

Washington University Law Review

Volume 76 | Issue 1

January 1998

Mahmoud Abdul-Rauf's Suspension for Refusing to Stand for the National Anthem: A "Free Throw" for the NBA and Denver Nuggets, or a "Slam Dunk" Violation of Abdul-Rauf's Title VII Rights?

Kelly B. Koenig
Washington University School of Law

Follow this and additional works at: https://openscholarship.wustl.edu/law_lawreview



Part of the [Civil Rights and Discrimination Commons](#), [Entertainment, Arts, and Sports Law Commons](#), [First Amendment Commons](#), [Labor and Employment Law Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Kelly B. Koenig, *Mahmoud Abdul-Rauf's Suspension for Refusing to Stand for the National Anthem: A "Free Throw" for the NBA and Denver Nuggets, or a "Slam Dunk" Violation of Abdul-Rauf's Title VII Rights?*, 76 WASH. U. L. Q. 377 (1998).

Available at: https://openscholarship.wustl.edu/law_lawreview/vol76/iss1/23

This Note is brought to you for free and open access by Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

MAHMOUD ABDUL-RAUF'S SUSPENSION FOR REFUSING TO STAND FOR THE NATIONAL ANTHEM: A "FREE THROW" FOR THE NBA AND DENVER NUGGETS, OR A "SLAM DUNK" VIOLATION OF ABDUL-RAUF'S TITLE VII RIGHTS?¹

INTRODUCTION

In 1965, Sandy Koufax, a Jewish baseball player, refused to pitch in the first game of the World Series because it fell on a holy day, Yom Kippur.² In 1967, numerous state boxing commissions stripped Muhammad Ali of his boxing license and of his heavyweight title when, as a result of his Muslim beliefs, he refused to step forward for the draft during the Vietnam conflict.³ More recently, in 1996, the National Basketball Association ("NBA") suspended then Denver Nugget Mahmoud Abdul-Rauf without pay when he refused to abide by a league rule that requires "players to line up in a dignified posture for the anthem."⁴ Abdul-Rauf claimed that his Muslim

1. When a basketball player is fouled by another player, he or she is entitled to a "free throw," an unobstructed attempt at the basket. This Note will evaluate if the NBA and the Denver Nuggets could "freely" "throw" Mahmoud Abdul-Rauf out of the NBA for refusing to stand for the National Anthem.

2. See Andrew Herrmann, *Athletes' Faith Sometimes Comes First*, CHI. SUN TIMES, Mar. 14, 1996, at 8.

3. See THOMAS HAUSER, MUHAMMAD ALI: HIS LIFE AND TIMES 170-72 (1991). "One hour after Ali refused to step forward to be inducted into Vietnam, before he'd even been charged with any crime, the New York State Athletic Commission suspended his boxing license and withdrew recognition of him as heavyweight champion." *Id.* at 172. Soon, all other jurisdictions in the United States followed in New York's footsteps. See *id.*

During his suspension, Ali spoke at various college campuses and articulated his beliefs on the Vietnam War:

I'm expected to go overseas to help free people in South Vietnam, and at the same time my people here are being brutalized and mistreated, and this is really the same thing that's happening over in Vietnam. So I'm going to fight it legally, and if I lose, I'm just going to jail. Whatever the punishment, whatever the persecution is for standing up for my [Muslim] beliefs, even if it means facing machine-gun fire that day, I'll face it before denouncing the religion of Islam.

Id. at 187. The religion of Islam is also referred to as Orthodox Islam or Black Muslim. See generally, HAUSER, *supra*.

4. Ken Denlinger, *Disorder On The Court; NBA Player's Refusal To Stand For Anthem Ignites Controversy*, WASH. POST, Mar. 14, 1996, at A01. Mahmoud Abdul-Rauf, formerly known as Chris Jackson grew up in Gulfport, Mississippi and played college basketball at Louisiana State University. He was selected third in the 1990 NBA draft by the Denver Nuggets but "squandered his first two seasons, mostly overweight and out-of-shape." John Mossman, *Islam Dominates Life, Career Of Abdul-Rauf*, THE BATON ROUGE ADVOCATE, Mar. 15, 1996, at 9D.

beliefs precluded him from participating in the National Anthem because the Koran forbids participation in any "nationalistic ritualism."⁵ Moreover, Abdul-Rauf believed that the American flag and the National Anthem connote tyranny and oppression.⁶

Religion and athletics have often conflicted in amateur sports as well as in the professional realm.⁷ Throughout the United States, pre-game prayers are regularly held in public high school and university locker rooms.⁸ Such rituals, however, are not conducted without limits. For example, at Memphis State University,⁹ several football players alleged that the coaches instituted a "no pray/no play rule."¹⁰ As the phrase suggests, if a student-athlete refuses to participate in mandatory prayer, he is banned from playing in the game.¹¹ In response, the American Civil Liberties Union ("ACLU") initiated legal action on behalf of the players. The university, however, settled this issue by

Abdul-Rauf's feud with former Nuggets coach Paul Westhead ended when the Denver Nuggets fired Westhead after the 1992 season. At that time, Abdul-Rauf rededicated himself under the coaching of Dan Issel. As a result, Abdul-Rauf won the NBA's Most Improved Player award in 1993. *See id.* Abdul-Rauf was considered to be one of basketball's best pure shooters; he led the Nuggets in scoring in the 1992, 1993 and 1994 seasons. *See id.*

Abdul-Rauf converted to the Orthodox Islam Faith in 1991 and legally changed his name in 1993. Abdul-Rauf, who complied with the NBA rule prior to the 1995-1996 season, no longer believes in standing for any nationalistic ideology and believes that "nothing should come between him and Allah." Doug Krikorian, *Oppression? Abdul-Rauf Gets Millions For Playing*, SACRAMENTO BEE, Mar. 14, 1996, at F4; *see also* Jim Hodges, *NBA Sits Abdul-Rauf For Stance On Anthem*, L.A. TIMES, Mar. 13, 1996, at C, available in 1996 WL 5249877.

Abdul-Rauf is the first professional athlete to refuse to stand for the anthem. *See* Manny Topol, *Legal Issues Cloudy/ Contract Law Or Religion?* NEWSDAY, Mar. 14, 1996, at A95. He signed an NBA contract and is therefore required to follow the league's rules and regulations. James Quinn, an attorney for the NBA Players Association, said that "the matter isn't that clear-cut. 'This particular issue is in the NBA handbook, but it was never negotiated with the players, so it's not purely a contract issue.'" *Id.*

5. *See Player To Stand For Anthem, NBA Lifts His Suspension*, THE OTTAWA CITIZEN, Mar. 15, 1996, at B2. "A 14-year-old rule requires players to 'line up in a dignified posture' for The Star Spangled Banner and, since the addition of two Toronto and Vancouver franchises, O'Canada." *Id.* Because Abdul-Rauf believes that the Koran forbids "nationalistic ritualism," he also refused to stand for O'Canada. *See id.* *See generally* Mary Ormsby, *Anthems A Reminder Of Our Great Good Luck*, THE TORONTO STAR, Mar. 17, 1996, at B4.

6. *See supra* note 4. "Abdul-Rauf stated that the American flag represents freedom, liberty and justice for 'the majority of us.' He also stated that the foundation of our country was built with bricks of racism, discrimination, segregation, deception, oppression—and that our flag represents not only the foundation, but the first, second, third. . . , 19th and 20th floors of current freedom, liberty, racism and discrimination." *Pledging Allegiance To Flak*, THE ARIZ. REPUBLIC, Apr. 28, 1996, at C14.

7. *See infra* notes 12-14 and accompanying text.

8. *See* Gil Fried & Lisa Bradley, *Applying The First Amendment To Prayer In A Public University Locker Room: An Athlete's And Coach's Perspective*, 4 MARQ. SPORTS L.J. 301, 302 (1994).

9. Memphis State University is now known as Memphis University.

10. *See* Charles S. Farrell, *Memphis State Coach Is Accused of Imposing Religious Beliefs On Players*, CHRON. OF HIGHER EDUC., OCT. 3, 1984, at 26.

11. *See id.*

reprimanding the coaches for violating state education rules on religious activity.¹²

It is not uncommon for athletics and religion to conflict.¹³ Because of the influx of foreign athletes in American professional sports, the clash between

12. See Peter Monaghan, *Religion in a State-College Locker Room: Coach's Fervor Raises Church-State Issue*, CHRON. OF HIGHER EDUC., Sept. 18, 1985, at 37-38 (citing Gil Fried & Lisa Bradley, *Applying The First Amendment To Prayer In A Public University Locker Room: An Athlete's and Coach's Perspective*, 4 MARQ. SPORTS L.J. 301, 315 (1994)). The ACLU disagreed on the legality of prayer in state college football programs. Moreover, the ACLU believes that religion as part of a state-financed program violates the constitutional mandate for government neutrality toward religion.

The ACLU set forth the same position when Bill McCartney, football coach at The University of Colorado, was accused of "giving priority in playing time to individuals sharing his religious attitude." See Peter Monaghan, *U. of Colorado Football Coach Accused of Using His Position To Promote His Religious Views*, CHRON. OF HIGHER EDUC., Nov. 11, 1992, at 35, 37 (citing Gil Fried & Lisa Bradley, *Applying The First Amendment To Prayer In A Public University Locker Room: An Athlete's And Coach's Perspective*, 4 MARQ. SPORTS L.J. 301 (1994)).

Pre-game prayers and other spiritual practices also are prevalent in the NBA. Phil Jackson, coach of the Chicago Bulls and Zen Christian, motivates his team before practice and games with prayers and meditation. Coach Jackson also leads his team in reading aloud modern-day reinterpretations of the Ten Commandments. Furthermore, he assigns his players to read other spiritual books when they are on road trips. See Karen Lincoln Michel, *Zen Christian Guiding Bulls To Hoop Heaven; Coach Inspires Team With Zen Principles, Sioux Philosophy*, THE EDMONTON J., June 8, 1996, at H4.

13. Student athletes also have challenged rules that impair their ability to participate in sports while also maintaining their religious beliefs, practices and observances. For example, members of two orthodox Jewish high schools' interscholastic basketball teams claimed that an Illinois High School Association rule forced them to choose between their religious observances and participating in interscholastic basketball. See *Menora v. Illinois High School Ass'n*, 683 F.2d 1030, 1031-32 (7th Cir. 1982). The Association, which regulates Illinois interscholastic high school sports, forbade basketball players from wearing headgear while playing out of concern that it might fall off during the game and players may sustain injuries as a result of slipping on the headgear. See *id.* at 1031. The student-athletes (plaintiffs) argued that orthodox Jews are required to cover their heads at all times. Thus, the rule forbid them from complying with Jewish law because it precluded them from fastening yarmulkes to their hair with bobby pins. See *id.* The district court upheld the rule and the Court of Appeals affirmed, holding that the student athletes had no constitutional right to wear yarmulkes that were fastened loosely. The Association's interest in safety was more compelling than the burden imposed on the plaintiffs' religious freedom. See *id.*

In 1995, Liberty University football coach, Sam Rutigliano, and four of his football players filed suit in response to the National Collegiate Athletic Association's ("NCAA") interpretation of Rule 9-2. In an attempt to increase proper conduct on the football field, Rule 9-2 "eliminates religious displays by players, including: crossing themselves, kneeling, and removing their helmets in the end zone following a touchdown." Amanda N. Luftman, Comment, *Does The NCAA's Football Rule 9-2 Impede The Free Exercise of Religion On The Playing Field?* 16 LOY. L.A. ENT. L.J. 445, 447 (1995). The coach and players asked the court to determine if the NCAA's rule restricts freedom of religion by penalizing players who kneel in the end zone to celebrate a touchdown. See *id.* at 454. The plaintiffs agreed to drop the lawsuit after the NCAA confirmed that praying remains permissible under the rules. However, "overt acts associated with prayer such as kneeling, may not be done . . . in an attempt to draw attention to oneself." *Id.* at 455. Despite the dismissal of *Liberty University v. NCAA*, the legality of Rule 9-2 is debatable. The rule may violate the free exercise of religion guaranteed by the First Amendment to the United States Constitution. See *id.* at 456-58. The plaintiffs, however, did not raise these arguments because they wanted to avoid the issue of whether the NCAA would be considered a state actor; thereby subjecting it to constitutional analysis. See *id.*

See, e.g., *Bradley's Inspired By A Higher Power—Mormon Faith Key Part of Philadelphia Star's*

religion and professional athletic employment is likely to occur repeatedly.¹⁴ As a result, it is necessary to evaluate how much a professional athlete can allow his or her religious beliefs, practices and observances to affect his or her employment. Does the law require private athletic employers to accommodate an athlete's religious beliefs, and thus allow him or her to refrain from standing for the National Anthem? How is an athlete's religious discrimination claim different from a Seventh-Day Adventist who, because of religious beliefs, refuses to work on Saturdays? Why are employers more likely to accommodate the Seventh-Day Adventist than the athletic employee who refuses to stand for the National Anthem? This Note will seek to answer these questions by examining the case of Mahmoud Abdul-Rauf to identify issues of importance in a potential future claim of religious discrimination against the NBA and the Denver Nuggets.

Part I provides background information that is helpful to understand Abdul-Rauf's potential claim. First, it summarizes the legal history of Title VII of the Civil Rights Act of 1964 and how it applies to Abdul-Rauf's potential claim. Second, it explains the circumstances surrounding the conflict between Abdul-Rauf's religious practice and his suspension. Finally, Part I evaluates the identity of Abdul-Rauf's employer for Title VII purposes. Part II analyzes the elements of Abdul-Rauf's potential Title VII claim. After establishing the prima facie case of religious discrimination, the focus of this Note shifts to an employer's duty to accommodate the employee. Part III considers the NBA and the Denver Nuggets' ability to avoid private employers' Title VII accommodation duties. Part IV discusses important factors that differentiate Abdul-Rauf's Title VII claim from the typical Title

Life, ROCKY MOUNTAIN NEWS, Dec. 11, 1994, at 4B; Steve Maranz, *Big Player. Big Money. Big Mistake?; The 76ers Still See Shawn Bradley as a Utopian Center, But There is No Payoff In Sight for Their \$44-million Gamble*, THE SPORTING NEWS, Nov. 28, 1994, at 39. These news reports follow the story of Shawn Bradley, the Mormon basketball player, who undertook his faith's call for a two-year mission. To do so, he delayed the attractive potential earnings of a professional basketball career.

14. The National Hockey League ("NHL") includes players from various Russian Republics, the Czech Republic and Finland. Some refer to the NHL as a "United Nations sport." See Mark Armijo, *Say What? Language Hinders Foreign Players*, THE ARIZ. REPUBLIC, Sept. 28, 1996 at C1. For example, while awaiting their green cards, seven players from the former Soviet Union participated in the Mighty Duck's 1996-1997 training camp. Twelve other Duck's players already have green cards, which make them eligible to play. See Karen Crouse, *Hockey Paper Chase: Foreign Players Who Don't File The Proper Paperwork Can Find Themselves In A Big Mess When They Take Their Skills To The U.S.*, THE ORANGE COUNTY REG., Sept. 12, 1996, at D01.

The issue of American professional sports leagues attracting foreign athletes began in the 1980s with the establishment of the North American Soccer League ("NASL"). The league employed a large number of foreign soccer players including Pele' and Franz Beckenbauer. In 1992, the "European Invasion" of players into the NHL started and has brought enhanced skill and talent to America's hockey. See Brett Prettyman, *Global Feel Helps Grizz On the Ice: Grizzlies Are Genuinely International*, THE SALT LAKE TRIB., June 6, 1996, at D1.

VII religious discrimination claim, and how such factors would affect the outcome of his claim. Finally, Part V proposes suggestions to ensure that athletic employers do not easily escape their Title VII accommodation duties and that athletes' rights under Title VII remain protected.

I. BACKGROUND INFORMATION OF ABDUL-RAUF'S TITLE VII CLAIM

A. *Legal Background of Abdul-Rauf's Claim*

Mahmoud Abdul-Rauf and other athletes in similar positions may seek to remedy their situations by asserting claims under Title VII of The Civil Rights Act of 1964 as amended in 1972.¹⁵ Title VII makes it "an unlawful employment practice for an employer to . . . discriminate 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."¹⁶

In 1967, the Equal Employment Opportunity Commission amended its guidelines to require employers to make reasonable accommodations to the religious needs of employees where such accommodations could be made without undue hardship.¹⁷ The question of the extent of the required accommodation, however, remained unsettled. As a result, in 1972, Congress amended Title VII to address such unresolved questions and to clarify the legislative underlying the statute.¹⁸ First, Congress amended the statute by adding a section stating that an employer commits an unfair employment practice if he "limit[s], segregate[s] or classif[ies] his employees . . . in any way which would . . . adversely affect his status as an employee because of such individual's race, color, religion, sex or national origin."¹⁹ This amendment was intended to prohibit all religious discrimination in private employment. In contrast to the original language of Title VII, which prohibits intentional discrimination on the basis of religion, the new section was

15. See 42 U.S.C. §§ 2000e-2000e-17 (1994).

16. 42 U.S.C. § 2000e-2(a)(1) (1994).

17. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 72 (1977); Peter Zablotsky, *After The Fall: The Employer's Duty To Accommodate Employee Religious Practices Under Title VII After Ansonia Board of Education v. Philbrook*, 50 U. PITT. L. REV. 513, 514 (1989).

18. See 42 U.S.C. § 2000e(j) (1994).

19. 42 U.S.C. § 2000e-2(a)(2) (1994). In *Riley v. Bendix Corp.*, 330 F. Supp. 583 (M.D. Fla. 1971), the court ruled that an employer who discharged an employee for refusing to work on his Sabbath had not committed an unfair labor practice even though the employer had not made any effort to accommodate the employee's religious needs. By enacting § 2000e(j) in 1972, however, Congress intended to change this result by requiring some form of accommodation. See *Hardison*, 432 U.S. at 74-75 n.9 (citing 118 Cong. Rec. 706-713 (1972)).

intended to lessen the impact of facially neutral employment policies that conflict with employees' religious beliefs.²⁰ Furthermore, Congress thought it necessary to clarify the accommodation requirement by defining religion to include "all aspects of religious observances and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business."²¹ In enacting this amendment, Congress recognized the difficulty individuals faced in finding an environment conducive to both employment and religious accommodation.²²

Notwithstanding the discussion of purpose and congressional concerns that led to the amendment, the legislation's plain language is not helpful in determining the extent of the employer's obligation.²³ Accordingly, courts have taken the initiative to determine whether, under Title VII, the situation mandates an employer to accommodate an employee's religious beliefs, practices and observances.²⁴

20. See Holly M. Bastian, *Religious Garb Statutes And Title VII: An Uneasy Coexistence*, 80 GEO. L.J. 211, 221 (1991).

21. 42 U.S.C. § 2000e(j) (1994). In *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), the court held that the discharge of an employee, who refused to work on Sundays for religious reasons, was not an unlawful employment practice because the manner in which the employer allocated Sunday work assignments was discriminatory in neither purpose nor effect. Moreover, it was consistent with the 1967 Equal Employment Opportunity Commission guidelines. To remedy the issues presented by *Dewey*, Congress included the definition of religion in its 1972 amendments to Title VII. See *Hardison*, 432 U.S. at 73 (citing 118 Cong. Rec. 706 (1972) (remarks by Sen. Randolph)).

22. See Zablotzky, *supra* note 17.

23. "[T]he statute provides no guidance for determining the degree of accommodation that is required of an employer. The brief legislative history of § 701(j) is likewise of little assistance in this regard." *Hardison*, 432 U.S. at 74. "The proponent of the measure, Senator Jennings Randolph, expressed his desire 'to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law.'" *Id.* at 74-75 (quoting 118. Cong. Rec. 705 (1972)). Randolph, however, made no attempt to define the circumstances under which the reasonable accommodation requirement would be applied. See *id.*

24.

Clashes between employers and employees over religious observances in the workplace are an increasingly familiar feature in the legal system. Accordingly, employees filed nearly 3000 charges of religious discrimination with the federal Equal Employment Opportunity Commission ("EEOC") and with state and local agencies in 1994 - an increase of over thirty percent from 1990.

Sidney A. Rosenzweig, *Restoring Religious Freedom To The Workplace: Title VII, RFRA And Religious Accommodation*, 144 U. PA. L. REV. 2513, 2513 (1996).

For example, the complaining employee may be a Sabbatarian who is unable to work on Saturdays or Sundays. Perhaps the employee may need to observe occasional holidays or attend religious events. The employee's religion may require him or her to wear certain clothing that conflicts with the employer's dress policy. The employee may refuse to attend required meetings in which the employer presides over devotional services or exercises. The employee may oppose medical diagnosis and treatment, which results in her above average use of sick days. The employee's faith may require

B. Historical Background of Abdul-Rauf's Claim

On March 12, 1996, Mahmoud Abdul-Rauf, a basketball player for the Denver Nuggets and a Muslim since 1991, announced that the NBA rule requiring players to "maintain a dignified posture" during the playing of the National Anthem prior to each game violated his religious beliefs.²⁵ For most of the 1995-1996 basketball season, the Denver Nuggets, with NBA consent, allowed Abdul-Rauf to remain in the locker room during the anthem.²⁶ In mid-March, fans began to notice that Abdul-Rauf was not standing for the anthem and, as a result, called Denver radio talk shows to voice their outrage.²⁷ In light of this outrage, the Denver Nuggets changed their position. Although the Nuggets tried to resolve the matter, Abdul-Rauf was adamant in his decision to refrain from participating in the National Anthem.²⁸ Abdul-Rauf, a devoted Muslim, believed that the Koran prevented him from observing any "nationalistic ritualism."²⁹ Furthermore, Abdul-Rauf believed that the American Flag and National Anthem symbolize oppression and tyranny.³⁰ Standing for such a symbol, according to Abdul-Rauf, interfered with his loyalty to Islam.³¹ The NBA suspended Abdul-Rauf without pay on March 12, 1996,³² a move that cost him more than \$30,000 per game.³³ After

him or her to take controlled substances in violation of the employer's rules. *See id.* at 2414-15.

25. Abdul-Rauf stated that his intention was not to disrespect those who regard the National Anthem as a sacred ceremony. He also stated that it was his understanding that "100 percent honesty and sincerity is the requirement for participation in the National Anthem." Roscoe Nance, *Beliefs Clash With Career Religion's Reason He Won't Rise For Anthem*, USA TODAY, Mar. 14, 1996, at 3C. However, the American Flag "is a symbol of oppression, of tyranny." *Id.* Abdul-Rauf stated that in the world of Islam, he is a practicing Muslim who stands firm on these convictions and hence, refuses to stand for the anthem. *See id.* Abdul-Rauf also stated, "I just don't look at Muslim issues, I look at Caucasian America and I look at the African-American being oppressed in this country and I don't stand for that. I'll never stand for that." Dave Krieger, *Abdul-Rauf Had Nuggets' Permission To Sit*, ROCKY MOUNTAIN NEWS, Mar. 13, 1996, at 1B.

26. *See, e.g.*, John Young, *Who Stands For The Right To Sit?* THE DENVER POST, Mar. 17, 1996, at D-03.

27. *See id.* *See also* Kreiger, *supra* note 25, at 1B; *A Puzzled Olajuwon Speaks Out On Citizenship*, N.Y. TIMES, Mar. 14, 1996, at B19.

28. "First, foremost and last, I'm a Muslim," Abdul-Rauf said in regard to the suspension. Donna Carter, *Abdul-Rauf Has New Song: R-e-s-p-e-c-t*, THE DENVER POST, Mar. 13, 1996, at D1. Abdul-Rauf also said, "my beliefs are more important than anything. If I have to give up basketball, I will." Roscoe Nance, *Abdul-Rauf Suspended Over Anthem*, USA TODAY, Mar. 13, 1996, at 1C.

29. *See supra* note 5.

30. *See supra* note 6.

31. *See* Nance, *supra* note 25.

32. *See id.*

33. *See id.* With a \$2.6 million salary, Abdul-Rauf would lose \$31,707 for each game missed. If he had chosen to refrain from standing for the National Anthem for the remainder of the season, he would have lost \$665,853. *See id.*

a one game suspension, however, Abdul-Rauf agreed to stand and pray silently as the anthem played in the arena.³⁴

C. *Who Is Abdul-Rauf's Employer?*

Before examining Abdul-Rauf's potential claim of religious discrimination, a threshold issue concerns the identity of Abdul-Rauf's employer. This question must be resolved in order to evaluate who is subject to Title VII accommodation duties.³⁵ In most cases the identity of the employer is obvious. However, ascertaining the employer becomes more complicated when a franchise relationship is involved, such as here, where the Denver Nuggets are a franchisee of the NBA.³⁶ Although the NBA actually suspended Abdul-Rauf for failing to abide by the league rule, one might still be of the opinion that the Denver Nuggets employed him.

Over the years, courts have articulated several tests to determine whether an entity is an employer for purposes of Title VII.³⁷ In *Evans v. McDonald's Corp.*,³⁸ the plaintiff was employed by a franchisee of McDonald's restaurants.³⁹ The plaintiff, alleging sexual harassment by a co-worker, brought a Title VII action against McDonald's and the co-worker.⁴⁰ The Tenth Circuit, applying the "integrated enterprise test," found that McDonald's did not exercise the requisite "monumental control" over the franchisee to be liable as the plaintiff's employer.⁴¹

The court set forth the elements of the "integrated enterprise test" and stated: "[e]ven were we to assume the existence of [(1)] an interrelation of operations, given the common goals and interaction of McDonald's and its independent franchises, the record indicates no common management, [(2)] no centralized control of labor relations, and [(3)] no common ownership or

34. See John Mossman, *Islam Dominates Life, Career of Abdul-Rauf*, THE BATON ROUGE ADVOCATE, Mar. 15, 1996, at 9D.

35. See, e.g., *Evans v. McDonald's Corp.*, 936 F.2d 1087 (10th Cir. 1991).

36. The National Basketball Association is also referred to as the National Basketball League. See Collective Bargaining Agreement between the National Basketball Association and the National Basketball Players Association [hereinafter Collective Bargaining Agreement] Exhibit A, National Basketball Association Uniform Player Contract (July 11, 1996). "THIS AGREEMENT made this ____ day of ____, 19__, by and between ____ (hereinafter called the 'Team'), a member of the National Basketball Association (hereinafter called the 'NBA' or 'League' and ____ whose address is shown below (hereinafter called the 'Player')." *Id.*

37. See *infra* notes 38-49 and accompanying text.

38. 936 F.2d 1087 (10th Cir. 1991).

39. See *id.* at 1088-89.

40. See *id.*

41. See *id.* at 1089-90.

[(4)] financial control.”⁴² Accordingly, McDonald’s, the franchisor, was not the plaintiff’s employer for Title VII purposes because it did not exercise the required “monumental control.”⁴³

It is likely that Abdul-Rauf would be successful in arguing that the NBA maintains the requisite “monumental control” over the Denver Nuggets to be considered Abdul-Rauf’s employer for Title VII purposes. Even though there is no common management between the NBA and Denver Nuggets, an evaluation the control of labor relations demonstrates that the NBA is Abdul-Rauf’s employer. Although all labor relations between the Denver Nuggets and its players are controlled by the National Basketball Players Association (“NBPA”) and are subjected to grievance arbitration, the NBA does have a central role as well.⁴⁴ First, the NBA and the NBPA agree that there are specific rules of conduct mandated by the league’s manual to which all league players must adhere.⁴⁵ Second, the incident involving Abdul-Rauf alone illustrates the NBA’s control. It demonstrates that when a player does not adhere to a league rule, the NBA has the authority to suspend the player. Although the NBPA supported Abdul-Rauf’s refusal to stand for the National Anthem, it could not prevent the NBA from taking action against Abdul-Rauf for violating the rule.

The NBA’s requisite “monumental control” over the Denver Nuggets becomes even more evident upon evaluating the standardized players

42. *Id.* at 1090.

43. *See id.* Four years after *Evans*, the U.S. District Court for the Eastern District of Oklahoma faced this same issue in *Scales v. Sonic Industries, Inc.*, 887 F. Supp. 1435 (E.D. Okla. 1995). The plaintiff, Deah Scales, brought a Title VII action claiming that Sonic Industries, Inc. and Newton Investments, Inc. terminated her employment on account of her gender, her pregnancy and her husband’s race. *See id.* at 1436. Sonic contended that it was not Scales’ employer; rather, Newton, the franchisee of the Idabel restaurant, was Scales’ sole employer. *See id.* at 1438. The court applied the same “integrated enterprise test” as applied in *Evans*, and concluded that Sonic did not own or operate the restaurant. *Scales*, 887 F. Supp. at 1438. Instead, all employment-related decisions were made by Newton. Furthermore, Sonic did not direct Scales’ work performance, pay Scales for her work nor did it provide her with any employee benefits. Finally, the record demonstrated that there lacked common financial control, joint ownership or management between Sonic and Newton. *See id.* at 1439. Consequently, the court held that Sonic, the franchisor, was not an employer for the purposes of Title VII. *See id.* at 1440.

Scales sought, however, to distinguish her case from *Evans*. Scales argued that “the control over labor relations takes [this case] out of the ambit of *Evans*” because Sonic’s Operation Manual, provided to its franchisees, “designated Sonic as the final arbiter in matters of labor relations” when a franchisee employee has a complaint. *Scales*, 887 F. Supp. at 1439. Nevertheless, the court held that such provisions were insufficient to support the suggestion that Sonic controlled the labor relations with respect to the Idabel restaurant’s employees. More specifically, the court stated, “Sonic’s Operation Manual does not vest ultimate control over labor relations in Sonic, but rather, that authority remains with the franchisee who is merely guided in its employment decisions by the content of the license/franchisee agreement with Sonic.” *Id.* at 1439-40.

44. *See* Collective Bargaining Agreement, *supra* note 36.

45. *See id.*; Exhibit A., National Basketball Association Uniform Player Contract.

contract that each NBA team must use.⁴⁶ In agreements made with the National Basketball Players Union, the NBA has demanded that the Denver Nuggets and all other teams adhere to such guidelines as: paying player expenses, player salary caps, and minimum team salaries.⁴⁷ These sections of the standardized contract are written so that the signing player knows that the team must do certain things, usually in the player's best interest, in order to adhere to the league rules.⁴⁸ These elements further suggest that the NBA exercised the requisite "monumental control" over each franchise team, including the Denver Nuggets. Accordingly, both the NBA and the Denver Nuggets are Abdul-Rauf's employers for the purposes of Title VII.⁴⁹

II. ELEMENTS OF ABDUL-RAUF'S POTENTIAL TITLE VII CLAIM

The analysis of any religious accommodation case begins by determining whether the employee has established a *prima facie* case of religious discrimination.⁵⁰ A plaintiff employee, such as Abdul-Rauf, establishes a *prima facie* case when he or she shows that: "(1) he holds a sincere religious belief that conflicts with an employment requirement; (2) he informed the employer about the conflict; and (3) he was discharged or disciplined for failing to comply with the conflicting employment requirement."⁵¹ After the employee establishes a *prima facie* case, the burden shifts to the employer to prove that it cannot reasonably accommodate the employee without incurring an undue hardship.⁵²

46. *See id.*

47. *See id.*

48. *See id.* at 34, "Moving Expenses: A Team's obligation to reimburse a player for 'reasonable' expenses relating to the assignment of a Player Contract from one Member to another . . . shall extend to the reimbursement of the actual expenses incurred by such player in moving to the home territory of his new Team." *Id.* *See also id.* at 69, stating:

(1) For each Season during the terms of this Agreement, there shall be a Minimum Team Salary equal to 75% of the Salary Cap for such Season. (2) In the event that, by the conclusion of the Salary Cap Year for a Season, a Team has failed to make aggregate Salary payments and/or incur aggregate Salary obligations equal to or greater than the applicable Minimum Team Salary for that Season, the NBA shall cause such Team to make such payments.

49. From this point forward, this Note will frame the arguments as if both the NBA and the Denver Nuggets would be co-defendant employers if Abdul-Rauf filed suit under Title VII.

50. *See Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987).

51. *Id.* *See also Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984).

52. *See Smith*, 827 F.2d at 1085. *See, e.g., Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d 397, 401 (9th Cir. 1978).

A. Can Abdul-Rauf Demonstrate The Existence Of A Sincerely Held Religious Belief That Conflicts With An Employment Requirement?

After naming the defendant employer(s), the plaintiff in a Title VII religious discrimination case must demonstrate that he or she holds a sincere religious belief that conflicts with an employment requirement.⁵³ Congress defined "religion" to include "all aspects of religious observance and practice, as well as belief."⁵⁴ Congress, however, left the courts to define what constitutes a "sincerely held religious belief."⁵⁵ Courts have met this task in cases brought under both Title VII and the Free Exercise Clause of the First Amendment to the United States Constitution.⁵⁶

In *Frazee v. Illinois Department of Employment Security*,⁵⁷ the United States Supreme Court established guidelines for the establishment of a "sincerely held religious belief." William Frazee refused a retail position because the job required him to work on Sunday, in violation of his "personal professed religious beliefs."⁵⁸ Subsequently, the Illinois Department of Employment Security denied unemployment benefits to Frazee.⁵⁹ Frazee claimed that in this case, the denial of unemployment compensation violated the Free Exercise Clause of the First Amendment.⁶⁰

53. See *Turpen*, 736 F.2d at 1026; see also *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985); *Brown v. General Motors Corp.*, 601 F.2d 956, 959 (8th Cir. 1979); *Anderson*, 589 F.2d at 401.

54. 42 U.S.C. § 2000e(j) (1994).

55. See *supra* notes 20-22 and accompanying text.

56. See, e.g., *Frazee v. Illinois Dep't. of Employment Sec.*, 489 U.S. 829 (1989); *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986); *Brown v. Dade Christian Sch. Inc.*, 556 F.2d 310 (5th Cir. 1977); *Brown v. Pena*, 441 F. Supp. 1382 (S.D. Fla. 1977). The First Amendment declares that "Congress shall make no law respecting an Establishment of religion, or prohibiting the free exercise thereof;" U.S. CONST. amend. I (emphasis added). This is the basis for a claim of religious discrimination in public employment where there is state action that conflicts with an employee's religious beliefs.

57. 489 U.S. 829 (1989).

58. *Id.* at 831 (quoting the appellate court decision, 512 N.E.2d 789, 790 (Ill. App. Ct. 3d 1987)). Frazee's position was that because he was a Christian, he felt it was wrong to work on Sunday. Previously, the Court had other opportunities to consider denials of unemployment compensation benefits to those who have refused to work on the basis of their religious beliefs. See *Sherbert v. Verner*, 374 U.S. 398 (1963) (concluding that a state could not constitutionally apply the eligibility provisions of its unemployment compensation program so as to constrain a worker to abandon his religious convictions respecting the day of rest); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 144 (1987) (holding that Florida's denial of unemployment compensation benefits to an employee discharged for her refusal to work on her Sabbath because of religious convictions adopted subsequent to employment was a violation of the Free Exercise Clause).

59. See *Frazee*, 489 U.S. at 830.

60. See *id.* at 831. See also *Hobbie*, 480 U.S. at 136; *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707 (1981).

The trial court and Illinois State Appellate Court held that because Frazee was not part of an established religious sect or church and did not claim that his refusal to work resulted from a tenet or from a belief of an established religious body, he did not have good cause for his refusal to work.⁶¹ The United States Supreme Court conceded that "membership in an organized religious denomination . . . would simplify the problem of identifying sincerely held religious beliefs."⁶² However, the Court rejected the notion that membership in a defined religious denomination was necessary to meet this test.⁶³ Despite the difficulty of distinguishing between religious and secular convictions, the Court did not question Frazee's religious sincerity.⁶⁴ Accordingly, it held that Frazee had a sincerely held religious belief despite his lack of membership in an established religious sect or tenet.⁶⁵

In *Brown v. Pena*,⁶⁶ however, a district court set limits on the "sincerely held religious belief" standard. Stanley Brown sued the Equal Employment Opportunity Commission Director following the termination of his employment, allegedly because of religious discrimination.⁶⁷ Brown claimed that it was part of his "religious creed" to eat Kozy Kitten Cat Food because "it contribut[ed] significantly to [his] state of well being . . . [and therefore] to [his] overall work performance."⁶⁸ The District Court for the Southern District of Florida dismissed the claim for failure to establish a "sincerely held religious belief."⁶⁹ In doing so, the court explained that the Fifth Circuit had previously identified three major factors used to determine whether a belief met this requirement: "(1) whether the belief is based on a theory of 'man's nature or his place in the Universe' (2) which is not merely a personal preference but has an institutional quality about it, and (3) which is

61. See *Frazee v. Illinois Dep't of Employment Sec.*, 512 N.E.2d 789, 791 (Ill. App. Ct. 3d 1987).

62. *Frazee*, 489 U.S. at 834 n.2.

63. *Frazee*, 489 U.S. at 834. Although the claimants in *Hobbie* and *Sherbert* were members of particular religious sects, the decisions in those cases did not turn on that factor. Rather, the judgments "rested on the fact that each of the claimants had a sincere belief that religion required him or her to refrain from the work in question." *Frazee*, 489 U.S. at 833.

64. See *id.* Justice White, delivering the opinion stated, "[i]t is true that there are assorted Christian denominations that do not profess to be compelled by their religion to refuse Sunday work, but this does not diminish Frazee's protection flowing from the Free Exercise Clause." *Id.* at 834.

65. See *id.*

66. 441 F. Supp. 1382 (S.D. Fla. 1977).

67. See *id.* at 1383-84.

68. *Id.* at 1384.

69. See *id.* The district court attempted to define or characterize "a religious belief or practice" by referring to the Supreme Court's decision in *Wisconsin v. Yoder*, 406 U.S. 205 (1971). In *Yoder*, the Court emphasized that a constitutionally protected religious belief is "not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living." *Pena*, 441 F. Supp. at 1384 (quoting *Yoder*, 406 U.S. at 215-16).

sincere.”⁷⁰ The court concluded that Brown’s personal religious creed concerning Kozy Kitten Cat Food could only be described as a personal preference and thus, it failed to qualify as a sincerely held religious belief.⁷¹

Based on the court’s holding in *Frazee*,⁷² Abdul-Rauf’s refusal to stand for the National Anthem most likely qualifies as a sincerely held religious belief. As a member of the orthodox Islamic Faith, his belief under the *Frazee* framework is firmly established.⁷³ Several members of his faith, including NBA player Hakeem Olajuwon and heavyweight boxer Mike Tyson, argue that Abdul-Rauf’s beliefs are not part of Muslim doctrine.⁷⁴ Such disagreements, however, are not relevant to Abdul-Rauf’s ability to establish that he held a sincere religious belief.⁷⁵

70. *Brown v. Dade Christian Sch., Inc.*, 556 F.2d 310, 324 (5th Cir. 1977) (Roney, J. dissenting) (internal citations omitted), *quoted in Pena*, 441 F. Supp. at 1385.

71. *See Pena*, 441 F. Supp. at 1384. The court reasoned that “a mere personal preference . . . is beyond the parameters of the concept of religion as protected by the constitution or, by logical extension, by 42 U.S.C. § 2000e et seq.” *Id. in McCrory v. Rapides Regional Medical Center.*, 635 F. Supp. 975 (W.D. La. 1986), the court concluded that the plaintiffs’ allegation missed the point of Title VII, where two discharged workers alleged that their supervisor’s “professed religious beliefs proscribing . . . extra-marital relationships conflicted with their private right to have such relationships,” thus making their termination unlawful. *Id.* at 977. The court reiterated that the “plaintiffs’ claims translate into a cause of action under Title VII if, and only if, their belief in their right to commit adultery is a ‘religious belief’ subject to protection.” *Id.* at 979. The court, unable to make such a finding, took notice “that the Baptist faith embraces the Holy Bible including the Ten Commandments - one of which states: ‘Thou shalt not commit adultery.’ This being so, it would be more than absurd to find that the Baptist faith condones the commission of adultery, much less embraces such a notion as a deep-seated institutional standard.” *Id.*; *see also McGlothlin v. Jackson Mun. Separate Sch. Dist.*, 829 F. Supp. 853 (S.D. Miss. 1992) (holding that a school district could not be liable for failing to accommodate an aide’s proffered religious beliefs regarding her hairstyles and headwraps when the district was unaware of her religion’s beliefs and hence required accommodation; aid was required to articulate her beliefs in such a way that administrators would come to appreciate that the beliefs were religious in nature).

72. *Frazee v. Illinois Dep’t of Employment Sec.*, 489 U.S. 829 (1989).

73. *See supra* notes 5-6 and accompanying text.

74. *See A Puzzled Olajuwon Speaks Out on Citizenship*, N.Y. TIMES, Mar. 14, 1996, at B19. Some Muslim scholars suggest that standing for the flag is a respectful act that does not contradict with the faith. For example, Ibrahim Abu-Rabi, professor of Islamic studies and Christian-Muslim relations at Hartford Seminary, said that standing for the anthem is a secular act, not a religious issue. *See Manny Topol, Legal Issues Cloudy/Contract Law Or Religion?* NEWSDAY, Mar. 14, 1996, at A95.

Other athletes who follow Islam, such as Hakeem Olajuwon, did not interpret the Koran as Abdul-Rauf did. Olajuwon said that, “he hadn’t discussed particulars with his colleague but that in general, to be a good Muslim is to be a good citizen.” Furthermore, “if Abdul-Rauf is certain his interpretation is the only acceptable one, he should be applauded for taking that stand at the cost of a magnificent livelihood.” Ed Fowler, *Abdul-Rauf Might Want To Think Twice*, HOUS. CHRON. Mar. 14, 1996, at 1.

75. When determining if one’s religious beliefs are protected under the Free Exercise Clause of the First Amendment as opposed to Title VII, courts conclude that “[i]ntrafaith differences . . . are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. . . . [The] guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. . . . Courts are not arbiters of scriptural interpretation.” *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707,

Similarly, it is irrelevant if Abdul-Rauf's refusal to stand for the anthem was based on political and not religious beliefs. Unlike the plaintiff in *Brown v. Pena*,⁷⁶ Abdul-Rauf's refusal to stand was not merely a personal preference or political statement.⁷⁷ Although Abdul-Rauf believed that the National Anthem is a symbol of tyranny and oppression, his refusal to stand for the anthem was primarily predicated on his adamant belief that the Koran forbade observance of any "nationalistic ritualism."⁷⁸ Abdul-Rauf's refusal to stand for O'Canada, the Canadian anthem, further demonstrates that his belief was not controlled by his political views about the American flag and National Anthem.⁷⁹ Instead, because Abdul-Rauf's belief was supported by his interpretation of Muslim doctrine, an institutional ideal was at the foundation of his religious belief. Thus, Abdul-Rauf's belief is not precluded by the limits set by *Brown v. Pena*.⁸⁰ Rather, Abdul-Rauf's membership in an established sect along with the institutional qualities at the foundation of his belief qualify under the *Frazee* framework.

B. Informing The Employer Of The Sincerity Held Religious Belief

The second element that an employee such as Abdul-Rauf must prove when setting forth a religious discrimination claim under Title VII is that he informed the employer of his belief.⁸¹ The NBA and the Denver Nuggets were not only aware of Abdul-Rauf's religious belief and his decision not to stand for the National Anthem, but they accommodated his belief for most of the 1995-1996 basketball season until mid-March, when the media reported his refusal to stand, leading to fan outrage.⁸²

C. Was Disciplinary Action Taken Against Abdul-Rauf Because Of His Sincerely Held Religious Belief?

To prove the third element of his prima facie case, Abdul-Rauf must demonstrate that he was disciplined for his failure to comply with the

715-16 (1981). See also Ernest C. Hadley, *Bases of Discrimination Under Title VII*, in A GUIDE TO FED. SECTOR EQUAL EMPLOYMENT LAW & PRACTICE, (1996).

76. 441 F. Supp. 1382 (S.D. Fla. 1977).

77. See *supra* note 56 and accompanying text.

78. See *supra* note 5.

79. See *supra* notes 5-6 and accompanying text.

80. *Pena*, 441 F. Supp. at 1382.

81. See *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 133 (3d Cir. 1986); *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141 (5th Cir. 1982).

82. See *Krieger*, *supra* note 25.

conflicting employment requirement,⁸³ "maintaining a dignified posture," during the National Anthem.⁸⁴ Abdul-Rauf was disciplined when the NBA suspended him, without pay, a move that resulted in a \$30,000 loss for Abdul-Rauf each time he refused to comply with the employment requirement.⁸⁵ The actions taken by the NBA fall within the Title VII language that renders it an unfair employment practice for an employer to "discriminate against any individual with respect to his compensation . . . because of such individual's race, color, religion, sex, or national origin."⁸⁶

III. THE EMPLOYER'S REQUIREMENTS TO ACCOMMODATE UNDER THE UNDUE HARDSHIP TEST

After Abdul-Rauf establishes has prima facie case, the burden then shifts to the NBA to prove that it cannot reasonably accommodate the employee without incurring an undue hardship. In the leading case of *Trans World Airlines, Inc. v. Hardison*,⁸⁷ the United States Supreme Court established the undue hardship test and explained its applicability. Larry Hardison joined the Worldwide Church of God one year after starting his employment with Trans World Airlines ("TWA").⁸⁸ According to the tenets of his religion, Hardison observed the Sabbath by refraining from working from sunset on Friday to sunset on Saturday.⁸⁹ Any potential problem was temporarily solved when Hardison transferred to the 11 p.m.-7 a.m. weekday rotation; working this

83. Title VII § 703(a), 42 U.S.C. § 2000e-2 (1994) provides in relevant part:

(a) It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate 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; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

84. For a discussion of the requirements of the prima facie case for religious discrimination under Title VII, see *Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984); *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 144 (5th Cir. 1982); see also *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985); *Brown v. General Motors Corp.*, 601 F.2d 956, 959 (8th Cir. 1978).

85. See *supra* note 33.

86. 42 U.S.C. § 2000e-2(a)(1) (1994).

87. 432 U.S. 63 (1977).

88. See *id.* at 66-67. "Because of its essential role in the Kansas City operation, the Stores Department must operate 24 hours per day, 365 days per year, and whenever an employee's job in that department is not filled, an employee must be moved from another department, or a supervisor must cover the job. This was required even if the work in other areas suffered as a result. See *id.*

89. See *id.* at 67.

shift allowed Hardison to observe his Sabbath.⁹⁰ The problem resurfaced, however, when Hardison bid for and received a transfer to a separate building where he was required to work a day shift.⁹¹ At this new site, he had insufficient seniority to bid for a shift that would allow him to have Saturdays off.⁹² As a result, Hardison suggested that he work four days per week.⁹³ TWA, however, did not consider this suggestion because Hardison's duties were essential and he was the only employee available during the Saturday shift to perform them.⁹⁴ TWA discharged Hardison after he refused to report to work on several Saturdays.⁹⁵

The Supreme Court defined the extent of a reasonable accommodation as it appears in Title VII.⁹⁶ Justice White, writing for the majority, held that "[t]o require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship."⁹⁷ More specifically, he wrote, "to require [the employer] to bear additional costs . . . to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion."⁹⁸ Furthermore, Justice White reasoned that by forcing TWA to incur certain costs to accommodate Hardison's religious beliefs, the Court would be requiring TWA to finance a day off for Hardison.⁹⁹ Also, the Court would be "requir[ing] TWA . . . to choose the employee who would enjoy [Saturdays off] on the basis of

90. *See id.* at 68.

91. *See id.* TWA authorized the union to seek an appropriate shift assignment for Hardison. However, TWA could not grant authorization unilaterally because of its superior obligation to the union under a collective bargaining agreement and because of the union's unwillingness to tamper with the seniority system. *See id.*

92. *See id.* at 68.

93. *See id.*

94. *See id.*

95. *See id.* at 69.

96. *See supra* note 90.

97. *Hardison*, 432 U.S. at 84.

98. *Id.* Justice White wrote:

TWA . . . had two alternatives: adopt a neutral system, such as seniority, a lottery, or rotating shifts; or allocate days off in accordance with the religious needs of its employees. TWA would have had to adopt the latter in order to assure Hardison and others like him of getting the days off necessary for strict observance of their religion, but it could have done so only at the expense of others who had strong, but perhaps non religious reasons for not working on weekend. . . . [T]o give Hardison Saturdays off, TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath.

Id. at 80-81.

The Court concluded that Title VII did not contemplate such unequal treatment. Further, Justice White wrote, "It would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others." *Id.*

99. *See id.* at 84.

religion," while incurring extra costs to secure a substitute."¹⁰⁰ Hence, the majority concluded that TWA should not be forced to finance an additional Saturday off because it would be a greater than de minimis cost for them to do so. Accordingly, TWA would face an undue hardship if required to accommodate Hardison's sincerely held religious belief.¹⁰¹

In *Turpen v. Missouri-Kansas-Texas Railroad Co.*,¹⁰² the Fifth Circuit Court of Appeals expanded on the concepts of de minimis cost and undue hardship. Turpen, a Seventh-Day Adventist, was employed by the Rock Island Railroad Company when it terminated all of its employees.¹⁰³ Some employees, including Turpen were rehired by another carrier.¹⁰⁴ The new

100. *Id.* In his dissent, Justice Marshall noted the trifling extent of the loss that the majority labeled greater than "de minimis" because it would have totaled \$150 in overtime costs until Hardison would have regained enough seniority to become eligible to transfer back to his former department. *See id.* at 92 n.6. In writing for the majority, however, Justice White noted that this ignored the district court's findings that this would have created an undue burden on TWA and "it fails to take account of the likelihood that a company as large as TWA may have many employees whose religious observances, like Hardison's, prohibit them from working on Saturdays or Sundays." *Id.* at 84.

101. *See id.* at 84. The court of appeals previously concluded that TWA could have permitted Hardison to work a four-day week, utilizing a supervisor or other worker on duty elsewhere, even though this would have caused other areas to suffer. *See id.* TWA could have filled Hardison's Saturday shift from other available personnel, even though this would have involved premium overtime pay; or TWA could have arranged a swap between Hardison and another employee either for another shift or for the Sabbath days. *See id.*

The Supreme Court held, however, that TWA made reasonable efforts to accommodate Hardison's religious needs, did not violate Title VII, and each one of the court of appeals' suggested alternatives would have been an undue hardship within the meaning of the statute. *See id.*

Since its articulation in 1977, the phrase de minimis cost has become synonymous with the phrase undue hardship. *See, e.g.,* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 67 (1986) (stating that "[A]n accommodation causes 'undue hardship' whenever that accommodation results in 'more than a de minimis cost.'") (quoting in part *Hardison*, 432 U.S. at 84; *Wisner v. Truck Cent.*, 784 F.2d 1571, 1573 (11th Cir. 1986); *Baz v. Walters*, 782 F.2d 701, 707 (7th Cir. 1986); *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 146 (5th Cir. 1982); *Nottelson v. Smith Steel Workers D.A.L.U.* 19806, 643 F.2d 445, 451 (7th Cir. 1981); *Howard v. Haverty Furniture Cos.*, 615 F.2d 203, 206 (5th Cir. 1980); *Yott v. North Am. Rockwell Corp.*, 602 F.2d 904, 908-09 (9th Cir. 1979); *Brown v. General Motors Corp.*, 601 F.2d 956, 958-60 (8th Cir. 1979); *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403, 406-07 (9th Cir. 1978); *Jordan v. North Carolina Nat'l Bank*, 565 F.2d 72, 77-78 (4th Cir. 1977), *overruled by*, *EEOC v. Ithaca Indus., Inc.*, 849 F.2d 116, 119 (4th Cir. 1988).

102. 736 F.2d 1022 (5th Cir. 1984).

103. *See id.* at 1023. Turpen was employed by the Rock Island Railroad for 29 years as a carman at the Peach Yard in Fort Worth, Texas. Turpen became a Seventh-Day Adventist in 1974; by that time he was sufficiently high on the seniority roster to enable him to bid on jobs that would allow him to have Friday nights and Saturdays off, thereby accommodating his Sabbath. *See id.*

104. "Portions of [Rock Island's] lines were taken over on an interim basis by several national rail carriers . . . including the Katy, and those unions that had collective bargaining agreements with the Rock Island." *Id.* at 1024. "Turpen's union . . . entered into a Labor Protective Agreement . . . covering Rock Island employees taken into the employ of interim service operators over the Rock Island lines." *Id.* "To avoid delays in operations, the agreement also allowed the Katy to hire former Rock Island employees on a temporary basis while negotiating an agreement concerning the manner in which seniority would be allocated between the Katy's existing employees and the former Rock Island employees." *Id.*

employer, “the Katy,” included Turpen in its Saturday shift.¹⁰⁵ Turpen’s religion, however, prevented him from working on Saturdays.¹⁰⁶ Accordingly, he suggested that he work another shift, or pay the difference between straight time and overtime that the Katy would have to pay to fill his Friday evening and Saturday shift.¹⁰⁷ The employer, however, refused to accommodate Turpen. Turpen left his post early one Friday without authorization and did not report to work the following day.¹⁰⁸ As a result, the Katy suspended and then discharged Turpen.¹⁰⁹

The Fifth Circuit agreed with the trial court and concluded that the Katy did not violate its Title VII accommodation requirement.¹¹⁰ In addition to paying another employee overtime and billing Turpen for the extra costs, the other accommodation possibilities included: rescheduling so that Turpen could have a “swing shift” that left him free on Friday and Saturday, or swapping Turpen with one of the employees whose seniority enabled him to choose a position with Friday and Saturday off.¹¹¹ Specifically, the Court of Appeals emphasized that “to require the Katy to hire an overtime employee and bill Turpen for the additional wages would have necessitated a greater than *de minimis*” cost because substantial expenses would be involved to keep records and to bill the absent employee.¹¹² Accordingly, the Katy did not have to do anything further to accommodate Turpen’s Seventh-Day Adventist beliefs.¹¹³

105. *See id.* at 1024. After the takeover, the Katy decided to give former Rock Island workers hiring priority based on their prior seniority.

In setting up the 24 hours a day, seven days a week schedule, . . . the Katy determined that six additional employees were needed and hired the top six off the Rock Island Roster. . . . The schedule for these employees drawn up by the Katy provided three positions with Friday evenings and Saturdays off. These three jobs were selected by the three former Rock Island employees with greater seniority than Turpen.

Id.

106. *See id.* at 1023.

107. *See id.* at 1025. “Turpen reported to work with the Katy as a temporary employee, [but] informed . . . the Katy representative in charge of [temporary hiring], of his desire to have Friday evenings and Saturdays off to accommodate his religious beliefs.” *Id.* at 1024. Nevertheless, the representative gave Turpen a schedule that required him to work on Friday evenings and Saturdays. A higher level representative then attempted to rearrange the schedule to accommodate Turpen, but was unable to accommodate the needs of the Katy as well as those of Turpen. *See id.* at 1025.

108. *See id.*

109. *See id.* “The Katy scheduled a formal investigation of Turpen’s failure to report to his assigned “trick” and his refusal to report in the future during his Sabbath.” *Id.* Turpen’s union processed Turpen’s discharge grievance, but did not succeed in getting Turpen reinstated. *See id.*

110. *See id.* at 1028.

111. *See id.* at 1027.

112. *Id.* at 1028.

113. *See id.* at 1022, 1026

The Third Circuit came to the opposite conclusion in *Protos v. Volkswagen of America*,¹¹⁴ when it determined that the accommodation requested by the employee would not cause the employer to incur an undue hardship.¹¹⁵ Protos, a Worldwide Church of God member, refused to work on her Sabbath because failure to observe her Sabbath was cause for excommunication from her church.¹¹⁶ Volkswagen, Protos' employer, announced that it would begin to schedule mandatory overtime work on Saturdays.¹¹⁷ After Protos notified Volkswagen of her religious beliefs, the company unsuccessfully investigated the possibility of assigning Protos to a new position where Saturday overtime was not mandatory.¹¹⁸ The company issued a formal written warning after Protos had accumulated five Saturday absences.¹¹⁹ After three more Saturday overtime absences and two suspensions, Volkswagen dismissed Protos.¹²⁰

The court concluded that this case differed from *Hardison*¹²¹ because, in this case, "[t]he evidence showed that Volkswagen regularly maintained . . . a crew of roving absentee relief operators [("ARO")] to be deployed as substitutes for absent employees."¹²² Furthermore, Protos' job was easily learned, and the assembly line operated as efficiently when an ARO performed her duties.¹²³ Therefore, unlike the requested accommodation

114. 797 F.2d 129 (3d Cir. 1986).

115. *See id.* at 139.

116. *See id.* at 131.

117. *See id.*

118. *See id.* at 132. Protos "provided her supervisor with a note from her minister explaining that in the Worldwide Church of God there were "no exceptions" to the prohibition of labor on the Sabbath." *Id.* at 131.

119. *See id.* at 132.

120. *See id.*

Protos was absent [from mandatory overtime work on three Saturdays]. The company took no immediate action, however, the company's Industrial Relations Department considered the appropriate response. [F]ollowing [Protos'] failure to appear on the next scheduled Saturday, the Industrial Relations Department advised her supervisor that any future absences should be disciplined. When informed of this decision, Protos reiterated her position, and after her absence on . . . the next scheduled Saturday, Volkswagen issued a formal written warning.

Id. at 132.

Protos then filed a complaint with the [EEOC] alleging that the company's action contravened Title VII. . . . That action prompted Volkswagen to undertake further inquiry, which convinced the company of the sincerity of Protos's religious beliefs. As a result, the company explored the possibility of assigning Protos to a new post where Saturday overtime was not required. But there was a waiting list of 200 people for transfer.

Id. Saturday overtime was subsequently scheduled for three more Saturdays. Protos did not appear for any of the three. "The company invoked the escalating sanctions for unexcused absences provided for in its regulations, and, after suspending her twice, dismissed Protos." *Id.*

121. 432 U.S. 63 (1977). *See also supra* note 87 and accompanying text.

122. *Protos*, 797 F.2d at 134-35.

123. *See id.* at 135.

proposed in *Hardison*,¹²⁴ the employer in this case was not obliged to pay higher wages to fill the vacancy and was assured that the job would be performed equally.¹²⁵ As a result, the court concluded that the accommodation requested would not have imposed an undue burden or a greater than de minimis cost on Volkswagen.¹²⁶

IV. DOES ABDUL-RAUF'S CLAIM FIT WITHIN THE SUPREME COURT'S FRAMEWORK?

A. Differences Between Most Title VII Religious Discrimination Cases and Abdul-Rauf's Potential Case

Mahmoud Abdul-Rauf's potential Title VII case is fundamentally different from the above cases. The analysis of costs incurred from hiring a substitute employee in *Hardison*,¹²⁷ *Turpen*,¹²⁸ and *Protos*¹²⁹ is vital. In each of those cases the employee's religious beliefs precluded him or her from

124. See *supra* notes 88-90. The Third Circuit Court of Appeals summarized the Supreme Court's reasoning in *Hardison*, by reiterating that if TWA accommodated Hardison by allowing him to work only four days per week, as he had suggested, the company's alternatives "would [have] involve[d] costs to TWA either in the form of lost efficiency in other jobs or higher wages." *Protos*, 797 F.2d at 133 (quoting *Hardison*, 432 U.S. at 84).

125. See *Protos*, 797 F.2d at 135.

126. See *id.* The district court found that "the efficiency, production, quality and morale of [the] assembly line remained intact during [Protos'] absence." *Id.*

Undue hardship is found regardless of the type of cost involved, be it a direct financial cost, such as costs incurred in securing a temporary replacement for an employee or costs involved in paying premium wages, or an indirect cost, such as costs resulting from lost efficiency or costs resulting from increased administrative workload.

Zablotsky, *supra* note 17 at 544-45 (emphasis added) (footnotes omitted). "Volkswagen first maintain[ed] that because Protos sought a guarantee of having all Saturdays off, her request was by definition incapable of being reasonably accommodated." *Protos*, 797 F.2d at 134. In making this argument, Volkswagen relied on *Jordan v. North Carolina National Bank*, "which held that a demand for every Saturday off 'was so unlimited and absolute . . . that [it] speaks its own unreasonableness and thus is beyond accommodation'". *Protos*, 797 F.2d at 134 (quoting *Jordan v. North Carolina Natl. Bank*, 565 F.2d 72, 76 (4th Cir. 1977)). In response to this argument the court refused to follow the *Jordan* analysis. To do so, the court reasoned, "would effectively remove from [Title VII's] protection all employees who subscribe to religions with strict prohibitions against Sabbath labor." *Id.* at 134. Further, the court stated:

[b]y its terms, however § 701(j) encompasses within its scope 'all aspects of religious observance and practice as well as belief,' . . . the *Hardison* court itself proceeded on the premise that a Sabbath observer was entitled to be accommodated by her employer and that the only question was "the reach of that obligation" on the part of the employer.

Id. at 134 (quoting *Hardison*, 432 U.S. at 66).

127. 432 U.S. 63 (1977).

128. 736 F.2d 1022 (5th Cir. 1984).

129. 797 F.2d 129 (3d Cir. 1986).

performing the essence of the employment duties.¹³⁰ As a result, the employer would be forced to use substitute workers if required to accommodate. In Abdul-Rauf's case, however, there was no need for the Denver Nuggets to replace him. Abdul-Rauf's sincerely held religious belief did not preclude him from fulfilling the essence of his employment duties. His primary duty was to play basketball. Once the National Anthem ended, Abdul-Rauf entered the arena and arrived at the Nuggets' bench prepared to play.¹³¹ Thus, the substitute employee factor is not a relevant component of Abdul-Rauf's accommodation analysis.

A second difference between Abdul-Rauf's potential Title VII claim and those in *Hardison*,¹³² *Turpen*,¹³³ and *Protos*¹³⁴ is that there were no alternative accommodations that the NBA could have provided for Abdul-Rauf. Specifically, the NBA could have allowed Abdul-Rauf to refrain from participating in the National Anthem or it could have, as it did, required him to stand for the National Anthem. Unlike accommodating the Seventh-Day Adventist, the Worldwide Church of God member or the Orthodox Jew by switching shifts to give the employee his or her Sabbath off, there were no similar alternatives available to accommodate Abdul-Rauf.¹³⁵

Based on these first two factors, accommodating Abdul-Rauf's religious beliefs would not be a difficult requirement to inflict on the NBA and Denver Nuggets. The third and most unique aspect of Abdul-Rauf's potential Title VII case, however, changes the analysis. Unlike most religious discrimination cases under Title VII, public opinion is a vital factor in Abdul-Rauf's accommodation analysis. In most cases, there are only two or three interested parties involved, including the employee, the employer and possibly a substitute employee.¹³⁶ In the context of professional sports, however, the fans sitting in the arena, as well as the fans watching from home, can observe the employee-athlete adhering to his or her religious beliefs. Fan reactions to athletes adhering to a particular religious practice can have a significant impact on the financial success of a team or sport. Specifically, fans can demonstrate their objections by choosing to refrain

130. See *Hardison*, 432 U.S. at 68-69; *Protos*, 797 F.2d at 131-32; *Turpen*, 736 F.2d at 1024-26.

131. See Krieger, *supra* note 25, at 1B.

132. 432 U.S. 63 (1977).

133. 736 F.2d 1022 (5th Cir. 1984).

134. 797 F.2d 129 (3d Cir. 1986).

135. For a discussion of alternative accommodations, see *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68-69 (1986) ("[A]n employer has met its obligations under § 701(j) when it demonstrates that it has offered a reasonable accommodation"; "the employer need not further show that each of the employee's alternative accommodations would result in undue hardship").

136. See Lee Boothby & Robert W. Nixon, *Religious Accommodation: An Often Delicate Task*, 57 NOTRE DAME LAW. 797, 801 (1982).

from attending the sporting events, watching games on television, and buying team merchandise. By doing so, fans are capable of directly lowering ticket sales and profits.

Because fan reactions may have serious implications on the Title VII accommodation analysis, it is important to evaluate how fan reactions may impact Abdul-Rauf's potential case. Once Abdul-Rauf's routine of remaining in the locker room during the National Anthem hit Denver Radio shows, numerous callers angrily noted that Abdul-Rauf had been willing to accept American prosperity.¹³⁷ Their hostility demonstrated that they expected a quid pro quo from him with regard to respecting the National Anthem. Moreover, by March 14, 1996, just two days following his suspension, the Denver Nuggets received more than two hundred phone calls from irate fans threatening to boycott games as long as Abdul-Rauf remained with the team.¹³⁸ Many fans threatened to cancel their season tickets.¹³⁹ Moreover, the league itself feared that the economic consequences of fan reprisals that might translate into a reduction in support from advertisers and television networks.¹⁴⁰

In light of this response from fans and advertisers alike, even if the NBA and the Denver Nuggets accommodated Abdul-Rauf's religious belief, the

137. See Quentin Letts, *Muslim Sports Star In Anthem Protest*, THE TIMES (London), Mar. 14, 1996, at 17. Fans suggested that Abdul-Rauf spend some of his wealth on seeing a psychiatrist. See *id.*

138. See Nance, *supra* note 25, at 3C.

139. See *id.*

140. See Scott Ostler, *Why We Should Stand Up for Abdul-Rauf/Suspended Nugget Is An Honorable Man*, THE SAN FRANCISCO CHRON., Mar. 14, 1996 at E1.

Abdul-Rauf has hit an emotional hot button with a significant portion of the population. If the NBA doesn't clamp down on him, thus setting a precedent others could use to show disrespect for the flag, it will be begging for a backlash. Advertisers on NBA telecasts, you can be sure, could take the loss of Abdul-Rauf's 19.6 points a game easier than the inference that they support a league that allows its people to mock the flag.

Ed Fowler, *Abdul-Rauf Might Want To Think Twice*, HOUS. CHRON., Mar. 14, 1996, at Sports 1. For example, some of Nike's best-known spokes-people are NBA players, including Michael Jordan, Charles Barkley, and Scottie Pippen. See Randall Lane, *You Are What You Wear*, FORBES, Oct. 14, 1996, at 42; Catherine Salfino, *You Can't Tell The Players Without An Endorsement Card*, DAILY NEWS REC. (Harrisonburg, Va.), Aug. 19, 1996, at 48, available in 1996 WL 8654556. Nike splits its multi-million-dollar advertising budget equally between using these spokes-people in print and on television, often advertising during televised NBA games. See Larry LaRue, *Griffey Leads '96 Moose Party*, THE NEWS TRIB. (Tacoma, Wash.) Feb. 11, 1996, at C11.

In addition to advertisers' reluctance to continue supporting a league that allows its players "to mock the flag," evidence suggests that Abdul-Rauf's religious beliefs have made him less marketable. "When [Abdul-Rauf] joined the NBA, he had a shoe contract with Nike. Now, he doesn't have one, and he's so miffed that he covers the logos on the shoes he wears - he won't say what brand - with masking tape." Mossman, *supra* note 4, at 9D. Furthermore, later evidence suggests that Nike would be extremely reluctant to support this alleged "mockery of the flag" because Nike may have been interested in buying Ascent Entertainment, which owns the Denver Nuggets. See Michael Hiestand, *Team Ownership Could Complicate Nike's Dealings*, USA TODAY, Oct. 22, 1996, at 11C.

evidence suggests that they would have incurred significant financial losses. The NBA and the Denver Nuggets likely believed that such losses resulting from fan and advertiser reactions would translate into a greater than de minimis cost and an undue hardship. As a result of such retaliation, the NBA and the Denver Nuggets likely found it prohibitively expensive to accommodate Rauf's religious belief.

In light of *Hardison*¹⁴¹ and *Turpen*,¹⁴² if all fans remained as season ticket holders, but a few non-season ticket holders refrained from attending one Denver Nuggets game because of Abdul-Rauf's actions, the NBA and the Denver Nuggets would likely argue that they would have incurred a greater than de minimis cost. In *Turpen*,¹⁴³ the Fifth Circuit was concerned with burdening an employer by requiring it to keep track of an overtime substitute worker and billing the employee for the added wages incurred because the process "would have necessitated a greater than de minimis cost and interference with operations and would thus have been an 'undue hardship.'"¹⁴⁴ Therefore, even without speculating that the NBA and Denver Nuggets could easily turn to season ticket waiting lists and could rely on scalpers to fill non-season ticket holder seats, a court, applying *Turpen*,¹⁴⁵ may conclude that the administrative costs, overall burdens, potential lost team merchandise sales, and lost advertisers' support would be a greater than de minimis cost inflicted on the NBA and Denver Nuggets.

B. Fan Factor As An Undue Hardship

Courts have been skeptical of hypothetical hardships that an employer believes may be caused by a proposed accommodation.¹⁴⁶ In addition, an

141. 432 U.S. 63 (1977).

142. 736 F.2d 1022 (5th Cir. 1984).

143. *See id.*

144. *Id.* at 1028.

145. *See id.*

146. *See* Smith v. Pyro Mining Co., 827 F.2d 1081, 1085-86 (6th Cir. 1987); Tooley v. Martin Marietta Corp., 648 F.2d 1239, 1243 (9th Cir. 1981); Brown v. General Motors Corp., 601 F.2d 956, 960 (8th Cir. 1979); Burns v. Southern Pac. Trans. Co., 589 F.2d 403, 406-07 (9th Cir. 1978); Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 520 (6th Cir. 1975).

[T]he following are not undue hardships in the context of religious accommodation cases: (1) general discontent or grumbling among other employees; (2) timekeeping or payroll changes not overly expensive or time-consuming; (3) vague, unexplained statements of conflict in seniority rights guaranteed by a collective bargaining agreement; (4) where a position requires Saturday work, providing for exchanging days off, where such exchanges are not an unlikely, remote possibility.

Hawkins v. United States Postal Serv., EEOC Request No. 05890937 (May 18, 1990), *quoted in* ERNEST C. HADLEY, A GUIDE TO FEDERAL SECTOR EQUAL EMPLOYMENT LAW & PRACTICE 512-13 (1996).

employer's argument is further weakened "when the proposed accommodation has been tried and the postulated hardship did not arise."¹⁴⁷ In such cases, however, the employer is usually concerned with efficiency and economic losses resulting from hiring a substitute for an employee who, for religious reasons, refuses to work on Saturday or Sunday.¹⁴⁸ In no previous case has public opinion, as an economic force, been present to inflict an undue hardship on an employer.¹⁴⁹ Furthermore, Abdul-Rauf's situation is not a case where continued accommodation would have brought the same results. Unlike an employer who has previously accommodated an employee by hiring a substitute employee and is therefore aware of the economic effects of continuing accommodation, fan outrage would have caused the NBA and the Denver Nuggets to incur an undue hardship only if they continued to accommodate Abdul-Rauf.¹⁵⁰ Moreover, in attempting to demonstrate undue hardship, the NBA and the Denver Nuggets would not be relying merely on hypothetical facts or their personal opinions.¹⁵¹ Rather, they would be relying on actual fan reaction.¹⁵²

147. *Brown*, 601 F.2d at 960.

148. See, e.g., *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Genas v. New York Dep't of Correctional Serv.*, No. 95-7125, 1996 U.S. App. LEXIS 2080, at *13 (2d Cir. Feb. 12, 1996); *Beadle v. City of Tampa*, 42 F.3d 633 (11th Cir. 1995); *Benton v. Carded Graphics, Inc.*, 28 F.3d 1208 (4th Cir. 1994); *Lee v. ABF Freight Sys., Inc.*, 22 F.3d 1019 (10th Cir. 1994); *Cooper v. Oak Rubber Co.*, 15 F.3d 1375 (6th Cir. 1994); *Mann v. Frank*, 7 F.3d 1365 (8th Cir. 1993); *Wright v. Runyon*, 2 F.3d 214 (7th Cir. 1993); *Smith*; *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129 (3d Cir. 1986); *Turpen*; *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141 (5th Cir. 1982); *Brown*; *Ward v. Allegheny Ludlum Steel Corp.*, 560 F.2d 579 (3d Cir. 1977).

149. "A claim of undue hardship cannot be supported by merely conceivable or hypothetical hardships; instead, it must be supported by proof of 'actual imposition on co-workers or disruption of the work routine.'" *Tooley*, 648 F.2d at 1243 (citing *Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d 397, 406-07 (9th Cir. 1978)) (emphasis added).

This statement is only one example of the court's emphasis on accommodating employees who are precluded from working on a particular day or on a particular shift due to their religious beliefs. Although the most likely accommodation to be requested is flexibility in the regular work schedule, other frequent accommodation requests include: wearing specific clothing to comply with their religious belief, keeping personal items of religious significance in their work stations, being excused from attending mandatory meetings in which the employer presides over devotional services and being excused from taking an employment oath. See HADLEY, *supra* note 146, at 514-16. None of these frequent requests, however, involve public opinion as an economic factor in the accommodation analysis.

150. For examples of fan outrage, see Nance, *supra* note 25, at 3C.

151. See *Anderson*, 589 F.2d at 401 (stating that undue hardship cannot be proved by opinions based on hypothetical facts).

152. The lack of a substitute employee's involvement, the lack of alternative accommodation possibilities and the presence of the fan factor make Abdul-Rauf's accommodation analysis unique and difficult to place in the typical Title VII religious discrimination accommodation analysis. See, e.g., HADLEY, *supra* note 146, at 512-13 ("The most likely accommodation to be requested is flexibility in the regular work schedule to participate in some religious practice.")

The NBA and the Denver Nuggets have a strong argument that the fan factor would cause them undue hardship if forced to accommodate Abdul-Rauf's religious belief. The significant impact of the fan factor is unique to professional athletic employment. As noted in Part IV-A of this Note, most Title VII religious discrimination claims involve only the employer, the employee alleging the Title VII violation and possibly a substitute employee.¹⁵³ When a professional athlete's religious beliefs enter his or her workplace, however, the equation changes because an uncalculatable amount of people with economic influence enter into the analysis. Accordingly, this Note suggests that employee-athletes will be more limited in allowing their religious beliefs to interact with their employment. Although *Hardison*¹⁵⁴ and *Turpen*¹⁵⁵ demonstrate that an employee's religious beliefs are often not accommodated, a professional athletic employer will often be able to avoid accommodation based on a fear of both fan outrage and the loss of advertisers' support.

For example, what would result if, during mid-season, Abdul-Rauf became a Seventh-Day Adventist and refused to play in Saturday games? Would the NBA and the Denver Nuggets have been required to accommodate his belief? According to the framework set forth in *Hardison*,¹⁵⁶ *Turpen*,¹⁵⁷ and *Protos*,¹⁵⁸ the NBA and the Denver Nuggets would have incurred a greater than de minimis cost if forced to locate and conduct contract negotiations with a substitute player who would only play Saturday games.¹⁵⁹ Nevertheless, even if the NBA and the Denver Nuggets were able to contract with a substitute player without having incurred a greater than de minimis cost, the fan factor would still be present in the accommodation analysis. As a result, it is likely that if fans voiced outrage and threatened to refrain from attending games, the NBA and the Denver Nuggets would have a strong argument that they would have incurred an undue hardship if required to accommodate Abdul-Rauf or any other Seventh-Day Adventist player.¹⁶⁰

153. See *supra* note 136 and accompanying text.

154. 432 U.S. 63 (1977).

155. 736 F.2d 1022 (5th Cir. 1984).

156. 432 U.S. 63 (1977).

157. 736 F.2d 1022 (5th Cir. 1984).

158. 797 F.2d 129 (3d Cir. 1986).

159. Unlike the situation in *Protos*, where roving employees were able to substitute and perform *Protos*' duties with equal skill and efficiency, it is unlikely that the Nuggets' back up guard would have the same skills as Abdul-Rauf. Furthermore, costs in locating and negotiating with a player of equal skill would likely qualify as an undue hardship for the Denver Nuggets. See generally *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129 (3d Cir. 1986).

160. A substantial number of fans would have to object to the player's practice for the team

As long as fans are financial supporters of athletic events through the purchase of tickets and retail merchandise, some professional athletes will be forced to keep their religious beliefs out of their workplace because their employers will be able to avoid Title VII accommodation duties. The importance of fans in professional sports creates nearly an automatic inference that an athletic employer will incur greater than de minimis cost.

V. PROPOSAL

The above analysis suggests that the fan factor present in professional athletics creates a greater than de minimis cost by definition, and likely allows athletic employers to escape from accommodating their employee-athlete's religious beliefs. Abdul-Rauf's situation demonstrates that an athletic employer is able to use the fan factor as a tool to avoid accommodation even if it would not require the employer to hire or negotiate with a substitute employee. An assembly line employer, however, is unable to avoid accommodating an assembly line employee when the vacancy can be easily filled with roving substitute workers present on the job site.¹⁶¹

A line must be drawn on the athletic employer's ability to avoid accommodation. Athletic employers should be required to demonstrate that they would incur an identifiable cost if forced to accommodate the employee-athlete.¹⁶² Thus, the employer would be required to quantify the greater than de minimis cost by presenting calculations of lost ticket sales, lost advertising sales and lost merchandise sales. This would prevent the athletic employer from using the fan factor as pretextual evidence of an undue hardship. First, athletic employers can not be sure that angry fans will carry out their threats and refrain from attending games or purchasing team merchandise because of a player's religious beliefs and observances. Second, employers cannot be sure that advertisers will withdraw or alter their relationships. Although losses of fan support, merchandise sales, advertising relationships and ticket sales are mere possibilities and thus weaken the strength of this proposal,

franchise and NBA to argue that accommodation would lead to a greater than de minimis cost.

By March 14, 1996, just two days after Abdul-Rauf's suspension, the Denver Nuggets had received more than two hundred phone calls from irate fans threatening that they would not attend games as long as Abdul-Rauf remained a Denver Nugget. Others threatened to cancel their season tickets. See Nance, *supra* note 25.

161. See generally *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129 (3d Cir. 1986).

162. Although athletic employers, unlike other private employers, are forced to deal with the fan factor, they too should be subject to the general requirements set forth in *Tooley v. Martin Marietta Corp.*, 648 F.2d 1239 (9th Cir. 1981) (a showing of undue hardship must include evidence). "Speculation as to the effects of granting the accommodation is not sufficient to sustain the agency's burden." See HADLEY, *supra* note 146, at 511.

undeterminable financial losses should not be allowed to override an employee's right to adhere to his or her religious beliefs. Therefore, the Denver Nuggets should have been forced to accommodate Abdul-Rauf's religious beliefs until they could quantify their undue hardship as a result of the fan factor.

More specifically, in *Hardison*,¹⁶³ the Supreme Court determined that TWA would have incurred extra costs to secure a replacement employee.¹⁶⁴ As a result, the Court concluded that requiring TWA to accommodate would have inflicted a greater than de minimis cost.¹⁶⁵ Similarly, in *Turpen*,¹⁶⁶ the court determined that substantial costs would be involved to keep track of and bill the absent employee for the difference between straight time and overtime paid to substitute employees.¹⁶⁷ In *Equal Employment Opportunity Commission v. Ilona of Hungary Inc.*,¹⁶⁸ the employer, using an expert accountant, argued that it would have lost \$769.00 in revenue had it accommodated the plaintiffs' request to take off Yom Kippur, a Jewish holy day.¹⁶⁹ In concluding that the employer would have suffered at most a de minimis cost had it accommodated the plaintiffs' request at the time they were made, the court rejected the expert testimony on revenues lost.¹⁷⁰ In doing so, the court emphasized that the lost revenue figure addressed the loss incurred by the employer's failure to accommodate, and not the loss the

163. 432 U.S. 63 (1977).

164. *See id.* at 84. In his dissenting opinion, Justice Marshall noted that TWA would have incurred \$150 in overtime costs over a three month period until *Hardison* would have regained enough seniority to become eligible to transfer back to his former department. *See id.* at 92 (Marshall, J., dissenting).

165. *See id.* at 84.

166. 736 F.2d 1022 (5th Cir. 1984).

167. *See id.* at 1028.

168. 97 F.3d 204 (7th Cir. 1996).

169. *See id.* at 212. "Lyudmila Tomilina and Alina Glukhovsky were employed by defendant Ilona of Hungary, Inc. . . . in its Chicago beauty salon, Tomilina as a manicurist and Glukhovsky as a skin care specialist." *Id.* at 207. Both employees were Jewish and asked to take off the Jewish Holy Day of Yom Kippur without pay. *See id.* On September 13, 1990, two weeks prior to Yom Kippur, Tomilina asked the manager of the Chicago salon for permission to take the day off on Saturday, September 29, 1990 to observe Yom Kippur. *See id.* Tomilina "sincerely believed that members of the Jewish faith should refrain from working on their day of atonement." *Id.* at 208. The owners of the salon instructed the manager to deny the request, which the manager did. *See id.* Thereafter, the manager continued to schedule additional appointments for Tomilina on September 29. *See id.* Tomilina, however, did not understand that her request had been denied and therefore did not report to work on Yom Kippur. Similarly, on September 13, 1990, Glukhovsky requested the day of Yom Kippur off without pay. *See id.* The salon manager told Glukhovsky that the salon owner denied this request. *See id.* Glukhovsky, however, emphasized the importance of the holiday and told the manager that she would not report to work on Yom Kippur and that the manager should refrain from scheduling any additional appointments for her on that day. When neither employee appeared for work on Yom Kippur, Ilona of Hungary, Inc. terminated their employment. *See id.* at 207-09.

170. *See id.* at 212.

company would have endured had it made an accommodation.¹⁷¹ Nevertheless, the court suggested that the employer's attempt to quantify its losses is a vital tool to demonstrate an employer's undue hardship.¹⁷² By contrast, in situations such as Abdul-Rauf's, where the employer is unable to calculate financial losses or even to demonstrate that losses would occur as a result of accommodation, the fan factor alone should not be enough to create an undue hardship for the employer.¹⁷³

Moreover, an athletic employer forced to hire or negotiate with a replacement employee should not be treated differently from any other private employer who faces a similar situation. As demonstrated by *Hardison*,¹⁷⁴ *Turpen*,¹⁷⁵ and *Equal Employment Opportunity Commission v. Ilona of Hungary, Inc.*,¹⁷⁶ if the employer can demonstrate, with quantifying evidence, that hiring or negotiating with a substitute employee would lead to a greater than de minimis cost, the athletic employer will not be required to

171. *See id.*

172. *See id.* at 212.

173. Under the American with Disabilities Act ("ADA"), an employer is obligated to accommodate a disabled employee unless that accommodation would impose undue hardship on the employer. American with Disabilities Act of 1990, 42 U.S.C.A. § 12112(b)(5)(A) (1995). As in the case of religious discrimination, the employer has the burden of persuasion on whether an accommodation would impose an undue hardship. *See Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1183 (6th Cir. 1996).

In determining whether an accommodation would impose an undue hardship under the ADA, courts should consider such factors as: (1) the nature and cost of the accommodation; (2) the overall financial resources of the facility; (3) the number of persons employed at the facility; (4) the effect on expenses and resources or the impact otherwise of such accommodation upon the operation of the facility; (5) the overall size of the business of a covered entity; (6) the number, type, and location of its facilities; (7) and the type of operations of the covered entity including the composition, structure, and functions of the workforce of such entity; (8) the geographic separateness, administrative, or fiscal relationship of the facility in question to the covered entity. *See* 42 U.S.C. § 12111(10)(B) (1994).

In the context of the ADA, when deciding whether an accommodation would cause an undue hardship on the employer, courts carefully consider the overall financial resources of the facility. For example, in *Equal Employment Opportunity Commission v. Amego, Inc.*, 110 F.3d 135 (1st Cir. 1997), the court concluded that the expense of hiring additional staff members, a proposed accommodation, would be too great for a small nonprofit organization like Amego to bear. *See id.* at 148; *see also* *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 542 (7th Cir. 1995) (holding that the employer may prove undue hardship by establishing that the costs of the proposed accommodation are excessive in relation either to its benefits or to the employer's financial health or survival).

Although the ADA undue hardship analysis is helpful in determining when a cost is truly an undue hardship, it is first necessary to present the courts with an exact or quantified cost incurred by accommodation. For example, in *Amego*, 110 F.3d at 147-48, the defendant employer presented evidence that the cost of hiring an additional employee would be approximately \$20,000. *See id.* at 148. Accordingly, even using the ADA undue hardship factors as a model to determine undue hardship in religious discrimination cases, the employer would still be required to quantify its losses resulting from accommodation.

174. 432 U.S. 63 (1977).

175. 736 F.2d 1022 (5th Cir. 1984).

176. 97 F.3d 204 (7th Cir. 1996).

accommodate the athletic employee. Thus, hypothetically speaking, if Abdul-Rauf decided in 1995 that he would adhere to Seventh-Day Adventist beliefs and could no longer play in Saturday games, the NBA and the Denver Nuggets should not be forced to hire or negotiate with another professional basketball guard to play only Saturday games. The Denver Nuggets would have little trouble demonstrating that hiring or negotiating with a replacement player for Saturday games is vastly more financially burdensome than appointing an already present roving worker to replace an assembly line worker.¹⁷⁷

Thus, athletic employees who are precluded from performing the essence of their employment duties because of their religious beliefs, observances or practices should not be given preferential treatment over non-athlete-employees. Similarly, athletic employers forced to hire or negotiate with replacement players should not be subjected to more harsh accommodation requirements than other private employers. Rather, they too, should be required to demonstrate, with identifiable evidence, that accommodating the employee-athlete would cause them to incur a greater than de minimis cost.

CONCLUSION

The analysis of Mahmoud Abdul-Rauf's potential claim of religious discrimination demonstrates that athletic employers have an advantage that may allow them to avoid their Title VII accommodation duties. Sports attorneys will not be able to contract around conflicting employment requirements in situations similar to Abdul-Rauf's where an athlete alters his or her religious beliefs after beginning employment. It is appropriate then, that courts ensure that athletic employers are not able to use the fan factor to hide the ball from the athlete-employee. Rather, all private employees, from famous and affluent athletes to modest assembly line workers, should be treated equally in the Title VII accommodation analysis.

In short, all private employers must play the accommodation game on the same court. Likewise, all private employees must have an equal chance to catch the ball and to pursue their religious beliefs.

Kelly B. Koenig

177. Zablotsky has noted:

Undue hardship is found regardless of the type of cost involved, be it a direct financial cost, such as costs incurred in securing a temporary replacement for an employee or costs involved in paying premium wages, or an indirect cost, such as costs resulting from lost efficiency or costs resulting from increased administrative workload.

Zablotsky, *supra* note 17, at 544-45.

