C089340

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

TERESA BROWN,
Plaintiff and Appellant,

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,
Defendant and Respondent.

APPEAL FROM SACRAMENTO COUNTY SUPERIOR COURT
KEVIN R. CULHANE, JUDGE – CASE NO. 34-2015-00176321

APPELLANT'S OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (*Check one*): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE	

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Date: November 22, 2019

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INTRODUCTION

Teresa Brown is a mother of three and a devout Seventh-day Adventist. Like adherents of other faiths across our state, Brown observes a Sabbath during which she must abstain from work. For Adventists, that time is sundown Friday to sundown Saturday.

Seeking to make ends meet in a job where she could excel and serve, Brown applied to become a correctional officer for the California Department of Corrections and Rehabilitation (CDCR). CDCR is one of our state's largest employers. It runs 34 prisons of varying security levels, has an annual budget exceeding ten billion dollars, and employs tens of thousands of correctional officers in myriad assignments and schedules. Brown aced the initial series of intellectual and physical tests—staff said she was "faster than some of the boys"—but CDCR rejected her because of the conflict between her Sabbath and its stated availability policy.

Sadly, this tale is not new. Indeed, Brown's situation was so anticipated by our legislature that it protected Sabbath observance by name in the Fair Employment and Housing Act (FEHA). The legislature also made clear that even when a Sabbath conflicts with a job requirement, an employer cannot reject a job applicant on that basis unless it can prove accommodating her would in fact cause "undue hardship" to the point of "significant difficulty or expense." Fitting squarely into this protection, Brown sued.

But despite an eight-day bench trial and lengthy briefing focused on whether CDCR could prove undue hardship, the trial court rejected Brown's claim on entirely different and unpleaded grounds. Specifically, the court found that CDCR's refusal to hire

Brown was justified because its "availability standards"—which the court cited as being "willing to work at any time and under all circumstances"—satisfy a "bona fide occupational qualification" (BFOQ) defense. The court's ruling was not only unexpected, it is reversible for at least four independent legal reasons.

First, BFOQ is a "term of art" defense that applies only in extremely rare cases where an otherwise-protected status like gender, ethnicity, or religion is itself a valid job qualification, or "Q" in the acronym. In other words, BFOQ comes into play only when there is facial or deliberate exclusion of a protected class. For example, gender in hiring a model, ethnicity in casting an actor, or religion in selecting a minister. Accordingly, BFOQ does not apply to neutral job rules like CDCR's supposed 24/7/365 "availability standards"—which purportedly apply to everyone. And it therefore cannot be used to sidestep the particularized hardship showing FEHA requires to justify the reflexive imposition of such standards on a given candidate in the religious-accommodation context.

Second, beyond applying BFOQ where it is inapplicable, the trial court committed further reversible error by refashioning its requirements. To prevail on a BFOQ defense, the employer must prove that: (1) the job requirement is reasonably necessary to the essence of its business; (2) all or substantially all members of the affected class cannot safely and efficiently perform the job; (3) individual determinations of whether each applicant could safely and efficiently do the job are infeasible; and (4) it is impossible or highly impractical to adjust job responsibilities to avoid using the claimed BFOQ as a categorical rule. The trial court, however,

ignored the last three elements of this multi-pronged inquiry and exhibited demonstrable confusion on the first element.

Specifically, the trial court found that CDCR's supposed requirement that officers be willing to work at any time of any day is a BFOQ because it relates to the essence of what CDCR does. But a BFOQ must not merely relate to an employer's business operation; it must be reasonably necessary to that operation. Worse yet, the trial court nowhere applied the other three parts of the BFOQ test, much less acknowledged them at all.

Third, even if the BFOQ test were appropriate for a neutral job rule and the trial court properly applied its elements—it is not, and the court did not—there is no substantial evidence for CDCR to satisfy any of the four elements anyway. For starters, there is no substantial evidence that requiring all officers to be willing to work any time and under all circumstances is actually necessary. Rather, CDCR excuses unwillingness for many reasons, such as military training, medical treatment, and intermittent leave.

CDCR fares even worse on the other elements. Specifically, there was no evidence whatsoever that "all or substantially all" members of a class cannot perform the job; indeed, the trial court discouraged exploration of situations apart from Brown and failed to even identify a class in its ruling. Moreover, there was no evidence individual assessments are infeasible; to the contrary, CDCR's own drawn-out approach to Brown's application and its admission at closing that it excuses the unwillingness of others to be available in a "variety of situations," shows individual

assessment is in fact done. Similarly, given its accommodation of others, CDCR cannot show alternatives are impossible.

Finally, reversal is required in any event because CDCR waived the BFOQ defense; indeed, the first time it cited the theory was day one of trial. For its part, the trial court found that CDCR's listing of a "business necessity" defense in its answer and its pre-trial argument that Brown was not "qualified" sufficed to raise BFOQ. But these are not BFOQ concepts; they are discrete criteria in disparate-impact and disparate-treatment cases, respectively. Further, the court's eleventh-hour application of the BFOQ defense via these inapt means prejudiced Brown where she could not gather evidence or disprove at trial its analytically distinct elements—particularly those not cabined to Brown.

While CDCR's BFOQ defense fails for these reasons, more is at stake than what happened to Teresa Brown. If, as the trial court would have it, the BFOQ defense applies to neutral policies and then can be met by merely showing the supposed importance of those policies without any examination or evidence of an affected class or the feasibility of individual assessment or alternatives, very little discrimination will be forbidden.

More to the point, employers can easily avoid having to justify on hardship grounds refusing jobs to religiously observant applicants. This is hardly what our legislature had in mind when adopting robust protection in FEHA for religious minorities against the painful and alienating choice between faith and livelihood absent unavoidable hardship in their particular case.

FACTS AND PROCEDURAL HISTORY

A. Teresa Brown observes a religious Sabbath.

Teresa Brown is an observant Seventh-day Adventist. (1 RT 125:21-28.) Accordingly, she abstains from work on a Sabbath that runs from sundown Friday to sundown Saturday. (1 RT 127:13-20.) Brown instead spends that time at church, serving others, and teaching her children the faith. (1 RT 125:23-128:16.)

Brown shares her beliefs in common with other officers at CDCR. (1 RT 262:20-263:18, 336:12-28.) Consistent with those beliefs, however, Brown testified she would work on her Sabbath if anyone is injured or their life is at stake. (1 RT 145:15-147:6.)

B. CDCR rejects Brown's application to be a correctional officer, citing its stated 24/7/365 availability policy.

Teresa Brown applied to be a correctional officer in 2013. (1 RT 191:11-13.) She disclosed her Sabbath by answering "yes" on the opening form when asked if "your religious beliefs prevent you from taking an exam on Saturday." (3 AA 443; 1 RT 138:25-139:8.)

CDCR nonetheless allowed Brown to continue in its months-long review process through its Backgrounds Unit. (1 RT 139:12-142:28; 2 RT 573:10-575:19, 752:9-28; 3 AA 344, 389-391.) First, CDCR had Brown take a four-hour problem-solving exam, which she passed. (1 RT 139:16-140:14.) Next, CDCR sent Brown for a physical-fitness test, which it specially arranged for her to take alone on a weekday to accommodate her faith. (1 RT 140:16-142:16.) Brown again passed, drawing praise that she was "faster than some of the boys." (1 RT 141:11-142:16.)

CDCR then required Brown to fill out a "Qualification Assessment Report" (QAR) form, which included yes/no question boxes asking her "willingness to work" overtime, on-call hours, rotating shifts for 24-hour coverage, off-site travel, and "weekend shifts (e.g., Saturday, Sunday, and/or Holidays) in emergency situations, on an as-needed basis, and/or on a regular rotating basis." (3 AA 455.)[1] As Brown explained at trial, she checked "yes" because these times include non-Sabbath hours or situations with lives at stake or injuries, such as a riot. (1 RT 143:5-148:19.)

CDCR next had Brown complete a "Personal History Statement," which asked another series of questions but, unlike the QAR, offered space to clarify. (3 AA 317-342.) Able to explain her entries, Brown marked "no" when asked if she was "freely willing to work split shifts, nights, weekends and holidays." (3 AA 340; 1 RT 150:22-151:25.) Then she wrote in the space provided, "I am a Seventh Day Adventist[.] I cannot work Friday after Sunset or Saturday before Sunset. I have a letter for my belief available upon request." (3 AA 341.)

Background Unit Sergeant Shannon Beaber thereafter interviewed Brown. (1 RT 150:16-17.) After covering a series of other topics, Beaber asked about the Sabbath. (1 RT 152:15-19; 3 AA 463-506.) Brown repeated she was unable to work sundown Friday to sundown Saturday. (1 RT 152:15-23; 2 RT 496:12-20; 3

[1] The QAR echoed the job posting and State Personnel Board (SPB) job description's mention of "willingness to work day, evening, or night shifts, weekends, and holidays, and to report for duty at any time emergencies arise" as a "special personal characteristic." (3 AA 387; 3 AA 314.) None of these documents define "emergency."

AA 489-490.) And although Beaber replied "it's a 24/7" position and Brown "could be working these odd hours," the topic of overtime or emergencies was never discussed. (1 RT 147:16-18, 258:15-20; 2 RT 500:8-26, 554:15-18, 561:2-21; 3 AA 489-491.) Beaber closed the subject by requesting the pastor letter Brown said explained her freedom to observe the Sabbath. (3 AA 491-492; 1 AA 48.)[2]

Brown had nonetheless stressed to Beaber she could work any other hour or day of the year. (1 RT 153:14-17; 3 AA 491.) Brown was also willing to work any correctional-officer job. (1 RT 254:28-255:15.) Moreover, with the exception of a few remote spots, she was willing to work "anywhere [CDCR] sent [her]" among its dozens of facilities. (1 RT 198:26-199:8, 255:5-6; 3 AA 494-495.) Finally, Brown is married to a non-Sabbatarian correctional officer whose seniority gives him more control over shifts and facility transfers, and who was willing and eligible to swap or transfer into any Sabbath conflict she might end up facing. (2 RT 1004:12-15, 1022:14-1023:4.)

After the interview, Sgt. Beaber consulted her supervisor, Lieutenant Steven Cox, who evaluated the situation. (2 RT 513:16-18, 573:10-576:28, 682:13-16.) Cox looked at the labor contract's

[2] CDCR read in Brown's deposition that, when asked by Beaber what "if the situation called for you, and you had no choice to have to work," Brown said she "can't stay" if a "[Sabbath] night comes" (1 RT 198:11-18), and that she "can't come in" if called on the Sabbath (1 RT 201:27-202:6). But Brown clarified at trial that, as opposed to any scheduling need, "if an inmate or officers' lives were at stake, I certainly would stay" or "wouldn't not go in." (1 RT 145:15-147:15.) The trial court suggested this exception might be subjective, but nowhere rejected it. (See 5 AA 928.)

terms on overtime by inverse seniority and shift swaps in the first year, and concluded they "could" or "may" raise a conflict. (2 RT 686:28-688:19; 2 AA 139, 152.) He also read the "special personal characteristics" in the SPB job description—which he deemed to list its requirements—and said he was "not aware" of a successful applicant checking "no" on the background availability question. (2 RT 673:10-674:1, 715:17-22, 739:25-740:27; 3 AA 386-388.)

Cox, however, did not examine any possible assignment at any facility, nor did he know how often emergencies or involuntary overtime arise at any prison—including at any women's prison. (2 RT 639:18-643:4, 720:18-20, 731:2-8.) Cox also did not speak to any warden or other hiring authority who would decide any future accommodation. (1 RT 396:20-26; 2 RT 579:27-580:8, 640:14-27, 731:5-14, 900:20-902:4.) Nor did he consult union officials, labor-relations analysts, EEO staff, or legal. (2 RT 593:10-16, 623:18-624:27.) And although Cox read Brown's pastor letter—which described generally her religious beliefs and suggested a range of accommodations—and said he understood from Beaber there were no exceptions to Brown's abstention from Sabbath work, Cox never spoke to Brown. (2 RT 623:11-17, 633:21-634:9, 719:19-25; 1 AA 48.) Beaber also never spoke to her again. (2 RT 553:25-27.)[3]

[3] CDCR explains Cox's not speaking to a warden by citing evidence that before Brown got on a hiring list she had to pass backgrounds, other pre-hiring steps, and the academy—which could take up to a year or two during which any given spot might be gone. (4 AA 769 [citing 1 RT 203:26-204:3; 2 RT 697:15-698:21, 824:10-26; 3 RT 1158:17-1161:4].) CDCR also addresses Cox not calling the union by citing his experience and its preference for senior officers and past lack of support. (See 4 AA 762 [citing 1 RT 265:17-26, 318:3-20, 398:27-28, 426:27-427:3, 431:15-20; 2 RT 690:18-24].) But it is

Nearly a year after she applied, Cox rejected Brown based on CDCR's stated availability policy. (2 RT 574:9-12; 3 AA 344-346.) Throughout this litigation, CDCR has insisted this policy is "a facially neutral practice applied to all applicants." (4 AA 753.) It has also proclaimed that its actions were not taken "based on any protected class or activity." (3 AA 401.)

C. CDCR employs thousands of officers in myriad posts, schedules, and prisons across the state.

CDCR is one of the largest employers in California. (3 AA 448.) It operates 34 adult prisons—including twelve within 150 miles of Brown's home—and has a budget exceeding $10 billion. (See 2 RT 676:26-677:6, 996:25-26; 3 AA 442-445, 3 AA 366-368.) As of 2010, CDCR employed more than 35,000 correctional officers. (1 RT 391:15-18.) When Brown applied in 2013, CDCR was in the midst of a "ramp up" to add 7,000 more. (2 RT 588:26-589:10.)

The SPB job description and QAR contemplate among an officer's "typical tasks" a variety of safety-related responsibilities, such as subduing inmates. (3 AA 386-388; 3 AA 454-459.) But the assignments of each officer "vary depending on the post to which he or she is assigned." (4 AA 740.) For example, some check IDs (2 RT 887:2-3), escort inmates to appointments (1 RT 355:20-21), operate the front gate (2 RT 890:16-17), serve in a public-relations role (2 RT 843:13-28, 862:17-863:8; 3 RT 1146:18-19), work in scheduling (3 RT 1146:17), or conduct investigations (3 AA 387).

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undisputed Cox never spoke to anyone about any facility's needs or capacity to accommodate in any situation.

Correctional officers also work a diverse range of schedules, including many with no Sabbath conflict. At first, all officers spend weeks at a training academy on a Monday-to-Friday schedule. (1 RT 347:7-10; 3 RT 1166:23-25.) Then, they report to assigned institutions for a two-year apprenticeship where CDCR has full discretion over job assignments and schedules across three daily shifts. (1 RT 405:11-407:13, 491:19-492:13; 2 RT 693:20-25; 3 RT 1168:14-17.) Officers can therefore work Monday-to-Friday, or a schedule with any other two-day period off. (See 1 RT 367:3-5, 399:11-402:24; 4 AA 615-622.) And although apprentices should rotate shifts and assignments at least every six months—for learning and facility needs—CDCR can rotate them among posts with Fridays and Saturdays off. (1 RT 405:9-406:23, 439:1-14; 2 RT 690:25-692:7, 3 RT 1162:5-13; 1 AA 25-26.)

After apprenticeship, the labor contract provides that 70% of the posts at each prison are assigned by seniority bid. (3 RT 1149:20-24; 2 AA 168-69.) The remaining 30%, however, are assigned at management discretion regardless of seniority. (1 RT 393:5-11; 2 RT 816:19-817:1, 859:15-862:10; 3 RT 1149:20-24.) As a result, although witnesses said it would be difficult for a new officer to bid a non-Sabbath post, CDCR could ensure such a post through the discretionary system—for the duration of the contract or longer, and particularly when the post is open or held by an apprentice. (1 RT 365:12-24, 399:11-402:24, 429:7-20; 2 RT 695:17-698:4, 785:5-8; 3 RT 1142:10-1144:13, 1173:20-25; 4 AA 622.) Except for a few jobs with special training, either assignment path

involves the same types of jobs. (1 RT 402:25-404:4; 3 RT 1149:25-1150:9.)[4]

Moreover, correctional officers can be assigned—whether by application or accommodation—a "permanent intermittent" post. (2 RT 895:22-896:28.) These officers work as needed, go through academy and apprenticeship, and "must be available to work all available shifts." (2 RT 990:9-992:1; 2 AA 281.) But their "available" shifts can be "limited" in their warden's discretion, and they work no overtime. (2 RT 895:22-896:28, 990:9-991:1; 2 AA 267.) These or other "relief" officers also fill ad hoc vacancies. (1 RT 322:4-7, 354:9-18, 404:5-16, 410:8-24; 2 RT 879:28-880:6.)

D. CDCR does not require all officers to be willing to be available at any time and under all circumstances.

As CDCR put it in its closing brief at trial, there are "a variety" of "situations where an officer may be excused from the requirement to have the willingness to work 24/7." (4 AA 755.)

For example, CDCR employs—and would "absolutely not" deny the application of—military reservists of various branches who are unwilling to work when they have weekend drills each month. (See 2 RT 605:11-15, 798:1-17, 1005:2-5; 3 RT 1198:17-20.) Navy reservists are further unwilling to work fourteen consecutive days every year due to training. (2 RT 1005:6-22, 1009:1-12.)

CDCR also employs or would employ those who are regularly unavailable for dialysis (2 RT 885:18-22), have intermittent child-care duties (2 RT 614:2-22, 802:18-25), or might be unavailable for

[4] Wardens can also use discretionary assignments to employ family members at the same facility. (3 RT 1167:13-1168:8.)

months of parental leave (2 RT 799:5-800:4). Moreover, CDCR employs other Sabbatarians who—like Brown—are unavailable sundown Friday to sundown Saturday every week. (1 RT 262:12-263:18.) Finally, although Captain Robert O'Brien contended that being willing to be available 24/7 is a job requirement for "safety and security," he agreed it "would be impossible" in practice to require all officers to be so available. (2 RT 793:9-17, 819:8-14.)

On that note, three rank-and-file officers testified, and all three reported having been routinely unavailable:

- Jordan Brown was in the Navy reserves for four of his first six years as a correctional officer. (2 RT 1004:6-1006:3.) To receive a schedule avoiding his monthly weekend training, Brown simply had to provide documentation for which days he could not work. (2 RT 1008:11-1009:12.) CDCR never said his unavailability raised a problem. (2 RT 1009:9-12.)

- Richard Hernandez is a Seventh-day Adventist who is unavailable sundown Friday to sundown Saturday. (1 RT 262:12-263:18.) After CDCR learned of this conflict as a new hire, it switched his shift and allowed him to use self-help methods before assigning him a discretionary post. (1 RT 272:16-21, 288:3-10, 311:10-314:23.) Hernandez has only twice worked on the Sabbath: before he worked out an accommodation and in a life-threatening situation consistent with his faith. (1 RT 310:1-311:9.) Hernandez's warden confirmed his accommodation "has not caused any safety concerns" or "hardship." (1 RT 426:2-427:10.)

- William Rawlings is a Seventh-day Adventist who is also unavailable sundown Friday to sundown Saturday. (1 RT 334:25-26, 336:9-28.) CDCR has retained Rawlings, and accommodated him with a

series of non-conflicting posts until he could bid for one. (1 RT 338:23-339:5, 347:9-15, 353:6-354:18.)[5]

An exhibit called "Correctional Officer Essential Functions" says generally that officers "must be able to work overtime," which can be up to 8 hours at a time, or very rarely, up to 16 in situations akin to a riot. (1 AA 8.) And witnesses said overtime is common, staffing needs can be unpredictable, and there can be times when everyone working stays, such as a riot. (1 RT 318:22-25, 344:13-14; 2 RT 561:15-19, 679:21-26, 805:7-806:3, 973:26-974:10.) But the trial expert who co-wrote the exhibit said overtime and other items it lists are subject to accommodation. (1 AA 8; 2 RT 889:18-894:11, 932:10-20.) Moreover, the percipient evidence involves only the nine prisons where those witnesses have worked.[6]

Furthermore, the contract says involuntary overtime shall be assigned "on a rotating basis by inverse seniority except when precluded by operational needs . . . or in emergency situations." (2

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[5] Although Hernandez marked "yes" on the personal history form availability question—saying it included non-Sabbath situations (1 RT 316:2-317:4)—and he has not been exempted from overtime or emergencies (1 RT 326:17-327:26), his Sabbath still makes him not available 24/7/365. Likewise, Rawlings, who had seniority when his Sabbath conflict arose, is not available unconditionally even though his seniority has helped limit overtime or emergency conflicts. (See 1 RT 337:15-17, 381:15-18; 3 AA 550.)

[6] Witnesses have worked at nine facilities: California Correctional Institution (Tehachapi) (1 RT 383:4-7); California Medical Facility (Vacaville) (2 RT 747:7-10); California State Prison in Los Angeles (1 RT 373:23-26); California State Prison in Sacramento (2 RT 748:6-8; 3 RT 1142:16-17); California State Prison in Solano (2 RT 747:19-25); Central California Women's Facility (1 RT 334:17-21); Folsom State Prison (2 RT 738:17-25); McGee Correctional Training Center (2 RT 747:25-28); and Mule Creek (2 RT 843:6-9).

AA 167.) But the contract also "normally" forbids overtime on a "last workday" before an officer's regular day off (RDO). (*Ibid.*; 2 RT 592:8-13, 930:9-27; 3 RT 1163:4-8.)[7] So if an officer's workweek ends before Friday sundown—or, better yet, on Thursday—she should not be held into that period. (See 1 RT 344:13-27.) Then, once these officers are off, CDCR calls them only in emergencies. (2 RT 592:1-10, 803:11-28, 930:20-27.) And, in any event, the just-described contract term does not look to seniority "in emergency situations" anyway. (2 AA 167.) Finally, trial expert and former acting director of CDCR, Richard Subia, said how much overtime is used depends on the prison; adding, "sometimes you never use it." (2 RT 840:14-841:1, 973:28-974.)[8]

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[7] The trial court relied on Captain O'Brien saying that, where he worked, if "I need you, you're not going home. If I tell you . . . you're coming in on Saturday even though you're off, you're going to come in." (5 AA 925 [citing 2 RT 793:20-27].) But immediately before and after that part of O'Brien's answer to the question whether officers have to be available, he says it "depends on the situation" and "[i]f you're on your day off, you're on your day off, if no one gets a hold of you. So you have a right to a life." (2 RT 793:18-27.)

Captain Leithen Engellener also shared that "in most cases" a shift continues if emergency paperwork is undone, but he framed this in his experience at one facility and did not explain how paperwork interacts with the no-RDO holdover rule. (3 RT 1151:5-1154:15.)

[8] Lt. Cox said lack of staff "would lead to the closure of inmate programs and [ ] fewer staff available to respond in the event of an emergency," but framed this in a moment of "staff shortages" at his prison. (2 RT 678:23-679:8, 717:16-718:26.) And while Subia agreed that abandoning a post or refusing (unaccommodated) overtime repeatedly could become a problem, he added that the former might not be a significant issue depending on the position involved and the latter would trigger an interactive process—not dismissal. (2 RT 933:27-934:23; 962:10-967:28, 989:13-990:8.)

As for emergencies more directly, witnesses said they can be frequent, but rarely, if ever, do they require calling someone at home. (2 RT 939:14-27.) Rawlings knew of just one such emergency in 22 years (1 RT 345:15-346:12); Jordan Brown knew of none in his 11 (2 RT 1021:27-1022:12); and Hernandez has never been so called (1 RT 309:19-28). Whereas O'Brien knew of no emergency at his prison ever requiring all officers to be there. (2 RT 806:15-19.)

Furthermore, even in the case of emergencies, prisons call on a "special emergency response team." (1 RT 345:15-346:10; 2 RT 939:21-940:9, 994:1-24.) And regardless, "sometimes you never use involuntary overtime," each prison handles things differently, and the evidence was for nine facilities. (2 RT 806:6-16, 973:28-974:1.)[9]

Captain O'Brien observed, "you have a right to a life." (2 RT 793:25-27.) Accordingly, CDCR excuses day-off unavailability for many reasons, such as being out of cell-phone service (1 RT 412:13-23); taking vacation, including for religious observance (1 RT 415:2-7); going to a wedding (1 RT 411:14-18); celebrating a birthday (1 RT 933:1-6); hiking (2 RT 611:17-28); or, after drinking beer and watching football, saying "Hey, I'm sorry, I've had a few drinks, I can't come in" (1 RT 416:11-28; 2 RT 612:26-613:3). Nor does CDCR reject applicants it anticipates will be unavailable for reasons like these. (2 RT 611:2-614:22.)

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[9] Warden William Sullivan said a sexual assault once occurred at the prison he ran when an officer "le[ft] the post early." (1 RT 435:3-436:1.) Sullivan, however, clarified that this tragedy did not involve failing to show up for or stay after a shift, but someone who left "early." (1 RT 435:18-22.) Nor did he offer evidence of such a danger at any of the other facilities of varying security levels. The trial court made no mention of the anecdote in its decision.

When CDCR cannot reach an officer, it moves on to the "next person" on a list. (2 RT 933:5-6.) Others might then be unhappy or grieve about being "hired out of turn." (2 RT 677:9-678:12, 717:16-718:10, 970:19-28; 3 RT 1155:8-19.) But the contract cost—which, again, would arise only where overtime is not excused—would be four hours of pay. (2 RT 678:13-22, 971:14-27.) The trial expert called this "budget dust." (2 RT 996:17-997:4.) Moreover, any hardship would be the same for any reason. (1 RT 414:20-15.)[10]

Finally, even when an officer is assigned a specific shift on a specific day, she can "swap" out if she has a conflict. (1 RT 311:10-314:23.) Shift swaps are common, can be facilitated by e-mail or Facebook, and although management can deny swaps that violate the labor contract, the current contract forbids ad hoc limits for particular officers. (2 RT 741:19-23, 924:7-927:23, 1015:28-1019:28; 3 RT 1171:22-1173:17; 1 AA 10; 4 AA 665.) Similarly, the labor contract says swaps are "normally" limited the first year—none the first three months and one per week after that—but Lt. Cox agreed this language allows "wiggle room" and these limits are waivable. (2 RT 724:23-726:18; 2 AA 154.)

All three line officers who testified at trial described their use of long-term swaps to get off work a certain day each week. Jordan Brown used shift swaps to get Saturdays off for a year. (2 RT 1019:13-18.) Likewise, Rawlings found it "very easy" to avoid Sabbath work using shift swaps. (1 RT 361:2-28.) And although

[10] The contract also exempts reverse seniority for "operational needs," which can include an accommodation; thus, Subia said no contract alteration is required to skip and return first to such a person the next time, if need be. (2 AA 167; 2 RT 932:10-934:28.)

Hernandez could not always find swaps in his first months on the job, he successfully combined them with paid time off to avoid a regular Sabbath-day assignment in that period. (1 RT 275:17-23, 313:24-314-23, 321:10-322:11, 328:25-329:3.)

E. Brown sues CDCR under FEHA. The trial court rules for CDCR, finding its "availability standards" are "bona fide occupational qualifications."

Brown sued CDCR for damages and injunctive relief under Government Code section 12940, subdivision (*l*)(1), which forbids an employer from refusing to hire a job applicant due to a conflict between her Sabbath and a job requirement, unless the employer can prove accommodating her would cause undue hardship. (See 3 AA 369-385; 4 AA 666-683, 802-807.)[11]

At trial, Brown testified about her Sabbath and application. (1 RT 125-261.) Beaber and Cox testified about their reasoning in rejecting Brown. (2 RT 464-566, 567-743.) Hernandez, Rawlings, and Jordan Brown testified about their ability to be unavailable. (1 RT 262-331, 334-381; 2 RT 1003-1042.) Sullivan, O'Brien, and Engellenner testified about their experience at their prisons. (1 RT 383-444; 2 RT 746-828; 3 RT 1140-1210.) And Subia testified about CDCR's ability to accommodate without undue hardship, adding that its "special personal characteristics" might help one succeed but are not essential to the job. (2 RT 839-999, 907:909:28.) For its part, CDCR provided no such expert evidence or studies, surveys, reports, or data on reporting needs or safety.

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[11] Brown also sued for religious discrimination under Section 12940, subdivision (a), but that claim was resolved before trial and is not at issue in this appeal.

After lengthy post-trial briefing on the matter of hardship (see 4 AA 684-779; 5 AA 815-866), the trial court ruled for CDCR but not on those grounds. Rather, it found CDCR's "availability standards" constitute "bona fide occupational qualifications." (5 AA 925.) According to the court, CDCR validly rejected Brown under its stated policy that all officers be "willing to work at any time and under all circumstances." (5 AA 916.)

The trial court found that the availability policy is a BFOQ because it relates to the essence or central mission of CDCR. But it did not address the facially neutral nature of the policy. Nor did it address whether all or substantially all members of a class are unable to safely and efficiently do the job, what the contours of that class might be, or whether it is infeasible to test individuals to see whether they nonetheless could perform the job or rearrange job responsibilities to avoid reflexive insistence on the policy.

In closing, the trial court emphasized that, notwithstanding its BFOQ finding, Brown established a prima facie claim under Section 12940, subdivision (*l*)(1). (5 AA 931.) It refused, however, to make findings on whether accommodating Brown would have caused undue hardship. (5 AA 931-932.) The court likewise deferred any decision on remedies. (*Ibid.*)

F. Brown unsuccessfully objects on waiver grounds to the trial court's BFOQ ruling.

Notwithstanding the trial court's BFOQ finding, at no point in its answer did CDCR mention that affirmative defense. (See 3 AA 507-511.) It instead pleaded "undue hardship" and "business necessity." (3 AA 508.) And in discovery, the court refused to

compel CDCR to produce information Brown requested on officers who needed one day off each week for religious or other reasons. (3 AA 460-462.)

In its summary-adjudication motion, CDCR also never claimed a BFOQ. (See 3 AA 517-546.) Rather, it was not until the brief it filed the first day of trial that CDCR cited the defense—and then under the heading "Business Necessity Affirmative Defense." (See 4 AA 642.) CDCR's 50-page closing brief referenced the BFOQ defense for two paragraphs, focusing instead on undue hardship; while its sur-reply to Brown's reply on the matter made no mention of BFOQ. (See 4 AA 730-779; 5 AA 842-866.)

During the eight-day bench trial, the term "undue hardship" was uttered dozens of times, compared to zero for BFOQ or "bona fide occupational qualification." Throughout trial, rather, the court restricted questioning on "departmental-wide policies," reasoning that the case concerned "a discreet [sic] set of interactions and their . . . alleged effect on the plaintiff" and must be so limited. (2 RT 467:20-468:20.) In other words, the court insisted the evidence and remedies should be limited to "historical facts that happened when this lady went into the hiring process." (3 RT 1248:4-5.)

Once the trial court indicated in its tentative decision that it planned to rely on BFOQ, Brown objected on waiver, among other grounds. (5 AA 888-909.) But the court said CDCR raised a BFOQ by invoking in its answer the "business necessity" defense and claiming its policies were "job related." (5 AA 929.) Moreover, the court added, Brown had notice of the BFOQ defense because her "qualification" for the job was at issue. (*Ibid.*)

STATEMENT OF APPEALABILITY

This appeal was filed April 5, 2019, and is from the superior court's final judgment of February 8, 2019 that is appealable under Code of Civil Procedure 904.1 subdivision (a)(1).

STANDARD OF REVIEW

This appeal raises four legal issues: (1) whether the BFOQ defense applies to neutral job requirements; (2) whether a BFOQ can be proven based on its relation to a business's essence, and not by its meeting all four elements required under established law; (3) whether there was substantial evidence to find these four elements were met; and (4) whether CDCR waived the defense.

The first two of these grounds—on the applicability of the BFOQ defense and its elements—are subject to de novo review. (*Seligsohn v. Day* (2004) 121 Cal.App.4th 518, 523 ["[O]f course, it is clear that the interpretation of a statute is a question of law to be determined by the reviewing court de novo." [Internal quotation marks omitted]].) And such review is particularly straightforward here given the statement of decision, which provides "in definite written form, [the trial court's] view of the facts and the law of the case, and [makes] the case easily reviewable on appeal by exhibiting the exact grounds upon which judgment rests." (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 982; see also *Durante v. County of Santa Clara* (2018) 29 Cal.App.5th 839, 842.)

The third ground for reversal—substantial evidence—is also reviewed de novo. (See *Smith v. Selma Community Hospital* (2008) 164 Cal.App.4th 1478, 1515 ["The existence or nonexistence of substantial evidence is a question of law."].) Put simply, if there

was no substantial evidence to support any one of the elements of the BFOQ defense as it is understood and applied in California, CDCR loses as a matter of law. (See *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651 [stressing "substantial evidence" is not any evidence, but "substantial proof of the essentials which the law requires" [internal quotation marks omitted].)

Fourth, the matter of waiver: whether CDCR's raising a "job related" or "business necessity" defense is enough to plead BFOQ. It is undisputed what CDCR said in its answer, so although waiver is usually a fact question, where, as here, "the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law and the reviewing court is not bound by the [trial] court's ruling." (*Saint Agnes Med. Ctr. v. Pacificare of Cal.* (2003) 31 Cal.4th 1187, 1196 [internal quotation marks omitted].) Moreover, even if there were disputes of fact, de novo review is still called for where the court's ruling is based on an erroneous understanding of BFOQ. (See *Hoover v. American Life Insurance Co.* (2012) 206 Cal.App.4th 1193, 1202 [holding that, in reviewing a waiver finding, the appellate court "must determine independently whether the trial court applied the correct legal standard"].)

Finally, to the extent CDCR argues the judgment should be affirmed on the alternative ground of hardship, this Court may not do so at this juncture. Rather, remand is the proper approach for a material issue on which the trial court declined to make findings and its decision remains uncertain. (*Wise v. Clapper* (1968) 257 Cal.App.2d 770, 776-777.) Here, the trial court issued a statement of decision that declined to make a hardship finding, and despite

Brown's request for one. (5 AA 931-932 [describing, but leaving unresolved, the matter of undue hardship and referring to possibility of a "divergent outcome[ ]" on that score]; 5 AA 904-907 [asking for ruling on hardship].)

ARGUMENT

I. THE TRIAL COURT ERRED BECAUSE BFOQ IS A "TERM OF ART" THAT APPLIES ONLY TO STATUS DISCRIMINATION, NOT NEUTRAL JOB RULES.

FEHA's core protections against all manners of workplace discrimination and non-accommodation are found in Government Code Section 12940. From discrimination on the basis of race, ethnicity, and age, to sexual harassment and, yes, the claim at issue here—the refusal to hire a job candidate because of a conflict between her Sabbath and a job requirement absent individualized proof of undue hardship—Section 12940 covers the situation.[12]

Notably, Section 12940 also begins with a clause excluding from its protections certain employment decisions that are based on a "bona fide occupational qualification." (Gov. Code § 12940.) And although the trial court purported to rely on this undefined prefatory clause in rejecting Brown's claim, BFOQ is a well-known

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[12] Brown sued under subdivision (*l*)(1), which forbids an employer from refusing to hire someone "because of a conflict between 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 . . . but is unable to reasonably accommodate the religious belief or observance without undue hardship." (Gov. Code § 12940, subd. (*l*)(1).) And it defines "[r]eligious belief or observance" to include "observance of a Sabbath or other religious holy day or days." (*Ibid.*)

legal concept that applies only to class-wide discrimination based on protected status. It therefore does not apply to Brown's claim, which challenges a status-neutral job requirement.

As California courts have stressed, BFOQ is an "extremely narrow exception to the general prohibition of discrimination on the basis of sex" or other protected classes. (*Bohemian Club v. Fair Employment & Housing Com.* (1986) 187 Cal.App.3d 1, 19 [quoting *Dothard v. Rawlinson* (1977) 433 U.S. 321, 334].) Indeed, BFOQ is not some open-ended term used to justify any manner of illegal acts based on the importance of the job rule. Rather, it is, to quote the Court of Appeal, a "term of art" limited to deliberate, class-wide discrimination. (*Nadaf-Rahrav v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 975 fn. 10.) For example, gender may be a BFOQ for a wet nurse (*Rosenfeld v. S. Pac. Co.* (9th. Cir. 1971) 444 F.2d 1219, 1224); ethnicity for actors (*Fey v. State* (2013) 174 Wash.App. 435, 448); or age for airline pilots (*Carswell v. Air Line Pilots Assn. Internat.* (D.D.C. 2008) 540 F.Supp.2d 107, 117).

State regulations thus stress that only a job requirement which "on its face excludes an entire group of individuals on a basis enumerated in [FEHA]" can qualify as a BFOQ. (Cal. Code. Regs., tit. 2, § 11010.) Likewise, the jury instruction limits its application to situations where an employer is in fact "entitled to consider [*protected status—for example, race, gender, or age*] as a job requirement" because, among other factors, "substantially all [*members of protected group*] are unable to safely and efficiently perform that job." (CACI 2501; accord CACI VF-2501 [reflecting same criteria].) For as the CACI 2501 "directions for use" provide,

an employer may assert a BFOQ only "where the employer has a practice that on its face excludes an entire group of individuals *because of their protected status*." (CACI 2501 [Italics added.].)

Accordingly, courts regularly affirm that only policies that facially or deliberately exclude a protected class can be BFOQs. As the Ninth Circuit in *Harriss v. Pan American World Airways, Inc.* explained in the similarly distinct disparate-impact context, "[w]hen a facially neutral practice is challenged for its disparate impact, the employer's justification is not that 'sex is a [BFOQ].'" ((9th Cir. 1980) 649 F.2d 670, 674 fn. 2.) Rather, it stressed, "[a] BFOQ is a warrant for affirmative deliberate discrimination." (*Ibid*.) Likewise, the Court of Appeal in *Johnson Controls, Inc. v. Fair Employment & Housing Commission* urged that rules which deliberately discriminate against a protected class are assessed differently than those that are facially neutral but disparately impact that class. ((1990) 218 Cal.App.3d 517, 544 fn. 10, 549 [applying BFOQ to policy denying work to all women of childbearing capacity].) Only deliberately discriminatory policies, the Court of Appeal observed, can be subject to a BFOQ defense. (*Id*. at p. 544 fn. 10.)

This distinction is illustrated by the U.S. Supreme Court's leading decision in *Dothard*. There, the Court analyzed two prison-related employment policies: the first facially excluded women from certain jobs; the second imposed neutral height and weight requirements that disproportionately impacted women. (*Dothard v. Rawlinson*, *supra*, 433 U.S. at p. 321.) Rather than applying BFOQ to both concepts, however, the Court "considered only the

BFOQ defense in assessing the legality of the facially discriminatory policy and only the Business Necessity Defense for the facially neutral policy." (*Harriss v. Pan Am. World Airways, Inc.*, *supra*, 649 F.2d at p. 674 fn. 2.) In short, the Supreme Court confirmed that the BFOQ defense does not apply to facially neutral policies which are not aimed at excluding a protected class.[13]

Scholarship reinforces that "the BFOQ defense is utilized only when an employer admits to discriminatory practices." (Katie Manley, *The BFOQ Defense: Title VII's Concession to Gender Discrimination* (2009) 16 Duke J. Gender L. & Policy 169, 173; see also Stephen F. Befort, *BFOQ Revisited: Johnson Controls Halts the Expansion of the Defense to Intentional Sex Discrimination* (1991) 52 Ohio St. L.J. 5, 9 ["The BFOQ is . . . an affirmative defense to *facially discriminatory* conduct."] [Italics added.].) And the Rutter Guide concurs, as it emphasizes in italics as follows: "A BFOQ is a practice that on its face *excludes an entire class or group of persons* (e.g., all women, or all persons with lower back ailments)." (Chin et al., Cal. Prac. Guide: Employment Litigation ¶ 9:2381 (The Rutter Group 2016).)

But CDCR's availability policy does not facially discriminate against any protected class—religious or otherwise. (See 1 AA 9.) To the contrary, CDCR proclaims its policy is "a facially neutral practice applied to all applicants" and that its actions were neither "based on . . . religion" or "any protected class or activity." (3 AA

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[13] As detailed below, the "business necessity" defense in *Dothard* is also inapplicable to Brown's case, as that defense arises only in the disparate-impact context, not the accommodation context. (Compare CACI 2502 & 2503, with CACI 2560 & 2561].)

401; 4 AA 753-754.) Nor did the trial court find to the contrary. Rather, it found CDCR refused to hire Brown because she could not meet the neutral supposed requirement of all officers being "willing to work at any time and under all circumstances." (5 AA 916.)

But as the just-described bevy of authority shows, the trial court's reliance on BFOQ defies what a BFOQ is under the law: a "term of art" that applies to overt discrimination in a narrow set of circumstances. It is not, as that court's ruling portends, an open-ended escape route allowing employers to dodge the particularized showing of hardship our state legislature demands in religious-accommodation cases. The trial court's ruling must be reversed.[14]

II. THE TRIAL COURT ALSO BOTCHED THE BFOQ DEFENSE BY IGNORING THREE OF ITS ELEMENTS AND CONFUSING THE ONE ELEMENT IT INVOKED.

A. The BFOQ defense requires four findings.

Even assuming the BFOQ defense applies to neutral job criteria like 24/7/365 availability—it does not—that defense is not

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[14] In a footnote, the court referenced on another point *Hildebrand v. Unemployment Insurance Appeals Bd.* (1977) 19 Cal.3d 765, a case about whether the state's denial of unemployment benefits violated the unconstitutional-conditions doctrine. (5 AA 927, fn. 5.) In passing dictum, the court in *Hildebrand* remarked that the employer's Saturday work requirement there "arguabl[y]" could be a BFOQ. (19 Cal. 3d at p. 772.) But it conducted no BFOQ analysis, noted neither party briefed the matter, and decided the case on entirely different grounds. (*Ibid.*) In any event, California courts have since rejected a BFOQ defense for neutral job rules. (See, e.g., *Nadaf-Rahrav v. Neiman Marcus Group*, *supra*, 166 Cal.App.4th at p. 975 fn. 10; *Johnson Controls, Inc. v. Fair Employment & Housing Com.*, *supra*, 218 Cal.App.3d at p. 544 fn. 10.)

merely about, as the trial court posited, assessing whether those criteria relate to the essence or central mission of a business. Rather, the employer must prove all of the following four stringent elements: (1) the requirement is "reasonably necessary" to its business; (2) "all or substantially all" members of the affected class are otherwise unable to safely and efficiently perform the job; (3) individual determinations of whether each applicant could safely and efficiently perform the job are "impossible or highly impractical;" and (4) it is likewise impossible or highly impractical to "rearrange job responsibilities" to avoid using the purported BFOQ as an absolute job requirement. (CACI 2501.)

Of course, few—if any—of these elements make sense where, as in this case, the job rule does not concern protected status but purports to apply to everyone. But that just further shows BFOQ is inapposite here. It does not eliminate its required findings.

"Necessary"

First, a BFOQ must be "reasonably necessary" to the essence of the employer's particular business. (*Johnson Controls, Inc. v. Fair Employment & Housing Com.*, *supra*, 218 Cal.App.3d at p. 540; *Ambat v. City and County of San Francisco* (9th Cir. 2014) 757 F.3d 1017, 1025.) In *Bohemian Club*, for example, the court held that a private club with exclusively male membership could not hire only men as a BFOQ, even though "the evidence overwhelmingly establishe[d] that club members prefer male employees." (*Bohemian Club v. Fair Employment & Housing Com.*, *supra*, 187 Cal.App.3d at p. 21.) Not only was there "no factual

basis" that female employees would hurt the club, but the gender requirement was not necessary to its business. (*Ibid.*)

Both California regulations and jury instructions reinforce this necessity requirement. (See Cal. Code. Regs., tit. 2, § 11010 [requiring "the essence of the business operation would otherwise be undermined"]; CACI 2501 [exclusion must be "reasonably necessary for the operation of [name of defendant's] business"].)

"All or substantially all"

Second, black-letter BFOQ law also requires a finding that "all or substantially all" members of the affected class are unable to safely and efficiently do the job. (See *Bohemian Club v. Fair Employment & Housing Com.*, *supra*, 187 Cal.App.3d at p. 19 [employer must show a factual basis that "all or substantially all women would be unable to perform safely and efficiently the duties of the job involved"]; *Harriss v. Pan Am. World Airways, Inc.*, *supra*, 649 F.2d at p. 676.) And, once again, the regulations and jury instructions are in accord. (See Cal. Code. Regs., tit. 2, § 11010 [employer "must prove that the practice is justified because all or substantially all of the excluded individuals are unable to safely and efficiently perform the job in question"]; CACI 2501 [employer must prove it "had a reasonable basis for believing that substantially all [members of the protected group] are unable to safely and efficiently perform that job"].)

Accordingly, in *Sterling Transit Co. v. Fair Employment Practice Commission*—where a trucking company had a policy against hiring anyone with a back deficiency regardless whether it was presently disabling—the Court of Appeal held the employer

could not maintain a BFOQ defense because it failed to prove "all, or substantially all, persons in [the] class are unable to perform the job duties safely and efficiently." ((1981) 121 Cal.App.3d 791, 797.) As the court explained, "[i]n view of the severe ramifications of cutting off an entire group of persons from an area of employment based solely on class characteristics," an employer must provide the requisite evidence about the characteristics and abilities of the entire class. (*Ibid.*)

"Individual assessment"

Third, a "BFOQ defense cannot be maintained if individual assessment, rather than categorical distinction, offers 'a practical reliable differentiation of the unqualified from the qualified applicant, [even if it is] not a perfect differentiation.'" (*Ambat v. City and County of San Francisco*, *supra*, 757 F.3d at p. 1029.) Jury instructions therefore make clear that to establish a BFOQ, an employer must prove "it was impossible or highly impractical to consider whether each [applicant/employee] was able to safely and efficiently perform the job." (CACI 2501.)

In *Ambat*, the Ninth Circuit addressed a policy prohibiting male deputies from supervising female inmates in a jail's housing units. (*Ambat v. City and County of San Francisco*, *supra*, 757 F.3d at p. 1021.) There, the court held summary judgment on BFOQ grounds was inappropriate because of a fact dispute whether male deputies' propensity for sexual misconduct could be assessed by individual testing; for example, through background checks and psychological examination. (*Id.* at p. 1029.) The rationale for requiring the employer to show infeasibility of individual testing

is simple: protected-class membership should not be used as a proxy if the qualifications of individual applicants could be assessed using nondiscriminatory criteria instead. (See *ibid.*)

"Rearranging job responsibilities"

Fourth and finally, to prevail on a BFOQ defense, an employer must prove it "'could not rearrange job responsibilities'" to reduce the necessity of the supposed BFOQ. (*Bohemian Club v. Fair Employment & Housing Com.*, *supra*, 187 Cal.App.3d at p. 19 [quoting *Hardin v. Stynchcomb* (11th Cir. 1982) 691 F.2d 1364, 1370-71].) Indeed, courts have emphasized that "it would be impossible to prove a BFOQ defense without 'demonstrat[ing] that . . . alternative approaches . . . are not viable.'" (*Ambat v. City and County of San Francisco*, *supra*, 757 F.3d at p. 1025.) And, once more, this element is reaffirmed by the jury instructions, which require the defendant employer to prove that "it was impossible or highly impractical for [name of defendant] to rearrange job responsibilities to avoid using [protected status] as a job requirement." (CACI 2501.)

For example, the Eleventh Circuit held in *Hardin v. Stynchcomb* that a jail's gender-specific policy for hiring deputy sheriffs could not be a BFOQ where the employer failed to prove it could not "rearrange job responsibilities so that female deputies assigned to the male section of the jail [would] not have to perform duties that impinge upon inmate privacy rights." (*supra*, 691 F.2d at p. 1374.) In other words, where an employer fails to prove the actual infeasibility of assigning a particular employee to a position

that would not implicate the employer's concern, any up-front prohibition on a class of such employees is invalid. (See *ibid.*)

B. The trial court either confused or omitted each of the four required BFOQ elements.

According to the trial court's formulation, a job requirement qualifies as a valid BFOQ as long as it relates to the essence or central mission of the employer's business. (See 5 AA 930.) But this approach would transform the multi-pronged test outlined in the cases, regulations, and jury instructions into a singular and faulty inquiry. It must be reversed as legal error.

As a preliminary matter, the trial court confused the one element it addressed. Specifically, the court stated multiple times that a BFOQ must "relate to" the essence of the business. (See 5 AA 919, 930.) But to be a BFOQ, the job qualification at issue must be "reasonably necessary" to that essence. (*Ambat v. City and County of San Francisco*, *supra*, 757 F.3d at p. 1025; accord CACI 2501.) In other words, to satisfy this element, the employer must demonstrate the criterion is in fact "reasonably necessary—not merely reasonable or convenient." (*Teamsters Local Union No. 117 v. Wash. Dept. of Corrections* (9th Cir. 2015) 789 F.3d 979, 987-88 [internal quotation marks omitted].)[15]

[15] Although the Supreme Court observed in *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.* (1991) 499 U.S. 187, 203, that "a job qualification must relate to" the employer's "essence," its emphasis there was on the latter term; in other words, a BFOQ must concern essential, not tangential aspects of the business—as the dissent there would have it.

On this point, the Ninth Circuit in *Harriss* admonished the trial court there for similar confusion, where the latter had ruled a BFOQ can arise where the job requirement is "reasonable" in light of safety concerns, as opposed to "reasonably necessary." (*Harriss v. Pan Am. World Airways, Inc.*, *supra*, 649 F.2d at p. 677.) As the Ninth Circuit explained, lowering the "necessity" requirement would "unnecessarily broaden the BFOQ defense which the Supreme Court characterized . . . as 'an extremely narrow exception.'" (*Ibid.*) The trial court's seeming diminishment of the "necessity" requirement here is likewise concerning.

But even worse, the trial court's BFOQ ruling eliminates the other three elements of the defense altogether. Most egregiously, it nowhere mentions or applies the required showing that "all or substantially all" members of the affected class are unable to safely and efficiently perform the job. Indeed, the trial court failed to make any findings on, or even describe, any class at all—much less a protected one. On that ground alone, its ruling is unsound. If that were not bad enough, the court also ignored the requirement that the employer prove the infeasibility of individually determining whether each applicant could safely and efficiently do the job. Finally, the trial court made no mention of the element requiring the employer to prove it cannot rearrange responsibilities to avoid using the proffered BFOQ as an absolute job requirement.

To support its single-element "essence of the business" test, the trial court relied on *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.* (1991) 499 U.S. 187 [*UAW*], and *Everson v.*

Michigan Department of Corrections (6th Cir. 2004) 391 F.3d 737 [*Everson*]. (See 5 AA 930.) But those very cases confirm that the essence of the business alone is insufficient as a matter of law to establish a BFOQ in any event.

In *UAW*, the Supreme Court held that excluding women of childbearing capacity from jobs involving potential lead exposure was not a BFOQ because the employer failed to prove this requirement fell "within the 'essence' of the particular business." (*UAW*, *supra*, 499 U.S. at p. 206.) Since the BFOQ defense failed on this ground, the Court noted it need not decide "whether all or substantially all women would be unable to perform safely and efficiently." (*Id.* at p. 207.) Likewise, in *Everson* the Sixth Circuit framed the "essence" factor as but one of several elements, including whether "reasonable alternatives exist" and "all or substantially all" members of a protected class could not perform the job. (*Everson, supra*, 391 F.3d at pp. 748-749.) The trial court eliminated these other elements, contrary to *UAW* and *Everson*.

Indeed, the trial court stands alone in treating the BFOQ defense as a single-element standard. Rather, established case law makes abundantly clear that the "essence of the business" inquiry is a necessary but not sufficient element of the defense. In *Ambat*, for example, the Ninth Circuit held the employer showed its rule was "reasonably necessary to the essence" of its business. (*Ambat v. City and County of San Francisco*, *supra*, 757 F.3d at p. 1017.) But instead of ruling for the employer on that basis, the court denied summary judgment because there remained a fact dispute regarding whether the "all or substantially all" element was met.

(*Ibid.*) By eliminating that element entirely—and two others as well—the trial court here erred as a matter of law.

Perhaps the trial court's error resulted from its confusing two distinct legal concepts: BFOQ and "essential functions." Witness the court's misplaced reference to a disability case for the proposition that the "elimination of an essential function is not a reasonable accommodation." (5 AA 928 [quoting *Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 375].) The "essential functions" or "essential duties" factor, however, arises only in the disability context under subdivision (a)(1) of Section 12940. (See Gov. Code § 12940, subd. (a) & (a)(1) [forbidding disability discrimination but conditioning any such claim on a plaintiff's ability to perform the job's "essential duties even with reasonable accommodation"].) It has no application to the BFOQ prefatory clause of Section 12940 or the religious-accommodation claim here under subdivision (*l*)(1). (See Gov. Code § 12940, subd. (*l*)(1) [forbidding refusal to hire based on conflict with religious practice absent undue hardship, with no "essential duties" pre-condition].)

FEHA does not provide a one-size-fits-all framework. Nor can courts graft a defense from one distinct statutory provision onto another—particularly where that defense is conspicuously absent from the latter's text. (See *In re Dakota H.* (2005) 132 Cal.App.4th 212, 225-226 [courts should not read statutes to "include omitted language"].)[16]

[16] CDCR cites a Senate Judiciary Committee memorandum's reference to "essential duties" in the religious-accommodation context. (See 4 AA 758-759; 4 AA 792.) But whatever that memo's

Unfortunately, the trial court's decision abounds with similarly misplaced authority. For example, the court cites a disability-accommodation case for the proposition that it is a "common-sense idea . . . that if one is not able to be at work, one cannot be a qualified individual." (5 AA 927 [quoting *Samper v. Providence St. Vincent Medical Center* (9th Cir. 2012) 675 F.3d 1233, 1237-38].) But that proposition flouts the applicable religious-accommodation provision of FEHA, which explicitly protects the "observance of a Sabbath" when one is not able to be at work. (Gov. Code § 12940, subd. (*l*)(1).) This is further proof FEHA's religious and disability frameworks are distinct, and the trial court's particular use of the latter for the former was error.

Regardless, FEHA's very mention of the "essential duties" condition in the disability subdivision shows that such duties are different from BFOQs. Indeed, if BFOQs and essential duties were interchangeable, then subdivision (a)(1)'s discussion of essential duties would be redundant given the BFOQ exception in FEHA's prefatory language. (See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012) p. 174 ["If possible, every word in every provision is to be given effect (*verba cum effectu sunt accipienda*) . . . None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence."] [Italics in original.].) The concepts are not, as the trial court would have it, synonymous.[17]

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drafters meant by that phrase, FEHA's plain text refers only to "undue hardship." (See Gov. Code § 12940, subd. (*l*)(1).)

[17] The trial court's analogy to *Quinn v. City of Los Angeles* is similarly inapt. (See 5 AA 928.) *Quinn* was not decided on a BFOQ;

In sum, even if the BFOQ defense applied to neutral job requirements—it does not—the trial court committed additional reversible error by confusing or omitting its elements.

C. The trial court's erroneous interpretation has dire implications for workers across the state.

The BFOQ defense appears in the "prefatory language" of Section 12940. (5 AA 920; Gov. Code § 12940.) Consequently, or as the trial court put it, all "subsequent requirements set forth in the statute"—like those prohibiting discrimination because of race, gender, sexual orientation, gender identity, disability, or national origin—"do not apply" where the BFOQ is triggered and its requirements are met. (5 AA 922.)

As a result, whenever courts loosen the definition of BFOQ beyond its meaning as a very limited "term of art" defense, all anti-discrimination law is threatened. Or as Judge Posner observed, "if the defense of bona fide occupational qualification were broadly construed . . . very little sex discrimination . . . [or] discrimination based on religion or national origin . . . would be forbidden." (*Internat. Union, United Automobile, Aerospace & Agricultural Workers of America v. Johnson Controls, Inc.* (7th Cir. 1989) 886 F.2d 871, 903 (dis. opn. of Posner, J.), rev'd (1991) 499 U.S. 187.)

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rather, Quinn lost for failing to make out a prima facie case for discrimination—a distinct claim not at issue here. (*Quinn v. City of Los Angeles* (2000) 84 Cal.App.4th 472, 480.) Moreover, Brown's accommodation-based claim does not contain the "qualification" element that was dispositive in *Quinn*. (See *Cal. Fair Employment & Housing Com. v. Gemini Aluminum Corp.* (2004) 122 Cal.App.4th 1004, 1011 [outlining prima-facie requirements for Section 12940, subdivision (*l*)(1) claims].)

That is why courts vigilantly safeguard this area of law to ensure a BFOQ remains an "extremely narrow exception to the general prohibition of discrimination." (*Bohemian Club v. Fair Employment & Housing Com.*, *supra*, 187 Cal.App.3d at p. 19.) Indeed, such caution adheres to both the specific wishes of our legislature, which "intended" that those applying discrimination law "narrowly construe the BFOQ defense," as well as its global command that FEHA's protection of employees "shall be construed liberally." (*Sterling Transit Co. v. Fair Employment Practice Com.*, *supra*, 121 Cal.App.3d at p. 797; Gov. Code § 12993, subd. (a).)

The trial court's approach violates these directives on many fronts. For it not only expands BFOQ to facially neutral policies, it makes it easier to meet the defense by disposing of all but one of its elements and confusing the one element it addressed. The resulting proposition of law—that all facially neutral policies that relate to the essence of a business qualify as BFOQs, regardless any class showing, individual testing possibility, or the existence of alternatives—enables a rash of concerning practices against not only correctional officers but other workers across California.

To start, if CDCR's "availability standards" are a BFOQ, then CDCR will be instantly licensed to fire other FEHA-protected individuals by citing the same policy. Specifically, the trial court found CDCR has a BFOQ in its policy requiring "willing[ness] to work at any time and under all circumstances." (5 AA 916.) If that is a valid legal conclusion, CDCR can now fire many officers who would otherwise be protected by FEHA, including:

- all medically impaired applicants, like cancer patients, who require routine treatment and are not willing to work when it conflicts with their medical appointments;

- all women anticipating pregnancy who are not willing to work if they become pregnant and need to take time off around their child's birth;

- all military reservists with routine commitments like regular weekend training, who are not willing to work during the weekends when they are summoned to train;

- all observant Muslims who are religiously obligated to pray in congregation on Fridays at noon and are therefore not willing to work during this period; and

- all observant Jews, Mormons, and other Sabbatarians who are not willing to work on their respective Sabbaths or religious holidays.

After all, if CDCR can establish a willingness-to-be-available-24/7/365 criterion as a BFOQ, then anyone who fails that criterion "may be excluded from employment without inquiry as to whether certain members of the class may, in fact, be capable of safe and efficient job performance." (*Sterling Transit Co. v. Fair Employment Practice Com.*, *supra*, 121 Cal.App.3d at p. 796.)

And if this standard is a valid BFOQ in the prison context based on the trial court's analysis, it will also be one in other contexts. According to the court's theory, 24/7/365 willingness to work is a BFOQ whenever it relates to the essence or mission of the business and regardless any class considerations, individual assessment, or alternatives. (See 5 AA 919). There are surely workers in many other fields for whom this test should strike fear.

For example, every emergency room in our state needs a rotating cast of doctors and nurses to be available any time. Under

the trial court's theory that an employer can satisfy the BFOQ defense by merely showing, without any further examination, that its policy relates to its central mission, every hospital could fire all observant Jewish doctors and nurses—even if there are hundreds of possible schedules without Sabbath work, there is no shortage of doctors available, unexpected calls are extremely rare, and non-Jewish doctors are also routinely unavailable. For that matter, hospitals could fire all the religious observers, medically-impaired, military members, and pregnancy-age women discussed above.

Not only could hospitals institute this availability BFOQ, but so too could police forces, fire departments, 9-1-1 dispatch centers, paramedic providers, nursing homes, security services, ski patrol, the military and national guard, and all other employers for whom safety depends on around-the-clock staffing. The trial court reassured that, under its approach, Brown could still find employment in "retail sales." (5 AA 926.) But that is hardly solace if California wishes to meaningfully safeguard equal employment opportunity for all its citizens.

Beyond unconditional availability-related policies, there are other disturbing approaches that could be sanctioned as well. One striking example for other vulnerable religious minorities: a clothing retailer like Abercrombie & Fitch could refuse to hire all women who wear headscarves as long as their "Look Policy" is part of their central mission of selling clothing. After all, the trial court's logic would provide a "prefatory clause" BFOQ end-around of the Supreme Court's approach in *E.E.O.C. v. Abercrombie &*

Fitch Stores, Inc. (2015) 135 S.Ct. 2028, which condemned in no uncertain terms such blanket policies.

Intended or not, the trial court's application of BFOQ to neutral job rules, coupled with its insistence those rules need only relate to the essence of a business without further analysis, will convert that rare exception into a weapon of choice for employers trying to avoid their obligations under FEHA. It cannot stand.

III. CDCR FAILED TO PROVIDE SUBSTANTIAL EVIDENCE ON EACH OF THE BFOQ ELEMENTS, RESULTING IN FURTHER REVERSIBLE ERRORS.

A. CDCR provided no substantial evidence that 24/7/365 willingness to work is reasonably necessary for the operation of its business.

In supporting the purported BFOQ that correctional officers be willing to work at any time of any day, the trial court pointed to theoretical and generic safety concerns, as well as the SPB job description. (5 AA 913-930.) But CDCR failed to provide substantial evidence that willingness to work at any time of any day is necessary to its business operation in practice. Rather, as CDCR observed in its closing brief at trial, there are a "variety of other situations where an officer may be excused from the requirement to have the willingness to work 24/7." (4 AA 755.)

Specifically, the "necessity" element requires an employer to show a "concrete" basis that the job criterion is in fact reasonably necessary and that alternatives have been "reasonably considered and refuted." (*Teamsters Local Union No. 117 v. Wash. Dept. of Corrections*, *supra*, 789 F.3d at pp. 987-88 [quotation marks omitted].) To say something is necessary is to say it cannot be done

without. (See *id.* at p. 987 [necessity means the "*essence* of the business operations would be undermined" [quotation marks omitted].) But by allowing unwillingness or unavailability for myriad reasons, CDCR cannot claim willingness to work at any time is necessary. Nor did CDCR offer studies, data, or other system-wide evidence to the contrary—by an expert or otherwise.[18]

Make no mistake, if it were truly necessary for each and every one of its officers to be willing to work at any time of any day, CDCR's operations would cease. CDCR, for example, "absolutely" employs officers in the military reserves who attend monthly weekend trainings when they are "not willing to work at any time and under all circumstances." (2 RT 605:11-606:11, 798:1-14; 3 RT 1181:13-20; 5 AA 916.) Similarly, CDCR "absolutely" does not deny employment to those anticipating pregnancy who "plan on taking parental leave." (2 RT 529:2-22, 799:5-9.) CDCR even employs other Sabbatarians. (1 RT 262:12-263:18, 336:12-28.)

CDCR's noncompliance with its proffered availability policy extends to emergencies as well. For example, CDCR would not discipline an officer for drinking on his day off, even though he would be unavailable if called in for an emergency. (1 RT 410:25-

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[18] The trial court also accorded deference to prison administrators. But such BFOQ deference "is not automatic;" rather, it depends on the "characteristics of the decision-making process," including such considerations as whether "relevant surveys or studies" were conducted, front-line officials were consulted, other jurisdictions were evaluated, or systemic data was developed. (*Ambat v. City and County of San Francisco*, *supra*, 757 F.3d at pp. 1026-27; see also *Teamsters Local Union No. 117 v. Wash. Dept. of Corrections*, *supra*, 789 F.3d at p. 988.) CDCR presented none of this evidence, so no deference is due.

411:7; 2 RT 527:10-17, 612:28-613:3; 3 RT 1194:15-1195:3.) It also would not discipline an officer who hikes out of cell service on her day off, even though she would not be available in an emergency. (1 RT 412:13-413:6.) Likewise military reservists who would not be willing or available to come in for an emergency during their training. (2 RT 605:11-606:11, 798:1-14; 3 RT 1181:13-20.)

In other words, CDCR cannot prove that willingness to be available at any time is necessary to its business when it employs officers who fail that requirement on a regular basis in practice—regardless of what they said in the application process. On that note, if it is truly necessary for officers to be willing to work at any time and circumstance, CDCR should fire not only all these officers but anyone who has ever been unwilling to work on any occasion—including, but not limited to, for reasons otherwise protected by Section 12940. Alas, that could include every officer in its force.

Finally, the trial court's BFOQ finding fails for the further reason that there is no factual basis to conclude a 24/7/365 commitment was needed in each of the myriad facilities and posts to which Brown could have been assigned. (See *Bohemian Club v. Fair Employment & Housing Com.*, *supra*, 187 Cal.App.3d at p. 19 [pegging BFOQ to particular job].) As the Ninth Circuit insisted in refusing to defer to a catch-all safety concern in the prison context, a concrete showing of harm arising from the particular job assignment is indispensable to a BFOQ defense—including what relative level of danger each facility poses, what shifts are involved, what housing units are affected, etc. (*Breiner v. Nev. Dept. of Corrections* (9th Cir. 2010) 610 F.2d 1202, 1211-13.)

As Captain O'Brien put it, "each situation is different" across all prisons and there is no "one-size-fits-all policy"; moreover, he added, "[s]ome [prisons] might be able to accommodate more than others, some can't." (2 RT 789:26-790:10.) The trial's lone expert likewise testified that the use of overtime, if any, "depends on what prison you're at." (2 RT 973:28-974:10.) Because CDCR offered no necessity evidence for each of the facilities where Brown could have worked, any blanket exclusion fails for that reason as well.

B. CDCR failed to present any evidence that "all or substantially all" members of a protected class cannot safely and efficiently perform the job.

Perhaps most strikingly, CDCR cannot establish a BFOQ because it provided no evidence "all or substantially all" members of the affected class—much less a protected one—cannot safely and efficiently perform the duties of a correctional officer. Rather, the proceedings below focused solely on Teresa Brown, and not on the capabilities of any broader class. Indeed, CDCR itself proclaimed in a verified interrogatory that its actions were not taken "based on any protected class or activity." (3 AA 401.) Consequently, there is no "factual basis" for a BFOQ. (*Bohemian Club v. Fair Employment & Housing Com.*, *supra*, 187 Cal.App.3d at p. 19.)

In fact, the trial court precluded exploration of any class. In discovery, for example, it refused to compel CDCR to produce information on whether other correctional officers who observed the Sabbath, or were comparably unavailable, could perform the job. (3 AA 460-462.) Similarly, in rejecting Brown's post-trial motion to amend her complaint to add a request for a broader change to CDCR's religious-accommodation policy, the court made

clear that the scope of evidence and remedies at trial was limited to "historical facts that happened when this lady went into the hiring process;" they therefore could not concern whether other members of a class had or could perform the job. (3 RT 1248:4-5.)

Without class evidence, CDCR cannot establish the BFOQ requirement that all or substantially all members of that class are unable to safely and efficiently do the job. (*Sterling Transit Co. v. Fair Employment Practice Com.*, *supra*, 121 Cal.App.3d at p. 797.)

C. CDCR presented no evidence that individual testing is infeasible.

Furthermore, CDCR presented no evidence it was infeasible to individually determine whether each applicant in the affected class could safely and efficiently perform the job. (See CACI 2501 ("[Defendant] must prove . . . it was impossible or highly impractical to consider whether each [applicant] was able to safely and efficiently perform the job"].) Recall this element is meant to establish that protected-class membership must be used as a proxy for one's ability to work safely and efficiently because that ability cannot, as a practical matter, be individually assessed using non-discriminatory criteria instead. (*Ambat v. City and County of San Francisco*, *supra*, 757 F.3d at p. 1029.)

Of course, this "individual testing" requirement makes little sense here, where CDCR's policy does not consider any class membership but purports to apply to everyone. Yet even if we contort this element to cover the policy at hand, CDCR still provided no evidence at all that individual determinations are infeasible. To the contrary, such determinations underpin CDCR's

rightful concession that there are "a variety of other situations where an officer may be excused from the requirement to have the willingness to work 24/7." (4 AA 755.)

Indeed, for an example of individual testing one need only look at CDCR's focus at every stage of this case on the particulars of Teresa Brown. Among other things, CDCR uses explanatory forms and open-ended interviews to assess availability, and trumpets supposed individual distinctions among those unwilling to be available 24/7. (See 1 RT 140:17-141:7; 2 RT 488:20-490:10, 494:19-495:19, 711:14-712:1, 873:2-874:10; 4 AA 755.) Individual assessment is not only possible, CDCR does it.

D. CDCR failed to provide substantial evidence that it is impossible or highly impractical to rearrange job responsibilities as an alternative.

Finally, CDCR did not provide substantial evidence to prove it is "impossible or highly impractical . . . to rearrange job responsibilities to avoid using protected status as a job requirement." (CACI 2501 [brackets omitted]; see also *Bohemian Club v. Fair Employment & Housing Com.*, *supra*, 187 Cal.App.3d at p. 4 ["[T]he employer must also bear the burden of proving that because of the nature of the operation of the business they could not rearrange job responsibilities . . . in order to reduce the BFOQ necessity."] [Internal quotations omitted].)

At the risk of beating a dead horse, CDCR could not have proved it was impossible to avoid using protected status as a job requirement, because, well, CDCR did not purport to use protected status as a job requirement. But even twisting this inquiry to apply

to CDCR's facially neutral policy, there is no substantial evidence that alternative approaches are not viable.

To the contrary, CDCR has a host of mechanisms—such as management-determined posts, shift swaps, or assignments where involuntary reporting is rare to non-existent—that could fulfill a prison's staffing needs without requiring 24/7/365 willingness to work. CDCR uses discretionary positions to accommodate a variety of scheduling needs—including the Sabbath—and can even assign officers to jobs that work only on certain days and are not subject to overtime. (1 RT 288:3-289:3, 353:6-354:18; 2 RT 863:18-864:24, 886:19-887:4, 890:13-17, 895:22-896:19, 898:1-7, 990:9-992:1.)

CDCR also allows officers to swap for days off (1 RT 311:10-27, 321:10-28; 2 RT 732:18-24); employs relief officers for vacancies when officers take vacation or leave (1 RT 322:4-7, 354:9-18, 404:5-16, 410:8-24; 2 RT 879:28-880:6, 895:22-896:19); and, if an officer is unavailable, CDCR goes to the next person on the list at little, if any, cost (1 RT 413:22-414:24; 2 RT 678:13-22, 996:17-997:4; 3 RT 1182:10-1183:4). And, again, because there was no evidence from most of the prisons Brown could work, CDCR cannot even show its stated job rule—to which alternatives would refer—is necessary.

To avoid using 24/7/365 willingness to work as an absolute requirement, CDCR can simply continue with the mechanisms it already has in place—whether for the "variety of other situations where an officer may be excused from the requirement to have the willingness to work 24/7" or otherwise. (4 AA 755.) And, where the situation requires, CDCR can seek to prove undue hardship—even if, as Brown contends, that effort failed in her case.

IV. CDCR WAIVED THE BFOQ DEFENSE.

In any event, this Court need not even address the trial court's many BFOQ errors, because CDCR waived the defense. Affirmative defenses must be pleaded. (*Richter v. Adams* (1937) 19 Cal.App.2d 572, 576.) Further, such pleading must be "specific[ ] and separately stated." (*Fairfield v. Hagan* (1967) 248 Cal.App.2d 194, 206, *abrogated on other grounds*.) Accordingly, "[a] party who fails to plead affirmative defenses waives them." (*Cal. Academy of Sciences v. County of Fresno* (1987) 192 Cal.App.3d 1436, 1442.) For a plaintiff "could not be expected to meet special defenses which are not pleaded" but has a "right to be protected against them." (*Jetty v. Craco* (1954) 123 Cal.App.2d 876, 880.)

These strict pleading rules apply no less in the BFOQ context. (See Chin et al., Cal. Prac. Guide: Employment Litigation ¶¶ 19:473 & 19:486 (The Rutter Group 2016) [designating BFOQ a "common" affirmative defense that must be specially pleaded]; *Tullis v. Lear School, Inc.* (11th Cir. 1989) 874 F.2d 1489, 1490-91 [rejecting BFOQ that was neither pleaded nor raised before trial].) An employer therefore cannot prevail on the BFOQ defense where it did not specifically and separately plead it.

The trial court found CDCR "sufficient[ly]" pleaded a BFOQ. (5 AA 929.) But CDCR did nothing of the sort. In its answer, rather, CDCR pleaded several affirmative defenses, but nowhere did it mention BFOQ or any of its elements. CDCR pleaded, in relevant part:

> SIX. The Complaint fails to state a claim against defendant under the California Fair Employment and Housing Act ("Gov. Code §§ 12900, et seq.") because the actions taken by

> defendant with regard to plaintiff, and the policies, procedures and standards applied to plaintiff, were job related and consistent with business necessity.

(3 AA 508.)

The trial court reasoned CDCR "perhaps inartful[ly]" raised a BFOQ by pleading its policies, procedures and standards were "job related and consistent with business necessity." (5 AA 929.) However, these are likewise terms of art, but for a distinct defense. (*Harriss v. Pan Am. World Airways, Inc.*, *supra*, 649 F.2d at p. 674 fn. 2 [explaining BFOQ and "business necessity" concern "different types of Title VII violations"].) As the Court of Appeal has observed, BFOQ and business necessity "have distinct conceptual bases." (*Johnson Controls, Inc. v. Fair Employment & Housing Com.*, *supra*, 218 Cal.App.3d at p. 540 ["It is conceivable that a business justification which would not suffice as a BFOQ for class-based disparate treatment might, nevertheless, suffice under the 'adverse impact/business necessity' standard"].)

Alternatively, the trial court reasoned CDCR otherwise gave Brown "clear notice" of BFOQ when it "challenged [her] initial qualifications" at the summary-adjudication stage. (5 AA 929.) As with the court's misunderstanding of the disparate-impact defense pleading, however, the "qualification" criterion is distinct to discrimination claims and the motion's memorandum therefore invoked it only for Brown's claim under subdivision (a)(1), not her (*l*)(1) claim. (See 3 AA 533-535; 598-600 [laying out distinct prima facie cases].) Indeed, CDCR itself rightly refused to extend the criterion to the (*l*)(1) claim at the motions stage, showing it knew the difference. (See 3 AA 518 [moving on qualification grounds for

the (a)(1) claim, but only on hardship grounds for the (*l*)(1) claim].) Likewise the law-and-motions judge, who limited his "qualification" analysis to the (a)(1) claim. (See generally 3 AA 597-603.)[19]

Regardless, the failure to plead a BFOQ defense prejudiced Brown. Among other things, if BFOQ was indeed pleaded, Brown should have been granted her request for documents showing how CDCR treated officers who sought similar accommodations, for either religious or non-religious reasons—which goes directly to whether these officers were able to do their jobs. (See Cal. Code. Regs., tit. 2, § 11010 [employer "must prove that the practice is justified because all or substantially all of the excluded individuals are unable to safely and efficiently perform the job in question"].) But the trial court refused that discovery. (See 3 AA 460-462.)

Likewise, at trial, Brown could have put on evidence and cross-examined CDCR regarding which supposed class it was excluding, and cross-examined witnesses on their experience with all members of that class. But any such effort was precluded by the court's insistence that the trial was limited to "historical facts that happened when this lady went into the hiring process" (3 RT 1248:4-5), or "a challenge to what allegedly happened to Plaintiff alone" (4 AA 806), and not "an exploration of [CDCR's] entire

[19] The trial court's conflation of job qualifications and BFOQ shows—yet again—its fundamental misunderstanding of BFOQ. In finding Brown was on notice of the BFOQ defense, for example, the court repeatedly refers in the plural to CDCR's variously stated "availability requirements" as constituting "bona fide occupational qualifications." (See, e.g., 5 AA 929.) Because the "Q" in BFOQ refers to protected status, plural references are wholly inapt.

practices of accommodation, past and present" (*ibid.*). But unless CDCR's business has changed—and there is no evidence of that—then surely once a BFOQ, always a BFOQ.

It is hard to imagine how Brown was not prejudiced by the unpleaded BFOQ if the matter of how CDCR treats other unavailable employees was out of bounds.

V. THIS COURT CANNOT ALTERNATIVELY AFFIRM ON THE GROUND OF UNDUE HARDSHIP.

As the trial court stressed in the statement of decision, it has reserved judgment on whether accommodating Teresa Brown would cause undue hardship, as that distinct defense is understood and applied under FEHA. (5 AA 931-932.) It also indicated further that its ruling on that fact-bound question is uncertain. (*Ibid.*) The proper approach, therefore, is remand for the trial court to address this unresolved issue in the first instance. (See *Wise v. Clapper*, *supra*, 257 Cal.App.2d at pp. 776-777 [outright reversal is required where trial court "failed to find" on a material issue and "it being uncertain what findings it would have made"].)

After all, there is ample room to find CDCR failed to prove undue hardship under the applicable legal test, which requires the employer to show through concrete, non-speculative proof that no reasonable accommodation of the particular plaintiff was possible absent "significant difficulty or expense." (Gov. Code §§ 12926, subd. (u) & 12940, subd. (*l*)(1); *Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 370; *Opuku-Boateng v. State of Cal.* (9th Cir. 1996) 95 F.3d 1461, 1474.) At a minimum, CDCR offered no evidence for dozens of facilities Brown could have served, nor

did it consider such evidence in rejecting her. As Brown made clear in her post-trial brief, she would fully expect a ruling in her favor on the undue-hardship question. (See generally 5 AA 815-841.)

CONCLUSION

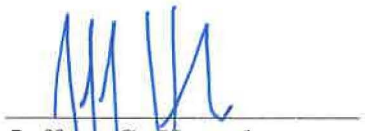
CDCR's BFOQ defense fails for several independent reasons. At the most fundamental level, that "term of art" defense is simply inapplicable to the neutral supposed job requirement at issue in this case. Beyond that, the trial court improperly interpreted the BFOQ defense in any event by eliminating all but one of its elements and confusing the remaining element it did address.

Furthermore, even assuming the BFOQ applies and the proper legal standard was actually used, CDCR failed to provide substantial evidence. Indeed, it submitted no evidence at all on multiple required elements of a BFOQ. Finally, CDCR waived the defense by not raising it until—and then barely at—trial, to the particular prejudice of Brown's ability to disprove its elements.

If the trial court's unprecedented and misguided approach to the BFOQ standard is unchecked, California's safeguards against employment discrimination and non-accommodation—long seen as the most robust in the country—will be uniquely and forever weakened. And among the most direct casualties will be FEHA's express promise to Sabbath observers and insistence that, before they can be denied a job because of that observance, an employer must make a particularized and strict showing of hardship.

This Court should reverse and remand.

November 22, 2019

By:  

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CERTIFICATE OF WORD COUNT

(Rule of Court 8.204, subd. (c)(1))

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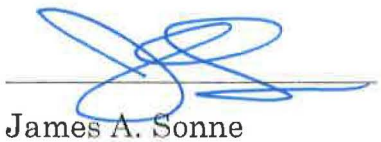
Dated: November 22, 2019



James A. Sonne

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SANTA CLARA

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Santa Clara, State of California. My business address is Crown Quadrangle, 559 Nathan Abbott Way, Stanford, CA 94305-8610.

On November 22, 2019, I served true copies of the following document(s) described as **APPELLANT'S OPENING BRIEF and APPELLANT'S APPENDIX** on the interested parties in this action as follows:

**** SEE ATTACHED SERVICE LIST**

☒ **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to **the trial court judge only** at the address listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Mills Legal Clinic at Stanford Law School for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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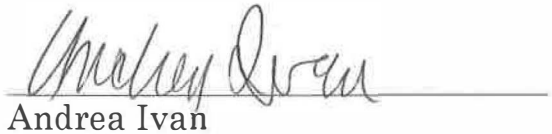
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 22, 2019, at Stanford, California.



Andrea Ivan

SERVICE LIST

TERESA BROWN v. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION
COA Case No. C089340 • SCSC Case No. 34-2015-00176321

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Sacramento County Superior Court Clerk Sacramento County Superior Court 720 9th St. Sacramento, CA 95814	Trial Court • Case No. 34-2015-00176321 Copy (Brief only) via U.S. Mail
Clerk of the Court Supreme Court of California 350 McAllister Street San Francisco, California 94102-3600	Electronic Copy (CRC, Rule 8.44(b)(1)) *Electronic Copy* via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling)