Discrimination And Ethics – Revisited

written by Richard Leslie | May 24, 2016

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In the June 2011 edition of the Avoiding Liability Bulletin, I wrote about the case where Eastern Michigan University dismissed a Christian student from its master's degree program in school counseling for refusing to counsel a homosexual client during the practicum course. The student refused to provide relationship counseling services to the client because she believes that homosexuality is morally wrong and that it conflicts with her orthodox Christian beliefs. More particularly, she would not engage in gay affirming counseling, and was dismissed from the program following an informal review and formal hearing process. She sued the University. I reported that the U.S. District Court granted summary judgment in favor of the University, and based its decision, in part, on the American Counseling Association's Code of Ethics provisions related to the prohibitions against discrimination in providing services to clients.

The student appealed the lower court decision to the U.S. Court of Appeals for the Sixth Circuit, which issued its decision on January 17, 2012 reversing the trial court's grant of summary judgment in favor of the university. As mentioned in the June 2011 article, a motion for summary judgment is a procedural maneuver to promptly dispose of civil litigation without the necessity of a trial. The U.S. Court of Appeals decision made clear that neither side deserves to win as a matter of law. The U.S. Court of Appeals sent the case back to the U.S. District Court (the trial court) for further proceedings. If the case is not settled, it may eventually proceed to trial and be decided on the merits. As in most cases, there will likely be questions of fact and credibility for a judge or jury to decide.

In a statement issued by Eastern Michigan University regarding the Court of Appeals ruling, the school said that the case has never been about religion or religious discrimination, nor is the case about homosexuality or sexual orientation. The school's statement said that the case is about what is in the best interest of a person in need of counseling, and about following curricular requirements of EMU's counseling program, which adheres to the Code of Ethics of the American Counseling Association and the Ethical Standards of the American School Counselor Association.

The U.S. Court of Appeals discussed two of ACA's Code of Ethics provisions, one of which (Section A.4.b.– Personal Values) says that counselors are aware of their own values, attitudes, beliefs, and behaviors and avoid imposing values that are inconsistent with counseling goals. This provision also says that counselors respect the diversity of clients, trainees, and research participants. The other provision (Section C.5.– Nondiscrimination) says that counselors do not condone or engage in discrimination based upon age, culture, disability, ethnicity, race, religion/spirituality, gender, gender identity, sexual orientation … or any basis proscribed by law. This provision also says that counselors do not discriminate against clients, students, employees, supervisees, or research participants in a manner

that has a negative impact on these persons.

The Court of Appeals entered upon an interesting discussion of these provisions. The decision states, in part:

"Although the university submits it dismissed Ward from the program because her request for a referral violated the ACA code of ethics, a reasonable jury could find otherwise – that the code of ethics contain no such bar and that the university deployed it as a pretext for punishing Ward's religious views and speech."

With regard to Ward's request for a referral, the decision explained that when the university asked Ward to counsel a gay client, Ward asked her faculty supervisor either to refer the client to another student or to permit her to begin counseling and make a referral if the counseling session turned to relationship issues. The faculty supervisor referred the client. Thereafter, the university commenced a disciplinary hearing into Ward's referral request, which eventually resulted in Ward's expulsion from the program. The lower court (U.S. District Court) decision had concluded that by insisting on undifferentiated referral of an entire class of clients, Ward violated the ACA Code of Ethics.

The Court of Appeals decision opines that the ACA code of ethics does not prohibit values-based referrals like the one requested by Ward. The decision explains that the point of the referral request by Ward was to avoid imposing her values on gay and lesbian clients. The Court points out that anothersection of the code of ethics expressly permits value-based referrals. The provision referred to by the Court (Section A.11.b. – Inability to Assist Clients) states that if counselors determine an inability to be of professional assistance to clients, they avoid entering or continuing counseling relationships. This section also says that counselors are knowledgeable about culturally and clinically appropriate referral resources and suggest these alternatives. The Court cites other examples supporting its assertion that value-based referrals are not prohibited in the counseling profession.

The Court states that even though the code of ethics permitted Ward's referral request, the university says that the department had a policy of disallowing any referrals during practicum. Ward claimed that no such policy existed and that referrals were not prohibited. The Court states that the record, as shown, contains no evidence of such a policy and that ample evidence supports the theory that no such policy existed – until Ward asked for a referral on faith-based grounds. The decision states that allowing a referral under the circumstances involved in this case would be in the best interest of the client, who would receive treatment from a counselor better suited to discuss his relationship issues.

With respect to Section C.5.-Nondiscrimination of the ACA Code of Ethics, the Court, by way of analogy, gives two examples of the application of this provision:

"Surely, for example, the ban on discrimination against clients based on their religion (1) does not require a Muslim counselor to tell a Jewish client that his religious beliefs are correct if the conversation takes a turn in that direction and (2) does not require an atheist counselor to tell a person of faith that

there is a God if the client is wrestling with faith-based issues. Tolerance is a two-way street. Otherwise, the rule mandates orthodoxy, not anti-discrimination."

It appears to be this Court's view that Ward's referral request can be seen as demonstrating her recognition and respect for this provision of the ACA Code of Ethics and that this is something that a jury could decide. While the Court expressed its opinions about these matters in the context of reversing the trial court's dismissal of Ward's lawsuit on EMU's motion for summary judgment, it should be understood that this Court did not decide the lawsuit in any way – what it did was send the case back to the trial court for further proceedings.

The Court made clear that at this stage of the case, and based upon the evidence received in this case, neither side deserves to win as a matter of law (on a motion for summary judgment). The Court pointed out, for example, that a jury might construe the evidence in the university's favor and might credit the university's claim that a no-referral policy existed for the practicum class, thus justifying the expulsion. Eastern Michigan University has petitioned for a rehearing en banc (the full bench of judges, rather than the panel of three that decided the case).

So, in a sense, we are back to the beginning, but the decisions of both Courts are interesting and thought-provoking. Suppose that the counseling student did not seek to refer, but instead agreed to treat the individual or the couple. What disclosures, if any, would the student be required to make, prior to the start of treatment, to the prospective patient, and why would these disclosures be required? If not required, what disclosures should be made, if any, prior to the commencement of treatment, and why? How would full disclosure of the student's orthodox Christian beliefs affect the patient and the therapeutic relationship? Should the student be permitted to become a school counselor? Some things to think about!