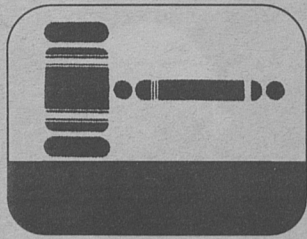


feature

LEGAL BRIEFS

by susan murray & beth robinson



A Closer Look at the New Jersey Decisions Against the Boy Scouts

In August, the unanimous New Jersey Supreme Court distinguished itself as the first state supreme court to recognize in the case of James Dale v. Boy Scouts of America that the Boy Scouts of America's attempt to exclude gay members is unlawful under that state's antidiscrimination law.

James Dale's Story

James Dale first became a BSA member when he was eight. Over the next ten years he earned more than twenty-five merit badges and various awards, and served in numerous leadership positions. Most important, Dale attained the rank of Eagle Scout, an honor achieved by only the top three percent of all scouts. After he turned eighteen, Dale applied for adult membership and began serving as Assistant Scoutmaster of Troop 73.

About that same time, Dale left home to attend Rutgers University, where he first came out as a gay man. Dale became the co-president of the Rutgers University Lesbian/Gay Alliance. In that capacity, he attended a seminar that addressed the psychological and health needs of lesbian and gay teenagers. A Newark newspaper interviewed Dale at that event, and published an article about the seminar. The article included Dale's photograph and a caption identifying him as "co-president of the Rutgers University Lesbian/Gay Alliance."

Shortly thereafter, Dale received a letter from his local Boy Scout council asking him to "sever any relations [he] may have with the Boy Scouts of America." The council later

explained its decision to revoke his membership with reference to "the standards for leadership established by the Boy Scouts of America, which specifically forbid membership to homosexuals." Dale sued under the New Jersey Law Against Discrimination (LAD), which forbids discrimination against gays and lesbians in public accommodations.

The New Jersey Supreme Court

The New Jersey Supreme Court first concluded that the LAD applied to the Boy Scouts. Rejecting the assertion that the Boy Scouts are a selective, private organization, exempt from the public accommodations law, the Court pointed to the Boy Scouts' national television advertising campaign, its recruiting drives and posters, and its ties with government, the military, and public schools. The Court

noted that over four million boys and one million adults were members in 1992. The Court quoted the organization's own publications expressing a commitment to providing "all eligible youth [with] the opportunity to affiliate with the Boy Scouts of America." One booklet was emphatically inclusive: "We have high hopes for our nation's future. These hopes cannot flower if any part of our citizenry feels deprived of the opportunity to help shape the future." In the face of this evidence that the Boy Scouts sought and accepted all the members it could get, the Court concluded that the Boy Scouts could not legitimately claim to be a private club exempt from the LAD.

Nor could the Boy Scouts hide behind its First Amendment right to freedom of association. The court concluded that, like the Jaycees and Rotary, the Boy Scouts are

not the kind of selective and intimate associations entitled to constitutional protection. To the contrary, the Boy Scouts made concerted efforts to recruit diverse and numerous members. An organization cannot invite and take all comers, and then claim to be a private and intimate organization protected by the Constitution.

A Mixed Bag?

Although most gay rights advocates herald the Dale decision as an important breakthrough, some are more wary of the Boy Scout cases. We should be careful, they argue, about legal arguments which limit the scope of the Constitution's protection of free speech and free association rights which are particularly important to the gay and lesbian community. Put another way: if we argue that the Constitution doesn't protect their choice to exclude us, how can we expect that same Constitution to protect our right to exclude them from our

organizations and, more importantly, our right to love and form families with our chosen partners?

Food for thought, although supporters of cases like Dale draw a distinction between organizations and associations that are truly private and personal, and those that only pretend to be private and personal when they want to exclude someone on the basis of their sex, sexual orientation, or other impermissible factors. ▼

Susan Murray and Beth Robinson are attorneys at Langrock Sperry & Wool in Middlebury, Vermont. 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 write OITM or call us at 388-6356.

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