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SECOND CIRCUIT REVIEW

BY MARTIN FLUMENBAUM AND BRAD S. KARP

After 'Dale': First Amendment, State Anti-Discrimination Laws

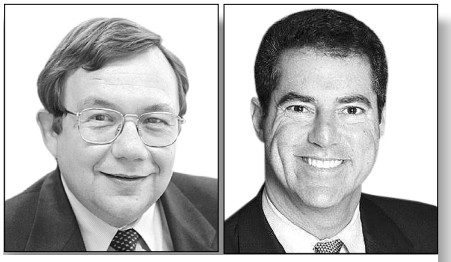
IN THIS MONTH'S column, we report on a recent decision of the U.S. Court of Appeals for the Second Circuit in which the court addressed the extent to which a state may, consistent with the First Amendment, enforce its gay rights law after the Supreme Court's 2000 decision in *Boy Scouts of America v. Dale*.[1] Side-stepping debate concerning the precise breadth of *Dale's* holding, the Second Circuit, in *Boy Scouts of America v. Wyman*,[2] held that the state of Connecticut may exclude from its annual charity drive an organization that in its membership and employment practices expressly discriminates against homosexuals.

The state of Connecticut has an annual employee charity drive. Established by statute[3] and supervised by a committee of designated state employees,[4] the Connecticut State Employee Campaign (campaign) raises voluntary contributions from state employees and then distributes the funds collected to participating charitable organizations. To receive money from the campaign, a charitable organization must file a non-discrimination statement; all such statements are reviewed by the campaign's governing committee.

The state of Connecticut also has a gay rights law.[5] Pursuant to that law, "[n]o state agency may provide grants, loans or other financial assistance to public agencies, private institutions or organizations which discriminate" on the basis of sexual orientation.[6]

Anti-Gay Policies

The Boy Scouts of America (BSA) admits discriminating against gays. According to papers filed in the district court, the BSA "does not employ known or avowed homosexuals as commissioned professional Scouters" and "does not register known or avowed homosexuals as adult volunteer leaders or youth members."[7]



Martin Flumenbaum *Brad S. Karp*

In light of the BSA's anti-gay policies, the campaign's governing committee sought an opinion from the Connecticut Commission on Human Rights and Opportunities (CHRO) on whether the committee could lawfully allow the BSA to participate in the campaign. After certain fact-finding, the CHRO advised the committee that the BSA's participation in the campaign would violate the state's gay rights law. Having been so advised, the campaign's governing committee excluded the BSA from the campaign. The BSA, in turn, sued for the right to participate in and receive funds through the campaign.

The question presented in *Boy Scouts of America v. Wyman* was whether the First Amendment, as interpreted by the Supreme Court in *Dale*, permits the state of Connecticut, in reliance on its gay rights law, to exclude the BSA from participation in the campaign given the BSA's policy of discriminating against gays. In a unanimous opinion authored by Judge Guido Calabresi, and joined by Judges Fred Parker and Robert Sack, the Second Circuit affirmed the decision of the U.S. District Court for the District of Connecticut granting summary judgment in favor of the state[8] and against the BSA.

Dale held that the state of New Jersey could not apply its gay rights law to compel the BSA to accept a homosexual, pro-gay activist as an assistant scoutmaster. Forcing the BSA, an avowedly anti-gay organization, to accept a homosexual, pro-gay activist as an assistant scoutmaster would, said the Supreme Court, violate the BSA's "freedom of expressive association" as guaranteed by the First Amendment.[9]

The 'Wyman' Case

In *Wyman*, the BSA, relying on *Dale*, argued that by excluding it from participation in the campaign, the state of Connecticut had, like the state of New Jersey, violated the BSA's First Amendment rights. In particular, the BSA asserted "that by conditioning its participation in the Campaign on a change in its membership policies, the defendants violated the BSA's constitutional right to expressive association."[10]

In deciding *Wyman*, the Second Circuit first addressed the threshold question of whether the campaign's decision to exclude the BSA implicated the associational rights recognized in *Dale*. The parties, like the courts which had previously considered the issue,[11] disagreed on how broadly *Dale* should be read. The BSA argued that *Dale* should be read broadly as allowing the BSA to exclude any homosexual from any position in the organization. The defendants, by contrast, argued that *Dale* should be read narrowly as only allowing the BSA to exclude gay activists from leadership positions. Ultimately, however, after noting that the narrow reading was "not without some merit,"[12] the Second Circuit found that it was unnecessary to resolve the dispute.

Martin Flumenbaum *and* **Brad S. Karp** *are partners, specializing in civil and criminal litigation, at Paul, Weiss, Rifkind, Wharton & Garrison LLP.* **Andrew Tauber,** *an associate at the firm, assisted in the preparation of this column.*

Because the BSA was appealing an order granting summary judgment, the Second Circuit was obligated to draw all reasonable factual inferences in the BSA's favor. On the record before it, the court found itself "unable to say with sufficient certainty that the decision to remove the BSA from the campaign was not based in part on the BSA's exclusion of gay activists from leadership positions, a practice of the BSA that, under any reading of *Dale*, is constitutionally protected."[13] Having thus concluded (for purposes of summary judgment) that the BSA's associational rights were implicated by the decision to exclude it from the campaign, the court proceeded to analyze whether those rights had in fact been violated.

The fact that the BSA's First Amendment rights, as recognized by *Dale*, were implicated by the decision to exclude it from the campaign was the beginning, not the end, of the Second Circuit's analysis. *Dale*, said the court, was not dispositive. *Dale* "considered New Jersey's attempt *to require* the Boy Scouts to admit a person who, the Supreme Court found, would compromise the Boy Scouts' message."[14] That sort of "state compulsion 'directly and immediately affects … associational rights that enjoy First Amendment protection' and imposes a 'serious burden' on them."[15] By contrast, "[t]he effect of Connecticut's removal of the BSA from the Campaign is neither direct nor immediate, since its conditioned exclusion does not rise to the level of compulsion."[16]

Second Circuit on 'Wyman'

According to the Second Circuit, the decision in *Wyman* was governed not by *Dale*, but by two distinct lines of First Amendment cases — one concerning non-public fora and the other concerning the doctrine of unconstitutional conditions, the former exemplified by *Cornelius v. NAACP Legal Defense & Educational Fund*[17] and the latter by *Regan v. Taxation with Representation of Washington*.[18] Both lines of cases "permit some, but not all, restrictions on speech and associational rights."[19] *Cornelius*, which considered the federal government's exclusion of legal defense and advocacy groups from a federal workplace charity drive, "held that the federal charitable campaign was a nonpublic forum and concluded that access to the campaign 'can be restricted as long as the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker's view.' "[20] *Regan*, which considered a prohibition on lobbying by certain tax-exempt charitable organizations, held that the prohibition was permissible if it was rational and if "the government did not discriminate invidiously in such a way as to 'aim at the suppression of dangerous ideas.' "[21] Having identified and delineated two controlling lines of authority, the Second Circuit found that "it makes no difference under which line we analyze it" because "[w]hether viewed as denial of access to a nonpublic forum or as the denial of a government benefit, the BSA's exclusion is constitutional if and only if it was (1) viewpoint neutral and (2) reasonable."[22]

The Second Circuit found that "the purpose of Connecticut's Gay Rights Law is to discourage harmful conduct and not to suppress expressive association."

The BSA argued that the gay rights law under which it was excluded from the campaign was viewpoint discriminatory both on its face and as applied. The Second Circuit, however, rejected both challenges.

As an initial matter, the Second Circuit found that Connecticut's gay rights law "prohibits discriminatory membership and employment policies not because of the viewpoints such policies express, but because of the immediate harms — like the denial of concrete economic and social benefits — such discrimination causes homosexuals."[23] Consequently, the court found, the law "as such" "is not obviously viewpoint discriminatory."[24] That, however, did not end the inquiry because "[b]oth the nonpublic-forum and the unconstitutional-conditions cases hold … that it is not enough that a law appear viewpoint neutral on its face." Rather, "[a] reviewing court must also determine that the rule is not a facade for viewpoint discrimination."[25]

Differential Adverse Impact

The BSA argued, and the Second Circuit agreed, that Connecticut's gay rights law "has a differential adverse impact on attempts to voice anti-homosexual viewpoints through the medium of expressive association." Indeed, the Second Circuit acknowledged that "[a]s a general matter, all anti-discrimination laws that govern organizations' membership or employment policies have a differential and adverse impact on those groups that desire to express through their membership or employment policies viewpoints that favor discrimination against protected groups."[26] But, said the court, while "a differential adverse impact upon a given viewpoint may suffice to trigger constitutional scrutiny," such "viewpoint disparity, standing alone, does not constitute proof of viewpoint discrimination."[27]

Rather, "[w]here a law is on its face viewpoint neutral (e.g., when it applies to conduct that is not primarily expressive) but has a differential impact among viewpoints, the inquiry into whether the law is in fact viewpoint discriminatory turns on the law's purpose." According to Second Circuit, "[s]uch a law is viewpoint discriminatory only if its *purpose* is to impose a differential adverse impact upon a viewpoint."[28] Relying on the Connecticut supreme court's statement that "[t]he Gay Rights Law was enacted in order to protect people from pervasive and invidious discrimination on the basis of sexual orientation," the Second Circuit found that "the purpose of Connecticut's Gay Rights Law is to discourage harmful conduct and not to suppress expressive association."[29] Based on this finding, the court held that "the law as enacted is viewpoint neutral."[30]

The Second Circuit acknowledged that "the legislature's viewpoint-neutral purpose in passing a law that has a predictably adverse impact on certain viewpoints may be cold comfort to those whose expression the law, in practice, limits." But, said the court, "that is precisely the result that follows from the Supreme Court's treating more restrictive measures, like those considered in *Dale*, differently from the lesser harm of removal from a nonpublic forum, like that at stake in the instant case."[31] The BSA, said the court, was simply "pay[ing] a price" for exercising its First Amendment rights under a permissible regulatory scheme designed to achieve constitutionally valid ends.[32]

Viewpoint Neutral

Having decided that Connecticut's gay rights law as enacted is viewpoint neutral and therefore facially valid, the Second Circuit then proceeded to consider whether

the law had been applied to the BSA in a viewpoint discriminatory manner. The court paid particular attention to the BSA's assertion that the State of Connecticut had, in the court's words, "discriminated between discriminators" and that the BSA had been excluded from the campaign specifically because of its anti-gay message.[33]

In support of its contention that it had been treated differently because of its anti-gay viewpoint, the BSA noted that a variety of other organizations that purportedly "serve preferentially or exclusively persons of a particular race, color, religious creed, sex, age, national origin, or ancestry" were allowed to participate in the campaign despite their allegedly discriminatory practices.[34] In particular, the BSA specifically pointed to the Lamda Legal Defense and Education Fund, the Hartford Gay and Lesbian Health Collective and the Stonewall Foundation as organizations allowed to participate in the campaign. The fact that these presumptively pro-gay organizations were allowed to participate in the campaign was evidence, said the BSA, that it had been excluded from the campaign because of its anti-gay viewpoint.[35]

The Second Circuit dismissed this assertion. If the BSA had presented the district court with evidence that the State of Connecticut had "without legitimate reason … discriminated between discriminators" by "selectively enforcing Connecticut's equal protection law only against anti-homosexual discrimination, and not against, for instance, anti-heterosexual discrimination," then summary judgment in favor of the state "might well" have been inappropriate. However, according to the Second Circuit, the BSA "presented no evidence that meets this description."[36]

First, said the court, the "evidence" of selective enforcement adduced by the BSA was nothing more than "a list of organizations that, by their names, would appear to target their services to persons of specific races, ethnicities, sexes, ages or sexual orientations." Aside from what is suggested by their names, the BSA, despite "being given ample opportunity to do so," presented "no evidence that these groups actually have policies of discrimination or do discriminate in the provision of services."[37]

Second, and "[m]ore significantly," said the Second Circuit, the BSA provided no evidence that "these groups discriminate in their membership or employment policies, as opposed to their policies in providing services."[38]

According to the Second Circuit, "Connecticut has made a distinction between groups that discriminate in employment and membership policies and groups that discriminate in the provision of services" and "Connecticut has decided that discrimination of the former sort violates its equal protection law and that discrimination of the latter sort does not."[39]

Exclusion 'Reasonable'?

Finally, having found the gay rights law to be viewpoint neutral as enacted and as applied, the Second Circuit considered whether the BSA's exclusion from the campaign was "reasonable," the second prong of the two-part test that the court derived from *Cornelius* and *Regan*. The decision by the campaign's governing committee to exclude the BSA was based on the CHRO's opinion that the Connecticut gay rights law required the BSA's exclusion. Given the state's involvement in the campaign (and the BSA's avowed discriminatory policies), that opinion was, said the Second Circuit, reasonable. Therefore, held the Second Circuit, "it follows that the Committee's actions were a reasonable means of furthering Connecticut's legitimate interest in preventing conduct that discriminates on the basis of sexual orientation."[40]

Consequently, concluded the court, "[b]ecause the BSA has not presented any evidence of viewpoint discrimination, and because the defendants' removal of the BSA from the Campaign was reasonable, the district court was correct to grant the defendants' motion for summary judgment on the BSA's First Amendment claim."[41]

The Second Circuit's decision in *Wyman* demonstrates that, notwithstanding *Dale*, a state may, under certain circumstances at least, enforce its gay rights law without violating the First Amendment. The Second Circuit's opinion, provides a frank and lucid framework for analyzing state action that differentially impacts expressive activity from a particular viewpoint.

(1) 530 US 640 (2000).
(2) 335 F.3d 80 (2003).
(3) Conn. Gen. Stat. §5-262.
(4) Conn. Agencies Regs. §5-262-2(d).
(5) Conn. Gen. Stat. §§46a-81a–46a-81r.
(6) Conn. Gen. Stat. §§46a-81n.
(7) 335 F.3d at 85.
(8) Technically speaking, the state of Connecticut was not itself a party to the action. However, the lead defendant, Nancy Wyman, was sued "in her capacity as Comptroller of the State of Connecticut and as a member of the Connecticut State Employee Campaign Committee," and all of the defendants were represented by the state Attorney General. For ease of exposition, the defendants — all of whom were members of the Connecticut State Employee Campaign Committee — are referred to as "the State."
(9) 530 US at 656.
(10) 335 F.3d at 88.
(11) See id. at n.2.
(12) Id. at 90.
(13) Id. at 91.
(14) Id. (emphasis in original).
(15) Id. (ellipses in original).
(16) Id.
(17) 473 US 788 (1985).
(18) 461 US 540 (1983).
(19) 335 F.3d at 91.
(20) Id. (quoting *Cornelius*, 473 US at 800). Speakers in a public forum enjoy maximal free speech protections. "Speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius*, 473 US at 800. A forum is "public" either by tradition or because it has been so designated by the government. Speakers in a nonpublic forum enjoy substantially less protection.
(21) 335 F.3d at 92 (quoting *Regan*, 461 US at 548). The appellee in *Regan* was denied a benefit, namely tax-exempt status under 26 USC §501(c)(3), because of its lobbying activities.
(22) Id.
(23) Id. at 93.
(24) Id.
(25) Id. (citing *Cornelius*, 473 US at 811-13; *Regan*, 461 US at 548).
(26) Id.
(27) Id. (citing *R.A.V. v. City of St. Paul*, 505 US 377, 385 (1992); *Madsen v. Women's Health Ctr.*, 512 US 753, 763 (1994)).
(28) Id. at 94 (emphasis added).
(29) Id. at 94–95 (citing *Gay & Lesbian Law Students Ass'n v. Bd. of Trustees.*, 673 A2d 484, 498 (Conn. 1996)).
(30) Id. at 95.
(31) Id. at n.8.
(32) Id.
(33) Id. at 96–97.
(34) Id. at 96 & n.10
(35) See id.
(36) Id. at 96.
(37) Id.
(38) Id.
(39) Id. at 96–97 (citing *Boy Scouts of Am. v. Wyman*, 213 F.Supp.2d 159, 168 (D. Conn. 2002)).
(40) Id. at 98.
(41) Id.