

# General Counsel Note

Most colleges and universities have institutional policies that prohibit discrimination based on certain status. Many colleges and universities must also comply with state law and policies that prohibit discrimination as well. These protected classes generally include race, sex, and national origin. In some cases, the protected classes also include sexual orientation. Therefore, any employer that clearly violates these policies and, in fact, does discriminate against one of the protected classes of the institution, could be banned from the institution's campus for the purpose of recruiting. Since federal law states that a person generally may not serve in the United States Armed Forces if he or she has engaged in homosexual acts, stated that he or she is a homosexual, or married a person of the same sex, the military, as a recruiter and employer, is required to discriminate based on sexual orientation. Therefore, colleges and universities and many schools within these institutions, recognizing that their policies prohibit discrimination based on sexual orientation, or realizing that such discrimination offended their institutional values, banned the military from recruiting on their campus.

In response to this exclusion, the United States Congress passed an act referred to as the Solomon Amendment. The Solomon Amendment requires that if any part of an institution of higher education refuses to allow military recruiters access to campus and students equally to that allowed other

recruiters, then the entire institution will risk loss of certain federal funds. Obviously this placed many higher education institutions in the position of choosing between honoring their commitment to prohibiting discrimination based on sexual orientation or receiving important federal funds.

Finding the mutually exclusive position unfavorable, an association called The Forum for Academic and Individual Rights (FAIR) decided to challenge the constitutionality of the Solomon Amendment. FAIR sued the United States and asked the federal courts to declare the Solomon Amendment unconstitutional and grant an injunction prohibiting the enforcement of the Amendment. FAIR based its argument on the grounds that the Solomon Amendment violated the First Amendment of the United States Constitution.

In 2003, the United States District Court in New Jersey held that the Solomon Amendment was indeed constitutional and denied FAIR's request for injunctive relief. FAIR appealed to the Third Circuit Court and in a divided 2004 decision, the Third Circuit reversed the District Court's decision and found the Solomon Amendment unconstitutional on three counts.

1. That the Solomon Amendment violated the First Amendment Freedom of Association by undermining an institution's ability to disseminate its message (cont. on p. 2)

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against sexual orientation discrimination;  
and,

2. That the Solomon Amendment unconstitutionally required institutions of higher education to surrender their First Amendment rights in exchange for federal funds;  
and,

3. That the process of recruiting students was, in fact, speech and not merely conduct.

The United States appealed the case to the United States Supreme Court and in March of 2006, the Supreme Court found that the Solomon Amendment was indeed consistent with the First Amendment. Recognizing that the government could not compel an individual to speak or engage in particular speech, the Court found that the Solomon Amendment did not compel universities or individual faculty members to engage in any particular speech. The Court further found that there was no unlawful restriction

of expressive conduct, nor any unlawful compelling of the accommodation of the military's version of speech. In addition, the Court found that the Solomon Amendment did not violate the First Amendment Freedom of Association clause.

What does this mean for colleges and universities? It is now settled after some four years of uncertainty that institutions of higher education that would like to continue receiving certain federal funds cannot enforce sexual orientation nondiscrimination policies against military recruiters. They must provide military recruiters with access to campus and students equal in quality and scope to the access provided other recruiters.

*This Note is for informational and educational purposes only. It states general propositions and is not intended to and should not be viewed as legal advice from the Office of the General Counsel.*