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 REPLY BRIEF

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INTRODUCTION

This appeal arises from a final judgment after a bench trial with a written statement of decision. In ruling for the defense in that decision, the trial court relied on a single legal theory while expressly reserving judgment on all others—including those Defendant now advances on appeal. In her opening brief, Plaintiff explained why the trial court erred in the singular conclusion it made. In response, Defendant concedes the error yet seeks to save the judgment on alternative theories the trial court refused to decide. But this Court cannot affirm on grounds the trial court expressly chose not to rule on in a statement of decision—especially where, as here, they involve fact-intensive matters and the appellant is likely, if not certain, to prevail on them. For this reason alone, this Court must reverse and, at the least, remand for further proceedings.

In allowing Defendant CDCR to reject Plaintiff Teresa Brown as a correctional officer due to her Sabbath conflict, the trial court found that CDCR's supposed requirement that all officers be willing "to work at any time and under all circumstances" constitutes a "bona fide occupational qualification" (BFOQ) for the job under the preface to Section 12940 of the Fair Employment and Housing Act (FEHA). Then, having made that finding, the court refused to decide whether CDCR proved it could not otherwise reasonably accommodate Brown absent undue hardship. As the trial court noted, that unresolved question involves a particularized inquiry distinct from BFOQ that concerns CDCR's ability to hire Brown as a one-off proposition under Section 12940, subdivision (*l*)(1).

As described in Brown's opening brief, however, the court's BFOQ ruling is wrong for several reasons. For starters, BFOQ is a "term of art" defense that applies only in the context of job rules that discriminate on

protected status, not to neutral job rules for which an individualized accommodation might be needed and required—like CDCR's 24/7/365 availability pledge. Moreover, even if a BFOQ defense could theoretically apply to CDCR's policy, the trial court failed to analyze the four required elements to prove that defense—which include class-wide showings of necessity and the lack of alternatives—and, furthermore, there was no substantial evidence for them anyway. Finally, CDCR waived the BFOQ defense by waiting until trial to raise it—and to Brown's prejudice.

In its brief, CDCR nowhere resists the conclusion it waived the BFOQ defense. Nor does it defend the trial court's failure to analyze the four BFOQ elements, or argue there was substantial evidence for any of them. Rather, CDCR admits that a BFOQ analysis "may not fit" because there is no "facially discriminatory policy usually present in BFOQ cases." (RB 12, 35.) Instead, CDCR asks this Court to reimagine the case "through a reasonable accommodation and/or undue hardship lens," or as a matter of "business necessity" or "minimum standards." (RB 35, 50-57.) In other words, CDCR concedes the trial court's BFOQ ruling was wrong yet clings to hope this Court will affirm on other grounds.

CDCR hopes in vain. Code of Civil Procedure Section 634 plainly forbids a reviewing court from drawing inferences on any controverted issues the trial court did not resolve in a statement of decision. And here, the trial court did not just fail to resolve the remaining disputed issue of whether CDCR breached its duty to reasonably accommodate Brown absent undue hardship under Section 12940, subdivision (*l*)(1). The court expressly reserved judgment on that distinct matter—and over Brown's objection, to boot. As the court put it, its BFOQ ruling "remove[d] the question of accommodation from consideration." (5 AA 927.)

Nor do CDCR's alternatives of "business necessity" or "minimum standards" fare any better. Neither was resolved by the trial court in the context of the remaining question of CDCR's liability under Section 12940, subdivision (*l*)(1) that the court reserved. Worse yet, the "business necessity" defense applies only to disparate-impact claims; it is not, as CDCR would have it, an alternative to proving the level of particularized hardship required under subdivision (*l*)(1). Likewise, any supposed "minimum standard" would be subject to this same (*l*)(1) analysis—which, by its terms, covers "any employment requirement." (Gov. Code § 12940, subd. (*l*)(1).) Indeed, the trial court acknowledged this in finding that, absent any BFOQ, Brown had at least "satisfied her burden to establish a prima facie claim" under subdivision (*l*)(1). (5 AA 931.)

Finally, an appellate court's review is further circumscribed by the basic principle that it may not decide fact-intensive issues in the first instance. Rather, it is up to the trial court—especially in the bench-trial context—to weigh evidence, evaluate witnesses, draw inferences, and resolve fact disputes. To that end, the question of whether CDCR proved it could not reasonably accommodate Brown absent undue hardship is a fact-intensive one that cannot now be resolved in CDCR's favor.

In fact, there is ample—if not conclusive—evidence in favor of Brown on both the reasonableness of accommodation and the absence of undue hardship. The former issue concerns whether CDCR proved there was no option to eliminate the conflict. And not only does FEHA protect "observance of a Sabbath" by name and list as options excusing "the person of duties that conflict" or having any such duties "performed at another time or by another person." (Gov. Code § 12940, subd. (*l*)(1).) But CDCR accommodates others in this very manner. (See 4 AA 755 [CDCR

noting "a variety of other situations wherein an officer may be excused from the requirement to have the willingness to work 24/7"].) In its brief, CDCR says accommodating Brown would demand too much of its operations. But those concerns lie in hardship, not reasonableness.

As for undue hardship, FEHA's test is strict: "significant difficulty or expense." (Gov. Code §§ 12926, subd. (u), 12940, subd. (*l*)(1).) And in assessing such difficulty or cost, courts must engage in an exacting and multi-faceted analysis of the employer's financial, logistical, structural, and human resources to accommodate the plaintiff in question. (*Ibid.*) But not only has the trial court yet to conduct this fact-intensive inquiry, CDCR faces a steep—if not futile—climb given its budget and the lack of any evidence on many facilities where Brown could have worked. CDCR argues accommodating Brown would violate the labor contract or raise safety issues. But there is, at a minimum, a bevy of evidence on these matters to prevent ruling in CDCR's favor—including testimony in support of accommodation from the trial's lone substantive expert.

This Court must reverse and remand for further proceedings—or, if it is so inclined, direct entry of judgment for Brown given the lack of any evidence at numerous CDCR facilities.

ARGUMENT

I. CDCR HAS RIGHTLY ABANDONED THE SECTION 12940 PREFATORY DEFENSE OF BFOQ ON WHICH THE TRIAL COURT RELIED IN ITS STATEMENT OF DECISION.

In ruling for CDCR in its statement of decision, the trial court found that CDCR's supposed requirement that all officers be willing "to work at any time and under all circumstances" qualifies as a "bona fide occupational qualification." (5 AA 916, 925.) Because of this finding, which is based on the preface to Section 12940 that excludes a BFOQ

situation from the civil-rights protections that follow in the Section, the court deemed it unnecessary to rule on Brown's accommodation claim. Rather, the court noted, its BFOQ finding "remove[d] the question of accommodation from consideration under Section 12940(*l*)." (5 AA 927.)

As Brown detailed in her opening brief, however, the trial court's reliance on BFOQ was wrong. For the sake of brevity, we will not rehash the entire analysis here—particularly since CDCR abandons the defense in its brief. But several points bear repeating. First, BFOQ is a "term of art" that applies in the rare situation where a policy that discriminates against a protected status—e.g., sex, ethnicity, age—is justified. (*Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 975 fn. 10; *Bohemian Club v. Fair Employment & Housing Com.* (1986) 187 Cal.App.3d 1, 19; see also *Dothard v. Rawlinson* (1977) 433 U.S. 321, 334 [calling BFOQ an "extremely narrow exception"]; AOB 31-33.)

Given this limited application of BFOQ and CDCR's contention in its brief that its policies "do not, facially or otherwise, exclude Sabbath observers," CDCR concedes BFOQ is not the "best" way to view the case and thus provides no BFOQ analysis. (RB 35; see also AOB 33-34 [on nature of BFOQ defense].) Rather, CDCR insists this case should instead be viewed "through a reasonable accommodation and/or undue hardship lens." (RB 35; see also RB 54-55 ["CDCR believes that this case is better resolved as an inability to reasonably accommodate or undue hardship because its Availability Standards do not facially exclude any religious observance."].) Although, as described below, the trial court's restricted statement of decision requires this Court to decline CDCR's invitation to

engage this alternative analysis in the first instance, Brown accepts CDCR's concession on the inapplicability of BFOQ.[1]

Beyond this outright inapplicability of a BFOQ defense to CDCR's availability pledge, the trial court's ruling also fails on the requirements to establish it. Namely, to prevail on a BFOQ defense the employer must prove: (1) the qualification is reasonably necessary to its business; (2) all or substantially all members of the affected class are otherwise unable to safely and efficiently do the job; (3) it is impossible or highly impractical to individually determine whether an applicant can do the job; and (4) it is similarly difficult to rearrange job responsibilities. (See AOB 34-39; CACI No. 2501.) As the Ninth Circuit has thus emphasized, "even in a correctional setting, our test for whether an employer is entitled to a BFOQ defense . . . is purposefully difficult to satisfy." (*Ambat v. City & County of S.F.* (9th Cir. 2014) 757 F.3d 1017, 1031.)

At no point in its statement of decision, however, did the trial court engage in this strict multi-level analysis—a failure Brown raised in her objections to the tentative form of the decision. (See 5 AA 901-903, 913-933; AOB 39-43.) Most strikingly, the court failed to address, or even mention, the latter three criteria: the inability of an entire class to do the job; the infeasibility of individualized assessments; and the infeasibility

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[1] In passing, CDCR cites *Johnson Controls, Inc. v. Fair Employment & Housing Commission* (1990) 218 Cal.App.3d 517 to opine "the BFOQ defense is also available in defense of facially neutral employment practices." (RB 55.) *Johnson Controls*, however, was not describing truly neutral policies that happen to affect certain workers—for which an accommodation can be required—but supposedly neutral policies that are nonetheless used as a pretext for "covert" discrimination—like the one there that did not exclude women from certain jobs on its face, but those with a "possibility of pregnancy." (218 Cal.App.3d at pp. 533, 544 & fn.10.) No such pretext is at issue here.

of rearranging job tasks. (See AOB 40.) Indeed, we still do not know the nature or contours of the relevant class—much less a protected one—that is supposedly at issue, or why members of any such class could not be assessed individually—as Brown purportedly was.

Nor does the lone paragraph in CDCR's brief that attempts to address the BFOQ finding claim that any of the four elements were met. (See RB 54-55.) All CDCR says is it "rightfully requires all of its officers to be available" for safety and security reasons. (RB 57.) But even if this isolated point were accurate—it is not—the need for a given policy is but one step in the analysis. (See CACI No. 2501; see also *Ambat v. City & County of S.F.*, *supra*, 757 F.3d at pp. 1027-1031 [refusing summary judgment to employer based on one factor alone]; AOB 40-41 [analyzing other cases framing BFOQ as a multi-step inquiry].)

Of course, these failures by the trial court and CDCR to engage the four required BFOQ findings make sense given the underlying lack of substantial evidence to support them—a point they likewise ignore. As the trial showed and CDCR has conceded, there are a "variety of other situations wherein an officer may be excused from the requirement to have the willingness to work 24/7." (4 AA 755; AOB 49-50.) Moreover, there was no evidence at all on the necessity of this requirement at myriad facilities where Brown could have worked. (See *Breiner v. Nev. Dept. of Corrections* (9th Cir. 2010) 610 F.3d 1202, 1211-1213 [requiring tailored showing of risk].) In short, CDCR cannot show the availability pledge was necessary to justify its inflexible imposition as a BFOQ.

Furthermore, neither was there substantial evidence to support the other three BFOQ requirements. There was no evidence whatsoever on "all or substantially all" members of a class—much less a protected

one—to analyze their abilities in the face of the open-availability policy. (See *Sterling Transit Co. v. Fair Employment Prac. Com.* (1981) 121 Cal.App.3d 791, 797 [rejecting BFOQ where employer failed to provide class-wide evidence].) Nor was there any evidence to show individualized testing was infeasible; to the contrary, CDCR purported to assess Brown individually. (See *Ambat v. City & County of S.F.*, *supra*, 757 F.3d at p. 1029 [holding there can be no BFOQ where individual testing can be done].) And it is impossible to find that job tasks cannot be rearranged where CDCR concedes it in fact works around its supposed "requirement to have the willingness to work" in a "variety of other situations." (4 AA 755; see also AOB 53-54 [summarizing other situations].)

Finally, the trial court's ruling fails for the further reason that CDCR waived a BFOQ defense—which CDCR again nowhere addresses in its brief. BFOQ is an affirmative defense that must be pleaded. (See Chin et al., Cal. Prac. Guide: Employment Litigation (The Rutter Group 2016) ¶¶ 19:473 & 19:486 [designating BFOQ as a "common" affirmative defense that must be specially pleaded]; AOB 55-58.) And although the trial court excused CDCR's failure to raise BFOQ in its answer or before trial based on references to "business necessity" and job "qualifications" (5 AA 929), these concepts are distinct to disparate-impact and disparate-treatment claims. (AOB 56-57.) They give no fair warning to a plaintiff in a religious-accommodation case. Worse yet, Brown was prejudiced in defending against any BFOQ defense where the trial court paradoxically forbid her from exploring situations apart from her own—a central part of any BFOQ analysis. (See AOB 57-58.)

In sum, the trial court's decision must be reversed because the sole theory on which it relied was not applicable, applied, or pled.

II. THIS COURT CANNOT AFFIRM ON GROUNDS THE STATEMENT OF DECISION RESERVED OR DID NOT RESOLVE; HERE, LIABILITY UNDER SUBDIVISION (*l*)(1).

In the absence of a statement of decision, the Court of Appeal can typically affirm on any ground supported by substantial evidence. (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 267.) But where the judgment follows a statement of decision, the rule is to the contrary. Rather, Code of Civil Procedure Section 634 provides that no implied findings should be made following a statement of decision as follows:

> When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court . . . prior to entry of judgment . . . it shall not be inferred on appeal . . . that the trial court decided in favor of the prevailing party as to those facts or on that issue.

The statement of decision has been called the "touchstone to determine whether or not the trial court's decision is supported by the facts and the law." (*Slavin v. Borinstein* (1994) 25 Cal.App.4th 713, 718.) It is therefore designed to describe both what the trial court decided and what it did not decide, and frame the issues on appeal accordingly. (*Miramar Hotel Corp. v. Frank B. Hall & Co.* (1985) 163 Cal.App.3d 1126, 1129.) As such, a "statement of decision may reveal that the trial court made factual findings in favor of the prevailing party on some disputed issues but not others, thus depriving the prevailing party of the benefit of inferred findings in its favor." (*In re Marriage of Fong* (2011) 193 Cal.App.4th 278, 293-294.)

Moreover, this rule against implied findings is heightened when the trial court "expressly refuse[d]" to decide the issue. (*Reid v. Moskovitz* (1989) 208 Cal.App.3d 29, 32 [holding that even apart from a statement

of decision, "when a trial court expressly refuses to make a finding . . . the Court of Appeal will not presume that the trial court made [it]"]; see also *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 39 Cal.App.4th 1379, 1384 ["When the record clearly demonstrates what the trial court did, we will not presume it did something different."].) And where the non-prevailing party objected to the court's refusal to decide an issue, any argument the Court of Appeal should resolve it is all the more futile. (See *Calloway v. Downie* (1961) 195 Cal.App.2d 348, 351-353 [holding that ambiguity on material issue should be resolved in favor of appellants who objected to trial court's refusal to make findings].)

Here, there was a statement of decision encompassing all issues. It was both requested by Brown at the end of a bench trial and, following comprehensive briefing by the parties, set up by a tentative decision that the trial court indicated—in accordance with Rule of Court 3.1590—would constitute the statement of decision absent objections specifying controverted issues. (3 RT 1235:7-20, 1267:23-1272:10; 4 AA 684-779; 5 AA 815-866, 886.) Brown, in turn, filed objections that, *inter alia*, flagged in detail the tentative's failure to resolve the matter of CDCR's liability under Section 12940, subdivision (*l*)(1). (5 AA 904-907.) And although the trial court stuck to its tentative approach in the ensuing final statement of decision—i.e., relying solely on the BFOQ preface to Section 12940 and refusing to rule on the underlying merits of Brown's claim under subdivision (*l*)(1)—the court noted it took "full consideration of the points raised in Plaintiff's Objections." (5 AA 884-886, 931-934.)[2]

[2] Notwithstanding Brown's request, the court had the right to issue sua sponte the statement of decision in the manner that it did—i.e., through a tentative to which Brown could and did respond. (Cal. Rules of Court, rule 3.1590(c)(1); see also *Slavin v. Borinstein*, *supra*, 25 Cal.App.4th at

Under these circumstances and based on the above-described rules of appellate review, this Court cannot go beyond the BFOQ ruling laid out by the trial court in its statement of decision and accede to CDCR's request to rule in its favor on Brown's claim under Section 12940, subdivision (*l*)(1). This is so for three independent reasons.

First, the trial court's statement of decision rested entirely on the BFOQ defense in the preface to Section 12940, which limits that section's use as follows: "It is an unlawful employment practice, unless based upon a bona fide occupational qualification [for an employer to] . . . ." (See 5 AA 931 [trial court calling BFOQ "dispositive of the Plaintiff's claim"].) Consequently, the court did not resolve the controverted issue of CDCR's liability under Section 12940, subdivision (*l*)(1) for not accommodating Brown. (See RB 32-33 [conceding this distinction].) Or, as the trial court explained, its BFOQ finding "remove[d] the question of accommodation from consideration under Section 12940(*l*)." (5 AA 927.)[3]

Specifically, Section 12940, subdivision (*l*)(1) forbids an employer from refusing to hire someone "because of a conflict between the person's

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pp. 718-719 [describing sua sponte statements of decision, while noting their preclusion of implied findings]; *In re Marriage of Rising* (1999) 76 Cal.App.4th 472, 476 fn. 7 [crediting objections in this context].)

[3] In its brief, CDCR further relies on "business necessity" and "minimum standards" as alternatives to support a BFOQ finding. (RB 50-57.) As detailed below, however, these legal concepts do not apply to religious-accommodation claims under Section 12940, subdivision (*l*)(1), which requires accommodation of "any employment requirement" to the point of undue hardship; rather, they are disparate-impact and disparate-treatment concepts, respectively. (See *post* at 30-34.) But to the present point of this Court being limited to the BFOQ ruling, even if "business necessity" or "minimum standards" applied to (*l*)(1) claims, they are, at a minimum, not BFOQ concepts and therefore have similarly not been resolved by the trial court in its BFOQ-only statement of decision.

religious belief or observance and any employment requirement," unless the employer can demonstrate:

> [T]hat it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties that conflict with the person's religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship, as defined in subdivision (u) of Section 12926.

Section 12940, subdivision (*l*)(1) thereafter notes that "[r]eligious belief or observance" includes the "observance of a Sabbath or other religious holy day or days." While Section 12926, subdivision (u) defines "undue hardship" as "an action requiring significant difficulty or expense, when considered in light of" the following:

> (1) The nature and cost of the accommodation needed;
>
> (2) The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility;
>
> (3) The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities;
>
> (4) The type of operations, including the composition, structure, and functions of the workforce of the entity;
>
> (5) The geographic separateness or administrative or fiscal relationship of the facility or facilities.

Aside from rightly acknowledging that Brown "would establish a prima facie case for accommodation" under Section 12940, subdivision

(*l*)(1), however, the trial court made no findings on any of these matters. (See 5 AA 931.) To the contrary, the court insisted that its BFOQ finding under the preface to Section 12940 meant it was not yet "called upon to determine" liability under subdivision (*l*)(1). (5 AA 932.) In fact, the court went so far as to describe the latter as a distinct "target issue" on which there was the "potential for divergent outcomes." (5 AA 931.)

Second, and relatedly, not only can this Court not affirm on non-BFOQ grounds because the trial court never ruled on them (Code Civ. Proc. § 634), but also for the independent reason that the court "expressly refuse[d]" to make attendant findings. (*Reid v. Moskovitz*, *supra*, 208 Cal.App.3d at p. 32.) In fact, this disallowance of implied findings based on an express refusal by the trial court to rule applies even "in the absence of a request for a statement of decision." (*Id.*)

Here, the trial court described in no uncertain terms its unfinished task as follows:

> But for [its ruling on BFOQ grounds], the Court would be called upon to determine the evidence established the initiation of a particularized inquiry as to whether Plaintiff's Sabbath observance could somehow be accommodated, and whether CDCR had carried its resulting burden to demonstrate that it explored any available reasonable means of accommodating the conflict between Plaintiff's Sabbath observance and the employment that she be willing to work at any time, including nights, weekends, mandatory overtime, and so forth.

(5 AA 932.) This Court cannot "determine" such "particularized" matters, lest it supplant the trial court as factfinder. (See *Tupman v. Haberkern* (1929) 208 Cal. 256, 262-263 [stressing "distinction between the trial and the appellate court under our system, [which] grows out of considerations

of jurisdiction: that it is the province of the trial court to decide questions of fact, of the appellate court to decide questions of law"].)

Third and finally, the trial court's reservation of the controverted matter of liability under Section 12940, subdivision (*l*)(1) occurred over Brown's objection. Indeed, she lodged a detailed response to the court's tentative decision. (5 AA 888-909.) And in that filing, Brown described the unresolved controverted issues of CDCR's supposed good-faith efforts to reasonably accommodate her or purported hardship CDCR might suffer to the point of "significant difficulty or expense" when it comes to job assignments or accommodations. (5 AA 893, 904-907.) The matter has thus, at a minimum, been preserved for future resolution by the trial court, and against implied findings on appeal. (See Code Civ. Proc. § 634 [refusing implied findings on objected-to unresolved issues].)

Any fair reading of its statement of decision shows the trial court took pains to limit itself to ruling on the BFOQ defense. While that ruling was mistaken, this Court must honor that court's choice to reserve ruling on other theories—which, as we will now describe, hold more than the "potential for [a] divergent outcome[]." (5 AA 931.)

III. THIS COURT SHOULD NOT AFFIRM ON THE FACT-INTENSIVE QUESTIONS OF REASONABLENESS OR HARDSHIP UNDER SUBDIVISION (*l*)(1) IN PARTICULAR.

Stripped of a BFOQ finding, the sole remaining inquiry of CDCR's liability under Section 12940, subdivision (*l*)(1) turns on the notoriously fact-intensive matter of its ability to have reasonably accommodated Brown absent undue hardship. As the trial court observed, absent its BFOQ ruling, it would need to decide if "the evidence established the initiation of a particularized inquiry as to whether Plaintiff's Sabbath observance could somehow be accommodated, and whether CDCR had

carried its resulting burden to demonstrate that it explored any available reasonable means of accommodating the conflict between Plaintiff's Sabbath observance and the employment." (5 AA 932.) Because this yet-to-be-conducted analysis requires such detailed fact finding, and given the foundational principle that such matters are for the trial court in the first instance, this Court cannot now decide them in CDCR's favor.

As a matter of jurisdiction, it is "the province of the trial court to decide questions of fact." (*Tupman v. Haberkern*, *supra*, 208 Cal. at p. 263.) As such, it is that court's role "to assess the credibility of the various witnesses, to weigh the evidence to resolve the conflicts in the evidence." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52.) Accordingly, the appellate court has "no power to judge the effect or value of the evidence, to weigh the evidence, to consider the credibility of witnesses or to resolve conflicts in the evidence or the reasonable inferences which may be drawn from that evidence." (*Id.* at pp. 52-53.) Where, therefore, the trial court has abstained on a question of fact, it is not for the appellate court to speak for it. (See *Reid v. Moskovitz*, *supra*, 208 Cal.App.3d at p. 32 ["[W]hen a trial court expressly refuses to make a finding . . . the Court of Appeal will not presume that the trial court made that finding."].)

Turning then to the remaining matter of CDCR's liability under Section 12940, subdivision (*l*)(1), the inquiry there—whether CDCR proved it had "explored any available reasonable alternative means of accommodating" but was "unable to reasonably accommodate . . . without undue hardship"—must at least be left to the trial court. Specifically, both operative questions—reasonableness and hardship—are questions of fact. This Court cannot therefore affirm based on them.

Reasonableness

When it comes to reasonableness, the onus is on the employer. (See Gov. Code, § 12940, subd. (*l*)(1) [employer must prove "it has explored any available reasonable alternative means of accommodating"]; see also *Soldinger v. Northwest Airlines* (1996) 51 Cal.App.4th 345, 370 [holding that after a job applicant establishes a prima facie case, the burden shifts to the employer to prove "it initiated good faith efforts to accommodate or no accommodation was possible without producing undue hardship"].) And, in making the required showing, a "reasonable accommodation is one that eliminates the conflict between the religious practice and the job requirement." (Cal. Code Regs. tit. 2, § 11062, subd. (a); see also *Opuku-Boateng v. State of Cal.* (9th Cir. 1996) 95 F.3d 1461, 1467 [describing reasonable accommodation in Title VII context as one "that would eliminate the religious conflict"]; *Ansonia Bd. of Education v. Philbrook* (1986) 479 U.S. 60, 70 [referring to reasonable accommodation there as one that "eliminates the conflict"].)[4]

Reasonableness in this context is therefore not, as CDCR suggests, about the impact of a given accommodation on its operations. (See RB 36-42.) Were it otherwise, the follow-on hardship inquiry would be duplicative or, worse yet, its distinct requirement that employers prove "significant difficulty or expense" to refuse accommodation could be avoided. (Gov. Code §§ 12940, subd. (*l*)(1), 12926, subd. (u); see also Gov. Code § 12993, subd. (a) [indicating FEHA protections "shall be construed liberally"].) It is unsurprising therefore that, with one distinguishable

[4] Courts look to cases decided under Title VII of the Civil Rights Act of 1964 where such precedent applies to analogous FEHA provisions. (See *Cook v. Lindsay Olive Growers* (9th Cir. 1990) 911 F.2d 233, 241.)

exception, the cases CDCR cites in support of its erroneous take on "reasonableness" were not decided on those grounds. (See RB 36-42.)[5]

Yet even beyond these contours of reasonableness in assessing a given accommodation, "the issue of whether plaintiff was requesting a reasonable accommodation is one of fact." (*Bells v. Wells Fargo Bank, N.A.* (1998) 62 Cal.App.4th 1382, 1389 fn. 6; *see also American Postal Workers Union, S.F. Local v. Postmaster Gen.* (9th Cir. 1986) 781 F.2d 772, 775 ["[T]he determination of when the 'reasonable accommodation' requirement has been met . . . must be made in the particular factual context of each case."].) Moreover, in evaluating an employer's response to a plaintiff's request, the reasonableness of that particularized effort is

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[5] All but one of the religion cases CDCR relies on in its "reasonableness" discussion were decided on other grounds. (See *Estate of Thornton v. Caldor* (1985) 472 U.S. 703, 710-711 [striking down as unconstitutional a state law requiring absolute accommodation]; *Noesen v. Medical Staffing Network, Inc.* (7th Cir. 2007) 232 F. App'x 581, 584-585 [ruling for employer on hardship grounds, while noting a reasonable accommodation is one that eliminates the conflict]; *Beadle v. City of Tampa* (11th Cir. 1995) 42 F.3d 633, 637 ["We believe that the magistrate's decision was correctly founded on its analysis of undue hardship, rather than on reasonable accommodation."]; *Bruff v. North Mississippi Health Services, Inc.* (5th Cir. 2001) 244 F.3d 495, 500-501, 503 [ruling for employer on hardship grounds]; *Balint v. Carson City, Nev.* (9th Cir. 1999) 180 F.3d 1047, 1051 ["[T]he issue before us is whether any accommodation would impose an undue hardship on the City."]); *Sides v. NYS Div. of State Police* (N.D.N.Y. June 28, 2005, No. 03-CV-153) 2005 WL 1523557, at *6 ["[T]he Defendant has satisfied its burden by establishing that any reasonable accommodation . . . would create undue hardship."].) And although in *Endres v. Indiana State Police* (7th Cir. 2003) 349 F.3d 922, the court combined concepts of undue hardship and reasonableness to disallow a police officer's selective enforcement of laws there under Title VII, that practice is a far cry from FEHA's express protection of "observance of a Sabbath" and allowance of time off for that purpose. (Gov. Code § 12940, subd. (*l*)(1).)

likewise "determined on a case by case basis." (*Soldinger v. Northwest Airlines*, *supra*, 51 Cal.App.4th at p. 370.)

Consequently, even if some of the operative evidence about what accommodation options CDCR could or did consider was undisputed—a point CDCR stresses in trying to convince this Court to jump into the fray (see RB 58)—any conclusion that CDCR acted reasonably in Brown's case would be for the trial court. In other words, whatever the underlying particulars, reasonableness is itself a question of fact. (See *Terry v. Atlantic Richfield Co.* (1977) 72 Cal.App.3d 962, 966 ["Except where there is no room for a reasonable difference of opinion, the reasonableness of an act or omission is a question of fact."].)

And, in any event, there was plenty of evidence on the abstract "reasonableness" of a number of options here. For starters, the statute expressly protects "observance of a Sabbath." (Gov. Code § 12940, subd. (*l*)(1).) Therefore, although such observance might cause hardship, the appropriateness of an accommodation that affords time off for it is statutorily presumed. Moreover, and as CDCR concedes, there are a "variety of other situations where an officer may be excused from the requirement to have the willingness to work 24/7"—placing Brown's need all the more in bounds. (4 AA 755.) Finally, the evidence showed CDCR failed to consult any facilities or the union, and rejected Brown without exploring on-the-ground options—including future adjustment of any conflicting assignment, even if temporarily—that courts weigh in assessing employer efforts. (See 2 RT 579:8-580:8, 593:10-16, 624:13-27, 638:22-643:4, 731:2-14; 5 AA 916, 931-932; *Soldinger v. Northwest Airlines*, *supra*, 51 Cal.App.4th at p. 373; *Opuku-Boateng v. State of Cal.*, *supra*, 95 F.3d at pp. 1469, 1474; *Cook v. Lindsay Olive Growers*, *supra*,

911 F.2d at p. 241.) As the trial court has already noted in reserving the matter, "Defendant halted Plaintiff's progress in the hiring process and arguably did not engage in a broad inquiry [to] evaluate any available reasonable accommodation . . . under section 12940(*l*)(1)." (5 AA 927.)

Hardship

Turning to undue hardship, that inquiry is also fact-intensive—if not more so—and therefore similarly inappropriate to be resolved in CDCR's favor in the first instance on appeal. As noted above, to demonstrate undue hardship under FEHA, an employer must show any reasonable accommodation would require "significant difficulty or expense" in light of a host of specified factors. (Gov. Code §§ 12940, subd. (*l*)(1), 12926, subd. (u).) Once again, these factors include: (1) the nature and cost of the accommodation; (2) the financial resources of the facilities involved in the accommodation, the number of people working there, and the effect of the accommodation on expenses, resources, and operations; (3) the overall financial resources of the employer, and the overall size of its business with respect to the number of employees, and the number, type, and location of its facilities; (4) the type of operations, including the composition, structure, and functions of the employer's workforce; and (5) the geographic separateness or administrative or fiscal relationship of the facility or facilities. (Gov. Code § 12926, subd. (u).)

Given this range of considerations, the question of undue hardship is an intensively factual one whose resolution is accordingly within the jurisdiction of the trial court. (*Humphrey v. Memorial Hospital Assn.* (9th Cir. 2001) 239 F.3d 1128, 1139 ["Ordinarily, whether an accommodation would pose an undue hardship on the employer is a factual question."]; *Opuku-Boateng v. State of Cal., supra*, 95 F.3d at p. 1468 ["Whether a

proposed accommodation would cause undue hardship must be determined in the particular factual context of the case."]); *Balint v. Carson City, Nev.*, *supra*, 180 F.3d at p. 1054 [same].)

Indeed, the importance of a trial court's role is all the more acute under FEHA than Title VII. Notably, the former goes beyond the latter's "de minimis" showing to require an employer to prove hardship to the point of "significant difficulty or expense." (Compare *Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 84 [adopting "de minimis" standard for Title VII], with Gov. Code § 12926, subd. (u) [describing FEHA's "significant difficulty or expense" standard].) Unlike perhaps a readily apparent "de minimis" cost or difficulty, therefore, determining whether that cost or difficulty is "significant" undoubtedly involves not only the existence of evidence but also its weight—a classic trial-court function. As with reasonableness, even if there are undisputed underlying facts it remains the factfinder's province to weigh them.

But the trial court here did not make the factual findings needed to find undue hardship, much less weigh the underlying facts. Nowhere in the statement of decision, for example, does it discuss the cost of potential accommodations; the size of CDCR's workforce; CDCR's financial resources or those of any facility; the number, type, and location of facilities; or the geographic separateness or administrative or fiscal relationship of facilities—all factors required in a hardship analysis under Section 12940, subdivision (*l*)(1)'s incorporation of Section 12926, subdivision (u). (See generally 5 AA 913-933.) To the contrary, the court indicated that, absent its BFOQ ruling, it would need to conduct a further evidentiary inquiry into such factors—an inquiry it stressed must be "particularized" to Brown. (5 AA 931-932.)

To that end, moreover, there was ample evidence against a finding of "significant difficulty or expense." CDCR, for example, employs those who are unable to work certain days or times because of military service, family, or other reasons—including on a regular basis and no matter any availability pledge. (See 1 RT 262:12-263:18, 336:12-28, 416:11-28; 2 RT 529:2-22, 605:11-607:4, 612:26-614:22, 798:1-802:25, 885:14-25, 1005:2-5; 3 RT 1181:13-20, 1198:17-20.) There was also evidence allowing shift swaps from the beginning of an officer's service, posts with non-Sabbath schedules and those for which involuntary reports are rare or non-existent, and situations where CDCR neither disciplines those who might be unavailable for overtime or emergencies nor faces cost problems in compensating replacements in that event. (See 1 RT 311:10-314:23, 321:10-28, 410:25-413:6; 2 RT 527:10-17, 605:11-606:11, 612:26-613:3, 724:23-726:18, 732:18-24, 798:1-14, 864:4-18, 895:22-898:1-7, 932:10-934:28, 996:17-997:4; 3 RT 1181:13-20, 1194:15-1195:3.)

Furthermore, although the labor agreement includes seniority provisions, CDCR has full discretion over all regular shifts in an officer's first two years and 30% of the shifts thereafter—which can allow prisons to assign posts with no Sabbath work. (1 RT 399:11-402:24; 2 RT 693:20-25; 3 RT 1149:20-24, 1168:14-17; 2 AA 168-169.) Moreover, when it comes to involuntary reporting by inverse seniority, not only does the contract discourage involuntary reporting after the end of an officer's workweek—which would likely include the Sabbath for Brown—any seniority-based reporting is suspended "in emergency situations" and is always subject to "operational needs." (2 AA 167.) And these "needs," the trial's expert observed, can include a Sabbath accommodation where the officer would

be skipped and put first in line for the next non-conflicting time she is needed. (2 RT 898:13-28, 932:10-934:13.)[6]

Finally, in making the "particularized inquiry" that the trial court refrained from (5 AA 932), a factfinder could well conclude CDCR failed to prove a 24/7/365 commitment was needed in the facilities Brown could be assigned. 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, some prisons "might be able to accommodate more than others." (2 RT 789:26-790:10.) While the trial's expert said the use of overtime, if any, depends on the facility; and witnesses testified emergencies rarely, if ever, require calling someone at home. (1 RT 309:19-28, 345:15-346:12, 2 RT 939:14-27, 973:28-974:10, 1021:27-1022:12.) Furthermore, and in any event, the percipient trial evidence involved only the nine CDCR facilities where those witnesses have worked—out of 34 total. Thus, any attendant evidence about a prison's needs—including for overtime, holdovers, or in emergencies—is necessarily limited to these places.[7]

Indeed, hypotheticals, speculation, or possibilities will not do when it comes to proving undue hardship—including in the prison employment

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[6] In its brief, CDCR makes a lot of the need for officers to rotate shifts and responsibilities during their first two years of service. (See RB 25-26, 48-50.) But there was also evidence that CDCR can decline to rotate apprentices as an accommodation and, in any event, can rotate among posts with Fridays and Saturdays off. (See 1 RT 405:9-406:23, 439:1-14.)

[7] Witnesses worked at California Correctional Institution (Tehachapi) (1 RT 383:4-7); California Medical Facility (2 RT 747:7-10); California State Prison in Los Angeles (1 RT 384:23-26); 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 746:21-22); McGee Correctional Training Center (2 RT 747:25-28); and Mule Creek (2 RT 843:6-9).

context. (*See Jamil v. Sessions* (E.D.N.Y. Mar. 6, 2017, No. 14-2355) 2017 WL 913601, at *14 [rejecting speculative hardship in prison Sabbath-accommodation case, and with a lengthy string cite]; *Opuku-Boateng v. State of Cal.*, *supra*, 95 F.3d at p. 1474 [noting a "mere possibility" is not excusable hardship]; *EEOC v. Abercrombie & Fitch Stores, Inc.* (N.D. Cal. 2013) 966 F.Supp.2d 949, 962 ["Hypothetical or merely conceivable hardships cannot support a claim of undue hardship."].)

This is particularly noteworthy in the pre-employment context, as courts are "somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that has never been put into practice." (*Burns v. Southern Pacific Transportation Co.* (9th Cir. 1978) 589 F.2d 403, 406 [internal quotation marks omitted].) And even more so where, as here, the employer is one of the largest in the state, has dozens of facilities to choose from—including twelve within 150 miles of the plaintiff's home—and has a multi-billion dollar budget. (See 3 AA 448-449, 366-368; 2 RT 996:23-28.) Based on the evidence from the handful of facilities explored at trial and the lack of evidence from still more others, therefore, a factfinder could easily rule for Brown.

In sum, this Court cannot affirm on the fact-intensive ground that CDCR met its obligation under Section 12940, subdivision (*l*)(1).

IV. TO THE EXTENT THIS COURT DECIDES ANY NON-BFOQ MATTER, IT SHOULD ORDER JUDGMENT FOR BROWN.

A. This Court must reject CDCR's alternative theories of "business necessity" and "minimum standards."

CDCR argues the trial court's judgment could be affirmed on the alternative theory of "business necessity" or "minimum standards." (RB 50-57.) But not only does the statement of decision preclude this Court from affirming on these concepts—again, that decision was based on the

BFOQ preface alone—neither applies to Brown's claim under Section 12940, subdivision (*l*)(1) in any event. In other words, CDCR cannot use these concepts to avoid the particularized showing of hardship required by subdivision (*l*)(1) not to accommodate Brown. This Court should, at a minimum, direct the trial court to ignore them.

First, CDCR cannot prevail under a "business necessity" defense because, as the trial court has already observed, that "defense insulates an employer from liability only in disparate impact cases." (5 AA 930, citing *Internat. Union, United Auto, Aerospace & Agricultural Implement Workers of America v. Johnson Controls, Inc.,* (1991) 499 U.S. 187, 197.) Accordingly, the jury instructions include a "business necessity" defense for disparate-impact claims but only "undue hardship" for religious-accommodation claims. (Compare CACI Nos. 2502 & 2503 [disparate impact], with CACI Nos. 2560 & 2561 [religious accommodation].)

Indeed, "business necessity" is found nowhere in subdivision (*l*)(1) despite its use elsewhere in Section 12940. (Compare Gov. Code § 12940, subd. (e) & (f), with § 12940, subd. (*l*).) And although CDCR cites a FEHA regulation on discrimination defenses (RB 53-54), that regulation rightly limits "business necessity" to "impact" cases. (Cal. Code Regs., tit. 2, § 11010, subd. (b).) Unsurprisingly again, therefore, none of the six cases CDCR cites to push "business necessity" as a distinct defense to religious accommodation uses the term in that context. (See RB 50-54.)[8]

[8] Two of the "business necessity" cases cited by CDCR rightly concerned a disparate-impact claim. (See *City & County of S.F. v. Fair Employment & Housing Com.* (1987) 191 Cal.App.3d 976; *Fitzpatrick v. City of Atlanta* (11th Cir. 1993) 2 F.3d 1112.) Two involved a disability claim and its distinguishable "essential functions" analysis. (See *Hastings v. Dept. of Corrections* (2003) 110 Cal.App.4th 963; *EEOC v. AIC Security Investigations, Ltd.* (7th Cir. 1995) 55 F.3d 1276.) One involved the

Second, CDCR's "minimum standards" defense also fails. In short, CDCR argues Brown has no FEHA claim because she is not "qualified" for the job based on standards CDCR can set under Government Code Section 1031. (See RB 55-57.) CDCR also cites the "essential functions" concept applicable to disability claims and a Senate committee staff memo suggesting religious believers must perform their "essential duties." (RB 56.) But Section 1031 nowhere authorizes CDCR to evade its obligations under 12940, subdivision (*l*)(1). (See *People v. Coronado* (1995) 12 Cal.4th 145, 151 [describing "familiar canons of statutory construction" to ignore extrinsic sources where "there is no ambiguity in the language of the statute" (internal quotation marks omitted)].)

Moreover, in a religious-accommodation case, any supposed job standards, qualifications, or functions are displaced by the hardship inquiry in any event. As FEHA makes clear, to shift the burden to the employer, a plaintiff need only show a known and sincere religious belief in conflict with "any employment requirement." (Gov. Code, § 12940, subd. (*l*)(1); see also *Soldinger v. Northwest Airlines*, *supra*, 51 Cal.App.4th at p. 370 ["Once the employee establishes [the three-factor] prima facie case, then the employer must establish it initiated good faith efforts to accommodate or no accommodation was possible without producing undue hardship."]; RB 28 [conceding this order of proof].)

Indeed, like CDCR's misplaced reliance on "business necessity," the legal concepts of "qualifications" and "essential functions" apply only

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"reasonably necessary" prong of BFOQ. (See *Everson v. Mich. Dept. of Corrections* (6th Cir. 2004) 391 F.3d 737.) And one only used "business necessity" as a generic term in an analysis about whether an employer's non-accommodation was justified by a "de minimis" hardship under Title VII. (*Sides v. NYS Div. of State Police*, *supra*, 2005 WL 1523557.)

in other types of cases. FEHA, for example, requires a disabled plaintiff to perform her "essential duties even with reasonable accommodations" (Gov. Code § 12940, subd. (a)(1)), but imposes no such prerequisite in making the employer prove hardship in the religion context (Gov. Code § 12940, subd. (*l*)(1)). The jury instructions and regulations are likewise in accord. (See CACI Nos. 2543 & 2560; Cal. Code Regs. tit. 2, § 11068, subd. (b) & § 11062, subd. (a).) And no case CDCR cites—which all involve disability—says otherwise. (See RB 55-56 [citing *Green v. State of Cal.* (2007) 42 Cal.4th 254; *Atkins v. City of L.A.* (2017) 8 Cal.App.5th 696; *Nadaf-Rahrov v. Neiman Marcus Group, Inc.*, *supra*, 166 Cal.App.4th 952; *Quinn v. City of L.A.* (2000) 84 Cal.App.4th 472].)

Similarly, CDCR's "qualification" criterion applies only to certain disparate-treatment claims under Section 12940, subdivision (a), where accommodation is not at issue. (Compare *Slatkin v. Univ. of Redlands* (2001) 88 Cal.App.4th 1147, 1158 [including "qualification" criterion in prima facie case for religious disparate-treatment claim], with *Soldinger v. Northwest Airlines*, *supra*, 51 Cal.App.4th at p. 370 [omitting criterion in religious-accommodation context].) Again, religious-accommodation claims arise where there is a conflict with "any employment requirement." (Gov. Code, § 12940, subd. (*l*)(1); see also CACI No. 2560.) After all, the question in the accommodation arena is not the applied-for job in the abstract, but the employer's ability—to the point of undue hardship—to accommodate the particular employee whose religious beliefs conflict with any of its supposed requirements.

Taken to its logical conclusion, CDCR is arguing that it need not accommodate Brown's Sabbath because she cannot do the job without that accommodation. But such circular thinking defies the whole point

of Section 12940, subdivision (*l*)(1)'s duty to accommodate the Sabbath absent undue hardship: Sabbatarians should be welcomed members of the workforce, and in service to our state and its people in this case. There may well be overlap between a showing of undue hardship and an employee's ability to meet certain standards or perform certain tasks in a given case. But in the religious-accommodation context, the plain text of FEHA concerns itself only with the former.[9]

B. If this Court opts for a judgment, it should do so for Brown because there was no proof CDCR could not accommodate her absent hardship.

If anything, should this Court wish to end this matter, it should remand for entry of judgment for Brown. As noted above, once a plaintiff has established a prima facie case—which the trial court found here (5 AA 931)—FEHA requires an employer to prove it "explored any available reasonable alternative means of accommodating . . . but is unable to reasonably accommodate . . . without undue hardship." (Gov. Code, § 12940, subd. (*l*)(1).) But not only did those who rejected Brown's application fail to consider—much less try—myriad options, there was no proof at trial on numerous places Brown could have worked.

On process, CDCR did not in fact explore available options, since the only two officials who handled the matter—Sergeant Beaber and Lieutenant Cox—conceded they did not review a host of accommodations or contact any warden or union official to assess their feasibility. (See 2 RT 504:25-506:25 [Beaber did not explore options since Brown "wasn't an employee yet"]; 566:7-13 [Beaber agreeing once "there was a conflict

[9] Even FEHA's disability-accommodation provision includes the modifier "even with reasonable accommodations" as part of its determination of a qualified individual. (Gov. Code § 12940, subd. (a)(1).)

with the work requirement, that was the end of [it]"; 579-8-580:8 [Cox did not contact any facility]; 593:10-16 [Cox never called the union]; 731:2-14 [Cox did not contact any warden or legal counsel].) This evokes *Soldinger v. Northwest Airlines*, where the court held that, absent proven hardship, an employer failed in its duty by not consulting counsel or the union on the feasibility of accommodation. (*Supra*, 51 Cal.App.4th at p. 373.) In short, CDCR cannot prove it initiated a "particularized inquiry" or "explored any available reasonable means" to accommodate Brown—as the trial court insists it must to prevail. (5 AA 932.)

As for hardship, again, FEHA's "significant difficulty or expense" test is a higher bar than Title VII's "de minimis" test and cannot be met by speculation. (Gov. Code §§ 12926, subd. (u), 12940, subd. (*l*)(1); *EEOC v. Abercrombie & Fitch*, *supra*, 966 F.Supp.2d at p. 962.) Nor are our prisons exempt from these strict requirements. (See Gov. Code §§ 12926, subd. (d) [defining covered "employer" under FEHA].) With all of this in mind, CDCR failed to prove that hiring Brown would have caused such significant and unavoidable hardship. For starters, the decisionmakers never considered the cost of accommodating Brown. (2 RT 548:20-549:6, 577:1-3.) Nor did they examine any possible assignments at any facility, or know, for example, how often any emergencies or overtime situations arise at any facility. (2 RT 639:18-643:4, 720:18-20, 731:2-8.)

Most importantly, CDCR offered no evidence at all—percipient or expert—on the vast majority of its 34 facilities. (See *ante* fn. 7). CDCR therefore could not prove with concrete, non-speculative evidence that no reasonable accommodation was possible absent "significant difficulty or expense"—as the law requires of CDCR to absolve itself of liability for rejecting Brown's application to serve as a correctional officer based on a

conflict with her Sabbath. (Gov. Code, §§ 12926, subd. (u), 12940, subd. (*l*)(1); *Soldinger v. Northwest Airlines*, *supra*, 51 Cal.App.4th at p. 370; *Opuku-Boateng v. State of Cal.*, 95 F.3d at p. 1474.)

In its brief, CDCR cites a number of cases on "undue hardship." (See RB 43-50.) Notably, however, each case arose under the Title VII "de minimis" test (not FEHA's "significant difficulty or expense")—which makes a difference, including in the public-safety context. (See *Kalsi v. N.Y. City Transit Authority* (E.D.N.Y. 1998) 62 F.Supp.2d 745, 757 [framing hardship issue in safety context by stressing "stark" difference between two hardship standards, which "should not be confused"].

Moreover, in each of the public-safety cases CDCR cites, there was proof of hardship for a known assignment or location, or hardship that was inevitable across all locations. (See *Balint v. Carson City*, *supra*, 180 F.3d 1047 [known assignment in single facility]; *Beadle v. City of Tampa*, *supra*, 42 F.3d 633 [known assignment and location]; *Ryan v. U.S. Dept. of Justice* (7th Cir. 1991) 950 F.2d 458 [inevitable hardship across all locations]; *U.S. v. City of Albuquerque* (10th Cir. 1976) 545 F.2d 110 [known assignment and location]; *Blair v. Graham Correctional Center* (C.D. Ill. 1992) 782 F.Supp. 411 [known assignment in single facility]; *Endres v. Ind. State Police*, *supra*, 349 F.3d 922 [known assignment in single location]; *Leonce v. Callahan* (N.D. Tex. Jan. 3, 2008, No. 7:03-110) 2008 WL 58892 [known assignment in single facility].)

None of these cases supports extrapolating across a diverse 34-facility system a concrete finding of "significant difficulty or expense" based on evidence concerning only a handful of locations.[10]

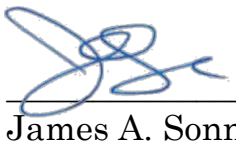
[10] Captain O'Brien observed there is no "one-size-fits-all policy" for all 34 facilities and "each situation is different." (2 RT 789:26-790:10.) Without

CONCLUSION

The trial court's statement of decision was expressly limited to the erroneous finding that CDCR's availability policy is a BFOQ—an error CDCR makes no effort to defend. Given this reality, this Court must reverse and remand for further proceedings on Brown's unresolved claim under Section 12940, subdivision (*l*)(1), in accordance with the rules on statements of decision and fundamental principles of appellate review.

Alternatively, even if this Court were to opine further, it should remand for entry of judgment for Brown given the inability of CDCR to prevail on any other theory in refusing her the opportunity to serve as a correctional officer based on her need to observe the Sabbath.[11]

July 22, 2020

By: 

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evidence at the facility level—where accommodation decisions are in fact made (2 RT 579:27-580:1, 900:20-27)—CDCR cannot prevail.

[11] Ms. Brown thanks Stanford law students Maria LaBella, Paul Draper, Giuliana Cipollone, and Jeffrey Hetzel for their work on this brief.

CERTIFICATE OF WORD COUNT

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

The text of this brief consists of 8,898 words as counted by the Microsoft Word 2016 program used to generate the brief.

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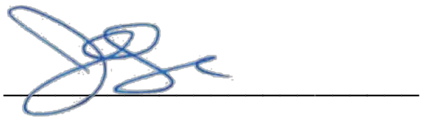

James A. Sonne

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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 559 Nathan Abbott Way, Stanford, CA 94305-8610.

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Erika Farmer

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