

**JULIE W. RUDIANI,
Plaintiff-Respondent,**

v.

**MISSION GIRLS OF NEW JERSEY, ESSEX COUNCIL,
Defendant-Appellant.**

A-98-4321-T4

Superior Court, Appellate Division

Submitted August 5, 1998 -- Decided September 4, 1998

Before Judges GRIM, REAPER and MERCY.

John Cardinal, Cardinal, O'Connor, L.L.P., attorneys for the plaintiff-respondent (*Mr. Cardinal*, of counsel and on the brief).

Alphonse Tamatto, Tamatto & Pattack, P.C., attorneys for the defendant-appellant (*Mr. Tamatto*, of counsel and on the brief).

REAPER, J.A.D., joined by GRIM, J.A.D.

This case arises out of a June 10, 1998 decision of the Superior Court, Law Division, holding that the Mission Girls of New Jersey, Essex Council ("MGNJ") are subject to the state Law Against Discrimination (LAD) and may not deny access to MGNJ leadership positions on the basis of sexual orientation. The trial court determined that the MGNJ is a place of public accommodation subject to the LAD, lacking the distinctive qualities that might afford the MGNJ constitutional protections under the First Amendment and bar application of the LAD. We disagree.

We hold that the MGNJ is not a place of public accommodation and therefore does not violate the LAD in denying the plaintiff-respondent's application for a position in the smaller, selectively chosen group of MGNJ leaders. We hold further that the trial court improperly excluded evidence of the plaintiff-respondent's intention to use a leadership position to promote lesbianism among young members. To apply the LAD and order the MGNJ's acceptance of plaintiff's application would violate the group's First Amendment's right of freedom of expressive association.

Accordingly, we reverse.

The Facts

Plaintiff-respondent Julie W. Rudiani has been an active member of the Mission Girls since she was eight years old. Until she was 14 years old, she was a member of Mission

Girls Troop 68 in Maplewood. At age 14, she became a member of Senior Troop 117 in Newark and remains active. In late January, 1998, Rudiani contacted the administrators of St. Theresa of Avila Elementary School in Newark, and suggested that the school sponsor a Mission Girls Troop beginning in the 1998-99 school year, to be led by Rudiani. Sr. Alice Sharpton, S.J., principal of St. Theresa's, interviewed Rudiani on February 4 and again on February 5, 1998, and agreed to sponsor the troop. On February 6, 1998, two weeks after her twentieth birthday, Julie Rudiani filed an application with the Essex Council of the MGNJ for a position as a Mission Girls Troop Leader.

At the time of her application, Rudiani was a sophomore at Rutgers College in Newark, and a member of the Rutgers Gay-Lesbian Alliance, a student group dedicated to fostering the rights of homosexuals and lesbians in the Rutgers community. On February 14, 1998, the late Rev. Ralph Reed, Chairman of the Board of Trustees of St. Theresa of Avila Elementary School and a well-known political activist, observed Rudiani at a gay rights march in University Heights. Recognizing Rudiani from her visits to St. Theresa's, Rev. Reed reportedly followed Rudiani and overheard the following heated exchange between Rudiani and an unidentified female companion:

Companion: "I can't believe you, Julie. How can an intelligent lesbian like you be a part of that patriarchal, girl-brainwashing group? How can you be such a damn hypocrite?"

Rudiani: silence.

Companion: "What about the time you said you couldn't wait to be in a position where you could do some good for gay rights and be a role model for young people?"

Rudiani: silence.

Companion: "You swore you'd do the right thing and use the Mission Girls for the only good they could do us --- as a means to fight the patriarchy and promote our life-style and our politics. Do you deny that promise?"

Rudiani: silence.

Companion: "You owe it to us and to all young women. You're not going to deny that now, are you?"

Rudiani: silence and noticeable reddening of the face.

Companion: "ARE YOU?"

Rudiani: silence and downcast eyes.

Companion: "I thought not."

Rudiani: continued silence.

Appalled and incensed that an avowed lesbian activist was about to take charge of a Mission Girls Troop at St. Theresa's, Father Reed immediately telephoned the MGNJ Essex Council Director, Donna Manover, and reported these observations. The next day, February 15, 1998, writing on behalf of the Board of Trustees of St. Theresa's, he urged Sr. Sharpton to withdraw the school's offer to sponsor a Mission Girls Troop. He identified Rudiani as a lesbian activist and set out his recollection of the conversation he had overheard, as set out above. It was his last official act in his capacity as Board of Trustees Chairman; Rev. Reed took ill the next evening, was hospitalized, and died of heart failure on March 7, 1998. He was never deposed in connection with the suit at bar, and the woman he alleged was with Rudiani has never been identified.

In response to Rev. Reed's report, Sr. Sharpton spoke to Essex Council Director Manover. Manover, in turn, consulted MGNJ officials in Trenton. As the result of those consultations, in a letter dated March 1, 1998, Manover informed Rudiani that her application for a leadership position with the Mission Girls was being denied on the basis of her lesbianism, stating that:

It has come to our attention through a trustworthy source that you are an avowed lesbian. It is the policy of our organization that no homosexual may be an adult member of the Mission Girls of New Jersey. The Mission Girls of New Jersey has always reflected the moral expectations that Mission Girl families have had for the organization. We do not believe that homosexuals provide a role model consistent with these expectations. Accordingly, we will not permit the registration of a publicly avowed lesbian as a leader of the MGNJ

Rudiani attempted to appeal this decision in a March 17, 1998 meeting with Manover and MGNJ officials in Trenton, at which time Rudiani admitted that she was a practicing lesbian and that she had been present at the February 14 march, though denying any intent to promote lesbianism actively through a troop leadership position. (Rudiani maintained these admissions and denials throughout the trial and appeal.) MGNJ officials again denied Rudiani's application, repeating the reasons cited in the March 1 denial.

Also on March 1, 1998, Sr. Sharpton wrote to Rudiani and indicated that while the school was still interested in sponsoring a Mission Girls Troop, it could not do so without a leader approved by MGNJ.

The Mission Girls of New Jersey was chartered by a State legislative act in 1915; its constitution states the following purpose:

to promote, through organization and cooperation with religious groups, the ability of girls to do things for themselves and their communities, and to teach them patriotism, courage, self-reliance, and kindred virtues. It is the purpose of the Mission Girls to serve others by helping to instill these values in young women.

The Mission Girls Oath, to which all members are sworn, states:

On my honor, I will do my best: To do my duty to God and my country and to obey the Mission Girls Law; To help other people and my community at all times; To keep myself physically strong, mentally awake, and morally straight.

The Mission Girls Law states that all Mission Girls will strive to be “Trustworthy, Loyal, Helpful, Friendly, Courteous, Kind, Obedient, Cheerful, Thrifty, Brave, Clean, and Reverent.”

Membership in the Mission Girls is open to girls who are six years old and older; troop leadership positions are open to women 20 years old and older. The latest available membership reports, as of December 1996, indicate that the group has 24,300 members statewide, including 3,023 girls and 289 troop leaders registered in the Essex Council. The MGNJ reports that membership is currently on the rise, and Councils throughout the state are planning expansion.

The MGNJ engages in advertising and recruitment of the general public through religious institutions and publications. Religious schools, churches and temples donate the use of facilities to MGNJ and help advertise MGNJ community-oriented activities. Charitable fundraising activities include celebrity sporting events and youth tournaments to benefit a variety of community programs, and are aimed at the general public. MGNJ owns 1.75 acres of shorefront property in Elberon, New Jersey, where a retreat center and camping facilities are maintained for use by all troops in the state. MGNJ also maintains a retail store in Paramus, New Jersey, which is open to the general public and sells Mission Girls uniforms, publications, accessories and camping equipment. All troop leaders are unpaid volunteers; administrative officers and support staff, currently numbering 22 individuals, receive a minimum wage paid out of MGNJ fundraising accounts and membership dues.

Although MGNJ is itself non-sectarian and open to all regardless of religious affiliation, all members are required to profess a belief in God and a commitment to foster the growth of Judeo-Christian values in the community at large. The organization emphasizes open membership in order to maintain its vitality and to reach girls at all levels of society. According to MGNJ publications, “neither the constitution nor the bylaws of the Mission Girls permits the exclusion of any girl who meets minimum age requirements.” The same publication says that adult troop leaders must demonstrate “1) dedication to the goals of the Mission Girls; 2) ability to relate to girls; 3) leadership skills; and 4) organizational skills.” MGNJ does not allege that Rudiani has failed to meet these requirements.

On March 25, 1998, Rudiani filed a complaint in the Superior Court, Law Division, alleging that defendant’s action violated the state Law Against Discrimination. She sought a declaratory judgment that MGNJ had deprived her of an accommodation in violation of the LAD; she also sought immediate reconsideration of her leadership application, as well as damages.

At a preliminary hearing pursuant to N.J.R.E. 104 on May 5, 1998, Judge Gerald Dean Ferraro of the Law Division denied plaintiff’s motion to exclude the evidence of Rev. Reed’s report. Procedurally, the case went forward as a bench trial, Judge Ferraro conditionally admitting the Reed report but reserving judgment as to its admissibility. The trial concluded and the court ruled on June 10, 1998 that MGNJ is a place of public accommodation under the LAD, and thus may not reject Rudiani’s leadership application on the basis of her sexual orientation. The court further concluded that MGNJ’s proffered evidence was inadmissible as hearsay and therefore did not support a conclusion that admission of Rudiani as a troop leader would infringe any MGNJ right of freedom of expressive association.

MGNJ filed its notice of appeal on both grounds on June 17, 1998.

Discussion

Appellant MGNJ denies that its rejection of Julie Rudiani's leadership application constitutes a violation of the LAD. New Jersey's anti-discrimination statute provides that:

All persons shall have the opportunity . . . to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, . . . *affectional or sexual orientation* . . . or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right. [N.J.S.A. 10:5-4 (1988) (emphasis added).]

The trial court based its determination of an LAD violation on its characterization of the MGNJ as a “place of public accommodation.” In so doing, the court relied on an expansive construction of the LAD which lists, expressly and without limitation, numerous places such as camps, shops, hotels, restaurants, theaters, swimming pools, hospitals, libraries, colleges and universities. N.J.S.A. 10:5-5(*l*). This subsection further provides that

Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, and the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed.

[*Id.*]

The court below rejected MGNJ's argument that it is a private club on the basis of its open membership policies and its recruitment of the general public. *Clover Hill Swimming Club v. Goldsboro*, 47 N.J. 25 (1966); *Fraser v. Robin Dee Day Camp*, 44 N.J. 480 (1965). The court also rejected MGNJ's contentions that it is exempt from the LAD because it qualifies as an “educational facility operated or maintained by a bona fide religious or sectarian institution” or “one in loco parentis” with the right to direct the moral education of its members. The court determined that MGNJ is not an educational facility, regardless of any ties to religious organizations, and that MGNJ's temporary charge of young members does not constitute status in loco parentis. *A.S. v. B.S.*, 139 N.J. Super. 366 (Ch. Div. 1976), *aff'd* 150 N.J. Super. 122 (App. Div. 1977).

The trial judge reasoned that “in answering the question whether MGNJ is 'a place of public accommodation' the court must be guided by the remedial nature of the LAD, and interpret the statute with an expansive approach sympathetic to its objectives,” citing *National Org. for Women v. Little League Baseball, Inc.*, 127 N.J. Super. 522 (App. Div.), *aff'd* 67 N.J. 320 (1974); *Andersen v. Exxon Co.*, 89 N.J. 483 (1982). Emphasizing MGNJ's open membership policy, statewide presence and community service activities, the court held that MGNJ is a place of public accommodation barred from discriminating in its membership policy on the basis of sexual orientation.

We disagree with this broad interpretation of the LAD, and find MGNJ's narrower

interpretation compelling.

First, the plain meaning of the language used in N.J.S.A. 10:5-5(f) clearly reveals the legislature's intent to limit the scope of the LAD to facilities open to the general public. The statute sets forth an extensive list of places of public accommodation --- not one of organizations. A physical place to which one may point is clearly what the legislature intended. Use of the phrase "and other real property" in N.J.S.A. 10:5-4 further indicates that a property-based interpretation is the proper one.

MGNJ is an organization for girls; its activities take place in facilities donated by religious schools and institutions. Its one retail shop and minimal property holdings do not convert this nonprofit organization into "a place of public accommodation." We agree with the approach taken in other jurisdictions, and reject an interpretation that includes membership organizations unconnected to a structural facility or a business establishment. *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267 (7th Cir.), *cert. denied*, 510 U.S. 1012 (1993); *Seabourn v. Coronado Area Council, BSA*, 257 Kan. 178, 891 P.2d 385 (1995).

Moreover, MGNJ argues that it is a private organization whose membership is restricted to those individuals who are willing and able to understand and live by the moral mandates of the Mission Girls Oath and Law. Troop meetings are relatively intimate activities, attended by small groups of girls, and led by adults with whom the young members develop personal, trusting relationships. Advertising and recruitment for new members are carried out exclusively through religious schools and institutions. Such policies and practices can not be said to constitute an open and unrestricted invitation to the public at large; MGNJ's relatively small membership, small troop sizes, selective membership criteria, and the heightened requirements for troop leaders in particular, preclude application of the LAD. *Kiwanis Int'l. v. Ridgewood Kiwanis Club*, 806 F.2d 468 (3rd Cir. 1986), *reh'g denied*, 811 F.2d 247 (3d Cir.), *cert. dismissed* 483 U.S. 1050 (1987).

Appellant further argues that application of the LAD to compel MGNJ's acceptance of an avowed lesbian would, in the circumstances here, violate MGNJ's First Amendment right of freedom of expressive association. Specifically, appellant points to the exclusion by Judge Ferraro of persuasive evidence that Rudiani intended to use her position as a Mission Girls troop leader to promote lesbianism among young girls. MGNJ argues that in holding the late Rev. Reed's report of the events of February 14, 1998 inadmissible as hearsay, the court failed to take notice of Rudiani's real threat to MGNJ's First Amendment rights. Ignoring the report, Judge Ferraro ruled that while the Mission Girls have a right to espouse moral tenets derived from Judeo-Christian beliefs, accepting Rudiani as a troop leader would not affect that right in any material way or impair MGNJ in reaching its various stated goals.

We agree with the Mission Girls that exclusion of Rev. Reed's report amounts to reversible error. Even when statements to be admitted as evidence were made by a deceased declarant unavailable at trial, such "hearsay" evidence is admissible in civil suits under certain factual circumstances, satisfied here. *Woll v. Dugas*, 104 N.J. Super. 586 (Ch. Div. 1969), *aff'd* 112 N.J. Super. 366 (App. Div. 1970); *Beckwith v. Bethlehem Steel*, 185 N.J. Super. 50 (Law Div. 1982). The trial court improperly excluded Rev. Reed's report, which strongly suggested that not only was Rudiani an avowed lesbian, but one who planned to use a leadership position in the Mission Girls to further her personal goal

of promoting lesbianism among the young members of her troop. Such activism by an adult troop leader would indeed impede the Mission Girls' ability to express its collective views reflecting Judeo-Christian morality, or to instill those core values in its young members.

To force the Mission Girls to accept Julie Rudiani as a troop leader would force them equally to endorse her symbolic, and possibly openly articulated, message of lesbianism. Even if we were to accept the trial court's finding that MGNJ is a "place of public accommodation" subject to the LAD, this court could not compel Rudiani's membership as an adult troop leader whose personal, expressed message contradicts the organization's message. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995); *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1 (1988). To do so would trample MGNJ's First Amendment right of freedom of expressive association. We may not compel the Mission Girls to alter their message of Judeo-Christian morality by including messages more acceptable to other groups in society. *Hurley*, 515 U.S. at 581.

For these reasons, we reverse the decision of the trial court and hold that MGNJ is not a "place of public accommodation" subject to the LAD. We hold further that the trial court erred in excluding evidence that Rudiani intended to use her position as a Mission Girls troop leader to promote lesbianism, and that application of the LAD in such circumstances would infringe MGNJ's First Amendment right of freedom of expressive association.

REVERSED.

MERCY, J.A.D., dissenting

I respectfully disagree with my colleagues and would affirm the decision of the court below to apply the LAD and preclude further sexual orientation discrimination by the Mission Girls. The trial court was correct both in its assessment of MGNJ as a "place of public accommodation" and in its ruling on the evidentiary issue. The majority seems to have ignored the legislative history behind the LAD, and the case law that has construed this LAD liberally in order to effectuate its sweeping purpose to eradicate the cancer of discrimination. *Fuchilla v. Layman*, 109 N.J. 319 (1988); *Jackson v. Concord Co.*, 54 N.J. 113 (1969).

The majority's logic is flawed. Interpreting the LAD to encompass only those organizations tied to a physical situs or business establishment is irrational because "places do not discriminate; people who own and operate places do." *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1282 (7th Cir.), (Cummings, C.J., dissenting), *cert. denied*, 510 U.S. 1012 (1993). The majority's decision permits an organization to discriminate at will simply because it does not operate out of a fixed location. Such a reading can not be what the legislature intended; indeed such a reading indiscriminately targets those who have the financial resources to own or operate a "place," and would no doubt be subject to attack on constitutional grounds.

The courts of this state have not previously embraced the narrow interpretation offered by the majority. In *National Org. for Women v. Little League Baseball, Inc.*, 127 N.J.

Super. 522, 531 (App. Div.), *aff'd* 67 N.J. 320 (1974), for example, the court determined that Little League Baseball, Inc. is a place of public accommodation by reason of its open invitation to children throughout the community at large, not because it operates out of baseball fields in public parks.

Even before the Little League decision, the highest Court in this State held that facilities and activities “offered to and . . . dependent upon the broad-based participation of members of the general public” are the types of accommodation that the Legislature intended to include under the LAD. *Fraser v. Robin Dee Day Camp*, 44 N.J. 480, 488 (1965). There, the court found in a day care center's open advertising of its services the requisite reliance on participation by the general public. *Id.* There is ample proof in the record that MGNJ relies on the broad-based participation of the general public; its membership numbers, advertising operations, recruitment efforts, and retail store all support the conclusion that the Mission Girls constitute a “place of public accommodation” under the LAD. The majority's holding today is bound by a niggardly literalism that constrains the effectiveness of this statute, and represents a setback in the battle against discrimination in this state.

Furthermore, I disagree with the majority's rather hasty disposal of the evidentiary issue presented by this case. Rev. Reed's report concerning the events of the February 14, 1998 gay rights march was properly deemed inadmissible as hearsay. Rev. Reed established a reputation as a modern-day St. George slaying the dragon of aberrant sexuality in Catholic education; he may have needed one last dragon to satisfy his thirst for publicity. His report to MGNJ's Donna Manover therefore can not be regarded as a trustworthy observation made in good faith; the trial court questioned that trustworthiness at a preliminary hearing, concluded it was lacking, and correctly excluded the evidence. *Jeter v. Stevenson*, 284 N.J. Super. 229 (App. Div. 1995).

There is, therefore, absolutely no evidence to support the Mission Girls' argument that compelled admission of Julie Rudiani threatens their right to freedom of expressive association. In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the Supreme Court held that Minnesota's public accommodation law, by requiring that the Jaycees admit women, did not unconstitutionally infringe upon the male members' freedom of expressive association. The Court found no evidence that the law would require any change in the Jaycees' creed or operations. *Id.* at 628-29. Similarly, the LAD does not require MGNJ to alter its philosophy or goals, its Mission Girls' Oath or Law. Julie Rudiani's avowed sexual orientation can have no material effect on the ability of the Mission Girls to carry out their stated goals. Compelling MGNJ to accept her application for a position as troop leader does not violate MGNJ's First Amendment right to freedom of expressive association. *Id.*

For the foregoing reasons, I would affirm the trial court's order compelling MGNJ to consider Julie Rudiani's application for troop leader without regard to her acknowledged lesbianism.

**IN THE SUPREME COURT
OF THE STATE OF NEW JERSEY**

A-98-522

JULIE W. RUDIANI,
Plaintiff-Appellant,

v.

MISSION GIRLS OF NEW JERSEY,
ESSEX COUNCIL,
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ORDER

The appeal of this matter by the plaintiff-appellant is, on this 8th day of September, 1998, hereby docketed as to all appropriate issues. Simultaneous briefing is directed and both parties are to file briefs with this Court on or before November 30, 1998.

STEPHEN W. TOWNSEND, Clerk
For the Court