certifies that all employers are similarly excluded from recruiting on the premises of the covered school, or presents evidence that the degree of access by military recruiters is at least equal in quality and scope to that afforded to other employers

32 C.F.R. § 216.4 (2004).

The Law School, by resolution of its faculty, promulgated an anti-discrimination policy that limited the Law School's services, including those of the Law School Career Planning and Placement Office ("CP&P"), to those employers who did not discriminate based on "sexual or

affectional orientation.” *See* Complaint at ¶ 15. For those employers who verified that they did not discriminate, CP&P established a time and place for them to interview students, notified students of the dates that the employers would be on campus, and scheduled interviews, when requested by students and if time permitted, at the University of Pennsylvania Office of Career Services (“OCS”). *See id.* at ¶ 15. Because the military did not verify that it does not discriminate against its gay and lesbian members, starting in 1998, military recruiters were referred to OCS, and OCS notified all Law School students of the dates that military recruiters would be on campus, and OCS scheduled interviews at OCS for all interested students. *See id.* at ¶¶ 16, 22. In January 2003, the Judge Advocate General of the Air Force contacted the President of the University, and notified her that the Law School policy did not comply with the Solomon Amendment or Department of Defense (“DoD”) regulations. *See id.* at ¶ 27. Under the threat of losing federal funding because of alleged noncompliance, the University President ordered the Law School not to enforce its anti-discrimination policy against military recruiters. *See id.* at ¶ 29.

Plaintiffs seek a declaration that the Law School met its obligations under the law through the policies and procedures instituted in 1998 and that Defendant is not authorized by the Solomon Amendment and related DoD regulations to deny federal funding to the University or the Law School. In the alternative, Plaintiffs request a declaration that the Solomon Amendment violates their First Amendment rights of free speech, expression, association, and academic freedom, and their Fifth Amendment due process and equal protection rights. Defendant moves to dismiss pursuant to Rule 12(b)(1) for lack of standing and pursuant to Rule 12(b)(6) for failure to state a claim. Plaintiff responds to the Motion to Dismiss and moves for summary judgment

on Counts I, II, and III.

Standing

Defendant argues that Plaintiffs do not have standing to bring their claims because they do not allege an injury, and that even if they allege an injury, they cannot show that it was caused by Defendant. Defendant argues additionally that Plaintiffs do not have standing to bring a claim on behalf of the Law School or University.

Plaintiffs claim more than mere stigmatic or dignitary injury. *Alliance of Lesbian, Gay, Bisexual, Transgendered, & Straight Students v. Cohen*, No. 1:99-CV-34 (D. Vt. Nov. 10, 1999) is distinguished. Plaintiffs here claim the same types of injuries-in-fact held sufficient to confer standing on law school faculty, law students, and law student organizations in *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, 291 F. Supp. 2d 269, 292-296 (D.N.J. 2003) (hereinafter “*F.A.I.R.*”), *Burt v. Rumsfeld*, No. 03-1777, 2004 U.S. Dist. LEXIS 11156 (D. Conn. June 9, 2003), and *Student Members of SAME v. Rumsfeld*, No. 03-1867, 2004 U.S. Dist. LEXIS 11157 (D. Conn. June 9, 2004). Plaintiffs allege that Defendant’s interest in changing the Law School’s procedures “has caused direct and substantial injury to plaintiffs who have been deprived of their anti-discrimination policy.” *See* Complaint at ¶ 31. They also claim that “the faculty and student plaintiffs have been injured by being deprived of the benefits and protections of the Law School’s anti-discrimination policy.” *See id.* at ¶ 32.

Some of the benefits that the faculty allege that they lost include the abilities to communicate and teach a message of anti-discrimination and to ensure that employers who use the resources of the law school respect the anti-discrimination policy. *See* Complaint at ¶¶ 16, 32. For example, faculty Plaintiff Stephen Burbank, in his affidavit, describes his ability to teach and

communicate messages about the importance of access to justice, and equal treatment and respect for personal autonomy and dignity, as undermined by Defendant's actions. *See id.* at ¶¶ 7-8. He also notes that the coerced abandonment of the anti-discrimination policy has had an adverse effect on him as a teacher and as a member of an academic community. *See* Plaintiff's Response at Attachment 2, Burbank aff. at ¶ 7. Therefore, and for reasons similar to those set forth in *FAIR* and *Burt*, the faculty Plaintiffs state cognizable injuries to their First Amendment rights to free speech, free expression, free association, and academic freedom. *See* 291 F. Supp. 2d at 292-296; 2004 U.S. Dist. LEXIS 11156 at *10-13. *See also* *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1982); *Bd. of Educ. v. Pico*, 457 U.S. 853, 866 (1982) (plurality opinion); *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey Bd. of Educ.*, 654 F.2d 868, 878 (3d Cir. 1981); *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 559 (1995); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

The student Plaintiffs and the student organization Plaintiff also state a cognizable injury. These Plaintiffs claim that Defendant has interfered with their ability to receive the Law School message of anti-discrimination. For example, Plaintiff Ellen London avers that she now "associates the Law School in [her] mind with a discriminatory and unprincipled organization," and now thinks that the Law School believes that discrimination on the basis of sexual orientation is a lesser evil than sex or race discrimination. *See* Plaintiff's Response at Attachment 3, London aff. at ¶¶ 4-5. Plaintiff Bryan Tallevi claims that he believes that the Law School appears to accept and participate in the discrimination by the military, and that the Law School has comprised an open and tolerant educational atmosphere by assisting military recruiters. *See*

Plaintiff's Response at Attachment 4, Tallevi aff. at ¶¶ 4-5. For these reasons, and for the rationale set out in *Student Members of SAME* and *FAIR*, the student Plaintiffs and the student organization Plaintiff state a cognizable injury to their right to receive information and messages from the Law School. See 2004 U.S. Dist. LEXIS 11157 at * 10-12; 291 F. Supp. 2d at 294-296. See also *Virginia State Bd. of Pharmacy*, 425 U.S. at 756; *Pico*, 457 U.S. at 866 (plurality opinion); *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church*, 654 F.2d at 878. However, as in *Student Members of SAME*, the students and the student organization are not the proper parties to bring the associational claim because the Law School faculty here sets the rules of association by resolution, see Complaint at ¶ 15. See 2004 U.S. Dist. LEXIS 11157 at * 9-10. Similarly, the claim of injury to the ability to convey the Law School policy of anti-discrimination belongs to the faculty, not to the students or student group.

Plaintiffs' cognizable injuries are traceable to the actions of the Defendant, because an injury is "causally connected and traceable to" a third-party's action if a defendant would not have acted but for the third-party's action. See *Pitt News v. Fisher*, 215 F.3d 354, 360 (3d Cir. 2000). See also *Bennett v. Spear*, 520 U.S. 154, 169 (1997) (distinguishing injury resulting from the independent action of a third party not before the court from "injury produced by determinative or coercive effect upon the action of someone else"). Here, Plaintiffs allege that Defendant "has sought to coerce the Law School to violate its anti-discrimination policy by threatening to deny federal contracts and grants," that Defendant "coerced the University to force the Law School to violate its anti-discrimination policy," and that the Law School would not have suspended its anti-discrimination policy but for the threatened withdrawal of federal funds. See, eg. Complaint at ¶¶ 2, 5, 34. Therefore, Plaintiffs' injuries were caused by Defendant's

action, *see also F.A.I.R.*, 291 F. Supp. 2d at 293, and Plaintiffs have standing to sue for alleged violations of their First Amendment rights to the extent that they state cognizable injuries.

Furthermore, if Plaintiffs seek to bring suit under the APA in Count I, they also have standing to do so to the extent they state cognizable injuries, because they claim injuries because of agency action, *see* 5 U.S.C. § 702 (2004), and the interest they seek to protect is “arguably within the zone of interests to be protected” by the First Amendment. *See Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

Plaintiffs also bring a due process and equal protection claim in Count IV, but they give no reason why they have standing to assert a claim under the Fifth Amendment, and none is apparent.

Nor do Plaintiffs have standing to sue on behalf of the Law School. To have standing to bring suit on behalf of a third party, a plaintiff “must have suffered an ‘injury in fact,’ ... must have a close relationship to the third party, ... and there must exist some hindrance to the third party’s ability to protect his or her own interests.” *See Powers v. Ohio*, 499 U.S. 400, 410-411 (1991). While Plaintiffs have suffered injuries, Plaintiffs do not show that the Law School or University are hindered in protecting their own interests like, for example, individuals who seek to protect medical privacy, *see, eg., Pennsylvania Psychiatric Society v. Green Spring Health Services*, 280 F.3d 278, 290 (3d Cir. 2002). In addition, the hindrance requirement is not relaxed for Plaintiffs as it may be for plaintiffs who face substantial threats to free speech, such as those bring a facial challenge to an overbroad statute, and those who must “forego their rights entirely or else face criminal prosecution to vindicate them.” *See Secretary v. Joseph H. Munson Co.*, 467 U.S. 947, 956-958 (1984); *Pitt News*, 215 F.3d at 363-364.

Defendant's Motion to Dismiss/Plaintiffs' Motion for Summary Judgment

Characterizing Count I as an APA cause of action, Defendant seeks to dismiss it on the grounds that there has been no final agency action. However, whether or not the administrative finality doctrine is relevant to an “as applied” free speech claim, *see Peachlum v. City of York*, 333 F.3d 429, 437 (3d Cir. 2003), Plaintiffs allege final agency action, *see* Complaint at ¶¶ 31-32, so Defendant's Motion to Dismiss Count I will be denied.

Because Plaintiffs request summary judgment on Count I, they need to present evidence to back up their allegations of a final agency action. The APA's “flexible” and “pragmatic” finality requirement may be met here, *see Abbott Labs. v. Gardner*, 387 U.S. 136, 149-150 (1967); Complaint at Ex. B, White aff., if it must be, *see Peachlum*, 333 F.3d at 437, but it may not be, *see* Complaint at Ex. A. Plus, Defendant has not had an opportunity, through discovery, to test the evidence presented in Plaintiffs' affidavits, or to gather and present evidence in opposition to Plaintiffs' claim. Therefore, because a genuine issue of fact remains, or because Plaintiffs' Motion was brought prematurely, Plaintiffs' Motion for Summary Judgment on Count I will be denied.

Because Plaintiffs state a claim in Count II for unconstitutional conditions on the receipt of federal funding, but prematurely move for summary judgment on it, Defendant's Motion to Dismiss Count II and Plaintiffs' Motion for Summary Judgment on Count II both will be denied.

Defendant also argues that Plaintiffs fail to state a First Amendment cause of action for impermissible content-based discrimination when they allege, in Count III, that the denial of federal funds to the Law School because of its anti-discrimination policy would violate the First Amendment by discriminating “in the application and enforcement of the [Solomon

Amendment] between educational institutions with ‘longstanding polic[ies] of pacifism based on historical religious affiliation’ and those without.” *See* Complaint at ¶ 39. For the reasons stated in *F.A.I.R.*, 291 F. Supp. 2d at 316, namely because the pacifism exception comports with the long-accepted principle of pacifist exemption from military service, *see* 50 U.S.C. App. § 456(j) (2004), or because the exception is a pragmatic concession to futility unrelated to free speech or expression, like the Solomon Amendment exception for schools where there is a lack of student interest, *see* 32 C.F.R. § 216.4(c)(6)(ii) (2004), Defendant’s Motion to Dismiss Count III will be granted and Plaintiffs’ Motion for Summary Judgment on Count III will be denied.

An order follows.

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Plaintiffs,	:	
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v.	:	
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DONALD H. RUMSFELD,	:	
SECRETARY OF DEFENSE,	:	NO. 03-5497
in his Official Capacity,	:	
Defendant.	:	

ORDER

AND NOW, this day of June, 2004, after oral argument, and in consideration of Defendant's Motion to Dismiss Plaintiffs' Complaint Pursuant to Rules 12(b)(1) and 12(b)(6), Plaintiffs' Response and Motion for Summary Judgment on Counts I, and alternatively Counts II and III, Defendant's Reply to Plaintiffs' Motion to Dismiss and Response to Plaintiff's Motion for Summary Judgment, and Plaintiffs' Reply, and the American Association of University Professors' Motion for Leave to File Brief *Amicus Curiae* in Support of Plaintiffs, IT IS ORDERED:

1. Defendant's Motion to Dismiss is GRANTED in part; DENIED in part.
 - i. Count IV is DISMISSED with prejudice because Plaintiffs lack standing.
 - ii. Count III is DISMISSED with prejudice for failure to state a claim upon which relief can be granted.
 - iii. To the extent that Plaintiffs have standing to bring their respective First Amendment and/or APA claims as set forth in the accompanying Memorandum, Defendant's Motion is DENIED.
2. Plaintiff's Motion for Summary Judgment is DENIED.
3. The American Association of University Professors' Motion is GRANTED. The

Clerk is directed to file the Brief *Amicus Curiae* submitted with the American Association of University Professors' Motion.

BY THE COURT:

Fullam, Sr. J.