

Client Alert

A report
for clients
and friends
of the firm **March 2006**

Supreme Court Rules Military Recruiters Entitled to Equal Access

Potential Interplay with Harassment Prohibitions under New York State Human Rights Law

In a unanimous opinion written by Chief Justice Roberts, the United States Supreme Court upheld the Solomon Amendment (10 U.S.C. 983), which requires that colleges and universities receiving federal funding provide the military "entry to campuses" and "access to students" for recruiting purposes. In *Rumsfeld v. Forum for Academic and Institutional Rights Inc.*, No. 04-1152 (2006), the Court found that the government's policy of requiring "universities to provide military recruiters access to students equal in quality and scope to that provided to other recruiters" did not unconstitutionally infringe upon the schools' first amendment freedoms of speech and association. The Court held that allowing military recruiters access to students was not speech but conduct and further distinguished this conduct from conduct that has been held to constitute speech, such as a parade, finding that the simple act of allowing the military

recruiters to use space at the school for recruiting did not communicate any support for the military's position on hiring gays and lesbians. The Court distinguished its decision in *Boy Scouts of America v. Dale*, 530 U.S.640-644 (2000), reasoning that unlike the Boy Scouts, who were being forced to allow homosexuals to be members and scout leaders, the schools are not being required to make the military recruiters members of the school. The schools are merely required to interact with them for the purpose of providing them equal access to students; therefore, the schools' associational rights are not being infringed upon because the schools are not being forced to associate themselves with the military.

The Court held that the schools are required to allow access equal to that of other recruiters, but noted that the schools are still permitted "to express whatever views they may have on the military's congressionally mandated employment policy." The Court went on to cite the Solicitor General's argument in which he stated that the schools could "put signs on the bulletin board next to the door, they could engage in speech, they could help organize student protests."

Although the Supreme Court's decision appears to eliminate any ambiguity as to a university's

obligations and rights with respect to military recruiting, there is a provision in the New York State Human Rights Law that may complicate matters. Although the Court takes the position that schools can engage in and facilitate speech protesting the military as long as they provide equal access to students for recruiting, the law in New York may limit the scope of the speech permitted. Section 296(4) of the New York Executive Law prohibits an education corporation or association (that receives property tax exemptions) from “permit[ting] harassment” on the basis of several protected characteristics, including military status, which the statute defines broadly to mean participation in the federal and state military services.

The interplay between the Court’s decision and New York law raises questions as to where college and university administrations must draw the line between harassment and speech. In reasoning that the Solomon Amendment does not infringe upon the schools’ freedom of speech in that they are not prohibited from putting up signs and organizing protests, the Court implies that such conduct does constitute protected speech. On the other hand, one could easily imagine a student arguing that having to walk through an organized protest in order to interview with a military recruiter or being bombarded with signs criticizing the military as one approaches an interview constitutes harassment based on intent to join the military. The scope of the “permit harassment” prohibition under Section 296(4) has yet to be litigated, so we can only speculate as to whether school sanctioned protests and posters could be found to be harassment. In light of the Court’s discussion in the *FAIR* opinion, 296(4) may be subject to constitutional challenge, depending upon the scope of the speech or

conduct impacted by the “permit harassment” prohibition. Nevertheless, college and university administrations must carefully consider these competing interests when determining where, when, and in what manner to permit students and faculty to express their objections to the military and its policies.

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Proskauer’s nearly 175 Labor and Employment lawyers are capable of addressing the most complex and challenging labor and employment law issues faced by employers. The following individuals serve as contacts and would welcome any questions you may have:

Edward A. Brill
212.969.3015 – ebrill@proskauer.com

Susan D. Friedfel
212.969.3384 – sfriedfel@proskauer.com

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