

- Hey, and welcome to PCTY Talks. I'm your host Shari Simpson. During our time together, we'll stay close to the news and info you need to succeed as an HR pro. And together we'll explore topics around HR thought leadership, compliance and real life HR situations we face every day. My guest today is Kelly Dobbs Bunting. She is the co-chair of the law firm's labor and employment practices, workplace compliance and counseling group. She has considerable experience defending class and collective wage in our litigation and misclassification claims related to race, sex, pregnancy, age, disability, discrimination, harassment, and retaliation. Kelly, thank you so much for joining me on the podcast today.

- Thank you for asking me Shari. It's a real pleasure.

- So I shared a little bit about what you do now, but you have this fascinating background and I'd love if you share a little bit about that and ultimately your passion for the LGBTQIA+ rights.

- Well, I think I came to have this passion as you say, I guess it's more about passion for the law and passion for the rule of law and the law of course tries to codify fairness. Very difficult to do as any HR practitioner knows fairness at work is an ephemeral concept for sure, very, very difficult to nail down, but the law tries to do that. And so, I appreciate that about the law. And I do believe of course that all people should be treated fairly and equally. And LGBTQ are friends in that community are no different and there have been several Biden administration pushes in that direction, trying to sort of build on what Bostock had done. And Bostock is the summer 2020 decision that actually stated from the Supreme Court that actually stated that LGBTQ+ individuals were covered under the word gender or sex in title seven, which is our Civil Rights Act. All of the states that had so far not recognized that LGBTQ+ individuals were actually covered under the sex or the gender category of title seven and therefore they were protected from discrimination and harassment in the workplace. Well, Bostock was sort of a wake up call and the Supreme Court said, "yes, they are." And therefore workplaces at that point those who hadn't included the protections from harassment and discrimination for their LGBTQ+ workers while now everyone moved to do it. And that was June of 2020. So in 2022 Biden really started to build out on those protections that the Supreme Court said the LGBTQ+ community had under the law, under the Civil Rights Act. So we have seen the law move in that direction, both state law and federal law. And unfortunately we've also seen some states, some employer groups, some religious groups push back on those protections and not only sue in court, but also put out a fair amount of press shall we say, on social media and in the court of public opinion in an attempt to curtail the rights that have been so hard fought for and have been won over the course of so many decades. So I believe in the law. I believe in fairness and equality. And so, yes, that's a passion of mine. But another reason is my niece is transgender. And she realized that in her teens, her early

teens and started transitioning in high school. The whole family lived that journey with her and seeing the struggles and seeing what she went through, what she's still going through, is she's since graduated college and has a fantastic job, but still seeing the bias that she faces. And she's such a good person and just wants to live her life. That's hit me pretty hard. Obviously, it definitely brings an abstract legal concept close to home, and I believe in her right to exist and her right to be left alone and her right to experience fairness and equality in the workplace. And so I think that that's part of why I speak out on these issues as well.

- What a fascinating story. And I'm sure we could spend hours talking about your niece's experience. What really interested me about talking to you is you recently gave a presentation at SHRM and it was a really complicated topic and it's gonna be even more complicated for us to cover in a short episode, but I will tee it up as best I can. So with our limited time, can you help us understand the legal background of how the Religious Freedom Restoration Act and state laws intersect with newly enacted workplace protection for that LGBTQIA+ community?

- Well, that was an hour long presentation Shari. But no, I'll try to go quickly. It really is an evolution that began in the late 80s, early 90s with a case that involved two peyote using employees, and peyote of course, banned substance. And they used it during their off time during a religious ceremony. Their workplace found out about it and fired them for illegal drug use. They sued, they went to the court and made it all the way up to the Supreme Court where they said, "Look, this is our religious expression." And therefore there should be sort of a carve out, I guess from the drug laws, which cover everybody else in a neutral manner because the illegal drugs in question were being used as part of an expression of their religion. And the court ruled against them. Now remember, this was late 80s into the early 90s, the court ruled against them and that upset Congress so much that in 1993, they passed. And then president bill Clinton signed the Religious Freedom Restoration Act. And trying to codify Americans' religious freedom. And the fact that if their beliefs are what they're doing may be clashes with other laws that are generally neutrally applied, then religion and their expression, and their religious practices would trump those laws. So that was back in the early 90s and that Religious Freedom Restoration Act has kind of grown. Its spawned many, many State Religious Freedom Restoration Acts that either expanded upon the federal law or were codified in a different manner from state to state their own Religious Freedom Restoration Acts. So you fast forward to today and you have a lot of decisions, including the hobby lobby decision which was also very recent holding that even for profit corporations might have religious beliefs that are worthy of protection. That was quite surprising when that came out. So you see the evolution of this Religious Freedom Restoration Act sort of growing, growing, growing to encompass a lot of things that perhaps originally the law was not intended to encompass. Then

you see the state laws growing out of that even broader in many instances than the federal law. And then you've got what is going to be an obvious clash with the growing body of law that protects LGBTQ+ rights. And it's not only the law itself like actual court cases, and verdicts, and decisions, but it's also a number of executive orders that this administration and other presidential administrations have put into effect that expand the rights of LGBTQ workers in the workplace. And then of course elsewhere in our society. So you are starting to see and in fact over the past year or so, we've really seen a number of these cases come before courts around the country not just the Supreme Court, and we're getting very different decisions depending on the state that these lawsuits are brought in. It results in quite a quandary for HR practitioners especially those who have employees in multiple states, because of the difficulties in keeping their handbooks, their policies, their workplace respect rules. They wanna keep them as equal as possible from state to state and sometimes given various state laws, especially new ones that have been coming out this year, it makes it impossible. Makes an HR person's job extremely difficult. Especially those and almost every workplace has it now. Those workplaces that had either equal protection mission statements they've got codes of conduct, which talk about, "we treat everyone with respect, regardless of whether we agree or disagree with the person's religion or sexual orientation", or any of the other number of protected categories. So it's become almost, workplace has become like many battlegrounds for these social issues that are playing out right now.

- You know, as I think about how this affects HR practitioners no matter what organization you work in, you're balancing everything. You're trying to have a really good understanding of the law, but you're not a lawyer you're trying to have, maybe you don't identify with a particular group that you're trying to protect. So you have that, your own DEIA journey that you're going through, and you're trying to understand. So when I think about some of the things that I've heard from HR practitioners, one of the things that comes up is employees refusing to work with certain populations, or treating a different population poorly, or discussing different populations, or microaggressions or all those kind of things that are wrapped up in the same thing. How do you help practitioners deal with those particular employees that have not embraced what you're trying to do in your company in a way that also respect some of the rights we just talked about?

- It's really hard. No, I mean, I have to say something about what you just said. HR practitioners these days, I mean, it's an impossible job. You look at what's happened over the past two and a half years. So HR practitioners had to be doctors, figuring out all the COVID 19 protocols then they had to be mental health practitioners, right? Because it really did a number on employees' mental health being brought back to work, not brought back to work, vaccinated, not

vaccinated, no one knew what was going on for so long. And now on top of all of these other jobs, HR practitioners now also have to be lawyers. It really is an impossible job. One of the things that I try to counsel clients with is like, go back to what you know. So there are two categories under the Civil Rights Act that you must accommodate. The law says you must accommodate. And that's a disability accommodation request and a religion accommodation request. So if an employee comes to you and says, "Hey, my religious beliefs are being impacted by being forced to work with an LGBTQ+ individual" or "I don't wanna take the diversity training", certainly have heard that, "because this company is asking me to agree with things that I don't agree with and that are against my religion. And therefore I shouldn't have to complete the diversity training." So you go back to what every HR practitioner knows and that is the interactive discussion that you have to have when a worker asks for an accommodation. So you sit down, you go through the interactive process. You ask, "okay, what is it about your religion that prevents you from working with this person, or forbid you from taking our diversity training, or prevent you from signing our code of conduct, which basically just says I will treat everyone in a respectful manner." You know, listen, you have to listen. So you listen to the person that's requesting the accommodation. And then you determine whether you as a company, a firm, an organization are able to accommodate this request without an undue hardship. And that's really become key now is okay, what is considered an undue hardship under the law? So you don't have to accommodate if it will cause an undue hardship to the company and undue hardship could be a cost. You know, it's gotta be more than just a small cost, but it's gotta be some sort of a cost to the company, or maybe it impacts safety, any kind of safety role. If the accommodation would impact that pretty much will trump because safety of course, is very important to employers in every occupation. Another undue hardship under the law would be if you are asking other workers to take on far more than their fair share in order to grant the accommodation to the worker that's requesting it. That's another, what would be considered an undue hardship under the law. So it's very fact intensive. It's very fact specific. It's going through the interactive process as any HR practitioner will tell you, is takes time. And it can be quite difficult but you have to do it, document the process, document the accommodations that you've come up with, the employee can always reject the accommodation that the employer has proffered. But the law says in most cases that an employer does not or the employee does not get to demand just the accommodation that that employee wants. It's really up to the employer to determine is this an accommodation that we as an organization can offer, that would not create an undue hardship on the organization?

- I like the advice around kind of getting back to the basics to the law and how to handle it. I imagine, and this is for a DEIA expert but there's that other side of the coin, right? Cause we all know that there's chatter, right? So if somebody puts an accommodation the

person that they wanna be accommodated from, there's empathy, and there's care that needs to go to that person. So it's definitely a complex issue.

- Absolutely. And you know, it's very often the people that are requesting the accommodation they do not get what they want. I mean, I think it would be very difficult to say, "Oh, okay, I will move you so that you never have any interaction with an employee who has a sexual orientation that you disagree with." I think that's asking a little too much because just as you rightly point out, the employer has to be concerned about the employee who is LGBTQ+ as well. Nobody wants upset in the workplace because it affects productivity, right? And it affects morale. It affects employee retention. No employer wants to be known as an organization that either rejects those who have sincerely held religious beliefs or rejects those who are LGBTQ+. So it is a very fine line, but the HR practitioner must consider both sides. I come up with an example of, and this actually occurred there is a worker that does not wanna celebrate Pride Week. You know, the employee was hoping for a hundred percent participation, has the posters up everywhere, has various activities going on in the employee break room or the cafeteria, or perhaps there's a volunteer walk in support of Pride Week. So, and you've got a worker who absolutely says, "No, I don't wanna participate." Well, the accommodation is pretty easy there. You don't make the worker participate, but you don't stop the Pride Week activities because you probably got other workers who very much wanna participate and wanna show their support. So, it's just a matter of trying to not only accommodate the person who has made the actual accommodation request, but accommodate the employer's values and accommodate others, other individuals, other workers that have different values.

- As I think about this role that HR practitioners have to balance, you know, I'm curious, do you have any resources you could point us to that can help us create policy language that takes into consideration how we're gonna approach accommodations but moreover rights policy that can support LGBTQIA+ rights?

- There are actually a lot and believe it or not the EOC will offer training. If you're looking for live training you can actually request live training from the EOC. I believe they also have sort of in the can training that you can request on diversity and inclusion. There also are very many states, California, New York, that have specific training that an employer can request and can get. And it's web based training. That's not a bad idea, but I tell you I often reach out to Lambda Legal, and I'll spell it, it's L-A-M-B-D-A Legal. They've got a toolkit for workplace equality, it's called Out At Work. They're very helpful. I've definitely reached out to the human rights campaign. Corporate Equality Index has a lot of really good statistics and information on equality in the workplace. Out And Equal is another organization that I've read their publications. And then there is a

national LGBTQ chamber of commerce, which is handy as well. And you can reach out if you're an organization that has one of those chapters in your areas. You can reach out, you can get some pointers, some tips, some help from that organization as well. There are a number of organizations that would be so happy if a workplace would reach out to them and wanna partner with them in either doing a presentation or getting some policy language, getting some ideas as to how they can make their own workspace more inclusive.

- Well Kelly, this was such a fascinating conversation and it's so great whenever I hear somebody who's kind of outside our space talk about the role of HR practitioner and everything that they go through. So appreciate the love that you gave to our listeners cause I know they need it, as they are dealing with everything they've dealt with. So Kelly, thanks for a few minutes of your time.

- Thank you for having me again. It's really enjoyable for me.

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