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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

BY FAX

TERESA BROWN, Plaintiff, vs. **CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,** Defendant.	Case No.: 34-2015-00176321 **PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION** Date: March 24, 2017 Time: 2:00 p.m. Department: 53 Judge: Hon. David I. Brown *[Reservation No. 2198317]* Complaint Filed: March 11, 2015 Trial Date: May 23, 2017

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INTRODUCTION

California welcomes job seekers who need to abstain from work on certain days for religious reasons. In fact, it is one of only a handful of states that protect a job applicant who observes "a Sabbath or other religious holy day" to the point of forbidding as unlawful discrimination the rejection of such an applicant on availability grounds unless the employer can prove as an affirmative defense that it could not have reasonably accommodated her absent "significant difficulty or expense." And in establishing "significant difficulty or expense," the employer must show such hardship would in fact occur; speculation is not enough. Moreover, the employer also must have explored all reasonable alternatives before denying the applicant.

But when Teresa Brown, a devout Seventh-day Adventist, applied to be a correctional officer for the California Department of Corrections and Rehabilitation (CDCR), CDCR rejected her only because she could not work on her Sabbath—a time Adventists reserve for their God. In its motion, CDCR nowhere shows it even tried to accommodate Brown, much less that it would have been too costly to do so. With a $9 billion budget, over a hundred facilities, and thousands of positions statewide, CDCR's concessions on efforts and expense aren't surprising.

Instead, CDCR argues accommodating Ms. Brown would have been either too difficult or unreasonable as a matter of law because of alleged safety concerns and potential violations of its collective-bargaining agreement (CBA). Every religious-accommodation case CDCR relies on, however, involved the wrong legal test: the Title VII "de minimis" one our legislature rejected in favor of "significant" difficulty in FEHA. Moreover, the FEHA test applies as much to safety-related jobs as to any others, and the only support CDCR offers to show every prison guard must be available 24/7 for safety reasons is conclusory testimony asserting such a need. CDCR also argues 24/7 availability is an essential function of a guard position disqualifying Brown, but unlike in the disability context, FEHA's Sabbath protections are triggered by a corresponding conflict with *any* job duty, essential or not. Finally, CDCR cannot use the CBA to defend its actions, as that contract gives broad discretion to management in scheduling and assigning officers—both in the so-called apprenticeship period and thereafter.

In categorically rejecting Ms. Brown, CDCR sent a "do not apply" message to anyone whose conscience demands they abstain from work at any time of the week for religious reasons, whether they are Adventist, Mormon, Jewish, Muslim, or of any other faith that might include a similar practice. Given our legislature's insistence on broad protection for Sabbath observers, the fact the state itself takes this position is particularly troubling. Indeed, CDCR seeks to achieve by its motion a categorical exemption its own legislature refuses. The motion must be denied.

STATEMENT OF UNDISPUTED FACTS

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

As a devout Seventh-day Adventist, Teresa Brown believes her Sabbath—sundown Friday to sundown Saturday—is a holy time during which she must abstain from paid work. (Ex. 2 22:4-24, 109:5-7, 122:18-19.)[1] During this time, Brown attends church and reads the Bible. (Ex. 2 22:4-8, 20-22.) For many years, Brown worked two jobs to support her family, but no matter her financial situation, she has never worked on her Sabbath. (Ex. 2 109:5-7; Ex. 7 9-10.)

B. Ms. Brown applies to be a correctional officer at CDCR, making clear in a lengthy hiring process that she would work any place and at any time except her Sabbath.

Ms. Brown applied to become a correctional officer (CO) in September 2013. (Ex. 2 65:7-10; Ex. 8.) In her application, Brown indicated she was willing to work at any of CDCR's 117 facilities, including in remote areas. (Ex. 2 113:23-114:3; Ex. 9 p. 2; Ex. 17 2:26-28.)

The hiring process for COs is lengthy and intense, often spanning a full year. (Ex. 11 p. 2.) Twice during that process, Ms. Brown provided written information about her availability to work. The first time was in an on-line questionnaire that asked about her ability to work overtime, on-call, rotating shifts, emergencies, weekends, or holidays, respectively, but did so in a "yes" or "no" format with no space for explanation. (Ex. 9.) Because Brown could work any of these times that didn't fall on her Sabbath, she checked "yes" to each related query. (Ex. 9.)

[1] All references to exhibits refer to Plaintiff's concurrently filed Compendium of Evidence.

Brown later completed a "personal history statement," which asked in a compound fashion whether she was "freely willing to work split shifts, nights, weekends and holidays" but allowed space for an explanation. (Ex. 7 24-25.) Brown checked "no," using the space provided to explain her inability to work on her Sabbath and offer a letter from her pastor. (Ex. 7 24-25.)[2]

After submitting her application, Ms. Brown traveled to CDCR facilities to take a written exam and a physical test, passing both. (Ex. 2 33:24-34:17, 54:19-55:3; Ex. 10 4:1-15; Ex. 4 107:6-9, 109:21-110:2.) Notably, CDCR allowed Brown to take the latter on a weekday because of her Sabbath. (Ex. 10 4:16-5:4.) The test-registration form had asked "Do your religious beliefs prevent you from taking an exam on Saturday?" and Brown checked "yes." (Ex. 8 p. 2.)

Ms. Brown was then invited for a sit-down interview with Sergeant Shannon Beaber. (Ex. 12; Ex. 13 2:3-8; Ex. 10 5:5-9.) During the interview, Beaber asked Brown why she answered "no" on the open-availability question of the personal history statement. (Ex. 4 122:4-8.) Brown repeated her belief about the Sabbath but also made clear she would work any other day or hour. (Ex. 12; Ex. 13 27:4-28:22; Ex. 4 127:19-25.) Beaber understood, asking that Brown provide a supporting letter from her pastor, which she did. (Ex. 4 122:18-20, 123:6-15, 137:1-18.)

C. CDCR rejects Brown for her inability to work on her Sabbath without considering any particular job assignment, schedule, or location.

Because she had never dealt with an applicant who could not work on a particular day of the week—for religious or other reasons—Sgt. Beaber approached her supervisor, Lieutenant Steven Cox. (Ex. 3 90:16-19, 91:16-19; Ex. 4 140:4-21, 142:20-143:21.) But Cox was also unsure what to do. He later testified he was trained to give "honest thought" to religious-accommodation requests and "couldn't just out of hand deny [them]." (Ex. 3 30:6-11, 32:5-9.) So Cox did "some research" by looking at "old documents," State Personnel Board items, and the CBA. (Ex. 3 100:5-12, 103:4-22.) Finding nothing, he ended his search. (Ex. 3 102:23-103:12.)

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[2] CDCR suggests Ms. Brown's respective answers on these two forms resulted in a "misrepresentation." (Def.'s Mem. 5:4-19.) But not only did each form's questions and explanatory options differ, the CDCR official receiving Brown's application testified her explanation on the second form provided "sufficient clarity." (Ex. 4 123:11-15.)

While Lt. Cox acknowledged in his deposition that it might eventually be possible to find a job for Ms. Brown that accommodated her religious practice, he questioned her ability to get a non-Sabbath position in the first two years of service—during which new hires are rotated—and through the seniority-based bidding system thereafter. (See Ex. 3 101:20-102:6, 110:7-19.) Cox also supposed Brown's inability to work Friday night and Saturday might present obstacles in the case of emergencies or the need to fill in for others. (Ex. 3 100:16-101:1, 101:6-19.)

But in making his decision, Lt. Cox did not examine any particular post or schedule at any of CDCR's 117 facilities, nor did he talk to any warden or anyone else in charge of assigning posts or schedules. (Ex. 3 103:4-12, 104:2-6, 105:5-10, 106:22-107:4, 148:25-149:1-7; Ex. 17 2:26-28.) Cox also failed to confer with any of CDCR's "EEO coordinators" or "labor relations analysts," who are charged with handling accommodation requests and collective-labor policies. (Ex. 3 146:24-147:16; Ex. 21 Ch. 3, Art. 1, § 31010.4; Ex. 14; Ex. 5 25:7-27:9.) Finally, he did not consider posts filled by management discretion (rather than seniority), which constitute every job in an officer's initial years of service and 30% of those thereafter—almost all of which have duties that are interchangeable with seniority-based posts. (Ex. 3 38:21-39:19, 50:15-17, 106:22-107:4; Ex. 5 60:25-61:4, 64:1-12; Ex. 6 66:1-18, 73:5-18, 76:24-77:2; Ex. 20, § 12.07, p. 97.) Although Cox demurred that "just because management controls 30 percent, [it] doesn't mean they're always available," he agreed these posts could be used to accommodate an employee's scheduling needs. (Ex. 3 102:7-10, 60:18-25.) And as exemplified by the attached declaration from an Adventist CO, they have been used to accommodate Sabbath observance. (Ex. 25.)

Four months after her interview, Sgt. Beaber and Lt. Cox sent Ms. Brown a letter telling her it would not hire her because, in their view, she was not "[w]illing[ ] to work day, evening, or night shifts, weekends and holidays and to report for duty at any time an emergency arises." (Ex. 15 p. 1; Ex. 4 145:12-16, 147:4-10.) Beaber and Cox testified that their conclusion about Brown not being "freely willing" to work at these times was due to her inability to work sundown Friday to sundown Saturday, i.e., on her Sabbath. (Ex. 4 149:14-150:4; Ex. 3 99:5-20.) And although Cox denied Brown's religious status came into play, CDCR's PMK on accommodation

policies testified she doubted Sabbath observers could ever be hired as correctional officers. (Ex. 3 99:5-20, 111:16-112:12; Ex. 5 110:23-111:19 [doubting "that that possibility . . . exists"].)

D. CDCR is a large and nimble 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 a growing officer staff of thousands.

CDCR is one of California's largest employers, employing tens of thousands of people in its 117 state prisons and other facilities. (Ex. 17 2:26-28, 3:4-19; Ex. 18.) The system's annual budget during the period relevant to this case was $9 billion. (Ex. 18.)

As for Correctional Officers, they are entry-level peace officers charged with supervising, disciplining, and/or caring for inmates. (Ex. 19.) A CO's duties may include monitoring inmates in a housing unit, escorting inmates throughout an institution, transporting inmates to court or medical appointments, working in the kitchen, or supervising work-crew operations outside the institution. (Ex. 3 37:21-38:12.) CDCR has tens of thousands of COs; as of August 2014, the twelve institutions within 150 miles of Ms. Brown's home had more than 6,000. (Ex. 17 2:26-28, 3:6-19.) When Brown applied, CDCR sought to hire 7,000 new COs. (Ex. 10 3:23-27.)

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

Once hired, COs spend several weeks at a system-wide training academy, and then report to institutions across the state for a two-year apprenticeship period. (Ex. 11 p. 2; Ex. 3 38:21-39:19, 50:15-17; Ex. 5 64:1-12.) CDCR has full discretion in making apprenticeship assignments and setting work schedules in these first two years. (Ex. 3 38:21-39:19; 50:15-17; Ex. 5 64:1-12.)

Following their apprenticeship, COs come under the CBA; that contract requires bidding for most schedules by seniority ("post and bid"). (Ex. 5 58:23-59:10, 60:6-8.) But the agreement also exempts 30% of positions from such bidding; these are filled at management's discretion without seniority as a constraint. (Ex. 5 60:25-61:4; Ex. 20, § 12.07, p. 97.) As CDCR observes in its memorandum, these positions are "reserved for management to administer the Apprenticeship Program and choose who they want to work the post." (Def.'s Mem. 6: 21-22.)

The 30% management posts are "scattered all over" any given institution, and with varied schedules—including those with no Sabbath work (e.g., Sunday-Thursday, Monday-Friday). (Ex. 5 60:25-61:4, 69:14-22; 75:25-76:2; Ex. 6 73:12-18; Ex. 6 71:12-72:2; Ex. 25.) And while a few are reserved for discrete tasks, the bulk of these jobs are flexibly assigned and involve tasks interchangeable with those of the 70% determined by seniority. (Ex. 6 73:12-18, 64:13-25, 66:1-18, 67:5-68:9, 75:1-76:3.) CDCR therefore designates identical posts as seniority or management. (Ex. 6 75:17-76:3.) For example, nearly 30% of all "first watch" (10 p.m. to 6 a.m.), Monday-Friday posts are filled at management discretion. (Ex. 6 71:1-72:2.)

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

The ability of all COs to swap shifts, whether in a 30% management post or not, provides additional schedule flexibility. COs can ask to swap shifts with each other for any reason, and these requests are typically approved. (Ex. 3 61:12-19, 62:16-64:14; Ex. 21 Ch. 3, Art. 20, § 33010.17, p. 216) There are some restrictions on shift swaps in a CO's initial period of service, as they are normally unavailable in the first 90 days of employment and are allowed only once a week the rest of the first year. (Ex. 6 93:17-19, 90:16-91:10.) But these limits may not matter for those who need flexibility only once a week, as management has discretion over apprenticeships and, of course, the first-year once-a-week cap would be no issue at all. (Ex. 6 90:16-91:10.) Shift swaps have been used in the past to accommodate an employee's Sabbath observance. (Ex. 25.)

In addition to shift swaps, CDCR retains "relief officers" to cover absences in certain circumstances. (Ex. 6 35:1-4.) CDCR also fills gaps with volunteers. (Ex. 5 79:3-86:24; Ex. 21 Ch. 8, Art. 37, § 85030.18.) Because volunteering provides the opportunity for overtime pay, it is offered by seniority and is in demand. (Ex. 6 47:6-17; Ex. 5 84:22-85:1; Ex. 4 89:23-90:8.) If all else fails, CDCR can fill absences by paying overtime to involuntary substitutes. (See Ex. 20, § 12.06.) And although those conscripted are called by reverse seniority, CDCR aims to allocate such undesired shifts fairly across all COs and discourages assignments to a CO immediately after her regular workweek. (Ex. 20, § 12.06; Ex. 5 81:23-82:22, 83:18-84:9.)

Finally, CDCR responds to emergencies in a number of flexible ways. While CDCR has the option of requiring COs to report involuntarily, its scheduling PMK testified that "rarely" would such a need ever arise. (Ex. 6 80:2-9, 82:17-20.) Instead, CDCR enlists volunteers or holds over COs already working; Ms. Brown testified she would be willing to be held over on a Friday shift in an emergency. (Ex. 6 77:22-78:2, 79:21-80:1; Ex. 2 27:13-15, 118:22-119:5.) CDCR does not require COs on military or FMLA leave to report in emergencies, and retains discretion not to discipline those who are absent for other reasons—even if the employee is AWOL. (Ex. 6 85:7-86:14, 103:10-104:3; see also Ex. 21 Art. 22, § 33030.16, p. 242.)

ARGUMENT

I. SUMMARY JUDGMENT STANDARD

A moving party is entitled to summary judgment only if it can show no triable issues of material fact and entitlement to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) In deciding the motion, the court must consider all evidence and "view such evidence and such inferences in the light most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) The summary-judgment burden tracks that of trial; if the case turns on an affirmative defense and that defense is unsupported, therefore, summary judgment for the defendant is improper and subject to reversal. (*Id*. at 851.) And any doubts "must be resolved in favor of the opposing party." (*Colores v. Board of Trustees* (2003) 105 Cal.App.4th 1293, 1305.)

II. CDCR CANNOT DEFEAT MS. BROWN'S PRIMA FACIE CASES UNDER FEHA FOR RELIGIOUS DISCRIMINATION OR NON-ACCOMMODATION.

A. CDCR concedes Brown has a prima facie case for discrimination. Any argument it makes to the contrary is based on the wrong legal standard.

FEHA condemns as unlawful disparate treatment an employer's failure to hire someone "because of a conflict between the person's religious belief or observance and any employment requirement," unless an accommodation is infeasible. (Gov. Code, § 12940, subd. (*l*)(1).) Indeed, as the U.S. Supreme Court made clear recently in *EEOC v. Abercrombie & Fitch*, "the rule for disparate-treatment claims based on a failure to accommodate a religious practice is

straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions." (*EEOC v. Abercrombie & Fitch Stores, Inc.* (2015) ___ U.S. ___, 135 S.Ct. 2028, 2033.) Refusing to hire a Sabbatarian based on her attendant unavailability, therefore, is religious discrimination. (*Id*. at 2032, fn. 1; Gov. Code, § 12940, subd. (*l*)(1).) No anti-religious animus is required.

To make out a claim for religious discrimination in hiring, an applicant need only show: (1) she held a bona fide religious belief, the practice of which conflicted with a job requirement; (2) that practice was a "motivating factor" in the employer's decision; and (3) the employer refused to hire the applicant because of her inability to fulfill the job requirement. (*EEOC v. Abercrombie & Fitch Stores, Inc., supra*, 135 S.Ct. at pp. 2032-2033; see also Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2016) ¶ 7:620.) And CDCR presents no facts to dispute Ms. Brown's prima facie case of discrimination under this standard, as it concedes that (1) Brown's inability to work her Sabbath because of a sincere religious belief was (2) the *sole* factor (3) in her rejection for the CO position. (Ex. 15 p. 1; Ex. 4 149:14-150:4; Ex. 3 99:5-20.) Because Brown makes out a prima facie case, the burden shifts to CDCR to prove it could not reasonably accommodate her absent undue hardship. (*Opuku-Boateng v. State of Cal.* (9th Cir. 1996) 95 F.3d 1461, 1467.)

Despite the "straightforward" instruction of the Supreme Court in *Abercrombie*, however, CDCR tries to dodge liability for discrimination by erroneously adding two more elements to the prima facie case. CDCR first claims Ms. Brown must also show she could perform a CO's "essential functions"—a term it then defines in circular (and convenient) fashion to include 24/7 availability. (Def.'s Mem. 10:6-7, 8:23-24.) In a similar vein, CDCR then argues Brown must also show she was "qualified" for the CO position, again using 24/7 availability as the operative factor. (Def.'s Mem. 7:8-9). CDCR is wrong on both counts.

First, the "essential functions" analysis applies to disability, not religious, discrimination. Specifically, FEHA's disability provision disclaims liability where an employee cannot perform the "essential duties even with reasonable accommodations;" while FEHA's religious provision

applies to a conflict with "any employment requirement." (Gov. Code, § 12940, subds. (a)(1) & (*l*)(1).) The CACI instructions concur. (Compare Judicial Council of California Civil Jury Instruction 2543 [on "essential duties" defense in disability] with 2560 [allowing religious-discrimination claim on conflict with "a job requirement"].) Indeed, the distinction in the two schemes makes particular sense in the Sabbath context, where the accommodation FEHA contemplates during that time is relief from all duties. (Gov. Code, § 12940(*l*)(1) [protecting "observance of a Sabbath" and suggesting as a reasonable accommodation in the case of a (Sabbath) conflict with job duties "the possibilit[y] of excusing the person from those duties . . . or permitting those duties to be performed at another time or by another person"].)[3]

Second and similarly, the prima facie case for religious discrimination based on failure to accommodate does not include a "qualified" element. (See, e.g., *EEOC v. Abercrombie & Fitch Stores, Inc. supra*, 135 S.Ct. at p. 2032 [outlining elements of discriminatory failure to accommodate, which do not include "qualified"]; Chin et al., *supra*, Cal. Practice Guide: Employment Litigation ¶ 7:620 [same]; Judicial Council of California Civil Jury Instruction 2560 [same].) And CDCR's argument shows why. As CDCR would have it, the very job requirement for which it says Ms. Brown is not "qualified" is the one for which she seeks accommodation—i.e., its supposed need for 24/7 availability. (See Def.'s Mem. 7:26-8:2.) But FEHA condemns such circular logic by requiring the applicant to show in her prima facie case only "a conflict" with "*any* employment requirement," leaving the matter of non-negotiable requirements to the employer to show in its affirmative defense of hardship. (Gov. Code, § 12940, subd. (*l*)(1) [italics added].) This is not an animus case where the three-part pretext test drawn from the Supreme Court's *McDonnell Douglas* decision is needed to establish liability based on indirect evidence of discrimination. (See *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802 [outlining test].) Rather, the prima-facie trigger for a discriminatory failure to

[3] Even if essential functions were relevant, there would at least be a fact dispute whether 24/7 availability is one at all here; CDCR's own document entitled "essential functions" does not list it. (Ex. 23.)

accommodate is insistence on the job qualification itself, i.e., the "motivating factor." (*Abercrombie*, at p. 2032.)

B. CDCR also concedes Brown has a prima facie case for non-accommodation.

In addition to forbidding as an act of illegal discrimination an employee's failure to hire based on the need for religious accommodation, FEHA also independently requires employers to reasonably accommodate a future employee's religious belief and practice. (Gov. Code, § 12940, subd. (*l*)(1).) To establish a prima facie case for failure to accommodate, a plaintiff must show: (1) a sincere religious belief; (2) the employer knew of the belief; and (3) the belief conflicted with a work requirement. (*Cal. Fair Empl. & Hous. Com. v. Gemini Aluminum Corp.* (2004) 122 Cal.App.4th 1004, 1011.) And, similar to the discrimination claim, once the plaintiff makes out a prima facie case, the burden shifts to the employer to show it could not reasonably accommodate absent undue hardship. (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 370.)

CDCR does not dispute Ms. Brown's prima facie case for failure to accommodate. (See Def.'s Mem. 12:16.) First, Ms. Brown is a devout Adventist who has consistently observed the Sabbath. (Ex. 2 22:4-24, 109:5-7.) Second, CDCR was aware in the hiring process that Brown's faith requires her to abstain from work Friday sundown to Saturday sundown. (Ex. 7 p. 25; Ex. 4 122:15-20.) Third, CDCR rejected Ms. Brown solely because of her unavailability to work on her Sabbath. (Ex. 15 p. 1; Ex. 4 149:14-150:4; Ex. 3 99:5-20.)

As with the discrimination claim, therefore, the burden again shifts to CDCR to prove it could not reasonably accommodate Ms. Brown absent undue hardship. It loses there, too.

III. CDCR FAILS TO ESTABLISH AN AFFIRMATIVE DEFENSE THAT IT COULD NOT REASONABLY ACCOMMODATE BROWN ABSENT UNDUE HARDSHIP.

A. CDCR cannot rely on the CBA to establish it had no duty to reasonably accommodate Brown, as it is at least disputed whether an accommodation would in fact conflict with the CBA.

Before rejecting or refusing to accommodate a future employee because of a conflict with her religious practice and a job requirement, FEHA insists that employers show they "explored

any available reasonable alternative means" of resolving the conflict. (Gov. Code, § 12940, subd. (*l*)(1).) Courts have considered, for example, whether the employer tried to find substitutes, arrange shift swaps, or consult 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.) Even where a collective-bargaining agreement is implicated, an employer must still explore other options consistent with that contract. (See *Balint v. Carson City* (9th Cir. 1999) 180 F.3d 1047, 1053 [stressing that a collective-bargaining agreement is not the end of the matter].) Moreover, employers cannot count on the seniority provisions of such agreements to deny accommodation where those provisions already include exceptions. (See *U.S. Airways, Inc. v. Barnett* (2002) 535 U.S. 391, 405; see also Cal. Code Regs., tit. 2, § 11068, subd. (d)(5) [reliance on seniority in disability context is limited where it allows variations to that rule].)

CDCR asserts the duty to reasonably accommodate does not require them to "take steps inconsistent with an otherwise valid" CBA. (Def.'s Mem. 12:7-9.) But CDCR had at least three options for hiring and accommodating Ms. Brown in a manner consistent with the CBA and without undue hardship: (1) assign her to a management-determined post without Sabbath work; (2) allow her to bid on a non-management post subject to seniority and use shift swaps, substitutes, or time off in the event of a conflict; or (3) assign her a non-management post without Sabbath work as a limited exception to seniority. CDCR fails to produce sufficient evidence that all of these options would cause significant difficulty or expense—as required under FEHA. (See *Opuku-Boateng v. State of Cal.*, *supra*, 95 F.3d at p. 1469.)

First, CDCR could have assigned Ms. Brown to one of the 30% management posts with a non-Sabbath schedule. (Ex. 6 71:21-72:2.) That CDCR did not even consider the 30% option is a headscratcher given management's total discretion over these posts, including in apprenticeship. (Ex. 5 60:25-61:4, 64:1-12; Ex. 3 38:21-39:19.) Nor would it be "significantly difficult" where (1) Brown had location flexibility; (2) there were thousands of such posts; (3) their use would be temporary until Brown gained the requisite seniority; and (4) CDCR was looking to hire 7,000 COs at the time (i.e., those with less or similar seniority to Brown). (Ex. 6 24:23-24; Ex. 17 2:26-

28, Ex. 10 3:23-27; see Gov. Code, § 12926, subd. (u) [considering employee numbers, geography, and the nature of the accommodation for undue hardship].) Indeed, CDCR has used a 30% management post as a Sabbath accommodation in the past. (Ex. 25.)

And to CDCR's implied point about the burden on others, because the 30% management posts are not awarded by seniority and are otherwise assigned in a manner permitted by the CBA, it would not violate the rights of any co-workers. The 30% option is quite distinct from the cases on which CDCR relies, where an employer would have to "violate," "alter," or "amend" their labor agreement to accommodate. (Def.'s Mem. 13:16-23, 17:13-22; *Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 95; *Blair v. Graham Corr. Ctr.* (C.D. Ill. 1992) 782 F.Supp. 411, 413-414; see also *Weber v. Roadway Express, Inc.* (5th Cir. 2000) 199 F.3d 270, 273-275.)

Second, CDCR offers no explanation why it could not have simply allowed Ms. Brown to bid on a 70% non-management post. Who knows, she might have secured a Monday-Friday or Sunday-Thursday schedule. And even if not, CDCR fails to show stop-gap options like holiday credit or leave (Ex. 6 18:11-23, 19:15-18; Ex. 25), voluntary swaps (Ex. 3 62:16-64:14), or CDCR-facilitated substitutes (Ex. 5 81:23-82:22), or a combination thereof, would have caused undue hardship—especially since these would be needed only until Brown had seniority for an open non-Sabbath post that could pop up any time, and CDCR has allowed a similar patchwork of solutions in the past. (See Ex. 5 58:14-60:2; Ex. 25.) And although CDCR argues Brown would not be able to use shift swaps in her first three months and only once per week thereafter (Def.'s Mem. 18:4-9), CDCR has total discretion in the apprenticeship period (including the first three months), so it could have given her a non-Sabbath schedule; and thereafter swaps are typically approved. (Ex. 3 61:12-19, 62:16-64:14; Ex. 21, Ch. 3, Art. 20, § 33010.17, p. 216.)

Third, CDCR fails to rebut the option of placing Ms. Brown in a 70% non-management post but making a one-time exception to seniority were a conflict to arise. CDCR claims this would contravene the union seniority system, constitute "preferential treatment of employees," and burden other employees with "undesirable shift[s]." (Def.'s Mem. 17:13-14, 23-24, 12:10-11, 16:14-15, 21-22.) But the Ninth Circuit has held the "mere existence of a seniority system

does not relieve an employer of the duty to attempt reasonable accommodation" that would not otherwise cause undue hardship. (*Balint v. Carson City*, *supra*, 180 F.3d at p. 1049.) Moreover, the Supreme Court has observed that plaintiffs can show a seniority-infringing accommodation is reasonable if there are exceptions to the policy such that one more "is unlikely to matter." (*U.S. Airways v. Barnett*, *supra*, 535 U.S. at pp. 405-406 [analyzing federal disability law which, like FEHA, defines undue hardship as "significant difficulty or expense"]; see also Cal. Code Regs., tit. 2, § 11068, subd. (d)(5) [FEHA disability rules mirror *Barnett*'s exception analysis].)[4]

In a last-ditch effort, CDCR hints that accommodating Ms. Brown was also unreasonable because it would have violated State Personnel Board (SPB) rules—specifically, a supposed SPB "regulation" making 24/7 availability an "essential function" of the CO position. (Def.'s Mem. 2:19-23, 12:1-6.) But the SPB document on which CDCR relies doesn't even list 24/7 availability under "Minimum Qualifications," including it instead under "Special Personal Characteristics"—alongside other qualities like "courage." (Ex. 24 p. 2.) Regardless of this fact dispute, an SPB rule would yield to FEHA anyway, which provides "[any] state law that purports to require or permit any action that would be an unlawful practice under [FEHA] shall to that extent be invalid." (Gov. Code, § 12955.6.) CDCR's purported "regulations" must be read in harmony with FEHA. (See *Broadmoor San Clemente Homeowners Assn. v. Nelson* (1994) 25 Cal. App. 4th 1, 5-6 [FEHA trumps contrary application of a regulatory statute].)

In sum, CDCR cannot rely on the CBA (or SPB regulations) to establish its affirmative defense that no reasonable accommodation was available in defeating Ms. Brown's claims.

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[4] CDCR also argues it could not accommodate Ms. Brown because, even with a non-Sabbath post, she may need to work involuntary overtime on her Sabbath. (Def.'s Mem. 16:4-6.) But such involuntary service is highly speculative had she been given a Monday-Friday post because CDCR discourages overtime after the last day of an employee's workweek. (See Ex. 20, § 12.06, p. 97; Ex. 5 83:18-84:9.) Moreover, CDCR also insists on allocating a fair share of involuntary overtime, so Brown's willingness to work any other time—including nights, Sundays, and holidays—would make any related imposition on others a non-starter. (Ex. 5 81:23-82:22; Ex. 20, § 12.06, p. 97; Ex. 4 127:19-25; see also *Opuku-Boateng v. State of Cal.*, *supra*, 95 F.3d at p. 1470 [no "cognizable burden" on others in Sabbath-accommodation case where they would be "assigned one undesirable shift instead of another" in 24/7 operation].)

B. CDCR cannot establish accommodating Brown would cause it an undue hardship, as no attendant safety evidence rises to that level.

1. The FEHA hardship test is strict: an employer must show accommodating the applicant would in fact cause "significant difficulty or expense."

Once again, FEHA allows an employer to escape liability for refusing to hire an applicant because of her need for religious accommodation, or for not providing such an accommodation, only if it can establish the affirmative defense that no reasonable accommodation was available absent "undue hardship." (Gov. Code, § 12940, subd. (*l*)(1).) And it cannot be stressed enough that the FEHA standard for hardship in the religion context is "significant difficulty or expense," which is the same test for disability and among the strictest in the country. (Gov. Code, §§ 12926, subd. (u), 12940, subds. (*l*)(1) & (m).)[5] It is most definitely not 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)].") Finally, for an employer to prevail it must prove significant difficulty or cost for every potential option. (*Opuku-Boateng v. State of Cal.*, *supra*, 95 F.3d at p. 1469 [requiring employer to show "the various potential accommodations would *all* have resulted in undue hardship"].) (Italics added.)

Shockingly, CDCR argues the undue-hardship test does not require an employer to "bear more than a de minimis cost in order to accommodate a religious belief of [sic] observance"—the lower Title VII standard our legislature explicitly rejected. (Def.'s Mem. 12:7-10.) And in its treatment of the matter, CDCR relies almost exclusively on Title VII cases. Granted, it is true that California courts look to federal decisions interpreting Title VII for assistance in interpreting FEHA to the extent there is overlap. (*Reno v. Baird* (1998) 18 Cal.4th

[5] We know of only three jurisdictions with a standard like California's "significant difficulty or expense" test for absolving employers from the duty to accommodate religion: New Jersey (N.J. Stat. Ann. § 10:5-12(q) (West 2014)), Oregon (Or. Rev. Stat. § 659A.033(4) (2011)), and New York City (N.Y. Exec. L. § 296(10)(d) (2016)).

640, 647-648.) But because these two undue-hardship standards are different—and intentionally so—any determination under the de-minimis standard of Title VII is irrelevant under FEHA.

As for proof, in demonstrating whether an accommodation poses undue hardship, speculative harm is not enough. (*EEOC v. Abercrombie & Fitch Stores, Inc.* (N.D. Cal. 2013) 966 F.Supp.2d 949, 962.) Rather, the employer must show concrete damage that would have in fact occurred. (*Opuku-Boateng v. State of Cal.*, *supra*, 95 F.3d at p. 1474; *Burns v. Southern Pacific Transp. Co.* (9th Cir. 1978) 589 F.2d 403, 406 [hardships must "actually" result].) Hypothetical harms based on assumptions about untried options will not do. (*Abercrombie*, at p. 962; *Anderson v. General Dynamics Convair Aerospace Div.* (9th Cir. 1978) 589 F.2d 397, 402.) The employer's burden to show concrete, non-hypothetical harm is therefore particularly weighty in the pre-hire context where no accommodation option has yet been tried. It would seem almost insurmountable for an employer to win summary judgment, i.e., as a matter of law.

Turning finally to the degree of harm required, hardships are not assessed in the abstract but are pegged to the particular employer's size and resources. (See Gov. Code, § 12926, subd. (u).) FEHA lists five factors to consider: (1) the nature and cost of the accommodation; (2) the financial resources and number of employees of the facilities involved; (3) the overall size and resources of the employer, including the number of employees and facilities; (4) the nature of the employer's work; and (5) the distribution of the employer's physical locations. (Gov. Code, §§ 12926, subd. (u), 12940, subd. (*l*)(1).) Not only do all employers bear the heightened burden to show significant difficulty or expense, therefore, but large, high-budget, resourceful employers face an even steeper climb. In such cases, accommodations costing even thousands of dollars may be required. (See, e.g., *Nelson v. Thornburgh* (E.D. Pa. 1983) 567 F.Supp. 369, 375-376, 380, affd. *sub nom*. *Appeal of Thornburgh* (3d Cir. 1984) 732 F.2d 147 [holding that a disability accommodation costing $6,638 annually was not a significant expense to a public employer with a $300 million budget].)

2. CDCR's emergency needs and supposed paramilitary status do not exempt it from FEHA's requirement to reasonably accommodate Brown.

CDCR cites safety concerns as justification for shirking its duty to accommodate. (Def.'s Mem. 12:19-13:3.) It even suggests it is a paramilitary-like organization, and as such, should be held to a different standard. (Def.'s Mem. 14:2-8.) Regardless of the surface or abstract appeal of these arguments, the record does not support their use for entering summary judgment in favor of CDCR in its outright refusal to hire or accommodate Ms. Brown.

CDCR contends the "evidence shows" accommodating Ms. Brown would result in "dire" consequences because no 24/7 availability would "significantly diminish[ ] [the] pool of officers available for deployment in emergency situations, such as riots or other situations requiring mass mobilization." (Def.'s Mem. 9:11-15.) But not only does the implausibility of Brown's isolated, temporary need for a Sabbath accommodation causing a "significantly diminished pool" speak for itself, the only evidence CDCR cites for its safety concerns are (1) written job descriptions; (2) testimony from Lt. Cox reciting this same global claim about eliminating a 24/7 requirement and that maximizing available COs is required by "institutional and public safety"; and (3) a declaration from Captain O'Brien that "public safety requires that employees are available at all times." (Def.'s Mem. 9:11-20 [citing Exs. B, C, 2, 4].) No specifics, no data, no studies.

Courts refuse to find a genuine issue of material fact where the only evidence presented is uncorroborated and self-serving testimony. (*Villiarimo v. Aloha Island Air, Inc.* (9th Cir. 2002) 281 F.3d 1054, 1061.) Not only that, but on summary judgment a moving party's declarations are subject to particularly strict scrutiny. (See *Colores v. Board of Trustees*, *supra*, 105 Cal.App.4th at p. 1305.) CDCR's non-specific, conclusory, and self-serving invocations wilt in this light. (See *EEOC v. Abercrombie & Fitch Stores, Inc., supra,* 966 F.Supp.2d 949 at pp. 963-964 [rejecting "unsubstantiated opinion testimony" from an employer's own workers to support undue-hardship defense in religious-accommodation case].)

Moreover, there is contrary evidence that accommodating Ms. Brown would not have negatively impacted safety. For example, CDCR's scheduling PMK testified that mandatory call-ins during emergencies "rarely" happen, making their chance of occurring on a day of the week

in conflict with Brown's Sabbath all the more remote. (Ex. 6 80:2-9, 82:17-20.) Again, the "mere possibility" of hardship cannot justify refusing to hire a Sabbath observer. (See *Opuku-Boateng v. State of Cal.*, *supra*, 95 F.3d at p. 1474.) And were the rare emergency to arise while she was at work—e.g., on a Friday—Brown was willing to stay to do the job. (Ex. 2 27:10-15, 118:18-119:5.) Finally, even in the event an emergency otherwise arose when Brown was absent, CDCR could have then decided whether or not to fire her—unlikely given CDCR's discretion over leave and progressive discipline—rather than outright refusing to hire her. (Ex. 6 85:7-86:14, 103:10-104:3; see also Ex. 21, Art. 22, § 33030.16, p. 242; and *EEOC v. Abercrombie & Fitch Stores, Inc., supra,* 966 F.Supp.2d at p. 962-964 [requiring concrete evidence of actual hardship].)

Perhaps seeing the writing on the wall, CDCR suggests that, no matter the facts on the ground, its prisons are "analogous to a paramilitary organization" and should be treated with an unstated level of deference. (See Def.'s Mem. 13:24-14:8.) The only support CDCR offers for this position, however, is an exposition of legal cases without any facts about how refusing to hire or accommodate Ms. Brown fits with that authority. This absence of factual support is particularly important because neither FEHA nor Title VII contain or suggest any exemption for "paramilitary" employers from the duty to reasonably accommodate absent undue hardship. (See *Balint v. Carson City, supra,* 180 F.3d at 1049, 1051 [subjecting to hardship analysis sheriff department's refusal to hire deputy for its jails based on Sabbath conflict].)

Furthermore, in its paramilitary argument CDCR relies heavily on what it describes as "the sole correctional case" of religious observance of which it is aware, *Blair v. Graham Correctional Center, supra,* 782 F.Supp. 411. (Def.'s Mem. 13:16-14:8.) In *Blair*, however, the court found for the department of corrections under Title VII only after examining its attempts to accommodate the employee—e.g., hiring him, allowing him to use "personal days, sick days and compensatory holidays in order to observe his [S]abbath," and "contacting the union and attempting to have him placed in another job or agency." (*Blair*, at p. 413.) In contrast, CDCR made no attempt to accommodate Brown, and, in any event, FEHA's hardship standard is "significant difficulty or expense" and not Title VII's "de minimis" test.

None of this is meant to diminish the importance of prison safety; rather it shows CDCR should balance that need with the civil rights of those seeking to join its ranks. If the safety of our prisons depends on the availability of every single one of its tens of thousands of correctional officers at every hour of every day, CDCR has much bigger problems than this lawsuit.

IV. CDCR FAILS TO SHOW IT SATISFIED FEHA'S REQUIREMENT TO HAVE EXPLORED ALL REASONABLE OPTIONS BEFORE REJECTING BROWN. IT MERELY BRAINSTORMED AND PERUSED SOME "OLD DOCUMENTS."

FEHA requires employers to try to accommodate a Sabbath observer before denying them a job. Specifically, it forbids an employer from refusing to hire someone because of a conflict with her Sabbath unless the employer can "demonstrate[ ] that it has explored any available reasonable alternative means of accommodating" but is unable to do so absent undue hardship. (Gov. Code, § 12940, subd. (*l*)(1).) To satisfy its obligation, therefore, an employer must show "good faith efforts"—by exploring, for example, shift adjustments, reaching out to other workers and/or union officials, or investigating exceptions to seniority rules. (*Soldinger v. Northwest Airlines*, *supra*, 51 Cal.App.4th at p. 370, 373 [refusing summary judgment to employer based on its failure to explore options like these]; see also *Balint v. Carson City*, *supra*, 180 F.3d at p. 1049 [requiring employer to explore alternatives despite seniority rule].) Lt. Cox's isolated and cursory exercise in "honest thought" just doesn't cut it. (Ex. 3 30:3-18.)

The list of CDCR's efforts to consider accommodating Ms. Brown's Sabbath observance borders on the embarrassing: Lt. Cox looked at the CBA, State Personnel Board specifications, some unspecified "meeting minutes," and a few "old documents." (Ex. 3 100:6-12, 103:4-22.) When he found no guidance, he gave up. (Ex. 3 100:6-12, 103:4-22.) Notably, Cox did not even review CDCR's EEO policy or consult anyone else for help—which is striking given his admitted lack of experience in the matter of religious accommodation. (Ex. 3 104:2-6, 140:5-12.)

Lt. Cox says he "came up" with possible conflicts with Ms. Brown's Sabbath, including complications with rotations in her first two years of service, seniority issues thereafter, and the need to work in emergencies or to fill gaps. (Ex. 3 100:13-103:12, 110:7-19.) But his private

brainstorming was both speculative and wrong. (*EEOC v. Abercrombie & Fitch*, *supra*, 966 F.Supp.2d at p. 962 ["Hypothetical or merely conceivable hardships cannot support a claim of undue hardship"].) Cox also failed to consider any of the plethora of options discussed above—e.g., a 30% management post, a 70% bid position with or without shift swaps and/or leave, a seniority exception, or a patchwork of these CDCR has used before. (Ex. 3 99:21-107:8; Ex. 25.)

CDCR invokes *Bhatia v. Chevron* to argue that proof of an undue hardship can absolve an employer from the need to "actually attempt[ ] an accommodation." (Def.'s Mem. 12:24-28 [citing *Bhatia v. Chevron U.S.A.* (9th Cir. 1984) 734 F.2d 1382, 1384].) But the Ninth Circuit's refusal in that case to require a hardship-inducing accommodation arose only after the court was satisfied the employer had done all it could to resolve the conflict between the employee's faith and work. Indeed, the court insisted in *Bhatia* that once an employee makes out a prima facie case, the burden shifts to the employer to "establish that it made good faith efforts to accommodate the [employee's] religious beliefs, and that to the extent that its efforts were unsuccessful, further accommodation would have caused it undue hardship." (*Id.* at p. 1383.) The employer prevailed on summary judgment where it took a number of steps to accommodate; for example, it "actively sought an alternative job for Bhatia," "offered him four different positions," and "promised to return Bhatia to his old job" if proper equipment was developed. (*Id.*)

As one California district court has noted, "[t]he Ninth Circuit is skeptical of hypothetical hardships based on assumptions about accommodations which have never been put into practice." (*EEOC v. Abercrombie & Fitch Stores, Inc.*, *supra*, 966 F.Supp.2d at p. 962.) Indeed, an employer is "on far firmer ground" to argue an applicant could not have been accommodated if the employer at least tried. (*Opuku-Boateng v. State of Cal.*, *supra*, 95 F.3d at p. 1474.) By categorically rejecting Ms. Brown, CDCR has built a case on sand that, at a minimum, cannot bear the heavy burden to win summary judgment.

CONCLUSION

This court should deny CDCR's motion because the agency fails to show as a matter of law that hiring Teresa Brown would have necessarily required an unreasonable accommodation

or resulted in significant difficulty or expense. As a public employer with a multi-billion-dollar budget, scores of facilities, and broad flexibility in the training and assigning of thousands of correctional officers, CDCR's obstinacy in the face of our legislature's express solicitude for Sabbatarians is as breathtaking as it is hypocritical.

Our legislature has set the religious-accommodation bar high for all employers in the state. It would be their job alone to amend FEHA to grant CDCR the exemption it seeks here—the absolute power to reject Sabbath-observing applicants from serving California in its prisons. CDCR's motion must be denied.

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