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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

CAROLINE MARTINEZ Plaintiff, vs. **FEDERAL EXPRESS CORPORATION d/b/a, FEDEX EXPRESS** Defendant.	Case No.: 15-cv-3155-YGR **PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT (LIABILITY), AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** Date: July 26, 2016 Time: 2:00 p.m. Courtroom: 1, 4th Floor Complaint Filed: June 5, 2015 Trial Date: November 7, 2016

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INTRODUCTION

Since at least January 2013, California has forbidden employers from refusing employee requests to abstain from work on a religious "Sabbath," unless it would cause "significant difficulty or expense" on the employer's business based on its relative size, financial resources, and available options. Cal. Gov't Code §§ 12926(u) & 12940(*l*)(1). And for years, California has forbidden employers from refusing such work releases where no other feasible alternative would eliminate the conflict between the worker's faith and job. *See Opuku-Boateng v. California*, 95 F.3d 1461, 1467 (9th Cir. 1996). An employer must therefore relieve a Sabattarian from work on *that day* of the week, unless it would be *significantly* expensive or difficult for *that employer*. Half measures, sort-of difficult, and somewhat costly will not excuse an employer—particularly in the abstract.

But when Caroline Martinez, a Seventh-day Adventist and part-time courier for Federal Express, requested a Sabbath accommodation in 2013, the company insisted she work those days. It did so for over a year and then, when Ms. Martinez's conscience could no longer tolerate it, forced her to choose between termination and unpaid leave, followed by a demotion. FedEx did this even though, as a multi-billion-dollar company, it could have (1) used a substitute at no or relatively little cost—at most a few thousand dollars until, in its view, Ms. Martinez had the seniority to change jobs; (2) returned Ms. Martinez to another station where her Sabbath was accommodated before; or (3) tried to move Ms. Martinez to another job or place that could have accommodated her. FedEx did none of this. Ms. Martinez's cross motion should be granted.

As for its motion, FedEx either misstates the law or relies on disputed facts that, though extraneous to Ms. Martinez's motion, doom its own. First, FedEx claims that not until the release of related regulations in 2016 did it have any duty to eliminate the conflict between a worker's faith and job—here, relieve Ms. Martinez from Saturday work per the requirements of her faith. *See* Def.'s Mem. 7. But these regulations, which cover many topics, reflect pre-existing law; moreover, the elimination rule is decades-old. *See*, *e.g.*, *Opuku-Boateng*, 95 F.3d at 1467. And none of the options FedEx says it offered eliminated the conflict. Second, FedEx relies on Title VII's "de minimis" hardship test, and inexplicably suggests California did not adopt "significant

difficulty or expense" until this year. *See* Def.'s Mem. 8-9. FedEx is wrong. The state test was plainly the law on January 1, 2013—i.e., at the time of the events in question. *See* Assemb. B. 1964, 2012 Leg., Reg. Sess. (Cal. 2012).

Finally, FedEx cites seniority and overtime as undue hardships. *See* Def.'s Mem. 7. But it ignores the Ninth Circuit's admonition in *Balint v. Carson City*, 180 F.3d 1047, 1056 (9th Cir. 1999), that seniority policies do not excuse employers from exploring other options; and, in any event, FedEx peddles these alleged hardships using the wrong test—i.e., "de minimis" rather than "significant difficulty or expense." FedEx also ignores conflicting testimony on its seniority policy's impact, and never describes any overtime amount that might be required—de minimis or otherwise. Summary judgment for FedEx is inappropriate.

In sum, Ms. Martinez is entitled to summary judgment. FedEx is not.

STATEMENT OF UNDISPUTED FACTS

I. Caroline Martinez objects to working on Saturday for religious reasons.

Caroline Martinez is a Seventh-day Adventist. [P.'s Ex. 1 at 62:6-7]. Like millions of Adventists across the world, she believes her Sabbath—sundown Friday to sundown Saturday—is a holy time during which she must abstain from paid work. [P.'s Ex. 9; P.'s Ex. 19; P.'s Ex. 23]. So during that time she seeks to fulfill her covenant with God by abstaining from work, attending church services, and conducting charitable activity. [P.'s Ex. 1 at 281:2-24].

Ms. Martinez's faith has served as a source of guidance and stability throughout her life. After her parents abandoned her as a child, Ms. Martinez's aunt and grandmother raised her in the Adventist church. [P.'s Ex. 1. at 251:8-11, 252:22-253:1, 253:8-12]. As an adult, she relies on her faith and church family for support during trying times. [P.'s Ex. 1 at 285:22-286:12]. She became particularly committed to observing the Sabbath in 2011. [P.'s Ex. 1. at 29:1-7].

II. FedEx is a large company with numerous options for accommodating workers.

A. FedEx earns billions and employs thousands.

Federal Express Corporation is an international courier service with headquarters in Memphis, Tennessee. [P.'s Ex. 11 at 9]. During the applicable time period, FedEx earned over $26 billion in annual revenue, had more than 160,000 employees on staff, and operated 645 city

stations in the United States. [P.'s Ex. 11 at 3, 25, 27]. Ten of these city stations are within a 45-mile drive of Ms. Martinez's home in Vallejo, California. [P.'s Ex. 12 at 8].

B. FedEx covers absent drivers with "swing," part-time, and volunteer drivers.

FedEx staffs each station with at least two types of drivers: (1) couriers who are assigned a particular route, and (2) swing drivers who fill in for absent couriers and help with heightened workloads during peak seasons and holidays. [P.'s Ex. 3 at 61:15-62:8, 29:18-22, 69:16-71:19; P.'s Ex. 4 at 64:22-65:12]. Drivers may be full-time or part-time; and although swing drivers are hired to cover courier absences, part-timers can also be used—and perhaps with less risk of overtime given their more limited hours. [P.'s Ex. 7 at 89:11-21; P.'s Ex. 6. at 38:12-17; P.'s Ex. 2 at 39:5-18]. Indeed, part-timers sign a posted "additional hours" sheet when they want to work more hours than scheduled. [P.'s Ex. 2 at 14:3-15:17]. FedEx has no trouble finding volunteers for these additional hours, even if that requires overtime. [P.'s Ex. 2 at 19:15-17, 39:5-20; P.'s Ex. 5 at 42:8-14].

C. FedEx has a religious accommodation policy, but does not train managers on it.

FedEx has a written policy allowing employees to ask station management for religious accommodations. [P.'s Ex. 7 at 45:9-15; P.'s Ex. 13; P.'s Ex. 30]. Management evaluates such requests on a "Religious Accommodation Worksheet." [P.'s Ex. 8 at 75:21-76:20]. The worksheet tells managers to weigh eleven factors, including whether the accommodation would require overtime pay, would cost more than $100, or the manager objects. [P.'s Ex. 14]. FedEx's 30(b)(6) witness testified this $100 figure is a potential disqualifier no matter the type or duration of accommodation. [P.'s Ex. 8 at 122:9-123:19]. The worksheet also invites managers to consider alternative options. [P.'s Ex. 14]. The worksheet nowhere mentions seniority or the terms of an employment-offer letter as reasons for rejecting an accommodation. [P.'s Ex. 14]. HR Advisor Craig VandeBerg testified that, for this reason, seniority "should have little impact" on such requests. [P.'s Ex. 7 at 40:7-23].

Although FedEx station managers can discuss the requested accommodation with the company's human resources or legal department, they receive no training on FedEx's policy.

[P.'s Ex. 8 at 83:17-23]. FedEx's 30(b)(6) witness testified that station managers make the ultimate decision to grant or deny the accommodation. [P.'s Ex. 8 at 76:11-14; 84:2-12].

D. FedEx considers seniority for internal job changes, but makes exceptions.

FedEx employees seeking new positions within the company typically place bids through an on-line system. [P.'s Ex. 8 at 23:8-9, 24:13-25:7]. Station managers then evaluate those candidates based on job classification, length of continuous service, qualifications, and ability to do the job. [P.'s Ex. 15]. In the event multiple qualified candidates apply for the same post, it is typically awarded to the longest-serving worker. [P.'s Ex. 8 at 24:20-25:7-14, 41:3-42:8]. But station managers can overrule transfers based on job-related discipline. [P.'s Ex. 8 at 24:20-25:7, 41:3-42:8]. Employees who want different routes can also informally bid on open routes in the same station without using the on-line system. [P.'s Ex. 8 at 29:5-16].

FedEx makes other exceptions to seniority preferences. Workers displaced due to injury may, for example, be given preferential treatment upon return to FedEx and awarded positions they otherwise could not acquire based on seniority. [P.'s Ex. 8 at 26:5-20]. FedEx has also granted religious accommodations outside seniority, including to Ms. Martinez at a prior station. [P.'s Ex. 8 at 71:6-21]. Finally, FedEx's offer letters clarify that work schedules assigned on the basis of company tenure are still "subject to change to meet the business needs of the company." [P.'s Ex. 16; P.'s Ex. 17]. In any event, FedEx's practice of considering seniority is a unilaterally adopted one it can change any time, and it did in fact make changes as recently as 2012. [P.'s Ex. 8 at 23:10-24:12, 33:18-35:1, 70:22-72:16; P.'s Ex. 15; P.'s Ex. 28].

III. Martinez asks to be released from Saturday work at FedEx. The company flip-flops.

A. FedEx excuses Martinez from Saturday work at its San Rafael station.

Ms. Martinez started as a part-time courier at FedEx's San Rafael station in 2010. [P.'s Ex. 17 at 5-27]. Her offer letter described her schedule as Monday through Saturday mornings, "with a day off during the week." [P.'s Ex. 17 at 5-27]. San Rafael had about 50 couriers—with 30 in positions akin to Ms. Martinez's; it had 10 swing drivers. [P.'s Ex. 12 at 4-5; P.'s Ex. 6 at 27:15-28:23]. In the event of absences, San Rafael used swing drivers or paid overtime; overtime never prevented management from covering for couriers. [P.'s Ex. 6 at 41:19-42:2].

In March 2011, Ms. Martinez became more committed to her faith. [P.'s Ex. 1 at 29:1-7]. She asked San Rafael management to be excused from work on Saturdays and provided a letter from her pastor. [P.'s Ex. 10 at 17-10; P.'s Ex. 19; P.'s Ex. 6 at 53:18-20]. Management filled out a Religious Accommodation Worksheet, noting that accommodating Ms. Martinez would be the "people thing to do"—a phrase emblematic of FedEx's "people first" philosophy. [P.'s Ex. 6 at 62:12-25; P.'s Ex. 20; P.'s Ex. 8 at 105:9-106:2]. The worksheet also notes, "two other FedEx employees also have been given this accommodation." [P.'s Ex. 20].

Management granted Ms. Martinez's request, moving her to a different shift without her bidding on that shift. [P.'s Ex. 8 at 71:22-72:1]. FedEx's 30(b)(6) witness described the accommodation as an exception to the company's "seniority policy." [P.'s Ex. 8 at 71:6-21].

B. FedEx refuses to release Martinez from Saturday work upon her transfer to Concord.

In December 2012, Ms. Martinez applied for a part-time courier position at the Concord station.[1] [P.'s Ex. 1 at 77:11-16]. She did so because she wanted a shorter commute from her home and relief from a stressful environment at San Rafael. [P.'s Ex. 1 at 77:11-16].

Concord is a larger station than San Rafael; during the relevant period, it had twice as many couriers (110)—including triple the employees in positions substantially similar to Ms. Martinez's (90)—and 60% more swing drivers (16). [P.'s Ex. 7 at 16:18-18:6; 19:3-9; P.'s Ex. 12 at 7; P.'s Ex. 3 at 26:14-27:6, 30:7-18]. Concord hired more couriers in the ensuing years. [P.'s Ex. 3 at 30:7-18; 151:10-154:4]. Concord regularly pays overtime. [P.'s Ex. 2 at 39:5-20; P.'s Ex. 5 at 42:8-14].

On January 4, 2013, Ms. Martinez signed an offer letter for Concord with a stated schedule of Monday through Saturday mornings "with a day off during the week." [P.'s Ex. 16; P.'s Ex. 3 at 107:13-108:20]. The letter, written by FedEx, nowhere disclaims Saturday as a "day off during the week;" it also uses the same language as San Rafael's, where Martinez was accommodated. [P.'s Ex. 16; P.'s Ex. 8 at 94:3-15]. The letter further states Ms. Martinez could

[1] The Concord station is alternatively referred to as Pacheco or CCR. [P.'s Ex. 7 at 18:5-12].

not switch jobs at Concord for one year, or outside Concord for two, but FedEx's 30(b)(6) witness testified this provision was waivable. [P.'s Ex. 16; P.'s Ex. 8 at 47:1-48:15].

Ms. Martinez transferred to Concord with the understanding her Sabbath accommodation would follow. [P.'s Ex. 1. at 81:1-83:2]. She based that understanding both on her San Rafael accommodation and on a conversation she says she had with a Concord manager when she was bidding for the job there. [P.'s Ex. 1 at 81:1-82:3, 83:22-24]. Ms. Martinez recalls the manager assured her the San Rafael accommodation would continue at Concord because "it's the same company." [P.'s Ex. 1 at 81:1-82:25].

In any event, FedEx management anticipated Ms. Martinez would want the religious accommodation at Concord that she had in San Rafael. In advance of the transfer, for example, five supervisors (including officials at both San Rafael and Concord) exchanged e-mails on the matter. [P.'s Ex. 7 at 69; P.'s Ex. 10]. This led to Concord station manager Margo Campbell completing a Religious Accommodation Worksheet before Martinez's arrival. [P.'s Ex. 7 at 69; P.'s Ex. 10]. On the worksheet, however, Ms. Campbell opposed accommodating Ms. Martinez for the stated reason she would "need to hire another person for the Saturday shift." [P.'s Ex. 14]. Campbell also cited overtime as a potential hardship, but e-mailed human resources she was "not sure" accommodating Ms. Martinez would in fact rise to the level of "hardship." [P.'s Ex. 14; P.'s Ex. 10].

Ms. Campbell did not consider the availability of swing drivers when filling out the worksheet. [P.'s Ex. 3 at 129:14-16; 141:11-142:19]. She also did not answer its question asking her to "[d]escribe any other accommodation(s) [she] considered," and testified she cannot remember any such consideration. [P.'s Ex. 14; P.'s Ex. 3. at 124:1-22, 141:11-142:19].

C. Despite her pleas, FedEx insists Ms. Martinez work Saturdays for over a year.

FedEx scheduled Ms. Martinez Monday to Friday for her first two weeks at Concord in February 2013, confirming for her that the Sabbath accommodation was secure. [P.'s Ex. 1 at 92:14-93:16]. So when Martinez saw her name on the Saturday schedule two weeks later, she was stunned. [P.'s Ex. 1 at 283:7-21]. In response, she submitted a written accommodation request with another pastor letter, stressing the importance of Sabbath as a "sacred and holy"

time. [P.'s Ex. 23, P.'s Ex. 13]. But FedEx refused Ms. Martinez's request to abstain from Saturday work.

Ms. Campbell says she considered the decision not to grant Ms. Martinez's request final; FedEx's 30(b)(6) witness testified that call was Campbell's to make. [P.'s Ex. 3 at 150:15-17; P.'s Ex. 8 at 84:10-12]. Over the next fifteen months, however, Ms. Martinez repeatedly pled her need to observe the Sabbath. [P.'s Ex. 3 at 150:9-14; P.'s Ex. 2 at 100:15-101:6]. She even wept in her supervisor's office. [P.'s Ex. 2 at 106:7-20; P.'s Ex. 1 at 218:18-219:17]. Ms. Martinez also renewed her request to regional human-resources official VandeBerg on his visit to Concord in June 2013. [P.'s Ex. 7 at 84:2-11; P.'s Ex. 24]. Among other options, Ms. Martinez was willing to return to San Rafael if it would enable FedEx to accommodate her. [P.'s Ex. 1 at 99:6-23, 164:9-13]. FedEx refused. [P.'s Ex. 1 at 99:6-23]. During this fifteen-month period, FedEx also forbade Martinez from bidding on another position that would allow her to observe her Sabbath—even if she had the seniority for it. [P.'s Ex. 16].

Ms. Martinez thereafter worked 54 out of 66 Saturdays. [P.'s Ex. 25]. Although Ms. Martinez says working on the Sabbath caused her significant anguish, guilt, and anxiety, her supervisor described her as a good and responsible employee. [P.'s Ex. 1 at 285:4-24; P.'s Ex. 2 at 90:24-91:2]. Martinez did her best to include elements of her Sabbath observance into her workday, such as listening to sermons while driving her FedEx truck. [P.'s Ex. 1 at 279:24-280:16]. But each Saturday she spent working made her feel like she was breaching her covenant to God. [P.'s Ex. 1 at 163:6-164:5].

D. Martinez's conscience can no longer tolerate Saturday work. FedEx offers her unpaid leave followed by a lower-paying position.

In May 2014, Ms. Martinez told Ms. Campbell she could no longer violate the Sabbath, even if involuntarily. [P.'s Ex. 2 at 128:23-129:23; P.'s Ex. 3 at 151:10-152:15]. Ms. Campbell offered her a 90-day unpaid leave of absence to find another post. [P.'s Ex. 26]. The leave of absence waived the time restrictions on applying for new positions, but it also meant she would be terminated if she did not find one. [P.'s Ex. 3 at 155:21-23; P.'s Ex. 27; P.'s Ex. 26]. Ms. Campbell testified the only alternative Ms. Martinez had at that point was "to stay working

Saturdays." [P.'s Ex. 3 at 157:2-24]. Or, as defense counsel asked Ms. Martinez at her deposition: "Well, you could quit your job, couldn't you?" [P.'s Ex. 1 at 267:20].

Ms. Martinez took the leave, explaining it was preferable to termination or violating a "Commandment of God." [P.'s Ex. 26]. During Ms. Martinez's leave, Concord management covered her shifts with swing drivers or other couriers who requested additional hours. [P.'s Ex. 3 at 167:10-15, 176:24-177:3]. Ms. Campbell does not remember having any trouble covering Ms. Martinez's shifts in her absence. [P.'s Ex. 3 at 167:10-21].

On July 17, 2014, Ms. Martinez accepted a part-time courier-handler position at Concord that did not require Saturday work. [P.'s Ex. 28]. Although the job offered lower pay, she accepted it because her leave was set to expire and termination was looming. [P.'s Ex. 1 at 135:5-137:1].

IV. Martinez files a charge of discrimination, and then lands a Monday-Friday post.

In May 2014, Ms. Martinez filed a charge of discrimination for failure to accommodate with the EEOC and California DFEH. [P.'s Ex. 21; P.'s Ex. 22]. Thereafter, the DFEH issued a right to sue letter, exhausting Martinez's administrative remedies. [P.'s Ex. 22].

In January 2015, Ms. Martinez acquired a full-time position allowing her to observe the Sabbath, when she bid and was given a Monday through Friday job at Concord. [P.'s Ex. 29].

ARGUMENT

I. SUMMARY JUDGMENT STANDARD

A moving party is entitled to summary judgment if she can show there is no genuine issue of material fact and she is entitled to judgment as a matter of law. Fed. R. Civ. Proc. 56(d). Moreover, summary judgment follows where the non-moving party fails to "make a showing sufficient to establish the existence of an element essential to that party's case and on which the party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

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II. CALIFORNIA LAW IS STRICT: EMPLOYERS MUST RELEASE A SABBATH OBSERVER FROM WORK THAT DAY UNLESS THEY CAN DEMONSTRATE IT WOULD CAUSE THEM SIGNIFICANT DIFFICULTY OR EXPENSE.

California's Fair Employment and Housing Act (FEHA) requires employers to accommodate employee religious practices that conflict with job requirements, unless they can show that after exploring any available reasonable alternative means it would cause them undue hardship—which the statute further defines as "significant difficulty or expense." Cal. Gov't Code §§ 12926(u) and 12940(a), (*l*)(1).

California courts apply a burden-shifting analysis to religious-accommodation claims. To establish a prima facie case for failure to accommodate, a plaintiff must demonstrate: (1) she had a sincere religious belief; (2) the employer was aware of that belief; and (3) the belief conflicted with an employment requirement. *Cal. Fair Emp't & Hous. Comm'n v. Gemini Aluminum Corp.*, 122 Cal.App.4th 1004, 1011 (2004). The statute expressly includes "observance of a Sabbath or other religious holy day or days" among its protected beliefs. Cal. Gov't Code § 12940(*l*)(1).

Once the employee establishes a prima facie case, the burden shifts to the employer to establish "it initiated good faith efforts to accommodate reasonably the employee's religious practice or that it could not reasonably accommodate the employee without undue hardship." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 966 F.Supp.2d 949, 961 (N.D. Cal. 2013) (internal quotation marks and emphasis omitted). And "[o]nly if the employer can show that no accommodation would be possible without undue hardship is it excused from taking the necessary steps to accommodate the employee's religious beliefs." *Opuku-Boateng*, 95 F.3d at 1467; *accord Balint*, 180 F.3d at 1056.

Reasonable accommodation is not best efforts; rather, the employer must eliminate the conflict between the employee's faith and job duties. *Opuku-Boateng*, 95 F.3d at 1467 ("Where the negotiations do not produce a proposal by the employer that would eliminate the religious conflict, the employer must either accept the employee's proposal or demonstrate that it would cause undue hardship were it to do so.") (citing *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F. 2d 610, 615 (9th Cir. 1988)). This elimination rule was reiterated in state regulations adopted this year. Cal. Code Regs. tit. 2, § 11062 (2016). Regardless, it has long been applied under Title VII,

which courts rely on to interpret analogous provisions of FEHA. *See Cook v. Lindsay Olive Growers*, 911 F.2d 233, 241 (9th Cir. 1990) ("Federal precedent applies to provisions of [FEHA] analogous to Title VII."). The new state regulations in fact cite as authority the operative section of the Ninth Circuit's *Opuku-Boateng* opinion. *See* Cal. Code Regs. tit. 2, § 11062 (citing *Opuku-Boateng*, 95 F.3d at 1467). For an employee who objects to working Saturdays, therefore, options that nonetheless require Saturday work are not reasonable. *See Graves v. Nordstrom, Inc.*, No. C-94-20457 RMW, 1994 WL 721589, *3 (N.D. Cal. Dec. 20, 1994) (unpublished).

Regarding undue hardship, FEHA's test for an employer's undue-hardship defense for refusing religious accommodation is "significant difficulty or expense"—the same standard for disability accommodation; it is not Title VII's "de minimis" test. Cal. Gov. Code §§ 12926(u), 12940(*l*)(1). Despite FedEx's curious suggestion otherwise, "significant difficult or expense" has been the California test since at least January 1, 2013, when the legislature amended FEHA accordingly. *See* Assemb. B. 1964, 2012 Leg. Reg. Sess. (Cal. 2012); Stats. 2012, c. 287 (A.B. 1964); *see also* Cal. Legis. Counsel, No. 0005360 (Aug. 28, 2012) AB 1964, p.2 ("[T]his bill would . . . clarify[] that the FEHA definition of undue hardship applies to the FEHA religious discrimination section (rather than the 'de minimus' [sic] standard under federal law)."). And in determining "significant difficulty or expense," the statute lists five factors: (1) the nature and cost of the accommodation; (2) the financial resources of the employee's workplace and number of employees there; (3) the size and financial resources of the employer; (4) the number of other employees with the same qualifications necessary to perform the employee's job duties; and (5) the distribution among the employer's physical locations. Cal. Gov. Code §§ 12926(u). What is significantly difficult or expensive is therefore relative to the employer's resources and options.

Inexplicably, not only does FedEx erroneously argue the undue-hardship test "at the time of the events" was "de minimis cost"—and limit its analysis accordingly—it also claims "[t]he size of the employer or its resources was irrelevant to the analysis at that time." Def.'s Mem.1. And yet, the January 2013 update to FEHA's religious-discrimination provision, A.B. 1964, also plainly incorporates the disability hardship standard, which includes employer size and resources in its definition. *See* Assemb. B. 1964, 2012 Leg. Reg. Sess. (Cal. 2012); Cal. Gov. Code

§§ 12926(u), 12940(*l*)(1) (note, the undue-hardship definition in section 12926 in 2013 was subsection (t), not (u); section 12926 has since been amended with an intervening subsection on another topic).

Finally, to carry its hardship burden an employer must show more than "'hypothetical hardships' based on assumptions about accommodations which have never been put into practice." *Abercrombie*, 966 F. Supp. 2d at 962 (internal quotation marks omitted); *see also Opuku-Boateng*, 95 F.3d at 1473 ("[h]ypothetical morale problems are clearly insufficient to establish undue hardship"). Rather, an affirmative showing of hardship "requires proof of actual imposition or disruption." *Abercrombie*, 966 F. Supp. 2d at 962 (citing *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981)). A hunch or assumption will not do. It is indeed the employer's burden.

III. FEDEX CANNOT PREVAIL, BECAUSE IT INSISTED MS. MARTINEZ WORK ON HER SABBATH DESPITE HAVING THE RESOURCES AND OPTIONS TO OTHERWISE ACCOMMODATE HER.

A. Ms. Martinez has shown a prima facie violation of California law, where FedEx knew her Sabbath observance conflicted with her Saturday work schedule.

FedEx does not and cannot dispute Ms. Martinez's prima facie case, i.e., sincere religious belief, employer knowledge, and conflict with a job requirement. *See Gemini*, 122 Cal.App.4th at 1011. First, FedEx does not dispute Ms. Martinez has a sincerely held religious belief that she must abstain from secular activities on her Sabbath, including paid work. *See* P.'s Exs. 10; 19; 23; 9. Second, FedEx does not dispute it was aware of this belief; FedEx first became aware of Ms. Martinez's Sabbath observance in 2011 when she requested an accommodation at San Rafael. *See* P.'s Ex. 6 at 53:18-20. And before Ms. Martinez transferred to Concord, numerous officials at FedEx (including those at Concord) knew she had an accommodation at San Rafael and would likely request the same upon transfer. *See* P.'s Ex. 10. Ms. Martinez also thereafter made multiple documented requests to Concord management and human resources. *See* P.'s Exs. 13; 3 at 150:9-14; 2 at 100:15-101:6; 7 at 84:2-11; 24. Third, FedEx does not dispute

management continued to schedule Ms. Martinez for work on her Sabbath for fifteen months despite her repeated accommodation requests. *See* P.'s Ex. 25.

Because Ms. Martinez has established her prima facie case, the burden shifts to FedEx to show no reasonable accommodation was possible without undue hardship. *See Soldinger v. Nw. Airlines, Inc.*, 51 Cal.App.4th 345, 370 (1996).

B. FedEx failed to offer a reasonable accommodation to Ms. Martinez for almost two years, as she was required to either work Saturdays or suffer financially.

FedEx cannot show it provided Ms. Martinez a reasonable accommodation in 2013 and 2014. First and foremost, it required her to work 54 out of 66 Saturdays, and when she could no longer tolerate it, put her on unpaid leave followed by a lower-paying post. *See* P.'s Exs. 25; 26. Because her very objection was to Saturday work, forcing her to work was unreasonable; it did not even come close to eliminating the conflict, as the law requires—whether theoretically or practically. *See Opuku-Boateng*, 95 F.3d at 1467 (describing elimination rule); *Townley*, 859 F. 2d at 615 (same); *Graves*, 1994 WL 721589 at *3 (same). FedEx says it tried to accommodate Ms. Martinez in the 66-week period with (1) ad-hoc relief from Saturdays when there was flexibility or (2) allowing non-overtime shift swaps. Def.'s Mem. 7. But neither was reasonable, as they required Ms. Martinez to wonder whether she could serve both her employer and her God any given week, and consistently resulted in a negative answer; such chance patchwork hardly addressed the dilemma, much less resolved it.

Nor was it a reasonable accommodation for FedEx to say it offered (3) unpaid leave or (4) a lower-paying position after the 66-week period, *see* Def.'s Mem. 7, where other options were available that would eliminate the conflict. *See Opuku-Boateng*, 95 F.3d at 1467 ("Where the negotiations do not produce a proposal by the employer that would eliminate the religious conflict, the employer must either accept the employee's proposal or demonstrate that it would cause undue hardship were it to do so"); *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 519-20 (6th Cir. 1975) (urging creativity to eliminate conflict; holding unreasonable lower-pay and reduced-skills job change option); *cf.* Cal. Code Regs. tit. 2, § 11068(c) (2016) (disability regulations: "[w]hen an employee can work with a reasonable accommodation other

than a leave of absence, an employer may not require that the employee take a leave of absence").

In sum, FedEx had a duty to accommodate Ms. Martinez by eliminating the conflict between her Saturday work and her Sabbath observance. It failed to do so, first by forcing her to work 54 out of 66 Saturdays and then by giving her an unpaid leave and a demotion.

FedEx concedes that under "current law" it must eliminate the conflict, and that such a rule forbids it from requiring Sabbath work. *See* Def.'s Mem. 8 (observing that Martinez "is being accommodated as required by current law because the conflict is eliminated"). FedEx nonetheless tries to dodge its obligations by arguing it had no such duty before April 2016, when regulations referencing the elimination rule were issued, *see* Cal. Code Regs. tit. 2, § 11062(a); rather, FedEx says that in 2013 employers had to offer only "any available reasonable alternative means of accommodation." Def.'s Mem. 8. But where, as here, regulations clarify pre-existing law, they are applied retroactively. *People ex rel. Deukmejian v. CHE, Inc.*, 150 Cal.App.3d 123, 134-35 (1983). More fundamentally, the elimination rule has been the norm for years through our courts' reliance on Title VII in applying analogous FEHA terms. *See Opuku-Boateng*, 95 F.3d at 1467; *Graves*, 1994 WL 721589 at *3; *Cook*, 911 F.2d at 241. Once FedEx's timing mirage is lifted, its concession about 2016 likewise extends to the events in question.

Finally, the regulation on which FedEx relies—"any available reasonable alternative means"—concerns undue hardship, not whether FedEx acted reasonably. Cal. Code Regs. tit. 2, § 11062(b)(7). In other words, undue hardship might allow less-than-adequate means . . . but only once FedEx has shown adequate means would cause it significant difficulty or expense.[2]

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[2] To the extent FedEx relies on a pre-June 2013 jury instruction for undue hardship, *see* Def.'s Mem. 8, instructions yield to the statute. Cal. R. of Ct. 2.1050(b) & (e).

C. FedEx cannot show undue hardship, because it had at least three options short of significant difficulty or expense to relieve Ms. Martinez from Sabbath work.

1. FedEx cannot show substitute drivers would have been too expensive or difficult. It would likely have cost the multi-billion-dollar company no more than $4000.

First, FedEx has not explained why it could not have used no-cost or limited-overtime substitutes to cover Ms. Martinez's Sabbath shifts. By defining undue hardship relative to an employer's financial resources, FEHA imposes a heightened burden on large, well-financed employers. Because they use the same "significant difficulty or expense" test, disability cases are instructive. In *Nelson v. Thornburgh,* for example, the court found that in light of the employer's $300 million budget, accommodating three employees with reading impairments at an annual cost of $6,638 each did not constitute significant expense under the ADA. 567 F. Supp. 369, 380 (E.D. Pa. 1983); *see also Arneson v. Sullivan*, 946 F.2d 90, 93 (8th Cir. 1991) (ordering a public agency to provide a disabled employee a new computer system, training on the system, and a "reasonable amount" to provide him with a distraction-free environment in which to work).

FedEx could have covered Ms. Martinez's shifts at little or no cost. FedEx employs swing drivers precisely for the purpose of covering absences. *See* P.'s Ex. 3 at 69:16-71:19. Plus, many FedEx couriers work part-time and seek extra hours. *See* P.'s Ex. 6 at 38:12-17. Both options were widely available and regularly used: at the time, Concord had about 90 drivers in posts similar to Ms. Martinez's and 16 swing drivers; either could have covered her shift, and they rarely incurred overtime. *See* P.'s Exs. 3 at 26:23-25, 30:7-18; 8 at 95:25-96:4; 2 at 39:5-18. Station manager Campbell did not investigate or even consider using swing drivers to cover for Ms. Martinez. *See* P.'s Ex. 3 at 129:14-16, 141:11-142:19.

In the unlikely event swing drivers and part-timers were not at hand, FedEx could have incurred limited overtime to cover Ms. Martinez's Saturday shifts until she had the seniority to bid for another post or another no-conflict arrangement was made. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986) (observing under Title VII that the employer need not adopt one reasonable accommodation over another). Management had little trouble finding volunteers for overtime. *See* P.'s Ex. 4 at 48:5-12. And although management had station-specific overtime allotments, it exceeded them as needed. *See* P.'s Ex. 6 at 41:19-42:2; 3 at 21:18-22:9. Moreover,

FedEx has not and cannot demonstrate paying overtime could come close to a "significant expense" given its $26 billion in annual revenue. *See* P.'s Ex. 11 at 3, 43.

Even if Ms. Martinez, a part-time courier, had worked full shifts that FedEx covered entirely with overtime, the additional cost FedEx would likely have incurred to accommodate Ms. Martinez would not have exceeded $75 a week.[3] And in the event *neither* swing drivers, *nor* part-time couriers, *nor* new hires were available to cover Ms. Martinez's Saturday shifts for an entire year, it likely would have cost FedEx less than $4,000. Since Ms. Martinez would gain seniority the longer she worked, this cost would be temporary; once she gained the seniority to attain a Monday to Friday position—as she has now—any such cost would disappear.

In any event, FedEx has offered no evidence on the cost of replacement drivers, whether in the abstract or relative to its financial resources and other options. It simply claims, without any data, that replacing Ms. Martinez on Saturdays would require "additional overtime expense" or "an additional employee." Def.'s Mem. 14. No figures. No analysis. FedEx cannot carry its burden to show that the alternative of substitute drivers would have imposed an undue hardship.

Notably, FedEx's hardship argument relies exclusively on the wrong law—i.e., the de minimis test, as developed for Title VII in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). *See* Def.'s Mem.1, 8-11, 14 (relying on *Hardison* for presumed law and in its analysis). In doing so, it ignores any inquiry into the resources or options available to FedEx. *See* Def.'s Mem. 11 ("the *extent* of the undue hardship on FedEx is irrelevant in this analysis"). FedEx's confusion now is not only consistent with its actions at Concord then, it concedes any argument under the applicable "significant difficulty or expense" test. This alone devastates its defense.

2. FedEx could have allowed Ms. Martinez to return to San Rafael or otherwise transfer.

Alternatively, FedEx could have let Ms. Martinez return to her accommodated job at San Rafael or transfer to a different station or another job at Concord. It never considered it. *See* P.'s Exs. 14; 3 at 124:1-22, 141:11-142:19.

[3] Ms. Martinez's starting wage at CCR was $18.33. *See* P.'s Ex. 16. Assuming her substitute had the same hourly wage and was paid overtime to cover the supposed eight-hour shift, FedEx would have incurred $73.32 in additional cost per day ($18.33 x 0.5 x 8 hours). FedEx pays time-and-a-half overtime. *See* P.'s Ex. 3 at 132:11-17.

"Allowing lateral transfers . . . constitutes a reasonable accommodation." *Cook*, 911 F.2d at 241; *see also* EEOC Compliance Manual § 12.4(c) (2008) ("When an employee's religious belief or practice conflicts with a particular task, appropriate accommodations may include . . . transferring the employee to a different position or location . . . ."). For example, the Seventh Circuit held in *Rodriguez v. City of Chicago* that transferring a police officer to a new district as a religious accommodation was reasonable under Title VII. 156 F.3d 771, 778 (7th Cir. 1998).

Here, FedEx could have let Ms. Martinez return to her accommodated job at San Rafael or waived the two-year prohibition on inter-station transfers in her Concord offer letter. Martinez was willing to return to San Rafael if it would enable FedEx to accommodate her. *See* P.'s Ex. 1 at 99:6-23, 164:9-13. And even if there was no position available there, FedEx could have otherwise waived the prohibition against inter-station transfers and allowed Ms. Martinez to move to any of the eight other city stations within a 45-mile drive of her home. *See* P.'s Ex. 12 at 8. Though her 2013 offer letter did not mention the possibility, in May 2014 Concord management waived the prohibition on inter-station transfers as part of her unpaid of leave of absence, and FedEx's 30(b)(6) witness confirmed the viability of that option. *See* P.'s Exs. 27 & 8 at 48:2-15. FedEx has not explained why waiver was possible in May 2014, but not 2013.

3. FedEx could have made an exception to its seniority policy, as it did in San Rafael.

Finally, FedEx cannot explain why it could make an exception to its supposed seniority policy at San Rafael, but could not do so at Concord. An accommodation that requires an exception to an employer's seniority policy may not constitute an undue hardship if exceptions to the policy already exist or employees cannot rely on the policy. *See US Airways, Inc. v. Barnett*, 535 U.S. 391, 405 (2002); *see also* Cal. Code Regs. tit. 2, § 11068(d)(5) (2016) (in the FEHA disability context, an employer cannot refuse to accommodate based on its seniority system if the employer "reserves the right to modify," or allows variations to, that system).

In *Barnett*, for example, the Court noted that under the American with Disabilities Act—which, like FEHA, defines "undue hardship" as "significant difficulty or expense"—a plaintiff may demonstrate an accommodation that conflicts with a seniority policy is reasonable if certain circumstances exist. *Barnett*, 535 U.S. at 405-06. These may include situations where employees

have reduced expectations that a seniority policy will be followed because an employer retains the right to unilaterally modify the policy, or exceptions to the policy exist such that "one further exception is unlikely to matter." *Id.*

FedEx employees cannot justifiably rely on its seniority policy for several reasons. First, FedEx has reserved the right to change the policy at any time, and did so as recently as 2012. *See* P.'s Ex. 15; 8 at 23:10-24:12; 33:18-35:1. Moreover, even though FedEx typically uses seniority for internal hiring, it is not determinative if a hiring manager has concerns with a job-related disciplinary record. *See* P.'s Ex. 8 at 24:20-25:7, 41:17-42:8. Finally, FedEx has in fact carved out exceptions to its seniority policy. Its 30(b)(6) witness testified that employees displaced from their jobs due to injury may, for example, be given "preferential treatment" and awarded positions they otherwise could not acquire based on their seniority when they return to FedEx. *See* P.'s Ex. 8 at 26:5-20. FedEx has also granted multiple religious accommodations outside seniority, including for Ms. Martinez at San Rafael; indeed, neither the Religious Accommodation Worksheet nor Religious Observance policy mention seniority. *See* P.'s Exs. 8 at 70:22-72:16; 14; 30.

FedEx mistakenly relies on *Balint* to suggest its seniority policy precludes its ability to accommodate Ms. Martinez. *See* Def.'s Mem. 10-11. But not only is the seniority policy unreliable for the reasons just described, the Ninth Circuit made clear in *Balint* that "the mere existence of a seniority system does not relieve an employer of the duty to attempt reasonable accommodation" that would otherwise not impose an undue hardship. 180 F.3d at 1049.

At bottom, FedEx has not and cannot put forward sufficient evidence to demonstrate that accommodating Ms. Martinez would have produced undue hardship, seniority or otherwise.

IV. MS. MARTINEZ DID NOT WAIVE HER FEHA RIGHTS.

Ms. Martinez's right to a religious accommodation cannot be waived. The enforcement of FEHA rights is for the public benefit; indeed, an employee's right to be free from religious discrimination, as defined, persists irrespective the terms of her employment contract. *Pearson Dental Supplies, Inc. v. Superior Court*, 48 Cal.4th 665, 677 (2010); *see also Armendariz v.*

Found. Health Psychcare Servs., Inc., 24 Cal.4th 83, 100-01 (2000) (observing in gender discrimination context, "[i]t is undisputable that an employment contract that required employees to waive their rights under the FEHA . . . would be contrary to public policy and unlawful").

Despite FedEx's insinuation to the contrary, Ms. Martinez's offer letter, whatever its terms, cannot release FedEx from its duty to reasonably accommodate her Sabbath observance. Her rights certainly were not forfeited simply by signing a form offer letter virtually identical to the one under which she was previously accommodated. *See* P.'s Exs. 16; 17. FEHA's accommodation regime would make little sense absent job requirements to which it would apply.

In any event, although FedEx alludes to waiver in introducing its motion, *see* Def.'s Mem. 1, it provides no legal argument or analysis. It is a red herring.

V. FOR THE ABOVE REASONS, SUMMARY JUDGMENT IS ALSO PROPER FOR MS. MARTINEZ ON HER DISCRIMINATION CLAIM.

In her complaint, Ms. Martinez raises two claims under FEHA: failure-to-accommodate and discrimination. *See* P.'s Ex. 18. Since FEHA's non-discrimination provision forbids adverse action "because of a conflict between the person's religious belief or observance and any employment requirement" unless accommodation is infeasible, however, the accommodation analysis likewise applies—particularly for the unpaid leave and inferior job in 2014. Cal. Gov't Code § 12940(*l*)(1). As the Supreme Court noted in *EEOC v. Abercrombie & Fitch Stores*, "the rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an [employee's] religious practice, confirmed or otherwise, a factor in employment decisions." 135 S.Ct. 2028, 2033 (2015).

FedEx argues it is not liable for discrimination under FEHA because it did not treat Martinez "unfairly or differently from any other employee." Def.'s Mem. 13. But as the Supreme Court has made clear, discrimination in the religion context is not limited "to only those employer policies that treat religious practices less favourably than similar secular practices;" rather, non-discrimination under Title VII (and by analogy, FEHA) affords "favored treatment" to religion in carrying out neutral employment practices. *Abercrombie*, 135 S.Ct. at 2034.

CONCLUSION

Because Ms. Martinez has established a prima facie case, and FedEx cannot meet its burden to show it provided a reasonable accommodation or was excused from doing so based on undue hardship, this Court should grant Plaintiff's cross-motion for summary judgment and deny Defendant's motion.

Dated this 14th day of June 2016.

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