

Religious Freedom and Professional Sports: the Case of the NBA Players Observing the Ramadan Fast

Marco Biasi

Assistant Professor of Labour Law – University of Milan

Alessandro Negri

Phd Candidate in Law and Religion – University of Milan

ABSTRACT

In an increasingly diverse society, a major challenge rises from the interaction between religious freedom of the individuals and the rules of the organizations they work for. In such a scenario, the NBA, one of the most international and multicultural professional sport leagues, provides a very interesting locus of analysis. In fact, its crucial stages – the Playoffs and the Finals – take place from April to June, a period which will (in part) coincide, in the next few years, with the Ramadan month, during which all Muslims, according to a religious obligation, have to fast from dawn to sunset. The presence of observant Muslim players in the NBA poses several legal issues. The Authors primarily cope with the hypothetical scenario of a Muslim professional player that abstains from carrying out the working performance or whose working performance is poor as a direct consequence of his religion-related conduct, wondering how such conducts would be qualified according to US employment and anti-discrimination law. Ultimately, the paper focuses on the employer's due role in facilitating the athlete's exercise of religious freedom, pursuant to the eventual developments of employment antidiscrimination law, which requires an (inter)active role of the employer in guaranteeing the employee's exercise of religious freedom and not only the employer's abstention from a disparate treatment based on the employee's religious conduct.

Keywords: *Professional Sport – Religion – Islam – Ramadan – NBA – Discrimination – Reasonable Accommodations.*

Marco Biasi is the author of sections 4 and 5. Alessandro Negri is the author of sections 2 and 3. The introductory and the conclusive parts are the results of a joint effort by the Authors. We are extremely grateful to Dallan Flake, Rafael Valencia and Maura Ranieri for their valuable comments. The usual disclaimer applies.

TABLE OF CONTENTS:

1. Introduction. – 2. Sports and Religion: from Neutrality to Pluralism. – 3. Sports in Islam: a Focus on Ramadan. – 4. Religious Freedom and Disparate Treatment in the NBA. 5. From the Prohibition of Religious Discrimination to the (Inter)active Accommodations. 6. Conclusions.

1. Introduction.

Considering how sports events take place throughout the whole calendar year, it is not unlikely that they could – partially – overlap with the Ramadan month.

As broadly known, during Ramadan period, the ninth month of the Islamic calendar, all Muslims, according to a religious obligation, have to fast from dawn to sunset.

As a consequence, it is likely that the working performance of Ramadan observant employees could be affected by the fasting.

In this sense, the well-known US professional basketball league (NBA) provides a very interesting locus of analysis, since its crucial stages – the Playoffs and the Finals – take place from April to June, a period which will partly coincide in the next few years with the Ramadan month.

Since employment antidiscrimination policies are applicable to the professional athletes (despite some relevant derogations due to the specificities of the sector), after a brief account of the development of the relationship between Sports and Religion, we wonder which safeguards are currently enjoyed by the Muslim NBA players according to the US legal framework in matter.

At first, we deal with the hypothetical scenario of a player that abstains from carrying out the working performance (i.e. playing), due to the fact that the latter could jeopardize his health and well-being. Secondly, we envision the case of a player who decides to play while abiding by the Ramadan prescriptions and whose working performance is poor as a direct consequence of the religious-driven conduct. The question is whether both the mentioned conducts could be classified as a breach of contract or whether the safeguard of religious freedom refrains the employer from taking an adverse (disciplinary) action.

Ultimately, the essay focuses on the employer's (due) role in facilitating the athlete's exercise of religious freedom, pursuant to the eventual developments of employment antidiscrimination law, which requires an (inter)active role of the employer in guaranteeing the employee's exercise of religious freedom and not only the employer's abstention from a disparate treatment based on the employee's religious conduct.

2. Sports and Religion: from Neutrality to Pluralism

It would have been unreasonable to expect that sports might be immune to

the overall comeback of religion in the public sphere¹ occurring in the recent decades.

On the one hand, this greater presence of religion in the sports field(s) could be just an outcome of the well-known phenomenon of interaction between globalization and individual cultural and religious identity-related demands, which characterizes postmodernity².

On the other hand, the peculiarities of sports should not be underestimated: if they, as undoubtedly are, constitute places of personal growth and education, athletes cannot avoid manifesting their most intimate choices, even of a religious nature, in the exercise of sporting discipline³.

Still, identity issues have been traditionally faced by sports institutions with a poor attention: sports have been considered as the neutral places *par excellence*, such inspired by the values of fair play, integrity and decency⁴ that every potentially conflicting element, as politics or religion, had to be excluded.

From a legal point of view, the result was a compelled (and compelling) neutrality⁵, basically aimed at ensuring that any athlete had the chance to practice sports without suffering any religious discrimination.

Therefore, the “sterilization”⁶ of the sports fields from potentially controversial factors determined an understanding of religious freedom in sports just as a negative liberty: this means that it was treated as a fundamental right to be protected from external interferences, but, at the same time, not to be actively promoted. In other terms, the overall understanding was that hiding religion and relegating it to the inner sphere was due to avoid the risks of dangerous conflicts which could undermine the golden principle (or mantra?) of sports’ neutrality.

Along the same lines, for example, the statutes of FIFA (“Fédération Internationale de Football Association”) provide that «discrimination of any kind

¹ S. FERRARI, *Lo spirito dei diritti religiosi*, Il Mulino, Bologna, 2002, pp. 37-74; more recently, S. FERRARI, S. PASTORELLI, *Religion in public spaces. A European Perspective*, Ashgate, Farnham, 2012.

² S. BENHABIB describes the perennial trap of the contemporary individual «between visions of the universal and adhesions to the particular» in *I diritti degli altri*, Raffaello Cortina Editore, Milan, 2006, p. 13.

³ C. GAGLIARDI, *Il simbolismo religioso nello sport: il caso Chahida*, in *Diritto e Religioni*, n. 1, 2014, p. 206.

⁴ N. FIORITA, *Non solo per gioco: la religione nell'ordinamento sportivo*, in *Stato, Chiese e pluralismo confessionale*, n. 32, 2015, p. 5.

⁵ About this “imposing secularism”, see M. D’ARIENZO, *La laicità francese: “aperta”, “positiva” o “im-positiva”?*, in *Diritto e Religioni*, n. 2, 2011, pp. 354-368.

⁶ A. DE OTO, *Sport, religione e pluralismo culturale: le molteplici forme di lotta alla discriminazione etnico-confessionale*, in *Stato, Chiese e pluralismo confessionale*, n. 17, 2017, p. 5.

against a country, private person or group of people on account of (...) religion is strictly prohibited and punishable by suspension or expulsion»⁷. Moreover, the mentioned statutes point out that «FIFA remains neutral in matters of politics and religion»⁸.

As to basketball, the Internal Regulations of FIBA (“Fédération Internationale de Basketball”) dictate, under article 19, that «basketball allows no discrimination between the basketball parties on the basis of race, gender, ethnic origin, religion, philosophical or political opinion (...) or other grounds»⁹.

This “compelled” neutrality, however, seems at the verge to end soon: the above-mentioned return of religion in the public sphere, together with the rising multiculturalism which marks contemporary Western societies, is leading to a different approach towards the intersection between sports and religious identity.

Nowadays, the attitude of the sports institutions has become progressively more open to the increasing players’ religious-based requests¹⁰ and this led to the shift of sports legislation¹¹ towards the introduction of reasonable accommodations suitable to athletes-believers¹².

In matter, it is worth mentioning the Interfaith Committee set up by the Committee for the Organization of the XX Olympic Winter Games held in Turin in 2006, targeting the dialogue between religions («starting from a reflection on the world of sports»)¹³.

Religious clothing, symbols, holidays are just some of the topics potentially confrontational.

Arguably, the most popular case in Italy was the “Chahida Sekkafi case”¹⁴.

In that circumstance, an Italian-born girl from a Moroccan family asked AIA

⁷ *FIFA Statutes*, August 2018 edition, art. 4.1.

⁸ *FIFA Statutes*, August 2018 edition, art. 4.2.

⁹ *FIBA Internal Regulations, Book 1: General Provisions*, art .19, in force as of 31 March 2019.

¹⁰ For the most recent case, FIFA World Cup 2018, see R. VALENCIA CANDALIJA, *Diversidad, religión y política durante la Copa del Mundo de Rusia 2018*, in *Fair Play. Revista de Filosofía, Ética y Derecho del Deporte*, vol. 12, pp. 19-53.

¹¹ With regards to the due reasonable accommodations pursuant to employment antidiscrimination policies, see *infra*.

¹² N. FIORITA, cit., p. 10.

¹³ V. CASTELLANI, *Alla radice del Comitato Interfedi di Torino 2006 – At the Root of the Interfaith Committee of Torino 2006*, in INTERFAITH COMMITTEE OF TURIN 2006 (ed.), *Le Religioni e lo Sport – Religions and Sport*, Effatà Editrice, Cantalupa, 2006, p. 4.

¹⁴ The so-called “Chahida case” has been widely debated by Italian medias: see *Storia di Chahida, primo arbitro donna in campo con il velo*, in *Il Messaggero*, 17 February 2014; *Chahida, la prima donna arbitro italiana col velo*, in *La Repubblica*, 27 February 2014.

(Italian Association of Referees) for permission to officiate football games wearing the Islamic veil. Her request was accepted, given that sport could not fail to take into account the need of the referee to carry out her working performance in full compliance with the precepts imposed by her religious belief¹⁵.

This approach was later confirmed by IFAB, «the universal decision-making body for the Laws of the Game of association football»¹⁶. In 2014, it gave the green light to a modification to the interpretation of Law 4 on players' equipment, specifying the provisions according to which male and female players could wear head covers¹⁷.

Beyond the specific case of the veil, it is worth noting that this shift in sports regulation from neutrality to constantly increasing recognition of faith-based requests is mainly related to Muslim athletes' demands¹⁸.

This could be explained by the holistic approach of Islam¹⁹, a religion which involves every aspect of believers' existence, including sports and physical activities, without a clear separation between worldly affairs and religious life.

Furthermore, the issue of diaspora cannot be ignored: especially Muslims in the West (Europe and United States) are now facing dilemmas about their multiple identities: their sense of belonging, on the one hand, to Islamic *Ummah* and, on the other hand, to host societies²⁰.

In these contexts, the individual dimension, the choice of belonging and the ethical, aesthetic and behavioral dimension of religiosity are particularly evident. The loosening of community and territorial ties makes more necessary the continuous reaffirmation, even outside the space of rituals, of identity elements, including the religious one²¹.

3. Sports in Islam: a Focus on Ramadan.

In order to understand the meaning of sports and physical activity in Islam, it is first necessary to pinpoint the particular role played by body in the Muslim Creed.

¹⁵ C. GAGLIARDI, *Il simbolismo religioso...*, cit., p. 210.

¹⁶ IFAB STATUTES, Version 3, 3 March 2017, art. 2.

¹⁷ AGENDA 128th Annual General Meeting of The International Football Association Board, par. VII, n. 2, 1 March 2014.

¹⁸ A. DE OTO, cit., p. 8.

¹⁹ B. H. A. RAHIM, H. MOHD JANI, N. M. DIAH, *Sports and physical activities in Islam: reflections of Muslim participation*, in www.researchgate.net, March 2019, p. 7.

²⁰ M. AMARA, *Sport, Islam, and Muslims in Europe: in between or on the Margin?*, in *Religions*, n. 4, 2013, p. 645.

²¹ V. FEDELE, *Religione, sport e mascolinità: L'islam diasporico e le storie dei pugili musulmani*, in *Funes, Journal of narratives and social sciences*, n. 1, 2017, pp. 46-47.

The human being, as the Qur'an says²², was created by Allah both body and soul. Therefore, not only the latter, but also the former is perceived as a direct emanation of the divine creation²³. If there is no dichotomy, as there is not, between the two, both have to be protected with the same devotion, being the physical care essential to preserve the perfection of what was made by Allah, who «created man in the best design»²⁴.

Along the same lines, also sports and physical activities could be viewed as a form of worship²⁵: more precisely, both Qur'anic verses and written accounts of the Prophet Muhammad's teachings (so-called "Hadiths") collected in Sunnah are frequently used to portray Islam's concept of sport²⁶.

For what concerns Qur'an, the verses generally cited²⁷ in order to support compatibility between sport and Islam are 38:41-42: «And mention Our servant Job, when he called out to his Lord, "Satan has afflicted me with hardship and pain". "Stamp with your foot — here is cool water to wash with, and to drink"»²⁸. The reference to stamping the feet as a salvific act is often utilized as the main proof of the importance of physical activity in the path of faith.

Coming to Hadiths, a few tell about the Prophet practicing himself sports or encouraging others to do it. In particular, he recommended swimming, shooting, horse riding, running, fencing, wrestling²⁹.

In any case, though, physical activity is subordinate to the spirit of the Revelation: performing sports should not disrupt from religious duties, be dangerous for who practices it and for the others, involve gambling, induce a lack of respect for the adversary and must be practiced in accordance with the rules of modesty in behavior and clothing³⁰. Indeed, another Qur'anic verse (Surah

²² *The Quran*, 22:5, 23:12-14.

²³ The formation of human being as a fetus is one of the wonders cited by the Holy Book as evidence of God's unique creative power; see V. J. HOFFMAN, *Islamic perspectives on the human body: legal, social and spiritual considerations*, in L. S. CAHILL and M. A. FARLEY (eds.), *Embodiment, Morality, and Medicine*, Kluwer Academic Publishers, Dordrecht/Boston/London, 1995, p. 37.

²⁴ *The Quran*, 95:4.

²⁵ B. H. A. RAHIM, H. MOHD JANI, N. M. DIAH, cit., p. 5.

²⁶ S. FAROOQ, A. PARKER, *Sport, Physical Education, and Islam: Muslim Independent Schooling and the Social Construction of Masculinities*, in *Sociology of Sport Journal*, n. 26, 2009, p. 279.

²⁷ V. FEDELE, *Controllo, legittimazione e riconoscimento: l'islam e lo sport*, in *Diritto e Religioni*, n. 1, 2014, p. 336.

²⁸ *The Quran*, 38:41-42.

²⁹ O. KIZAR, *The Place of Sports in the Light of Quran, Hadiths and the Opinions of the Muslim Scholar in Islam*, in *Universal Journal of Educational Research*, n. 6, 2018, p. 2664.

³⁰ V. FEDELE, *Controllo...*, cit., p. 337, O. KIZAR, cit., p. 2664.

57:20) seems to limit the role of sport in everyday life: «Know that the worldly life is only play, and distraction (...) the life of this world is nothing but enjoyment of vanity»³¹.

Therefore, if a Muslim cannot allow sports to distract himself from the duties imposed by his faith, this applies *a fortiori* to the five pillars of Islam: these are the so-called *arkan al Islam* and represent the main religious duties of worship (*ibadat*) incumbent on all Muslims³². Naturally, the ritual rules disciplining them are Qur'anic verses³³; the disrespect thereof does not automatically imply the exclusion of the individual from the *ummah*, the universal Muslim community³⁴, but abiding by them is still a key element of an Islamic life.

One of the five pillars, as broadly known, is fasting from dawn to sunset during the holy month of Ramadan, the ninth in the Islamic calendar, when the Qur'an was revealed³⁵. As the Holy Book says: «O you who believe! Fasting is prescribed for you, as it was prescribed for those before you, that you may become righteous»³⁶.

Actually, fasting imposed by Islam during this month does not require only the abstinence from food and drink but also from sexual relations and violence, arguments and bad thoughts which can distract from raising the level of closeness to Allah.

Qur'an provides for some exemptions to the duty of fasting³⁷: for example, elderly, pre-pubescent children, travelers, pregnant women are exonerated from the obligation but, they are required to possibly make up for the missed days after the month of Ramadan is over³⁸.

As dictated explicitly by the verses of the Holy Book, Muslims who miss or break their fast should pay a «ransom of feeding a needy person». This religious donation is an example of *kaffara*, an expiatory and propitiatory act through which facts of a certain gravity are remitted in classical Islamic criminal law³⁹.

³¹ *The Quran*, 57:20.

³² M. PAPA, L. ASCANIO, *Shari'a*, Il Mulino, Bologna, 2014, p. 53.

³³ F. CASTRO, *Il modello islamico*, Giappichelli, Turin, p. 14.

³⁴ D. PEARL, W. MENSKI, *Muslim Family Law*, Sweet & Maxwell, London, p. 123.

³⁵ *The Quran*, 2:185.

³⁶ *The Quran*, 2:183.

³⁷ R. VALENCIA CANDALIJA, *El conflicto entre la religión y las obligaciones laborales en el fútbol: especial consideración sobre el descanso semanal y las festividades religiosas*, in *Revista Española de Derecho Deportivo*, n. 42, 2018, p. 63.

³⁸ M. PAPA, L. ASCANIO, cit., p. 58.

³⁹ D. SCOLART, *L'Islam, il reato, la pena. Dal fiqh alla codificazione del diritto penale*, Istituto per l'Oriente C. A. Nallino, Roma, 2013, p. 54.

Nonetheless, some Muslim-majority countries punished the violations of Ramadan fasting without permission under criminal law, but they arguably did it in absence of a solid religious basis. It is emblematic the case of Libya, where, in 1973, in the wake of Gaddafi's "Popular Revolution", an amendment to criminal code prescribed beatings for those who violated fasting during the month of Ramadan⁴⁰.

4. Religious Freedom and Disparate Treatment in the NBA

In the wake of the shift of sports from a mere hobby to a professional activity, the application of both labor law and anti-discrimination policies to professional athletes is uncontested. Indeed, the circumstance that sportsmen might be part of the privileged category of those who (arguably⁴¹) live out their dreams does not provide any reasonable ground to deprive them from their employment rights⁴².

For the purposes of this essay, it is noteworthy that US antidiscrimination law prohibits disparate treatments based – *inter alia* – on religion⁴³. Moreover, the law specifies that any aspect of "religious observance and practice" falls under the protection against religious discrimination⁴⁴.

⁴⁰ More specifically, the fasting violation was qualified as a hadd crime by the Popular Committee of the Prefecture of Benghazi. See P. MINGANTI, *Ricezione di pene hadd nella legislazione della Repubblica in Libia*, in *Oriente Moderno*, n. 4, 1974, p. 129.

⁴¹ Compare A. AGASSI, *Open*, Einaudi, 2009, *passim*.

⁴² Compare the posts by a few anonymous Internet users of an Italian sports media website commenting the news of two soccer players of Ajax fasting during Ramadan (https://www.sportmediaset.mediaset.it/calcio/championsleague/champions-league-e-ramadan-un-problema-per-l-ajax_1274242-201902a.shtml): "at home you can do whatever you want, but if your conduct undermines your team, then the fans can be rightfully disappointed"; "it is unlikely that a wealthy soccer star chooses to fast...it is all a fake"; "if a team wants to avoid such issues, it might simply abstain from hiring Muslim players"; "why can't they start fasting after the competition is over?"

⁴³ Title VII Civil Rights Act 1964. As broadly known, religious freedom is protected also under the I Amendment of the US Constitution in matter of "Religion and Expression". However, the provision is directed at the State Actor and not at private entities such as the NBA franchises (See G.W. SCHUBERT, R.K. SMITH, J.C. TRENTADUE, *Sports Law*, West Publishing, St. Paul, 1986, 82). Therefore, a player might hardly claim a violation of his First Amendment right(s) against his private employer: compare M. BIASI, 'Either We Kneel Now as a Team...or We Are Going to Crumble As Individuals'. *A Labor Law Perspective on the 'Kaepernick Case'*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3135810.

⁴⁴ See *Eeoc v. Abercrombie & Fitch Stores, Inc.* 135 S. Ct. 2028 (2015): "An employer may not make an applicant's religious practice...a factor in employment decisions".

Accordingly, any adverse business action based on a religion-related conduct is prohibited⁴⁵, so NBA players who fast during Ramadan should not be differently treated (i.e. disciplined or retaliated against) by their teams⁴⁶.

Indeed, pursuant to US employment law, the athlete's religious *neutrality* cannot be classified as a "bona fide occupational qualification"⁴⁷.

For the latter purposes, the employer should be able to demonstrate that the player's religious belief and conduct refrain him from fulfilling the *essence* of his employment duties.

However, such a demonstration would be almost impossible (also) in the case of the fasting NBA players for several reasons.

At first, it is interesting to remind that, in the past, Hakeem Olajuwon played some legendary games while fasting for Ramadan⁴⁸ and, more recently, Enes Kanter was very solid on the court during the 2019 NBA Playoffs⁴⁹, despite a shoulder injury that he could not effectively heal due to Ramadan's prescriptions⁵⁰. These relevant cases factually show that players' activity is not necessarily impaired – and certainly not undermined in its essence – by the religion-

⁴⁵ Compare D.F. FLAKE, *Religious Discrimination Based on Employer Misperception*, in *Wisconsin Law Review*, 2016, 90.

⁴⁶ Notably, in 1996, the NBA player Mahmoud Abdul-Rauf refused to stand because, in his view, the US Flag was "a symbol of oppression that went against his Muslim belief". He was immediately suspended. His conduct was classified as a breach of contract, because, according to the NBA's Guidelines, NBA Players, Coaches and Trainers were required to "*stand and line up in a dignified posture along the sidelines or on foul line during the playing of the National Anthem*". The case was thereafter settled as he accepted to simply look down and pray during the anthem. See K.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?*, in *Washington University Law Review*, 1998, 76, 1, 377 ss.

⁴⁷ Under US antidiscrimination law, if a specific qualification (such as religion) is *reasonably necessary* to the normal operation of that particular business or enterprise, employers are exempted from the ban on disparate treatment pursuant to Title VII of the US Civil Rights Act. See *Kern v. Dynallectron Corp.*, 577 F. Supp. 1196 (N.D. Tex. 1983), holding that the conversion to Islam was a Bona Fide Occupational Qualification and thus a legitimate condition for the employment of a helicopter pilot working in Saudi Arabia, as the laws of the latter Country prevented non-Muslim from flying over the Mecca area.

⁴⁸ <https://theundefeated.com/features/hakeem-olajuwons-most-impressive-ramadan-performances/>.

⁴⁹ https://www.washingtonpost.com/opinions/2019/05/09/enes-kanter-when-ramadan-nba-playoffs-collide-my-faith-is-my-strength/?noredirect=on&utm_term=.2db59cfa545e.

⁵⁰ <https://www.mironline.ca/the-story-of-enes-kanter-basketball-star-faithful-muslim-and-erdogan-critic/>.

related conduct, although there are studies providing evidence that observing Ramadan could affect muscular strength and endurance, high-intensity exercise performance, anaerobic power and maximal aerobic power⁵¹.

Secondly, tracing a direct link between the athlete's poor performance – which, especially in collective sports, is itself hard to measure, even in times of “sports analytics” – and his fasting would be extremely hard, also considering that an imperfect physical conditioning is inevitable for *any* player during a long and demanding season of – at least – 82 games.

Not by chance, NBA teams and players enter into fixed-term contracts and not into permanent open-ended contracts. This allows a team which is not fully satisfied with a player's game to re-negotiate the contract terms (or, simply, to part ways) at its expiry time instead of taking a disciplinary action for “poor performance” during the validity of the agreement, besides the cases of unprofessional or improper behaviors (on and off the field)⁵².

5. From the Prohibition of Religious Discrimination to the (Inter)active Accommodations

In 1972, the US Civil Rights Act of 1964 was amended to commend the employers not only to refrain from disparate treatment on religious grounds, but also to take reasonable steps to accommodate their employees' religious beliefs⁵³. As pointed out in literature, the decision to protect religion observance and practices even at some cost to the efficiency of private employer policies reflected the societal commitment to an active promotion of religious pluralism⁵⁴.

By contrast, the law allowed the employer to refuse to take the due “reason-

⁵¹ See, *ex multis*, H. CHTOROU (ed.), *Effects of Ramadan Fasting on Health and Athletic Performance*, OMICS International, Foster City, 2015.

⁵² See generally the NBA Collective Bargaining Agreement 2017: <http://3c90sm371saecdwt32v9qof.wpengine.netdna-cdn.com/wp-content/uploads/2016/02/2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf>.

⁵³ On Section 2000e(j) Civil Right Act, see the detailed account by K. ENGLE, *Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, in *Texas Law Review*, 1998, 76, 369 ss.

⁵⁴ S. ESTREICHER, M.C. HARPER, *Cases and Materials on Employment Discrimination Law*, Thomson West, Eagan, 2000, 563.

able accommodations” if the latter turned into an “undue hardship” for the employer.

The open and vague nature of the concepts of “reasonable accommodations” and “undue hardship” called the US Courts to a delicate activity of interpretation and adaption to the specificities of the single cases⁵⁵.

According to the influential “Hardison” precedent of the Supreme Court, any burden on the employer that entailed a “more than a de minimis cost” was an “undue hardship”⁵⁶.

Needless to say, the “de minimis” standard of the “undue hardship” is evidently very low in terms of employee’s protection.

However, a little hardship is still necessary to bring about the due accommodation⁵⁷ and, in the NBA case, the portrait of an international and multicultural League⁵⁸ possibly justifies – according to the adage *cuius commoda eius incommoda* – an extra effort on reasonable accommodations, which would also potentially have a beneficial return on the NBA brand⁵⁹.

As to the employee-employer relationship, one might argue that providing qualified medical staff and special nutrition to the fasting player is certainly due by the employer (i.e. not an excessive hardship)⁶⁰, also considering how the well-being of players is a key to the same Team’s success.

Conversely, on the organizational side, setting the Team’s schedule to accommodate the fasting player’s needs seems to transcend the “de minimis”

⁵⁵ A. MADERA, *Le istanze di accomodamento religioso sul luogo di lavoro negli U.S.A.: un commento alla decisione E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, in E. CAMOSSA (ed.), *Democrazie e religioni. Libertà religiosa, diversità e convivenza nell’Europa del XXI Secolo*, Quaderni dell’Università degli Studi di Trento, 2016, 171 ss.

⁵⁶ *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). See A.B. SMITH JR., C.B. CRAVER, L.D. CLARK, *Employment Discrimination Law: Cases and Materials*, 6th ed., 2006, LexisNexis, Newark, 293 ss.;

⁵⁷ Compare S.L. SILBIGER, *Heaven Can Wait: Judicial Interpretation of Title VII’s Religious Accommodation Requirement since Trans World Airlines v. Hardison*, in *Fordham Law Review*, 1985, 53, 841.

⁵⁸ <https://www.nba.com/global/bigsummer/>.

⁵⁹ On the delicate relationship between the preservation of the corporate image and the exercise of religious freedom, see D.F. FLAKE, *Image is Everything: Corporate Branding and Religious Accommodation in the Workplace*, in *University of Pennsylvania Law Review*, 2015, 163, 699 ss., spec. 720 ss.

⁶⁰ Compare *EEOC v. JBS USA, Inc.*, 339 F. Supp. 3d 1135 (D. Colo. 2018), holding that the decision of the defendant company to revise the mealtime and break policies satisfied the requirement of providing reasonable accommodations to the Muslim employees who fasted during working hours.

standard on several grounds⁶¹.

At first, the schedule of the activities of the NBA Teams largely depends on the NBA calendar and, whilst the latter is out of reach of the single Team⁶², even the request of any change in the former would likely be afoul of the “de minimis” standard⁶³.

Moreover, any special or preferential treatment for fasting players could be potentially conflicting with the religious – or, arguably, “merely” personal⁶⁴ – interests of the co-workers.

As emerged from the “old” cases of the Jewish workers demanding to rest on Saturday⁶⁵, US Courts tend to classify the accommodation requests as an

⁶¹ Compare E. GRAGNOLI, *I lavoratori italiani possono chiedere il riposo nel giorno di Indù Dipavali?*, in *Var. Temi Dir. Lav.*, 2019, 1, 177 ss., pointing out how in any Country the selection of the days of work and rest – which, in our example, could be referring to the NBA Team’s schedule of the activities such as practice, meetings, etc. – should pursue a compromising logic, in order not to harm the business operations.

⁶² In this sense, requiring NBA Teams to lobby for the rescheduling of the overall NBA calendar would be surely excessive, since it would impair the whole League. Compare the different case of the shift selection by the single employer, which might possibly qualify as a reasonable accommodation: *Beadle v. Hillsborough County Sheriff’s Department*, 29 F.3d 589 (11th Cr. 1994); *Smith v. Pyro Mining Co.*, 827 F.2d 1081 (6th Cir. 1987). It is still interesting to note that, outside of the professional sports (i.e. employment) context, the National Collegiate Athletic Association (NCAA) made special accommodations for Brigham Young University, a Mormon-owned school whose athletes have been allowed to play the NCAA Tournament games on Thursday and Saturday, instead of Sunday: see <https://magazine.byu.edu/article/ncaa-changes-sunday-competition-policy/>.

⁶³ Compare *Burns v. S. Pac. Transp. Cp.*, 589 F.2d 403, 407 (9th Cir. 1978).

⁶⁴ *Brener v. Diagnostic Center Hospital*, 671 F.2d 146 (5th Cir. 1982); *Weber v. Roadway Express, Inc.*, 199 F.3d 270 (5th Cir. 2000).

⁶⁵ *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), finding that a State law that required an employer to accommodate a Sabbath’s observer scheduling needs, regardless of any hardship on the employer or other employees, was unconstitutional; *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382 (9th Cir. 1984), holding that an accommodation that required a religious employee’s coworkers to take on additional, physically hazardous work would qualify as an undue hardship for the employer; *Cook v. Chrysler Corp.*, 981 F.2d 336 (8th Cir. 1992), holding that the employer was not obliged to compromise contractual rights of other workers to accommodate employee’s religious objection to Friday night work; *Turpen v. Mo.-Kan.-Tex. R.R.*, 736 F.2d 1239, 1243 (9th Cir. 1981). In the sports field, it is worth mentioning the refusal of the legendary baseball pitcher Sandy Koufax to start game 6 of the 1965 MLB World Series, which took place on Yom Kippur: in matter see S. LEVINSON, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, in *Cardozo Law Review*, 1992, 14, 1579-1580.

“undue hardship” when the co-workers could be thereby seriously affected⁶⁶.

In this sense, it is interesting to note how a “trilogy of interests”⁶⁷ is here at stake, so that a very careful balance has to be found in order not to place an unreasonable burden on the employer (1) as well as to avoid preferences and privileged treatment that would harm potentially resenting co-workers (2), on the one hand, and to safeguard religious freedom of the observant employees (3), on the other hand.

Not by chance, it was pointed out in literature that compromise has always been a key element of a successful search for a reasonable accommodation⁶⁸, which, according to a proper line of thought, urges an active interaction of the involved parties⁶⁹.

It seems indeed that only through an interactive process, the employee and the employer (and/or their representatives in the collective negotiations) could find an accommodation that takes fully into account the overall (trilogy of) interests.

If, on the contrary, the employer unilaterally adopts the accommodation of his choice, the effect of the latter on the employees could be compromised and the risk of (legal...and not only!) disputes is evidently tangible⁷⁰.

6. Conclusions

In the increasing diversity of contemporary workplaces and societies in general, personal identity and religious freedom have to be not only safeguarded, but also actively promoted.

If we consider the case of the athletes fasting during Ramadan (the focus of this paper), it seems clear that a simple “laissez faire” approach, along with the ban on disparate treatment on religion grounds, does not suffice anymore in a

⁶⁶ Compare R.M. BIRNBACH, *Love Thy Neighbor: Should Religious Accommodations That Negatively Affect Coworkers' Shift Preferences Constitute an Undue Hardship on the Employer under Title VII*, in *Fordham Law Review*, 2009, 78, 1331 ss.

⁶⁷ K. ENGLE, *Persistence*, cit., 394.

⁶⁸ R.F. GREGORY, *The Civil Rights Act and the Battle to End Workplace Discrimination: A 50 Year History*, Rowman & Littlefield, Lanham, 2014, 190.

⁶⁹ Dallan Flake convincingly argues that the ADA rules in matter of disability accommodations, which place upon both parties the duty to work together in good faith to determine a reasonable accommodation, should be applied to religious discrimination as well: see D.F. FLAKE, *Interactive Religious Accommodations*, Paper Presented at the Law and Society Annual Conference 2019, 1st June 2019, Washington DC, referring also to the decision by federal Courts that referenced the interactive process in deciding religious accommodation claims.

⁷⁰ Compare *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986).

germane pluralistic perspective.

Accordingly, Sports Federations and Leagues cannot entrench themselves behind the old “mantra” of sports neutrality, as they basically did during both 2012 Summers Olympics in London and 2018 FIFA World Cup⁷¹, but they have to *affirmatively* take into account the religious needs and the related demands of the athletes.

As to the NBA (our locus of analysis), there has not been this far either any special request or – *a fortiori* – any controversy in matter, but something might possibly come up in the next years, when the NBA crucial stages – the Playoffs and the Finals – will partly coincide with the Ramadan period.

As already observed, US antidiscrimination law commends the employers to take “reasonable” steps to accommodate their employees’ religious beliefs, without either impairing the overall employer organization or negatively affecting the religious employees’ co-workers.

In our view, providing qualified medical staff and special nutrition to the fasting player might be a reasonable accommodation by his NBA Team, whilst the request to reset the Team’s schedule to accommodate the fasting player’s needs would qualify as an “undue hardship”.

Still, it seems that in this matter the method counts more the merits: it is the (inter)active search of a reasonable accommodation itself that helps promoting the open dialogue and the mutual understanding which is the essential key to prevent religious conflicts (also) in an international and multicultural League like the NBA, where diversity is highly enriching and certainly not burdensome.

⁷¹ In the two occasions, the organizers did not take into any account Muslim athletes’ fasting, despite – at least in 2012 – the explicit requests by the Islamic Human Rights Commission as well as by some Muslim-majority Countries such as Turkey, Egypt and Morocco: see V. FEDELE, *Controllo...*, cit., p. 345. In order to solve the dilemma between respecting divine prescriptions and renouncing to Olympics, Muslim religious authorities allowed athletes to miss the fasting, assimilating them to travelers and letting them decide freely whether to observe Ramadan or to make up for the missed days later: N. FIORITA, cit., p. 14. With regards to FIFA World Cup in 2018, see R. VALENCIA CANDALIJA, *Diversidad...*, cit., p. 39.