

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

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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.

Promoting inclusion

Simply having an anti-discrimination and harassment policy is insufficient; ethical employers advance efforts to draw closer toward *inclusion*. In a nutshell, inclusion means going beyond simply hiring diverse employees—it necessitates shaping the workplace into an environment where employees feel a sense of involvement and belonging, thus empowering and enabling them to succeed. Adapting the environment requires an acknowledgment that LGBTQ+ employees and religious employees with anti-LGBTQ+ beliefs may not “see” each other in a way that fosters inclusion. Religious employees may be focused on behaviors that they view as sinful or immoral in a way separate and apart from the personhood of LGBTQ+ people.^[9] Indeed, religious employees objecting to LGBTQ+ DE&I initiatives often claim not to have “anything against gay people, only against the gay ‘lifestyle.’” LGBTQ+ employees for their part may have sensitivity, discomfort, or distrust toward religious employees because of lived experiences of rejection by religious loved ones, negative experiences with religious organizations, or perceived social hostility from religious conservatives.

Employee education is paramount to bridging this gap. Some employers bear the mindset that run-of-the-mill equal employment opportunity (EEO) workplace trainings, which are typically available online and outdated, check off the box. They do not, and ethical employers should not settle for these convenient workplace trainings if the ultimate goal is to cultivate an inclusive workplace environment. Because conducting EEO training is generally the norm and a legal requirement in some states (e.g., California, Connecticut, and Maine are required to provide sexual harassment trainings), ethical employers should consider using and adopting *interactive, discussion-based* training exercises with emphasis on a framework for appropriate workplace interactions. The training may include live discussions about LGBTQ-related vocabulary, working through scenarios involving LGBTQ-related issues in the workplace, or moderated forums or dialogues about workplace microaggressions.

Oftentimes, training reveals that a lack of fundamental understanding of the basic beliefs is the root of conflicts between the two groups. With interactive, discussions-based training exercises, employees are exposed to other methods of learning—albeit unconventional for some—to build understanding of employees’ rights and beliefs, which hopefully will lead to trust and camaraderie. Indeed, employers can expect impassioned discussions during these training exercises. *But this is good.* Dialogues offer an employer an opportunity to intervene *before* actual workplace conflict arises, remedy the apparent conflict by clarifying misconceptions and workplace policies and procedures, and create harmonious paradigms for how employees may and can interact at work. Remember, the employer’s goal is not to upend the religious employees’ belief structures, nor is it to convince LGBTQ+ employees to grin and bear it through demeaning interactions. Rather, the key is to strike that balance by defining and fostering a culture of mutual respect and cooperation to hopefully avoid conflicts that may arise later.

Eliminating conflicts before they arise

An employer’s DE&I initiative is—and should be—an ongoing effort to increase representation and opportunity for disadvantaged and underrepresented groups in the organization. However, employees’ refusal to participate in DE&I initiatives because of religious objections can also create obstacles to the success of the DE&I program. If religiously conservative employees hesitate or decline to participate in a DE&I initiative because it includes LGBTQ+ employees, the employer should certainly avoid compelling participation. An employee’s explanation that a DE&I activity infringes upon the employee’s sincerely held religious belief is most likely adequate in this situation, particularly where clashes or disruptions are seemingly absent.

The above approach is fine when it comes to accommodating rank-and-file employees, but less than full buy-in from supervisors and managers could discredit the DE&I program. Indeed, the middle management—those who typically have a direct impact on rank-and-file employees’ day-to-day activities and wield control over bonuses, pay raises, leadership opportunities, and promotions—are often overlooked because of the misconception that they “should already know these things.” But if an employer fails to equip its middle management with training and education that underlines the significance of an inclusive workplace environment, any DE&I effort will ultimately fall apart. When managers decline to fully participate in DE&I programs, LGBTQ+ employees may question the company’s commitment to its DE&I program and may further perceive it as an objection to LGBTQ+ equality. Unfortunately, at that point, there is little the employer can do to avoid that perception. Hence, employers should concentrate on continual employee education and training, as well as instituting and strengthening key policies, such as for preferred gender pronouns, all-inclusive family leave benefits, and gender confirmations.

Bridging the gap

Of course, a sincere and ethical DE&I program also seeks religious diversity and inclusion; an employer’s DE&I initiatives should foster inclusion of religious conservatives as well, but what does that look like? The workplace must always be welcoming to those who are religiously conservative, but with the understanding that it is *also* welcoming to LGBTQ+ employees, as legal protection exists around LGBTQ+ employees’ right to a safe and professional work environment free of harassment and discrimination.

Building and sustaining DE&I initiatives while balancing the various rights and beliefs of employees is no easy feat. An ethical employer’s investment and commitment must be *all inclusive*—from top to bottom, and both inward-facing and outward-facing. Is it challenging? Yes. Is it doable? Absolutely.

Takeaways

- Stop with the lip service; effective diversity, equity, and inclusion initiatives require intentional and
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meaningful efforts.

- Stay abreast of legal developments, because landmines do exist when implementing such initiatives.

1 Bostock v. Clayton County, Georgia, 590 U.S. ____, 140 S. Ct. 1731 (2020).

2 Lev 20:13 KJV.

3 Peterson v. Hewlett-Packard Co., 358 F.3d 599 (9th Cir. 2004).

4 Peterson 358 F.3d at 607.

5 Newman v. Piggie Park Enterprises, Inc., 256 F. Supp. 941, 945 (D.S.C. 1966).

6 See Bodett v. CoxCom, Inc., 366 F.3d 736 (9th Cir. 2004).

7 Dan Avery, “Starbucks barista says she was fired for refusing to wear Pride shirt,” NBC News, November 24, 2020, <https://www.nbcnews.com/feature/nbc-out/starbucks-barista-says-she-was-fired-refusing-wear-pride-shirt-n1248847>.

8 Karma Allen, “Ex-workers sue Kroger, claiming they were fired for refusing to wear rainbow symbol,” ABC News, September 19, 2020, <https://abcnews.go.com/US/workers-sue-kroger-claiming-fired-refusing-wear-rainbow/story?id=73100744>.

9 See Andrew Koppelman, “Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law,” *Southern California Law Review* 88, no. 3 (March 2015), 619, 624–626.

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