Attorneys for Plaintiff

Daphna Spivack, Student Registration No. 44202
Stephen Wu, Student Registration No. 44204
James A. Sonne, State Bar No. 250759
Zeba A. Huq, State Bar No. 261440
Stanford Law School Religious Liberty Clinic
559 Nathan Abbott Way
Stanford, CA 94305
Phone: (650) 723-1422; Fax: (650) 723-4426
Email: jsonne@law.stanford.edu

Wendy Musell, Esq., State Bar No. 203507
Stewart & Musell, LLP
2200 Powell Street, Suite 440
Emeryville, CA 94608
(415) 593-0083; Fax: (415) 520-0920
E-mail: wmusell@stewartandmusell.com

Alan J. Reinach, State Bar No. 196899
Jonathon S. Cherne, State Bar No. 281548
Church State Council
2686 Townsgate Road
Westlake Village, CA 91359
Phone: (805) 413-7398; Fax: (805) 497-7099
Email: ajreinach@churchstate.org

ORIGINAL

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

TERESA BROWN,	Case No.: 34-2015-00176321
Plaintiff,	**PLAINTIFF'S TRIAL BRIEF**
vs.	Date: March 19, 2018
	Time: 8:30 AM
CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,	Department: 47
	Civil Trial Assignment – Long Cause
	Complaint Filed: March 11, 2015
	Trial Date: March 19, 2018
Defendant.	

INTRODUCTION

This case tests our state's commitment to the protection of minority faiths. Specifically, California provides broad protection to Sabbath-observing job seekers by requiring employers to do all that they can to accommodate the practice. The Fair Employment and Housing Act (FEHA) forbids an employer from refusing an applicant because of her "observance of a Sabbath" unless the employer explored "any available reasonable means" of accommodating that observance but could not in fact accommodate it absent "undue hardship." FEHA further defines undue hardship as "significant difficulty or expense"—the same standard for accommodating disability and the most demanding religious-accommodation test in the country. And in establishing such difficulty or cost, the employer must prove that hardship of that magnitude would in fact result from hiring the particular applicant. Generalized, speculative, or hypothetical harm will not do.

But Defendant California Department of Corrections and Rehabilitation (CDCR) refused to hire Plaintiff Teresa Brown because she made known during the interview process that, as a Seventh-day Adventist, she does not work from sundown Friday to sundown Saturday. And in so doing, CDCR did not even try to accommodate Brown, much less evaluate whether it would have been too costly or difficult to do so through any possible assignment in any one of its many prisons across the state—as FEHA requires it must prove. While CDCR might try to invoke supposed hardships relating to safety, scheduling, or contract obligations, these concerns are abstract and speculative in Brown's case—as this Court previously warned in denying summary adjudication to CDCR. In fact, witnesses will testify that not only was accommodation possible, it has already been done for others. At a minimum, CDCR wrongly turned a scheduling issue into a hiring issue.

In categorically rejecting Brown, CDCR broadcast a "Do Not Apply" message to anyone whose religious convictions demand they abstain from work for some set period of time, whether they are Seventh-day Adventist, Mormon, Jewish, Muslim, or of any other faith with a similar practice. CDCR forced a binary choice no one should have to make: forfeit your opportunity to work, or abandon your conscience. The fact it is the State of California itself taking this position, effectively exempting CDCR from the obligations of FEHA, is all the more troubling—especially given the broad protection for Sabbath observers it demands of every other employer.

STATEMENT OF FACTS

A. As a practicing Seventh-day Adventist, Teresa Brown objects to working from sundown Friday to sundown Saturday for religious reasons.

Teresa Brown is a devout Seventh-day Adventist who believes that her Sabbath—which Adventists observe from sundown Friday to sundown Saturday—is a holy time during which she must abstain from work. During the Sabbath, Brown attends church services, reads the Bible, and otherwise dedicates the day to God and family.

B. Brown applies to be a correctional officer at CDCR, and indicates she could work at any time except her Sabbath and at facilities across the state.

Brown applied to CDCR to become a correctional officer in September 2013—around the same time the agency announced it was looking to increase its ranks by 7,000 such officers. In submitting her application, Brown indicated she was willing to work anywhere in the state.

The hiring process for correctional-officer positions is lengthy and intense, involving a series of successive steps. After her written application, for example, Brown made multiple trips to CDCR facilities to complete a written exam and a physical-fitness test, passing both. Notably, CDCR made an allowance for Brown to reschedule her fitness test from Saturday to another day of the week when it learned her religious beliefs precluded her from coming in on the Sabbath.

Having passed the written and physical tests, Brown was invited for a sit-down interview with Sergeant Shannon Beaber. This interview focused on confirming the accuracy of written background information Brown had provided. During their discussion, Beaber raised the subject of Brown's indication in an application form that she was not "freely willing to work split shifts, nights, weekends and holidays" due to her Sabbath obligation. At that point, Brown repeated that, as a practicing Adventist, she was unable to work sundown Friday to sundown Saturday. Brown emphasized, however, that she would work any other day or hour of the week. Beaber understood, asking only that Brown provide a supporting letter from her pastor—which she did.

C. CDCR rejects Brown because of her inability to work on her Sabbath, but fails to consider any particular job assignment, schedule, or location in doing so.

Because Beaber had never dealt with an applicant who could not work on a particular day of the week—for religious reasons or otherwise—she approached her supervisor, Lieutenant Steven Cox, to discuss Brown's situation. But Cox was also unsure how to handle the matter.

Cox later testified he was trained to give "honest thought" to religious-accommodation requests and "couldn't just out of hand deny [them]." So, Cox did "some research" by looking at "old documents," State Personnel Board items, and the labor contract. Finding nothing on the topic, Cox ended his search. He then decided to deny Brown the job because she could not work on the Sabbath. Brown received a rejection letter four months after her interview with Beaber.

In reviewing Brown's situation, Cox did not examine any possible assignment or schedule at any of CDCR's 117 facilities. Nor did Cox talk to any warden or other personnel in charge of assignments, consult with CDCR's labor-relations analysts who handle collective-labor policies, or confer with any of the agency's Equal Employment Opportunity (EEO) coordinators who handle accommodation requests—as required by best practices and CDCR's since-formalized policy on the matter. Cox also did not contact or otherwise try to work with the union.

D. CDCR is a large employer with scores of facilities and thousands of correctional officers who are assigned schedules at its sole discretion.

1. CDCR has a multi-billion-dollar budget and tens of thousands of correctional officers who perform a variety of tasks across many institutions.

CDCR is one of our state's largest employers. It employs more than 60,000 people across 117 prisons and other facilities, and has an annual budget exceeding $9 billion.

CDCR employs tens of thousands of correctional officers, including more than 6,000 in twelve institutions within 150 miles of Brown's home. When Brown applied in 2013, CDCR had announced its intention to hire 7,000 new officers.

The duties of a correctional officer vary. They may include inmate monitoring, escorting, or transport; working in the kitchen; or supervising work crews outside an institution.

2. CDCR has exclusive authority to assign officers to particular facilities and schedules in their first two years of work, and significant discretion thereafter.

Once hired, correctional officers spend several weeks at a training academy and then report to their assigned institution across the state for a two-year apprenticeship period. CDCR has full discretion in both assigning apprenticeship positions and setting work schedules in these first two years. Notably, witnesses will testify that it is possible for a correctional officer to avoid Sabbath work in both the training-academy and apprenticeship periods.

Following apprenticeship, correctional officers are subject to a bifurcated job-assignment system under the collective-bargaining agreement. That contract provides that 70% of officer assignments are determined through seniority-based bidding. The agreement further stipulates, however, that the other 30% are filled at management's discretion regardless of seniority. Jobs that can either be bid on by seniority or assigned by management are indistinguishable in duties and schedules, and are allocated proportionately at each facility and across shifts—including those with no Sabbath work, e.g., Sunday-Thursday, Monday-Friday. Witnesses will again testify that Sabbath accommodations can be made through the discretionary, management-determined posts—at least until an officer has the seniority to guarantee a non-Sabbath schedule by bid.

3. CDCR also regularly allows shift swaps or pays overtime to cover absences, and retains broad discretion over staffing in emergency situations.

Regardless of their post, the ability of correctional officers either to voluntarily swap shifts for any reason or use vacation time to cover their absences provides additional flexibility to their schedules. In fact, swapping shifts is so common that officers have developed an online system to facilitate them. Shift swaps and vacation time have been used for Sabbath accommodation.

CDCR also fills absences with volunteers, and even employs "relief officers" for the express purpose of covering absences. Because volunteering provides the opportunity to earn overtime pay, it is offered by seniority and is in high demand, making involuntary substitutions uncommon. If all else fails, CDCR has the option of filling absences by paying overtime to involuntary replacements by reverse seniority. But the labor agreement requires the fair allocation of any such involuntary-overtime shifts across officers and also discourages them immediately

after an officer's regular workweek. Consequently, an officer with a Monday-Friday schedule, for example, will typically not be assigned involuntary Saturday overtime.

Finally, CDCR responds to emergencies in a number of flexible ways. While CDCR has the option of requiring officers to report involuntarily, its scheduling PMK testified that "rarely" would the need arise. Instead, CDCR enlists volunteers, or holds over those who are already on site—something Brown was willing to do. Moreover, CDCR does not require all officers to report in emergencies—including those on vacation, military or family leave, or those who have consumed alcohol—and assesses any reason for such an absence on a case-by-case basis.

PROCEDURAL HISTORY

Brown sued CDCR on March 11, 2015, alleging both disparate-treatment and failure-to-accommodate claims under FEHA. CDCR answered, citing undue hardship as an affirmative defense. After discovery, each party sought summary judgment, or in the alternative, summary adjudication. The Court, Judge David Brown presiding, granted summary adjudication to CDCR on disparate treatment but denied each party's motion on the failure-to-accommodate claim.

In denying CDCR's motion, Judge Brown found that CDCR failed to demonstrate that undue hardship would have resulted from "temporarily restricting Plaintiff's schedule until a more permanent accommodation could be arranged." Judge Brown also rejected CDCR's safety, involuntary call-in, and labor-contract concerns as merely speculative, and noted disapprovingly that CDCR failed to show it tried to work with the union to accommodate Teresa Brown.

LEGAL ARGUMENT

I. California law is strict: an employer cannot reject a Sabbath-observing applicant unless it shows any alternative would in fact cause significant difficulty or cost.

A. FEHA broadly forbids an employer from rejecting a job applicant based on her lack of availability on the Sabbath, using a burden-shifting framework.

FEHA expressly prohibits an employer from rejecting a job applicant because of her "observance of a Sabbath," unless the employer can show that, after exploring any reasonable alternative, hiring her would have caused undue hardship—which the statute further defines as "significant difficulty or expense." (Gov. Code, §§ 12926, subd. (u), 12940, subd. (*l*)(1).)

California courts apply a burden-shifting analysis to religious-accommodation claims. To establish a prima facie case, a plaintiff must show: (1) a sincere religious belief; (2) the employer knew of the belief; and (3) the belief conflicted with any work requirement. (*Cal. Fair Empl. & Hous. Com. v. Gemini Aluminum Corp.* (2004) 122 Cal.App.4th 1004, 1011.) Once the plaintiff has established a prima facie case, the burden shifts to the employer to show "it initiated good faith efforts to accommodate or no accommodation was possible without producing undue hardship." (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 370.) In other words, only if the employer can prove 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 v. State of Cal.* (9th Cir. 1996) 95 F.3d 1461, 1467.)[1]

B. To absolve itself of liability, an employer must demonstrate "any available reasonable alternative" would have caused "significant difficulty or expense."

The statutory text of FEHA emphasizes that an employer can prevail only if it can prove that available alternatives to refusing employment based on an applicant's need to observe the Sabbath would have necessarily resulted in significant difficulty or expense. Specifically, it details as follows the employer's heightened obligation to explore accommodations absent undue hardship, declaring it an "unlawful employment practice" for an employer:

> [T]o refuse to hire or employ a person . . . because of a conflict with the person's religious belief or observance and any employment requirement, unless the employer . . . demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties that conflict with the person's religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship, as defined in subdivision (u) of Section 12926 [as 'significant difficulty or expense'] . . . .

(Gov. Code, § 12940, subd. (*l*)(1).) Furthermore, the statute makes clear, "[r]eligious belief or observance, as used in this section, includes, but is not limited to, observance of a Sabbath or other religious holy day or days." (*Id.*)

[1] Some of the cases we cite were decided under federal law (Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)), but this federal precedent applies to analogous FEHA provisions. (*See Cook v. Lindsay Olive Growers* (9th Cir. 1990) 911 F.2d 233, 241.)

In assessing an employer's obligation to explore alternatives, courts have considered, for example, whether the employer tried to locate substitutes to fill the missing time, arranged shift swaps, or consulted with the union or legal counsel. (*See, e.g., Soldinger v. Northwest Airlines, supra*, 51 Cal.App.4th at p. 373; *Cook v. Lindsay Olive Growers* (9th Cir. 1990) 911 F.2d 233, 241.) Additionally, the "mere existence" of a seniority system does not excuse an employer from exploring available accommodations that would not infringe upon seniority. (*Balint v. Carson City* (9th Cir. 1999) 180 F.3d 1047, 1049; *see also Soldinger, supra*, at p. 374.) And even when a seniority violation cannot be avoided, that alone cannot be the basis for refusing such an accommodation if there are exceptions to seniority rules in other instances. (*See U.S. Airways, Inc. v. Barnett* (2002) 535 U.S. 391, 405 [observing in analogous disability context: "The plaintiff might show that the system already contains exceptions such that, in the circumstances, one further exception is unlikely to matter"]; *see also* Cal. Code Regs. tit. 2, § 11068, subd. (d)(5) [reliance on seniority in disability is limited where employer allows variations to that rule].)

Furthermore, to excuse its refusal to adopt any particular available alternative on "undue hardship" grounds, an employer must show that the alternative would cause "significant difficulty or expense"—the same exacting test for accommodating disability. (Gov. Code, §§ 12926, subd. (u), 12940, subds. (*l*)(1) & (m).) As our legislature made clear, the standard is purposefully more stringent than the "de minimis" test of Title VII. (Ops. Cal. Legis. Counsel, No. 0005360 (Aug. 28, 2012) Discrimination in Employment: Reasonable Accommodations Law (Assem. Bill No. 1964) (2010–2012 Reg. Sess.) 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, again, for an employer to prevail, it must not merely prove significant difficulty or cost for one possible option but for each and every potential option. (*Opuku-Boateng v. State of Cal., supra*, 95 F.3d at p. 1469 [requiring employer to show that "the various potential accommodations would all have resulted in undue hardship"].)

C. In proving the difficulty or cost of accommodation as an affirmative defense, an employer cannot rely on speculation, hypotheticals, or generalized harm.

As Judge Brown made clear in denying CDCR's motion for summary adjudication, to prove that an accommodation would cause undue hardship amounting to significant difficulty or expense, the employer must show concrete damage would have in fact occurred. (*Opuku-Boateng v. State of Cal.*, *supra*, 95 F.3d at p. 1474 ["concrete" hardships must be shown]; *Burns v. Southern Pacific Transportation Co.* (9th Cir. 1978) 589 F.2d 403, 406 ["actual" hardships must result].) Indeed, to prevail an employer must demonstrate that "*no accommodation would be possible* without undue hardship." (*Opuku-Boateng*, *supra*, at p. 1467 [emphasis added].) And in evaluating actual hardship, courts look not to generalized concerns but to the hardship associated with the facts of the particular case. (*EEOC v. Abercrombie & Fitch Stores, Inc.* (N.D.Cal. 2013) 966 F.Supp.2d 949, 962 ["Both the magnitude and the fact of hardship require an examination of the facts of each specific case."].) Consequently, the defendant must show that accommodating this particular plaintiff, in this instance, would in fact cause significant difficulty or expense.

Accordingly, speculative, hypothetical, or merely possible hardships cannot establish the requisite undue hardship. (*EEOC v. Abercrombie & Fitch*, *supra*, 966 F.Supp.2d at p. 962 ["Hypothetical or merely conceivable hardships cannot support a claim of undue hardship"]; *Opuku-Boateng v. State of Cal.*, *supra*, 95 F.3d at p. 1474 ["mere possibility" of harm cannot constitute undue hardship].) Moreover, courts are "skeptical" of hypothetical hardships based on assumptions about untried options. (*Abercrombie*, *supra*, at p. 962; *see also Anderson v. General Dynamics Convair Aerospace Division* (9th Cir. 1978) 589 F.2d 397, 402 ["Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts."].)

The Ninth Circuit, for example, rejected a state employer's claim that accommodating a Seventh-day Adventist who required a Sabbath accommodation in a 24/7 facility would cause undue hardship where the evidence provided was speculative. (*Opuku-Boateng v. State of Cal.*, *supra*, 95 F.3d at p. 1471.) While the employer argued that the plaintiff would struggle to swap his Saturday shift, the court held that this was merely a "hypothetical difficulty" because the employer failed to show that other employees would in fact refuse to take plaintiff's shift in

exchange for another undesirable shift. (*Id.*) Similarly, a California federal district court rejected a retailer's reliance on speculative concerns regarding the economic effect a Muslim employee's headscarf would have on customers. (*EEOC v. Abercrombie & Fitch*, *supra*, 966 F.Supp.2d at p. 964.) Instead, the court insisted, the employer could rely only on actual causal data. (*Id.*)

Finally, even in assessing actual, concrete hardships, the analysis is not generalized but specific to both the employee and employer. (*See* Gov. Code, § 12926, subd. (u).) FEHA lists five factors to consider in determining whether an accommodation would be too difficult or costly, all of which are pegged to the particular employee or employer: (1) the nature and cost of the accommodation the employee needs; (2) the financial and human resources at the facilities involved in providing the accommodation; (3) the employer's overall size, resources, staffing, and facilities; (4) the nature of the employer's operations and workforce; and (5) the distribution of the employer's physical locations. (Gov. Code, §§ 12926, subd. (u), 12940, subd. (*l*)(1).)

CDCR therefore bears a doubly heavy burden in outright rejecting a job applicant who needs a Sabbath accommodation: the heightened requirement to show "significant difficulty or expense" applicable to all California employers, and the particular challenge of showing why, as a massive and well-resourced employer, it could never accommodate that person in any one of its scores of facilities across the state. (*See* Comment, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act* (1991) 139 U.Pa. L.Rev. 1423, 1449-50 [stressing particular difficulty for large employers in analogous disability context].)

II. CDCR loses because it cannot prove that it tried to accommodate Brown, or that doing so would have been too difficult or expensive.

1. Brown establishes a prima facie case that CDCR violated FEHA.

Brown satisfies all three elements of a prima facie case on her failure-to-accommodate claim: (1) sincere religious belief; (2) employer knowledge; and (3) conflict with a job requirement. (*Cal. Fair Empl. & Hous. Com. v. Gemini Aluminum*, *supra*, 122 Cal.App.4th at p. 1011.) First, she is a devout Seventh-day Adventist who observes the Sabbath. Second, CDCR knew in the hiring process that Brown's faith requires her to abstain from work Friday sundown

to Saturday sundown. Third, Brown's observance of the Sabbath conflicted with CDCR's general requirement that officers be available 24/7.

2. CDCR cannot defend itself by showing it explored any available reasonable alternatives but could not accommodate Brown absent undue hardship.

CDCR will not meaningfully contest that Brown establishes a prima facie case. The issue thus becomes whether CDCR in actuality "explored any available reasonable alternative means of accommodating" but could not do so absent undue hardship. (Gov. Code, § 12940, subd. (*l*)(1).)

In exploring options, CDCR must make "good faith efforts," such as looking into possible shift adjustments, reaching out to other employees or union officials, or investigating exceptions to applicable seniority rules. (*See, e.g., Soldinger v. Northwest Airlines, supra*, 51 Cal.App.4th at p. 373; *Balint v. Carson City, supra*, 180 F.3d at p. 1049; *Cook v. Lindsay Olive Growers, supra*, 911 F.2d at p. 241.) Cox's cursory exercise in "honest thought"—amounting to looking over a few "old documents" and "meeting minutes," and, of course, resulting in no accommodation—will not do.

At bottom, CDCR's only hope is to prove, given all its resources and options, that no accommodation could ever have been made for Brown without incurring actual significant difficulty or expense. (*See Opuku-Boateng v. State of Cal., supra*, 95 F.3d at p. 1467 [to prevail, an employer must prove that "no accommodation would be possible without undue hardship"].) It will fail there, too. In fact, CDCR's own employees will contradict it on the matter at trial.

Specifically, CDCR will be unable to prove that every one of at least five options would have been infeasible. First, CDCR had the discretion to give Brown positions with Sabbaths off, whether in the two-year apprenticeship period, where it retains full authority over all assignments, or thereafter, through the 30% management posts. Additionally, CDCR will not be able to show this arrangement would have caused undue hardship in Brown's case because (1) she had location flexibility; (2) CDCR had thousands of these posts across the state and was looking to hire more officers; and (3) any such assignment need only be temporary until Brown gained seniority to ensure a non-Sabbath post, either management-determined or not. Given the myriad possibilities,

witnesses will testify this is a scheduling issue and not a hiring issue, and that Sabbath observers have in fact been accommodated through the use of such management-determined assignments.

Second, CDCR will be unable to show that allowing Brown to bid on a 70% seniority-based post after her apprenticeship period would not have accommodated her needs. She may very well have landed a non-Sabbath schedule. We will never know because CDCR never tried.

Third, in the event Brown received a post that nonetheless scheduled her to work on the Sabbath, CDCR could have allowed her to use shift swaps, substitutes, holiday pay, vacation leave—or any combination thereof—until a more permanent solution could be found. Current CDCR officers have effectively used shift swapping and holiday or vacation leave as a means to avoid working on the Saturday Sabbath. The fact that these officers are willing to work on Sundays, a highly desired day off, makes shift swapping all the more feasible.

Fourth, CDCR will be unable to show that, in any event, it could not have allowed Brown an exception to Sabbath work in the case she otherwise had to work then—an option that would be necessary only until she had the seniority to ensure a non-Sabbath schedule. As Judge Brown previously found in denying CDCR's motion for summary adjudication, CDCR will fail to show "temporarily restricting plaintiff's schedule until a more permanent accommodation could be arranged" would create an undue hardship. The Ninth Circuit has held that the "mere existence of a seniority system does not relieve an employer of the duty to attempt reasonable accommodation." (*Balint v. Carson City*, *supra*, 180 F.3d at p. 1049.) Likewise, the Supreme Court has noted that plaintiffs can even show a seniority-infringing option is reasonable if there already exist exceptions to seniority such that one more "is unlikely to matter." (*U.S. Airways v. Barnett*, *supra*, 535 U.S. at p. 405-06.) CDCR already exempts from seniority-based job bidding a full 30% of the relevant officer posts; temporarily exempting one more should not matter.

Fifth, and as Judge Brown suspected, CDCR will be unable to show "it attempted to work with the union, but that the union refused to, or was unable to, provide an accommodation." Indeed, seminal cases in the field stress the importance of union collaboration in establishing that an accommodation would have been infeasible. (*E.g.*, *Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 78-79; *Soldinger v. Northwest Airlines*, *supra*, 51 Cal.App.4th at p. 373.)

Cox's failure to contact the union was a fatal abdication of his duties, and not only as a matter of process but because nearly all of CDCR's purported concerns relate to labor relations.

3. CDCR's evidence of supposed undue hardship will also fail.

As it stands, CDCR has pointed only to hypotheticals or conceivable conflicts, which are insufficient to make an undue-hardship defense. (*See EEOC v. Abercrombie & Fitch*, *supra*, 966 F.Supp.2d at p. 962 [rejecting "[h]ypothetical or merely conceivable hardships"].) Based on its approach thus far, CDCR will likely try to argue at trial that accommodating Brown might have (1) rendered CDCR unable to administer its apprenticeship program; (2) resulted in preferential treatment over other bargaining-unit employees; (3) caused safety and security issues; (4) been impossible due to mandatory-overtime rules; and (5) been temporary and ineffectual. But, just as Judge Brown found in denying summary adjudication, none of these supposed harms is concrete or specific to Teresa Brown's placement in any particular post. We will take each in order.

First, CDCR will be unable to contend that an accommodation would impede its ability to administer the apprenticeship program, because CDCR enjoys full discretion over apprenticeship posts and schedules. Plus, it has in fact accommodated another Adventist during apprenticeship by assigning him a Sunday-Friday schedule and, when necessary, allowing shift swaps and leave. Consequently, CDCR will not establish significant difficulty or expense in its apprenticeships.

Second, and as described above, CDCR will not show that accommodating Brown would have resulted in preferential treatment in violation of the labor agreement, because it cannot show it has no mechanisms for accommodating without unduly impacting others. For example, CDCR could have assigned Brown one of the many management-determined posts where seniority is not an issue and where she would not be scheduled on the Sabbath, as it has done for others. And again, CDCR also will not show it reached out to its counsel, EEO officials, wardens, the union, other workers, or any actual facilities to see how Brown might have been accommodated.

Third, CDCR will not prove undue hardship through its supposed safety and security concerns. To show pertinent hardship, CDCR must argue accommodating Brown alone would imperil security—hardly a credible claim given that not all officers are on-site at all times and, as witnesses will testify, CDCR has in fact accommodated other Adventists without safety problems.

Moreover, CDCR maintains facilities of varying security levels; without knowing where Brown would be assigned, therefore, it cannot rely on emergencies in the abstract to prove that a safety-related hardship would in fact result from her inability to be called up on the Sabbath. And no matter the facility, witnesses will testify that emergency situations are not only rare and dealt with in due course, but not all correctional officers are available to report and absences are forgiven where there are compelling reasons why the officer was unable to report to work.[2] Finally, and in any event, Brown testified she would stay on the job were an emergency to arise on her shift.

Fourth, any supposed hardship arising from Brown's inability to involuntarily report in non-emergency situations will be similarly speculative. Witnesses will testify that mandatory reporting is unlikely since officers often willingly elect to take on extra shifts because overtime pay is available. Furthermore, CDCR discourages any overtime that would result in a consecutive six-day workweek, so the likelihood of Brown being called in on a Saturday would have been remote had she been accommodated with a Monday-Friday post. Moreover, there is also no evidence that she would not be able to swap any problematic shift. Finally, and as with emergencies, officers who are called in may offer compelling reasons why they cannot work.

Lastly, CDCR will be unable to show hardship by claiming an accommodation would be temporary and ineffectual. CDCR has so far offered no evidence why this would be so. If anything, the fact that the accommodation would be temporary lessens any supposed hardship. And witnesses will testify to the viability of short-term accommodations before an officer has enough seniority to guarantee a desired schedule.

DAMAGES

Brown's past lost wages and benefits amount to approximately $52,000. Her future lost earnings and benefits amount to approximately $780,000, while lost retirement benefits amount to another $620,000. (These damages are mitigated by Brown's previously held job as a certified nurse assistant.) Brown and her husband will also testify about emotional distress she suffered.

[2] CDCR may also trot out a theory it offered at the summary-adjudication stage that, as a supposed "paramilitary organization," it is somehow entitled to a lower legal standard in arranging its affairs. But, as Judge Brown noted in rejecting the theory, CDCR has produced no evidence in support of how it might fit into such a theory in this case. We expect nothing more at trial.

CONCLUSION

CDCR will be unable to justify its refusal to hire Teresa Brown based on her professed inability to work on the Sabbath. CDCR will not show it seriously considered, much less tried, numerous options that would have given Brown the chance to make a living serving our state without betraying her faith. Nor will CDCR show that every available accommodation—like those afforded others—would have in fact been significantly difficult or expensive.

At most, Brown's need for Sabbath accommodation was a scheduling issue, not a hiring issue. Permitting CDCR to prevail would shut the door not only to her, but all religious minorities with similar beliefs. This is hardly what our legislature had in mind when it adopted express and heightened protections for Sabbath observers—in both private and public employment alike.

Dated: March 19, 2018

Respectfully Submitted,

DAPHNA SPIVACK
STEPHEN WU
Certified Student Attorneys
Stanford Law School Religious Liberty Clinic

JAMES A. SONNE
ZEBA A. HUQ
Supervising Attorneys
Stanford Law School Religious Liberty Clinic

ALAN J. REINACH
JONATHON S. CHERNE
Church State Council

WENDY MUSELL
Stewart & Musell, LLP

Attorneys for Plaintiff Teresa Brown