



# FRATERNAL LAW™

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As many of our readers are aware, Kappa Kappa Gamma was sued earlier this year by several members who took issue with the decision to admit a transgender woman as a member of the sorority. Given the significance of the case and the multitude of questions it generated, the case's dismissal on August 25<sup>th</sup> warranted immediate attention, and therefore we are releasing Tim Burke's article as a special edition of the Newsletter.

As we recognize the victory KKG achieved in this case, we also invite you to mark your calendars to join us for our annual Fraternal Law Conference in early November. We will dive deep into this case and many others that have shaped the legal landscape of the fraternal world. The Conference is a wonderful opportunity to connect, learn, and strategize with fellow fraternity and sorority leaders, legal professionals, and experts in the field.

Thank you for being a part of the *Fraternal Law Newsletter* community, and we look forward to exploring this groundbreaking case and other updates together.

-Ilana L. Linder

## Lawsuit Against Kappa Kappa Gamma Over Transgender Member Dismissed

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In a decision surprising because of its speed, the lawsuit challenging Kappa Kappa Gamma's ("KKG") decision to allow its chapter at the University of Wyoming to admit Artemis Langford, a transgender woman, as a member of the Chapter was dismissed.<sup>1</sup> The court issued a strong, forty-one-page decision just two weeks after the motion to dismiss the Complaint had been fully briefed. Some may suggest it is also surprising that the U.S. District Court Judge, Alan B. Johnson, who granted the dismissal, was appointed to the bench in 1985 by President Ronald Reagan.

As Judge Johnson described the case, six members of the University of Wyoming Chapter of KKG that were "embittered" (the Court's word) by their Chapter's admission of Langford, sued KKG, its President, Mary Pat Rooney, the local House Corporation, and Langford. The Chapter

<sup>1</sup> *Westenbroek v. Kappa Kappa Gamma Fraternity*, No. 23-CV-51-ABJ, 2023 WL 5533307 (D. Wy. Aug. 25, 2023).

itself was not sued. The Plaintiffs wanted the Court to void Langford’s admission, find that the KKG President “violated her fiduciary obligations by betraying KKG’s Bylaws, and prevent other transgender women from joining” Kappa Kappa Gamma. *Id.* at \*2.

The Court, relying heavily on caselaw precedent—and writing in a refreshingly clear style not always seen in court decisions—makes short work of Plaintiffs’ case.

“Unadorned, this case condenses to this: who decides whether Langford is a Kappa Kappa Gamma sister?” summarizes the Court. Early on, the Court makes clear that it is not the job of the Federal Court to make that determination:

The University of Wyoming Chapter voted to admit—and, more broadly, a sorority of hundreds of thousands approved—Langford. With its inquiry beginning and ending there, the Court will not define “woman” today. The delegate of a private, voluntary organization interpreted “woman,” otherwise undefined in the non-profit’s bylaws, expansively; this Judge may not invade Kappa Kappa Gamma’s freedom of expressive association and inject the circumscribed definition Plaintiffs urge.

*Id.* at \*1.

The Court carefully reviewed the policies of KKG, noting KKG’s purpose includes uniting women in close bonds of friendship so that each may attain social, moral, and intellectual excellence. Critically, the Court notes that the organization’s purpose includes “to establish Chapters at various colleges and universities, provide for proper organization, installation and operation *with each Chapter having the right and responsibility to select members of its choice in accordance with Fraternity<sup>2</sup> standards and procedures.*” (Emphasis in original.) *Id.* at \*2.

In 2018, KKG had published a “Guide for Supporting Our LGBTQIA+ Members,” stating in part, “Kappa Kappa Gamma is a single-gender organization *comprised of women and individuals who identify as women*, whose governing documents do not discriminate in

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<sup>2</sup> While KKG’s formal name is Kappa Kappa Gamma Fraternity, the Court, except when quoting from KKG documents, refers to KKG as a sorority, as Plaintiffs do throughout their documents.

membership selection except by requiring good scholarship and ethical character.” (Emphasis in original.) *Id.*

The Guide clearly states that “each Kappa Chapter has the final choice of its members...[T]he Chapter is well within its rights to offer [a] potential member [whose is transgender] a bid.” *Id.*

The Court accepted the fact that the Wyoming Chapter voted to admit Langford and that “per KKG protocol, Langford was subsequently approved by KKG headquarters prior to her initiation to the Chapter.”<sup>3</sup> *Id.* at \*3.

While the Court analyzed a variety of issues raised by both the Plaintiffs—in their Complaint and response to Defendants’ Motion—and the Defendants—in their Motion to Dismiss—this article will focus on the key issues relied on by the Court on the merits of the claims. Of the four different claims made by Plaintiffs, the most important one was their attempt to establish a derivative action under Ohio law where KKG is incorporated. Plaintiffs claimed that the President had violated her duties of loyalty, care, and obedience and compliance with KKG bylaws. While the Court found that it had jurisdiction over KKG President, and that Plaintiffs had gotten half-way through the requirements of a derivative action, the Court struck a death knell to this claim. Strongly stating that Plaintiffs’ derivative claim against Rooney “fails to escape KKG’s First-Amendment-protected freedom of expressive association to include transgender members.” *Id.* at 4.

Plaintiffs claimed that from 1870 to 2018, KKG defined “woman” to exclude transgender women, and to change that required a bylaw amendment. Defendants, in their Motion to Dismiss, argued that private organizations may interpret their own governing documents and may define

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<sup>3</sup> Unlike the Plaintiffs who, in their Complaint and other Court papers, refused to refer to Langford in the feminine, the judge did use the feminine throughout his decision.

“woman” as including transgender women. The Court resolved it by writing, “Defendants are correct. Defining ‘woman’ is Kappa Kappa Gamma’s bedrock right as a private, voluntary organization—one this Court may not invade.” *Id.* at \*12.

The Court cites to very consistent Ohio law, given that the derivative action depends on Ohio law, to support its conclusion that courts will not interfere with the internal affairs of a voluntary association. One of the Ohio cases explained:

A voluntary association may, without direction or interference by the courts, for its government, adopt a constitution, by-laws, rules and regulations which will control as to all questions of discipline, *or internal policy and management*, and its *right to interpret and administer the same is as sacred as the right to make them*.<sup>4</sup>

(Emphasis in original). *Id.* at \*13 (quoting *Stibora v. Greater Cleveland Bowling Ass'n*, 63 Ohio App. 3d 107, 113 (8th Dist. 1989)).

And the Court finds ample support from federal courts as well, beginning with the 2000 *Boy Scouts of America v. Dale*<sup>5</sup> case in which the Court allowed the Scouts to prohibit Dale, an openly gay man, from being a scoutmaster because to do so violated Scout policy. To require admitting Dale as a scoutmaster would run “afoul of the Scout’s freedom of expressive association.” *Id.* at \*13 (quoting *Boy Scouts*, 530 U.S. at 656. The U.S. Supreme Court summarized it bluntly: “the Boy Scouts take an official position. . . and that is sufficient for first amendment purposes.” *Id.*

Judge Johnson summarized the point by writing:

*Dale* controls today, interestingly with the shoe on the other foot. Whether excluding gay scoutmasters in *Dale* or including transgender women in Kappa, this Judge may not invade Kappa’s sacrosanct associational right to engage in protected speech. KKG’s “official position” of admitting transgender women, even if decreed by a mere “delegate,” is speech which this Court may not impinge.

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<sup>4</sup> *Stibora v. Greater Cleveland Bowling Assoc.*, 63 Ohio App. 3d 107, 113 (8<sup>th</sup> Dist. 1989).

<sup>5</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

*Id.* at \*14.

Repeating the core facts supporting his decision, Judge Johnson goes on to note: Cognizant of Langford's gender identity, the UW Chapter determined that she met *their* criteria for membership including, inter alia, 'integrity, respect and regard for others'; KKG confirmed the same . . . their decisions lie beyond the purview of this Court.

*Id.*

The Court favorably observed that the standing rules of KKG provide that "the administrative duties of Fraternity Council shall include. . . interpreting the Fraternity's Bylaws and Standing Rules."<sup>6</sup> *Id.* While noting that Plaintiffs' desire to interpret those Bylaws differently than the National Fraternity has, the Court refused to take Plaintiffs' bait, explaining:

This Court cannot step in every time a member, or even multiple members, cries foul when a bylaw is disparately interpreted; if it did KKG and its Fraternity counsel would spend their days responding to derivative suits from thousands of current members and 210,000 alumnae.

*Id.* at \*15.

The Court suggested Plaintiffs have other alternatives than seeking Court intervention, stating, "Plaintiffs' alternative recourse lies within their Chapter and organization not this Court. An appeal to other Chapters is one route; disassociation, while drastic, is another." *Id.*

It must be noted that this decision may not bring this legal controversy to an end. Plaintiffs have the opportunity to appeal the decision. The Court declined to dismiss the case with prejudice, specifically dismissing it without prejudice, so the Plaintiffs also have the opportunity to file a new complaint.<sup>7</sup> In any event, this is a very strong start for Kappa Kappa Gamma.

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<sup>6</sup> Regardless of whether the governing documents of any organization specifically contain such language, there is strong argument that among the powers inherit in a governing board is the ability to interpret the organizations documents.

<sup>7</sup> Plaintiffs had also sued Artemis Langford, the member in question, who also filed a Motion to Dismiss. But given the Court's dismissal of the case against the other Defendants, her separate motion to dismiss was rendered moot.

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**25th Annual Fraternal Law Conference Registration Is Now Open****November 2nd & 3rd, 2023**

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We have reached a monumental milestone: our Fraternal Law Conference is celebrating 25 years! Come join us for an exciting program filled with timely and relevant legal updates. Don't miss your chance to get in on all the action! But act quickly, as we can only provide CLE processing for those registered within Fourteen days of the event.

**REGISTER TODAY!**

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The goal of *Fraternal Law* is to provide a discussion of fraternity law, but its contents are not intended to provide legal advice for individual problems of Greek organizations. The latter should be obtained from your attorney.

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