COSMOS
Navigate the Compliance Universe

Ethikos Volume 36, Number 2. March 26, 2022
Striking the balance between LGBTQ+ and religious employee rights

By Damien DeLaney and Zarra Elias

Damien DeLaney (damien.delaney@akerman.com) is Partner at Akerman LLP in Los Angeles. **Zarra Elias** (zarra.elias@moffitt.org) is the Assistant General Counsel II, Employment Law, at the Moffitt Cancer Center in Tampa, Florida.

In maintaining an ethical—and legally compliant—workplace, employers have an obligation to create an inclusive environment for their employees. In some instances, certain employees' rights may conflict with others', but in no circumstance is that conflict more salient than the conflict that arises between employees who identify as LGBTQ+ and employees with religion-based anti-LGBTQ+ views. Both groups are protected by federal law: religion is expressly recognized as a protected status under Title VII of the Civil Rights Act of 1964 (Title VII), while the United States Supreme Court recently confirmed in the landmark case *Bostock v. Clayton County, Georgia*, that sexual orientation, gender identity, and gender expression fall within the definition of "sex" under Title VII.[1] Many local and state laws also provide additional protections under their own civil rights laws.

Employers may see this as a bit of a quandary: How do we balance employees' rights while maintaining a nondiscriminatory and inclusive workplace?

The issue is not a zero-sum game, nor can it be. Employers owe legal and ethical obligations to both groups. An employer can minimize its legal risk, as well as ensure happy, productive, and fulfilled employees, by finding a balance between the needs of both groups. In this article, we offer general guidelines and suggestions for how to strike that balance.

Managing conflicts when they arise

Consider this scenario: An employer initiates a diversity, equity, and inclusion (DE&I) campaign that includes posters depicting five employees over captions reading, "Black," "Blonde," "Old," "Gay," and "Hispanic," as well as a companion poster reading, "Diversity is our strength." A long-tenured employee, describing himself as a "devout Christian," objects to these posters and decides to post two Bible verses above his cubicle. One of these quotes reads: "If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them."[2] A supervisor sees these verses posted and, believing the postings to violate the employer's anti-harassment policy, reports them to human resources. When asked to remove the religious postings, the employee says that he will remove the postings only if the employer also removes the diversity poster. Following a series of meetings, initiated by the employer, between the employee and his managers, the employee refuses to remove his religious postings and is consequently terminated.

Did the employer fail to accommodate the employee's religious beliefs? In this case, the United States Court of Appeals for the Ninth Circuit said no.[3] The court found that the employee's ultimatum, which would have either required the employer to consent to conduct demeaning to its LGBTQ+ employees or to exclude LGBTQ+ employees from inclusion in its diversity initiatives, did not require accommodation as it "created undue hardship for [the company] because it would have inhibited its efforts to attract and retain a qualified, diverse

workforce, which the company reasonably views as vital to its commercial success."[4]

In general, an employer's obligation to accommodate sincerely held religious beliefs does not extend to accommodations that would "result in discrimination against…co-workers or deprive them of contractual or other statutory rights." Since the enactment of Title VII, courts have recognized that religious people cannot exercise their rights in ways that inhibit the rights of others. For instance, in *Newman v. Piggie Park Enterprises*, a civil rights–era case, a South Carolina federal court concluded that a restaurant owner could not rely on a purported religious race-discriminating belief to exclude Black patrons, "in utter disregard of the clear constitutional rights of other citizens."[5] LGBTQ+ employees likewise have a right to work in a safe, nondiscriminatory environment that does not require employers to allow employees with anti-LGBTQ+ religious views to express their views in ways that abridge or undermine that right.[6]

When the conflict involves the religious employee directly demeaning or harassing the LGBTQ+ employee, the employer has a legal and ethical duty to take steps to restore the safe, nondiscriminatory work environment. These issues become murky when the religious employee's objections are more passive, such as the refusal to participate in diversity initiatives that include LGBTQ+ employees. For instance, in a recent New Jersey case, an employee claimed that she was wrongfully terminated for declining to wear an official Pride shirt.[7] Similarly, the Equal Employment Opportunity Commission sued a company for terminating two workers who refused to wear a company apron embroidered with a rainbow heart, alleging that the employees were fired after requesting an accommodation not to wear the apron.[8] In these cases, the employer's burden in accommodating is slight; conceivably, the employer can simply permit the employee not to participate and continue working as normal. But employers should take a broader view by also inquiring how the refusal to participate—particularly by supervisors—may be perceived by LGBTQ+ employees as a lack of support or even as discriminatory animus.