

**THE NFL’S PROHIBITION AGAINST
PROSELYTIZING: TITLE VII, RELIGIOUS
DISCRIMINATION, AND EYE BLACK
MESSAGES**

*Stephanie Jordan Bennett**

Introduction	374
I. Background.....	376
A. Religious Discrimination under Title VII of the Civil Rights Act of 1964.....	376
B. The NFL’s Proscription against Personal Messages on Eye Black	378
II. The Invalidity of the NFL’s Prohibition against Personal Messages on Eye Black under Title VII	380
A. First Theory of Liability: Harassment under Title VII....	381
B. Second Theory of Liability: Disparate Treatment under Title VII.....	383
C. Third Theory of Liability: Denial of Reasonable Accommodation Under Title VII.....	384
III. Balancing the NFL’s Interests with Title VII Concerns: A Proposed Amendment to the NFL’s Eye Black Regulation...	387
Conclusion	389

*Stephanie received her Bachelor of Arts in English and International Studies from Emory University in 2010. She is a May 2013 Juris Doctor candidate at the University of Mississippi School of Law and is currently the Technical Editor of the *Mississippi Law Journal*. She would like to thank Professors Jack Wade Nowlin, Lanesha Sims, and William W. Berry III for their help and support while writing this article. She dedicates this article to Wesley Edward Patton, who provided her with the topic of eye black messages in the NFL. As “Stone Cold” Steve Austin would say, “And that’s the bottom line, because Stone Cold said so.”

INTRODUCTION

For God so loved the world that he gave his only begotten
Son, that whoever believeth in him shall not perish, but have
everlasting life. — John 3:16¹

Through eye black messages of Bible verses ranging from John 3:16 to Mark 8:36, Timothy Richard Tebow has proselytized to millions of Americans over the course of his football career.² For example, after Tebow led the University of Florida Gators to victory in the 2009 National Championship Game, ninety-two million people searched Google.com for “‘John 3:16,’ the verse Tebow wore during the game.”³ Even though traditionally used to avoid glare from the Sun and “often harmless,” eye black messages can taunt fellow athletes and potentially cause violent player altercations.⁴ Due in part to preventing player violence, the NFL prohibits the use of “all words, logos, numbers or other symbols on . . . eye black,” a prohibition that intrinsically forbids proselytizing by religious athletes.⁵ Although the NFL’s

¹ *John 3:16* (King James).

² Ben Volin, *NCAA Trying to Ban Messages on Eye Black Under the “Tebow Rule,”* PALM BEACH POST (Feb. 12, 2012), <http://www.palmbeachpost.com/sports/gators/ncaa-trying-to-ban-messages-on-eye-black-232356.html>; see also Michael DiRocco, *The Message is Out on Eye Black in College Football and the NFL*, FLA. TIMES-UNION (Apr. 17, 2010), <http://jacksonville.com/sports/college/florida-gators/2010-04-17/story/message-out-eye-black-college-football-and-nfl> (“Reggie Bush, who played at Southern California from 2003-05, is generally credited with popularizing . . . [eye black messages]. Bush wrote ‘619,’ the area code of his hometown of Spring Valley, California]” on his eye black).

³ Volin, *supra* note 2. Other Biblical verses referenced by Tebow include Ephesians 2:8-10 (King James) (“For it is by grace you have been saved, through faith—and this not from yourselves, it is the gift of God—not by works, so that no one can boast. For we are God’s workmanship, created in Christ Jesus to do good works, which God prepared in advance for us to do.”) and James 1:2-4 (King James) (“Consider it pure joy, my brothers, whenever you face trials of many kinds, because you know that the testing of your faith develops perseverance. Perseverance must finish its work so that you may be mature and complete, not lacking anything.”). Patrik Jonsson, *Top 5 Tim Tebow Eye Black Biblical Verses*, CHRISTIAN SCIENCE MONITOR (Feb. 3, 2010), <http://www.csmonitor.com/USA/Society/2010/0203/Top-5-Tim-Tebow-eye-black-biblical-verses>.

⁴ Volin, *supra* note 2 (Recently, Ohio State quarterback Terelle Pryor “found himself in hot water . . . when he honored disgraced quarterback Michael Vick on his eye black.”).

⁵ *Id.*; see generally DiRocco, *supra* note 2.

prohibition has yet to be challenged in court, the regulation's potential legal ramifications are discussed below.

The First Amendment prohibits the government from restricting speech, but does not apply to the private employer-employee relationship between the NFL and its professional athletes.⁶ Therefore, the legality of the NFL's restriction against eye black messages must be evaluated under Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based upon race, color, religion, sex, or national origin.⁷ This article argues that the NFL should amend its eye black regulation to allow religious proclamations in an effort to prevent Title VII religious discrimination and to accommodate players who believe they have a duty to share their faith with the world.

Part I of the article briefly summarizes relevant Title VII doctrine and explains the NFL's prohibition against messages on eye black. Part II analyzes the NFL's regulation under Title VII and explains why the NFL should reasonably accommodate potential claimants like Tim Tebow by allowing them to wear religious messages on their eye black. Part III proposes an amendment to the NFL's regulation in an effort to balance the League's interest in preventing altercations among players and promoting uniform athlete appearance with Title VII religious discrimination concerns.⁸ This article does not address First Amendment arguments, broadcasting regulations, or other concerns not within the purview of Title VII.

⁶ DiRocco, *supra* note 2. In contrast to sports organizations interfering with religious freedom, examples of religion interfering with sports include "the famous refusal of Sandy Koufax to pitch on Yom Kippur during the 1965 World Series" and "the unwillingness of Islamic NBA player Mahmoud Abdul-Rauf to stand during the pre-game national anthem." *Id.*

⁷ *Id.*

⁸ Although not addressed in this article, threshold issues such as timeliness, standing, and preclusion must be addressed before an athlete can bring a suit under Title VII. For further information concerning the threshold requirements necessary to bring a claim under Title VII, see EEOC Compliance Manual, Section 2: Threshold Issues, *available at* <http://www.eeoc.gov/policy/docs/threshold.html> (last visited Mar. 22, 2013).

I. BACKGROUND

A. *Religious Discrimination under Title VII of the Civil Rights Act of 1964*

In 1963, President John F. Kennedy recommended the promulgation of civil rights legislation to ban discrimination in voting, public schools, and places of employment.⁹ The following year, Congress and President Lyndon B. Johnson approved the Civil Rights Act of 1964.¹⁰ Title VII of the Civil Rights Act proscribes both intentional and unintentional discrimination in employment in an “endeavor[] to achieve true equality in the American workplace.”¹¹ With the promulgation of Title VII, “Congress also created the Equal Employment Opportunity Commission to . . . process claims made pursuant to . . . [Title VII’s] provisions.”¹²

Title VII applies to employers, like the NFL, who employ “fifteen or more persons [and] whose business affects interstate commerce.”¹³ Title VII does not apply “to the employment of aliens outside any state . . . or to a religious corporation[s] . . . employment of individuals of a particular religion.”¹⁴ In addition, collective bargaining agreements—such as those used by the NFL—cannot eliminate protections guaranteed by the Civil Rights Act.¹⁵

Religious discrimination claims under Title VII fall into three theories of liability: (1) harassment, (2) disparate treatment, and

⁹ Gregory, *infra* note 31, at 27.

¹⁰ *Id.*

¹¹ *Id.* “It shall be unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge, or to otherwise 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.” 42 U.S.C. § 2000e (2012).

¹² Gregory, *infra* note 31, at 28. If an employee believes his employment rights were violated because of his religious beliefs, the employee must file a discrimination claim with the Equal Employment Opportunity Commission, which acts as a “prerequisite to later filing a lawsuit in federal court.” 118 AM. JUR. *Trials* 183 (2010).

¹³ Kent Greenawalt, *Title VII and Religious Liberty*, 33 LOY. U. CHI. L.J. 1, 1 (2001).

¹⁴ 42 U.S.C. § 2000e(b) (2012).

¹⁵ Greenawalt, *supra* note 13, at 19-20, n. 80. “If a collective bargaining agreement insisted that an employer not make a required accommodation, the agreement would be illegal in that respect . . .” *Id.*

(3) denial of reasonable accommodation.¹⁶ As a prerequisite to any Title VII religious discrimination claim, the employee must establish that his “beliefs actually constitute a religion,” defined as “all aspects of religious observance and practices” such as “praying, . . . displaying religious objects, . . . and engaging in forms of religious expression.”¹⁷

The first Title VII religious discrimination theory of liability, harassment, occurs when an employee is either “required or coerced to abandon, alter, or adopt religious practice[s] as a condition of employment” or “subjected to unwelcome statements or conduct . . . so severe or pervasive that the individual . . . reasonably finds the work environment to be hostile.”¹⁸

The second theory of liability, disparate treatment, occurs when an employer treats employees differently because of their religious beliefs.¹⁹ Proving disparate treatment, however, does not require proof of actual bias by an employer against an employee.²⁰

The third and final theory of liability under Title VII, religious accommodation, requires an employee to prove that: (1) he “has a sincerely held religious belief, practice[,] or observance . . . [that] conflicts with a requirement of employment,” and (2) the employer has refused to provide him with a reasonable accommodation for his belief.²¹ The duty of reasonable

¹⁶ See generally EEOC Compliance Manual, Section 12: Religious Discrimination (Sept. 22, 2009), available at http://www.eeoc.gov/policy/docs/religion.html#_ftn81 [hereinafter EEOC Manual]; *Religious Accommodation in the Workplace: Your Rights and Obligations*, ANTI-DISCRIMINATION LEAGUE, http://www.adl.org/religious_freedom/resource_kit/religion_workplace.asp (last visited Mar. 22, 2013) [hereinafter Anti-Discrimination League]. Examples of discrimination based on religious beliefs include “harassment on the basis of religion; retaliation against an individual for filing a charge of discrimination, participating in an investigation, or opposing discriminatory practices based on religion; employment decisions based on stereotypes . . . ; and denying employment opportunities to a person because of . . . a particular religion.” 118 AM. JUR. *Trials* 183 (2010).

¹⁷ 118 AM. JUR. *Trials* 183 (2010); see also Greenawalt, *supra* note 13, at 1 (“In 1980, the EEOC issued Guidelines on Discrimination Because of Religion that . . . do not confine the definition of religious practices to theistic concepts or to traditional religious beliefs. The definition also includes moral and ethical beliefs.”).

¹⁸ *Questions and Answers: Religious Discrimination in the Workplace*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N § 4, http://www.eeoc.gov/policy/docs/qanda_religion.html (last modified Jan. 31, 2011) [hereinafter EEOC Questions and Answers].

¹⁹ *Id.* at § 3.

²⁰ *Id.*

²¹ 118 AM. JUR. *Trials* 183 (2010).

accommodation, however, is only “implicated once the employer is [put] on notice of the situation requiring the accommodation,” and an employer may refuse a reasonable accommodation because of undue hardship.²²

As this article explains in Part II, the NFL’s regulation is legally valid under the harassment and disparate treatment theories of liability. The NFL’s regulation of eye black messages violates Title VII, however, under the denial of reasonable accommodation theory of liability. Therefore, the NFL should reasonably accommodate players wishing to proselytize through eye black messages.

B. The NFL’s Proscription against Personal Messages on Eye Black

Since joining the NFL in 2010, Tebow has complied with NFL Rule 5, § 4, Article 8 and abandoned proselytizing through eye black.²³ NFL Rule 5, § 4, Article 8 states in relevant part: “[t]hroughout the period on game-day that a player is visible to the stadium and television audience . . . , players are prohibited

In 1972 Congress amended Title VII of the Civil Rights Act of 1964 to add a distinct obligation of employers[:] the duty to reasonably accommodate the religious practices of employees to the extent they can do so without undue hardship. Since Congress did not define either the terms ‘reasonable accommodation’ or ‘undue hardship’ there has been considerable litigation interpreting these terms, the bulk of which has involved applying the duty of reasonable accommodation to the desires of employees not to work on Saturdays or Sundays for religious reasons or on religious holidays.

Andrew M. Campbell, *What Constitutes Employer’s Reasonable Accommodation of Employee’s Religion Religious Preferences Under Title VII of the Civil Rights Act of 1964*, 134 A.L.R. 1 (1996).

²² 118 AM. JUR. *Trials* 183 (2010); *see, e.g.*, Slater v. Douglas Cnty., 743 F. Supp. 2d 1188 (D. Or. 2010).

After an employee . . . notifies that employer . . . of his or her need for a religious accommodation, the employer or labor organization has an obligation to reasonably accommodate the individual’s religious practices. A refusal to accommodate is justified only when an employer . . . can demonstrate undue hardship would in fact result from each available alternative method of accommodation.

Reasonable Accommodation Without Undue Hardship as Required by Section 701(j) of Title VII of the Civil Rights Act of 1964, 29 CFR § 1605.2 (2012).

²³ Ethan Cole, *Tim Tebow Moves Bible Verse From Eye Black to Wrist*, CHRISTIAN POST (Dec. 27, 2010), <http://www.christianpost.com/news/tim-tebow-moves-bible-verse-from-eye-black-to-wrist-48232/>.

from wearing, displaying, or otherwise conveying personal messages either in writing or illustration, unless such message has been approved in advance by the League office.”²⁴ As learned by Giants safety Antrel Rolle after he displayed the University of Miami logo on his eye black in 2011,²⁵ the NFL punishes violations of Rule 5 through the imposition of fines, which begin at a minimum of \$5,000 for the first offense and \$10,000 for the second offense.²⁶ Any NFL player wishing to convey religious messages through eye black has two options to restore his ability to announce his faith on the field: (1) seek permissive employer withdrawal of the prohibition or (2) challenge the regulation under Title VII.

²⁴ Nat'l Football League, *2011 Official Playing Rules and Casebook of the National Football League* 30 (2011), http://static.nfl.com/static/content/public/image/rulebook/pdfs/2011_Rule_Book.pdf [hereinafter NFL 2011 Official Playing Rules]. In its entirety the NFL rule states:

Throughout the period on game-day that a player is visible to the stadium and television audience (including in pregame warm-ups, in the bench area, and during postgame interviews in the locker room or on the field), players are prohibited from wearing, displaying, or otherwise conveying personal messages either in writing or illustration, unless such message has been approved in advance by the League office. Items to celebrate anniversaries or memorable events, or to honor or commemorate individuals, such as helmet decals, and arm bands and jersey patches on players' uniforms, are prohibited unless approved in advance by the League office. All such items must relate to team or League events or personages. The League will not grant permission for any club or player to wear, display, or otherwise convey messages, through helmet decals, arm bands, jersey patches, or other items affixed to game uniforms or equipment, which relate to political activities or causes, other non-football events, causes or campaigns, or charitable causes or campaigns. Further, such armbands and jersey patches must be modest in size, tasteful, noncommercial, and non-controversial; must not be worn for more than one football season; and if approved for use by a specific team, must not be worn by players on other teams in the League.

Id.

²⁵ Michael David Smith, *Antrel Rolle Fined \$5,000 for Wearing University of Miami Logo*, NBC SPORTS (Nov. 11, 2011), <http://profootballtalk.nbcsports.com/2011/11/11/antrel-rolle-fined-5000-for-wearing-university-of-miami-logo/>.

²⁶ Nat'l Football League, *2011 League Policies for Players (Synopsis)* at 3 (2011), <http://www.nflevolution.com/wordpress/wp-content/uploads/2012/08/2011-synopsis-of-the-policies-final-8-19-11-5081.pdf>. Likewise, the NCAA Rule 1, § 4, Article 6(e) requires “Any shading under a player’s eye . . . [to] be solid black with no words, numbers, logos or other symbols.” Nat'l Collegiate Athletic Ass'n, *2011 and 2012 NCAA Football Rules and Interpretations* 1-4-6(e) (May 2011), http://www.americanfootball.ru/Sport/Rule/2011_football_rules.pdf.

II. THE INVALIDITY OF THE NFL'S PROHIBITION AGAINST PERSONAL MESSAGES ON EYE BLACK UNDER TITLE VII

Recall from Part I that as a prerequisite to any Title VII religious discrimination claim, the employee must establish that his “beliefs [in fact] constitute a religion.”²⁷ As defined by Title VII, religion includes “all aspects of religious observance and practices,” such as “displaying religious objects, wearing religious clothing, wearing religious symbols, . . . and engaging in forms of religious expression.”²⁸ Courts give “‘great weight’ to the plaintiff’s own characterization of those beliefs” in determining what qualifies as religious expression under Title VII.²⁹

This Article assumes the Title VII claimant to be a member of a religion recognized by Title VII and to be sincere in his religious beliefs.³⁰ In addition, the hypothetical claimant in the following analysis is presumed to believe, like many Christians, that the Bible requires him “to spread the word of God whenever an opportunity presents itself”³¹ and to “give the Lord . . . praise.”³²

²⁷ 118 AM. JUR. *Trials* 183 (2010).

²⁸ *Id.*

²⁹ Gregory, *infra* note 31, at 17.

³⁰ The Article presumes the hypothetical claimant to be like Tim Tebow in that he would encounter little difficulty in providing his religious beliefs under Title VII. *See, e.g.,* Sally Quinn, *Tim Tebow: Living My Religion*, WASH. POST (Jan. 16, 2012), http://www.washingtonpost.com/blogs/under-god/post/tim-tebow-living-my-religion/2012/01/16/gIQAcOuH3P_blog.html; *Tim Tebow To Deliver Easter Speech At Celebration Texas Church*, HUFFINGTON POST (Apr. 6, 2012), http://www.huffingtonpost.com/2012/04/06/tim-tebow-easter_n_1409143.html.

³¹ Nate Davis, *Tim Tebow Responds to Jake Plummer’s Comments on His Faith*, USA TODAY (Nov. 23, 2011), http://content.usatoday.com/communities/thehuddle/post/2011/11/tim-tebow-responds-to-jake-plummers-comments-on-his-faith/1#.T5a_29ln4Wo. Tebow famously compared his relationship with God to a marriage: “If you’re married, and you have a wife, and you really love your wife, is it good enough to only say to your wife ‘I love her’ the day you get married? Or should you tell her every single day when you wake up and every opportunity?” *Id.*; *see also* Raymond F. Gregory, ENCOUNTERING RELIGION IN THE WORKPLACE 2 (2011) (Approximately 96 percent of Americans believe in God, but 30 percent also believe that “discussion of religious matters at work should always be avoided” and 60 percent “that care must be exercised when views on religious matters are exchanged with coworkers.”).

³² Davis, *supra* note 31; *see also* Michael David Smith, *Texas Church Expecting Crowd of 30,000 for Tebow’s Easter Sermon*, NBC SPORTS (Apr. 6, 2012), <http://profootballtalk.nbcsports.com/2012/04/06/texas-church-expecting-crowd-of-30000-for-tebows-easter-sermon/> (discussing Tim Tebow’s 2012 Easter-day sermon in Texas).

A. *First Theory of Liability: Harassment under Title VII*

An athlete would likely be unable to invalidate the NFL's prohibition against eye black messages by using the harassment theory of liability under Title VII. To prove a harassment claim, the employee must establish: (1) the adverse treatment is based on religion, (2) the harassment "is unwelcome," (3) the claimant "subjectively perceive[s] the environment to be abusive," and (4) the conduct is so severe or pervasive as "to create an objectively hostile or abusive work environment."³³

In regards to the first factor—adverse treatment based on religion—the potential claimant likely will not be able to prove that the NFL "singled out [the player] . . . because of his religion."³⁴ NFL Rule 5, § 4, Article 8 neither prohibits a particular religious message nor targets a specific religious group.³⁵ Instead, the rule prohibits all writing and illustration on eye black.³⁶ The NFL has established a uniform policy without regard to the religious beliefs of individual employees, a practice upheld by the Supreme Court in *Trans World Airlines, Inc. v. Hardison*.³⁷

The second factor of a religious harassment claim—that the employee views the harassment as "unwelcome"—will be difficult to prove as well. As the Supreme Court found in *Burlington Industries, Inc. v. Ellerth*, telling someone of the harassment is not necessary for the employee to prove that the treatment is "unwelcome."³⁸ Instead, "[t]he severity and pervasiveness factors operator inversely," meaning that "[t]he more severe the harassment, the less frequently the incidents need to occur" to establish an objectively "hostile work environment."³⁹

Although the NFL's ban is pervasive by preventing religious messages on game-days, the severity of the NFL's regulation is

³³ EEOC Manual, *supra* note 16, § 12-III.

³⁴ *Id.* § 12-III, n. 81 (citing *Turner v. Barr*, 811 F. Supp. 1, 2 (D.C. Cir. 1993)).

³⁵ NFL 2011 Official Playing Rules, *supra* note 24, at 30.

³⁶ *Id.*

³⁷ *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 64-65 (1977).

³⁸ *Burlington Indus. v. Ellerth*, 524 U.S. 742, 771 (1998).

³⁹ EEOC Manual, *supra* note 16, § 12-III.

arguable.⁴⁰ In order for employer conduct to be actionable, the severity and pervasiveness of the conduct must be so severe as to “alter the conditions of [the victim’s] employment”⁴¹ Although not required, “tangible results (caused by the discrimination), like hiring, firing, promotion, compensation, and work assignment” support employer liability.⁴²

The claimant, therefore, should attempt to present tangible proof of discrimination, such as the testimony of a fellow athlete or evidence of forced retirement, to fulfill the second factor of his religious harassment claim: that the harassment is “unwelcome.” The claimant could, however, satisfy the third factor of harassment—subjective perception of hostility—by stating that the NFL’s prohibition causes him to perceive his work environment as “abusive.”⁴³ In regards to the fourth and final requirement (that the conduct “create[s] an objectively hostile or abusive work environment”⁴⁴), the claimant would need to show that the conduct was severe or pervasive enough to create such an environment.⁴⁵ As with the second requirement, that the claimant views the harassment as “unwelcome,”⁴⁶ the claimant should attempt to support his claim with “tangible results.”⁴⁷

The potential claimant faces significant burdens in attempting to fulfill the first, second, and fourth factors, and it is therefore unlikely that the NFL’s actions will qualify as harassment under Title VII. The claimant still may be able to prove discrimination, however, under the second and third theories of liability, disparate treatment and reasonable accommodation, respectively.

⁴⁰ NFL 2011 Official Playing Rules, *supra* note 24, at 30; *see generally* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986); Faragher v. City of Boca Raton, 524 U.S. 775 (1988).

⁴¹ *Meritor Sav. Bank, FSB*, 477 U.S. at 67 (citation omitted).

⁴² *Faragher*, 524 U.S. at 790.

⁴³ EEOC Manual, *supra* note 16, § 12-III.

⁴⁴ EEOC Manual, *supra* note 16, § 12-III.

⁴⁵ *Meritor Sav. Bank, FSB*, 477 U.S. at 67 (citation omitted).

⁴⁶ *Supra* notes 38-42 and accompanying text.

⁴⁷ *Faragher*, 524 U.S. at 790.

B. Second Theory of Liability: Disparate Treatment under Title VII

The second theory of liability, disparate treatment, occurs when an employer treats an employee of one religion differently than an employee of another religion.⁴⁸ Disparate treatment violates Title VII regardless of whether actual bias motivates the employer's conduct.⁴⁹ For a disparate treatment action, the claimant need not "provide direct proof of disparate treatment" to prevail.⁵⁰ If direct evidence, either oral or written, cannot "on its face demonstrate a bias against a protected group," the claimant must prove that: (1) he is a member of a protected group under Title VII, and (2) he was treated differently than similarly situated employees to establish disparate treatment.⁵¹ Once the claimant satisfies this prima-facie showing, "the burden shifts to the employer to articulate a legitimate non-discriminatory reason for the adverse action."⁵² If the employer articulates a non-discriminatory reason for the adverse action, then the burden shifts back to the claimant who must show that: "the employer's reason is a pretext for discrimination," and the actual reason is discriminatory in nature.⁵³ The hypothetical claimant may be hard-pressed to prove disparate treatment by the NFL because the regulation applies to all athletes regardless of faith.⁵⁴ Unless the claimant can show he was treated differently than his coworkers of another religion, the claimant will likely not be able

⁴⁸ EEOC Manual, *supra* note 16, § 12-I. Disparate treatment can be proven either through direct or inferential evidence. Equal Emp't Opportunity Comm'n, *Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory* § II (July 14, 1992), <http://www.eeoc.gov/policy/docs/disparat.html> (citing *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 (1983)) [hereinafter *Revised Enforcement Guidance*].

⁴⁹ EEOC Manual, *supra* note 16, § 12-I.

⁵⁰ *Revised Enforcement Guidance*, *supra* note 48, § II (citing *United States Postal Serv. Bd. of Governors*, 460 U.S. at 714).

⁵¹ *Model for Analysis for Disparate Treatment*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/federal/directives/md110/appendixl.html>.

⁵² Jon Hyman, *Is It Time to Do Away with McDonnell Douglas?*, LEXISNEXIS LABOR & EMP'T LAW CMTYS. (Jan. 18, 2012), <http://www.lexisnexis.com/community/labor-employment-law/blogs/labor-employment-commentary/archive/2012/01/18/is-it-time-to-do-away-with-mcdonnell-douglas.aspx>; *see also* *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

⁵³ Hyman, *supra* note 52.

⁵⁴ NFL 2011 Official Playing Rules, *supra* note 24, at 30.

to prove a disparate impact claim. Denial of reasonable accommodation provides the final Title VII opportunity for the claimant to invalidate the NFL's regulation of eye black messages.

C. Third Theory of Liability: Denial of Reasonable Accommodation Under Title VII

Under the third theory of liability, denial of reasonable accommodation, an employee must prove that: (1) he “has a sincerely held religious belief . . . [that] conflicts with a requirement of employment,” (2) that he gave notice to the employer of the situation, and (3) that his employer did not make a “good faith effort[] to accommodate the employee.”⁵⁵ The employer may deny a reasonable accommodation, however, if it would impose “undue hardship” on the employer.⁵⁶ Although the first two factors are relatively easy to establish, proving the remaining factor can be daunting to the Title VII claimant.

In evaluating the first requirement of a reasonable accommodation claim, sincerity of belief, factors to be considered include: (a) whether employee behavior is “inconsistent with the professed belief,” (b) if the accommodation sought is “a particularly desirable benefit that is likely to be sought for secular reasons,” (c) “whether the time of the request renders it suspect,” and (d) “whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.”⁵⁷

If the claimant acts in a manner similar to Tim Tebow, then he would easily fulfill the sincerity requirement of a reasonable accommodation claim. From volunteering to promote literacy rates⁵⁸ to speaking at Celebration Church on Easter Sunday,⁵⁹ Tebow has shown sincerity in upholding his Christian values. The potential claimant will also satisfy the second requirement of a reasonable accommodation claim—that he gave notice to his

⁵⁵ 118 AM. JUR. *Trials* 183 (2010).

⁵⁶ *Id.*

⁵⁷ EEOC Questions and Answers, *supra* note 19, § 8.

⁵⁸ *Tim Tebow Volunteers to Promote Reading*, FOX SPORTS FL. (Feb. 13, 2012), <http://www.foxsportsflorida.com/02/13/12/Tim-Tebow-volunteers-to-promote-reading/landing.html?blockID=665416>

⁵⁹ Kate Alexander, *On Easter Sunday, Tebow is a Headliner*, N.Y. TIMES (Apr. 8, 2012), http://www.nytimes.com/2012/04/09/sports/football/tebow-draws-thousands-to-an-easter-service-in-texas.html?_r=1.

employer—as long as he provides notice to the NFL of his need for a religious accommodation.⁶⁰

Courts, however, have traditionally favored employers under the third factor of a religious accommodation claim.⁶¹ The third and final factor of the claim—good faith effort to provide a reasonable accommodation—is one that “eliminates the employee’s conflict between his religious practices and work.”⁶² In *Wilson v. U.S. West Communications*, the Eighth Circuit “held that an employer could require a woman who wore a large button depicting a fetus because of her religious opposition to abortion to cover the button when outside her cubicle at work without violating its duty to reasonably accommodate the religious practices of its employees.”⁶³ The hypothetical claimant could argue that the plaintiff in *Wilson* was religiously accommodated in the place where she presumably performed most of her work: her cubicle. The claimant, however, works primarily on the field, particularly on game days that determine whether he will be rehired for the next season. The claimant could argue that he, like the plaintiff in *Wilson*, should be allowed an accommodation in his principal workplace. The claimant could also argue that the NFL has not, unlike the employer in *Wilson*, actually engaged in a “good faith effort[] to accommodate [the] employee.”⁶⁴ Numerous cases have required a reasonable accommodation for religious expression including for a Muslim teenager who believed she needed to wear a hijab even though it conflicted with her employer’s dress code and for a woman who felt obligated to proselytize to her coworkers by wishing them “Have a Blessed Day.”⁶⁵

Even though the claimant may succeed in proving that he is entitled to a reasonable accommodation, the NFL could still argue

⁶⁰ EEOC Questions and Answers, *supra* note 18, § 7.

⁶¹ See generally Anti-Discrimination League, *supra* note 16.

⁶² *Id.* at 1.

⁶³ Campbell, *supra* note 21, § 2; see, e.g., *Wilson v. U.S. West Commc’ns*, 58 F.3d 1337 (8th Cir. 1995).

⁶⁴ 118 AM. JUR. *Trials* 183 (2010).

⁶⁵ See, e.g., *EEOC v. Abercrombie & Fitch Stores*, 798 F. Supp.2d 1272 (N.D. Okla. 2011) (employer required to reasonably accommodate Muslim teenager wishing to wear a hijab); *Anderson v. U.S.F. Logistics (IMC)*, 274 F.3d 470, 476 (7th Cir. 2001) (employer required to allow a woman to wish “Have a Blessed Day” to coworkers and supervisors who didn’t object, but not to customers).

that the accommodation would cause the League undue hardship, an argument illustrated in the Supreme Court case of *Trans World Airlines, Inc. v. Hardison*.⁶⁶ In *Trans World Airlines, Inc.*, employee Hardison converted to a religion whose members did not work on Saturdays.⁶⁷ Upon transfer to a new work location, Hardison had insufficient seniority to avoid Saturday labor.⁶⁸ Although Trans World Airlines encouraged the union to reach an arrangement with Hardison, the union was unwilling to violate the seniority system.⁶⁹ Trans World Airlines, therefore, rejected Hardison's request because it would result in unmanned work positions and the pay of overtime wages.⁷⁰ The Supreme Court upheld the decision to not accommodate Hardison and found that Trans World Airlines would have incurred undue hardship by leaving a position vacant or paying overtime wages.⁷¹

Undue hardship typically involves receiving time off for religious purposes—thereby requiring the employer to hire additional employees or pay overtime wages—or when an accommodation would threaten the hygiene necessary for a particular occupation, such as allowing exposed facial hair during food preparation.⁷² Undue hardship cannot exist, however, if the costs are merely de minimis.⁷³ The reasonable accommodation of the hypothetical claimant would neither place a monetary burden on the NFL nor cause it to face a hygiene concern. The NFL, therefore, would likely need to reasonably accommodate the claimant by allowing religious messages on his eye black.

⁶⁶ See, e.g., *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

⁶⁷ Greenawalt, *supra* note 13, at 19; see, e.g., *Trans World Airlines, Inc.*, 432 U.S. at 63.

⁶⁸ Greenawalt, *supra* note 13, at 19.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See, e.g., *Rising v. Roadway Express, Inc.*, No. 76-725-F, 1981 WL 247 (D. Mass. July 15, 1981); *EEOC v. Caribe Hilton Int'l*, 821 F.2d 74 (1st Cir. 1987); *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307 (4th Cir. 2008); *Woods v. Safeway Stores*, 579 F.2d 43 (4th Cir. 1978).

⁷³ *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

III. BALANCING THE NFL'S INTERESTS WITH TITLE VII
CONCERNS: A PROPOSED AMENDMENT TO THE NFL'S EYE BLACK
REGULATION

In addition to the invalidity of the NFL's prohibition against messages on eye black under Title VII, ramifications from a 1991 NCAA rule banning "choreographed end zone celebrations" also illustrate the need for the NFL to accommodate religious proselytization by athletes.⁷⁴ In 1991, the NCAA adopted a rule "enacted to eliminate the increasingly widespread practice of choreographed end zone celebrations following a touchdown."⁷⁵ The examples the NCAA provided to universities illustrated conduct that "violated the [new] rule" and included a video "show[ing] a player dropping to one knee and crossing himself after scoring a touchdown."⁷⁶

Shortly after receiving the video, several member universities filed a lawsuit in federal district court seeking to enjoin the NCAA from enforcing the rule.⁷⁷ The lawsuit spawned a "wave of publicity and, within twenty-four hours, a settlement," whereby "the NCAA issued a 'clarification' of the rule, and [the plaintiffs] . . . dismissed the lawsuit."⁷⁸ As NBC sports writer Michael Smith stated, "if Tim Tebow were to put Bible verses on his eye black, as he used to do in college, the NFL would surely fine Tebow, too. But it would have a PR nightmare on its hands."⁷⁹

In an effort to avoid public outrage and potential Title VII litigation, as well as promote the First Amendment freedoms of speech and religion, the NFL should adopt the revisions to its regulation proposed below.

The NFL's prohibition against eye black messages states in relevant part:

Throughout the period on game-day that a player is visible to the stadium and television audience (including in pregame warm-ups, in the bench area, and during postgame interviews in the locker room or on the field), players are prohibited from

⁷⁴ Worthen, *supra* note 19, at 131.

⁷⁵ *Id.* at 130.

⁷⁶ *Id.* at 131.

⁷⁷ *Id.* at 132.

⁷⁸ *Id.*

⁷⁹ Smith, *supra* note 30.

wearing, displaying, or otherwise conveying personal messages either in writing or illustration, unless such message has been approved in advance by the League office.⁸⁰

In order to avoid liability under Title VII as well as negative publicity and public outrage, the NFL should add the following language and modify its rule to read:

Throughout the period on game-day . . . , players are prohibited from wearing, displaying, or otherwise conveying personal messages either in writing or illustration, unless such message *is religious in nature as defined by Title VII of the Civil Rights Act of 1964* or has been approved in advance by the League office.⁸¹

By adopting the aforementioned amendment, the NFL would prevent an occurrence similar to the NCAA's 1991 choreographed end zone celebration scandal and show its support to the American public for the First Amendment freedoms of speech and religion.⁸² Most players who wear eye black do not use it to incite violence or upset the opposing side. Instead, players typically adorn themselves with their hometown area codes (like Reggie Bush and LaMarcus Coker), tributes to fallen cousins (like Ray Rice) or fathers (like Ray Mauualuga), and references to their hometown churches (like C.J. Spiller).⁸³ Examples of derogatory content on eye black like Yunel Escobar's homosexual slur are rare exceptions to the general rule of non-offensive eye black messages.⁸⁴ Although the NFL may ultimately want to consider allowing all messages on eye black, the above solution would allow religious expression while avoiding the purposeful incitement of

⁸⁰ NFL 2011 Official Playing Rules, *supra* note 24, at 30.

⁸¹ Italics added for emphasis.

⁸² As broadly defined by Title VII, religion includes "all aspects of religious observance and practices," such as "praying, attending religious services, displaying religious objects, wearing religious clothing . . . , and engaging in forms of religious expression." 118 AM. JUR. *Trials* 183 (2010).

⁸³ Paul Lukas, *The Evolution of Eye Black*, ESPN, <http://sports.espn.go.com/espn/page2/story?page=lukas/061127> (last visited Mar. 22, 2013).

⁸⁴ Matt Brooks, *Yunel Escobar's Gay Slur on Eye Black Triggers MLB Investigation*, WASH. POST (Sept. 18, 2012), http://www.washingtonpost.com/blogs/early-lead/post/yunel-escobars-gay-slur-on-eye-black-triggers-mlb-investigation/2012/09/18/c256460e-0194-11e2-9367-4e1bafb958db_blog.html.

violence caused by permitting any message including racial or gay slurs or other derogatory content.

CONCLUSION

The proposed amendment to the NFL rule regarding eye black attempts to balance the League's interests in ensuring uniform athlete appearance and preventing player taunting with personal liberty concerns.⁸⁵ Fifteen-thousand people attended Tim Tebow's sermon on Easter Sunday, 2012, at Celebration Church in Georgetown, Texas,⁸⁶ while approximately forty-three percent of all Americans believe that a higher power helps Tebow win football games.⁸⁷ Unless the NFL wishes to add to its recent list of scandals—ranging from eavesdropping by the New Orleans Saints⁸⁸ to a sexual relationship between a Bengals cheerleader and high school student⁸⁹—the NFL should adopt the proposed amendment to its prohibition against personal messages on eye black. By adopting the proposed amendment, the NFL would preemptively avoid religious discrimination Title VII challenges, while also circumventing the potentially violent and costly repercussions that might arise by allowing any message on eye black including racial and homosexual slurs, cheating accusations, and other inflammatory remarks.

⁸⁵ For an examination of First Amendment implications for sports associations' social networking regulations, see Davis Walsh, *All A Twitter: Social Networking, College Athletes, and the First Amendment*, 20 WM. & MARY BILL RTS. J. 619 (2011).

⁸⁶ Selim Algar, *Tebow Gives Sermon to 15,000*, N.Y. POST (Apr. 9, 2012), http://www.nypost.com/p/news/local/st_tim_sermon_xlFluNbDxoLeiswiCUNHpJ.

⁸⁷ *Poll Finds 43 Percent of People Believe God Helps Tebow Win*, CBS DENVER (Jan. 12, 2012), <http://denver.cbslocal.com/2012/01/12/poll-finds-43-percent-of-people-believe-god-helps-tebow-win/>.

⁸⁸ Jeffri Chadiha, *Another Test for Saints' Owner*, ESPN (Apr. 24, 2012), http://espn.go.com/nfl/story/_/id/7849882/nfl-latest-allegations-tough-test-new-orleans-saints-owner.

⁸⁹ Andy Campbell, *Sarah Jones Case: Bengals Cheerleader Pleads Not Guilty to Sex With Student*, HUFFINGTON POST (Apr. 3, 2012), http://www.huffingtonpost.com/2012/04/02/sarah-jones-not-guiltyplea_n_1397386.html.

