OPENLY GAY ATHLETES

There have always been gay athletes, although until very recently no male athletes currently involved in professional team sports have announced their sexual orientation. In April 2013, an NBA player, Jason Collins, created headlines by publicly acknowledging that he was gay, joining many others with less sports prominence. During a year when the Supreme Court struck down the offensive federal Defense of Marriage Act and bolstered state action on marriage equality, the Collins story caused only minor discussion.

This recent case addressed the constitutional protection under the First Amendment afforded to gay athletes. Members of a softball team disqualified from the "Gay Softball World Series" tournament for being "non-gay" brought action against the organization that operated tournament, alleging violations of the State of Washington's Law Against Discrimination.

APILADO v. NORTH AMERICAN GAY AMATEUR ATHLETIC ALLIANCE

792 F.Supp.2d 1151 (W.D. WA)
May 31, 2011.

JOHN C. COUGHENOUR, District Judge.

I. BACKGROUND

This case arises from the disqualification of a softball team from the 2008 Gay Softball World Series (GSWS). The event was operated by Defendant North American Gay Amateur Athletic Alliance (NAGAAA) and attended by Plaintiffs Steven Apilado, LaRon Charles, and Jon Russ. The Plaintiffs' team, D2, advanced to the final round and was playing in the championship game when the commissioner of the Atlanta league filed a protest under Rule 7.05 of the NAGAAA Softball Code against six players of the D2 team.

Rule 7.05 states that "[a] maximum of two Heterosexual players are permitted on a GSWS roster." Penalties for violation of this rule include permanent suspension of the heterosexual player, disqualification and forfeiture of the offending team's games, one year's suspension of the team's manager, and a minimum $100 fine imposed against the team's association. Under Softball Code Section 1. 15, Gay means "having a predominant sexual interest in a member or members of the same sex and includes both gay men and lesbians." Softball Code Section 1.18 defines heterosexual as "having a predominant sexual interest in a member or members of the opposite sex." . . .

D2 lost the championship game. When it was over, NAGAAA's protest committee conducted a hearing. Upon conclusion of the hearing, the protest committee determined that Plaintiffs were "non-gay," and, therefore, that D2 was not eligible to compete in GSWS. The protest committee disqualified D2 from the tournament, declared its victories and second-place finish in the tournament forfeited, and recommended that Plaintiffs be suspended from NAGAAA softball play for one year.

Plaintiffs ask the Court to rule that NAGAAA is a "public accommodation" under Washington's Law Against Discrimination (WLAD), and that NAGAAA unlawfully discriminated against Plaintiffs based on their actual or perceived sexual orientation. The Court finds that NAGAAA is a public accommodation, but that the First Amendment protects their right to exclude those whose membership would negatively impact their expressive activity. . .

III. DISCUSSION

[The Court rules that NAGAAA is a public accommodation covered by the Washington statute.]

2. First Amendment Claims

Even if NAGAAA appears to be a public accommodation under WLAD, the Court's analysis does not end there. NAGAAA's next argument is that Rule 7.05 is protected by the First Amendment. The First Amendment guarantees the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647(2000). In *Dale*, the Supreme Court observed that when laws and regulations intrude into the internal affairs of an organization, or force a group to accept members it does not desire, these laws might be unconstitutional. In essence, "[f]reedom of association ... plainly presupposes a freedom not to associate."

In order for NAGAAA to show that its decision to exclude someone from membership is protected by the Constitution, it must show three things: (1) NAGAAA is an expressive association, (2) forced inclusion of unwanted members would affect NAGAAA's ability to express its viewpoints, and (3) NAGAAA's interest in expressive association outweighs the state's interest in eradicating discrimination.

a. *Is NAGAAA an Expressive Association?*

The first question the Court must address is whether or not NAGAAA is an expressive association. . . NAGAAA is well within the wide boundaries that the Supreme Court has drawn. NAGAAA's mission is to "promote[ ] amateur sports competition, particularly softball, for all persons regardless of age, sexual orientation or preference, with special emphasis on the participation of members of the gay, lesbian, bisexual and transgender (GLBT) community." A brochure distributed in 2008 states that NAGAAA is "committed to helping our community," "Promotes the idea of athletic competition and good physical health in support of the gay lifestyle," and "Strives for high standards of sportsmanship and conduct to attain fair play on and off the field." These goals and activities are similar in many respects to the very goals and activities specifically endorsed by the Supreme Court. NAGAAA is an expressive association.

b. *Would NAGAAA's Expression be Impacted if it were Prohibited from Limiting Membership?*

NAGAAA argues next that admitting more than two heterosexual players per team would interfere with its chosen expressive purpose. "The forced inclusion of an unwanted person in a

group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." At this step, the Supreme Court requires a degree of judicial deference. "As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression." This deference is not absolute. *Dale* goes on to hold that associations like NAGAAA cannot "erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message."

In *Dale,* the Court held that the Boy Scouts of America would have difficulty expressing the viewpoint that homosexuality was inconsistent with the values embodied in the Scout Oath and Law while simultaneously allowing Dale, a gay rights activist to serve as an assistant scoutmaster. "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."

Here, the question is whether forcing NAGAAA to include an unlimited number of heterosexual players would significantly affect its expressive activity: promoting amateur sports by emphasizing the participation of the gay community and promoting athletic competition and physical health in support of the gay lifestyle. It would be difficult for NAGAAA to effectively emphasize a vision of the gay lifestyle rooted in athleticism, competition and sportsmanship if it were prohibited from maintaining a gay identity. ("It would be difficult for [a student group] to sincerely and effectively convey a message of disapproval of certain types of conduct if, at the same time, it must accept members who engage in that conduct.").

Plaintiffs argue first that NAGAAA's expressive purpose is self-contradicting. How, they ask, can NAGAAA promote amateur sports competition for *all* persons regardless of age, sexual orientation or preference and exclude people based on sexual orientation? But as the Supreme Court has stated, "it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent." ("As is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational") . . . NAGAAA might very well believe that given the history of gay exclusion for sports, the only way to promote competition for *all* persons, and ensure that gay athletes have the same opportunities as straight athletes, is to create an exclusively gay community with exceptions for a small number of straight players. It is not the role of the courts to scrutinize the content of an organization's chosen expression.

Plaintiffs further argue that the controlling case is not *Dale,* but rather *Roberts v. United States Jaycees*, 468 U.S. 609, 627 (1984). That case concerned the United States Jaycees, an organization whose objective was to promote and foster the growth and development of young men's civic organizations. The Jaycees brought suit against Minnesota state officials to prevent enforcement of the Minnesota Human Rights Act which might have required the Jaycees to admit women as full voting members. The Jaycees argued that they had taken a number of public positions on issues over the years, and that the inclusion of women would impact their ability to express these viewpoints. The Court concluded that there was no basis in the record for

concluding that admission of women as voting members would impede the organization's ability to disseminate its preferred views. While the Jaycees had a "creed of promoting the interests of young men," it could not be assumed that women would not share this creed. The Court concluded that the Jaycees "relie[d] solely on unsupported generalizations about the relative interests and perspectives of men and women. Although such generalizations may or may not have a statistical basis in fact with respect to particular positions adopted by the Jaycees, we have repeatedly condemned legal decision-making that relies uncritically on such assumptions."

By arguing that NAGAAA is similar to the Jaycees, Plaintiffs demonstrate that they misunderstand the expressive purpose of NAGAAA. NAGAAA is not claiming that heterosexuals would have different opinions about the LGBT community than that community's own members in the way that the Jaycees claimed that women would have different views on foreign policy from men. The Court would be very surprised if there is any opinion of the gay lifestyle that is not shared by at least a few straight people. Nor is NAGAAA engaged in a merely symbolic act of exclusion akin to the Jaycees. The Commissioner of NAGAAA submitted a declaration explaining that the desire for exclusivity was born of the fact that many members of the LGBT community come from backgrounds where team sports have been environments of ridicule and humiliation. NAGAAA's efforts to promote an athletic, competitive, sportsmanlike gay identity, with a unique set of values, in response to a particular need, are protected by the First Amendment. Forced inclusion of straight athletes would distract from and diminish those efforts.

This does not mean, of course, that any group seeking to discriminate against an entire group of people can do by hiding behind the First Amendment. The next part of the test preserves the ability of the states to stamp out invidious discrimination wherever they find it.

c. *Does the State have an Interest in Enforcing its Anti–Discrimination Laws in this Case?*

The final question for the Court is whether or not NAGAAA's interest in expressive association outweighs the state's interest in eradicating discrimination. A state can override freedom of associative expression "by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." Plaintiffs argue that any burden on NAGAAA's expression is outweighed by the state's interest in upholding public accommodation laws. But Plaintiffs have failed to argue that there is a compelling state interest in allowing heterosexuals to play gay softball. Plaintiffs have failed to meet their burden of showing that that there is no genuine issue of material fact with respect to the state's interest in this issue, and summary judgment is not appropriate.

[In a subsequent order, issued November 10, 2011, 2011 WL 5563206 (W.D.Wash.), the Court ruled that the NAGAAA's interest in expressive association outweighed the State's interest in eradicating discrimination, and that forced inclusion of straight athletes would distract from and diminish the "NAGAAA's efforts to promote an athletic, competitive, sportsmanlike gay identity, with a unique set of values, in response to a particular need," efforts protected by the

First Amendment. Precedent supported “the thrust of NAGAAA's argument: the state interests should be narrowly defined to a particular form of discrimination. Indeed, if state public-accommodation statutes truly prohibited discrimination against all groups and in any form, then freedom of association would be toothless.”