No. C095798

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

TERESA BROWN,

Respondent,

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,

Appellant.

Appeal from Sacramento County Superior Court
Steven Gevercer, Judge – Case No. 34-2015-00176321

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
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Case Name: *TERESA BROWN v. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION*

Court of Appeal No.: C095798

CERTIFICATE OF INTERESTED PARTIES OR ENTITIES OR PERSONS
(Cal. Rules of Court, Rule 8.208)

(Check One) **INITIAL CERTIFICATE** [X] **SUPPLEMENTAL CERTIFICATE** [ ]

Please check the applicable box:

[X] There are no interested entities or persons to list in this Certificate per California Rules of Court, rule 8.208(d).

[ ] Interested entities or persons are listed below:

Full Name of Interested Entity or Party	Party *Check One*	Non-Party *Check One*	Nature of Interest *(Explain)*
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The undersigned certifies that the above listed persons or entities (corporations, partnerships, firms or any other association, but not including government entities or their agencies), have either (i) an ownership interest of 10 percent or more in the party if an entity; or (ii) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

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INTRODUCTION

This appeal challenges a judgment that followed a prior reversal and remand by this Court, with the trial judge having twice reviewed the evidence and arguments. In the end, and for reasons stated from the bench with no statement of decision, the judge found that the California Department of Corrections and Rehabilitation (CDCR) violated the Fair Employment and Housing Act (FEHA) in rejecting Teresa Brown's application to be a correctional officer based on her need to observe the Sabbath. This Court should affirm and put this decade-long dispute to an end for two independent reasons: (1) CDCR omits on appeal a transcript of the trial court's oral ruling; and (2) the judgment is supported by implied findings and substantial evidence.

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

Seeking to provide for her family in a job where she could excel and serve, Brown applied to be a correctional officer for CDCR. As one of our state's largest employers, CDCR 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 physical and intellectual tests. But CDCR nonetheless rejected her application at the pre-

employment backgrounds stage because of the conflict between her Sabbath and a stated 24/7/365 availability policy.

Sadly, this tale is not new. Indeed, it was a situation so concerning to our legislature that Sabbath observance is covered by name in FEHA's famously robust protections for employee religious practice in Government Code section 12940, subdivision (*l*)(1). Thus, even when an applicant's Sabbath conflicts with a job requirement, the employer cannot reject her unless it proves with nonspeculative, particularized evidence that it explored every option to resolve the conflict but all such resolutions would cause undue hardship of "significant difficulty or expense."

Seeking this protection, Brown sued. After a two-week bench trial and a judgment in CDCR's favor, this Court reversed. On remand, the trial court reviewed the evidence a second time after another round of briefing. It then held a hearing and ruled for Brown for reasons stated from the bench. In a follow-on remedies order and the judgment, the court awarded damages and ordered Brown be reinstated in the application process.

CDCR now brings this second appeal. It raises two issues. First, CDCR argues that the trial court's remedies order misconstrues this Court's prior remand as a mandate not to treat as a per se undue hardship Brown's inability to meet CDCR's availability requirements. Second, CDCR says no substantial evidence supports the trial court's decision in favor of Brown under Section 12940, subdivision (*l*)(1).

As described below, however, CDCR's appeal must be dismissed because, of the thousands of record pages it designated,

the agency omits the heart of the matter: the trial court's decision on the merits. Without a transcript of the hearing where that decision was rendered, both this Court and Brown are deprived a full and fair opportunity to address it.

Alternately, CDCR's challenge to the remedies order must be rejected because the absence of a statement of decision triggers the doctrine of implied findings—precluding any such challenge. Regardless, the trial court committed no error where it rightly noted that CDCR had to prove undue hardship no matter the nature of Brown's beliefs or the job requirement.

Furthermore, substantial evidence supports a finding that CDCR failed to prove undue hardship. CDCR never tried an accommodation. Nor did it consult any warden or the union, much less produce evidence on the reporting needs of most facilities. What's more, Brown was willing to work any other day or hour, and at nearly any facility. The labor contract affords CDCR broad discretion on weekly schedules and permits other ad hoc accommodation options. Officer and expert testimony explained that, in any event, accommodations are made at the facility level—not backgrounds—and unscheduled reporting needs vary by facility, with some having no such need. And there was further testimony that the possibility of emergencies in the prison environment would not disqualify Brown.

This Court should affirm the judgment and allow Teresa Brown to finally resume her effort to serve our state as a correctional officer in a manner consistent with her faith.

STATEMENT OF THE CASE

A. Teresa Brown observes a religious Sabbath.

Teresa Brown is an observant Seventh-day Adventist. (2 RT 127:27-128:6.) Accordingly, she abstains from work on a Sabbath that runs from sundown Friday to sundown Saturday. (Trial Exhibit ("Exh.") 7; 2 RT 129:19-27.)

Brown spends the Sabbath at church, teaching her children the faith, and serving people in need. (2 RT 128:1-130:23.) Consistent with her beliefs, however, Brown would also work on her Sabbath if anyone were injured or anyone's life were at stake. (2 RT 147:28-149:20.)

B. Brown applies to be a correctional officer at CDCR.

Brown applied to be a correctional officer in 2013. (2 RT 194:26-28.) At that time, she was already working for CDCR as a certified nursing assistant, a position in which her Sabbath was known and accommodated. (2 RT 131:25-137:27.) On the first form in the application process, Brown accordingly answered "yes" when asked if "your religious beliefs prevent you from taking an exam on Saturday." (Exh. 2; 2 RT 141:9-141:21.)

Following this answer, CDCR allowed Brown to continue in a months-long review process through its Backgrounds Unit. (2 RT 141:25-145:13, 4 RT 599:19-601:28, 5 RT 792:14-793:5; Exhs. 11, 26.) First, CDCR had Brown take a four-hour problem-solving exam, which she passed. (2 RT 142:1-142:27.) Next, CDCR sent Brown for a physical-fitness test, which it arranged for her to take on a weekday to accommodate her faith. (2 RT 143:1-145:1.)

Brown again passed, drawing praise that she was "faster than some of the boys." (2 RT 144:16-17.)

CDCR then required a "Qualification Assessment Report" (QAR) form. (2 RT 145:18-25.) The QAR included yes/no question boxes asking Brown's "willingness to work" overtime, on-call hours, rotating shifts, 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." (Exh. 4.) As Brown explained at trial, she checked "yes" because these times include non-Sabbath hours or emergency situations with injuries or lives at stake. (2 RT 145:18-151:5.)

CDCR next had Brown complete a "Personal History Statement," which asked another series of questions. (2 RT 152:27-153:9; Exh. 3.) Unlike the QAR, this form offered space to clarify. (Exh. 3.) Able to explain her entries, Brown marked "no" when asked if she was "freely willing to work split shifts, nights, weekends and holidays." (Exh. 3; 2 RT 153:10-154:6.) She then 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." (Exh. 3.)

Background Unit Sergeant Shannon Beaber thereafter interviewed Brown. (2 RT 153:4-5; 4 RT 496:14-16; 2 CT 431-35; Exhs. 236, 236A.) Beaber had no experience with religious accommodations. (4 RT 496:14-498:22, 586:22-587:2.) After covering other topics, Beaber asked Brown about the Sabbath. (2 RT 154:23-155:13; 2 CT 432; Exhs. 236, 236A.)

Brown repeated she cannot work sundown Friday to sundown Saturday but would work "any hours besides those hours." (2 RT 155:5-156:7, 4 RT 520:17-26; 2 CT 432-33; Exhs. 236, 236A.)

Beaber remarked to Brown that the correctional-officer job is "a 24/7" position and she "could be working these odd hours." (2 CT 433; Exhs. 236, 236A.) But at no point during or after the interview did Beaber—or anyone else—discuss with Brown mandatory-overtime or emergency reporting on the Sabbath. (2 RT 150:2-4, 262:25-264:16; 4 RT 500:8-14, 524:18-525:9, 579:16-580:11, 587:3-22, 651:25-652:3; 2 CT 431-35; Exhs. 236, 236A.)

In any event, Brown stressed to Beaber she was willing to work any other hour or day of the year, including hours on Friday and Saturday that did not fall within her Sabbath. (2 RT 155:5-156:7; 2 CT 433; Exhs. 236, 236A.) Brown also testified she would work on the Sabbath if anyone were hurt or anyone's life were at stake, in accordance with her faith. (2 RT 147:28-149:26.)[1]

Moreover, Brown was willing to work any correctional-officer role and, except for a few remote spots, "anywhere [CDCR] sent [her]" among its dozens of facilities. (2 RT 151:15-26, 202:16-

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[1] CDCR read from Brown's deposition that when Beaber noted the possibility of staying into the Sabbath, Brown said she could not. (2 RT 202:1-7, 204:26-205:5.) But Beaber did not mention emergencies or mandatory overtime in the interview, nor did she try to clarify Brown's beliefs on that score. (2 RT 150:2-4, 262:25-263:2; 4 RT 524:18-525:9, 579:16-580:11, 587:3-22; 2 CT 431-35; Exhs. 236, 236A.) And Brown clarified at trial that, as a matter of her faith, "if an inmate or officers' lives were at stake, I certainly would stay. Or if a riot was going on, I wouldn't walk out, or I wouldn't not go in." (2 RT 147:28-149:20; see also 2 RT 148:16-20 [adding she would report if there were injuries].)

27, 259:7-22; 5 RT 714:22-715:2; 5 CT 1213-14; Exhs. 4, 236, 236A.) Furthermore, Brown is married to a non-Sabbatarian officer with seniority who would swap shifts—or even transfer facilities—to resolve any potential Sabbath conflict. (6 RT 1058:11-14, 1077:1-19, 1095:25-27.)

Finally, Beaber closed the subject by requesting a pastor letter that Brown said explained her Sabbath observance, which Brown thereafter provided. (2 CT 434; Exhs. 7, 236, 236A.) Beaber never spoke to Brown again. (4 RT 579:16-18.)

C. CDCR rejects Brown on Backgrounds, citing a 24/7/365 availability policy but without evaluating any facility or contacting any warden or the union.

After her interview with Brown, Beaber consulted her supervisor in the Backgrounds Unit, Lieutenant Steven Cox. (4 RT 538:5-7, 598:16-23, 599:19-603:14; 5 RT 720:10-17.)

Upon reviewing the labor contract's terms on mandatory overtime and shift swaps in the first year, Cox concluded that those terms "could" or "may" raise a conflict. (5 RT 724:22-726:25; Exh. 20.) Cox also read the "special personal characteristics" in the State Personnel Board (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. (5 RT 722:11-723:3, 754:17-21, 779:25-780:28; Exh. 1.) Cox said he relied on "honest thought" and labor-and-employment experience. (4 RT 597:14-601:28, 636:25-637:11.)

Cox, however, did not examine any assignment at any of CDCR's dozens of facilities, nor did he know how often emergencies or involuntary overtime arise at any prison—no

matter the security level. (4 RT 668:26-672:16; 5 RT 759:23-25, 770:19-771:3.) Cox also did not speak to any warden about any facility's reporting needs or ability to accommodate, even though religious accommodations are determined by each facility's local authority. (3 RT 411:4-10; 4 RT 606:13-23, 669:22-670:13; 5 RT 770:19-771:3; 7 RT 1232:15-24.) Nor did Cox consult the union, labor relations, EEO staff, or legal. (4 RT 652:4-653:13.)

In evaluating Brown's situation, Cox also never spoke with Brown to clarify her availability or discuss accommodation; in fact, he never spoke with her at all. (4 RT 651:25-652:3.) Cox read the pastor letter—which described Brown's beliefs, suggested a range of accommodations, and offered to discuss the topic in person—and said he understood from Beaber there were no exceptions to Brown's abstention from Sabbath work. (4 RT 662:19-663:9; 5 RT 758:22-28; Exh. 7.) But Cox sought no clarification from Brown's pastor. (4 RT 531:19-532:12.)

The trial's expert on prison operations and safety—Richard Subia, former acting director of CDCR—denounced Cox's decision to cut off at the backgrounds stage any chance of Brown being accommodated in any future schedule. (6 RT 890:5-891:4.) Subia stressed: "[t]he job of backgrounds is hiring not scheduling." (6 RT 950:28-953:7.)

Nearly a year after Brown applied, Backgrounds sent her a rejection letter. (Exh. 12.) It explained Brown was rejected based on the Personal History Statement she completed months earlier where she marked "no" when asked if she was "freely willing to work split shifts, nights, weekends and holidays." (Exh. 12; 4 RT

600:18-21.) The letter nowhere mentioned Brown's response to CDCR's request for "supplemental information" on the Statement where she described her religious beliefs. (Exhs. 3, 12.)

D. CDCR employs thousands of correctional officers in myriad posts, schedules, and prisons.

CDCR is one of our state's largest employers. (Exh. 52.) It operates 34 adult prisons—including twelve within 150 miles of Brown's home—and has a budget exceeding $10 billion. (3 RT 405:1-18; 5 RT 714:22-715:2; 6 RT 1050:20-23; Exhs. 2, 52, 63.) As of 2010, CDCR employed more than 35,000 correctional officers. (3 RT 405:19-22.) When Brown applied in 2013, it was in a "ramp-up" to add 7,000 more. (4 RT 615:22-616:6.)

Correctional officers "perform[] duties that vary among institutions and among designated posts within an institution." (Exh. 1.) This range is "due to varying security levels of inmates, design of correctional facilities, geographical location, watch assignment, and the number of inmates." (*Ibid.*) The SPB job description and QAR contemplate a variety of responsibilities among an officer's typical tasks. (Exhs. 1, 4.)

And among other job assignments, some officers check in visitors (6 RT 937:18-26); escort inmates to appointments (3 RT 369:6-7); staff the front gate (6 RT 941:13-15); serve in a public-information role (6 RT 893:10-28, 912:23-913:17; 7 RT 1210:25-1211:2); work in scheduling (7 RT 1211:9-13); conduct investigations (Exh. 1); or oversee transportation, education, or medical settings (3 RT 341:17-20, 368:5-369:27).

Correctional officers also work a diverse range of schedules. When officers begin their careers, they spend weeks at a training academy on a Monday-to-Friday schedule. (3 RT 360:8-22; 7 RT 1231:23-25.) Thereafter, they report to assigned institutions for a two-year apprenticeship where CDCR has full discretion over posts and schedules across three daily shifts. (3 RT 419:28-422:3; 4 RT 515:19-516:15; 5 RT 732:1-6; 7 RT 1233:15-18.)

Officers can thus work Monday to Friday, or a schedule with any other two-day period off. (See 3 RT 381:1-3, 413:20-417:11; Exh. 65.) To provide an array of experiences, CDCR generally rotates apprentices every six months among shifts and assignments. (3 RT 419:26-422:8; 5 RT 729:8-729:20; 7 RT 1226:27-1227:7; Exh. 28 at 3-3 to 3-4.) In all cases, however, CDCR controls whether and how an apprentice rotates among posts—and it can accommodate those who cannot work Friday and Saturday. (3 RT 419:26-421:13, 454:21-455:9; Exh. 28.)

After apprenticeship, the labor contract opens up 70% of the positions at each prison for post-and-bid. (7 RT 1214:3-7; Exh. 20 at 99.) But during and after apprenticeship, 30% of positions—amounting to thousands of officers—are assigned and scheduled at management discretion, regardless of seniority. (3 RT 407:10-16; 5 RT 732:1-6, 859:6-16; 6 RT 909:20-912:16; 7 RT 1214:3-7.)

As a result, CDCR can ensure a non-Sabbath schedule through a management-determined post. (3 RT 413:24-419:24; 5 RT 734:24-735:6; 7 RT 1238:25-1239:7; Exh. 65.) Wardens use these positions for many reasons, including to employ family at the same facility. (7 RT 1232:14-1233:9.) Management-

determined and post-and-bid positions involve the same types of jobs, with few exceptions. (3 RT 417:12-418:20; 7 RT 1214:8-21.)

Alternatively, correctional officers can be assigned a "permanent intermittent position" (PIE). (6 RT 946:24-948:2.) These officers work as needed, go through academy and apprenticeship, and "must be available to work all available shifts." (6 RT 1043:27-1045:20; Exh. 20 at 211.) But "available" PIE shifts can be limited in a warden's discretion, and they include no overtime. (6 RT 946:24-948:2, 1043:27-1045:20.) These or other relief officers also fill ad hoc vacancies. (3 RT 334:21-24, 367:23-368:4, 418:21-419:5, 425:2-426:20; 6 RT 930:20-26.) The trial's expert testified Brown could be accommodated through a PIE for her entire career, and in an arrangement where she would never work on her Sabbath. (6 RT 946:24-948:5.)

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

As CDCR acknowledged in its closing brief at trial, there are "a variety" of "situations wherein an officer may be excused from the requirement to have the willingness to work 24/7." (11 CT 3029.) This Court also found on the earlier appeal that "the evidence demonstrates CDCR employs correctional officers who are at times unavailable or unwilling to work." (12 CT 3457.)

For example, CDCR employs—and would "[a]bsolutely not" refuse—military reservists unwilling to work when they have weekend drills each month; or, in the case of the Navy, a two-week training period each year. (4 RT 631:27-632:28; 5 RT 840:8-25; 6 RT 1059:1-21, 1062:4-1063:14; 7 RT 1271:26-1272:1.) CDCR

also employs (or would employ) those with regular unavailability for dialysis (6 RT 936:12-938:7); child-care duties (4 RT 641:28-642:22; 5 RT 845:4-11); or months of parental leave (5 RT 841:14-842:16). Captain Robert O'Brien called it "impossible" in practice to require every officer to be available 24/7/365. (5 RT 835:8-19.)

Moreover, CDCR employs and accommodates other Sabbatarians who—like Brown—are unavailable sundown Friday to sundown Saturday each week. (2 RT 266:25-268:6.) Relatedly, three rank-and-file officers testified and reported having been routinely unavailable:

- Richard Hernandez is a Seventh-day Adventist who is unavailable sundown Friday to sundown Saturday. (2 RT 266:25-268:6.) Once CDCR learned of this, it switched his shift and allowed other workarounds before assigning him a discretionary post. (2 RT 277:15-20, 293:9-25; 3 RT 323:19-327:4.) Since then, Hernandez has worked only once on the Sabbath: in a life-threatening situation, consistent with his faith. (3 RT 322:9-323:18.) Hernandez's warden confirmed his accommodation "has not caused any safety concerns" or "hardship." (3 RT 441:8-442:20.)

- William Rawlings is a Seventh-day Adventist who is also unavailable sundown Friday to sundown Saturday. (3 RT 347:26-27, 349:10-16.) CDCR accommodated Rawlings with a series of nonconflicting posts until he could bid for one. (3 RT 351:25-352:7, 360:19-27, 366:20-368:4.)

- Jordan Brown was in the Navy reserves for four of his first six years as a correctional officer. (6 RT 1058:1-1060:2.) To receive a schedule avoiding his monthly weekend training, Brown simply had to document the days he could not work. (6 RT 1062:12-1063:14.) CDCR never said this sort of

> unavailability was a problem—including for emergencies or overtime. (6 RT 1063:11-14.)

In addition to regular unavailability, CDCR allows irregular absences in a host of situations. As O'Brien shared, correctional officers "have a right to a life." (5 RT 835:27-836:1.) Accordingly, CDCR excuses day-off unavailability for reasons like being out of cell-phone service (3 RT 427:11-428:5); taking vacations, including for religious observance (3 RT 430:3-12); attending a wedding (3 RT 426:10-14); celebrating a birthday (6 RT 985:1-11); hiking (4 RT 639:11-22); or, after drinking beer and watching football, saying, "Hey, I'm sorry, I've had a few drinks, I can't come in" (3 RT 431:13-432:2; 4 RT 640:22-27). CDCR does not reject applicants it anticipates will be unavailable for reasons like these. (4 RT 638:24-642:22.)

When CDCR cannot reach an officer, it moves on to the "next person" on the list. (6 RT 985:5-11.) If an officer is consequently "hired out-of-turn," he is entitled to the contract cost of four hours' pay. (5 RT 715:5-716:18; 6 RT 1024:12-25; 7 RT 1219:25-1220:8.) But the trial expert deemed this "budget dust," in light of CDCR's resources and his prison's budget. (6 RT 1050:11-26.) Moreover, any cost to CDCR would be the same if someone is unavailable no matter the reason. (3 RT 429:14-24.)

When an officer is assigned a shift, she can also "swap" out if she has a conflict. (3 RT 323:19-327:4.) Shift swaps are common and can be facilitated by email or Facebook. (6 RT 975:23-979:16, 1070:12-1074:14; Exhs. 22, 64.) All three testifying rank-and-file officers described their use of long-term swaps to get off work a certain day each week. Rawlings found it "very easy" to avoid

Sabbath work with swaps. (3 RT 374:21-375:24.) And after his first few months on the job, Hernandez combined swaps with paid time off (PTO) to avoid a Sabbath-day assignment. (2 RT 280:18-24; 3 RT 326:5-327:4, 341:21-27.) Likewise, Jordan Brown used swaps to get Saturdays off for a year. (6 RT 1073:27-1074:4.)

Correctional officers' duties may include mandatory overtime and unpredictable staffing. (3 RT 331:7-16, 357:20-358:6; 5 RT 847:21-848:28; 6 RT 1027:2-14; Exh. 27.) Notably, however, according to undisputed testimony from the expert, overtime reporting is subject to accommodation—even if, as CDCR argues, it is deemed an "essential function." (6 RT 940:15-945:11, 984:9-20; Exh. 27; see also 6 RT 949:15-950:6; Exh. 20 at 97.) What's more, the expert stressed, "[s]ometimes you never use involuntary overtime" because each prison manages overtime differently. (6 RT 1027:2-5.)

Further, the labor contract typically forbids overtime on a "last workday" before a regular day off. (Exh. 20 at 97; 4 RT 618:23-619:11; 6 RT 982:6-25; 7 RT 1227:28-1228-4.) So if an officer's workweek ends before Friday sundown—or, better yet, on Thursday—she should not be held into that period. (See 3 RT 357:20-358:6.) Then, once officers are off, CDCR would call them only in emergencies. (4 RT 618:27-619:11; 5 RT 845:25-846:3.) Asked when officers must be available for overtime, O'Brien said, "[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." (5 RT 835:20-836:1.)

As for emergencies, witnesses said they rarely, if ever, require calling someone in from home. (6 RT 991:20-992:12.)

Rawlings knew of just one such emergency in 22 years (3 RT 358:24-359:24); Jordan Brown knew of none in his 11 (6 RT 1076:14-1077:19); and Hernandez has never been called in (3 RT 321:27-322:8). O'Brien knew of no emergency at his prison ever requiring all officers to be there. (5 RT 849:1-5.)

Regardless, in the rare case of an emergency where additional personnel might be needed, prisons rely on a specially trained cadre: the Special Emergency Response Team. (3 RT 358:24-359:21; 6 RT 991:25-992:16, 1047:16-1048:17.) And in any event, the labor contract does not privilege seniority in emergency reporting. (Exh. 20 at 97.) Moreover, the expert added that the "simple fact[] that there may be emergencies at a prison" does not "preclude, in [his] opinion, Ms. Brown from being employed as a correctional officer." (6 RT 993:2-6.)

F. Brown sues CDCR under FEHA. The trial court first rules for CDCR, finding its "availability standards" are a "bona fide occupational qualification" (BFOQ).

Brown sued CDCR for damages and injunctive relief under Government Code section 12940, subdivision (*l*)(1). (1 CT 44-61; 10 CT 2879-96; 11 CT 3079-84.)[2]

At trial, Brown testified about her Sabbath and application. (2 RT 127-265.) Beaber and Cox testified about their rejecting Brown. (4 RT 487-673; 5 RT 681-783.) Hernandez, Rawlings, and Jordan Brown testified about their scheduling accommodations. (2 RT 266-298; 3 RT 306-344, 347-395; 6 RT 1057-98.) Sullivan,

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[2] Brown also sued for religious-creed discrimination under subdivision (a), but that claim was resolved before trial and is not at issue here.

O'Brien, and Captain Leithen Engellenner testified about experiences at their prisons. (3 RT 396-460; 5 RT 786-871; 7 RT 1204-51; 8 RT 1259-83.) And trial expert Subia testified about CDCR's ability to accommodate without undue hardship. (6 RT 889-1053.) CDCR offered no such expert evidence or studies, surveys, reports, or data on reporting needs or safety.

After trial, the court ruled for CDCR on the ground that its "availability standards" constituted a "bona fide occupational qualification" (BFOQ) under the preface to Section 12940. (11 CT 3245.) In so ruling, however, the court said Brown had established a prima facie case under subdivision (*l*)(1). (*Ibid.*)

Moreover, the trial court explained that if it had not found a BFOQ, "the burden [would] shift to [Defendant] to establish it initiated good faith efforts to accommodate her belief or that no accommodation was possible without producing undue hardship." (*Ibid.*, citation omitted.) The court reserved judgment on that showing, but stressed that CDCR "halted [Brown]'s progress in the hiring process and arguably did not engage in a broad inquiry [to] evaluate any available reasonable accommodation." (11 CT 3241, 3246.)

G. The Court of Appeal reverses the BFOQ finding and remands for the trial court to decide if CDCR met its burden under Section 12940(*l*)(1).

This Court reversed on two grounds. First, it held that BFOQ is a term-of-art defense for policies that facially discriminate against a class—as opposed to neutral job rules for which the duty to accommodate is triggered. (12 CT 3456-57.) Second, even if BFOQ applied, the Court said CDCR failed to

provide substantial evidence to meet its requirements. (12 CT 3457-58.)

Specifically, this Court held that CDCR failed to make a class-wide showing that applicants who are unable to meet CDCR's "availability standards" cannot safely and efficiently do the job. (12 CT 3457.) Rather, it observed, "the evidence demonstrates CDCR employs correctional officers who are at times unavailable or unwilling to work." (*Ibid.*) What's more, this Court held that CDCR lacked substantial evidence to show that it would be impossible or highly impractical to rearrange job responsibilities to avoid using open availability as an absolute requirement. (12 CT 3458.) To the contrary, the Court observed, the evidence showed that "the difficulty of accommodating a correctional officer's unavailability for work varies with the circumstances, and some unavailability is accommodated." (*Ibid.*)

Having reversed the BFOQ finding, the Court of Appeal remanded and instructed the trial court to decide Brown's claim under subdivision (*l*)(1)—and that provision only. (12 CT 3459.)

H. On remand, the trial court rules for Brown at a bench hearing and with no statement of decision.

On remand, the parties submitted further briefing and the trial court "read and analyzed the entire trial record, including the transcript of proceedings and all trial exhibits." (13 CT 3753 [judgment].)

In an hour-long hearing on September 17, 2021, the court ruled for reasons stated from the bench that Brown was entitled to judgment. (13 CT 3753-54; 15 CT 4236, 4286.) CDCR did not

designate a transcript of this hearing for appeal, and there is no statement of decision. (20 CT 5959.) But the minute order indicates "[t]he Court ruled that the evidence did not prove that the requested accommodation would bring an undo [*sic*] hardship to the defendant and requested that counsel assist with the formulation of a remedial order." (13 CT 3718.)

On December 22, 2021, the trial court issued a remedial "order on submitted matter" and the judgment. In the former, it offered "some of the observations set forth at the September 17, 2021 hearing, as detailed more fully in the record of that hearing," as "they may bear on the scope of the appropriate remedial orders." (13 CT 3742.) Among other things, the court noted in this remedies order that "CDCR had not sustained its burden to demonstrate that it was unable to reasonably accommodate Plaintiff's religious observance without undue hardship." (13 CT 3741-42.) The court also said "it seems clear that the Appellate Court intended that accommodation inquiry must be made even where the job requirement at issue effectuated an essential function." (13 CT 3743.)

In the judgment, the court awarded damages and ordered Brown be reinstated to the process at the point when CDCR rejected her. (13 CT 3753-54.) Assuming Brown passes the remaining steps, it then ordered she be put on a hiring list for at least two years and retained jurisdiction over any issues. (13 CT 3753.) The court did not guarantee Brown a position.

I. CDCR files this appeal. In designating the record, however, CDCR omits the trial court's decision.

CDCR raises two issues in this appeal: (1) whether, in deciding for Brown under subdivision (*l*)(1), the trial court "erroneously interpreted" this Court's prior reversal of its BFOQ ruling; and (2) whether the trial court's decision on remand lacks substantial evidence. (AOB 12.)

As noted above, CDCR omitted from its record designation any transcript of the September 17, 2021 decision. (20 CT 5959.)[3]

STANDARD OF REVIEW

In challenging a superior court's decision on appeal, the appellant must provide an adequate record. (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 186-87 (*Foust*).) If the record on a challenged matter "is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed." (*Id.* at p. 187, citation omitted.)

Moreover, in a bench trial with no statement of decision, the doctrine of implied findings applies. (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 267-68 (*Shaw*).) "Under the doctrine of implied findings, the reviewing court must infer, following a bench trial, that the trial court impliedly made every factual finding necessary to support its decision." (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 48; see also *id.* at pp. 58-59 [explaining that the statement-of-decision

[3] CDCR also filed a notice of appeal from the trial court's award of attorneys' fees. (1 Supp. CT 18.) But CDCR nowhere raises in its brief, and thus waives, any challenge to that award.

process is where challenges to the trial court's reasoning must be made].) Review on appeal is then limited to "whether the implied findings are supported by substantial evidence." (*Shaw* at p. 267.)

Finally, challenges to the sufficiency of the evidence are reviewed under the substantial-evidence standard. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.) Accordingly, the court must "view all of the evidence in the light most favorable to the judgment, drawing every reasonable inference and resolving every conflict to support the judgment." (*Jonkey v. Carignan Construction Co.* (2006) 139 Cal.App.4th 20, 24 (*Jonkey*).)

Thus, appellants "raising a claim of insufficiency of the evidence assume[] a daunting burden." (*Whiteley v. Philip Morris Inc.* (2004) 117 Cal.App.4th 635, 678 (*Whiteley*), citation omitted.) The substantial-evidence standard "is generally considered the most difficult standard of review to meet, as it should be, because it is not the function of the reviewing court to determine the facts." (*In re Michael G.* (2012) 203 Cal.App.4th 580, 589.)

"So long as there is 'substantial evidence,' the appellate court *must affirm* . . . even if the reviewing justices personally would have ruled differently had they presided over the proceedings below, and even if other substantial evidence would have supported a different result." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2023) ¶ 8:39.)

Substantial evidence must be "reasonable in nature, credible, and of solid value." (*In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644.) But this is easily satisfied: "The testimony

of a single credible witness—even if a party to the action—may constitute 'substantial evidence.'" (Eisenberg, *supra*, ¶ 8:52.)

ARGUMENT

I. FEHA PROTECTS SABBATH OBSERVERS IN THE WORKPLACE AND SETS A HIGH, FACT-INTENSIVE STANDARD FOR EMPLOYERS TO JUSTIFY THEIR REFUSAL TO ACCOMMODATE THE PRACTICE.

A. Sabbath observers establish a prima facie case under Section 12940(*l*)(1) by showing a conflict between that practice and any job requirement.

Government Code section 12940, subdivision (*l*)(1) forbids employers from rejecting a job applicant because of a conflict between her "observance of a Sabbath" and "any employment requirement," unless the employer can prove that it "explored any available reasonable alternative means of accommodating [that observance] . . . but is unable to reasonably accommodate the religious belief or observance without undue hardship."

Accordingly, courts follow a two-part burden-shifting framework. First, the plaintiff must establish a prima facie case that: (1) she held a sincere religious belief; (2) the employer knew of that belief; and (3) the belief conflicted with any job requirement. (*Cal. Fair Employment & Housing Com. v. Gemini Aluminum Corp.* (2004) 122 Cal.App.4th 1004, 1011 (*Gemini*).) Once the plaintiff establishes a prima facie case, the burden shifts to the employer to prove it tried to accommodate the plaintiff but could not do so absent undue hardship. (*Ibid.*)

Notably, an employer cannot evade the burden-shifting of subdivision (*l*)(1) by invoking concepts outside that provision,

such as the job-qualification prerequisite for disparate-treatment claims under subdivision (a) or the "essential duties" criterion for disability claims under (a)(1). (Compare *Slatkin v. U. of Redlands* (2001) 88 Cal.App.4th 1147, 1158 [including job-qualification condition for disparate-treatment claim], with *Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 370 (*Soldinger*) [omitting it for religious accommodation]; compare CACI Nos. 2541 & 2543 and Cal. Code Regs., tit. 2, § 11068, subd. (b) [listing essential-duty condition for disability claim], with CACI Nos. 2560 & 2561 and Cal. Code Regs., tit. 2, § 11062, subd. (a) [omitting it for religious accommodation].)

In its brief, CDCR argues 24/7/365 availability is a "minimum qualification[]" and "essential function," and it is "not obligated [to] accommodate an unqualified applicant" or "waive an essential function." (AOB 41, 58-64.) But neither term is part of the religious-accommodation analysis. Instead, FEHA requires CDCR to prove it explored accommodation to the point of undue hardship for "any employment requirement." (Gov. Code, § 12940, subd. (*l*)(1).) FEHA cannot be read "to omit expressed language or include omitted language." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 225-26, citation omitted.)

B. Once a Sabbatarian establishes a prima facie case, the employer must prove it explored any available reasonable means to accommodate.

After the plaintiff makes out a prima facie case, the burden shifts to the employer to first prove "it has explored any available reasonable alternative means of accommodating the [plaintiff's] religious belief or observance." (Gov. Code, § 12940, subd. (*l*)(1).)

Notably, the onus to initiate this exploration falls on the employer. (*Soldinger*, *supra*, 51 Cal.App.4th at p. 370; see also EEOC, Compliance Manual on Religious Discrimination (July 22, 2008) ["[T]he employer should obtain promptly whatever additional information is needed to determine whether an accommodation is available that would eliminate the religious conflict without posing an undue hardship"].) In fact, the employee has no duty even to negotiate until "*after* the employer has suggested a possible accommodation." (*Heller v. EBB Auto Co.* (9th Cir. 1993) 8 F.3d 1433, 1440.)[4]

As for what counts as an "available reasonable alternative means of accommodating," the question is not how onerous to the employer the option might be—that's undue hardship. Rather, the "reasonable" prong concerns only whether the option "eliminates the conflict between the religious practice and the job requirement." (Cal. Code Regs., tit. 2, § 11062, subd. (a); CACI No. 2560; see also *Opuku-Boateng v. State of Cal.* (9th Cir. 1996) 95 F.3d 1461, 1467 (*Opuku-Boateng*) [describing reasonable accommodation as one that "eliminate[s] the religious conflict"].)

Courts assess an employer's efforts to explore reasonable accommodations "on a case by case basis." (*Soldinger*, *supra*, 51 Cal.App.4th at p. 370.) Yet, FEHA illustrates what "reasonable alternative means" consists of in practice: it requires an employer to consider "excusing the person from those duties that conflict with the person's religious belief or observance or permitting

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[4] California courts look to authority under Title VII of the Civil Rights Act that involves analogous FEHA provisions. (*Cook v. Lindsay Olive Growers* (9th Cir. 1990) 911 F.2d 233, 241.)

those duties to be performed at another time or by another person." (Gov. Code, § 12940, subd. (*l*)(1).)

Similarly, FEHA's regulations urge that accommodation can include "job restructuring, job reassignment, modification of work practices, or allowing time off in an amount equal to the amount of non-regularly scheduled time the employee has worked in order to avoid a conflict with his or her religious observances." (Cal. Code Regs., tit. 2, § 11062, subd. (a).)

Fundamentally, by protecting "observance of a Sabbath," FEHA presumes the propriety of affording time off for it. (Gov. Code, § 12940, subd. (*l*)(1).)

C. If the employer fails to explore all available options, it must prove no accommodation is possible absent undue hardship.

Where an employer fails to show it explored available alternatives, it can prevail only if it proves that "any reasonable accommodation would have caused it an undue hardship." (*Soldinger*, *supra*, 51 Cal.App.4th at p. 373.)

To prove such hardship, an employer must meet a series of requirements that is strict and factually demanding in several respects: (1) the high degree of hardship required for it to be undue; (2) the range of considerations in assessing an undue-hardship showing; (3) the need for concrete and particularized evidence of undue hardship; and (4) that any hardship showing that meets the preceding factors be met for all options. What's more, navigating this litany is (5) all the more difficult in the pre-hire context where no accommodation has been tried.

First, the employer must prove hardship rising to "significant difficulty or expense." (Gov. Code, § 12940, subd. (*l*)(1); § 12926, subd. (u).) Notably, although disability and religious-accommodation claims differ in other respects, FEHA uses the same strict undue-hardship standard for both. (See Gov. Code, § 12940, subds. (*l*)(1) & (m)(1); § 12926, subd. (u).)

Second, "significant difficulty or expense" is evaluated across five factors, summarized as follows: (1) the nature and cost of the accommodation; (2) the financial and human resources of the facilities involved; (3) the overall financial resources of the employer, as well as the size of its business, facilities, and workforce; (4) the type of operations; and (5) the geographic relationship of facilities. (Gov. Code, § 12926, subd. (u).)

Third, the employer's burden to prove "significant difficulty or expense" across the five factors must be particularized to the plaintiff in question. (See *Balint v. Carson City* (9th Cir. 1999) 180 F.3d 1047, 1054 (*Balint*) [emphasizing "undue hardship must be determined within the particular factual context of each case"].) Additionally, the evidence must be concrete and specific, not hypothetical or generalized. (*Opuku-Boateng*, *supra*, 95 F.3d 1461 at pp. 1473-74 [rejecting "mere possibility . . . of harm"].)

Fourth, the employer must prove not only "significant difficulty or expense" across five factors in a particularized and concrete way, but that "the various potential accommodations would *all* have resulted in" such hardship. (*Opuku-Boateng*, *supra*, 95 F.3d at p. 1469 [emphasis added].) Again, subdivision (*l*)(1) insists on undue hardship for "any available reasonable

alternative." (Gov. Code, § 12940, subd. (*l*)(1); see also *Soldinger*, *supra*, 51 Cal.App.4th at p. 373 [insisting employer prove "any reasonable accommodation would have caused it an undue hardship," citation omitted].)

Fifth, satisfying the foregoing requirements is especially daunting in the pre-hire context. Indeed, 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 (*Burns*), citation omitted.) "The employer is on stronger ground when [it] has attempted various methods of accommodation and can point to hardships that actually resulted." (*Draper v. U.S. Pipe & Foundry Co.* (6th Cir. 1975) 527 F.2d 515, 520 (*Draper*).)

II. THE JUDGMENT MUST BE AFFIRMED BECAUSE CDCR OMITS FROM THE APPELLATE RECORD THE BENCH RULING ON WHICH IT RESTS.

The foregoing summary of the substantive law is necessary to understand all aspects of this case. But before applying it to the facts, two procedural flaws in CDCR's appeal must be addressed—and the first is fatal.

On appeal, an appellant must "present a complete record for appellate review." (*Stasz v. Eisenberg* (2010) 190 Cal.App.4th 1032, 1039 (*Stasz*).) More directly, where an appellant seeks "to raise any issue that requires consideration of the oral proceedings in the superior court, the record on appeal must include a record of these oral proceedings." (Cal. Rules of Court, Rule 8.120(b).)

Accordingly, if the record on a challenged matter "is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed." (*Foust*, *supra*, 198 Cal.App.4th at p. 187, citation omitted.) "In numerous situations, appellate courts have refused to reach the merits of an appellant's claims because no reporter's transcript of a pertinent proceeding or a suitable substitute was provided." (*Id.* at pp. 186-87 [citing litany of cases].)

CDCR raises two issues here: (1) whether the trial court "erroneously interpreted" this Court's reversal on BFOQ as a "mandate to disregard . . . Brown's unwillingness to remain at work or report to work in an emergency if the need arose between Friday sundown and Saturday sundown – requiring it to rule in Brown's favor"; and (2) whether the "decision on remand in Brown's favor lacked substantial evidentiary support." (AOB 12.)

Because these issues challenge the trial court's decision on the merits, however, a record of that decision is necessary. Yet that decision was rendered orally at a hearing for which CDCR omits a transcript from the record. (See 13 CT 3753; 20 CT 5959 [omitting September 17, 2021 hearing from record designation].) Nor did the court issue a statement of decision or other suitable account of its reasoning. (See Code Civ. Proc., § 632 [statement-of-decision provision]; Cal. Rules of Court, Rule 3.1590 [process].)

Instead, the only record materials related to the bench ruling are the hearing's minute order, an "order on submitted matter" concerning remedies, and the judgment. (13 CT 3718 [minute order], 3738-52 [order on submitted matter], 3753-54

[judgment].) Each of these documents fails to include the oral decision needed for appellate review. In fact, two of the three expressly disclaim that they serve as a substitute for that decision, and the third is a one-sentence minute order.

The minute order simply recounts the court's conclusion at the September 17, 2021 hearing that "the evidence did not prove that the requested accommodation would bring an undo [*sic*] hardship to the defendant and requested that counsel assist with the formulation of a remedial order." (13 CT 3718.)

The December 22, 2021 "order on submitted matter" offers some background and shares that the court "re-read and analyzed the entirety of the trial record and reviewed all of the exhibits." (13 CT 3741.) But on substance, this order again cites the September 17 hearing as where the court "held that . . . CDCR had not sustained its burden to demonstrate that it was unable to reasonably accommodate Plaintiff's religious observance without undue hardship." (13 CT 3741-42.)

What's more, the "order on submitted matter" purports to recount only part of the oral ruling and for remedies: "Because they may bear on the scope of the appropriate remedial orders at issue here, the Court recounts here some of the observations set forth at the September 17, 2021 hearing, *as detailed more fully in the record of that hearing*." (13 CT 3742 [emphasis added].)

Finally, the judgment offers no analysis and points to the September 17 oral ruling as the sole authority on the merits: a "hearing was scheduled and occurred on September 17, 2021, whereupon the Court set forth its determinations and conclusions

following remand, again as stated in the record, and determined thereupon that Plaintiff was entitled to judgment for the reasons stated therein." (13 CT 3753.)

Without the merits ruling, this Court cannot meaningfully review how the trial court analyzed and weighed the evidence or applied its remand. Brown, moreover, is prejudiced in her ability to respond to CDCR's challenge to the trial court's decision.

CDCR's omission of the transcript is fatal to its appeal. (See *Stasz*, *supra*, 190 Cal.App.4th at pp. 1038-39 [affirming judgment based on appellant's failure to include transcript of hearing where challenged decision was made].)

III. THE ABSENCE OF A STATEMENT OF DECISION BARS CDCR'S CHALLENGE TO THE TRIAL COURT'S SUPPOSED ANALYSIS. REGARDLESS, CDCR FAILS TO SHOW ANY ERROR.

Aside from its fatal flaw in the missing oral ruling, CDCR's appeal alternately suffers from a second procedural problem in challenging the trial court's supposed reasoning: the absence of a statement of decision. Besides, the language CDCR targets in the "order on submitted matter" reveals no legal error.

Where a judgment on a bench trial includes no statement of decision, the doctrine of implied findings applies. (*Shaw*, *supra*, 170 Cal.App.4th at p. 267.) Under this doctrine, "an appellate court will presume that the trial court made all factual findings necessary to support the judgment . . . and the only issue on appeal is whether the implied findings are supported by substantial evidence." (*Ibid.*) In other words, "a reviewing court looks only to the judgment to determine error" and will not

review purported errors in the "law the trial court employed" or in its "logic or reasoning." (*Id*. at pp. 268-69.)

There is no substitute for a statement of decision when assessing the trial court's reasoning on a bench-trial judgment. (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 982 [stressing that a statement of decision, with its attendant proposals, objections, and clarifications, is essential to appellate review of the trial court's reasoning].) Notably, an order on submitted matter cannot "be used to impeach the order or judgment." (*Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 591.) Nor can court minutes. (*Shaw*, *supra*, 170 Cal.App.4th at p. 268.) Even a "written statement of reasons prepared by a trial court does not equate to a statement of decision" and cannot impeach the judgment. (*Rymel v. Save Mart Supermarkets, Inc.* (2018) 30 Cal.App.5th 853, 862.)

Here, the trial court issued no statement of decision. Again, the only related documents are the minute order, its remedial "order on submitted matter," and the judgment. (13 CT 3718, 3738-52, 3753-54.) None of these is a statement of decision, much less include "the court's complete factual and legal basis supporting its decision." (*A.G. v. C.S.* (2016) 246 Cal.App.4th 1269, 1283.) To the contrary, the remedies order and judgment expressly defer to the oral ruling. (13 CT 3742, 3753.)[5]

Accordingly, the doctrine of implied findings applies and bars CDCR's challenge to the trial court's supposed

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[5] Even if CDCR had designated a transcript of the oral ruling on the merits, that ruling is similarly not a statement of decision.

misapplication of the remand to determine liability under subdivision (*l*)(1). (*Shaw*, *supra*, 170 Cal.App.4th at p. 268.)

Alternatively, even if one were to treat the "order on submitted matter" as a statement of decision—it is not—the trial court's analysis was appropriate. Specifically, CDCR argues the court misapplied this Court's remand to decide CDCR's liability under subdivision (*l*)(1) by "disregarding" Brown's "unwillingness" to work on the Sabbath. (AOB 12, 36-40.)

CDCR relies on a footnote. (AOB 38.) But a review of that footnote and its context reveals no error. All the court said was that it cannot deem as dispositive under (*l*)(1) the distinguishment in its prior BFOQ analysis between availability and "willingness" to be available. (13 CT 3743.) The court added, "it seems clear that the Appellate Court intended that [the] accommodation inquiry must be made even where the job requirement at issue effectuated an essential function." (*Ibid.*)

This is a proper understanding of the law: an employer must prove it explored options to the point of undue hardship upon a conflict with "any job requirement"—whether or not the employer deems it an "essential function." (Gov. Code, § 12940, subd. (*l*)(1).) What's more, the trial court's remedies order did not disregard Brown's availability—willing or otherwise. It simply, and rightly, rejected CDCR's categorical argument that "an employer is not required to accommodate an applicant who

cannot or will not perform the essential functions of the position." (13 CT 3743.)[6]

IV. CDCR MAKES NO ARGUMENT THAT BROWN FAILED TO ESTABLISH A PRIMA FACIE CASE, OR THAT IT SUFFICIENTLY EXPLORED OPTIONS FOR ACCOMMODATING HER. RIGHTLY SO.

CDCR nowhere disputes in its brief that Brown established a prima facie case under subdivision (*l*)(1). Nor does CDCR dispute that it failed to meet (*l*)(1)'s follow-on requirement to explore any available reasonable means of accommodation. (See AOB 36-64 [focusing only on undue hardship].) Rightly so: there is substantial evidence for both findings. (See *Jonkey*, *supra*, 139 Cal.App.4th at p. 24 [requiring indulgence of all evidence and inferences on substantial-evidence review].)

Regarding the prima facie case: (1) Brown has a sincere religious belief (Exh. 7; 2 RT 127:27-130:23); (2) CDCR knew of that belief (Exhs. 3, 7; 2 RT 136:8-137:6, 143:2-20; 4 RT 512:11-514:18, 527:23-529:12, 657:14-659:22, 662:19-664:11); and (3) the belief conflicted with a stated job requirement (Exh. 11; 4 RT 542:13-27, 574:20-23, 592:13-15; 5 RT 699:23-27). (See *Gemini*, *supra*, 122 Cal.App.4th at p. 1011 [describing elements].)

Regarding exploration, CDCR had to prove it "explored any available reasonable alternative means" of resolving the conflict between its 24/7/365 availability policy and Brown's Sabbath.

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[6] Even if one ignores the implied-findings doctrine and assumes the court erred in its merits observation in the remedies order, the absence of the oral ruling on the merits—to which the order deferred—precludes reliance on that observation. (13 CT 3742.)

(Gov. Code, § 12940, subd. (*l*)(1).) But neither Beaber nor Cox—the only officials who dealt with Brown—did so.

Beaber admitted she did not "explore any potential ways that [she] could have hired Ms. Brown while allowing her to observe the Sabbath." (4 RT 573:12-15.) And Cox said he didn't investigate any particular options to accommodate Brown. (4 RT 665:24-669:25, 671:4-20; 5 RT 770:19-25; see also 4 RT 606:13-15, 669:22-670:9; 5 RT 770:28-771:3 [failed to consult wardens or facilities]; 4 RT 652:4-653:13; 5 RT 770:26-27 [failed to consult labor relations, EEO, or legal]; 4 RT 620:10-16, 651:25-653:13 [failed to consult union]; *Soldinger*, *supra*, 51 Cal.App.4th at p. 373 [ruling against employer where it failed to consult union or legal].) Recognition of a conflict should have begun the inquiry, not ended it. (See Gov. Code, § 12940, subd. (*l*)(1) [imposing duty to resolve conflict].)

Plus, CDCR had many options to resolve the conflict—options which, again, are contemplated by subdivision (*l*)(1). (See Gov. Code, § 12940, subd. (*l*)(1) [protecting Sabbath observance by name and including excused or substitute work or coverage among ways to address employee's absence].) As this Court found, "CDCR employs correctional officers who are at times unavailable or unwilling to work." (12 CT 3457; see also 3 RT 431:13-432:2 [insobriety], 426:10-14 [wedding], 427:11-428:5 [no cell service], 430:3-12 [vacations]; 4 RT 639:11-22 [hiking].) This includes CDCR's excusing officers absent on the Sabbath. (2 RT 266:25-268:6; 3 RT 440:16-441:17.)

Recall, the issue here is not whether an option presents a hardship—only whether it "eliminates the conflict." (Cal. Code Regs., tit. 2, § 11062, subd. (a).) CDCR makes no argument on the point, and there was evidence of many such options.[7]

V. SUBSTANTIAL EVIDENCE SUPPORTS A FINDING THAT CDCR DID NOT PROVE ACCOMMODATING BROWN WOULD CAUSE UNDUE HARDSHIP.

A. CDCR must show there is no substantial evidence to support a finding that it failed to prove undue hardship. It cannot.

To recap, CDCR's brief nowhere disputes—and substantial evidence supports—that Brown established a prima facie case and CDCR failed to explore available options. CDCR can therefore prevail on appeal as a substantive matter only if it can show there is no substantial evidence that it failed to prove that accommodating Brown would cause undue hardship. (See *Soldinger*, *supra*, 51 Cal.App.4th at p. 370.)

Again, FEHA's hardship standard demands an employer prove "significant difficulty or expense" across five factors:

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

[7] Although CDCR makes no substantive argument on reasonableness, it seems to confuse the concept with undue hardship—requiring the clarification above. (See AOB 29, 57.)

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.

(Gov. Code, § 12926, subd. (u).)

Moreover, any hardship defense must be proven through a concrete, particularized showing for every option. (*Anderson v. Gen. Dynamics Convair Aerospace Div.* (9th Cir. 1978) 589 F.2d 397, 402 (*Anderson*) ["Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts"]; *Soldinger*, *supra*, 51 Cal.App.4th at p. 373 [employer must prove hardship for all options].) On this note, courts prefer hardship showings where the employer tried to accommodate—rather than "hypothetical hardships that [it] thinks might be caused." (*Burns*, *supra*, 589 F.2d at p. 406, citation omitted.)

Finally, and as a reminder, appellants "raising a claim of insufficiency of the evidence"—here, CDCR's challenge on undue hardship—assume a "daunting burden." (*Whiteley*, *supra*, 117 Cal.App.4th at p. 678.) Appellate courts "do not review the evidence to see if there is substantial evidence to support the losing party's version of events, but only to see if substantial evidence exists to support the verdict in favor of the prevailing party." (*Pope v. Babick* (2014) 229 Cal.App.4th 1238, 1245.)

Rather than tailoring its argument to the five statutory factors, CDCR takes a more scattershot approach in its brief. But its arguments can be understood as falling into two buckets: personnel and safety. Breaking the former down further, CDCR

argues accommodating Brown would violate the labor contract and amount to preferential treatment, hurt officer morale, and interfere with apprenticeship. (See AOB 36-64.) To map all of this onto the factors, therefore, CDCR seems to argue only the first, second, and fourth: the nature and cost of the accommodation (#1), and its effect on facility and entity operations (#2 and #4).[8]

As detailed below, however, substantial evidence supports at both a global and particular level that CDCR failed to prove undue hardship across the factors. Globally, CDCR's showing suffered from two fatal flaws: (1) it included no evidence on myriad posts, schedules, and facilities where Brown could work, including involuntary-reporting needs, if any—which witnesses said vary by facility; and (2) it foreclosed accommodation at the backgrounds stage rather than deciding the matter at the facility level—where witnesses said such decisions are made.

More particularly, and as also detailed below, CDCR makes no argument it lacked institutional resources to accommodate Brown. What's more, substantial evidence defeats CDCR's contentions that it would be unsafe to accommodate Brown, that an accommodation would violate the labor contract, or that shift-schedule and ad hoc options were not viable alternatives.

Notably, because CDCR offered no accommodation, it must not merely disprove the feasibility of one option; it must disprove

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[8] Unsurprisingly, CDCR makes no argument on financial and institutional resources. (Gov. Code, § 12926, subds. (u)(3), (5).) It has a multi-billion-dollar budget and tens of thousands of officers, and was looking to hire thousands more. (3 RT 405:19-22; 4 RT 615:22-616:6; 6 RT 1050:17-23.)

the feasibility of them all—including any combination thereof, and even on an experimental basis. (*Soldinger*, *supra*, 51 Cal.App.4th at pp. 370-73; *Opuku-Boateng*, *supra*, 95 F.3d at p. 1474.) Substantial evidence shows CDCR failed to do so.

B. CDCR's lack of evidence on institutions where Brown could have worked and its exclusion of her at the backgrounds stage doom its appeal.

A finding that CDCR failed to prove accommodating Brown would cause undue hardship is supported by substantial evidence as a global matter. The agency relied on the observations of only a handful of witnesses from select facilities—who, even then, presented conflicting testimony on the viability of accommodating Brown. Moreover, substantial evidence supports a finding against CDCR on undue hardship where it failed to decide accommodation at the appropriate point—i.e., the facility level.

As Capt. O'Brien observed, there is no "one-size-fits-all policy" for all CDCR facilities and "each situation is different." (5 RT 831:23-832:7.)[9] And, as the trial expert stressed, involuntary overtime, if any, "depends what prison you're at" and "[s]ometimes you never use involuntary overtime." (6 RT 1027:2-5.) Moreover, the expert explained, the effect on prison operations due to an officer's absence—even if unauthorized—"depends on what post we're talking about." (6 RT 1043:2-16.)

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[9] O'Brien: "I've worked at four institutions now, and they're all different, the amount of positions they have. Some might be able to accommodate more than others, some can't. So is it reasonable to put an accommodation request in? Of course it is, and there's a process in place for that. Will it be granted? That's up to the individual hiring authority at that time." (5 RT 831:27-832:7.)

Yet no percipient witness testified to the infeasibility of accommodating Brown across the facilities or positions where she could work. Nor did CDCR offer evidence on any accommodations at any facility that it investigated for her and found wanting. Indeed, it made no such inquiry at all. (4 RT 573:12-15 [Beaber]; 4 RT 665:24-669:25, 671:4-11; 5 RT 770:19-25 [Cox].)[10]

One cannot extrapolate a concrete finding that hiring Brown would have caused hardship across a 34-facility system with legions of posts, schedules, and situations. (See Gov. Code, § 12940, subd. (*l*)(1) [insisting on hardship for "any available" option]; *Jamil v. Sessions* (E.D.N.Y. Mar. 6, 2017, No. 14-CV-

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[10] The ten facilities on which there was percipient evidence at trial (from either side) are: California Correctional Institution in Tehachapi (3 RT 397:4-7 [Sullivan]); California Health Care Facility in Stockton (6 RT 1067:20-23 [Jordan Brown]); California Medical Facility in Vacaville (5 RT 787:7-10 [O'Brien]); CSP-Los Angeles (3 RT 398:24-27 [Sullivan]); CSP-Solano (5 RT 787:19-24 [O'Brien]); CSP-Sacramento (5 RT 788:6-8 [O'Brien]; 7 RT 1206:22-24 [Engellenner]); Central California Women's Facility (3 RT 347:18-22 [Rawlings]); Folsom (5 RT 786:19-25 [O'Brien]); McGee Correctional Training Center (5 RT 787:25-28 [O'Brien]); and Mule Creek (6 RT 1069:5-10 [Jordan Brown]).

CDCR presented no evidence on 24 (south to north): Donovan Correctional Facility, Centinela State Prison, Calipatria State Prison, Ironwood State Prison, Chuckawalla Valley State Prison, California Rehabilitation Center, California Institution for Women, California Institution for Men, California Men's Colony, Wasco State Prison, Kern Valley State Prison, North Kern State Prison, Avenal State Prison, Pleasant Valley State Prison, Substance Abuse Treatment Facility in Corcoran, CSP-Corcoran, Correctional Training Facility, Salinas Valley State Prison, Valley State Prison, Deuel Vocational Institution, Sierra Conservation Center, San Quentin, High Desert, California Correctional Center, and Pelican Bay. (Exh. 63.)

2355) 2017 WL 913601, at *14-15 (*Jamil*) [rejecting speculation in prison Sabbath-accommodation case, with string cite].)

What's more, "[a]ccommodations are [decided] at the facility level." (4 RT 606:13-15 [Cox].) As the expert stressed, "[t]he issue of being able to accommodate an employee's ability to be on the job at a certain time on a certain watch or a certain shift, that's a scheduling matter that is done . . . through the [local] hiring authority." (6 RT 951:23-953:7; accord 4 RT 606:13-15.) But CDCR presents nothing on the unexamined facilities; nor did those who denied Brown the opportunity to work there. (See 4 RT 671:4-672:16 [Cox conceding lack of knowledge on need for overtime or emergency reporting at *any* facility].)

Perhaps, as O'Brien opined, CDCR "wouldn't have known [at the pre-hire stage] what prison [Brown] was going to go to." (5 RT 833:2-12.) If so, that's a problem of CDCR's own making. (See *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"].)

CDCR cites no case in its brief where a large, multi-facility employer has prevailed on a generalized hardship argument—much less under FEHA's high standard—after rejecting an applicant without trying to accommodate.[11]

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[11] In every religious-accommodation case CDCR cites in its brief, the employer engaged in accommodation efforts, proved harm in a known assignment or facility, or lost. (See, e.g., *Groff v. DeJoy* (2023) 600 U.S. 447 (*Groff*) [employer lost]; *Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63 (*Hardison*) [holding for employer only after finding it tried to work with union]; *Balint*, *supra*, 180 F.3d 1047 [known assignment in single facility, and

C. Substantial evidence supports a finding that accommodating Brown would not cause undue hardship on personnel.

1. *There is substantial evidence that accommodating Brown would not violate the labor contract.*

Beyond the global flaws in its evidence, CDCR's personnel arguments fail in any event. Of these, CDCR first points to supposed concerns over the labor contract, including preferential treatment. (AOB 44-49.) According to CDCR, any accommodation of Brown would violate seniority provisions for weekly schedules

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summary judgment for employer reversed]; *Beadle v. City of Tampa* (11th Cir. 1995) 42 F.3d 633 (*Beadle*) [employer hired plaintiff, made temporary accommodation, and proved hardship in known assignment]; *Bhatia v. Chevron U.S.A., Inc.* (9th Cir. 1984) 734 F.2d 1382 (*Bhatia*) [employer offered alternative posts and proved actual safety risk]; *Brener v. Diagnostic Center Hospital* (5th Cir. 1982) 671 F.2d 141 (*Brener*) [employer made efforts]; *Bruff v. North Mississippi Health Services, Inc.* (5th Cir. 2001) 244 F.3d 495 (*Bruff*) [efforts in known job and facility]; *Cook v. Chrysler Corp.* (E.D. Mo. 1991) 779 F.Supp. 1016 (*Cook*) [hardship proven in known facility]; *EEOC v. Firestone Fibers & Textiles Co.* (4th Cir. 2008) 515 F.3d 307 [accommodation offered in known facility]; *Endres v. Indiana State Police* (7th Cir. 2003) 349 F.3d 922 (*Endres*) [hardship shown in known assignment and facility]; *Eversley v. MBank Dallas* (5th Cir. 1988) 843 F.2d 172 (*Eversley*) [efforts made in known facility]; *Patterson v. Walgreen Co.* (11th Cir. 2018) 727 Fed.Appx. 581 [efforts made]; *Weber v. Roadway Express, Inc.* (5th Cir. 2000) 199 F.3d 270 (*Weber*) [harm shown in known assignment]; *Yott v. North American Rockwell Corp.* (9th Cir. 1979) 602 F.2d 904 (*Yott*) [employer and union tried to accommodate].)

and overtime. (*Ibid.*) But there is substantial evidence to support a contrary finding through a variety of options.

Management-Determined Positions

First, although CDCR summarily dismisses the option, substantial evidence shows accommodating Brown with a management-determined post is viable. (See AOB 55-56 [dismissing option].)

To reiterate, 30% of posts at each facility are under CDCR's sole control. (3 RT 407:10-16; 4 RT 610:3-611:13.) For these thousands of positions, CDCR alone governs assignments and scheduling. (3 RT 414:4-418:20; 4 RT 616:23-617:23; 7 RT 1214:3-21.) Seniority plays no role, and there are no incumbent rights. (3 RT 443:25-445:4; 4 RT 610:28-611:1; 6 RT 909:20-912:16; 7 RT 1214:3-21.) What's more, these posts are used to accommodate officers with scheduling needs, including Sabbath observers. (3 RT 340:28-342:18, 366:22-368:4; 6 RT 913:24-915:5, 948:6-950:6.) And except for a few with special training, management-determined positions involve the same types of jobs as those subject to post-and-bid. (3 RT 417:12-418:20; 7 RT 1214:8-21.)

As a result, CDCR could ensure a non-Sabbath schedule for Brown through its discretionary system; after all, CDCR has accommodated a Sabbatarian using this method, and it has caused no hardship. (3 RT 293:23-25, 441:8-442:20.)

CDCR, for example, could assign Brown a management-determined post with a Monday-to-Friday schedule, which would not only avoid Sabbath work as a regular matter but also avoid conflicting overtime given the contract's avoidance of overtime on

a "last workday." (Exh. 20 at 97; 3 RT 340:28-341:13, 357:20-358:6; 4 RT 618:23-619:11; 6 RT 982:6-25; 7 RT 1227:28-1228:4.) Better yet, Brown could be assigned a Sunday-to-Thursday schedule. Even assuming the last daily shift, she would have to work over twenty-four hours straight to reach Friday sundown. (2 RT 277:19-23; 3 RT 340:28-341:13, 357:20-358:6.)

Contrary to any argument that management-determined posts would have been infeasible for Brown, each facility has the flexibility to make that assignment from the start—all apprentice spots are management-determined—and at all points thereafter. (3 RT 293:9-294:10, 366:24-368:4, 442:18-23, 458:11-14; 5 RT 732:1-6; 6 RT 914:25-915:5, 937:18-26.) Even if for some reason CDCR could not offer a management-determined post at the outset, local management would have the flexibility to so place Brown if and when the time came. (6 RT 911:18-913:23.)

Finally, to the extent that a given management-determined post could not be guaranteed—at the backgrounds stage or later—CDCR's showing would fail as speculative in any event. (See *Anderson*, *supra*, 589 F.2d at p. 402 [rejecting speculation].)

Shift Swaps

Second, Brown could use shift swaps. In its brief, CDCR argues swaps were not an option due to emergencies and mandatory overtime and they are unavailable or limited at the start of a career. (AOB 51-52.) In support, CDCR cites *Balint*, *supra*, 180 F.3d 1047, and *Eversley*, *supra*, 843 F.2d 172.

But not only does the lack of evidence on emergency or mandatory-overtime reporting across facilities doom that aspect

of CDCR's argument on shift swaps, FEHA requires considering swaps as an accommodation method. (Gov. Code, § 12940, subd. (*l*)(1); *Soldinger*, *supra*, 51 Cal.App.4th at p. 373.)

Moreover, officers regularly use swaps to get time off for all kinds of reasons, from hunting trips, to weekend barbecues, to observing the Sabbath. (2 RT 171:7-22; 3 RT 323:19-324:8; 6 RT 1074:22-28.) In fact, witnesses testified that shift swaps are commonly used and "[v]ery easy" to obtain. (6 RT 1070:12-25.) One officer used a regular swap partner for at least a year to get every Saturday off. (6 RT 1073:27-1074:4.) Hernandez used swaps alongside PTO to avoid a Sabbath conflict. (2 RT 280:18-24; 3 RT 326:5-327:4, 341:21-27.)

Swaps are an especially promising option for Brown, considering her husband is a non-Sabbatarian officer who can swap with her regularly and is even willing to transfer prisons. (6 RT 1077:1-19, 1095:25-27.) To facilitate transfers, witnesses testified that CDCR grants "warden's requests," where an officer can ask for one of her family members to be assigned to work at her prison; for example, Capt. Engellenner obtained a warden's permission to work at the same prison as his mother. (7 RT 1232:14-1233:4.)

CDCR says the labor contract restricts swaps for the first year. (AOB 52.) However, limits on swaps at the start of an officer's employment are permissive and can be waived by local management. (5 RT 764:18-765:17; 6 RT 975:23-977:12.)

Finally, CDCR's reliance on *Balint* and *Eversley* is misguided. In *Balint*, there were only 12 or 13 officers, only one

had the weekend off, and shift trades were allowed only on a one-time emergency basis. (*Balint*, *supra*, 180 F.3d at p. 1050.) By contrast, CDCR has tens of thousands of officers, and swaps are an established part of its operations—including on a long-term basis and for virtually any reason. (See 3 RT 323:19-325:7, 405:19-22; 5 RT 772:9-15; 6 RT 977:14-981:3; Exh. 64.) *Eversley* is also distinguishable, where the employer engaged in accommodation efforts and the proposed swaps would have been involuntary. (*Eversley*, *supra*, 843 F.2d at pp. 175-76.)

PIEs

Third, substantial evidence supports that accommodating Brown through a permanent-intermittent position (PIE) would not cause undue hardship. PIEs are rotating employees who fill shifts as needed, their shifts can be limited in their warden's discretion, and they work no overtime. (6 RT 930:20-26, 946:24-948:2, 1043:27-1045:20.) CDCR argues a PIE would be a "non-starter" because it is a different job classification. (AOB 56.) But not only does CDCR cite no evidence for that proposition, the trial's expert testified that a hiring authority could indeed assign Brown to a PIE with Fridays and Saturdays off. (6 RT 946:24-947:12.) The expert further testified CDCR could employ Brown in a PIE for her entire career. (6 RT 947:5-948:5.)

Temporary Solutions

Fourth, substantial evidence shows that, if necessary, the labor contract would allow CDCR to temporarily avoid Brown working on the Sabbath until it could find a permanent solution. This option was urged by Brown's pastor and is recommended by

the EEOC and courts. (See Exh. 7 [pastor]; EEOC Compliance Manual, *supra* ["When faced with a request for a religious accommodation which cannot be promptly implemented, an employer should consider offering alternative methods of accommodation on a temporary basis, while a permanent accommodation is being explored"]; *Opuku-Boateng*, *supra*, 95 F.3d at p. 1474 [condemning employer's refusal to try "temporary or trial accommodation" and "experiment"].)

CDCR failed to present evidence on the difficulty or cost of a host of temporary measures—including a temporary schedule and the use of swaps, leave time, relief officers, or other substitutes. If anything, the evidence shows these temporary measures were feasible—whether during the academy, which has a Monday-to-Friday schedule; in apprenticeship, where management has unfettered discretion in scheduling; or thereafter, if a long-term option was not readily available—even if Brown had to be rotated or transferred. (See 2 RT 293:9-295:15; 3 RT 360:19-22, 419:28-420:16, 439:11-440:5; 4 RT 617:17-23, 621:4-11; 6 RT 933:21-934:9, 949:3-25; 7 RT 1236:7-24.)

Preferential Treatment

Finally, CDCR argues accommodating Brown would cause personnel problems because it would amount to preferential treatment in the allocation of schedules and work. (AOB 45-49.) In support, CDCR relies on *Hardison*, *supra*, 432 U.S. 63, and a handful of other Title VII cases. But not only is there substantial evidence to the contrary, the cases CDCR cites are inapposite.

Regarding the evidence, CDCR cannot allege preferential treatment where it treats other employees in like manner. As this Court has found, "CDCR employs correctional officers who are at times unavailable or unwilling to work." (12 CT 3457; see also 11 CT 3029 [CDCR conceding point after trial].) This includes employees who observe the Sabbath. (2 RT 266:25-268:6; 3 RT 440:16-441:17.) Moreover, any seniority concerns can be cured by the methods outlined above—management-determined posts, PIEs, swaps, temporary solutions. Plus, the expert testified that the labor contract's seniority provisions on overtime are subject to an exception for "operational needs" that includes "a need to accommodate." (6 RT 949:15-950:6; Exh. 20 at 97.)

Regarding the case law, the Supreme Court's unanimous decision last term in *Groff v. DeJoy* rejected the "de minimis" test for undue hardship under Title VII referenced in *Hardison*—and adopted in the other authority CDCR cites—in favor of a more robust standard: "substantial increased costs in relation to the conduct of [the employer's] particular business." (*Groff*, *supra*, 600 U.S. at p. 470.) Regardless, the FEHA test is "significant difficulty or expense" anyway. (Gov. Code, § 12926, subd. (u).)

Moreover, the Court in *Groff* insisted that, to present an undue hardship based on co-worker effects, the employer must prove a direct impact on "the conduct of the employer's business" in the "particular case." (*Supra*, 600 U.S. at p. 472.) And still, the employer must also show "[c]onsideration of other options." (*Id.* at p. 473.) Even in *Hardison* the Court ruled for the employer only after finding it tried to work with the union. (*Hardison*, *supra*,

432 U.S. at pp. 78-79; see also *Brener*, *supra*, 671 F.2d at pp. 144-45 [describing employer in *Hardison* as having made a series of "significant efforts"].)

As for the other cases CDCR relies on, the court in *Yott*, *supra*, 602 F.2d 904, upheld a trial finding for the employer but only where it had worked with the union to accommodate and proved concrete harm to others. In *Bhatia*, *supra*, 734 F.2d 1382, the employer made good-faith efforts to accommodate, but the court found accommodation would cause unavoidable harm to co-workers. In *Weber*, *supra*, 199 F.3d 270, the employer proved diminished co-worker seniority and pay. And in *Bruff*, *supra*, 244 F.3d 495, the employer made a particularized showing and engaged in accommodation efforts. To the contrary, there is substantial evidence CDCR made no such efforts or showings.

2. *There is substantial evidence that accommodating Brown would not cause undue hardship based on morale.*

CDCR says accommodating Brown "would be detrimental to officer morale." (AOB 49.) In support, it cites testimony from Cox and Sullivan, and another set of Title VII cases. (AOB 49-53.) But not only does CDCR's evidence fall far short of the standard for morale-based undue hardship, its cases are again inapposite.

When it comes to supposed co-worker unhappiness, courts require employers to show "actual imposition on co-workers or disruption of the work routine," not mere "grumbling." (*Brown v. Polk County* (8th Cir. 1995) 61 F.3d 650, 655 (*Brown*), citation omitted; accord *Tooley v. Martin-Marietta Corp.* (9th Cir. 1981) 648 F.2d 1239, 1243.)

Here, Cox testified only that "fewer staff being available . . . would lead to the closure of inmate programs," and extensive medical absences during a period of staff shortages once led to some staff being unhappy; Sullivan testified he heard "concerns" from the union before accommodating Hernandez that there "could" be issues, but added there was no pushback after that point and "accommodation has not caused a hardship"; and CDCR asserts without citation that accommodating Brown would "foreseeabl[y]" hurt morale. (3 RT 441:14-442-23, 447:2-7; 5 RT 756:16-757:28; AOB 50.) This hardly proves "actual imposition on co-workers or disruption of the work routine." (*Brown*, *supra*, 61 F.3d at p. 655, citation omitted.)

As for the religious-accommodation cases on which CDCR relies, and in contrast to this case, the employer made or should have made "significant efforts to accommodate" or proved actual business disruption—not to mention each applied Title VII's pre-*Groff* "de minimis" test. (*Brener*, *supra*, 671 F.2d at pp. 144-47; *Endres*, *supra*, 349 F.3d at p. 925 [plaintiff abdicated duties]; *Balint*, *supra*, 180 F.3d at p. 1056 [reversing judgment for employer and remanding on efforts]; *Eversley*, *supra*, 843 F.2d at p. 176 [stressing efforts]; *Cook*, *supra*, 779 F.Supp. at pp. 1024-25 [employer and union "explored every avenue"]; cf. *Scotch v. Art Inst. of California-Orange County, Inc.* (2009) 173 Cal.App.4th 986, 1012 [accommodation offered in disability case].)[12]

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[12] Brown's commitment to work at any other time, including undesirable shifts, is further evidence against co-worker unhappiness. (2 RT 156:4-7; 2 CT 433; Exhs. 236, 236A.) (Compare *Endres*, *supra*, 349 F.3d at p. 925 [plaintiff abdicated

3. *There is substantial evidence that accommodating Brown would not cause undue hardship based on the apprenticeship program.*

Finally, CDCR argues accommodating Brown would cause personnel problems in preventing her from gaining requisite training. (AOB 54.) CDCR cites testimony on the supposed need for apprentices to rotate shifts at least every six months. (*Ibid.*)

But CDCR has complete discretion over apprenticeship schedules. (See 3 RT 419:28-421:13; 4 RT 515:19-516:15; 5 RT 732:1-6; 7 RT 1233:15-18.) Apprentices can therefore work Monday-to-Friday, or a schedule with any other two-day period off. (See 3 RT 381:1-3; 413:24-417:11; Exh. 65.) Moreover, witnesses testified that apprentices can be rotated among posts with Fridays and Saturdays off and get the needed experience, and CDCR can extend assignments beyond six months. (3 RT 419:28-421:13, 454:24-455:11; 5 RT 729:3-11; 6 RT 990:20-991:4; 7 RT 1226:27-1227:7; Exh. 28 at 3-3, 3-4.) Officer Hernandez was so accommodated. (3 RT 421:8-13, 454:27-455:11.)

Moreover, in the only case CDCR cites for its training argument, the shift-rotation system was random and inflexible. (*Beadle*, *supra*, 42 F.3d at p. 637.)

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duties that could only be performed by others] and *Bhatia*, *supra*, 734 F.2d at p. 1384 [same], with *Opuku-Boateng*, *supra*, 95 F.3d at pp. 1470-71 [stressing plaintiff's willingness to do his share of undesirable work in rejecting hardship defense].)

D. Substantial evidence supports a finding that accommodating Brown would not cause undue hardship on safety.

1. *CDCR provided no evidence of safety issues across the places and jobs Brown might work.*

In addition to personnel arguments, CDCR raises safety concerns. (AOB 41-43, 58-64.) The crux of its argument is that Brown's inability to work on her Sabbath in cases of mandatory overtime or emergencies would pose a safety risk. (AOB 42-43.)

But in proving a safety-based hardship, the employer must still make a concrete and particularized showing. (See Gov. Code, § 12940, subd. (*l*)(1) [insisting on proven hardship for "any" option]; *Draper*, *supra*, 527 F.2d at pp. 521-22 [rejecting purported "safety hazard" that was not proven "inevitable" or "unavoidable"]; *Jamil*, *supra*, 2017 WL 913601, at *17 [insisting on nonspeculative evidence of safety hardship in prison setting].)

As detailed in Section V.B. above, CDCR's safety argument fails as a global matter where its evidence is limited to officer experiences in fewer than a third of its 34 facilities. (See *supra* 47-49.) This is particularly striking given that religious accommodations are made at the facility level, and emergency or overtime needs, if any, vary by facility—with the trial expert adding that the fact of emergencies does not preclude Brown's being a correctional officer. (3 RT 441:8-11; 5 RT 831:23-832:7; 6 RT 993:2-6, 1027:4-5.) What's more, the expert testified, any effect on operations due to an officer's absence "depends on what post we're talking about." (6 RT 1043:2-16; see also 6 RT 1027:4-5

[stressing each prison differs and "[s]ometimes you never use involuntary overtime"].)[13]

2. *There is substantial evidence that accommodating Brown would not cause undue hardship based on emergencies.*

Even assuming CDCR presented evidence across facilities and posts—it did not—its safety argument fails in any event.

As for emergency reporting, there was substantial evidence in Brown's testimony that she would "certainly" stay or report on the Sabbath "if an inmate or officers' lives were at stake" or "they're injured." (2 RT 147:28-150:1.) She added, "if a riot was going on, I wouldn't walk out, or I wouldn't not go in." (*Ibid.*)

Moreover, the fact that CDCR tolerates unavailability for many reasons—including those not protected by law—vitiates CDCR's claim to need every officer to be available at all times in case of emergency. (See 4 RT 632:10-633:2; 5 RT 840:8-25; 6 RT 1059:1-21, 1062:28-1063:14; 8 RT 1271:26-1272:4 [reserve trainings]; 6 RT 936:12-16 [dialysis]; 4 RT 641:28-642:22, 5 RT 845:4-11 [child care]; 5 RT 841:14-842:16 [parental leave]; 2 RT 266:25-268:6 [Sabbath]; 3 RT 427:11-428:5; 4 RT 639:11-22 [no phone]; 3 RT 430:3-12 [vacation]; 3 RT 426:10-14; 6 RT 985:1-9 [family events]; 3 RT 431:13-432:2; 4 RT 640:22-27; 6 RT 985:9-11 [insobriety]; see also 4 RT 638:24-642:22 [CDCR does not reject

[13] Warden Sullivan said a sexual assault occurred at the prison he managed when an officer unexpectedly left his post early. (3 RT 450:22-451:21.) But Sullivan clarified that this tragedy did not involve an officer's inability to report for or stay after a shift. (3 RT 451:9-14.) And neither he nor CDCR offered evidence of such a danger across all facilities of varying security levels.

applicants it anticipates will be unavailable for such reasons].) As this Court found, CDCR "employs correctional officers who are at times unavailable or unwilling to work." (12 CT 3457.)

Furthermore, there is substantial evidence that any emergency requiring CDCR to call an officer from home is rare. Both the expert and officers with decades of combined service testified that emergencies requiring off-duty officers to be called in are "very seldom" or "[a]lmost never" occur. (3 RT 321:23-322:8; 6 RT 991:25-992:16, 1047:16-1048:24, 1076:14-27.) And where they might occur, CDCR would activate the Special Emergency Response Team—an elite cadre with training "similar to SWAT in a police department." (3 RT 358:25-359:24; 6 RT 991:25-992:16, 1047:16-1048:24.) CDCR also has relief officers who would cover absences in emergencies. (3 RT 424:24-425:18.)

Finally, when it comes to staffing generally, CDCR had to prove not only that employing Brown would threaten safety in any post at any facility she could have worked—it did not—but also that a "safety hazard" was "inevitable" and "unavoidable." (*Draper*, *supra*, 527 F.2d at pp. 521-22.)

If anything, the evidence shows that hiring and accommodating Brown would be a net asset. After all, when Brown applied, CDCR was seeking to hire 7,000 officers. (4 RT 615:22-616:6; 5 RT 717:27-718:9.) Plus, Brown was willing to work any other time—including Sundays, holidays, nights, etc. (2 RT 156:4-7.) And, the expert testified, if a reporting need arose on Brown's Sabbath but she had an accommodation, it would be a "nonissue" to skip her that day, move to the next person on the

list, and return to her first the next time a need arose that was not on her Sabbath. (6 RT 985:12-986:26, 989:25-990:9, 1053:14-22.) As one court observed in a prison Sabbath-accommodation case, "scrambling to find last-minute coverage . . . present[s] a greater risk to the facility's security than if a schedule providing for this coverage had been planned in advance, pursuant to an accommodation." (*Jamil*, *supra*, 2017 WL 913601, at *17 n.30.)

3. *There is substantial evidence that accommodating Brown would not cause undue hardship based on mandatory overtime.*

CDCR advances the hypothetical that the need for Brown to work mandatory overtime—for an emergency or otherwise—could arise on her Sabbath, including on a holdover after the end of a scheduled shift. (AOB 58.) But again, CDCR has offered no evidence on the overtime needs of most facilities where Brown could have worked. (See *supra* 47-49.) As the expert urged, involuntary overtime, if any, "depends what prison you're at" and "[s]ometimes you never use [it]." (6 RT 1027:4-6.) And again, as described above, CDCR tolerates unavailability for many reasons. (See *supra* 61-62; 12 CT 3457.)

Regardless, CDCR could avoid any mandatory-overtime issue by assigning Brown a management-determined post with a schedule that ends on Thursday. The labor contract discourages officers from being held over at the end of their work-week or called in for overtime on their day off. (Exh. 20 at 97; 3 RT 340:28-341:13; 4 RT 618:23-26; 5 RT 848:11-14; 7 RT 1227:28-1228:4.) The expert confirmed a holdover "doesn't happen for people who are going on their days off." (6 RT 1027:27-1028:3.)

Even if unanticipated overtime were needed, it could be avoided on Brown's Sabbath.

Furthermore, the expert explained, overtime reporting is subject to accommodation in any event. (Exh. 27; 6 RT 940:15-945:11, 984:9-20.) And again, Brown testified she would report on or stay into her Sabbath in the case of a riot, if lives were in danger, or if anyone were injured. (2 RT 147:28-150:1.)[14]

Finally, there is also substantial evidence Brown could be assigned a PIE or other position that is not subject to mandatory overtime at all. (6 RT 1045:4-7 [PIEs]; 7 RT 1207:10-23 [positions that do not require coverage on weekends].)

4. *CDCR's arguments about "essential functions" are inapposite under subdivision (l)(1).*

CDCR closes its brief by contending, in a variant of its earlier-defeated BFOQ argument, that emergency reporting is an "essential function" for which any accommodation would cause an undue hardship. (AOB 58-64.) CDCR is wrong again.

As detailed in Section I.A. above, the distinct concept of "essential functions" applies only to disability claims under Section 12940, subdivision (a), and not religious-accommodation claims under (*l*)(1). (See *supra* 31-32; Gov. Code, § 12940, subd. (*l*)(1) [covering "any employment requirement"].)

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[14] To the extent seniority in mandatory overtime were ever any concern, the expert further said the contract's exception for "operational needs" includes "a need to accommodate." (6 RT 949:15-950:6; Exh. 20 at 97.) Seniority provisions also don't apply in "emergency situations." (Exh. 20 at 97.)

Unsurprisingly, therefore, to support its argument about supposed essential functions being a categorical rule, CDCR cites only Section 12940 cases involving disability-discrimination claims under subdivision (a). (See AOB 58-62 [citing *Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215; *Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729; *Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359; *Hastings v. Dept. of Corrections* (2003) 110 Cal.App.4th 963].)

CDCR also cites two federal cases. (AOB 62-63.) But the first—*Salmon v. Dade County School Board* (S.D.Fla. 1998) 4 F.Supp.2d 1157—is another disability case. And the second—*EEOC v. North Memorial Health Care* (8th Cir. 2018) 908 F.3d 1098, 1103-04—refers to essential functions in dicta and relies on a disability case.[15]

Finally, it should be observed that this Court rejected CDCR's prior argument about a categorical job requirement in reversing the BFOQ ruling on the last appeal. It held there was no class-wide evidence that applicants who are unable to meet CDCR's "availability standards" cannot safely and efficiently do the job, or that it would be impossible or highly impractical to

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[15] CDCR elsewhere cites *Quinn v. City of Los Angeles* (2000) 84 Cal.App.4th 472, for the proposition that an applicant's inability to meet a "minimum qualification[]" dooms her claim for religious accommodation. (AOB 41.) But *Quinn* involved a disability claim under Section 12940, subdivision (a) (*Quinn* at pp. 475, 482 fn.5), not a religious-accommodation claim under (*l*)(1)—which applies to any employment requirement.

rearrange responsibilities to avoid using open availability as an absolute requirement. (12 CT 3457-58.)[16]

CONCLUSION

CDCR failed to include the trial court's decision in the record, and the judgment is otherwise supported by implied findings and substantial evidence. This Court should affirm.

Date: March 21, 2024

Respectfully submitted,

STANFORD LAW SCHOOL
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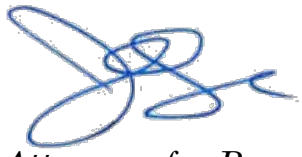
By: 

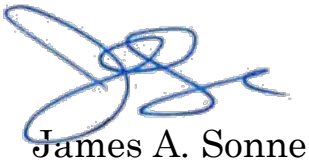
Attorneys for Respondent
Teresa Brown

[16] Even if it were an applicable legal concept—it is not—the trial expert testified that 24/7/365 availability is "not an essential function." (6 RT 918:12-15.)

CERTIFICATE OF COMPLIANCE

The foregoing **Respondent's Brief** complies with the type-volume limitation of California Rule of Court 8.520(c)(1) because it contains 13,999 words, excluding the parts of the brief exempted under Rule 8.520(c)(3), and was prepared in 13-point Century Schoolbook, a proportionally spaced typeface, using Microsoft Word. Finally, the electronic brief was subject to a virus scan and no virus was detected prior to its submission.

Dated: March 21, 2024



James A. Sonne

Attorney for Respondent
Teresa Brown

CERTIFICATE OF SERVICE

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.

On the date set forth below, I served one true copy of the following document(s) described as **RESPONDENT'S BRIEF** on the interested parties in this action as follows:

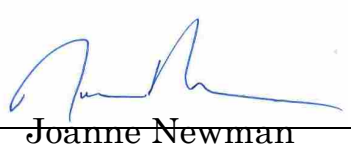
☒ **BY FIRST-CLASS UNITED STATES MAIL:** Pursuant to CRC R. 8.212(c)(1), a true and correct copy of the foregoing was mailed to the superior court clerk in this case, addressed as follows:

Sacramento County Superior Court
Clerk of the Court
720 Ninth Street
Sacramento, CA 95814

☒ **BY ELECTRONIC FILING / SERVICE:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) **as indicated on the attached service list.**

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

Executed on March 21, 2024 at Stanford, California.



Joanne Newman

SERVICE LIST

TERESA BROWN v. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION

COA Case No. C095798 • SCSC Case No. 34-2015-00176321

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