

SUPREME COURT OF NEW JERSEY
A-195/ 196 September Term 1997

JAMES DALE,

Plaintiff-Respondent
and Cross-Appellant,

v.

BOY SCOUTS OF AMERICA and
MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

Defendants-Appellants
and Cross-Respondents.

Argued January 5, 1999 -- Decided August 4, 1999

On certification to the Superior Court, Appellate Division, whose opinion is reported at [308 N.J. Super. 516](#) (1998).

George A. Davidson, a member of the New York bar, argued the cause for appellants and cross-respondents (Cerrato, Dawes, Collins, Saker & Brown; attorneys; Mr. Davidson, Sanford D. Brown and Carla A. Kerr, a member of the New York bar, on the briefs).

Evan Wolfson, a member of the New York bar, argued the cause for respondent and cross appellant (Lewis H. Robertson, attorney; Mr. Wolfson, Mr. Robertson and Thomas J. Moloney, a member of the New York bar, on the briefs).

David R. Rocah submitted a letter in lieu of brief on behalf of amici curiae American Civil Liberties Union of New Jersey and American Civil Liberties Union (Lenora M. Lapidus, Legal Director, attorney).

William S. Singer submitted a letter in lieu of brief on behalf of amici curiae American Public Health Association and Parents, Families and Friends of Lesbians and Gays (Singer & Fedun, attorneys).

Robert E. Rochford submitted a brief on behalf of amici curiae National Catholic Committee on Scouting, The Church of Jesus Christ of Latter-Day Saints, General Commission on United Methodist Men, The United Methodist Church and The Lutheran Church-Missouri Synod (Winnie Banta Rizzi Hetherington & Basralian, attorneys).

David H. Dugan, III, submitted a brief on behalf of amici curiae The Claremont Institute for the Study of Statesmanship and Political Philosophy and United States Congressmen

Charles T. Canady, Christopher B. Cannon, Tom A. Coburn, M.D., John E. Peterson, John Shadegg and Mark Souder.

Kathleen A. Mazzouccolo submitted a letter in lieu of brief on behalf of amici curiae Diocesan Council of the Episcopal Diocese of Newark, Friends Committee on National Legislation, Jewish Reconstructionist Federation, Union of American Hebrew Congregations and Unitarian Universalist Association.

Bray B. Barnes submitted a brief on behalf of amicus curiae The Individual Rights Foundation (Warshaw & Barnes, attorneys).

Theodore R. Bohn submitted a letter in lieu of brief on behalf of amicus curiae New Jersey Lesbian and Gay Law Association.

James P.A. Cavanaugh submitted a letter in lieu of brief on behalf of amici curiae National Association of Social Workers and New Jersey Chapter of the National Association of Social Workers.

Michael Patrick Carroll submitted a brief on behalf of amicus curiae Southeastern Legal Foundation (Mr. Carroll, attorney; Valle Simms Dutcher, a member of the Georgia Bar, on the brief).

James J. Cerbone submitted a brief on behalf of amici curiae United States Congressmen, Honorable Robert Aderholt (Ala.), Ernest Istook (Okla.), Asa Hutchinson (Ark.) and Charles "Chip" Pickering (Miss.)(Cerbone & Lombardo, attorneys).

The opinion of the Court was delivered by
PORITZ, C.J.

In 1991, the New Jersey Legislature amended the Law Against Discrimination (LAD), [N.J.S.A. 10:5-1](#) to -49, to include protections based on "affectional or sexual orientation." This case requires us to decide whether that law prohibits Boy Scouts of America (BSA) from expelling a member solely because he is an avowed homosexual.

Defendants BSA and Monmouth Council (collectively Boy Scouts) seek review of a decision of the Appellate Division holding that: (1) Boy Scouts is a place of public accommodation as defined by the LAD; (2) Boy Scouts' expulsion of plaintiff James Dale, an assistant scoutmaster, based solely on the club's policy of excluding avowed homosexuals from membership is prohibited by the LAD; and (3) the LAD prohibition does not violate Boy Scouts' [First Amendment](#) rights. Plaintiff, James Dale, seeks certification on his common law claim, dismissed by the Appellate Division. We granted both parties' petitions, ___ N.J. ___ (1999), and now affirm.

SYLLABUS

James Dale v. Boy Scouts of America, and Monmouth Council, Boy Scouts of America (A-195/196-97)

Argued January 5, 1999 -- Decided August 4, 1999

PORITZ, C.J., writing for a unanimous Court.

The issue in this appeal is whether New Jersey's Law Against Discrimination (LAD), [N.J.S.A. 10:5-1](#) to -49, prohibits Boy Scouts of America (BSA) from expelling a member solely because he is an avowed homosexual. If the LAD prohibition applies, the Court also must determine whether BSA's [First Amendment](#) rights are thereby violated.

BSA is a federally chartered corporation. Since its inception in 1910, over eighty-seven million youths and adults have joined BSA. BSA's success in attracting members is attributable, in part, to its long-standing commitment to a diverse and "representative" membership, as well as to its aggressive recruitment through national television, radio, and magazine campaigns. BSA's mission, as set forth in its Mission Statement, is "to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime...." Notwithstanding BSA's encouragement of its members' ethical development, BSA does not endorse any specific religion or set of moral beliefs, instead encouraging its members to be guided by their own conscience or ethical judgment. In addition, consistent with its policy of leaving matters of religion and sexual responsibility to church and home, BSA discourages its leaders from discussing sexual topics. Finally, BSA membership is open to any boy who meets the various age requirements.

James Dale became a member of BSA in 1978 at the age of eight. He remained a youth member of BSA until his eighteenth birthday in 1988. Dale was an exemplary scout. During his long membership, he earned many badges and honors, including the award of an Eagle Scout Badge, an honor achieved by only the top three percent of all scouts. On March 21, 1989, Dale sought adult membership in BSA. Monmouth Council and BSA accepted and approved his application for the position of Assistant Scoutmaster of Troop 73, where he served for approximately sixteen months.

In July 1990, Dale was interviewed by the [Star-Ledger](#), which ran an article reporting on a seminar that addressed the psychological and health needs of lesbian and gay teenagers. In connection with the interview, Dale's photo appeared in the [Star-Ledger](#) with a caption identifying him as co-president of the Rutgers University Lesbian/Gay Alliance. Later that month, Dale received a letter from BSA Monmouth Council Executive James W. Kay, revoking Dale's BSA membership. In response to Dale's request for the basis of the Monmouth Council's decision to revoke his BSA membership, Kay indicated that the standards for leadership established by the BSA specifically forbade membership to homosexuals.

Thereafter, in September 1990, Dale wrote to the BSA Northeast Regional Director asking for a review of his membership decision and for a copy of BSA's leadership standards. In November 1990, the Assistant Regional Director of the Northeast Region notified Dale that the Northeast Review Committee supported the decision of the Monmouth Council to deny his registration with BSA. Although BSA agreed to have the National Council review Dale's membership revocation, Dale opted instead to institute legal proceedings, believing that a National Council review would be futile.

In July 1992, Dale filed suit against BSA and the Monmouth Council in Superior Court, seeking both declaratory and injunctive relief, as well as compensatory and punitive damages. He alleged that BSA had violated the LAD and common law by revoking his membership based solely on his sexual orientation. In September 1993, Dale moved for partial summary judgment, demanding his immediate reinstatement. BSA and the Monmouth Council cross-moved for summary judgment on all of Dale's claims.

The trial court denied Dale's motion and granted BSA's and the Monmouth Council's motion. After concluding that Dale was a "sexually active homosexual," the court found that BSA had always had a policy of excluding "active homosexuals." The court opined that homosexual acts are immoral and attributed to BSA a longstanding antipathy toward such behavior. The court further held that the LAD was not applicable because BSA was not a "place of public accommodation," or alternatively, that it was exempt under the "distinctly private" exception found in the LAD. The court rejected Dale's common law claim, finding that the State's policy was that established by the LAD. Finally, because the court believed that BSA's moral position in respect of active homosexuality was clear, it found that its [First Amendment](#) freedom of expressive association prevented government from forcing BSA to accept Dale as an adult leader-member.

The Appellate Division affirmed the dismissal of Dale's common law claim as duplicative, but otherwise reversed and remanded the matter for further proceedings. In a separate opinion, Judge Landau concurred with the majority's holding that BSA should restore Dale's membership, but dissented from the majority to the extent that it would compel BSA to accept Dale in any Scout leadership position.

The majority held that as a "place of public accommodation," BSA had violated the LAD by denying Dale the privilege of serving as a volunteer assistant scoutmaster based solely on his sexual orientation. The majority found BSA to be a place of public accommodation based on several factors, including its broad-based membership solicitation and the fact that BSA had "historically partnered" with various public entities and public service organizations. For the same reason, the court rejected BSA's argument that it was exempt from the LAD under the "distinctly private" exception. In respect of BSA's freedom of expressive association claim, and noting the compelling state interest in eradicating discrimination, the majority concluded that granting Dale access to the accommodations afforded by scouting will not affect in any significant way BSA's ability to express its views and to carry out its activities.

The Supreme Court granted BSA's petition for certification and Dale's cross-petition for certification on the dismissal of his common law claims. In addition, the matter is before the Court as of right based on the dissent in the Appellate Division on the issue of BSA's right to remove Dale from a leadership position.

HELD: Boy Scouts of America is a “place of public accommodation” and is, therefore, subject to the provisions of New Jersey's Law Against Discrimination; application of the Law Against Discrimination to Boy Scouts of America does not infringe on its First Amendment rights.

1. The goal of the LAD is to bestow on all persons the opportunity to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, without discrimination based on a variety of factors, including affectional or sexual orientation. The term “public accommodation” has been liberally construed to carry out the legislative purpose of eradicating discrimination. (pp. 25-27)
2. The Legislature's failure to modify the judicial construction of the term “public accommodation” or “place” is evidence of legislative support for prior judicial construction of that portion of the LAD, especially when the Legislature has amended the statute several times without altering the construed sections. (pp. 27-33)
3. A membership association, like BSA, may be a “place” of public accommodation even if the accommodation is provided at a moving situs; the various locations where Boy Scout troops meet fulfill the LAD “place” requirement. (p. 33)
4. When an entity, such as BSA, invites the public to join, attend, or participate in some way, that entity is a public accommodation within the meaning of the LAD. (pp. 33-37)
5. Certain organizations, such as BSA, that benefit from relationships with the government and other public accommodations are themselves places of public accommodation within the meaning of the LAD. (pp. 37-41)
6. The list of places of public accommodation in the LAD is not exclusive. Similarity to the list has been a benchmark for determining whether an unlisted entity should be included. (pp. 41-42)
7. Exemptions from remedial statutes generally should be narrowly construed. (pp. 42-43)
8. The essence of a “distinctly private” club or organization is selectivity in its membership. Joining requirements, such as those identified in the BSA membership application, are insufficient to establish selectivity where they do not function as true limits on the admission of members. BSA is not “distinctly private” because it is not selective in its membership. (pp. 43-53)

9. BSA's clear pronouncements on the subject of religion are inconsistent with its claim that it is exempt from the LAD as an “educational facility operated or maintained by a bona fide religious or sectarian institution.” (p. 53)

10. BSA is not exempt from the LAD under the in loco parentis exception because BSA does not assume the responsibilities and duties of a parent or of one who stands in the place of a parent. (pp. 53-55)

11. Because an assistant scoutmaster position is a “privilege” and an “advantage” of Boy Scout membership, and because BSA has revoked Dale's registration based on his avowed homosexuality - a prohibited form of discrimination under the statute - BSA has violated the LAD. (pp. 55-57)

12. Dale's common law claim, if pursued, is duplicative of his LAD claim because it would not protect an interest in addition to or aside from those protected by the statute. (pp. 57-58)

13. In determining whether BSA enjoys a protectable **First Amendment** intimate association right, one must consider size of the organization, its purpose and selectivity, and whether others are excluded from critical aspects of the relationship. BSA's large size, its nonselectivity, its inclusive rather than exclusive purpose, and its practice of inviting or allowing nonmembers to attend meetings, establish that the organization, at both the local and the national level, is not sufficiently personal or private to warrant constitutional protection under the freedom of intimate association. (pp. 58-67)

14. Infringements on the right to associate for expressive purposes may be justified by regulations adopted to serve compelling state interests that are unrelated to the suppression of ideas and that cannot be achieved through means significantly less restrictive of associational freedom. (pp. 67-69)

15. BSA's ability to disseminate its message is not significantly affected by Dale's inclusion because: BSA members do not associate for the purpose of disseminating the belief that homosexuality is immoral; BSA discourages its leaders from disseminating any views on sexual issues; and BSA includes sponsors and members who subscribe to different views in respect of homosexuality. (pp. 69-75)

16. BSA's expulsion of Dale was based on prejudice and not on a unified Boy Scout position. Thus, Dale's expulsion is not justified by the need to preserve the organization's expressive rights. (pp. 75-79)

17. Discrimination has been justified by the invocation of stereotypes. Adherence to the principle of equality demands that our legal system protect the victims of such discrimination. The purpose of the LAD is to eradicate unlawful discrimination. (pp. 79-81)

18. Because there is nothing to suggest that one of BSA's purposes is to promote the view that homosexuality is immoral, application of the LAD does not infringe on its right of expressive association. However, even if Dale's membership worked some slight infringement on BSA's members' right of expressive association, that infringement would be justified because it serves New Jersey's compelling interest in eliminating discrimination based on sexual orientation. (pp. 81-85)

19. Dale's membership in BSA is not symbolic of an endorsement of homosexuality by BSA and in no way infringes on its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another. (pp. 85-89)

Judgment of the Appellate Division is **AFFIRMED** and the matter is **REMANDED** to the Chancery Division for further proceedings consistent with the Court's opinion.

JUSTICE HANDLER has filed a separate concurring opinion, in which he denounces certain unfounded stereotypical notions in respect of homosexuals, such as the myth that a homosexual male is more likely than a heterosexual male to molest children, as well as the myth that homosexuals are inherently immoral. Justice Handler further stresses the impropriety of BSA's exclusion of Dale on the basis of his expression of his homosexuality because his acknowledgment constitutes self-identifying speech, making it realistically impossible to separate his spoken statements from his status. Thus, Justice Handler views BSA's exclusion of Dale as tantamount to one based on Dale's mere status as a homosexual. Justice Handler notes that had Dale, on the other hand, expressed more general views on the morality, social implications, history, or etiology of homosexuality in his role as a Boy Scout leader, which directly conflicted with BSA's stated positions, then BSA could claim that its discrimination was based purely on expression. In addition, Justice Handler believes that the inconsistency and vagueness of BSA's position regarding its members' views on morality generally, and homosexuality in particular, belies the existence of a "specific expressive purpose," necessary to establish a permissible exclusion.

Finally, Justice Handler agrees with the Court's determination that BSA had engaged in no selectivity in admitting its members, providing strong evidence that BSA is "public," and thus subject to the proscriptions of the LAD. However, he further notes that while membership selectivity is relevant to a determination of whether an organization meets the LAD's definition of "place of public accommodation," it is not necessarily determinative, as other factors may outweigh the presence of genuine selectivity in ultimately finding that an organization is subject to the LAD.

JUSTICES POLLOCK, O'HERN, GARIBALDI, STEIN, and COLEMAN join in CHIEF JUSTICE PORITZ's opinion. JUSTICE HANDLER filed a separate concurring opinion.