

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

----- X
STUDENT MEMBERS OF SAME :
(STUDENT/FACULTY ALLIANCE FOR MILITARY :
EQUALITY), a Yale Law School student organization, and :
OUTLAWS, a Yale Law School student organization, : 3:03CV 1867 (JCH)
Plaintiffs, :
- against - : February 20, 2004
DONALD H. RUMSFELD, in his capacity as U.S. :
Secretary of Defense, :
Defendant. :
----- X

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS**

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PRELIMINARY STATEMENT

For more than 25 years, Yale Law School has prohibited discrimination based on sexual orientation. The law school's commitment to equality under law and its prohibition of discrimination based on sexual orientation – as well as race, religion, gender, and national origin – is at the heart of Yale Law School's mission, and guides all official law school activities. Consistent with this policy of nondiscrimination – which directly benefits students – only employers who can certify that they do not discriminate on the basis of sexual orientation are permitted to participate in the official Yale Law School recruiting programs.

The military is not such an employer. Pursuant to the military's "Don't Ask, Don't Tell" policy, gay men and lesbians are not permitted to serve openly in the military. Discovery of a soldier's homosexuality can lead to court martial, dishonorable discharge or worse. While the Yale Law School community cannot change the military, it has the right not to grant it access to official law school programs specifically intended for employers who do not discriminate. Notwithstanding this right, defendant has demanded, under threat of the withdrawal from Yale University of over \$200 million in federal funding, that the military be allowed to participate.

Plaintiffs, who are student members of two official law school organizations, bring this suit to vindicate their right to benefit from the law school's nondiscrimination policy and to receive the message of nondiscrimination in its intended, unabridged form. Plaintiffs also seek to participate in an expressive association defined by the association, and not by the government. These are plaintiffs' rights, and so, contrary to the arguments in defendant's motion to dismiss, plaintiffs are precisely the parties with standing to vindicate them. Not only are the plaintiffs the proper parties to

prosecute these claims, now is the time for adjudication to occur. Defendant's other ground for avoiding the merits of this suit – the doctrine of ripeness – is simply inapplicable where, as here, defendant has caused, and continues to cause, injury to plaintiffs.

Finally, defendants are wrong that the Complaint fails to state claims upon which relief can be granted. The First Amendment entitles plaintiffs to receive and benefit from the message of nondiscrimination Yale Law School intends to convey. It also safeguards students' right to participate in an association committed to principles of nondiscrimination unfettered by the government. Moreover, the Fifth Amendment prohibits the type of invidious discriminatory motive at the heart of the Solomon Amendment and its application by defendant. Indeed, plaintiffs have informed defendant they will move shortly for summary judgment because, in light of facts that cannot be disputed, plaintiffs are entitled to judgment as a matter of law.

STATEMENT OF FACTS

A. Plaintiffs Are Official Student Organizations Committed To Nondiscrimination

The Student/Faculty Alliance for Military Equality ("SAME") is an officially recognized student organization of the Yale Law School committed to activism in support of the Yale Law School nondiscrimination policy, which prohibits discrimination on the basis of sexual orientation. Cplt. ¶ 10. The organization has 48 student members, consisting of students from each class at the law school, including gay, lesbian and heterosexual students. Cohen Decl. ¶ 11. The activities of SAME include researching the effect of the Solomon Amendment on the law school and the university, educating students and faculty on the issue, publicizing the message of nondiscrimination and protesting military participation in official law school interview programs. Cplt.

¶ 10. As an official student organization, SAME abides by the law school nondiscrimination policy, which directly benefits SAME and its members. Cohen Decl. ¶¶ 10-11.¹

OutLaws is an official student organization at Yale Law School for lesbian, gay, bisexual and transgender (“LGBT”) students. Cplt. ¶ 11. Approximately 30 students are official members of OutLaws, and each member is gay, lesbian or bisexual, although not every student member is open about his or her sexual orientation. Kavey Decl. ¶ 5. The membership includes students from each class at the law school. Id. OutLaws creates a social forum for LGBT students and educates members of the Yale Law School community and others about the issues affecting LGBT persons. Id. As an official student organization, OutLaws abides by, and advocates, the policy and practice of nondiscrimination. Id. ¶¶ 7, 11.

B. Fundamental Role Of Nondiscrimination Policy At Yale Law School

From 1978 until the fall of 2002, Yale’s nondiscrimination policy specifically protected students from discrimination on the basis of sexual orientation. See Cplt. ¶¶ 24, 41.² The existence of a nondiscrimination policy and practice that covers

¹ On a motion to dismiss under Rule 12(b)(1), the Court may refer to evidence outside the pleadings, such as affidavits. MM Global Servs., Inc. v. Dow Chem. Co., 283 F. Supp. 2d 689, 696 (D. Conn. 2003) (citing Antares Aircraft, L.P. v. Fed. Republic of Nigeria, 948 F.2d 90, 96 (2d Cir. 1991)).

² The decision of Yale Law School to extend its nondiscrimination policy to gay and lesbian students was part of a broader trend initiated by New York University Law School in 1978. See Forum for Academic and Institutional Rights, Inc. v. Rumsfeld, 291 F. Supp. 2d. 269, 280 (D.N.J. 2003) (“FAIR”). Throughout the late 1970s and 1980s, a greater number of law schools included a prohibition against discrimination on the basis of sexual orientation in their nondiscrimination policies. Id. In 1990, the importance of eliminating discrimination against LGBT students gained widespread acknowledgement when the Association of American Law Schools (“AALS”) voted to require that member schools amend their nondiscrimination policies to insist that employers using law school

sexual orientation (as well as race, gender, religion, and national origin) is critical to the maintenance of an atmosphere that fosters open discourse and groundbreaking legal research. Id. ¶¶ 3-4. The nondiscrimination policy is thus a significant aspect of many students' law school experience. For John Tye, a first-year law student at the law school, the nondiscrimination policy teaches students the value that individuals are to be judged on the basis of personal merit, not arbitrary personal characteristics. Tye Decl. ¶¶ 1, 6. Other students, Heather Sias and Fadi Hanna, chose to attend Yale Law School because they expected the nondiscrimination policy to protect them from job discrimination on the basis of sexual orientation, which they had encountered in the past. Sias Decl. ¶¶ 2-3; Hanna Decl. ¶¶ 5-7.

Consistent with the policy, the Career Development Office ("CDO") at Yale Law School required every employer participating in the law school's official interview programs to confirm that it was aware of and complied with the law school nondiscrimination policy. Cplt. ¶ 25. In the absence of a signed form, an employer could not participate in the Fall Interview Program or Spring Interview Program hosted by the CDO at the Holiday Inn near campus. Id.

C. Congress Enacts The Solomon Amendment To "Send A Message" To America's Law Schools

By 1994, an increasing number of law schools, following in Yale's footsteps, had extended nondiscrimination policies to protect gays and lesbians. Moreover, President Clinton had unsuccessfully tried to lift the military's ban on gay and lesbian servicemembers. Not surprisingly, during the same congressional session in

career services offices provide assurance that they do not discriminate on the basis of sexual orientation. Id.

which Congress passed the Solomon Amendment, legislators expressed statements opposing both President Clinton's attempt to lift the ban on gays and lesbians and the greater levels of tolerance shown toward gay men and lesbians at institutions of higher learning. Representative Philip Crane expressed his displeasure with President Clinton's efforts regarding gay and lesbian servicemembers on the House floor:

Today's peace is being threatened by the Clinton administration's policies that may take us "Back to the Future" and once again lead to an ineffective, weak military - which encourages mischief and aggression throughout the world. Eliminating COLA's [cost of living allowances] for both those on active duty and for retirees, allowing homosexuals to service in the military, and shunning uniformed officers in the White House are all signs of the same degradation and lack of respect displayed little more than a decade ago.

139 Cong. Rec. E1758-01 (daily ed. July 14, 1993) (statement of Rep. Crane).³

Meanwhile, Representative Richard Pombo, a co-sponsor of the bill, characterized the application of university nondiscrimination policies to the military as "nothing less than a backhanded slap at the honor and dignity of service in our Nation's Armed Forces." 140 Cong. Rec. H3860-63 at H3863 (May 23, 1994) (statement of Rep. Pombo).

By enacting the Solomon Amendment, Representative Pombo stated, universities would learn that their open policies toward gays and lesbians would have consequences:

These colleges and universities need to know that their starry-eyed idealism comes with a price. If they are too good - or too righteous - to treat our Nation's military with the respect it deserves ... - then they may also be too good to receive the generous level of taxpayer dollars presently

³ This court may take legal judicial notice of legislative history. See Yale New-Haven Hosp., Inc. v. Thompson, 198 F. Supp. 2d 183, 186 (D. Conn. 2002).

enjoyed by many institutions of higher education in America.

Id. Representative Pombo thus urged members of Congress to support the Solomon Amendment and “send a message over the wall of the ivory tower of higher education.”

Id.

Representative Solomon echoed a similar sentiment during his speeches on the House floor. He declared that the bill would “tell[] recipients of Federal money at colleges and universities that if you do not like the Armed Forces, if you do not like its policies, that is fine. That is your first-amendment rights. But do not expect Federal Dollars to support your interference with our military recruiters.” 140 Cong. Rec. H3860-63 at H3861 (May 23, 1994) (statement of Rep. Solomon). Consistent with these punitive views, the Solomon Amendment requires the withholding of funds from universities that fail to comply with the terms of the statute. See 140 Cong. Rec. H3860-63 at H3863 (May 23, 1994) (statement of Rep. Underwood).

D. Defendant Forces Yale Law School To Compromise Its Message Of Nondiscrimination

In compliance with the Solomon Amendment, the Yale Law School never prevented or effectively prevented military recruiters from gaining access to campus, to students on campus or to student information for recruitment purposes. Cpl. ¶ 27. Notwithstanding this compliance, on May 29, 2002, Army Colonel Clyde Tate II informed Yale University President Richard C. Levin in writing that Yale was “not complying with federal law and regulations with respect to access” to the law school for military recruiting. See letter from Tate to Levin, dated May 29, 2002 (Ex. A).⁴ Colonel

⁴ Unless otherwise indicated, referenced exhibits are attached to the Declaration of Catharine M. Clark.

Tate cited the inability of the military to participate in the CDO interview program as evidence that Yale was “not in compliance with federal requirements.” Id. Colonel Tate again cited statutory and regulatory authority for denying federal funds to allegedly noncompliant universities. Id. Finally, the letter included the following ultimatum: “Unless we receive new information from you by July 1, 2002, showing that policies and practices of your institution have been modified to conform with federal requirements . . . we will consider forwarding this matter to the Office of the Secretary of Defense with a recommendation of funding denial.” Id.

Following an extension to respond to Colonel Tate’s demand, and believing Colonel Tate’s threat expressed in the May 29, 2002 letter that more than \$200 million in federal aid to Yale University was at stake, the faculty of Yale Law School was forced to suspend application of the nondiscrimination policy to the military. Cplt. ¶¶ 6, 31. Due to the suspension of the policy, military recruiters participated in the fall 2002 and spring and fall 2003 interview programs. Id. ¶¶ 31, 34.

Yale Law School’s suspension of its nondiscrimination policy to permit military participation by the Judge Advocate General Corps (“JAG”) in the official interview programs abridges the law school’s policy and message of nondiscrimination. The military is the only employer that is permitted access to the official interview program, and gay men and lesbians are the only protected group for whom coverage of the nondiscrimination policy has been lessened. Cplt. ¶ 32; see also Sofen Decl. ¶ 6 (“No other employer who would refuse to hire me because I am gay is permitted to participate as JAG does.”). The law school’s nondiscrimination message now bears the following caveat: “Discrimination based on sexual orientation is less objectionable than other forms