

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JULEA WARD,

Plaintiff-Appellant,

v.

ROY WILBANKS, FLOYD CLACK, GARY D. HAWKS, PHILIP A. INCARNATI,
MOHAMED OKDIE, FRANCINE PARKER, THOMAS W. SIDLIK, JAMES F. STAPLETON,
DR. SUSAN MARTIN, DR. VERNON POLITE, DR. IRENE AMETRANO,
DR. PERRY FRANCIS, DR. GARY MARX, PAULA STANIFER,
DR. YVONNE CALLAWAY, AND DR. SUZANNE DUGGER,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia
**AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES
AND AFFIRMANCE**

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FOR THE SIXTH CIRCUIT

Disclosures of Corporate Affiliations and Financial Interests

Sixth Circuit

Case Number: 10-2100

Case Name: John W. Hardy, Roy W. Baskin et al.

Attorney: Alan F. Schoenfeld, and Brian A. Sutherland

Name of counsel: David Sapp

Pursuant to 6th Cir. R. 26.1, American Counseling Association

Name of Party

party:

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No. [Empty rectangular box for number]

interest:

[Large empty rectangular box for interest details]

CERTIFICATE OF SERVICE

I certify that on February 11, 2011 the foregoing document was served on all

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STATEMENT OF INTEREST

The American Counseling Association (“ACA”) is the largest organization for professional counselors in the United States, with over 45,000 members nationwide. For over 50 years, it has promulgated a code

STATEMENT OF THE ISSUES

Eastern Michigan University (“EMU”) requires all students in its graduate counseling program to follow and to demonstrate an ability to follow the ACA Code of Ethics. The Code requires students to refrain from imposing their own values on clients and, relatedly, to refrain from discriminating against certain classes of clients, including based on sexual orientation. Correspondingly, it requires counseling supervisors to identify areas where counseling students may lack competence. The district court held that it was constitutionally permissible for EMU to dismiss Julea Ward because she refused to fulfill an educational requirement reasonably related to professional conduct—abiding by the ACA Code of Ethics during a counseling practicum. Ms. Ward violated the ACA Code of Ethics by refusing to counsel clients who may wish to discuss homosexual relationships, as well as others who fail to comport with her religious teachings, *e.g.*, persons who engage in “fornication.” R.E. 1-5, Transcript of Formal Review Hearing, Mar. 10, 2009, at 27:21. Ms. Ward contends that she was not dismissed for her conduct, but rather for her religious beliefs.

This *amicus* brief addresses two issues of great concern to the ACA: First, whether the ACA Code of Ethics permits a counseling practicum student to refuse to counsel an assigned client based on the student’s concern that the client may seek advice regarding homosexual relationships; and second, whether requiring

students to demonstrate the competence to counsel different types of clients as assigned by their supervisors is a matter of legitimate pedagogical concern in the training of future counselors.

SUMMARY OF ARGUMENT

The ACA Code of Ethics prohibits both graduate counseling students and professional counselors from refusing to counsel someone simply because he wishes to discuss homosexual relationships. First, the Code provides that counselors must “avoid imposing values that are inconsistent with counseling goals.” A.4.b. Counselors may—and do—hold and express their own individual beliefs and values. But they cannot act on those beliefs by referring clients whose counseling goals implicate a different set of values. Refusal to discuss an issue—and refusing to accept a client based on the issue he or she wants to discuss—communicates and imposes the counselor’s position, dislike, or discomfort with that issue, which may in turn harm the client. Second, the Code provides that counselors must not “engage in discrimination based on ... sexual orientation.” C.5. Categorical refusal to counsel persons seeking guidance concerning homosexual relationships is plainly impermissible under the Code.

A university may reasonably require student counselors to demonstrate competence in counseling different types of clients. University counseling programs serve a gate-keeping function under the ACA Code in that they require

counselor educators and supervisors to endorse only those students who demonstrate competence to counsel different types of clients. Graduate counseling students must be able to show that they can respect the dignity and promote the welfare of persons (A.1.a) who do not share their values because every counselor, no matter how specialized, comes across such persons as a routine part of his or her professional experience. The capacity to advance the client's goals without interjecting and imposing the counselor's own values (A.4.b) is not just reasonably related to the pedagogical concerns of counseling; it is at the very core. The same is true of adherence to the Code's nondiscrimination provision (C.5): Students cannot become counselors if they are unwilling to abide by, and demonstrate the capacity to fulfill, the basic ethical standards that govern their chosen profession; relevant here, a standard of nondiscrimination based on sexual orientation.

Ms. Ward does not dispute that she rejected an assigned client because he identified himself as homosexual and as seeking counseling related to his homosexuality. This action, not her beliefs, violated the ACA Code of Ethics. Because she refused to see assigned clients based on her objection to engaging in client-affirming counseling about homosexual relationships, EMU advised her that she would need to change her conduct in order to continue in the counseling program. When she did not, but instead insisted that she would not counsel anyone on homosexual issues, Ms. Ward failed to fulfill a legitimate academic

requirement—demonstrating an ability to adhere to the ethical standards of the counseling profession, as embodied in the ACA Code of Ethics. Defendants properly dismissed her.

ARGUMENT

I. THE ACA CODE OF

with this goal, the “primary responsibility of counselors is to respect the dignity and to promote the welfare of clients,” A.1.a, and to avoid harming clients, A.4.a.

The Code of Ethics applies to students in counseling programs.

counseling relationship in all but truly exceptional cases. In all cases, the decision requires great care and deliberation.

B. The Code Prohibits Discrimination, Including Based On Sexual Orientation

Consistent with the professional objective of making counseling services widely available to as many persons as possible and making counselors aware of the harms that may be inflicted by refusals or discrimination during treatment, the Code directs that counselors may not “engage in discrimination based on” numerous factors, including race, gender, disability, and relevant here, “sexual orientation.” C.5. The nondiscrimination provision applies to each of the counselor’s professional functions, including, of course, fostering the interests and welfare of clients. A.1.a. A counselor who refuses to provide counseling with respect to homosexual relationships engages in discrimination based on sexual orientation, because he or she chooses whether to provide counseling services based on this category of issues. For the same reason, a counselor who attempts to identify and refer homosexual clients who may raise sexual orientation concerns also engages in discrimination based on sexual orientation. Under the ACA Code of Ethics, a counseling student can no more reject an assigned client because he might seek advice concerning a homosexual relationship than she could reject a client because he could be expected to discuss his disability or Jewish ancestry. All are discrimination under the Code. C.5.

The nondiscrimination provision is essential to the goals of the counseling profession, and thus a counselor cannot willfully violate the nondiscrimination provision and be professionally competent at the same time. Counselors are expected to help clients to sustain healthy relationships with all persons, including persons with different backgrounds and sexual identities. A.Intro., C.5. A student who refuses to help whole classes of people, or refuses to provide counseling on a whole class of issues, manifests an inability to embrace the core objectives at the heart of counseling and the ACA Code: to serve a broad client base and to promote the welfare of clients in ways that are meaningful and sustaining *to the clients*. A.1.a. Excluding homosexual relationships from the bounds of discourse signals the counselor's intent to impose his or her own values in the area of sexual relationships (A.4.b), and perhaps other areas. Especially in a diverse society, a counselor will inevitably be asked to provide services to persons with different values, and the competent and ethical counselor must be prepared to do so.⁵

The nondiscrimination provision thus expresses one of the primary obligations of the profession—to give help without regard to class-based

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matters of last resort, to be handled on a case-by-case basis with sensitivity to the facts specific to the client in question.⁷

The Code recognizes that a counselor *should* refer a client if the counselor has an “inability to be of professional assistance.” A.11.b. But this provision does not have the same meaning for students as it does for counselors (and as discussed below, it does not have the meaning that Ms. Ward would give it for counselors, either). A practicum student, by definition, is not engaged in the delivery of “professional assistance,” and a student who would refer a client every time she experiences doubt about her abilities will have no clients at all. All practicum students provide counseling under the supervision of a counselor educator, and the supervisor takes responsibility for ensuring that the client receives appropriate treatment. *See* F.1.a (“A primary obligation of counseling supervisors is to monitor the services provided by other counselors or counselors-in-training. Counseling supervisors monitor client welfare and supervise clinical performance[.]”). A supervisor and counselor educator seeks to assign only clients that the practicum student can assist, while at the same time exposing the student to a range of issues and opportunities to demonstrate ear-.0005 8798der the supervision of a ci.30re

Because a primary purpose of the student practicum experience is to demonstrate competence while counseling clients under the supervision of a

Ms. Ward erroneously contends that the “ACA Code of Ethics states that counselors can make referrals at any time, even before a counseling relationship begins[.]” Appellant’s Br. 11. This is incorrect. As explained above, the Code only permits referrals under limited circumstances—and in any event, it specifically prohibits referrals based on sexual orientation. *See supra* Part I.B.

Ms. Ward relies on Section A.11.b of the ACA code, which provides:

If counselors determine an inability to be of professional assistance to clients, they avoid entering or continuing counseling relationships. Counselors are knowledgeable about culturally and clinically appropriate referral resources and suggest these alternatives. If clients decline the suggested referrals, counselors should discontinue the relationship.

A.11.b; *see* Appellant’s Br. 12. Ms. Ward does not explain why this provision means that “counselors can make referrals at any time,” Appellant’s Br. 11, and it clearly does not. Instead, it authorizes referrals only *if* the counselor is unable “to be of professional assistance.” A.11.b. Ms. Ward suggests that a values conflict may give rise to “inability” (Appellant’s Br. 11-15), but “inability” here primarily means a deficit of skills or experience necessary to treat a specialized problem, not a conflict in values, and especially not a conflict with a group specifically protected from discrimination.

To be sure, the literature on which Ms. Ward relies recognizes that a difference in values may be so arresting that it renders the counselor unable to be of professional assistance. *See* Appellant’s Br. 12. She points out that one

textbook observed that 40 percent of counselors responding to survey indicated they “had to refer a client because of a value conflict” regarding “personal values

meet with him and then refer in the event a values conflict arose”; that Ms. Ward refused to participate in a “remediation plan”; and that, during a formal review, Ms. Ward refused to counsel clients concerning homosexual relationships.

Appellant’s Br. 11, 15, 57 (internal quotation marks omitted). These undisputed facts are sufficient to conclude that Ms. Ward committed and vowed to continue committing violations of the ACA Code of Ethics, specifically, Sections C.5 and A.4.b.

Ms. Ward’s proposed approach to counseling, in which she would at the outset refer all potential clients with whom her personal values conflict, is untenable in the real world. She supposes that she could detect values-based conflicts in advance, and screen out such persons before they even walk through the door. This cannot work, at least not without harming the client. For instance, consider a person who comes into a clinic seeking counseling. He completes an intake form, and identifies himself as homosexual. If the counselor reviews the

More unrealistic still, Ms. Ward states that she would be perfectly willing to counsel homosexual clients, so long as they don't seek advice concerning homosexual relationships. R.E. 82-3, Deposition of Julea Ward, Dec. 22, 2009, at 189, 200, 212. But of course, the counselor—and sometimes the client—cannot know all the issues that will arise in the course of counseling, and if such an issue does arise, the client is poorly served by a counselor who tells him that the issue is off limits. Harm to the client is especially likely to occur in the situation Ms. Ward invites—where the counselee discloses his homosexuality after developing trust and a seemingly productive relationship with the counselor, and the counselor subsequently ends the relationship for that reason. The ACA Code of Ethics, as well as common sense, prohibit abandoning the client at the moment he raises an issue that may well go to the heart of his personal identity and emotional well being. Suppose, for example, that a client is trying to decide whether to come out to her friends and family. Rather than help the client make that decision, Ms. Ward would essentially tell her, “go back in the closet and stay there, I don't want to talk about it.” To stat

II. EMU PROPERLY DISMISSED MS. WARD FOR FAILURE TO ADHERE TO THE ACA CODE AND HENCE TO FULFILL AN ACADEMIC REQUIREMENT THAT WAS REASONABLY RELATED TO LEGITIMATE PEDAGOGICAL CONCERNS

A. The ACA Code Of Ethics Requires Counselor Educators To

Counselor educators, as members of the profession and supervisors of prospective members of the profession, are expected to identify limitations in the competence of their students and must “recommend dismissal from training programs, applied counseling setting, or state or voluntary professional credentialing processes when ... supervis

obligated to ensure that she did not graduate, at least not without improving her performance. F.5.d, F.9.b. Second, in holding certain issues off limits, she manifested a willingness to impose her values in a manner inconsistent with counseling goals. A.4.b. And third, she discriminated based on sexual orientation. C.5. Defendants, having observed this conduct, had an ethical obligation under the Code to seek remedial assistance for Ms

discuss homosexual relationships, or indeed, any sexual relationship outside of marriage.

The counseling program at EMU is accredited by the Council for Accreditation of Counseling and Related Educational Programs—CACREP—which requires its accredit institutions to follow the ACA Code of Ethics. And CACREP specifically requires that students demonstrate knowledge of the ACA Code of Ethics. R.E. 14-14, CACREP 2001 Standards § II.K.1.h. CACREP accredits 604 counseling programs at approximately 250 institutions of higher learning.⁸ Ms. Ward's practicum course required that students comply with the ACA Code of Ethics. R.E. 14-9, Practicum Manual, at 7. In other words, EMU's counseling program, like hundreds of other programs, requires students to demonstrate that they are willing and able to comply with the code of ethics promulgated by their chosen profession's self-regulating body. This is an eminently reasonable pedagogical choice.

Ms. Ward sought a degree at a university that serves the entire community, not just the people who share her views. To the extent that her professors are aware that she cannot provide competent services to a portion of the community (especially one that the ACA deems to be particularly susceptible to harm), she cannot be awarded a degree to be a counselor in that community. A counselor may

⁸ See <http://www.cacrep.org/directory/directory.cfm> (follow links).

student group by conditioning access to funds and facilities on adherence to the school's nondiscrimination policy, which prohibited discrimination based on, *inter alia*, sexual orientation); Brief for *Amicus Curiae* American Bar Association in Support of Respondents 2, *Martinez*, 130 S. Ct. 2971 (No. 08-1371), *available at* 2010 WL 989699 (noting that ABA's Law Student Division forbids discrimination based on sexual orientation).

Ms. Ward

CONCLUSION

When Ms. Ward enrolled as a student in an accredited counseling program that requires students to abide by the ACA Code of Ethics, she became subject to certain rules that protect clients from discrimination by counselors. When she

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation provided in Fed. R. App. P. 32(a)(7)(B). The foregoing brief uses Times New Roman (14-point) proportional type, and contains 5,450 words, exclusive of exempted portions.

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I certify that on February 11, 2011, I electronically filed the foregoing Brief for Petitioner-Appellee with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the Court's CM/ECF System. Counsel for all parties are registered CM/ECF users and will be served with the foregoing document by the Court's CM/ECF system.

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