United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

August 22, 2005

Before

Hon. MICHAEL S. KANNE, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

Hon. DIANE S. SYKES, *Circuit Judge*

CHRISTIAN LEGAL SOCIETY, Chapter at Southern Illinois University School of Law, a Student Organization at the Southern Illinois University of Law on behalf of itself and its individual members, Plaintiff-Appellant, No. 05-3239 v. JAMES E. WALKER, in his official capacity of President of Southern Illinois University, PETER C. ALEXANDER, in his official capacity as Dean of Southern Illinois University School of Law, JESSICA J. DAVIS, in her official capacity as Director of Law Student Development, et al., Defendants-Appellees.	Appeal from the United States District Court for the Southern District of Illinois. No. 05 C 4070 G. Patrick Murphy, Chief Judge.

The following are before the court:

1. **MOTION FOR INJUNCTION PENDING APPEAL AND ADVANCEMENT OF HEARING, AND TO STAY PROCEEDINGS BELOW**, filed on August 4, 2005, by counsel for the appellant.

2. **DEFENDANTS'-APPELLEES' JOINT RESPONSE IN OPPOSITION TO PLAINTIFF'S-APPELLANT'S MOTION FOR**

INJUNCTION PENDING APPEAL AND ADVANCEMENT OF HEARING, AND TO STAY PROCEEDINGS BELOW, filed on August 12, 2005, by counsel for the appellees.

The appellant, the Christian Legal Society Chapter at Southern Illinois University School of Law ("CLS"), filed the underlying action challenging the revocation of its status as a recognized student organization. The revocation was based upon the dean's determination that CLS's faith-based requirement that its officers and voting members abide by biblical tenets regarding homosexuality violates the university's affirmative action policy and, alternatively, unspecified federal/state antidiscrimination laws. The district court denied CLS's motion for a preliminary injunction and CLS has appealed. CLS filed the present motion for an injunction pending appeal.

Based on the facts and law presented and argued in CLS's motion and the defendant's response and our balancing of the injunction factors, we determine that it is appropriate to grant the motion for an injunction in order to reinstate CLS's status as a registered student organization pending resolution of the appeal from the denial of its preliminary injunction motion. In order to obtain an injunction, a party must show that it is reasonably likely to succeed on the merits; has no adequate remedy at law; is suffering irreparable harm that outweighs any harm the non-moving party might suffer if the injunction is granted; and that an injunction will not harm the public interest. *Joelner v. Village of Washington Park*, 378 F.3d 613, 619 (7th Cir. 2004). Although a district court's balancing of the injunction factors on the "sliding scale" is reviewed for abuse of discretion, legal issues are reviewed de novo, and we see several flaws in the district court's legal analysis. *Id.* at 620.

First, the loss of First Amendment rights presumptively constitutes an irreparable injury for which there is no adequate remedy at law, and an injunction protecting First Amendment rights is also presumptively considered to be consistent with the public interest. *Joelner*, 378 F.3d at 620. The district court instead concluded that there had been no showing of irreparable harm because CLS "continues to exist" and may "carry-on its business," including holding meetings on campus. This is contrary to *Healy v. James*, 408 U.S. 169 (1972). In *Healy*, the Supreme Court held that a public university's refusal to confer official student organization status on a Students for a Democratic Society chapter violated the students' First Amendment associational rights. The Court emphasized that the loss of the right to use campus facilities for meetings was the "primary impediment to free association flowing from nonrecognition," but the Court also specifically stated that the loss of access to campus bulletin boards and the student newspaper as modes of communication were "impediments [that] cannot be viewed as insubstantial." *Healy*, 408 U.S. at 181. The Court characterized the university's denial of recognition as "a form of prior restraint" and placed the burden on the

university to justify it, saying also that this is a "heavy burden." *Id.* at 184. Here, although the revocation of CLS's recognized student organization status does not prohibit it from holding meetings on campus, it does prohibit it from any access to campus bulletin boards, private meeting space, storage space, a faculty advisor, and university website, publication, and email access. Accordingly, under *Healy,* the law school's revocation of CLS's status as a recognized student organization constitutes a cognizable infringement of CLS's First Amendment rights, and the law school bears the heavy burden of justifying the infringement. The Supreme Court said in *Healy* that a public university's interest in maintaining order and preventing disruption or violence on campus might constitute a sufficient justification for such an infringement, but the university policy invoked here is an affirmative action/antidiscrimination policy, not one that implicates the university's interest in maintaining order and preventing disruption.[1]

Second, regarding the law school's affirmative action/antidiscrimination policy justification for the revocation, it is unclear exactly what policy or law CLS was violating. The affirmative action policy specifies that the university does not discriminate in employment and "educational opportunities." CLS points out that this policy does not really apply here because CLS does not employ anyone or constitute an "educational opportunity" offered by the university. The other policy invoked by the dean requires all recognized student organizations to comply with "all appropriate federal or state laws concerning nondiscrimination and equal opportunity." But the dean did not identify what federal or state law CLS was accused of violating. To the extent that CLS could be considered to be in violation of a public accommodations antidiscrimination law, then requiring compliance on pain of revocation of student organization status would appear to run afoul of *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000), and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). The district court held that these cases did not apply because CLS's "right to meet, assemble, evangelize, and proselytize are not impaired," but only its official recognition– "with all the accoutrements thereof"– had been lost. But this analysis simply repeats the error of assuming that the denial of official student organization recognition does not constitute a cognizable First Amendment injury, which is contrary to *Healy*.

Finally, granting the injunction would not bring about any irreparable harm

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[1] CLS also asserts an equal protection argument that the district court did not address based on the preliminary nature of the proceedings and the parties' representations at the preliminary injunction hearing. (The parties declined the district court's invitation to resolve the merits of the entire litigation with the preliminary injunction motion, based on a desire to take discovery on all claims, including CLS's equal protection claim.) We therefore do not address the argument here.

to the law school. The defendants assert that they might be "expose[d] ... to claims of discrimination and yet further litigation," but this is at best speculative. The law school simply will be reinstating CLS's status a registered student organization pending appeal in compliance with a court order.

For the foregoing reasons, we conclude that CLS has made a sufficient showing to warrant restoration of the status quo ante pending appeal. Accordingly,

IT IS ORDERED that the motion for an injunction pending resolution of the present appeal is **GRANTED**. The appellees shall reinstate CLS's status as a registered student organization, entitling CLS to the full benefits accompanying that status. Given the preliminary stage of the appeal and the preliminary stage of the litigation below, we caution that this order should not read as expressing any ultimate view about the final outcome of this appeal.

IT IS FURTHER ORDERED that proceedings in the district court are **STAYED** pending resolution of the present appeal.

IT IS FINALLY ORDERED that briefing in this appeal is briefing **EXPEDITED** and will proceed as follows:

1. The brief and required short appendix of the appellant is due no later than September 7, 2005.

2. The brief of the appellees is due no later than September 28, 2005.

3. The reply brief of the appellant, if any, is due no later than October 5, 2005.

The parties are advised that the briefs must be received in the clerk's office and served on the opposing party by the specified dates. No extensions of time will be granted.

Oral argument in this matter will be scheduled by separate court order.

WOOD, *Circuit Judge*, dissenting. Briefly put, this case presents the question whether the Christian Legal Society at Southern Illinois University School of Law (CLS-SIU) has the right to be a recognized student organization, despite the fact that for reasons relating to the tenets of the religion shared by its members, it openly refuses to comply with the Law School's policy forbidding discrimination on the basis of sexual orientation. The case is at a very preliminary stage at this point. The Law School revoked CLS-SIU's status as a recognized student organization on March 25,

2005; CLS-SIU sued; and the district court on July 5, 2005, refused to issue a preliminary injunction that would have required the reinstatement of CLS-SIU during the pendency of the litigation. CLS-SIU now seeks what it calls an "injunction pending appeal" or a "stay" from this court, whereby we would "stay" or "enjoin" the district court's order *refusing* an injunction. More directly phrased, what CLS-SIU wants from us is the same preliminary injunction directing the Law School to reinstate it pending the litigation.

My colleagues have decided that CLS-SIU is entitled to such an injunction. I regret that I cannot join them in this assessment. To begin with, their action does not reflect the fact that the standard of review that applies to this type of request is that of abuse of discretion. See *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 896 (7th Cir. 2001); *David K. v. Lane*, 839 F.2d 1265, 1271 (7th Cir. 1988). The applicant, here CLS-SIU, has the burden of showing a strong and substantial likelihood of success on the merits, as well as real irreparable injury. In my view the district court reasonably concluded that CLS-SIU has done neither. To the extent that this court has a greater responsibility to take a fresh look at the matter because of the First Amendment issues presented, I find the ultimate result far more difficult to predict than my colleagues apparently do. Whether or not CLS-SIU will prevail in the end depends in my opinion on numerous facts that have not yet been developed in the record; for this reason, I would not stay the district court's proceedings. Moreover, as anyone who has looked at the Supreme Court's most recent foray into the Establishment Clause area would be compelled to agree, the law is highly nuanced. Compare *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 125 S.Ct. 2722 (2005) (upholding an injunction against a display of the Ten Commandments in a courthouse based on the Establishment Clause because the county had a purpose of advancing religion), with *Van Orden v. Perry*, 125 S.Ct. 2854 (2005) (finding that a monument inscribed with the Ten Commandments placed on the grounds of the Texas State Capitol did not violate the Establishment Clause because of the historical context). I do not find any of the cases on which CLS-SIU relies to require a ruling in its favor here, nor do I find any of the cases on which the Law School relies to dictate a result for it. Last, the actions of the Law School were modest by comparison to many other cases. Under the circumstances, which I describe briefly below, I find no abuse of discretion in the district court's conclusion that CLS-SIU will not suffer irreparable injury if it must operate without recognized student organization status for a time. I have no objection, however, to expediting this appeal, in the interest of resolving these questions on the basis of full briefing and argument.

In the interest of space and time, I offer only a brief summary of the reasons that lead me to these conclusions. First is the paucity of the record on which we are being asked to override the district court's conclusions. All we know is that there is an organization called CLS-SIU; that it is a local chapter of an organization called the Christian Legal Society; that it was a registered student organization at the Law School until March 25, 2005; that registered student organization status carried with

it privileges such as access to space on Law School bulletin boards, private meeting space within the Law School, storage space within the Law School, access to the Law School's website and publications, email access on the Law School's List-Serve, eligibility for certain funding through the law School, and use of the SIU name. The record also includes the following statement, which is what caused all the trouble:

> CLS interprets its Statement of Faith to require that officers and members adhere to orthodox Christian beliefs, including the Bible's prohibition of sexual conduct between persons of the same sex. A person who engages in homosexual conduct or adheres to the viewpoint that homosexual conduct is not sinful would not be permitted to serve as a CLS chapter officer or member. A person who may have engaged in homosexual conduct in the past but has repented of that conduct, or who has homosexual inclinations but does not engage in or affirm homosexual conduct, would not be prevented from serving as an officer or member.

Finally, the record reveals that the Dean of the Law School, Peter C. Alexander, informed CLS-SIU that it was in violation of the policy of SIU-Carbondale "to provide equal employment and education opportunities for all qualified persons without regard to race, color, religion, sex, national origin, age, disability, status as a disabled veteran or a veteran of the Vietnam era, sexual orientation, or marital status." (This policy is referred to in the record as the Affirmative Action/Equal Employment Opportunity Policy.) Dean Alexander went on to say that recognized student organizations also must adhere to "all appropriate federal or state laws concerning nondiscrimination and equal opportunity." Although the district court did not mention the Illinois Human Rights Act, 775 ILCS 5/1-103, the ultimate outcome of this case may be affected by the fact that the Act was amended by Pub. Act. 93-1078 § 5, which added the italicized language in the section defining unlawful discrimination:

> [§1-103(Q)] "Unlawful discrimination" means discrimination against a person because of his or her race, color, religion, national origin, ancestry, age, sex, marital status, handicap, military status, *sexual orientation*, or unfavorable discharge from military service as those terms are defined in this section.

The effective date of the amendment is January 1, 2006.

The existence of this impending Illinois law and its relevance to the case is just one of many questions that no one has explored yet in this litigation. Other facts that will have a strong bearing on the ultimate outcome include the following:

> 1. What (other) specific state or federal laws does the Law School claim that CLS-SIU's policy with regard to voting members and officers violates?

> 2. How has CLS-SIU's policy been applied in the past to students who may not share its views?
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> 3. By the same token, how has the SIU-Carbondale Affirmative Action Policy been applied in the past? Has it ever been applied to student organizations, as opposed to employees of the University or classroom situations?
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> 4. Does the evidence show that the SIU-Carbondale Affirmative Action Policy, which the district court found was facially neutral, has been applied neutrally?
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> 5. What are the membership and leadership requirements for other recognized student organizations, including the Muslim Students' Association, the Adventist Campus Ministries, the Chi Alpha Christian Fellowship, the Young Women's Coalition, the Republicans, the Democrats, and the Lesbian and Gay Law Students and Supporters?
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> 6. Have any other student organizations been denied recognition? If so, under what circumstances? If not, then what justification does SIU-Carbondale have for starting with CLS-SIU?

If it turns out that CLS-SIU is the only student organization that (a) espouses views that are inconsistent with the Affirmative Action Policy and (b) has been denied recognition as a student organization, then there would be reason to fear viewpoint discrimination. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995). If, on the other hand, the other organizations have accommodated their rules and trusted to individual preference to attract the desired participants, we would have a different case. It is virtually impossible to evaluate the Law School's action with respect to CLS-SIU without knowing whether it conforms or not to the treatment of similar organizations. CLS-SIU has made extensive allegations about these other organizations in its moving papers, but we have nothing before us that would enable us to assess those statements, nor does CLS-SIU give us any reason to think that it has direct knowledge of the internal policies of the other organizations.

CLS-SIU argues in passing that it is not even clear that the Affirmative Action Policy applies to student organizations, given the fact that it mentions "equal employment and education opportunities." Perhaps CLS-SIU has a point here; once again, we cannot tell on this record. In a closely related context, however, the Supreme Court has already said that recognized extracurricular activities play an important part in a university's overall educational mission. In *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000), the Court upheld a viewpoint- neutral mandatory fee imposed on all students of the University of Wisconsin at Madison, where the fee supported nonclassroom student activities. The University was permitted, the Court concluded, to

> determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall.

Id. at 233. In light of *Southworth*, it does not seem too much of a stretch to conclude that SIU-Carbondale and its Law School regard recognized student organizations as part of their educational mission, too.

Although, from the standpoint of the law, CLS-SIU relies heavily on *Healy v. James*, 408 U.S. 169 (1972), the facts before the Court there were quite different from the ones the district court has already found here. There the Court found that "[t]he primary impediment to free association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purposes." *Id.* at 181. Indeed, as the Court went on to note, the Students for a Democratic Society (SDS) group there was not even allowed to meet in a campus coffee shop. *Id.* The Court also listed a number of the things about which CLS-SIU is complaining, including campus bulletin boards and the school newspaper. It plainly thought, reasonably enough in 1972, that these facilities were essential for communicating both with members and with the campus community at large. It is against that backdrop that the Court found the First Amendment associational interests of the SDS group to have been undervalued by the lower courts, and it was for that reason that the Court remanded the case.

The directive that the Law School gave to CLS-SIU was far less absolute. Not only was CLS-SIU free to meet in any campus coffee shops or other facilities it chose; it could continue to have free access to the law school's classrooms. Although it would have needed to pay a fee to use the Auditorium, this was a tiny group of six to 12 students, and there is nothing in the record to suggest that it was about to hold an independent program for which a large room was necessary. Beyond that, there is a quaint tone to the Court's discussion of the importance of the campus bulletin board. The bulletin boards that count for today's students are in cyberspace. The Law School did not purport to forbid CLS-SIU from establishing its own website or from maintaining email lists of its members and other interested students. If it had its own website, any student at the school with access to Google (that is to say, all of them) could easily find CLS-SIU. This is different enough from *Healy* that it is not a foregone conclusion that the same result would or should obtain. If my colleagues are taking the position that there is an absolute rule that anyone who alleges any kind of interference with First Amendment rights has automatically shown irreparable injury, I respectfully disagree. *Joelner v. Village of Washington Park, Ill.*, 378 F.3d 613 (7th Cir. 2004), does not go that far. That case deals with the regulation of adult book stores. The passage on which my colleagues rely, in which this court quoted from Justice Brennan's plurality opinion in *Elrod v. Burns*, 427 U.S. 347 (1976), reads as follows:

> It is clear therefore that First Amendment interests were either

> threatened or in fact being impaired at the time relief was sought. The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. Since such injury was both threatened and occurring at the time of respondents' motion and since respondents sufficiently demonstrated a probability of success on the merits, the Court of Appeals might properly have held that the District Court abused its discretion in denying preliminary injunctive relief.

Id. at 373-74 (citation omitted). (It is notable that the two Justices who concurred in the judgment and thus dictated the result, Justices Stewart and Blackmun, specifically criticized the plurality's opinion for being "wide-ranging." *Id.* at 374.) Taken as a whole, this passage stands only for the unremarkable proposition that when First Amendment interests are at stake *and* when there is a sufficient probability of success on the merits of the First Amendment claim, a preliminary injunction is proper. But the plaintiff must do more than utter the words "First Amendment" to earn an injunction. Context is critical, and the degree of impairment of the particular First Amendment interest (right of association; right of free exercise of religion; right of a public employee to express views; right of the press; etc.) is also an element of the analysis that I would not want to jettison.

As the district court pointed out, this case bears no resemblance to *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). No one is asking CLS-SIU to accept a single homosexual member or (as in *Dale*) leader; CLS-SIU is free to follow the commands of its own creed. Nor is CLS-SIU being asked to adopt a message with which it disagrees, as in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995). Instead, this case is more like the post-*Dale* decision of the Second Circuit in *Boy Scouts of American v. Wyman*, 335 F.3d 80 (2d Cir. 2003), in which the court upheld a decision by the State of Connecticut to forbid the Boy Scouts from participating in the state's workplace charitable contribution campaign, on the ground that the Boy Scouts' anti-homosexual policy violated state law. In so holding, the court rejected the Boy Scouts' argument that the State's decision to exclude them violated their First Amendment right of expressive association.

It is also possible that this case may be affected by *Rumsfeld v. Forum for Academic and Institutional Rights*, No. 04-1152 (cert. granted May 2, 2005; oral argument scheduled for Dec. 6, 2005), which raises the question whether the Solomon Amendments, under which law schools are compelled to permit the U.S. military to recruit on-campus, infringe upon the law schools' own expressive association. See also 390 F.3d 219 (3d Cir. 2004). Although the military context may prove to be important in the *FAIR* litigation, it may find its equivalent in the religious freedom context here.

The distinctions between earlier cases and the one with which we are now presented, coupled with the fact that the particular action that SIU-Carbondale's Law School took against CLS-SIU closed only certain avenues of association to the group,

convince me that the district court's decision to deny the preliminary injunction was comfortably within the discretion it enjoyed. I express no view, of course, about the ultimate outcome here. More facts need to be developed before we can say with confidence either that CLS-SIU's rights were violated, or that they were not. I would allow those facts to be developed with dispatch in the district court proceedings, and address the outcome with the benefit of a full record.

I therefore dissent from the panel's decision to issue this injunction pending appeal.