Speaker 1 (00:00):

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Malcolm (00:14):

Hi, and welcome back to The Asked & Answered Podcast. My name is Malcolm Ingram, and I'm an associate at Greenberg Traurig Philadelphia office. I'm here with my colleague Kelly Bunting, who's a shareholder in the Philadelphia office of Greenberg Traurig as well. Today we'll be talking about the clash of religious objection and LGBTQ+ rights in the workplace. It's a tough topic for HR practitioners and one that only prompts us to get tougher. Kelly, you recently presented on this topic at Sher's annual 2022 meeting. So let's dive right in where do religious accommodations originally?

Kelly (00:53):

Well, Malcolm, the protections for employees who request an accommodation at work due to their religious beliefs are found in both federal and in state law. So you know Title seven, most employers with 15 or more employees are covered under Title seven, the Civil Rights Act. And you've got all those specific categories that are protected from harassment and discrimination under Title seven, race, color, sex, sexual orientation, national origin, ancestry, disability, and religion. So Title seven prohibits covered employers from discriminating against employees based on their religion, but employers can't discriminate against employees based on their sexual orientation either. And what we're seeing it playing out in the workplace is there has developed a real tension between protection for employees based on their sexual orientation, gender identity, and then employees who have religious beliefs that a certain sexual orientation is wrong.

Malcolm (02:05):

Okay. So what is the definition of religion under federal law?

Kelly (02:09):

It's really, really broad. So there's a carve out from the federal law and most state laws for religious nonprofits like churches, temples mosques. They're exempt from certain civil rights laws that offer workplace protection from discrimination and harassment. And there's a pretty famous case that just sets it right out there. The government will not step in to tell a religious institution how to govern itself. And then that just means that churches, temples, mosques, they're allowed to hire those of their own faith. They're allowed to decline to offer birth control in their healthcare plans or cover abortions or gender transition surgery in their healthcare plans. That's all that means. So religious organizations have been treated differently under the law for quite some time. And there's also a ministerial exception, which is a legal doctrine that prohibits the application of anti-discrimination law to religious institution's employment relationships with its ministers. And ministers have been defined very broadly in the past.

Kelly (03:24):

It could be a teacher. It could be someone that really you wouldn't consider to be a minister. But getting back to your question about religion, I mean, under Title seven, it really is just defined as a sincerely held religious ethical or moral belief. That's it. And so that's really broad, obviously. And then after all of the vaccine exemption cases throughout the pandemic over the past two years, the EOC came out with new

guidance, you remember last year on religious discrimination and religious accommodation. And the EOCs guidance defines religion even more broadly. It includes all aspects of religious observance and practice as well as belief, not only traditional organized religion, but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people or that seems illogical or unreasonable to others.

Kelly (04:36):

So if you think about that for a minute, that pretty much covers anything that you could come up with as far as what a court or the EEOC would consider to be a religion under federal law. And then as far as state law, states define religion more broadly than federal law, a lot of them, because they include creed along with one of the protected categories, along with religion in their state statutes. And in particular, Massachusetts, Tennessee, Colorado, New Jersey, New York, Washington, Wisconsin, Wyoming, they all protect creed as well as religions.

Malcolm (05:19):

Okay. So we have the Civil Rights Act and what the states are doing. What other protections are there in the workplace for employees who object to some practice at work based on their religious beliefs?

Kelly (05:29):

Well, Malcolm, the one that's most implicated today is the Religious Freedom Restoration Act. That was signed into law by president Clinton in 1993. Now this is a federal law. And then when a law came along in 1997, where the Supreme court said that the Religious Freedom Restoration Act did not actually apply to the states, well, then the states started their own versions of the RFRA. So by the late nineties, states had started passing religious freedom restoration acts of their own. And right now you've got 23 states that have their own version of the RFRA. There is a long history of nonprofit and religious organization employees being protected from discrimination in the workplace due to their religious beliefs.

Malcolm (06:31):

Okay. So we know there are plenty of protections in law for employees with religious beliefs, but what about the protections and the law for LGBTQ plus employees? I mean, of course, Title seven of the Civil Rights Act protects sexual orientation, transgender, bisexual employees as well, but what else?

Kelly (06:47):

That's right, Malcolm, but really Title seven has only protected sexual orientation since 2020. That was the Bostock, the Clayton county decision where the Supreme court actually came out and ruled for the first time that LGBTQ plus individuals were covered in the definition of gender, in the protected categories that the Civil Rights Act set forth. So based on Bostock, which was like I said, just passed in 2020, this year 2022, the federal government has really moved quickly to solidify some of these protection principles and they've issued a lot of guidance. So the Biden administration has just passed earlier this year, a number of protections. In March, the administration proclaimed a transgender day of visibility and specifically mentioned Bostock and said, look, we're going to build on the protections offered by the Bostock case. And we're going to enact these new measures specifically to protect transgendered Americans.

Kelly (08:02):

So the protections are really long. The White House issued a press release, and I think it was like seven pages long. It listed all of the things, all of the protections that the Biden administration now has passed for transgender and LGBTQ plus Americans. Employees are now able to choose a non-binary gender marker when they file an EEOC complaint. So you remember you used to be able to choose male or female, and that was it. Now you can choose an X instead of an M or F when you're filing an EEOC complaint. The EEOC also offers MX as a title. So before it used to just be Mr. Mrs, or Miss, now you can choose MX when you're filing an EEOC complaint. Even on us passport applications, Americans can now select an X for their gender.

Kelly (09:05):

There's more money, of course, under these enactments for transgender kids and their families for mental health funding. There's more resources in the schools. There's special training for schools and for school leaders and more resources for gender affirming healthcare. And Malcolm, this is where so many of the battles that you're reading about now legally that are taking place between the RFRA and the protections in the law for LGBTQ plus employees in the workplace. It's the healthcare battle, employee benefits, healthcare coverage for gender transition surgery, that's where you're seeing the real clash in the workplace.

Malcolm (09:52):

I also understand that recently in May, the Department of Health and Human Services announced that it will build on the protections of the Bostock case and interpret section 1557 of the Affordable Care Act to cover gender affirming healthcare. Section 1557 is a section of Affordable Care Act that prohibits discrimination on the base of sex in certain healthcare programs. And HHS is relying on the Bostock decision to say sex includes gender identity and sexual orientation, right?

Kelly (10:19):

That's right. Again, this is going to apply to a number of things like providing family planning services and birth control to same sex couples, transgender individuals. There's more resources for transgender youth. And there's additional Aids and HIV funding. But this HHS rule saying that federally funded insurance programs have to cover things like gender affirming surgery, that has been the subject of a lot of court battles. It is right now, the subject of permanent injunctions in North Dakota and in Texas. The federal government is fighting these injunctions. They're trying to get them lifted. But in essence, what they're doing right now, the injunctions block certain religiously affiliated healthcare systems and members of certain medical and employer groups from being forced to provide insurance coverage for gender transition procedures. The injunctions have been in place for a while, and it doesn't look like they're going anywhere, but I'll tell you, the law keeps changing.

Kelly (11:32):

Just this week a federal judge in North Carolina determined that an exclusion in a state healthcare plan for teachers and state employees which had sort of this blanket provision that barred coverage for treatments related to gender transition surgery, gender dysphoria, anything like that, the court said it was textbook discrimination based on sex, and that it violated federal discrimination laws. Here's a quote from that opinion. "Defendant's belief that gender affirming care is ineffective and unnecessary is simply not supported by the record. Consequently, their categorical sex and transgender based exclusion of gender affirming treatments from insurance coverage unlawfully discriminates against plaintiffs in violation of the US Constitution and Title seven." Now that's a North Carolina district court

decision. It was 73 pages long. You can see how emotional these battles can be. And we're going to continue to see the health benefits sector and the coverage of transgender gender affirmation surgery, that's going to continue, Malcolm. It's really a fight in the courts right now.

Malcolm (13:05):

But what are the states doing about this? I imagine they likely want to push back. What are you seeing other states do?

Kelly (13:11):

You're absolutely right. The states have pushed back as well. There are employer groups that are pushing back. The states that have filed for injunctions and that are fighting these new provisions by the federal government that protect transgender and LGBTQ plus individuals, they see this as government overreach. And the states are passing laws restricting LGBTQ plus rights in ways that really affect employers. Right now, Florida, Alabama, Texas, Iowa, Oklahoma, Arizona, Utah, Indiana, these are all states, and I know I've probably missed a few, that have passed certain bans and limitations that directly affect LGBTQ plus employees and workers, and also transgender employees and workers.

Malcolm (14:11):

Can you tell me a little bit about what's going on in Florida? I believe there's a don't say gay law in Florida?

Kelly (14:16):

Correct. And of course, that got a lot of press. That is one of the laws that the states have passed sort of pushing back against what state government's view as federal government overreach. But Alabama has a similar law to Florida's don't say gay law. And that's been an effect now for a bit. At least 20 state legislatures have introduced just this year alone, similar, don't say gay bills. But I have to tell you, Malcolm, what employers are really concerned about is Florida's Stop Woke Act. I don't know if you've heard about that because it restricts the parameters of diversity training that employers can offer to their employees.

Malcolm (15:06):

Like what? Give me an example.

Kelly (15:09):

Well, the Woke Act or the Stop Woke Act passed in Florida puts a number of prohibitions on employer training, like all the diversity training that employers like to offer. The training, for example, can't teach that one race, color, sex, or national origin is morally superior to the other. The training can't state that any individual bears responsibility or must feel guilt for actions committed in the past by other individuals of the same race, color, sex, or national origin. The training can't state that things like hard work, fairness, merit, excellence, neutrality, and color blindness are racist or sexist, or were created to oppress other races, colors, genders, or national origins. The list goes on. It's quite extensive. And what I should say is the law doesn't prohibit talking about these concepts during an employer's diversity training, but the concepts must be presented in an objective way. And the employer cannot support one side or the other, because if the training promotes any of the prohibited concepts in the law, then the

employer can't make the training mandatory for its workers. Your diversity training at that point must be voluntary.

Malcolm (16:38):

I'm an employer. And I want to comply with this act, or I don't want to comply with this act. What are the penalties if I violate this act?

Kelly (16:45):

There are definitely in penalties for employers who violate this act. It is for example, any employee who takes a diversity training and believes that their rights have been violated can file a complaint with the Florida Commission on Human Relations within a year of the violation. They can also pursue a lawsuit in court. Employees can get an injunction, they can get back pay, compensatory damages, and punitive damages, Malcolm, up to $100,000. And the Florida attorney general can go after employers who violate the law and get an injunction and also get damages up to $10,000 per violation. So Florida based employers or those employers who have Florida workers really should review their training, make sure it comports with the law. Another recommendation would be to add disclaimers to the training in writing and verbally to state that the employer does not endorse any of these concepts or that no employee is required to agree with the concepts.

Kelly (17:56):

And other employers in other states should be aware that laws like this could actually be passed in their states as well.

Malcolm (18:04):

That's a lot. So was is an employer to do?

Kelly (18:08):

Well, if you have an employee making a religious objection to diversity training, or maybe they don't want to work with an LGBTQ plus coworker, or they're objecting to signing the code of conduct or something like that, you have to accommodate. I mean, you go back to exactly what employers know. You accommodate, you engage in the interactive process. It's no different from accommodating requests for religious exemptions to the COVID 19 vaccine that we saw over the past year or so. So the law says a religious accommodation is any adjustment to the work environment that will allow an employee or an applicant to practice his or her or their religion.

Kelly (18:51):

And the accommodation must be reasonable. And an employer can refuse to accommodate if it will create an hardship. So this is very typical day to day HR sort of guidance and advice. Anyone who comes to HR and says, look, I want to request an accommodation, you sit down and you talk about it, and you start the interactive process.

Malcolm (19:17):

You make a good point, Kelly. But what is an undue hardship? You mentioned that phrase earlier.

Kelly (19:22):

Well, that's true. So an employer can refuse to accommodate if it will create an undue hardship. And under the law, an undue hardship is any accommodation that is too expensive, implicates workplace safety, decreases efficiency, infringes on the rights of other employees, requires other employees to do more than their share of work. These are very accepted undue hardship categories.

Speaker 6 (19:55):

Thank you for listening and tune into the next episode of Asked and Answered Greenberg Traurig labor and employment podcast.