



## LEGAL BRIEFS

by susan murray & beth robinson

# Supreme Court Says Boy Scouts Can Discriminate Against Gays

A few months ago we reported that the New Jersey Supreme Court had unanimously ruled that the Boy Scouts had violated New Jersey's anti-discrimination law when it kicked scoutmaster James Dale out of the Boy Scouts simply because he was gay. Now we're here to report that the United States Supreme Court believes otherwise: by a narrow five to four vote, the highest court in the land has upheld the Boy Scouts' right to discriminate against gay scouts and scoutmasters.

The First Amendment to the United States Constitution grants all of us the right to "freedom of association." Essentially, the Scouts argued that they have a First Amendment right not to have to associate with gay people, because opposition to homosexuality is a core belief of the Boy Scouts, and the Court agreed. In doing so, the Court ignored one small factual problem: when the Boy Scouts kicked Dale out of the Scouts, they did not even have an express anti-gay message or purpose — in fact, none of their publications or policies even mentioned homosexuality, and they had never given any instructions condemning homosexuality!

The Scouts argued that their "policy" against gay scouts was expressed in the Scout's Oath that scouts must be "morally straight," and in the Scout's Law that scouts must be "clean in word and deed." Believe it or not, based on these vague "oaths," the Court concluded that the Scouts' First Amendment freedom to

express who it wants to associate with would be significantly burdened if it had to include gay scouts in its midst.

The four justices in the minority complained that the majority had taken an "astounding view of the law" by simply deferring to the Scouts' unsupported claim that one of its fundamental associational messages was to disapprove of homosexuality. The fear is that state laws, like Vermont's, which outlaw discrimination in public accommodation, will now be severely undermined, since now a defendant will be able to get around the law simply by making a sham claim that its freedom of association rights allow it to exclude gay people. Will a Vermont restaurateur or hotel owner now be able to exclude gay people simply by claiming his or her freedom of association rights will be violated if he or she is forced to "associate" with a gay person by letting the gay person into the restaurant or hotel?

The Court's decision to let the Boy Scouts discriminate against gays seems to be another example of what many GLBT legal experts call the "gay exception" to Constitutional law. If the Jaycees' right to freedom of association does not allow them to exclude women (a decision this very Supreme Court made a few years ago), then why does the Boy Scouts' right to freedom of association allow them to exclude gays? There seems to be no logical reason for the discrepancy. As Justice Stevens stated in his critical dissenting opinion, the

majority's decision sends a message that it's okay to exclude gay people, and that being a homosexual is a "constitutionally prescribed symbol of inferiority."

The bottom line is that James Dale, who had joined the Boy Scouts when he was eight years old and earned dozens of badges and awards, cannot be a scoutmaster to his local troop of boys. And in a last bit of irony, Dale's troop has apparently disbanded. Why? Because of a shortage of adult scout leaders. Unbelievable.

*Susan Murray and Beth Robinson are attorneys at Langrock Sperry & Wool in Middlebury, Vermont whose practices include employment issues, family matters, estate planning, personal injury and worker's compensation cases, and general commercial and civil litigation. This column features timely information about legal issues of interest to our community. We hope to provide information about important laws and court cases that may affect our rights, as well as practical nuts and bolts advice for protecting ourselves and our families. If you'd like to see us cover a particular topic, please feel free to write OITM or call us at 388-6356. ▼*



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