LEGAL Q & A

Q. What is the Third Circuit Court of Appeals' decision in *FAIR v. Rumsfeld* and how does it affect military recruiting on college campuses?

A. The simple answer: While the court held that the Solomon Amendment was unconstitutional, as of the publication of this article, the decision has no immediate impact, because it has been stayed by the court until the U.S. Supreme Court grants or refuses consideration of the case.

However, because military recruiting is more and more part of the landscape of on-campus recruiting, it is important to understand the background of the case, the decision, and compliance requirements.

Legal Background

Many undergraduate and graduate-level schools maintain formal policies of nondiscrimination that withhold career services from employers that exclude employees and applicants based upon race, color, national origin, religion, age disability, and sexual orientation, among other factors. These schools may also require employers to certify their commitment to the school's nondiscrimination policy before they can use the career services facilities for recruiting and interviewing. For law schools, the American Association of Law Schools, the nonprofit association to which all law schools belong, also requires the nondiscrimination certification policy. Most schools also have active gay and lesbian advocacy groups on campus.

The federal anti-discrimination laws do not include sexual orientation as a protected classification under the law. Thus, there is no federal prohibition against discrimination in employment on the basis of sexual orientation. To date, only 14 states prohibit sexual orientation discrimination in employment: California, Connecticut, the District of Columbia, Hawaii, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, Nevada, New Jersey, Rhode Island, Vermont, and Wisconsin. Despite the lack of legal protection, most private and public employers do not discriminate based upon a person's sexual orientation and are able to so certify to the schools.

For the U.S. military, however, it is a different story. The military has had a long-standing policy of excluding gays and lesbians from all branches of service. This policy was protected by federal law. In 1993, President Clinton issued an executive order requiring the military to modify the total exclusion policy to "don't ask, don't tell." This policy prohibits the military from proactively investi-

gating the sexual orientation of service members without some reason to suspect homosexuality—"don't ask"—and it forbids service members from declaring that they are homosexual—"don't tell."

Thus, the military is not allowed to ask in an interview the sexual orientation of an interviewee. By the same token, should an interviewee disclose his or her homosexuality, the military can refuse to accept the person into the service. Many schools interpret this policy as conflicting with their policies against discrimination on the basis of sexual orientation. In fact, the military is unable to certify that they do not discriminate on the basis of sexual orientation.[1] While there have been several legal challenges to the "don't ask, don't tell" policy, to date most federal courts have upheld the policy as constitutional.[2]

In 1994, Congress passed the Solomon Amendment, a law that withholds Department of Defense (DOD) funding from any educational institution with a policy of denying or effectively preventing the military from obtaining entry to campuses for recruiting purposes, preventing the establishment of an ROTC unit, or preventing a student from participating in a ROTC unit. Congress believed that if a school received DOD funds, it should not have a choice about having the military recruit on campus.

The law was subsequently amended several times to clarify what was meant by "denying" the military on campus and expanded the penalty provisions. The current iteration of the law requires a school to provide equal access to the military in the same manner it does for other employers seeking job candidates. Moreover, if a "sub element" of a school refuses to provide equal access, federal funds from the Departments of Labor, Homeland Security, Transportation, Health and Human Services, and/or Education—not merely DOD funds—could be withdrawn from the entire institution. So, for example, if the law school denies the military access, funds will be taken not only from the law school but the entire university, impacting research departments such as the biology department.

There is one exception to this broad mandate. Schools with a long-standing policy of pacifism based on historical religious affiliation may exclude the military without loss of federal funds. Moreover, even if a school violates this mandate, federal funds available directly to students for financial assistance are not affected.

In summary, while schools and most private employers have strong equal employment opportunity policies that cover sexual orientation, the law, in most states, does not provide such protection. The military, in fact, is permitted to discriminate and can force schools to permit the military to recruit on campus despite the fact that its policy runs counter to the school's policy and in some cases, state law. The quandary for schools was—and still is—whether to risk loss of federal funds by enforcing its non-discrimination policy and limiting the military's on-campus recruiting privileges.

Facts of the Case

Prior to 2001, the military considered the law schools to be in compliance as long as the recruiters were permitted some form of access to students, such as posting job notices and interviewing at the ROTC offices, in the library, or in the offices of the veterans association. However, after September 11, 2001, the DOD began to strictly apply the law and demanded not only access to campuses but treatment equal to that accorded to other recruiters. The DOD advised schools that they were required to provide to military recruiters access to students in quality and scope that the school provided to other recruiters. Thus, the school had to provide the military the same level of assistance from career services as it did for other employers regarding arranging interviews, posting job notices, and providing admission to career fairs.

In September 2003, an association of 26 public and private law schools and law faculty sued the Secretary of Defense and several other agencies, seeking to have the Solomon Amendment declared unconstitutional. The association also asked for the court to enjoin the DOD from enforcing the law while the lawsuit made its way through the court system. The District Court refused to issue the injunction. However, on November 29, 2004, the Third Court of Appeals, in *The Forum for Academic and Institutional Rights v. Rumsfeld, et.al.,* reversed the lower court's decision and granted the injunction. In a 2-1 decision, the court found that enforcement of the Solomon Amendment violated the law schools' rights to free speech.

The Court Decision

In reviewing the schools' First Amendment claim, the court first found that the laws schools were "expressive associations." According to the court, the law schools inculcated into students their mission, philosophy, and values. One of the values that the law school, in particular, holds is that discrimination against homosexuals is wrong. This value is reflected in their antidiscrimination policies. The court analogized this to the Boy Scouts of America, an organization that also inculcated certain values into their members, mainly that a homosexual life style is wrong. The court pointed out that in the case of *Dale v. the Boy Scouts of America*, the U.S. Supreme Court upheld the Boy Scouts' refusal to permit a gay person to be a Scout leader, stating that the Boy Scouts should not be

forced by the state antidiscrimination laws to accept an individual who is gay because to do so would be an impairment of the Scouts' freedom to express its values. Having a gay man as a role model and spokesman for the organization, the U.S. Supreme Court reasoned, would undermine the ability of the Scouts as a whole to profess the organization's anti-homosexual message.

The court held that the Solomon Amendment, likewise, infringes the First Amendment expressive association right of the law schools by forcing them to participate in the government speech embodied in the amendment and express a message (acceptance of employment discrimination based on sexual orientation) incompatible with their declared educational objectives.

While it is ironic that the court used the BSA decision to justify the law schools' refusal to permit the military on campus, the court found that the Solomon Amendment compels the law schools to have on campus a group that is antithetical to the values that they profess and as such impairs their freedom to express these values. The mere presence of the military on campus undercuts the schools' ability to teach these values. By compelling interviews at career services, job posting and publishing recruiting notices of an employer who discriminates on the basis of sexual orientation, the Solomon Amendment impairs the law schools' ability to teach an inclusive message by example.

Moreover, the court found that the Solomon Amendment compels the schools to disseminate, support, and subsidize a message contrary to what the schools are trying to impart in their students. According to the court, for the law schools to permit military recruiters on campus and provide them with a full array of career services assistance forces the law schools to send and subsidize a message that the military policies against gays are acceptable when the policies are antithetical to the schools' antidiscrimination policies. The court pointed out that the law schools are expressly precluded from disclaiming the military's recruiting message by the Solomon Amendment's requirement that their treatment of the military be equal in quality and scope to the treatment of other employers. Since the law schools do not place a disclaimer on any other employer, then would not be able to do so for the military.[3] Having found that the law schools have a substantial First Amendment claim, the court next looked at the military's interests that are served by the Solomon Amendment. The court acknowledged that the Solomon Amendment is within the constitutional power of the government to raise and support a military. The court also recognized that the United States has a vital interest in having a system for acquiring talented military lawyers.

Despite these interests, the government did not submit any evidence that would support the necessity of requiring law schools to provide the military with a forum for and assistance in recruiting. Instead,

the government argued that the impact of the wholesale exclusion of military recruiters from law school campuses is self-evident. The court stated that it might be the case that on-campus recruitment is an employer's principal tool for attracting talented students, but it does not follow that recruiting by means of the Solomon Amendment is effective. The court believed that the contrary might also be true—that the Solomon Amendment has, in fact, hampered recruitment by subjecting the military's exclusionary policy to public scrutiny. The record is replete with references to student protests and public commendation.

The court also believed that the Solomon Amendment could "hardly be tailored more broadly." It pointed out that unlike a typical employer, the military has ample resources to recruit through alternative means. For example, it may generate student interest by means of loan repayment programs. It may use sophisticated recruitment devices that are generally too expensive for employers, such as TV and radio ads. These methods do not require the assistance of law school space or personnel. While they are more costly, the government has not given any reason to suspect that they are less effective than on-campus recruitment. The availability of alternative, less speech restrictive means of effective recruitment is

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Rochelle Kaplan, Esq., *provides NACE with information on legal issues relating to the recruitment and employment of new college graduates.*

sufficient to render the Solomon Amendment unconstitutional.

In summary, the court held that the Solomon Amendment infringes the First Amendment expressive association right of the plaintiff law schools by forcing them to participate in the government speech embodied in the amendment and express a message (acceptance of employment discrimination based on sexual orientation) incompatible with their declared educational objectives. The court further held that the government failed to articulate a compelling interest sufficient to override the plaintiff law schools' expressive association rights.

When the Third Circuit Court issued its decision, it did not enjoin the enforcement of the law. Rather, in accordance with court rules, it had to wait 52 days before issuing a mandate to the district court to enjoin the law. During this period, on January 14, 2005, the government filed a motion to stay the mandate pending an appeal to the U.S. Supreme Court. On January 20, 2005, the Third Circuit Court granted the motion until further proceedings of the court. As it stands now, the government has until March 1 to file its appeal with the U.S. Supreme Court. If the government does file this appeal, it can ask for a further stay until the outcome of the case in U.S. Supreme Court, which may not be for several months, and possibly longer.

Should the Third Circuit Court's ruling stand because either the Supreme Court agrees with the court or because the Supreme Court refuses to hear the case, it will most likely be sent back to the trial court to determine the scope of the injunction. The district court would determine the scope of the injunction—what schools are covered and what form of military recruiting, if any, must be permitted. The injunction will be directed at the laws schools that brought the case, but since most are part of a university, the entire university may be covered as well. Moreover, if the Solomon Amendment is held to be unconstitutional by the U.S. Supreme Court, it will have nationwide impact.

Compliance

In the meantime, the Solomon Amendment is still the law. Schools need to determine during this interim period whether they will continue compliance or refuse to comply as they await the outcome of the court proceedings. Those schools that do not comply will risk losing their federal funds. Below is an outline of the current compliance regulations promulgated by the DOD in 1998 and 2000:

1. Colleges and universities can lose federal funding if the DOD determines that they have policies or practices that prohibit or prevent:
   - The maintenance, establishment, or operation of a senior ROTC unit at the school;
   - A student from enrolling in a senior ROTC unit at another college or university;
   - Entry to a campus or access to its students for purposes of military recruiting; or
   - Access by military recruiters to "student recruiting" information, which is defined as information about students currently enrolled at the college or university, including a student's name, address, telephone listing, date and place of birth, educational level, major, degrees received, and most recent educational institution enrollment. A "currently enrolled student" is anyone over the age of 17 who is registered for at least one credit hour.
2. The school may charge the military for actual costs incurred in providing military recruiters access to student recruiting information provided that the charges are reasonable and customary. The

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school must explain to the military recruiter, within 15 days of the recruiter's request, its method of determining costs and its basis for concluding that such charges are reasonable and customary.

3. While the DOD determines if a school is ineligible for funds, the federal agencies are authorized to designate what funds will be withheld. Because of the large number of federal agencies involved, the rules do not specify what specific funds are affected by any determination of ineligibility. However, the Department of Education (DOE) has provided information on the law's impact on student financial assistance programs that fall under Title VI of the Higher Education Act. (See http://ifap.ed.gov/dpcletters/doc0467_bodyoftext.htm.) Essentially, the DOE determined that federal financial aid directly distributed to the student is not covered by the law. However, "campus based" financial aid, those funds applied for and received by the school to be distributed to students, *are* covered under the law.
4. If repeated requests for access to information about students, campus military recruiting privileges, or a school's ROTC program and policies are unsuccessful, the DOD will send a letter to the school asking for a formal written or verbal response regarding the withholding of this information. If the school responds verbally, the DOD prepares written documentation of the response and sends it to the school for approval or clarification within 30 days. The DOD will forward its documentation of the school's verbal response, the school's formal written response, or evidence showing the DOD's attempts to obtain confirmation to the U.S. Secretary of Defense for review. The DOD will make a final determination of eligibility for federal funds within 45 days of receipt of the school's response.
5. If the DOD determines that the school has an anti-ROTC policy, or one that denies access to the military, and that the school is ineligible to receive federal funds, the DOD will:
   - Disseminate the list of ineligible schools to the federal agencies affected by this decision, the Committee on Armed Services of the U.S. Senate, and the Committee on National Security of the U.S. House of Representatives;
   - Publish in the Federal Register each individual determination and, at six-month intervals, a list of the schools that are ineligible for contracts and grants;
   - Refuse to solicit, award, or make payments on any contract or grants of funds;
   - Terminate contracts and grants of fund; and
   - Inform the affected school that funding may be restored if the school provides sufficient proof that its policy has changed.
6. Should a school meet one of the following criteria, it will be considered to either be exempt from or in compliance with the requirements. A school must:
   - Have a long-standing policy of pacifism based on historical or religious affiliation;
   - Exclude all employers from recruiting on campus or present evidence that the degree of access military recruiters have is at least equal in quality and scope to that afforded to other employers;
   - Certify that it does not collect recruiting information on students or that such information has already been supplied to the military that semester or within the last four months;
   - Certify that each student (in the case where a specific student's information is denied) has formally asked the school to withhold this information from all employers;
   - Permit only on-site visits by employers in which students have expressed interest and certify that the military is not among them and that the school provided the military the same opportunities to inform students of military recruiting activities as are available to other employers.

Access that is "equal in quality and scope" in the regulations means that military recruiters must be afforded the same opportunities as all other employers—whether that is career fairs, job posting, interviewing privileges, informational receptions, and the like. It is also important to point out that the school must disclose the "student recruiting information," even if it has a policy of not disclosing directory information to any other third party or employer. It can only refuse to provide specific student information because a student has instructed the school not to disclose his or her information to any employer.

NACE Principles for Professional Conduct

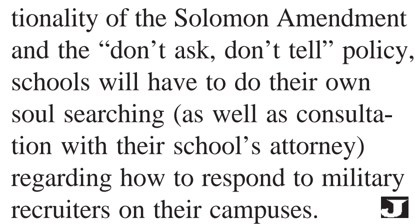
Schools should also consider the NACE *Principles for Professional Conduct* as they ponder their response to military recruiting. The *Principles* provide for an open and free selection of employment opportunities; a recruitment process that is fair and equitable; and informed and responsible decision-making by candidates.

In particular, the *Principles* instruct career services professionals to counsel without bias and provide information on a full range of employment opportunities to students—underscoring the importance of letting students decide for themselves whether to pursue an employment opportunity.

By the same token, a fundamental ethical principle of the career service profession is fairness to all students. The *Principles* contain a strong equal

employment opportunity statement to both career services and employer professionals. The EEO principles instruct schools and employers to refer, interview, and hire students without regard to race, color, religion, gender, disability, national origin, age, and sexual orientation. Career services will have to balance the goal of providing a full range of employment opportunities with the nondiscrimination policies. Along these lines, career services has to consider whether it now permits employers with discriminatory policies to recruit on campus even without being faced with lose of funding, and why it is doing so. Consideration of student interest in the military versus student exclusion by the military places the two essential principles at odds with one another.

In the next few months and years, as the courts sort out the constitutionality of the Solomon Amendment and the "don't ask, don't tell" policy, schools will have to do their own soul searching (as well as consultation with their school's attorney) regarding how to respond to military recruiters on their campuses.



Endnotes

[1] Some undergraduate career centers report that recruiters have signed the school's EEO statement that includes nondiscrimination on the basis of sexual orientation. The schools gave the military full recruiting privileges.

[2] In December 2004, the Service Members Legal Defense Network (SLDN) filed a lawsuit challenging that policy based upon a recent U.S. Supreme Court decision that struck down state sodomy laws as unconstitutionally invading the privacy of individuals because of sexual orientation.

[3] This may not be the same for undergraduate career services centers that routinely disclaim the policies and practices of employers that post jobs or interview on campus.

For further resources on this subject:

- American Association of Collegiate Registrar and Admissions Officers: www.aacrao.org/compliance/solomon/final.htm.
- Military Recruiting and a Few Good Ameliorative Measures: www.nalp.org/press/pdf/0903mil.pdf.
- National Association of Colleges and Employers: Research & Resources—Legal Issues—Military Recruiting: www.naceweb.org/info_public/legal.htm#military.
- National Association of Law Placement: www.nalp.org.
- Solomon Response: www.solomonresponse.org.

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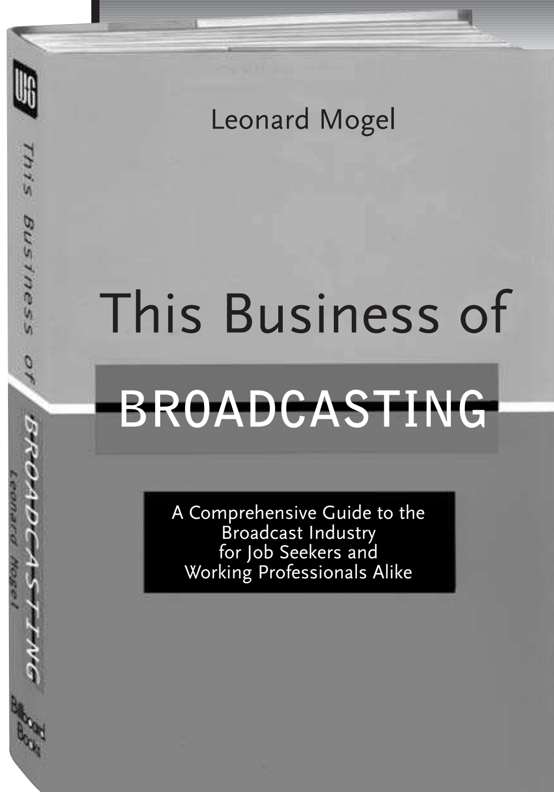

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