

Exploring Religious Freedom in the American Workplace

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Abstract

The First Amendment specifically protects the freedom of religion, an idea that has been championed in America for over two centuries. In the workplace, religious freedom is more limited. *Equal Employment Opportunity Commission v. United Health Programs of American Inc. and Cost Containment Group Inc.* (2016) serves as an example of how some religious expression must be limited in order to protect religious freedoms of the majority in the workplace. The purpose of this thesis is to determine how First Amendment religious freedoms are being protected and restricted in the workplace. This research is relevant to working Americans, as the current protections and restrictions on religious freedom in the workplace must be understood in order for such expression in the workplace to continue appropriately. To do this, major court cases such as *Sherbert v. Verner* (1963), *Lemon v. Kurtzman* (1971), *Employment Division, Department of Human Resources of Oregon v. Smith* (1990), and *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark* (1999) are examined. Additionally, current attitudes, acts, and Constitutional amendments pertaining to the issue are reviewed. From the gathering of this information, conclusions about the protection and limitation of religious expression in the workplace are drawn.

Keywords: First Amendment, workplace, freedom of religion

Exploring Religious Freedom in the American Workplace

America was founded upon the ideals of religious freedom. Because this freedom was held in such high regard, the original governing document drafted by the founding fathers intentionally left the federal government with very little power. This document, known as the Articles of Confederation, made the states' intentions clear: All Americans had God-given rights that were to be protected from government overreach at all costs. The Articles of Confederation only governed the United States from 1789-1797 (Maggs, 2017). During those eight years, rebellion, chaos, and inconsistent funding plagued America's federal government. It was this chaos under the Articles of Confederation that eventually "paved the way for creating the far more enduring Constitution" (Maggs, 2017, p. 403). When the Constitution was first drafted, those who identified as Anti-Federalists were alarmed. This was because the Constitution laid out a new set of standards for Americans to follow, giving the federal government more power than it had ever possessed. Unlike the Articles of Confederation, under which Congress did not even possess the authority to collect taxes from states, the Constitution implemented a more stable and self-sufficient government. This marked a radical shift in the way that America was governed, and the way American liberties would be protected. Despite the obvious weaknesses of the Articles of Confederation, many Anti-Federalists were slow to support the Constitution, because they viewed the new document as a potential threat to their recently won freedoms. As champions of small government, Anti-Federalists felt that the Constitution was too vague, leaving too much latitude for a potential overreach of federal government authority in the future. Despite initial rejections, incidents like Shay's Rebellion and the sheer weight of America's debt made it clear that the Articles of Confederation could not remain; stronger government intervention was needed when it came to state's rights and individual liberties. The adoption of

the Constitution marked the United States' transition from a confederation to a democratic republic.

Today, the United States remains a democratic republic, a style of government “in which the sovereign power is derived from and is exercised, either directly or indirectly, by the great body of the people” (Woodburn, 1903, p. 56). Because Anti-Federalists had originally refused to ratify the Constitution, a compromise was made. This compromise came in the form of the Bill of Rights, or the first ten amendments of the Constitution. The Bill of Rights satisfied both Federalists and Anti-Federalists because it gave the government new and necessary power, while also protecting specific individual liberties and states' rights. It was adopted on December 15, 1791 (Kayman, 2011). Though the Bill of Rights outlines ten specific natural rights that are to be protected from interference, perhaps the most iconic and noteworthy amendment is the First Amendment. The First Amendment states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. (U.S. Const. amend. I)

Since the 1791, the First Amendment has served as the guardian of five liberties: the freedom of speech and religion, freedom to assemble and petition, and the freedom of the press (U.S. Const. amend. I). Stuart (1994) supports this, writing, “The Founding Fathers of this Nation recognized the importance of religious belief and guaranteed to every citizen the fundamental right of religious freedom by including an express guarantee in the First Amendment” (p. 383). Aside from simply holding an important place in U.S. history and government, this amendment dictates how Americans young and old conduct themselves at home, school, and the workplace. Without

the First Amendment, there would be no specific protection provided for many of the freedoms Americans take for granted. While each of the five freedoms outlined by the First Amendment carry equal weight, the current polarizing climate of America has brought the issue of religious freedom especially into the light (Schor and Fingerhunt, 2020). The purpose of the following research is to determine how the First Amendment right to freedom of religion is currently being protected and restricted in the American workplace.

Although the Constitution guarantees individuals the freedom of expression, this freedom is subject to cautious restriction based on time, place, and manner. This idea can specifically be applied to the freedom of religious expression. The idea of restricting rights is supported by Clay Calvert (2017) of the *Oklahoma Law Review*, who states, “When the government regulates the time, place, or manner of speech, it must satisfy intermediate scrutiny and prove that (1) it has significant interest, (2) the regulation is narrowly tailored, and (3) ample alternative channels of expression remain open” (p. 623). Examining how religious restrictions based on time, place, and manner are executed in the workplace is a clear way to assess the current climate surrounding this issue in America.

While the freedom of religion is often championed by Christians seeking to exercise their rights in the workplace, they are certainly not the only group of people seeking for their First Amendment freedoms to be honored. Muslims, Buddhists, and Hindus also seek to exercise religious freedom in the United States. Though these religious groups want to see the robust protection of religious freedom, there are other groups, such as Freedom from Religion, who strive to ensure that they are protected from employers and others’ religious expression. Neither group is defending an unworthy cause. Rather, both the religious and the unreligious are calling for action to be taken on two sides of the same coin. Religious groups want to see their freedom

of religion protected, while unreligious groups want to be free to live without the encroachment of others' religious beliefs upon them. Clearly, the issue of religious expression in the workplace is a multi-faceted subject that affects the daily life of a majority of adult Americans in the workplace.

Defining “Religion”

Before a legitimate examination of the laws, acts, workplace codes of conduct, and court cases influencing the protection and restriction of religious freedom in the workplace can take place, the definition of “religion” must first be clearly understood. According to Little, there are three ways religion can be defined: through “substantial definitions, functional definitions, [or] family resemblance definitions” (Little, 2016, para. 9). Substantive definitions of religion “attempt to delineate the crucial characteristics that define what a religion is and is not” (Little, 2016, para. 11). Bellah (1964) uses a substantive definition to define religion as “a set of symbolic forms and acts which relate man to the ultimate conditions of his existence” (p. 359). On the contrary, functional definitions of religion “define religion by what it does or how it functions in society” (Little, 2016). Geertz (1966) uses this kind of definition to explain religion as:

...a system of symbols which acts to establish powerful, pervasive, and long-lasting moods and motivations in men by formulating conceptions of a general order of existence and clothing these conceptions with such an aura of factuality that the moods and motivations seem uniquely realistic. (p. 4)

Lastly, a family resemblance definition of religion describes religion “on the basis of a series of commonly shared attributes” (Little, 2016, para. 13). Just as family members who resemble each

other share multiple similar features, rather than just one specific feature, the definition of religion encompasses many belief systems with similar qualities, rather than one single or specific quality. Benson Saler (1999) elaborates on this idea, explaining that religion should be viewed:

...as a graded category the instantiations of which are linked by family resemblances. Graded categories are exemplified by such familiar categories as 'tall person' and 'rich person.' There are no universally accepted standards for drawing a sharp line between the tall and the not tall and the rich and the not rich, although public and private agencies sometimes offer guidelines. And these categories are graded because some tall persons are taller than others and some rich persons richer than others. Religion, of course, is a far more complex matter than these homey examples, since it rests on a large set of elements or predicates and, moreover, we need to take account of their elaborations and complexities. But it otherwise resembles the examples cited. Some religions are characterized by more of the typicality features that we associate with religion than others. In a manner of speaking, some religions (e.g., Judaism, Christianity, Islam, Hinduism, Buddhism) are more religious than what some (but not all) scholars regard as other religions (e.g., Taoism, Confucianism, Communism). Where, you may ask, does the category give out? There is no sharp cutoff point, nor do we need one. Rather, we have some clear cases of religion and then increasingly less clear ones...scholars must make recommendations about inclusion or exclusion relative to their interests, and they must support those recommendations with analysis and argument, not definitional fiat... Our category is distinguished by central tendencies, not necessary features, and centrality implies periphery rather than fixed borders. (p. 402)

In order to properly protect the religious freedoms of its citizens, the United States Supreme Court has set a precedent of abiding by the family resemblance definition, which takes a broad and inclusive stance towards religious expression (Clements, 1989). This precedent has been solidified through the years by the court decisions that will be examined later in this thesis. For the sake of clarity, this paper will also be focusing on religion in the workplace through the lens of a family resemblance definition.

Opening Case Study

The case of *Equal Employment Opportunity Commission v. United Health Programs of America Inc. and Cost Containment Group Inc.* (2016) is a prime example of the fragile relationship between First Amendment freedoms—specifically the freedom of religion—and workplace conduct. In this case, employees sued United Health Programs of America, Inc. (UHP) and the parent company, Cost Containment Group, Inc. (CCG), after the companies forced employees to engage in religious exercises and activities while on the job. Located in Long Island, New York, CCG is a “small wholesale company that provides discount medical plans to groups of individuals” (*EEOC v. United health Programs of America, Inc.* 213 F.Supp.3d 377, 386 (2016)). They also provide such plans for non-profit and for-profit organizations. After experiencing financial hardship, executives of CCG felt that corporate culture was beginning to fall apart. In response to the perceived problem, Chief executive Officer Robert Hodes and Chief Operations Officer Tracey Bourandas created a plan to motivate employees, promote teamwork, and increase overall workplace satisfaction. The solution, they believed, could be found through Hode’s aunt, Denali Jordan. Jordan had recently developed a children’s’ curriculum called “Onionhead,” and was eager to translate her work into a more professional setting, later renaming her program “Harnessing Happiness.” This program was

described by Jordan as “a multi-purpose conflict resolution tool” that was meant to help “people of all ages with addiction, abuse and domestic violence, family issues, marital problems, eldercare, death and dying, the full spectrum of autism and other cognitive disabilities or illnesses (such as Alzheimer’s), and to generally develop better problem-solving and communication skills” (*EEOC v. United health Programs of America, Inc.* 213 F.Supp.3d 377, 386 (2016)). The plaintiffs, however, disagreed. They described Onionhead as a “system of religious beliefs and practices” (*EEOC v. United health Programs of America, Inc.* 213 F.Supp.3d 377, 386 (2016)) that were pushed upon them during their time as employees. *EEOC v. United Health Programs of American Inc.* is a unique case because the plaintiffs’ claims fall into two specific categories regarding religious expression in the workplace. The first category of claims falls under the idea of reverse religious discrimination. This means that the employers were pushing religious beliefs on their employees, which was inappropriate. The second category of claims deals with the fact that the appellants were fired over their refusal to succumb to said religious beliefs (Leagle, n.d.). Firing a person on the basis of religion is strictly prohibited by Title VII of the Civil Rights Act of 1964 (Tomaskovic-Devey & Stainback, 2007).

Clearly, UHP and CCG’s usage of Onionhead—a program that the court deemed religious—violated the employees’ right to religious freedom in the workplace, which protects against proselytizing. The United States Eastern District Court of New York ruled in favor of the employees, who were represented by the Equal Employment Opportunity Commission (Leagle, n.d.). It was found that the defendants were in violation of Title VII. This recent court case demonstrates just how relevant the discussion of religious expression in the workplace is and why such freedoms must be both limited and protected.

The following sections of this thesis will provide readers with a justification for this issue, followed by a research question and literature review of relevant court cases. Finally, applicable laws and current attitudes towards the protection and restriction of religious freedom will be explored before conclusions are drawn.

Justification

The purpose of conducting this research is to shine a light on a growing conversation in the American workplace. In an age where America's religious beliefs are on the decline (Wormald, 2015), it is important to determine which religious liberties are protected by law and which expressions of religion are allowed to be curbed at the preference of one's employer. Pew Research conducted a study in 2018 and 2019 to determine the percentage of Americans who profess to be religious. According to the study, 26% of Americans say they are atheist, agnostic, or "nothing in particular." This number is a 9% increase from the same group's response (at 17%) in 2009 ("Decline of Christianity," 2019). The study also determined that 65% of American adults claim to be Christian, which signifies a 12% drop in those claiming Christianity since 2009 ("Decline of Christianity"). While Christianity is clearly on the decline, the numbers of those professing to be Hindu, Buddhist, or Muslim in the United States tell a different story. Hindus and Muslims continue to maintain the same number of believers, while Buddhism increased just slightly from 0.6% to 0.7% in 2014 (Wormald, 2015). Regardless of how a specific religion such as Buddhism or Islam may have increased or retained the same number of adherents, Pew Research still found that "The [religious] group that has experienced the greatest net gains due to religious switching is the religiously unaffiliated" (Wormald, 2015, para. 8). Clearly, religious involvement as a whole is on the decline in the United States. Irrespective of how many people practice religion in America, the law remains the same: everyone has the right

to religious freedom. However, this decline does signify a shift in the way that religious freedom is being viewed. In the past, Americans wanted their religious freedom protected so that they could express themselves accordingly. It was upon this basis that the first settlers came to the American colonies. Today, there is a rising tide of people who want to be protected *from* religion in the workplace more than they want religion to be protected in the workplace. It is important to distinguish which laws are helping and which laws are hurting the cause of freedom of religion in the workplace in an age where religious beliefs in general are on the decline (Jones, 2017).

James Sonne, the Director of Stanford Law School's Religious Liberty Clinic, affirms this idea, stating, "Religious discrimination in the workplace is an issue that continues to fester in the US, to the particular detriment of minority faiths like Muslims, Sikhs and Seventh-day Adventists" (Moodie, 2017, para. 3). When examining this issue, it is important to remember that freedom of religious expression includes all faiths—not just Christianity or the preferred faith of a particular employer. Clearly, religious discrimination in the workplace is a problem that is not going to go away on its own. Gregory (2011) writes, "...experts in this field of law predict that conflicts involving religion in the workplace will in the years to come continue to plague workers and their employers" (p. 28), further driving home the point that the conversation about protecting and restricting religion in the workplace must be had. In view of this, the Marquette Law Review points out that "Religious accommodation doctrine is ripe for another round at the Supreme Court. Not since several landmark rulings in the 1970s and 1980s has the Court reviewed the Title VII statutory mandate that employers must accommodate religion in the workplace" (Ruan, 2008, p. 2). Among such "landmark rulings" is *Lemon v. Kurtzman*, the case that originated the famous precedent known as the "Lemon Test," which has affected numerous court decisions large and small through the years.

In order to determine how First Amendment religious freedoms are affecting religious expression in the workplace, America must be willing to examine both sides of the issue. Only after exploring the issue from multiple angles can solid conclusions about the protection and restriction of religious freedoms be drawn.

Research Question

How do current First Amendment laws protect and restrict the exercise of religious freedom in the workplace?

Literature Review

This thesis will examine major court decisions that have affected policies regarding the First Amendment. More specifically, four major cases have been selected for examination due to the historic nature of their influence on the subject of religious freedom in the workplace. While not every case deals specifically with workplace religious freedom, the outcome of each case directly affects religious expression in the workplace. The following court cases have played integral roles in the protection and restriction of First Amendment freedoms in the workplace: *Sherbert v. Verner* (1963), *Lemon v. Kurtzman* (1971), *Employment Division, Department of Human Resources of Oregon v. Smith* (1990), and *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark* (1999). While three of the above cases were heard by the Supreme Court, *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark* was heard by the Third Circuit of the U.S. Court of Appeals. Because of their differences, each case's ruling brings a unique perspective to light regarding religious freedom in the American workplace.

Sherbert v. Verner

Sherbert v. Verner dealt with the issue of religious expression and discrimination in the workplace head on. In 1963, the Supreme Court ruled in *Sherbert v. Verner* that a worker had the right to apply for unemployment benefits after losing her job over her religion convictions. The textile mill where the appellant, Adeil Sherbert, worked had followed a five-day work schedule for fourteen years when a new work schedule was suddenly introduced. Because of this, Sherbert had worked five days a week—Monday through Friday—without fail since the beginning of her employment. With the new schedule, she was required to work on Saturdays. As a Seventh day Adventist, this was against her religious beliefs. Sherbert requested not to work on Saturdays since it was in conflict with her religious beliefs, but her request was denied. When Sherbert refused to work on her Sabbath, she was promptly fired (Greenwalt, 2006). After losing her job, Sherbert applied for other jobs, but was unable to secure another job due to her refusal to work on Saturdays. Because of this, she applied for unemployment compensation, part of South Carolina's Unemployment Compensation Act. The act stated that "a claimant shall be ineligible for benefits if he failed without good cause, to accept available suitable work when offered him" (p. 201). Since South Carolina viewed Sherbert's refusal to work as a 'personal reason,' rather than a legitimate claim, they denied her application for unemployment. The South Carolina Supreme Court agreed with this decision, holding it up in their court. (Killilea, 1974). The case eventually made its way to the U.S. Supreme Court, where the justices ruled 7-2 in favor of Sherbert ("Unemployment Compensation," 1963). They ruled that it was unconstitutional for South Carolina to deny Sherbert unemployment benefits since she was applying on the basis of her religious beliefs. This court case is significant because it set a new precedent: protecting

religious freedom now mean more than simply protecting religious actions—it meant protecting religious beliefs as well.

According to Greenawalt, the case of *Sherbert v. Verner* set a precedent for future decisions dealing with the Free Exercise Clause by greatly expanding the power of the clause. Stuart (1994) writes, “*Sherbert* completed the expansion of the Free Exercise Clause and marked the beginning of the modern law of free exercise of religion by recognizing that courts can grant religious exemptions even from generally applicable laws” (p. 397). This Supreme Court case helped expand and clarify the Free Exercise Clause by asking four specific questions. The first question asks, “Does an indirect impingement on religion raise a free exercise problem?” (Greenawalt, 2016, p. 179). In other words, since the Free Exercise Clause prohibits government from banning people’s practice of religion, does the state of South Carolina’s decision not to grant Sherbert unemployment count as an indirect violation of the Free Exercise Clause? The second question, “Does neutral application of a law not directed against religion raise a free exercise problem?” (p. 179) follows a similar theme. This probing question asks readers to consider whether a neutrally applied law, such as the unemployment application policy in South Carolina, can still unintentionally violate a person’s right to religious freedom. Simply put, is it an issue if a law that is not directed against a specific religion is neutrally applied? Next, the third question from this case asks, “What standard is appropriate for reviewing such interferences with the exercise of religion?” (p. 179). Since there was no standard deemed appropriate for reviewing instances of interferences at the time, this court case blazed a new trail. In fact, the *Sherbert v. Verner* decision became a determining factor in the standard by which interferences with religious freedom are measured. Today, workplace discrimination laws dealing with religious expression still look to *Sherbert v. Verner*. To follow up the third question concerning

the standard for examining the interferences and violations of religious freedoms, this case asks a fourth and final question: “With what stringency should that standard be applied?” (p. 179).

Specifically, once the appropriate standard for interference into a person’s religious freedom has been established, how tightly should it be abided by? Since the ideas of religion and sincerity are subjective at best, this question cuts to the root of the problem. When is too far? When is more action necessary?

Sherbert v. Verner helped set the precedent for the correct level of government and employer interference when dealing with issues of religious expression in the workplace. This issue would be picked up by the Supreme Court again just a few years later—this time in regard to public schools.

Lemon v. Kurtzman

Decided in 1971, Supreme Court case *Lemon v. Kurtzman* established a three-pronged test for future decisions grappling with the separation of church and state (“*Lemon v. Kurtzman*,” n.d.). This test, referred to popularly as “the Lemon Test” laid out three specific standards to be followed when dealing with government interference of religious freedoms: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion... finally, the statute must not foster an excessive government entanglement with religion” (Munoz, 2015, p. 179). This means that government interference in religious activities must have a secular purpose, be neutral in effect, and there must not be excessive entanglement by the government in religious matters. Although *Lemon v. Kurtzman* aimed specifically at religious expression in schools, the Lemon Test has been applied across a number of issues related to religious expression, including workplace legal disputes.

However, the Lemon Test has come under fire in recent years. Conservative Justices Antonin Scalia and Clarence Thomas have criticized the Lemon Test's weakness and subjectivity (Supreme Court of the United States, 1993). Other justices who have criticized the test and suggested other methods for testing the limits of the Establishment Clause should be implemented include Justice Sandra Day O'Connor and Chief Justice William Rehnquist, further demonstrating the flimsiness of the Lemon Test (Pacelle, n.d.). Despite the question of legitimacy surrounding its three-pronged test, *Lemon v. Kurtzman* has had a monumental and undeniably large effect on the outcomes of numerous court cases dealing with religious freedom. Even though the Lemon Test is now viewed as an outdated legal tool by many, it has played an incredibly influential role in the structure of rules and regulations protecting and restricting religious freedom in the workplace.

Employment Division, Department of Human Resources of Oregon v. Smith

In *Employment Division, Department of Human Resources of Oregon v. Smith* (1990), the Supreme Court ruled against two men who filed for unemployment after being fired from their jobs for using peyote, a hallucinogenic drug, as part of a Native American religious ritual (Hermann, n.d.). This decision clarified that "if a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it certainly follows that it may impose the lesser burden of denying unemployment compensation benefits to persons who engage in that conduct" (*Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)). This ruling supported the idea that neutral and generally applicable state laws that did not specifically seek to discriminate against a religion were not in violation of the Free Exercise Clause. Although this cause sought to demonstrate why some limitations of religious freedom in the workplace must be permitted, it only left a

more confused public, since it was in direct opposition with precedents set by the Supreme Court in earlier years. The previous decisions of *Lemon v. Kurtzman* in 1963, and *Sherbert v. Verner* in 1971, made it clear that neutral state laws could be found guilty of unintentionally limiting and discriminating against people's right to religious expression in the workplace. The fact that *Department of Human Resources of Oregon v. Smith* differed from these previous rulings by siding with the state government demonstrated a major shift in the way that the Establishment Clause would be interpreted in the future, in terms of religious freedom in the workplace. Stuart warns about this, writing that "the *Smith II* decision effectively holds laws of general applicability that burden religious practices to the lowest level of scrutiny employed by the courts—the 'rational relationship' test" (Stuart, 1994, p. 411). This test states that a law simply has to be "rationally related to a legitimate state interest," effectively downgrading laws "that burden religious practices to the lowest level of constitutional protection" (pp. 411-412). The result of this is the endangerment and jeopardization of the Free Exercise Clause. This precedent would later be overpowered by the actions of the Religious Freedom Restoration Act of 1993.

Fraternal Order of Police Newark Lodge No 12 v. City of Newark

Fraternal Order of Police Newark Lodge No 12 v. City of Newark (1999) is another case that directly addresses religious expression in the workplace. This pivotal case focused on whether or not two police officers from the Newark Police Department could maintain beards for religious purposes in a work environment with a strict "no beard" policy. As Sunni Muslims, Officers Faruq Abdul-Aziz and Shakoor Mustafa felt it was their religious obligation to grow and maintain facial hair. Having a beard was against the Newark officer code of conduct, which stated, "Full beards, goatees or other growths of hair below the lower lip, on the chin, or lower jaw bone area are prohibited" (*Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d

Cir. 1999)). Ultimately, the U.S. Court of Appeals for the Third Circuit ruled in the men's favor, stating that since police from the station could seek a medical exemption from the "no beard" policy, the same exemption should be allowed for religious reasons (*Fraternal Order of Police v. City of Newark*, 1999). Although this decision seems to contradict that of *Department of Human Resources of Oregon v. Smith*—in which the men appealing on the grounds of religious discrimination did not win their case—it simply highlights the finer differences between the two decisions. For instance, *Smith* was able to restrict employees' religious freedom since the case concerned "criminal prohibitions" (*Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 363 (3d Cir. 1999)), whereas the plaintiffs in *Fraternal Order of Police* were not breaking federal or state laws by growing beards. In the same way, the precedent set by the *Smith* decision differed from the *Fraternal Order of Police* in that the *Smith* decision "[did] not apply to government rules that, like the 'no-beard' policy, already make secular exemptions for certain individuals" (*Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 363 (3d Cir. 1999)). Lastly, the *Smith* and *Fraternal Order of Police* decisions differ because the policemen were basing their case on both the Free Exercise Clause and the Free Speech Clause, unlike the employees of the *Smith* decision, who were basing their case exclusively on the Free Exercise Clause (*Employment Div., Dept. of Human Resources of Oregon v. Smith*, 1990). Today, the *Fraternal Order of Police* decision still serves as a precedent for other cases when an employee's religious grooming or dress in the workplace has been called into question.

Though each of the court cases reviewed above wrestle with unique and specific scenarios, the rulings all set precedents for one another. This has been demonstrated by *Sherbert's* establishment that the freedom to believe and the freedom to exercise religion should be protected, *Lemon's* three-pronged test, *Smith's* indication that neutrally applied state laws are

not a violation the Free Exercise Clause, and *Fraternal Order of Police's* ruling that grooming exceptions can be made on religious grounds in the workplace. Each of these cases continues to influence the judicial decisions of today, as seen in 2016 by the decision to protect employees' religious freedoms by restricting those of their employers in *Equal Employment Opportunity Commission*.

Influential Laws

Several conclusions about the protection and restriction of religious freedom in the workplace can be reached through a survey of relevant data collected from laws, workplace regulations, the Constitution, major court decisions, and current societal attitudes. The following laws have significantly influenced protection and restriction of religious freedom, and they continue to exert their influence today.

The First Amendment

The Constitution outlines several ideas pertaining to freedom of speech and religious expression. Most obviously, the Bill of Rights includes the First Amendment, which ensures five specific rights, including the freedom of religion. The First Amendment states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. (U.S. Const. amend I)

Because there are several rights mentioned in the First Amendment, it is important to pay attention to the two specific clauses related to freedom of religion: the Free Exercise Clause and the Establishment Clause. These clauses work in tandem to maximize Americans' freedom of

religion while limiting the imposition that the government or other entities are allowed to make on said freedom. The Free Exercise Clause states that the government may not prohibit people from exercising their religion. The Establishment Clause states that a government religion cannot be adopted, effectively creating what is commonly referred to as “the separation of church and state.” Natanya Ruan (2008) of the Marquette Law Review reinforces these ideas, stating that “the Free Exercise Clause protects religious expression against governmental power, while the Establishment Clause bars government from adopting a religion itself” (p. 3). While both clauses within the First Amendment related to freedom of religion are specifically aimed at protection from the government, they are still more than applicable to the private workplace. Without the restrictions placed on the federal government by the First Amendment, smaller entities would have no model to follow. This would result in inconsistency at the state level, which would trickle down to businesses large and small. Without the First Amendment’s protection of religious freedom, there would be no basis for right and wrong concerning this issue in the workplace. This influential amendment affects every level of life in the United States—from the federal government to the private workplace. Inarguably, the First Amendment is the original standard by which religious freedom in the workplace is protected and restricted in the United States.

The Fourteenth Amendment

The Fourteenth Amendment is another demonstration of the Constitution’s massive influence on the protection and restriction of religious freedoms in the workplace. This is because this amendment shields religious freedom from overbearing state governments. The Fourteen Amendment has five sections, with section one containing the Equal Protection Clause. Section One, Article One states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (U.S. Const. amend. XIV, §1)

In other words, the Fourteenth Amendment's Equal Protection Clause bars states from denying people their right to free expression of religion. This amendment further cements what the First Amendment already established—religious freedoms must be reasonably protected from all levels of authority, no matter how large or small.

In addition to the First and Fourteenth Constitutional amendments, there are two acts that have strongly influenced the formation of policies both protecting and limiting religious freedoms in the workplace. These acts are the Civil Rights Act of 1964 and the Religious Freedom Restoration Act of 1993. While these acts were written nearly three decades apart from one another, their connection and far-reaching influence is unmistakable.

The Civil Rights Act of 1964 and Title VII

Signed into law by President Johnson, the Civil Rights Act of 1964 outlawed segregation and discrimination, providing for equal opportunity in the workplace on issues concerning race, sex, and religion. Because the Civil Rights Act of 1964 was birthed out of intense racial tensions in America, it did not focus solely on religious freedom; however, the idea of equal opportunity—which encompasses religious freedom—still shines through. Title VII of the Civil Rights Act of 1964 specifically mentions religious expression, prohibiting employers from discriminating against “any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex or national

origin...” (Tomaskovic-Devey & Stainback, 2007, pp. 49-50). Sec.703 Title VII strictly prohibits segregation or classification of employees based on age, sex, race, or religion. It also stipulates that employers and employment agencies may not fire current employees or deny potential employees on the grounds of age, sex, race, or religion. Shortly after the introduction of the Civil Rights Act of 1964, the Equal Employment Operation Commission (EEOC) was introduced. Created in July of 1965, the EEOC is alive and well today, actively working to protect employees’ rights by enforcing federal laws and processing claims dealing with workplace discrimination (Gregory, 2011). Gregory (2011) states, “Initially most of the claims filed with the EEOC alleged acts of racial discrimination, but with the passage of time, increasing numbers of sex, national origin, and religious claims have been lodged with the commission” (p. 28). This statement clearly demonstrates how the Civil Rights Act of 1964 has played an increasingly influential role in the shaping of workplace standards concerning the free exercise of religion and the restriction of religious freedom.

It should be noted that Title VII does not apply to all employers in the traditional sense of the word. According to the document, an employer is “a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year” (Civil Rights Act of 1964, Title VII, Sec. 701). However, according to Title VII, *employers* do not include:

- (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or a State or political subdivision thereof, (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954: Provided, That during the first year after the effective date prescribed in subsection (a) of section 716, persons having fewer

than one hundred employees (and their agents) shall not be considered employers, and, during the second year after such date, persons having fewer than seventy-five employees (and their agents) shall not be considered employers, and, during the third year after such date, persons having fewer than fifty employees (and their agents) shall not be considered employers: Provided further, That it shall be the *policy of the United States to insure equal employment opportunities for Federal employees without discrimination* because of race, color, *religion*, sex or national origin and the President shall utilize his existing authority to effectuate this policy [emphasis added]. (Civil Rights Act of 1964, Title VII, Sec. 701)

Put another way, Title VII does not grant freedom of religious expression in the workplace to people across the board. Because there are different kinds of employers, a number of unique standards and laws apply to respective industries and employers. For instance, while the President may use his authority to help shield federal employees from religious discrimination, he cannot take the same action to prevent such unsavory discrimination from taking place within a religious organization. Allowing such exclusions in the text of Title VII of the Civil Rights of 1964 protects the rights of religious organizations while also safeguarding the separation of church and state. Without this vital separation, religious freedom in secular organizations—much less religious organizations—would potentially face too much restriction by the government.

The Religious Freedom Restoration Act of 1993

Similarly, the goal of the Religious Freedom Restoration Act (RFRA) of 1993 was created to ensure the government was taking appropriate measures to secure religious freedoms

for Americans (“Religious Liberty,” 2016). More specifically, the act was created to do the following:

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government. (Religious Freedom Restoration Act of 1993, §2, subpoint b, 1993)

The RFRA was a response to the Supreme Court case, *Employment Division, Department of Human Resources of Oregon v. Smith* (1990). As a result, it created “a statutory prohibition against government action that substantially burdens the free exercise of religion, even if the burden results from a law of general applicability” (Stuart, 1994, p. 414). This means that the case prohibited the government from taking action that might harm a person or a group’s religious freedom, even if the action being taken or the law being applied is simply being applied in a general or neutral fashion. The RFRA makes it clear that the only way the government may legally encroach the religious freedoms enjoyed by Americans is by demonstrating that “the action is the least restrictive means of furthering a compelling government interest” (p. 414). To restate this idea, the government is not allowed to impinge on a person’s freedom of religion unless there is a compelling justification.

As time and circumstances have changed, opinions and attitudes concerning the laws, acts, and judicial precedents affecting religious liberties have adapted. The relatively recent passage of the RFRA in 1993 proves this, as the attitude of society saw a need for greater clarity on the issue of religious freedom. In the same way, current attitudes surrounding the issue continue to form and evolve.

Current Attitudes

Current attitudes towards the protection and restriction of religious expression in the workplace range widely. Traditionally, the support of religious liberties has been by those practicing Christianity or some other faith. Pew Research found that while Christianity accounted for 77% of the American population in 2009, today it is more outnumbered (2019). In similar research conducted by Pew Research, it was estimated that Muslims will surpass Jews by 2040, becoming the second-largest religious group in America. Additionally, Pew estimated that by 2050, there will be a population of 8.1 million Muslims in America, making them 2.1% of the nation's total population and nearly doubling their current numbers (Mohamed, 2018). The movement away from Christianity towards other faiths—or no faith—has never been more prevalent. Because of America's shift away from traditional religion as a whole, current attitudes towards religious freedom have become less friendly. Presently, groups like Freedom from Religion have burst onto the scene, continuing to grow in numbers and in support as they demand protection from religious influences within the workplace (Walpin, 2015). Clearly, the protection and restriction of First Amendment religious freedoms are two sides of the same coin. Americans can generally agree that religious freedoms should be protected in the workplace, but only to the extent that such protections do not encroach upon the rights of the employer or of other employees (Storslee, 2019).

The University of Chicago Divinity School and The Associated press-NORC Center for Public Affairs Research conducted a poll in August 2020, specifically asking people how they felt about current levels of religious freedom in America. In the study, 55% of respondents reported that they find issues of religious freedom to be “very important” to them (Schor and Fingerhunt, 2020, para. 2). In the same poll, 35% of Americans reported feeling that their right to

religious freedom was being threatened presently, while 44% stated that “other people’s claims about their freedom of religion challenge their own general rights or freedoms” (The University of Chicago, 2020, para. 6). Put a different way, more respondents were concerned about the potential negative impact of other people’s religious freedoms on them, as opposed to simply being concerned about the general protection of their personal religious freedom. This widespread opinion serves as further supporting evidence that more people feel as though the religious freedoms of others need to be limited. This falls into line with the adage, “Your right to swing your arms ends just where the other man's nose begins” (Chafee, 1919, p. 957). Interestingly enough, opinions surrounding this issue also varied greatly depending on a person’s level of education. 87% of those with a college degree believe the government should allow people to practice “any religion without government restriction,” whereas this sentiment was only echoed by 69% of people who had a high school diploma or less (The University of Chicago, 2020, para. 4). While the survey demonstrated that majority of Americans believe in religious freedom, it also demonstrated that there are a wide range of opinions surrounding the level of freedom Americans perceive they currently possess, as well as the level of threat they felt is facing their freedoms. This study further supports the general attitude of most Americans, who are in support of religious freedom in the workplace, as long as it does not inhibit or threaten their own personal beliefs.

Conclusion

After reviewing documents dating back to eighteenth-century American history, one idea has become clear: the amount by which religion is protected and restricted in the American workplace must continue to be discussed and debated in order to be determined. While there are a number of influential court cases that discuss religious freedom, there have been few cases

brought before the highest court in the land that specifically discuss how the protection and restriction of religious freedoms are supposed to interact within the workplace. Of the cases that do discuss this issue, such as *Sherbert v. Verner* (1963), *Employment Division, Department of Human Resources of Oregon v. Smith* (1990), *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark* (1999), or *Equal Employment Opportunity Commission v. United Health Programs of American Inc. and Cost Containment Group Inc.* (2016), many have produced rulings that contradicted or otherwise discounted each other. This was demonstrated by *Lemon v. Kurtzman*'s controversial Lemon Test, as well as *Department of Human Resources of Oregon v. Smith*'s reevaluation of the Establishment Clause. Because these precedents are routinely looked to by the lower courts when deciding cases involving freedom of religious expression in the workplace, it is important to have a conversation surrounding this issue. Without discussion, no clarity can be found. Without discussion, America's feelings on the current issues surrounding religion cannot be determined, and most importantly, without discussion, no concrete evidence regarding the protection and restriction of religious freedom can be compared.

Proper Protection

As this thesis has discussed, clear lines must be established to maintain the delicate balance between protecting rights and restricting rights. As the Free Establishment Clause, Free Exercise Clause, and Equal Protection Clause demonstrate, too much protection or too much restriction simply results in an overreach of power from federal government, state government, or private businesses.

After analyzing various documents, one conclusion can be drawn. The freedom of religion has a history of robust protection in the United States, dating all the way back to the original settlers and then the Founding Fathers. Because of this, the sentiment that religious

freedom should continue to exist in America—particularly in the workplace—is strong. As influential court cases like *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark* (1999) have demonstrated, America has made great strides in the past two decades to ensure that both religious belief and religious expression remain protected in the workplace.

Appropriate Restriction

The analysis of pivotal court cases, amendments, and laws throughout this thesis has also proven that it is possible to restrict people's religious freedoms in the workplace without sliding down the slippery slope of reverse religious discrimination. As *Equal Employment Opportunity Commission v. United Health Programs of American Inc. and Cost Containment Group Inc.* (2016) demonstrated, there is a need for a reasonable restriction of religious freedom in the workplace in order to avoid situations of proselytizing. Controversial debates over the Establishment Clause have also determined the course for the reasonable restriction of religious freedom in America. As *Employment Division, Department of Human Resources of Oregon v. Smith* (1990) demonstrated, there are instances where neutrally applied state or federal laws trump the perceived religious freedoms of a specific group, especially when a crime is being committed in the name of religion. In order to ensure that when religious freedoms are only restricted when appropriate and legal, it is important to follow the standard of time, place, and manner. This means that the government should only restrict religious speech when the interest of the government is significant, the regulation is narrow and specific, and there are alternative options available for expression (Calvert, et. al, 2017).

There is much to be said about the protection and restriction of religious freedom in the American workplace, and it is a subject that will continue to be debated and examined as long as the United States stays true to the Constitution. As President Ronald Reagan once stated,

“Freedom is never more than one generation away from extinction” (Ronald Reagan Presidential Foundation, 1984, para. 1). Like any other major freedom that is unique to the United States, religious liberty will be slowly robbed from the American people if they do not remain vigilant. Because of this, Americans must continue guarding their religious freedoms in the workplace, arming themselves with the truth that is found in the Constitution, confirmed by the Supreme Court, and protected by laws and acts throughout history.

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