

ANTHONY ROMEO, individually
and on behalf of himself and
student applicants for
"TRUTH", a gay and lesbian
student
organization denied
Provisional Recognition by
Seton Hall University,

Plaintiff,

vs.

SETON HALL UNIVERSITY, A.B.C.
Corp.'s 1-100, John Does 1-100
and DEF Non-Profit Corp.'s or
Institutions 1-100 that may be
necessary but currently
unknown to Plaintiff for
purposes of effectuating the
equitable relief sought
herein,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY
DOCKET NO. ESX-L-1866-04

Civil Action

DEFENDANT'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS
PLAINTIFF'S COMPLAINT UNDER R. 4:6-2(e)

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PRELIMINARY STATEMENT

[T]he Church . . . refuses to consider the person as a "heterosexual" or a "homosexual" and insists that every person has a fundamental Identity: the creature of God, and by grace, his child and heir to eternal life.

- Letter To The Bishops On The Pastoral Care Of Homosexual Persons, (Congregation for the Doctrine of the Faith, October 1, 1986).

This motion is brought under R. 4:6-2 on behalf of the defendant, Seton Hall University ("Seton Hall"), to dismiss the complaint of the plaintiff, Anthony J. Romeo, for failure to state a claim upon which relief can be granted.

Plaintiff seeks to use the instrumentalities of the State of New Jersey to force Seton Hall to officially and formally recognize "an organization for openly gay and lesbian students at Seton Hall." Thus, the stated goal of plaintiff's complaint is to require Seton Hall to disregard its fundamental obligation to its Catholic identity and officially recognize a student group whose sole binding element is a focus on matters of sexual orientation.

The laws of the State of New Jersey, however, do not reach so far as to require Seton Hall to disregard the Catholic identity that forms its mission. Indeed, a finding to the contrary would pit New Jersey's laws against the Free Exercise Clause of the First Amendment of the Constitution and thus would still require a ruling in favor of Seton Hall.

Finally, plaintiff's claims of waiver by Seton Hall and of the creation of a unilateral contract by his matriculation at Seton Hall are arguments constructed upon strained and incomplete readings of documents that, on their face, defeat plaintiff's claims. Indeed, sadly, plaintiff has taken Seton Hall's continued commitment to promote the dignity of the whole person and its denunciation for discrimination as taught by the Catholic Church and turned it on its head to argue that Seton Hall is really required to act as plaintiff sees fit. This matter should be dismissed with prejudice as a matter of law as no valid claim has been stated.

STATEMENT OF FACTS¹

Plaintiff is a student at Seton Hall. (Certification of Dania M. Billings, Ex. A (Complaint) at ¶1) ("Billings Cert.").

On or about November 13, 2003, plaintiff submitted an application seeking provisional recognition from Seton Hall's Student Organization Advisory Council to form a gay and lesbian student group to be known as TRUTH.² *Id.* at ¶23 and Complaint's Ex. B. The purpose of the group, as stated in plaintiff's application, was, in part, to provide a forum for discussion and education, and a support group for lesbian, gay, bisexual and transgender students of the University. *Id.*

On December 18, 2003, on behalf of Seton Hall, Dr. Laura A. Wankel, Vice-President of Student Affairs, wrote a letter to plaintiff informing him that provisional recognition of TRUTH could not be granted because "[n]o organization based solely upon sexual orientation may receive formal University recognition." *Id.* at ¶24 and Complaint's Ex. C. Basing her decision on a thorough review of Catholic doctrine, Dr. Wankel explained that "the most compelling guidance from the Church directs us to care for the human person whose fundamental

¹ For the sake of this motion only, Seton Hall, as it must, accepts plaintiff's factual allegations as true.

² Plaintiff's choice of name alone insured that his group could not be recognized by Seton Hall, because the acronym conflicts with the teaching that Truth is Christ alone.

identity is as a 'child of God'- not as a 'heterosexual' or a 'homosexual.'" *Id.* at Complaint's Ex. C.

Although the University could not give TRUTH official or formal recognition, Dr. Wankel attached to her letter a "Memorandum of Understanding," which outlined a plan for how the University would continue to work with lesbian and gay students to prevent discrimination and support such students. *Id.* Specifically, Seton Hall proposed a plan for providing the student group the opportunity to have a "special relationship" to the University's Office of Vice President for Student Affairs, through which the group would be afforded broad privileges, including the right to:

- Sponsor educational events, meetings and programs;
- Sponsor volunteer and community service initiatives;
- Provide a forum for discourse, discussion and the exchange of views;
- Support lesbian and gay students of Seton Hall University through programs that educate the campus community about the injustice of discrimination on the basis of sexual orientation;
- Elect officers and or create ad hoc committees;
- Submit requests for funds for particular activities, and or other resources to the Vice President for Student Affairs.

Id.

After plaintiff received this letter, meetings were held between students and University representatives in an effort to cooperatively create a student group that would further the interest of the plaintiff within the bounds of Seton Hall's Catholic character. (Billings Cert., Ex. A (Complaint) at ¶ 25). Seton Hall remains committed to meeting the needs of students who are homosexual persons by continuing to enforce preexisting policies that promote the dignity of the whole person and by developing additional resources that are consistent with the mission of Seton Hall and the teachings of the Catholic Church. *Id.* at ¶ 26.

Lest there be any doubt, the Catholic Church teaches unequivocally that disrespect and marginalization of homosexual persons must be condemned because this discrimination "reveals a kind of disregard for others which endangers the most fundamental principles of a healthy society." (Billings Cert., Ex. F (Letter To The Bishops of the Catholic Church On the Pastoral Care of Homosexual Persons) at ¶ 10). This teaching infuses the entirety of Seton Hall's approach to these questions and has always motivated Seton Hall's refusal to condone discrimination against homosexual persons.

In a Complaint filed March 10, 2003, plaintiff alleges that Seton Hall violated the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, (the "LAD"), "by and through its refusal to

recognize a gay and lesbian organization." (Billings Cert., Ex. A (Complaint) at ¶¶ 31-35).

Realizing that Seton Hall is exempt from the dictates of the LAD on this issue because it is an educational facility operated or maintained by a religious organization and thus falls within an LAD exemption, plaintiff alleges that an anti-discrimination policy maintained by the University "constitutes an affirmative waiver of the religious exemption codified in the LAD and affirmatively acknowledges jurisdiction of the LAD and its prohibitions against sexual orientation based discrimination." *Id.* at ¶ 34. This argument fundamentally misreads the very documents upon which it is based.

In his second cause of action, plaintiff alleges that his reliance upon the University's anti-discrimination policy created a unilateral contract between plaintiff and Seton Hall. *Id.* at ¶¶38-45. Plaintiff alleges that because Seton Hall has refused to proceed in a fashion acceptable to him by refusing to recognize his group for openly gay and lesbian students, the University is in breach of this alleged contract. *Id.* at ¶45. As a matter of law, and on the face of the documents presented, the University's policy does not constitute a binding unilateral contract. Accordingly, plaintiff's second cause of action also must be dismissed for failure to state a claim upon which relief can be granted.

LEGAL ARGUMENT

POINT I

THE LEGAL STANDARD FOR A MOTION TO DISMISS UNDER R. 4:6-2(e)

On a motion to dismiss pursuant to Rule 4:6-2(e), this Court reviews a complaint and must dismiss it if a cause of action cannot be gleaned by a liberal reading of it. *Velantzas v. Colgate-Palmolive Company*, 109 N.J. 189, 192 (1988); *DiCristofaro v. Laurel Grove Memorial Park*, 43 N.J. Super. 244, 252 (App. Div. 1957); *Printing Mart v. Sharp Electronics*, 116 N.J. 739, 746 (1989). This inquiry is focused on considering the legal sufficiency of the alleged facts apparent on the face of the complaint. See *Decker v. Bally's Grand Hotel Casino*, 280 N.J. Super. 217, 221 (App. Div. 1994); *In the Matter of Prudential Insurance Company Derivative Litigation*, 282 N.J. Super. 256, 267 (Ch. Div. 1995), citing *Rieder v. State Department of Transportation*, 221 N.J. Super. 547, 552 (App. Div. 1987).

For this purpose, all facts alleged in the Complaint, and all legitimate inferences and implications drawn therefrom, are deemed admitted. *Decker*, 280 N.J. Super. at 221. Despite this limited focus, "**dismissal is mandated** where the factual allegations are palpably insufficient to support a claim upon which relief can be granted." *Id.* (emphasis added).

In this matter, plaintiff has asserted a cause of action based on the University's alleged violation of the LAD. It is axiomatic that for an entity to be in violation of the LAD, it must be subject to its terms. The violation allegedly committed by the University in this case does not exist as a matter of law. Rather, the University is exempt from the provisions of LAD because it is a educational facility operated and maintained by a bona fide religious or sectarian institution. N.J.S.A. 10:5-5(1). Because Seton Hall is exempt from the provisions of the LAD, plaintiff's first cause of action fails to state a claim upon which relief may be granted and must be dismissed, as a matter of law.

Similarly, plaintiff's second cause of action for breach of contract fails on the face of the complaint, because the document upon which the putative "contract" is premised on its face indicates that no such contract exists. Thus, no relief can be granted to the plaintiff as there is no set of facts that could show the existence of the necessary contract.

POINT II

**PLAINTIFF'S LAD CLAIM FAILS TO STATE A CLAIM
UPON WHICH RELIEF CAN BE GRANTED BECAUSE
DEFENDANT IS EXEMPT FROM THE LAD ON THIS
ISSUE**

Plaintiff seeks to enforce rights under the LAD that, as a matter of law, simply do not exist in this matter. That is, plaintiff wishes this Court to order Seton Hall to recognize his student group; however, the plain language of the LAD makes it clear that Seton Hall has not violated the LAD on the facts presented. Thus, the plaintiff's LAD claims should be dismissed.

**A. The LAD's Plain Language Exempts Seton Hall From The
LAD In This Matter**

While, the LAD provides that it is illegal for "any owner of any place of public accommodation . . . to discriminate against any person . . . on account of sexual orientation," a plain reading of the rest of the statute clarifies that this seemingly all inclusive mandate is, in fact, limited by statute. N.J.S.A. 10:5-12(f). Specifically, the LAD qualifies the scope of the statute, presumably to avoid First Amendment concerns, by limiting the definition of "a place of public accommodation," to exempt from that definition educational institutions affiliated with religious organizations. N.J.S.A. 10:5-5(1). The LAD states that "[n]othing herein contained shall be construed to include or to apply to any . . . educational facility **operated**

or maintained by a bona fide religious or sectarian institution." N.J.S.A. 10:5-5(1) (emphasis added). Thus, an educational facility - such as a university - that is maintained or operated by a religious or sectarian institution - such as the Roman Catholic Archdiocese of Newark - is exempt from the dictates of the LAD, and Seton Hall's actions in this matter must be deemed compliant with the statute.

**B. Defendant's Policy Of Anti-Discrimination Does Not
Constitute An Affirmative Waiver Of The Religious
Exemption Of The LAD**

Plaintiff admits on the face of his Complaint that Seton Hall is exempt from his demands under the LAD. (Billings Cert., Ex. A (Complaint) at ¶ 3). While recognizing Seton Hall's right to the exemption, plaintiff argues in his Complaint that Seton Hall has waived its exempt status by adopting an Anti-Discrimination policy. *Id.* at ¶34. Plaintiff's position is without merit; Seton Hall has not waived its rights under the religious exemption to the LAD by implementing an anti-discrimination policy for three reasons that are clear both from the referenced policy itself and from other documents available to the plaintiff.

**1. The Policy At Issue Adopts All Aspects Of The
Anti-Discrimination Law - Including The
Exemption**

Plaintiff is correct in asserting that Seton Hall has repeatedly stated its commitment to defending the right of all

of students to be free from bias and attack of any sort motivated by prejudice. (Billings Cert., Ex. A (Complaint) at ¶ 20). Indeed, Seton Hall, which requires all students to participate in anti-discrimination training, held a seminar in an effort to educate students on the legal and ethical rights of homosexual persons to be free from discrimination in response to this incident. *Id.* Plaintiff now erroneously relies on the fact that Seton Hall will not condone such actions as evidence that Seton Hall must formally recognize plaintiff's student group.

Plaintiff's argument springs from Seton Hall's Equal Employment Opportunity/Affirmative Action policy ("EEO/AA"). The policy, upon which plaintiff relies to allege waiver, specifically "supports and implements" the entirety of what Seton Hall understands to be its rights and duties under the LAD. Specifically, the policy states:

The University supports and implements **all state and federal anti-discrimination laws**. . . No person may be denied employment or related benefits or admission to the University or to any of its programs or activities, either academic or nonacademic, curricular or extracurricular, because of race, color, religion, age, national origin, gender, sexual orientation, handicap and disability, or veteran's status. All executives, administrators, faculty and managers, both academic and administrative, are responsible for individual and unit support of Seton Hall University's EEO/AA programs. EEO/AA policies are to be applied

in all decisions regarding hiring, promotion, retention, tenure, compensation, benefits, layoffs, academic programs, and social and recreational programs.

(Billings Cert., Ex. A (Complaint) at Complaint's Exhibit A). (emphasis added). Thus, clearly, the EEO/AA policy does not forbid Seton Hall from relying on the fact that LAD exempts it from certain provisions of the LAD.

That is, the University's EEO/AA statement specifically asserts that it implements **all state anti-discrimination law** and it does just that: it incorporates **all of the language** of the LAD, which includes the religious organization exemption. Thus, because the LAD specifically contains an exemption for an educational facility operated or maintained by a bona fide religious or sectarian institution, this exemption, which is clearly applicable to Seton Hall for all the reasons set forth below, is adopted as part of Seton Hall's EEO/AA policy.

2. The EEO/AA Policy Also Recognizes On Its Face That It Is Circumscribed By The Teachings Of The Catholic Church

Furthermore, in the EEO/AA policy, the University states its commitment to EEO/AA programs and that the University ensures that they "are carried out **in accordance with the teachings of the Catholic Church and the proscriptions of the law.**" (Billings Cert., Ex. A (Complaint) at Complaint's Ex. A). Thus, the EEO/AA policy upon which plaintiff relies to argue

waiver, on its face, indicates that the policy incorporates the teachings of the Catholic Church and Seton Hall's understanding of those teachings. Plaintiff cannot, therefore, rely upon the policy to argue waiver of the religious institution exemption when the policy itself recognizes that it is governed by the teachings of the Catholic Church.

3. Because The EEO/AA Policy Reserves Absolute Discretion For Its Interpretation In Seton Hall, It Could Not Reasonably Be Read As A Waiver Of Any Right Held By Seton Hall

Finally, the EEO/AA policy on its face places complete discretion for the interpretation of the policy in Seton Hall; thus, the policy could not rationally be interpreted as somehow limiting Seton Hall's rights.

Specifically, the policy provides a contact name and number for the University's EEO/AA Officer, "who is responsible for providing information regarding the provisions of the laws and regulations referred to in the preceding paragraphs and their applicability to the services, programs, and activities offered by the University." *Id.* Moreover, at the bottom of the page disseminating the information on this policy is the following language: "Responsibility for the interpretation and administration of this policy resides solely with the Department of Human Resources." *Id.*

Thus, any questions as to the application of the EEO/AA policy are to be addressed with the Department of Human Resources, and Seton Hall retained the exclusive and absolute discretion to determine the effect of the policy on any aspect of student life. As such, no reasonable person could believe that the University was agreeing to be bound by the LAD without reference to: 1) the religious exemption of the LAD; 2) the teachings of the Catholic Church; and 3) the absolute discretion of Seton Hall to determine the effect of the policy on any specific factual scenario.

This fact is confirmed by several other documents issued by Seton Hall that state in an unequivocal fashion that Seton Hall cannot be required to recognize organizations whose purposes and teachings are at odds with the teachings of the Catholic Church. Indeed, the Seton Hall Student Handbook, published on the University's website, and always available to students, emphasizes that University groups must "respect the values and mission of the University." (Billings Cert., Ex. B (Excerpts from the Student Handbook)).³ (emphasis added).

Further, the handbook, under a section entitled Student Rights and Responsibilities, reiterates, "[s]tudents have the

³ Inclusion of this document, and indeed of all of the documents provided, is appropriate on a motion to dismiss because they are either documents that have been referenced in the complaint or documents of which judicial notice may be taken.

right to self-determination in their own affairs . . . **which are respectful of the values and mission of the University.**" *Id.* (emphasis added). Thus, Seton Hall retained exclusive jurisdiction over the question of whether a group could be recognized on campus and that essential to the decision on recognition was whether the group's function was in accord with the Catholic teaching that infuses the identity and mission of Seton Hall.

C. Seton Hall Is An Educational Facility Operated And Maintained By A Religious Or Sectarian Institution

Even if plaintiff did not admit that Seton Hall operated within the exemption for education facilities maintained by religious or sectarian institutions, the conclusion that Seton Hall does so operate would be confirmed by four arguments. First, it is self-evident. Second, the structure and history of Seton Hall are conclusive on the issue. Third, the State of New Jersey has previously concluded that institutions such as Seton Hall do fall within the exception. Four, case law supports Seton Hall's understanding.

1. A University Maintained By The Roman Catholic Archdiocese Of Newark Is Exempt

Seton Hall is a school of higher learning. (Billings Cert., Ex. C (Mission Statement of Seton Hall University)). Seton Hall is operated and maintained by a bona fide religious or sectarian institution, the Roman Catholic Church -

specifically the Archdiocese of Newark. (Billings Cert., Ex. G (Excerpt from the Official Catholic Directory)). It is self-evident that the Catholic Church is a bona fide religious or sectarian institution. Thus, *ipso facto*, Seton Hall is exempt under the LAD.

2. The History And Structure Of Seton Hall Confirm Its Right To The Exemption

Further, an examination of the history and corporate structure of the University provides irrefutable evidence of its operation and maintenance by the Roman Catholic Archdiocese of Newark. (Billings Cert. Ex. D (By-laws of Seton Hall University)). The By-laws of Seton Hall University ("By-Laws") state the purposes of the University, noting in relevant part:

the advancement of education for all persons who seek and qualify for the services of the corporation in the traditions of liberal arts education and Judeo-Christian heritage; **...recognizing and reaffirming its traditional affiliation and faith in the Roman Catholic Church.**

Id. at § 1 (emphasis added).

The By-Laws also state that the entire management of the affairs and concerns of the University are vested in the Board of Trustees and the Board of Regents. *Id.* at Preamble. In turn, the Board of Trustees is required to **check quote** "maintain the essential character of the University as a **Catholic institution of higher learning, it being the stated intention of**

the University that the University shall retain in perpetuity its identity as such an institution. The Board of Trustees shall have the power to take all action necessary to achieve this purpose." *Id.* at Article III § 1-A (emphasis added).

Further, the land upon which Seton Hall sits is required by the By-Laws to revert to the Roman Catholic Archdiocese of Newark if Seton Hall is dissolved. *Id.* at Article III § 1-E. This right remains in the Archdiocese of Newark due to the fact that the Archdiocese provided the original land grant and because the Archdiocese has in the past and continues now to provide services to Seton Hall in the form of priests who teach at Seton Hall. *Id.* Thus, the relationship between Seton Hall and the Catholic Church is clear.

Finally, The Board of Trustees consists of 13 members, many of whom are clergy. *Id.* at Article III § 2-A. Further, the Most Reverend Archbishop of the Roman Catholic Archdiocese of Newark is the President and Chairman of the Board of Trustees. *Id.* at Article III §2-A,E. Finally, in regard to officers of the University, the Chancellor/President of the University is required at all times to be a Roman Catholic priest, who shall be Chief Executive Officer of the University, subject to the authority only of the Board of Trustees and the Board of Regents. *Id.* at Article VI, 1.

**3. The State Of New Jersey Has Previously Held
That Institutions Such As Seton Hall Fall
Within The Exemption**

When the 1992 amendments to the LAD were being considered by the New Jersey Legislature to include sexual orientation as a protected class, the New Jersey Catholic Conference inquired into the effect of the amendments on the rights of institutions such as Seton Hall. In response, the Legislative Counsel wrote a detailed opinion explaining in depth that institutions such as Seton Hall would be exempt from the effect of the amendments. (Billings Cert., Ex. E (March 20, 1992 Letter of Legislative Counsel)). Legislative Counsel highlighted not only the limitations on the LAD created by the First Amendment to the Constitution, but also focused on the fact that the plain language of the LAD removes such institutions from the scope of the amendments. *Id.* at 3. Finally, Legislative Counsel concluded that "[b]ecause State and federal law grants religious groups broad exemption from the requirements of civil rights laws, it is unlikely that [the LAD amendments on sexual orientation] if enacted, could affect these groups in a substantial manner." *Id.* at 9.

Seton Hall relied upon this letter from Legislative Counsel in deciding not to seek additional language in the amendments, and it should not now be told that the opinion of Legislative Counsel, clearly based upon an extensive review of the law, is

without merit. This Court should be guided by the analysis performed by Legislative Counsel and rule that Seton Hall's actions in this matter are not in violation of the LAD, because the LAD does not reach to the actions at issue.

4. State And Federal Case Law Confirms That Seton Hall Falls Within The Exemption

While case law is sparse in New Jersey on the scope of the religious exemption provision contained in the LAD, federal law, does provide some guidance on the issue. This law is instructive here because "[u]nder New Jersey law, claims brought under the LAD receive the same analysis as do claims brought under federal anti-discrimination laws." *Nardi v. Stevens Inst. of Tech.*, 60 F.Supp. 2d 31, 48 (E.D.N.Y. 1999) (citing *Erickson v. Marsh & McLennan, Co.*, 117 N.J. 539, 549-50 (1990)).

Religious or sectarian institutions have been held to be exempt from the provisions of anti-discrimination laws when such laws would work in conflict with the essential religious character of the institution in question. See *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991) (affirming, on statutory and First Amendment grounds, District Court's dismissal of federal anti-discrimination law claims brought by plaintiff who was not rehired by Catholic school because she remarried after divorce in violation of Catholic teaching).

D. The First Amendment Protects Seton Hall's Right To Refuse To Officially Recognize Plaintiff's Group

Forcing Seton Hall to officially recognize a student group defined by and focused upon the sexual orientation of its members would require Seton Hall to violate its essential Roman Catholic identity and mission, that are the core of its existence. Because of the "Free Exercise" Clause of the First Amendment to the Constitution of the United States of America, Seton Hall University, as a Catholic institution, cannot be forced to endorse practices that are inconsistent with Catholic teaching. Thus, even to the extent that plaintiff did not recognize Seton Hall's rights to be exempt under the LAD, and this Court was not convinced that the exemption was applicable to Seton Hall, dismissal would still be required pursuant to the First Amendment.

1. Plaintiff's Proposed Group Is Directly At Odds With Catholic Teaching⁴

In the end, the irreducible doctrine of the Catholic Church at issue in this matter teaches that groups that focus upon sexual orientation are improperly "reductionist" because they fail to see the fullness of the "human person" as a being "made

⁴ This Court is not at liberty to investigate the validity of this teaching or of Seton Hall's understanding of it because determinations of what the Catholic Church does or does not teach are outside the jurisdiction of a civil court, the information is offered, however, to fully elucidate the issue presented.

in the image and likeness of God." (Billings Cert., Ex. F (Letter To The Bishops of the Catholic Church On the Pastoral Care of Homosexual Persons) at ¶ 16).

Indeed, it was for this specific reason that Seton Hall refused to formally recognize the plaintiff's group - a group "for openly gay and lesbian students at Seton Hall." (Billings Cert., Ex. A (Complaint) at ¶ 23 and Complaint's Ex. C). Further, the Catholic Church has specifically stated that homosexual activity cannot "be approved of." (Billings Cert., Ex. F (Letter To The Bishops of the Catholic Church On the Pastoral Care of Homosexual Persons) at ¶ 3).

For these reasons, the Catholic Church teaches that "[n]o authentic pastoral programme [sic] will include organizations in which homosexual persons associate with each other without clearly stating that homosexual activity is immoral." *Id.* at ¶ 15. Further, the Catholic Church has clarified the duties of Catholic institutions in a way that makes it clear that a Catholic institution may not provide assistance to an organization that fails to support Church teaching. In the context of Catholic institutions of higher education, the Catholic Church has stated that:

All support should be withdrawn from any organizations which seek to undermine the teachings of the Church, **which are ambiguous about it**, or which neglect it entirely. Such support, **or even the semblance of such**

support, can be gravely misinterpreted. Special attention should be given . . . the use of Church buildings by these groups, **including the facilities of Catholic schools and colleges**. To some, such permission to use Church property may seem only just and charitable, but in reality **it is contradictory to the purpose for which these institutions were founded**, it is misleading and often scandalous.

Id. at ¶ 17 (emphasis added).

Here, the plaintiff's group's mission statement makes it clear that it is the very type of group that the Catholic Church states cannot be recognized by Seton Hall. *Id.* at ¶ 15.

2. Seton Hall's First Amendment Rights

The Free Exercise Clause of the First Amendment provides an institution protection by forbidding governmental action from "encroaching on the ability of a church to manage its internal affairs." *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 460 (D.C.Cir. 1996) (citing *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)). Thus, "[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990). Indeed, a "long line of Supreme Court cases . . . affirm[] the fundamental right of churches to decide for themselves, free from state interference, matters of church

government as well as those of faith and doctrine." *Catholic Univ. of Am.*, 83 F.3d at 462 (quotations omitted).

Here, the laws of the State of New Jersey cannot be used to force Seton Hall to formally recognize a student group whose mission is fundamentally at odds with the tenets of the Catholic Church that guide Seton Hall pursuant to Seton Hall's history and governance. To do so would violate Seton Hall's right to free exercise of its religious beliefs.

Further, the validity of the interpretation of the LAD exemption that cover Seton Hall, discussed above, is confirmed by the fact that this Court should avoid an interpretation of the LAD that allows Seton Hall's essential Catholic identity and mission to be compromised. Indeed, the Appellate Division has recognized that "[i]n the absence of a clear expression of legislative intent to extend the coverage of the LAD into this domain, [the LAD] should be construed to avoid governmental entanglement with religion in order to preserve its constitutionality." *Wazeerud-Din v. Goodwill Home and Missions, Inc.*, 325 N.J.Super. 3, 11 (App.Div. 1999) (citing *Market St. Mission v. Bureau of Rooming & Boarding House Standards*, 110 N.J. 335, 341, *appeal dismissed*, 488 U.S. 882, 109 S.Ct. 209 (1988)).

Finally, that the LAD cannot force a Catholic institution to adopt policies or recognize groups that are at odds with the

fundamental teachings of the Catholic Church is confirmed by the decision of the Supreme Court of the United States in the analogous case of *Dale v. Boy Scouts of America*, 530 U.S. 640 (2000). There, the Supreme Court of the United States, reversing the New Jersey Supreme Court, made it clear that the First Amendment limits the ability of New Jersey through the LAD to force organizations to adopt views and accept members with which it disagrees. Specifically, in *Dale*, the Supreme Court held that:

The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scout's rights to freedom of expressive association. That being the case, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law.

Id. at 659 (emphasis added).

The Supreme Court's directive in that analogous matter is similarly applicable here. To require Seton Hall to adopt as an "official" student group, a student group that is dedicated to principles that are directly in conflict with the teachings of the Catholic Church that gives Seton Hall its essential Catholic character, would violate Seton Hall's rights under the First Amendment's free exercise clause. This Court should dismiss the plaintiff's claims under the LAD with prejudice.

POINT III

PLAINTIFF'S CONTRACT CLAIM FAILS AS A MATTER OF LAW, BECAUSE DEFENDANT'S ANTI-DISCRIMINATION POLICY DOES NOT CONSTITUTE A UNILATERAL CONTRACT WITH PLAINTIFF

Plaintiff argues that Seton Hall has breached a contract with plaintiff by failing to provide provisional recognition to plaintiff's proposed gay and lesbian student group. That is, plaintiff alleges that because defendant adopted a written anti-discrimination policy, it follows that plaintiff's reliance upon such information in making a decision to attend the University has the effect of constituting a unilateral contract between defendant and plaintiff. (Complaint, ¶¶ 42-45). Plaintiff then reads this contract as requiring Seton Hall to act in a manner that accords with plaintiff's interpretation of the LAD; namely, Seton Hall is required to recognize plaintiff's group because he has demanded it and he interprets the LAD to require it. Plaintiff is misguided in these assertions.

A. The Law Of Contracts Requires The Existence Of An Intent To Be Bound

The law of contracts clearly requires there be intent for formation of a contract; that is, a party cannot unwillingly be made party to a contract. Indeed, the "ultimate question as to whether parties have entered into a contract is one of intent." *Comerata v. Chaumont, Inc.*, 52 N.J. Super 299, 305 (App. Div. 1958). Furthermore, "[a] contract, whether express or implied

in fact, has its source in common intention of parties." *P. Ballantine & Sons v. Gulka*, 117 N.J.L. 84 (N.J.Sup. 1936). In addition to an intent to be bound, "the recipe for making of binding contract requires if not absolute definiteness and certainty on essential terms, at least expressions of assent sufficient to permit reasonable implications to be drawn as to performance to be rendered." *Heim v. Shore*, 56 N.J. Super 62, 72 (App. Div. 1959).

These rules are also applicable to unilateral contracts such as the one the plaintiff alleges here. A "unilateral contract" is one in which there is a promise on one side only which become binding upon the other side giving consideration. *Friedman v. Tappan Development Corp.*, 22 N.J. 523 (1956). Plaintiff's argument in this matter appears to be that he believes Seton Hall promised to recognize his gay and lesbian student group in exchange for the consideration of the plaintiff agreeing to attend Seton Hall.

Unilateral contracts, however, must still follow the "basic rule;" namely, that the court must be able "to ascertain and determine **the intention of the parties**, as of the time of making, as expressed by the language they employed, when read and considered as a whole and in the light of the surrounding circumstances and the purposes they sought to attain." *Packard Englewood Motors, Inc., v. Packard Motor Car Co.*, 215 F.2d 503,

508 (3d Cir. 1954) (emphasis added) (citing *Schlein v. Gairoard*, 127 N.J.L. 358, 360 (1941); *Schlossman's, Inc. v. Radcliffe*, 3 N.J. 430, 435 (1950); *Lawrence v. Tandy & Allen*, 14 N.J. 1, 6 (1953)). Here, these fundamental predicates - intent to contract and definite terms are missing.

B. Because The Documents At Issue Evidence Both A Lack Of Terms And A Lack Of Intent To Be Bound, There Is No Contract In This Matter

Plaintiff's contract claim fails because the documents upon which he relies evidence neither an intent to be bound nor the existence of specific terms that could be enforced.

As to intent to be bound, plaintiff derives alleged intent on the part of Seton Hall from a single sentence in Seton Hall's anti-discrimination policy which reads: "The University supports and implements all state and federal anti-discrimination laws." However, as noted above, the EEO/AA policy specifically tells the reader that it must be understood in the broader context of Seton Hall's commitment to its Catholicity. (Billings Cert., Ex. A (Complaint) at Complaint's Ex. A). Thus, it is not a statement that all will be done in a fashion acceptable to the plaintiff. Indeed, in the end, nothing was ever presented to plaintiff that suggested that Seton Hall would be bound to an individual student's interpretation of Seton Hall's policies regarding questions of sexual orientation.

Further evidence of the University's lack of intent to be contractually bound follows from the inclusion within the text of the policy of a contact name and number for the University's Equal Employment Opportunity/Affirmative Action Officer, "who is responsible for providing information regarding the provisions of the laws and regulations referred to in the preceding paragraphs **and their applicability to the services, programs, and activities offered by the University.**" (Billings Cert., Ex. A (Complaint) at Complaint's Ex. A) (emphasis added). This language renders the "contractual terms" at issue so vague as to be illusory. It is not possible, under any set of facts, to conclude that Seton Hall promised plaintiff that it would treat plaintiff's group in a specific fashion.

Indeed, no expressions of assent to permit formal recognition of gay and lesbian student groups on campus were ever made by the University. On the contrary, as noted above, the Seton Hall Student Handbook states that the University will only recognize groups that "respect the values of the University" (Billings Cert., Ex. B (Excerpts from the Student Handbook)). This language presupposes that Seton Hall will have the ability to make decisions about proposed student groups on a case-by-case basis.

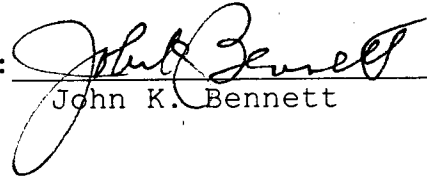
Seton Hall did not express an intent to be bound or set out terms that created a contractual offer under which the plaintiff

could conclude that he was entering into a contract that required Seton Hall to interpret the LAD pursuant to the plaintiff's desire and recognize his proposed student group. In light of these facts, no contract could possibly exist between plaintiff and the University. Therefore, plaintiff's second cause of action must be dismissed as a matter of law for failure to state a claim.

CONCLUSION

Based upon the foregoing, defendant respectfully requests that this Court dismiss plaintiff's Complaint for failure to state a claim upon which relief may be granted.

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