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Legal and Ethical Implications of Using Religious Beliefs as the Basis for Refusing to Counsel Certain Clients

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This article addresses potential legal and ethical implications of lawsuits that have been brought when counselors and counseling students have used their religious beliefs as the basis for refusing to counsel lesbian, gay, bisexual, and transexual clients. Four lawsuits are reviewed, issues relevant to the cases are identified, and implications for counselor educators and counseling students are discussed.

Keywords: legal issues, ethics, value conflicts, religious discrimination

A series of legal cases have sparked considerable discussion around the question of whether counselors can use their religious beliefs as the basis for refusing to counsel lesbian, gay, bisexual, and transsexual (LGBT) clients. This discussion has illuminated tension between counseling professionals and counselor educators who view LGBT relationships as normal and healthy expressions of love and intimacy (see Whitman & Bidell, this issue) and some religiously conservative counselors and counselors-in-training who consider same-sex relationships to be immoral. LGBT-affirmative counselors and counselor educators believe that LGBT clients have the right to expect that they will be able to discuss their intimate relationship issues without fear that their counselors will judge them negatively. This belief is based on the ethical responsibility of counselors to avoid imposing their own values. An opposing stance is taken by some conservative religious counselors and counselors-in-training who believe that they should have the right to refuse to counsel LGBT clients regarding relationship issues because homosexual behavior conflicts with their religious values.

These conflicting values and competing rights have been at issue in four court cases: two that involved counseling practitioners and two that involved counselors-in-training. In this article, we describe these cases and discuss the legal rights and ethical responsibilities of counselors and employers, and of counselor educators and students, that these cases have brought into focus. We conclude with a look at possible future developments related to these cases.

Lawsuits Brought by Counseling Practitioners

The first legal case that brought religious values issues to the attention of the counseling profession was *Bruff v. North Mississippi Health Services, Inc.* (2001). In this case, the United States Court of Appeals for the Fifth Circuit upheld the termination of an Employee Assistance Program (EAP) counselor (Bruff) who refused to counsel a lesbian client on relationship issues. In early 1996, Sandra Bruff counseled her EAP-referred client, who returned several months later for further counseling. The client disclosed that she was a lesbian and asked for help with improving her relationship with her partner. At that point, Bruff explained that "homosexual behavior" conflicted with her religious beliefs and offered instead to continue to counsel the client regarding other issues. Another appointment was scheduled, but the client did not return and complained to her employer, who then filed a complaint with Bruff's employer, the North Mississippi Medical Center (Hermann & Herlihy, 2006).

Bruff's employer attempted to accommodate her religious beliefs, asking her to clarify the job duties from which she wished to be excused. Bruff asserted that she would be unwilling to counsel a client on any subject that went against her religion. The employer determined that it was not feasible to assign all such clients to the other EAP counselors; therefore, Bruff was removed from her position and placed on leave without pay. Her employment was terminated after she failed to avail herself of opportunities to transfer to another position within the company.

Bruff filed suit, and among her claims was the assertion that her employer had violated the prohibition against religious discrimination under Title VII of the Civil Rights Act of 1964, as amended in 1972. The case eventually was decided at the federal appellate court level. The Court held that although employers do have a legal obligation to make reasonable accommodations for their employees' religious beliefs, this obligation did not extend to accommodating Bruff's "inflexible position" (*Bruff v. North Mississippi Health Services, Inc.,* 2001, p. 500), which resulted in undue hardship to the EAP program. The Court of Appeals

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specifically did not take a position on the ethical issues involved; the holding was based on the legal issues raised by the parties. The Bruff case was perhaps the first to call the counseling profession's attention to the issue of whether it is ethically appropriate to refer a client on the basis of a counselor's personal religious values.

In *Walden v. Centers for Disease Control and Prevention* (2010), the U.S. District Court for the Northern District of Georgia ruled against a counselor in a case that presented circumstances very similar to those in *Bruff v. North Mississippi Health Services, Inc.* (2001). In 2007, an employee of the Centers for Disease Control and Prevention (CDC) sought relationship counseling through her EAP. During the initial intake session, Walden, the EAP counselor, informed the client that her desire to obtain same-sex relationship counseling conflicted with Walden's values. Walden then referred the client to another counselor. Later, the client filed a complaint against Walden, stating that although the second counselor was satisfactory, she "felt judged and condemned" and that Walden's "nonverbal communication also indicated disapproval" (*Walden v. Centers for Disease Control and Prevention*, 2010, p. 5).

Walden's employer, in an attempt to accommodate her religious beliefs, asked her to refer future clients "without mentioning her religious objections or personal values" (*Walden v. Centers for Disease Control and Prevention*, 2010, p. 9). The employer's objection was not to the practice of referring LGBT clients, but to Walden's practice of disclosing her judgment of the clients' sexual or affectional orientation while doing so. When Walden refused to change her referral process, she was laid off. Like Bruff, she did not take advantage of opportunities to apply for other positions within the corporation and was then terminated as an employee.

Walden filed suit, arguing that her termination was a violation of Title VII's prohibition against religious discrimination. The U.S. District Court ruled against Walden, basing its decision on "the manner in which [Walden] handled the situation" rather than on Walden's religiously based refusal to provide same-sex relationship counseling.

The rulings in these two legal cases affirmed that employers of counselors have a legal duty to make reasonable accommodations for the counselors' religious beliefs. However, these two legal cases affirm that counselors cannot be inflexible when religious accommodations are offered. In *Bruff v. North Mississippi Health Services, Inc.* (2001), the counselor's inflexible position resulted in undue hardship to her EAP colleagues, and, in *Walden v. Centers for Disease Control and Prevention* (2010), the counselor's insistence on disclosing her religious values when making a referral failed to meet the employer's expectation that the "EAP provide a welcoming environment for any CDC employee seeking help" (p. 7). When counselors take such rigid positions, it appears that courts will likely uphold the right of employers to terminate their employment.

Lawsuits Brought by Counseling Students

In the two legal cases that prompted this special section, conservative Christian counselors-in-training have brought suit against the counselor educators who dismissed them from their training programs. In these two cases, the core question again is whether counselors can use religious beliefs as the basis for referring LGBT clients. However, these cases have potential implications that extend beyond the narrow rulings in *Bruff* and *Walden*, because they have challenged how counselors are trained at public universities.

In *Ward v. Wilbanks* (2010), student Julea Ward filed suit after she was dismissed from the counseling program at Eastern Michigan University (EMU). Ward was enrolled in her practicum class when she learned that a clinic client who had been assigned to her was an individual who had previously sought counseling to deal with same-sex relationship issues. Ward told her supervisor that she would not be able to provide effective counseling services for this client because "providing 'gay-affirmative' counseling would have violated her religious beliefs" (*Ward v. Wilbanks,* 2010, p. 34). The supervisor reassigned the client. An informal review was held, in which the counseling faculty expressed concern that Ward was refusing to comply with program policies and the *ACA Code of Ethics* (American Counseling Association [ACA], 2005). A remediation plan was suggested to help Ward comply with the *ACA Code of Ethics*, but Ward refused to participate in the plan. After a formal review, Ward was dismissed from the counseling program. Ward brought suit, and the court granted summary judgment in favor of the university, effectively upholding the student's dismissal from the program. Ward appealed, and, in January 2012, the U.S. Sixth Circuit Court remanded the case back to the district court for a jury trial (see Dugger & Francis, this issue, for a full discussion of this case).

A more recent lawsuit was brought by a student in *Keeton v. Anderson-Wiley* (2010). The facts of the case are similar to those in *Ward v. Wilbanks* (2010). Jennifer Keeton, a counseling student at Augusta State University (ASU), had repeatedly stated that she "condemns homosexuality" (*Keeton v. Anderson-Wiley*, 2010, p. 3) based on her view of the Bible's teachings. The faculty, concerned that Keeton might "not be able to separate her personal religious views on sexual morality from her professional counseling responsibilities" (*Keeton v. Anderson-Wiley*, 2010, p. 4), placed her on remediation status. Keeton decided not to participate in a portion of her remediation plan, and, eventually, she was dismissed from the training program. Keeton brought suit against the faculty and the university; in 2010, the U.S. District Court for the Southern District of Georgia denied her motion for a preliminary injunction. The court rejected Keeton's claim that her Title VII rights to freedom from religious discrimination had been violated, stating that it was not Keeton's "personal beliefs that were their

[the faculty's] concern, but rather only her inability to separate her personal beliefs in the judgment-free zone of a professional counseling situation" (*Keeton v. Anderson-Wiley*, 2010, p. 20).

Keeton appealed the court's decision to the federal appellate court, which issued a decision in December 2011 upholding the university's dismissal of Keeton. The court noted that "Keeton does not have a constitutional right to disregard the limits [the university] has established for its clinical practicum and set her own standards for counseling clients in the clinical practicum" (*Keeton v. Anderson-Wiley*, 2010, p. 25).

Issues Raised by the *Ward* and *Keeton* Cases

The *Ward* and *Keeton* cases raised a number of interrelated issues that have generated ongoing debate regarding the rights and responsibilities of both counselor educators and counseling students. In the following sections, we discuss some of those rights and responsibilities as they relate to dismissal procedures, due process and informed consent, nondiscrimination, and referral.

Dismissal Decisions

A primary responsibility of counselor educators is to function as gatekeepers to the profession (Gaubatz & Vera, 2002; Remley & Herlihy, 2014). Counselor educators and supervisors have an ultimate duty to protect the public from counseling practitioners who are unable to provide competent services. According to the *ACA Code of Ethics*, when counselor educators become aware of students' limitations that might impede performance, they must not endorse these students for completion of the training program (ACA, 2005, Standard F.5.d.), and they are ethically obligated to recommend dismissal from the program when those students are unable to provide competent professional services (Standard F.5.b.).

The decision to dismiss a student from a counseling program is a very serious one, and counselor educators do not take it lightly (Remley & Herlihy, 2010). In making such decisions, they rely on guidelines provided by the *ACA Code of Ethics* (ACA, 2005) and by their accrediting body, the Council for Accreditation of Counseling and Related Educational Programs (CACREP). The *ACA Code of Ethics* mandates that dismissal decisions are made only after students have received ongoing evaluation and appraisal (Standard F.9.a.) and after faculty have sought consultation and have documented their decision (Standard F.9.b.2.). Students must be given an opportunity to appeal dismissal decisions. These decisions are particularly difficult when they are based on deficiencies in clinical performance rather than on academic performance. The CACREP *Standards* (2009) mandate that faculty must uphold the institution's due process requirements and codes of ethics when evaluations indicate that the student is not appropriate for the profession.

Historically, courts have recognized that university faculty members are uniquely qualified to judge the performance of students, and they have deferred to the judgments of professors on matters of student dismissal (*Regents of University of Michigan v. Ewing,* 1985). In *Board of Curators, University of Missouri v. Horowitz* (1978), the U.S. Supreme Court established that professional program faculty may dismiss students who are academically successful but are deficient in skill performance, as long as elements of due process are observed. The Horowitz case involved a medical student who demonstrated proficiency in nonclinical course work but was dismissed from medical school in her final year because of her perceived lack of clinical skills.

In *Plaintiff v. Rector and Board of Visitors of The College of William and Mary* (2005), a decision was rendered in favor of the counseling faculty and the university when a counseling student was dismissed on the grounds of deficient professional performance. McAdams and Foster (2007) and McAdams, Foster, and Ward (2007) discussed the dismissal of the student from their counseling program. They noted that counselor education faculty members are ethically obligated to dismiss students when remedial efforts do not result in improved clinical performance, although they can experience legal consequences when they do so.

The courts' rulings in *Ward* and *Keeton* generally have been consistent with the established reluctance of courts to interfere with academic decisions. The *Keeton* court stated explicitly in its discussion of its ruling that "matters of educational policy should be left to educators" (p. 14). The district court in *Ward*, in its analysis, commented that courts give "universities broad latitude when it comes to matters of pedagogy" (p. 22). The appeals court in *Ward* also recognized that universities are given considerable latitude in designing educational policy.

Due Process and Informed Consent

As is evident in the previous discussion of dismissal decisions, the rights of students must be protected throughout the process. Students must have recourse to address such decisions and be provided with due process according to the policies and procedures of their institution (*ACA Code of Ethics*, 2005, Standard F.9.b.3.). The first *Ward* court paid careful attention to the plaintiff's claim that her due process rights under the 14th Amendment had been violated. The court noted that EMU's disciplinary policy was stated in the student handbook, which incorporated the *ACA Code of Ethics* with its nondiscrimination standards. The court noted that Ward was given opportunities to improve her performance, including an informal review that was not disciplinary in nature and the offer of a remediation plan. The appeals court in *Ward*, in its decision to remand the case for a jury trial, identified that a "key problem . . . is that the school does not have a no-referral policy for practicum students." (p. 3). This underscores the importance of providing students with informed consent and

the need for universities to have in place clear statements about what students will be expected to do in their practicum. The *Keeton* court examined the remediation plan developed by the ASU faculty and, using reasoning similar to that of the district court in the *Ward* case, determined that Keeton's 14th Amendment due process rights had not been violated.

Perhaps due, in part, to these legal cases, our professional literature indicates that counselors and counselor educators have given considerable attention to remediation plans in recent years. Efforts are being made to define problematic behaviors, identify behavioral indicators, develop effective interventions, and ensure that procedures are legally sound (Brown, 2011; Dufrene & Henderson, 2009; Henderson, 2010; Kress & Protivnak, 2009; McAdams & Foster, 2007; McAdams, Foster, & Ward, 2007; Ziomek-Daigle & Christensen, 2010).

Nondiscrimination

Although attorneys for the student plaintiffs asserted that the students were asked to change their beliefs regarding the morality of same-sex relationships, the *Ward* and *Keeton* courts disagreed. For example, the first *Ward* district court noted that the student "was not required to change her views or religious beliefs; she was required to set them aside in the counselor–client relationship" (*Ward v. Wilbanks,* 2010, p. 33). The Keeton appellate court noted that "far from compelling Keeton to profess a belief or change her own beliefs about the morality of homosexuality, [the university] instructs her not to express her personal beliefs regarding the client's moral values" (*Keeton v. Anderson-Wiley,* 2010, p. 29). The counselor educators explained that dismissal decisions were based on concerns not only about students' refusal to set aside their beliefs, but also about their refusal to counsel any LGBT clients regarding relationship issues. The faculty relied on professional codes of ethics and accreditation standards in determining that the students were engaging in unacceptable discriminatory behavior.

The CACREP *Standards* (2009) include sexual orientation as a category of multicultural diversity (p. 61) and require students in accredited programs to understand "counselors' roles in eliminating biases, prejudices, and processes of intentional and unintentional discrimination" (Section II.G.2.f.). ACA has taken a strong social justice stance in its protection of the rights of LGBT individuals. The *ACA Code of Ethics* (ACA, 2005) prohibits counselors from condoning or engaging in discrimination based on sexual orientation (Standard C.5.). The appellate court in the *Keeton* decision acknowledged the validity of incorporating ACA's standards into the curricula of counseling programs at public universities:

> All students are taught the ACA's fundamental principles, including that counselors must support their clients' welfare, promote their growth, respect their dignity, support their autonomy, and help them pursue their own goals for counseling. Further, [the university's] curriculum requires that all students be competent to work with all populations, and that all students not impose their personal religious values on their clients. Keeton remains free to express disagreement with [the university's] curriculum and the ethical requirements of the ACA, but she cannot block the school's attempts to ensure that she abides by them if she wishes to participate in the clinical practicum, which involves one-on-one counseling, and graduate from the program. (*Keeton v. Anderson-Wiley,* 2010, pp. 17–18)

Because the student plaintiffs in both lawsuits indicated that they intended to become school counselors, they would be expected to abide by the ethical standards of the American School Counselor Association (ASCA). The preamble to the ASCA *Ethical Standards for School Counselors* (2010) provides that "each person has the right to be respected, be treated with dignity and have access to a comprehensive school counseling program that advocates for and affirms all students from diverse populations including . . . sexual orientation." The ASCA *Ethical Standards* also state that school counselors are expected to continue to improve knowledge and skills related to effectively working with a diverse population, including gay and lesbian clients (Section E.2.c.).

ASCA (2013) also has issued a position statement on counseling lesbian, gay, bisexual, transgender, and questioning (LGBTQ) youth, which further clarifies that school counselors "are committed to the affirmation of youth of all sexual orientations and identities." ASCA's position is that it is the role of the professional school counselor "to provide support to LGBTQ students to promote student achievement and personal well-being." The school counselor's role includes assisting "all students as they clarify feelings about their own sexual orientation/gender identity and the identity of others in a nonjudgmental manner."

Additionally, ACA took the unusual step of filing an amicus curiae brief in support of the EMU faculty defendants, expressing the belief that it is unethical behavior on the part of a counseling student to refuse to counsel an entire class of individuals, such as LGBT clients.

Referral

Some religiously conservative counselors-in-training, like Ward and Keeton, have suggested that referring gay or lesbian clients to other counselors is ethically mandated because they are not competent to work with the clients. Although the *ACA Code of Ethics* (ACA, 2005) requires that counselors practice only within the boundaries of their competence (Standard C.2.a.), the same standard reiterates that counselors are expected to "gain knowledge, personal awareness, sensitivity, and skills pertinent to working with a diverse client population." Standard A.4.b. further supports respecting the

diversity of clients and cautions counselors to avoid imposing their own values on clients.

It could be argued that Ward felt incompetent to counsel her practicum client, particularly if she had not anticipated that she would be required to counsel a client whose behavior was in conflict with her religious values. In that instance, referring that particular client was a more acceptable option for Ward than attempting to counsel him and thus risk doing harm. However, LGBT-affirmative counselor educators do not accept the refusal of Ward (or any other student) to attempt to gain competence with the LGBT client population. They expect such students to comply with the provisions of a remediation plan created to help them develop multicultural competence in working with LGBT clients. In other words, a referral might be appropriate in a single instance, but, as the district court in *Ward v. Wilbanks* (2010) noted, "it was not one referral, but rather plaintiff's refusal to counsel an entire class of people" (p. 15) that led to her dismissal.

At this point in time, it is probably accurate to state that counselor educators generally agree that referring a client due to a lack of competence is acceptable. However, if the counselor is likely to encounter similar clients in the future who will require that counselor to have the knowledge and skills to assist them, then the counselor has an ethical obligation to take action to acquire the needed competence. Determining whether it is appropriate to refer a client because of a conflict in values is more difficult. Our professional literature is confusing and somewhat contradictory on the topic (see Kocet & Herlihy, this issue). Additionally, the *Ward v. Wilbanks* (2010) appellate court's interpretation of the *ACA Code of Ethics* (ACA, 2005), with respect to referral policies, seems to be inconsistent with previous rulings. The appeals court interpreted the provision in the ethical standard regarding "inability to be of assistance" to mean that the *Code* explicitly permits values-based referrals. The issue of values-based referrals is likely to continue to be hotly debated for quite some time.

Possible Future Developments

As previously described, the ruling in one of the lawsuits filed against counselor educators (*Keeton v. Anderson-Wiley*, 2010) was appealed, but the court ruled in favor of the counselor educator defendants. The ruling in the other lawsuit against counselor educators (*Ward v. Wilbanks,* 2010) has been remanded back to the trial court, and one decision involving a counseling practitioner (Walden) is under appeal (*Walden v. Centers for Disease Control and Prevention,* 2010). The appellants are receiving ongoing financial support from religiously conservative political organizations. To date, this support has not resulted in victories in court cases brought against counselor educators. The courts have not ruled on the broad issue of the morality of same-sex relationships, but rather on narrower bases, such as whether a dismissed student's due process rights were violated and/or whether the student's right to religious expression was abridged. Counselor educators will continue to fulfill their gatekeeping responsibilities, and it seems likely that more lawsuits will be brought against them by students who have been dismissed for failing to comply with the curricular requirements of academic programs.

It is worth noting that conservative political groups have enjoyed more success in the legislative arena than in the courts. Recently, a law was enacted in Arizona that prohibits a university from disciplining or discriminating against a student in a counseling or other mental health program because the "student refuses to counsel a client about goals that conflict with the student's sincerely held religious beliefs" (AZ Rev. Stat. 15-1862, 2011), so long as the student consults with a supervisor or professor. Three bills have been introduced in Michigan; the wording in one of these" (S.B. 588, 2011) is essentially the same as the Arizona law. We expect that, given these successes, religiously conservative groups will continue to work to enact similar legislation in additional states.

It seems doubtful that the opposing viewpoints represented in the lawsuits can ever be fully reconciled. The plaintiffs and the defendants rely on different sources of authority to formulate and maintain their views on LGBT relationships: religiously conservative counselors and students rely on their interpretation of Biblical teachings, whereas LGBT-affirmative counselors and counselor educators rely on an accumulated body of social science research indicating that same-sex relationships are healthy expressions of love and intimacy. Perhaps the most fruitful dialogue going forward would convey mutual respect and affirmation of the right to hold differing views on same-sex relationships, while holding true to the fundamental principle that it is the client's goals and values, not those of the counselor, that are the focus of the counseling relationship.

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