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 APPELLATE DIVISION DOCKET NO.: **ON APPEAL FROM:** SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ESSEX COUNTY DOCKET NO. ESX-L-1866-04 Civil Action SAT BELOW: HONORABLE CLAUDE M. COLEMAN, J.S.C.

DEFENDANT'S BRIEF AND APPENDIX SEEKING INTERLOCUTORY APPEAL

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TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES (Continued)

Page

Statutes

PRELIMINARY STATEMENT

This brief is submitted by the defendant, Seton Hall University ("Seton Hall" or "the University"), in support of its motion for leave to file an interlocutory appeal. Such a motion is warranted on the facts of this case because the only pending questions are questions of law, and yet, after initially granting Seton Hall's Motion to Dismiss for Failure to State a Claim, the Motion Court improperly reversed itself on plaintiff's motion to vacate the dismissal and for reconsideration of the motion to dismiss.

The Plaintiff's motion to vacate the dismissal was improvidently granted because, on the merits, the Motion court got it right the first time in finding that Seton Hall had not waived its exempt status under New Jersey's Law Against Discrimination, N.J.S.A. 10:5-1, *et seq.* (the "LAD) and thus could not be sued on the theories posited by the plaintiff. Nevertheless, the Motion Court was persuaded to reopen this case so that discovery could take place on the purely legal issues of whether various Seton Hall documents constitute a waiver of Seton Hall's LAD exemption and whether those documents create a unilateral contract which binds Seton Hall to act in the manner desired by plaintiff.

As both of these issues are questions of law, this request to take an interlocutory appeal should be granted in order that

the parties may have a resolution of this matter immediately without having to engage in unnecessary discovery.

STATEMENT OF FACTS

Plaintiff is a student at Seton Hall.[1] (Da11 at ¶1).

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] (Da14 at ¶23 and Da26). 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." (Da14-15 at ¶24 and Da32). 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 identity is as a

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[1] Seton Hall accepted the plaintiff's factual allegations as true only for the sake of the motion to dismiss.

[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.

'child of God'- not as a 'heterosexual' or a 'homosexual.'" (Da32).

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.

(Da33)

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. (Da15 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. (Da15 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." (Da81 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.

PROCEDURAL HISTORY

On March 10, 2004, plaintiff, Anthony Romeo, individually, and on behalf of himself and other student applicants for "TRUTH", a proposed gay and lesbian student organization, (hereinafter "Romeo" or "plaintiff"), filed a Complaint against Seton Hall University, A.B.C. Corp.'s 1-100, John Does 1-100 and DEF Non-profit Corp.'s or institutions 1-100 in Superior Court,

Law Division, Essex County, under Docket Number L-1866-04. (Da11).

On June 9, 2004, defendant Seton Hall filed a motion to dismiss plaintiff's Complaint pursuant to Rule 4:6-2(e). (Da6). Due to confusion, plaintiff did not file an Opposition to defendant's motion to dismiss. On June 25, 2004, the Honorable Claude M. Coleman, J.S.C. entered an Order, which included a brief opinion granting Seton Hall's motion to dismiss with prejudice based upon the pleadings and motion papers of defendant. (Da93-94).

On July 21, 2004 and July 27, 2004, plaintiff, supported by a Certification of Marianne F. Auriemma, Esq., a brief, an Affirmation in Support of Thomas D. Shanahan, Esq., moved for reconsideration and to vacate the dismissal of his Complaint. (Da95). Plaintiff's motion papers argued, in part, the merits of the plaintiff's claims and addressed the issues in defendant's brief in support of its motion to dismiss.[3] (Da97-104).

On August 18, 2004, defendant served its Opposition to plaintiff's motion for reconsideration and to vacate a

dismissal. On or about August 23, 2004 plaintiff filed his Reply to defendant's Opposition to his motion for reconsideration. (Da108).

On August 31, 2004, the Honorable Claude M. Coleman, J.S.C. heard the oral arguments of the parties. By Order and Memorandum of Decision (hereinafter "Opinion") dated September 20, 2004, the trial court, upon consideration of plaintiff's brief in support of his motion for reconsideration and defendant's brief in Opposition, reinstated plaintiff's Complaint and vacated his prior dismissal with prejudice of plaintiff's claims. (Da1-5).

The Opinion bases this reinstatement on the question of whether documents promulgated by Seton Hall waived its right to exemption under the LAD and whether those same documents create a unilateral contract which binds Seton Hall. (Da3-5).

Defendant Seton Hall, which was served with the the Order on September 22, 2004, now thereby moves for leave to appeal the September 20, 2004 Order and Memorandum.

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[3] Plaintiff also argued that the Motion Court's failure to allow him to submit a brief on the original motion to dismiss was capricious; Seton Hall does not seek to appeal on any aspect of this issue and instead is arguing only the merits. Therefore, Seton Hall has left the various portions of the record below relating to the procedural confusion out of the appendix. Seton Hall will, of course, be happy to provide these documents should this Court wish to view them.

LEGAL ARGUMENT

POINT I

LEAVE TO FILE AN INTERLOCUTORY APPEAL SHOULD BE GRANTED IN THIS MATTER

While, "the grant of leave to appeal an interlocutory order is itself highly discretionary," it will be exercised in the "interests of justice" to prevent a matter from proceeding when there are pending unanswered questions to law that must be resolved. *See State v. Reldan*, 100 N.J. 187, 205 (1985) (noting Appellate Division's broad discretion); Rule 2:2-4 (setting forth "interests of justice" standard); *Macedo v. Dello Russo*, 359 N.J.Super. 78 (App.Div. 2003) (granting interlocutory appeal and reversing trial court's dismissal of Consumer Fraud Act claim on legal grounds); *Watts v. Camaligan*, 344 N.J.Super. 453, 461 (App.Div. 2001) (granting interlocutory appeal and reversing motion court's denial of motion to dimiss); *Carroll v. United Airlines*, 325 N.J.Super. 353 (App.Div. 1999) (granting interlocutory appeal to resolve uncertainty created by motion court's denial of third-party defendant's motion to dismiss).

In the instant case, Seton Hall moved to dismiss on the basis that, as a matter of law, the LAD specifically exempts it from this very litigation. In response, plaintiff, while admitting the validity of the exemption, argued that Seton Hall had somehow waived the exemption. The motion court initially decided the motion in Seton Hall's favor, but then, on

reconsideration, concluded that the issue of waiver was a fact question. A review of the submitted material, however, and the case law confirms that, as presented, the question of waiver was one of law and that the Motion Court should have affirmed its previous dismissal of plaintiff's Complaint.

POINT II

THE MOTION COURT PROPERLY DISMISSED THE CASE AS A MATTER OF LAW UPON ITS INITIAL CONSIDERATION OF THIS MATTER

An examination of the relevant arguments, the supporting case law and the documents referenced in the Complaint confirms that the motion court should have affirmed its dismissal of this case as a matter of law.[4]

The plain language of the LAD makes it clear that, as a matter of law, Seton Hall has not violated the LAD on the facts presented by plaintiff. The LAD provides, in part, that it is illegal for "any owner of any place of public accommodation...to discriminate against any person...on account of sexual orientation." N.J.S.A. 10:5-12(f). The LAD then qualifies the scope of the statute, presumably in recognition of First Amendment protections, by limiting the definition of "a place of public accommodation." Namely, the LAD exempts educational institutions affiliated with religious organizations from the

[4] The documents submitted by Seton Hall were either referenced in the plaintiff's Complaint, or were items of which the Court could properly take judicial notice on a motion to dismiss.

definition. N.J.S.A. 10:5-5(l). Specifically, 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." *Id.* Thus, an educational facility such as Seton Hall, which is maintained or operated by a religious institution, is exempt from the dictates of the LAD. Seton Hall is thus exempt from suits of this nature under the LAD.

Plaintiff admitted in his Complaint, and in papers before the Motion Court, that Seton Hall was exempt from his demands under the LAD, nevertheless, he argued that, incongruously, Seton Hall affirmatively waived its exempt status (and thus consented to being sued under the LAD in this case) by adopting an Anti-Discrimination policy. (Da99-100 at ¶¶ 5-8). The Motion Court, holding plaintiff to his Complaint, properly found that the plaintiff had conceded that Seton Hall "is exempt from the requirements of the NJLAD." (Da4). Thus, the only question before the Motion Court was whether Seton Hall's Equal Employment Opportunity/Affirmative Action ("EEO/AA") policy could be read as a waiver of Seton Hall's statutory rights. The answer to this question, as a matter of law, is that Seton Hall did not waive its statutory rights.

A. Seton Hall Did Not Waive The Rights It Admittedly Has Under The LAD

Seton Hall presented specific reasons why a waiver of its statutory LAD exemption could not be inferred, however, the Motion Court's opinion failed to consider the three legal arguments made by Seton Hall that required the dismissal of this action. This Court should give these arguments proper consideration and in doing so reverse the Motion Court's vacation of its order of dismissal.

1. Seton Hall's Reference To The LAD Necessarily Incorporated Seton Hall's Exemption From Portions Of It

First, the Motion Court relied on Seton Hall's commitment to defending the right of all students to be free from bias and prejudicial attacks as evidence that Seton Hall might have waived its right to refuse to formally recognize plaintiff's student group. (Da4). This position, however, cannot be supported by the plain language of the University's EEO/AA policy.

The EEO/AA policy, far from waiving Seton Hall's statutory rights, makes it clear that no such rights are being waived. First, the policy states that Seton Hall "supports and implements" the entirety of what Seton Hall understands to be its rights and duties under the LAD. The policy states that: "[t]he University supports and implements **all state and federal**

anti-discrimination laws." (Da23-24). (emphasis added). Thus, on its face, the EEO/AA policy does not forbid Seton Hall from relying on the fact that the LAD itself exempts the University from certain provisions of the LAD.

2. The Plain Language Of The Policy States That It Will Be Interpreted In Accord With The Teachings Of The Catholic Church

More importantly, the policy states that the University is committed to EEO/AA programs which will be "carried out **in accordance with the teachings of the Catholic Church** and the proscriptions of the law." (Da23). Thus, the EEO/AA policy upon which plaintiff and the Motion Court relied 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. Reliance upon the policy to find the possibility of waiver of the LAD's religious institution exemption, when the policy itself recognizes that it is governed by the teachings of the Catholic Church was thus incongruous.

3. The Plain Language Of The Policy Places Its Interpretation Solely In Seton Hall's Discretion

Third, 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. The policy plainly states that: "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 to 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.

4. The Motion Court Failed To Deal With These Arguments Each Of Which Required Dismissal As A Matter Of Law And Instead Confused The Fundamental Issue

Without specifically explaining how the three different sections of the policy cited above could be ineffective to protect Seton Hall's statutory and constitutional rights, the Motion Court found that a waiver may have occurred and instructed the parties to commence with discovery on whether Seton Hall had a subjective intent to waive its rights. (Da4-5).

This ruling, however, failed to apply the practical effect of what this Court has stated about waiver; namely:

> A waiver must be the intentional relinquishment of a known right. *W. Jersey Title Co. v. Indus. Trust Co.*, 27 N.J. 144, 152-53 (1958). Waiver must occur by a "clear unequivocal and decisive act." *Id.* at 152. The circumstances must show clearly that while the party knew of the right, he or she abandoned the right either by design or indifference. *See Merchs. Indem. Corp. of N.Y. v. Eggleston*, 68 N.J.Super. 235, 254 (App.Div. 1961), *aff'd*, 37 N.J. 114 (1962).

Borough Of Closter v. Abram Demaree Homestead, Inc., 365 N.J.Super. 338, 354 (App.Div. 2004).

Further, it is well-recognized that "[a]lthough there are some circumstances under which statutory rights may be waived, even in those circumstances, 'any such waiver must be clearly and unmistakably established, and contractual language alleged to constitute a waiver will not be read expansively.'" *Christ Hosp. v. Department of Health and Senior Services*, 330 N.J.Super. 55, 63 (App.Div. 2000), *quoting Red Bank Regional Educ. Ass'n v. Red Bank Regional High Sch. Bd. of Educ.*, 78 N.J. 122, 140 (1978).

On the basis of the Complaint, and the documents presented the question of waiver is not in need of any further factual development; rather, that Seton Hall did not waive its statutory rights was plain on the very face of the documents presented to the Motion Court. Indeed, what is most confusing about the decision of the Motion Court is that, even while citing case law that states that waiver is determined by looking at the actions

of the party allegedly waiving its right, it simultaneously suggests that the question of waiver in this case will be viewed from the perspective of the plaintiff. (Da4) (suggesting that the failure of Seton Hall to place the language cited above "prominently" may have resulted in waiver). However, the question of waiver is a question of subjective intent on the part of the person **giving up the right**. *Petrillo v. Bachenberg*, 263 N.J.Super. 472, 480-81 (App.Div. 1993) (reversing judgment because trial court had failed to properly instruct jury that waiver required subjective intent on the part of the person waiving rights).

The confusion is further compounded by the Motion Court stating, immediately after questioning whether Seton Hall made it sufficiently "clear" that it was not waiving its statutory rights under the LAD, that the question to be resolved was Seton Hall's "state of mind or intent." (Da4). Yet Seton Hall's "state of mind" is perfectly clear from reviewing the language of the EEO/AA policy discounted by the Motion Court; namely, Seton Hall was not waiving its rights or else it would not have stated that the policy would be "carried out **in accordance with the teachings of the Catholic Church**." (Da23). Similarly, none of the other language cited above would have been included if Seton Hall had the subjective intent to waive its statutory rights.

In sum, pursuant to the LAD, Seton Hall has certain statutory rights and thus the question to be resolved is whether Seton Hall intended to waive its rights. A plain reading of the policy's language, regardless of whether it is in bold or not, makes it clear that Seton Hall had no such subjective intent to waive those rights. Therefore, the question of waiver must, as a matter of law, be decided in favor of Seton Hall. Under the law, the subjective understanding of persons who are not waiving any rights is simply not relevant to this question of whether rights have been waived by the rights-holder.

In conclusion, because the finding that the policy language at issue does not constitute a waiver does not require any discovery, this Court should grant Seton Hall's motion for an interlocutory appeal and take the opportunity to find, as a matter of law, the Seton Hall has not waived its statutory rights under the LAD.

B. The Motion Court's Decision To Allow The Plaintiff's Contract Argument To Proceed Ignores That, As A Matter Of Law, No Unilateral Contract Could Be Created

Plaintiff also asserted in his Complaint that Seton Hall breached a contract with him by failing to provide provisional recognition to his proposed gay and lesbian student group. (Da17 at ¶¶42-45). Plaintiff asserts that Seton Hall's adoption of a written anti-discrimination policy formed a unilateral contract pursuant to which Seton Hall apparently agreed to

recognize plaintiff's gay and lesbian student group in exchange for the consideration of the plaintiff agreeing to attend Seton Hall. However, plaintiff's assertions that a valid and binding contract was formed between Seton Hall and plaintiff are wholly lacking in legal support.

In order for such a contract to be formed, the Court must be able to discern the terms of the contract and the intent of the parties to be bound. *Packard Englewood Motors, Inc., v. Packard Motor Car Co.*, 215 F.2d 503, 508 (3d Cir. 1954). 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 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 becomes binding upon the other side giving consideration. *See, e.g. 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 and thus the Motion Court was correct in granting Seton Hall's motion to dismiss, and that judgment should now be reinstated by this Court.

1. 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 intent to be bound nor the existence of specific terms that could be enforced. In addition, the analysis applied by the Motion Court was misplaced and holds Seton Hall to contract principles that are

inapplicable in light of precedent and concern for the constitutional rights of Seton Hall.

Plaintiff simply failed to point to any document that could be construed as creating sufficient terms for the imposition of contract liability - or even the possibility of it - upon Seton Hall. For example, as to intent to be bound, plaintiff derives alleged intent on the part of Seton Hall from the 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. (Da23).

This 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.**" (Da23) (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 proposed 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, the Seton Hall Student Handbook states that the University will only recognize groups that "respect the values of the University." (Da36). 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 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 or its own Student Handbook 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 was properly

dismissed by the Motion Court and should not have been resurrected.

2. The Motion Court Erred In Ruling That This Matter Should Be Interpreted Pursuant to Woolley v. Hoffman-LaRoche

In addition, an examination of the Motion Court's opinion reinstating the contract claim highlights the errors made below and which will improperly govern this matter going forward absent correction by this Court. First, the Motion Court relied upon *Woolley v. Hoffman-LaRoche, Inc.*, 99 N.J. 284 (1985), for the proposition that Seton Hall's student handbook could have created a unilateral contract. (Da5).

This application of *Woolley* (an argument not actually forwarded by the plaintiff here) in the context of the student-university relationship is, however, misplaced. In fact, the courts of this State have repeatedly recognized in a variety of contexts that the relationship between the student and the university should not be analyzed from a contract perspective because the relationship is not truly contractual in nature. *Mittra v. University of Medicine and Dentistry of New Jersey*, 316 N.J.Super. 83, 90 (App.Div. 1998) (refusing to apply *Woolley* standard to claim that university improperly dismissed plaintiff from dental program); *Beukas v. Board of Trustess of Fairleigh Dickinson University*, 255 N.J.Super. 552, 564 (Law Div. 1991) (refusing to force a contract analysis onto plaintiff's claim

that the university improperly closed dental school which plaintiffs attended); *Trustees of Columbia University* v. *Jacobsen*, 53 N.J.Super. 574 (App.Div.), *appeal dismissed*, 31 N.J. 221 (1959), *cert. denied*, 363 U.S. 808 (1960) (refusing to recognize fraud action predicated upon alleged failure of university to provide courses as represented in college catalog).

In this case, the analysis should be similar to that applied in *Mittra*; namely, did Seton Hall fulfill its procedural obligations to the plaintiff. *Mittra*, 316 N.J.Super. at 91-92. Here, there is no dispute - indeed, the face of the Complaint admits as much - that Seton Hall properly considered the plaintiff's proposed group and attempted to reach an agreement with the plaintiff.

3. The Motion Court Erred Applying The *Woolley* Standard Based On The Facts As Alleged By Plaintiff

Furthermore, even if this matter is examined under the contract principles set forth in *Woolley* a plain reading of the relevant portion of the Student Handbook relied upon by the plaintiff, demonstrates that plaintiff has no reasonable basis to believe that he is entitled to have Seton Hall recognize his proposed group. Indeed, the Student Handbook reads as follows:

> Students have the right to self-determination in their own affairs within the parameters of sound and reasonable

> judgment, and which are respectful of the values and mission of the University. Students may:
>
> * * *
>
> 5. seek to join or organize clubs, organizations or associations that promote their common interests, and respect the values and mission of the University. Such organizations are required to submit a statement of purpose, a statement of compliance with all anti-discrimination policies of the University and a list of current officers.

(Da36). Thus, the terms of the Student Handbook itself are explicit. Seton Hall will not recognize simply any group that is formed, but will only recognize clubs that "are respectful of the values and mission of the University." *Id.*

Here, Seton Hall made its concern with the plaintiff's proposed group clear and decided not to formally recognize the group based on these principles. Indeed, as set forth above in the Statement of Facts, Dr. Wankel made every attempt to accommodate the plaintiff within Seton Hall's understanding of its Catholic character and mission. She based her decision on a thorough review of Catholic doctrine, and explained that "the most compelling guidance from the Church directs us to care for the human person whose fundamental identity is as a 'child of God'- not as a 'heterosexual' or a 'homosexual.'" (Da22).

This concern for giving the plaintiff a fair opportunity to be heard and to come to an accommodation with him evidences that

Seton Hall applied the Student Handbook in exactly the manner that it stated it would. These facts are not in need of further discovery because they are set forth in the plaintiff's own Complaint. The Motion Court erred in ruling that the Motion to Dismiss should not have been initially granted because, based on the facts alleged by plaintiff, there is no set of facts upon which he will be entitled to relief.

4. The Motion Court's Opinion Strips Seton Hall Of Its Constitutional Rights, And Puts Its Catholic Mission In Jeopardy

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." (Da81 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.

Nevertheless, plaintiff's attempt to turn Seton Hall's disgust with marginalization and disrespect into an affirmative obligation to formally recognize the plaintiff's proposed group no matter what form it takes, is misplaced and misreads the law and Seton Hall's obligations under the Student Handbook. The New Jersey courts have long recognized some discretion should be left to private associations so that they may run their affairs

as they see fit. Here, plaintiff seeks to eliminate all of Seton Hall's rights and force it to adopt positions that are in conflict with its fundamental precepts. In light of the Supreme Court's warnings about the scope of state power in *Dale v. Boy Scouts of America*, 530 U.S. 640 (2000), this Court should grant the motion for leave to file an interlocutory appeal and then reverse the decision of the Motion Court and dismiss the complaint with prejudice.

CONCLUSION

In conclusion, based on the foregoing, it is respectfully requested that this Court: grant Seton Hall's motion for leave to file an interlocutory appeal, reverse the decision of the Motion Court and dismiss plaintiff's Complaint with prejudice.

CONNELL FOLEY LLP
Attorneys for Defendant,
Seton Hall University

By: Marc D. Haefner

DATED: October 11, 2004

SUPERIOR COURT OF NEW JERSEY

ESSEX VICINAGE

CHAMBERS OF
DE M. COLEMAN
JUDGE

HALL OF RECORDS
465 DR. MARTIN LUTHER KING, JR., BLVD.
NEWARK, NEW JERSEY 07102

NOT FOR PULBICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

Memorandum of Decision on Motion for Reconsideration

Case Name: Anthony Romeo vs. Seton Hall, et al.

Docket No.: ESX-L-1866-04

Date: September 20, 2004

Relief Sought: Motion to Reconsider and Vacate Dismissal of Complaint

TO: Thomas D. Shanahan, Esq., Co-Counsel for Plaintiff
Marianne Auriemma, Esq., Attorney for Plaintiff
Connel Foley, LLP, Attorney for Defendant
Dania M. Billings, Esq., Attorney for Defendant
Mark D. Haefner, Esq., Attorney for Defendant

Materials Reviewed: Plaintiff's Brief in Support of its Motion to Vacate the Dismissal and for Reconsideration of the Motion to Dismiss.

Defendant's Brief in Opposition to Plaintiff's Motion to Vacate the Dismissal and for Reconsideration of the Motion to Dismiss.

This Memorandum deals with the motion filed by Plaintiff seeking reconsideration of the Court's Order on June 25, 2004, which dismissed Plaintiff's complaint with prejudice. The application on June 25 was unopposed and was decided on the materials submitted and the reasoning stated therein.

Plaintiff argues that the motion should have been heard on July 9, 2004, to which the parties had apparently agreed, but due to misunderstandings and some confusion on the part of the parties and the court, the Defendant did not have time to prepare its opposition and appear at oral argument. Plaintiff also argues that the court failed to consider Plaintiff's arguments, and therefore its decision on June 25, 2004 was arbitrary, capricious or unreasonable. The court finds some merit to Plaintiff's arguments and in its discretion reconsiders its prior Order, and after listening to the

arguments of counsel, reading the briefs of both parties, and considering the colloquy between counsels and the court on August 30, 2004, the Court GRANTS Plaintiff's Motion to Amend and VACATES its previous Order to Dismiss With Prejudice, and allows this matter to proceed to trial.

Defendant's Motion to Dismiss is brought under R.4: 6-2(e), failure to state a claim upon which relief can be granted. The Rule provides that if matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by R. 4:46. Defendant presented its motion with matters outside the pleadings. However, Defendant's and Plaintiff's arguments and the exhibits presented were directed to the allegations contained in the pleadings and toward the standard informing decision of a motion to dismiss for failure to state a claim under R. 4:6-2. There were no statements of facts, no affidavits, and no referrals to depositions. Since all parties have now responded and no facts beyond the pleadings were relied upon, the court decides the motion using the standard under R. 4:6-2. Under this Rule, the complaint must be searched in depth and with great liberality to determine if a cause of action can be gleamed even from an obscure statement, particularly if further discovery is taken. See Printing Mart v. Sharp Electronics, 116 N.J. 739 (1989). Every reasonable inference is accorded the plaintiff, and the motion is granted only in rare instances, and ordinarily without prejudice.

Plaintiff's first cause of action accuses Defendant of violating the New Jersey law Against Discrimination. Plaintiff concedes that Seton Hall is a religious or sectarian institution, maintained by the Roman Catholic Archdiocese of Newark, and is exempt from the requirements of NJLAD. Plaintiff alleges, however, that Seton Hall has affirmatively waived its exemption by its own internal policies and by its conduct. Plaintiff cites Seton Hall's Student Handbook and its anti-discrimination policy which appears on its website and includes participation in extracurricular activities.

> "The University supports and implements all state and federal anti-discriminate ton 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 non-academic, curricular or extracurricular, because of race, color, religion, age, national origin, gender, sexual orientation, handicap, and disability or veteran's status...These policies are to be applied in all decisions regarding hiring, promotion, retention tenure, compensation, benefits, layoffs, academic programs, and social and recreational programs."

The concept of waiver requires in intentional relinquishment of a known right. Allstate v. Howard Savings Inst., 127 N.J. Super. 479 (Ch. Div. 1974). Thus, Plaintiff must show that Defendant knew of its right to an exemption and deliberately and voluntarily intended to relinquish it. Defendant's argument that the interpretation of NJLAD would be on its own terms and in "accordance with catholic teachings" is not at all clearly or prominently mentioned and is not deemed to be a limitation or qualification of the rights promised by implantation of all State and Federal Anti-Discrimination Laws. Plaintiff's claim involves a determination of Defendant's state of mind or intent. Discovery is not completed, and the court is faced with a meager record. Other evidence and circumstances may show more clearly unmistakably signs of Defendant's decision to forgo an advantage it may have insisted on in order to attract students from around the world and of

different backgrounds and cultures. Defendant voluntarily solicits and accepts students from around the nation and the world, many of whom have been the subject of discrimination and suffer from confusion and rejection. Incoming students have need of not just financial support, but moral and emotional support. Defendant has allowed other similar groups to organize for purposes of social and emotional support. Defendant's message at its website and in its handbook seems to promise students not only acceptance at its facilities and protection against discrimination, including discrimination based upon sexual orientation, but to allow all incoming students equal access to its social, recreational and academic programs, and the same services and privileges provided other groups. Giving the Plaintiff the benefit of all favorable inferences, the facts as alleged would seem to support a claim of waiver. Having shown that Defendant waived its exemption under LAD, Plaintiff must then show that Defendant has violated LAD by denying to Plaintiff that to which it had accorded all other groups at its facilities. Again, the facts would tend to support a claim that plaintiff's application was DENIED because of its sexual orientation.

Plaintiff's second cause of action alleges Breach of Contract by Defendant. Plaintiff cites Seton Hall's Student Handbook, which seeks to protect students against sexual oriented, based discrimination and submits that the student handbook creates a binding contract between student and university, which is binding on both. Wooley v. Hoffman, 99 N.J. 284 (1985).

The law of contracts also requires that there be intent to form a contract. Defendant's intent may be express or implied. P. Ballantine & Sons v. Gulka, 117 N.J.L. 84 (N.J. Sup. 1936). Without evidence of the surrounding circumstances and the reasonable inferences to be drawn therefrom, the court is unwilling at this stage to state as a matter of law that Defendant's handbook creates a unilateral enforceable contract. The facts here are similar to those in Wooley: The website is available to everyone. The handbook is distributed to every incoming student; and the " terms" are reasonable clear. Plaintiff alleges that he relied upon the statements made in making his choice of universities. Thus, the factual allegations are sufficient to support a claim from which relief can be granted. Giving the Plaintiff every reasonable inference at this point, and for this purpose, "all facts alleged in the complaint and legitimate inferences drawn therefrom are deemed admitted", a promise and reliance upon that promise may be found. Defendant's refusal to accord Plaintiffs the same rights that it grants to others at its facilities could be deemed a breach of the promise made by Defendant.

The court in its decision merely allows the complaint to survive dismissal. Plaintiff must prove each element of one or both counts of his case, and the fact that it may be a long and arduous journey does not justify the court blocking the road at this point. Printing Mart v. Sharp Electronics, Supra.. Nor does this decision preclude further motions or cross motions after discovery is completed.

An appropriate order shall accompany this memorandum.

CLAUDE M. COLEMAN, J.S.C.