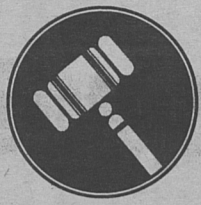


LEGAL



BRIEFS

“What, No Badge for Fabulousness?”

BY SUSAN MURRAY AND BETH ROBINSON

Apparently the Boy Scouts of America have decided that a scout is not only trustworthy, thrifty, and brave: now a scout, and a scout leader, must be heterosexual.

A Tale of Two Leaders

In California in 1980, the Boy Scouts rejected the application of Timothy Curran, a former Eagle Scout who had received numerous honors throughout his scouting career, because he had publicly discussed his homosexuality. Ten years later, in New Jersey, the Boy Scouts dismissed James Dale, a leader with an equally impressive roster of scouting accomplishments, for the same reason.

Invoking state laws prohibiting discrimination on the basis of sexual orientation, both former scouts sued. The California Supreme Court ruled in favor of the Boy Scouts. The New Jersey Supreme Court is still considering the issue, but the intermediate appeals court ruled in favor of the Scout leader.

In analyzing these cases, the courts grappled with two questions: First, are the Boy Scouts covered by state anti-discrimination laws? Second, is it unconstitutional to require the organization to accept gay leaders?

Applicability of State Laws

The California Supreme Court concluded that California's anti-discrimination laws governing "business establishments" do not apply to the Boy Scouts. The reasoning: "The Boy Scouts is an organization whose primary function is the inculcation of a specific set of values in its youth members," and, to that end, "Scouts meet regularly in small groups . . . and are required to participate in a variety of activities, ceremonies, and rituals that are designed to teach the moral principles to which the organization subscribes."

The New Jersey appeals court disagreed (although the New Jersey Supreme Court will have the last word in that case). In concluding that the Boy Scouts are a place of public accommodation under New Jersey's anti-discrimination law, the appeals court noted that as of 1993, scouting had nearly 5 million members nationwide, and nearly 90 million boys and men have joined the Boy Scouts since 1910; that the Boy Scouts actively advertise to the public to encourage new members; and that the Boy Scout charter and bylaws emphasize inclusion of all boys who meet entrance age requirements. Given these facts, the court recognized that it would be disingenuous to treat the Boy Scouts as a truly private club.

Constitutional Considerations

Given its conclusion that the

anti-discrimination statute did not apply, the California Supreme Court did not have to resolve the constitutional question. The New Jersey court, in contrast, had to grapple with the question of whether compelling the Boy Scouts to accept gay leaders would violate the organization's First Amendment rights to express its opposition to homosexuality and to

ken fear that gay scoutmasters would pose some sort of threat to their scouts: "There is absolutely no evidence . . . that a gay scoutmaster, solely because he is a homosexual, does not possess the strength of character necessary to properly care for, or to impart [Boy Scout] ideals to the young boys in his charge. Nothing before us even suggests that a male, simply because he is

“Nothing before us even suggests that a male, simply because he is gay, will somehow undermine [the Boy Scouts’] fundamental beliefs and teachings.”

associate with leaders who share its views.

In analyzing that question, the court considered whether applying the anti-discrimination law would interfere with the Boy Scouts' reason for organizing and existing. The Court concluded that the Boy Scouts were chartered by Congress "to promote . . . the ability of boys to do things for themselves and others, to train them in Scoutercraft, and to teach them patriotism, courage, self-reliance, and kindred virtues . . ." To that end, Scout leaders are expected to impart in scouts the values of "trustworthiness, honesty, independence, physical and moral courage, commitment, cleanliness and fidelity."

The court concluded that applying the anti-discrimination law to the scouts would not in any way impede the Boy Scouts' ability to instill in scouts the qualities of leadership, courage, and integrity associated with the Boy Scouts, and rejected the Boy Scouts' constitutional defense.

Shattering Myths

The New Jersey court went on to address the Boy Scouts' unspo-

gay, will somehow undermine [the Boy Scouts'] fundamental beliefs and teachings."

The Future

The Boy Scout issue is far from resolved. Until, as one California Supreme Court justice put it, "the ideals of scouting transform its conduct," we can expect to see more dismissals of highly-qualified and committed gay scout leaders, and more litigation. However, the litigation will likely be concentrated in the minority of states which have gay rights laws (such as Vermont), since gay men and lesbian women in most states don't enjoy basic protections against arbitrary discrimination. ▼

Susan Murray and Beth Robinson are attorneys at Langrock Sperry & Wool in Middlebury whose practices include general commercial and civil litigation, employment, family, estate, personal injury and worker's compensation cases. If you'd like our column to cover a particular legal issue of interest to our community, please write OITM or call us at 388-6356.

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