

## Religious Discrimination or Legitimate Business Decision? It Depends.

By [Martha Zackin](#) on February 14, 2012

Anyone who works frequently with employment counsel has heard the words “it depends” – it (the answer to a question) depends on the specific facts and circumstances at issue, which should be analyzed and discussed before a course of action is determined.

Two recent cases illustrate this point. Both cases arose out of similar, but not identical, situations.

In [Ward v. Polite, et al](#), Julea Ward was a graduate-level counseling student at Eastern Michigan University (EMU) who, as a graduation prerequisite, enrolled in a counseling practicum that required her to participate in one-on-one counseling sessions with real clients. EMU policy prohibits discrimination on the basis of sexual orientation and teaches students to affirm a client’s values during counseling sessions. When the university asked Ms. Ward to counsel a gay client, Ms. Ward, a devout Christian whose values prevented her from affirming a client’s same-sex relationships, 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. Although EMU referred the client to another counselor, it initiated disciplinary proceedings against Ms. Ward and, ultimately, expelled her from the program. In support of its decision, EMU claimed it had a “no referral” policy and that Ms. Ward’s actions violated the American Counseling Association’s code of ethics.

In [Walden v. Center for Disease Control and Prevention, et al](#), Marcia Walden was employed as a counselor with a company that staffed and managed the employee assistance program (EAP) for the Center for Disease Control and Prevention (CDC). Ms. Walden, who describes herself as “a devout Christian who believes that it is immoral to engage in same-sex sexual relationships,” believes that her religion prohibits her from encouraging or supporting same-sex relationships through counseling. In the course of an initial intake counseling session with a CDC employee, Ms. Walden learned that the employee sought counseling for trust issues that had arisen within her long-term, same-sex relationship. Concluding that the employee’s need for relationship counseling conflicted with her religious beliefs, Ms. Walden told the employee that she could not provide counseling because of her own “personal values,” which would interfere with the client/therapist relationship. The employee, who felt “judged and condemned” by Ms. Walden, complained to the CDC about Ms. Walden’s treatment of her. The CDC, which understood that referrals may be necessary and appropriate, was nonetheless concerned with the manner in which Ms. Walden had stated her objections to the CDC in the course of making the referral. After numerous discussions with Ms. Walden about how she could handle similar situations in the future, and after concluding that Ms. Walden was unwilling to alter her approach, Ms. Walden’s assignment to the CDC was terminated.

After extensive discovery, both EMU and the CDC moved for summary judgment with the respective district courts where the cases were pending. The motions were granted, and Ms. Ward and Ms. Walden both appealed. That is where the similarity between these two cases ended. In Ms. Ward’s

case, the United States Court of Appeals for the Sixth Circuit overturned the grant of summary, holding that a jury could find that Ms. Ward was expelled from the counseling program because of her religious beliefs. Ms. Walden did not fare as well; the United States Court of Appeals for the Eleventh Circuit affirmed summary judgment, holding that no reasonable jury could find that Ms. Walden was terminated because of her religious views.

The different outcomes described above seem to rest on a single, distinguishing fact. Specifically, when Ms. Ward learned that she may be asked to provide relationship counseling to a gay client, she asked permission to either refer the client at the start or to do so if the counseling sessions turned to relationship issues. Because she had acted in an appropriate way, and had not expressed her personal views to the client, the Sixth Circuit felt that a jury could find that her expulsion was based on her religious beliefs. In contrast, the manner in which Ms. Walden referred her client to another counsel was harsh, and left the client feeling worse than she had felt going in. That, the Eleventh Circuit felt, constituted a legitimate basis for Ms. Walden's termination, totally unrelated to her religious beliefs.

What have we learned? First, these cases highlight the unpredictability of the courts- would the results have been different, perhaps, if Ms. Ward's case was before the Eleventh Circuit, or Ms. Walden's before the Sixth? Further, these cases also underscore that fact-specific analysis and case-by-case decision-making are critical. Finally, I hope that the next time you hear the words "it depends" from your employment counsel you understand why.