No. 17-55976

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Lorette Robinson,
Plaintiff—Appellant,

v.

CVS Pharmacy, Inc.,
Defendant—Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
HON. CONSUELO B. MARSHALL, DISTRICT JUDGE • CASE NO. 15-8282-CBM-KSX

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JURISDICTIONAL STATEMENT

Plaintiff Lorette Robinson, a Seventh-day Adventist and employee of defendant CVS Pharmacy, Inc., sued the company in the United States District Court for the Central District of California. She alleges CVS violated federal and state anti-discrimination law when it refused her a full-time position based on her inability to work on her Sabbath. (3 ER 419-21.) The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1367, because the action arises under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, and its state-law equivalent, the California Fair Employment and Housing Act (FEHA), Cal. Gov't Code § 12940.

The district court granted CVS's motion for summary judgment and denied Robinson's cross-motion on June 12, 2017, and entered judgment for the company. The district court found CVS reasonably accommodated Robinson when, at the time her store unionized in 2014, the company offered her a part-time position in lieu of the full-time position it then refused her because of her need to observe the Sabbath. On July 11, 2017, Robinson filed a timely notice of appeal from the district court's order. This Court therefore has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

The anti-discrimination provisions of Title VII and FEHA protect Sabbath observers in two related yet distinct ways. First, they each forbid an employer from refusing a job opportunity because of an individual's need for an accommodation not to work on the Sabbath; that is, they forbid "disparate treatment" on that basis. As the Supreme Court recently made clear in *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015), an employer cannot make the need for religious accommodation a motivating factor in denying a job opportunity. And although an employer might defend itself by pointing to conflicts between an accommodation and a collective-bargaining agreement, that excuse is dispositive only where the accommodation would infringe on another employee's rights. *See, e.g.*, *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 83 (1977) (holding seniority violation was not required there).

Second, in addition to forbidding disparate treatment, Title VII and FEHA also each require an employer to reasonably accommodate Sabbath observers absent a concrete showing of undue hardship. *Opuku-Boateng v. California*, 95 F.3d 1461, 1467 (9th Cir. 1996). An employer has some flexibility when it comes to accommodating a current employee,

but to meet its legal obligations the employer must "reasonably preserve" the employee's status in terms of pay, terms, conditions, and privileges. *Am. Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 776 (9th Cir. 1986). Moreover, the assessment of whether a supposed accommodation has preserved the employee's status is a highly contextualized one that should therefore be left to the fact-finder in the normal course. *Hudson v. W. Airlines, Inc.*, 851 F.2d 261, 266 (9th Cir. 1988).

Given an employer's dual obligations not to engage in disparate treatment based on an individual's need for Sabbath accommodation and to reasonably accommodate that practice, two questions arise here:

(1) Whether, contrary to the district court's finding, CVS engaged in illegal disparate treatment by refusing Robinson the full-time job to which she was in fact entitled by seniority, because of her need for an accommodation to a new labor agreement's supposed requirement that full-time employees must be available to work at all times.

(2) Whether the district court erred in finding as a matter of law that CVS reasonably accommodated Robinson where, to eliminate the conflict with her Sabbath, the company refused Robinson a full-time job

with a guarantee of 40 hours a week and instead gave her a part-time job with a guarantee of 24 hours and resultant lower pay and benefits.

STATEMENT OF THE CASE

A. Lorette Robinson is a devout Seventh-day Adventist who objects to working sundown Friday to sundown Saturday.

Lorette Robinson is a devout Seventh-day Adventist. (2 ER 222:2-4, 271 ¶ 2.) Her faith requires that she observe the Sabbath from sundown Friday to sundown Saturday by, among other things, refraining from secular work. (2 ER 271 ¶ 2.) Robinson's faith is central to her life, and she is a leader at her church. (2 ER 271 ¶ 3.)

B. CVS operates a national chain of pharmacies.

CVS is America's largest pharmacy, with annual revenue exceeding $150 billion. (*See* 3 ER 375.) It operates more than 9,500 retail stores nationwide, and has approximately 250,000 employees. (3 ER 372-73.)

C. Robinson has worked at CVS's Los Angeles store on Vine Street for two decades. Although she abstains from work on the Sabbath, Robinson is willing to work any other time.

Robinson has worked at the CVS store at 861 North Vine Street in Los Angeles since 1997—when it was under the Sav-on moniker. (2 ER

199:18-22; *see* 2 ER 271 ¶ 4.) She works as a scan coordinator, ensuring all listed prices are accurate. (2 ER 201:1-15, 271 ¶ 5.) Robinson enjoys working at Vine Street, and considers her co-workers to be part of her family. (2 ER 271 ¶ 7.)

Consistent with her faith, Robinson has never worked on her Sabbath. (*See* 2 ER 223:14-16.) She has, however, been ready and willing to work any other day or time of the week. (*See* 2 ER 250:11-251:18, 271 ¶ 9, 272 ¶ 10.) Robinson is consistently willing to work undesirable shifts; for example, she has worked shifts beginning just after the Sabbath, working into the night, and has come in to stock shelves at 2 a.m. (2 ER 250:11-16, 251:1-18, 272 ¶ 10.) She has worked Thanksgiving, Christmas, and New Year's. (2 ER 272 ¶ 10.)

Although CVS classified Robinson as a "full-time" employee before the store unionized in 2014, it did not guarantee a minimum number of hours to her or anyone else. (2 ER 212:2-8, 249:9-11, 254:15-255:6.) High performers, however, were "rewarded with a good amount of hours within their store." (2 ER 255:8-9; *see* 2 ER 212:2-8.) And in the period leading up to the unionization, Robinson worked more hours than anyone else at Vine Street. (2 ER 212:2-8.)

D. Vine Street unionizes. CVS refuses Robinson a full-time job, insisting that although she qualifies by seniority, the new labor contract forbids Sabbath accommodation for the post.

1. CVS interprets the new labor contract to require "open availability" to qualify for a full-time position, contrary to the understanding of both Robinson and the Union.

In 2014, the employees at Vine Street joined the United Food and Commercial Workers, Local 770. (2 ER 210:25-211:16.) Under the resulting collective-bargaining agreement reached by CVS and the union, a set number of full-time positions would be assigned anew at each store based on seniority. (2 ER 206:7-8, 280, 284; *see* 2 ER 246:11-14.) The contract also states that a full-time employee "shall be guaranteed forty (40) hours' work per week . . . provided the employee is available and able to work the required work schedule." (2 ER 281.)

Over the objections of both Robinson and the union, CVS has interpreted this 40-hour guarantee to require unlimited availability as a condition of full-time status. (3 ER 382; *see* 2 ER 242:18-243:9.) For Vine Street, this means that to qualify for a full-time position an employee would need to be available to work at least 7:00 a.m. to 10:00 p.m. every day of the week. (*See* 2 ER 204:2-3, 256:24-257:5.)

Whereas the labor agreement required that full-time positions be assigned by seniority, management retained full discretion over setting employees' weekly schedules—both before and after unionization, and for both full-time and part-time workers. (2 ER 277.)

2. CVS refuses Robinson a full-time position because of her need to observe the Sabbath. The company makes her part-time instead, with fewer hours and benefits.

After the store unionized, three full-time positions were allotted to Vine Street. (2 ER 206:7-8.) Assistant manager Shannon Peck told Robinson she was the most senior employee there, and as a result was first in line for a full-time slot: "[Y]ou are the one that has first choice to have—to keep your full-time status." (2 ER 246:17-19.) Peck added, however, that to be eligible, "you have to be available." (2 ER 246:17-19.) Apart from her Sabbath, Robinson was, and always has been, available to work a full schedule of 40 hours at any other time of the week. (2 ER 261:5-20, 272 ¶ 13.)

Management made clear to Robinson that she would be hired into one of the three full-time positions if she would indicate her "open availability" on a form. (2 ER 219:15-220:9, 246:11-24, 272 ¶¶ 11-13.) Robinson was urged to say she was available, no matter the situation, to

allow her to obtain the full-time position. (2 ER 272 ¶ 13.) Robinson could not do so, however, because her faith both requires her to abstain from work on the Sabbath and forbids lying. (2 ER 272 ¶ 12.) Refusing to mislead, Robinson explained she was available at any other time, but could not violate her Sabbath. (2 ER 272 ¶¶ 12-13; *see* 2 ER 218:1-9.)

CVS denied Robinson a full-time position because she could not pledge open availability. (2 ER 247:12-16; 3 ER 367.) Three others with less seniority were given the jobs instead, while Robinson was assigned a part-time position. (2 ER 247:12-16, 248:8-15.)

The collective-bargaining agreement at Vine Street guarantees part-time employees 24 hours per week, rather than the 40 guaranteed to full-timers. (2 ER 281-82.) And since her change in status, Robinson has generally been assigned 24 to 30 hours per week in the part-time job. (1 ER 009.) Also, she now gets two weeks of paid vacation instead of the five she would have received in the new full-time position, and five hours of pay on each holiday rather than eight. (2 ER 216:8-20, 217:18-23, 225:2-5, 285, 288-89.)

3. Robinson complains, but CVS refuses to exempt her from "open availability" and instead suggests she find hours at other stores.

Robinson complained to the union and then met with her managers to discuss CVS's denial of the full-time job. (*See* 2 ER 205:3-9, 209:6-11, 272 ¶ 15.) While the managers told Robinson she was a valued employee, they continued to refuse her a full-time post and instead suggested she try to make up lost pay by calling other stores each week asking if they needed any help; the managers offered Robinson contact information for three stores in the Los Angeles area. (2 ER 263:18-264:7, 265:4-8, 272 ¶ 15; 3 ER 367-68.) But, they explained, these hours would be available only to the extent the other stores had them each week. (2 ER 265:7-8, 272 ¶ 15; 3 ER 367-68.)

Frustrated, Robinson at first declined the contact information for the other stores because she felt it was wrong for her home store of many years to make her search elsewhere for hours each week. (2 ER 252:1-9; *see* 2 ER 272 ¶ 15.) Ultimately, though, she was willing to pursue the option, and has since picked up additional hours at other stores—including those on CVS's list. (2 ER 273 ¶ 16.)

Because Robinson does not own a car and must travel by public transit, it can take up to two hours to reach some of the other stores. (2 ER 273 ¶¶ 16-17.) Even so, Robinson has worked an average of 32 hours per week, including the extra hours she picks up when possible, instead of the 40 guaranteed to a full-time employee. (2 ER 273 ¶¶ 16, 18; *see* 2 ER 281; *see generally* 3 ER 296-365.) She has also been limited recently in her ability to pick up hours elsewhere because the Vine Street manager started to assign her more midday shifts—often of five hours—which hinders her from getting to other stores before they close. (2 ER 273 ¶ 18; *see* 2 ER 204:2-9.)

E. The union files a grievance on Robinson's behalf.

There is no evidence CVS asked the union for a variance from the open-availability requirement, or worked with the union to accommodate Robinson. To the contrary, the union filed a grievance under the labor agreement on her behalf, and took it to arbitration. (*See* 3 ER 382.)

The union argued in arbitration that CVS violated the collective-bargaining agreement by both "failing to reasonably accommodate [Robinson's] religious practices and beliefs" and "discriminat[ing] against her by, in essence, punishing her for exercising her faith." (2 ER 239:1-5,

see 267:19-25.) And although the arbitrator denied the grievance based on his understanding of the agreement, the union insisted CVS violated it by "not honoring her faith." (2 ER 240:2-7, 241:1-3; 3 ER 378.)

F. Robinson sues. The trial court enters summary judgment for CVS, finding its actions to be reasonable as a matter of law.

Robinson filed this lawsuit on October 22, 2015, alleging violations of Title VII and FEHA for discrimination on the basis of religion. (3 ER 553.) At the close of discovery, each party moved for summary judgment. (2 ER 183-84; 3 ER 392-94.) The district court granted CVS's motion and denied Robinson's. (1 ER 011.)

The court rejected Robinson's discrimination claims under a theory of disparate treatment, saying hers is "not a failure to hire case." (1 ER 010.) Additionally, the court rejected her claims under the reasonable-accommodation theory, finding CVS's efforts were reasonable as a matter of law because the company did not force Robinson to work on the Sabbath and invited her to call three other stores each week to try to make up lost hours. (1 ER 008.) Further, the court found, any decrease in Robinson's income did not make CVS's efforts unreasonable. (1 ER

008.) The court did not address particular income figures, vacation or holiday pay, or challenges Robinson may have faced to find extra hours.

Citing *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986), the district court also found that because, in its view, CVS had fulfilled its duty to accommodate Robinson, the company need not show that an exception to its open-availability rule would have been unreasonable or caused undue hardship. (1 ER 009.) In any event, the court found, any such exception would be unreasonable because it would be inconsistent with the labor agreement and deprive other employees of their right to be classified as full-time. (1 ER 009-10.) Moreover, the court said, giving Robinson the full-time position would constitute "preferential treatment" for her religious beliefs and afford her the "absolute right not to work on the Sabbath" but receive full-time status anyway. (1 ER 009-10.)

The court did not address Robinson's seniority relative to her co-workers. (*See generally* 1 ER 005-011.)

This appeal follows.

SUMMARY OF THE ARGUMENT

This Court should reverse summary judgment for CVS and direct the district court to enter judgment for Robinson instead, because the company engaged in illegal disparate treatment by indisputably denying Robinson a full-time job to "avoid accommodating a religious practice that it could accommodate without undue hardship." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2031 (2015). Alternatively, this Court should reverse and remand for trial, because the district court's finding that CVS acted reasonably by substituting a part-time job for a full-time one with different hours and benefits is a call that only a jury can make.

In *Abercrombie*, the Supreme Court insisted in no uncertain terms that "the rule for disparate treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions." 135 S. Ct. at 2033. And although the district court brushed aside Robinson's disparate-treatment theory based on its finding that this "is not a failure to hire case," both the holding and logic of *Abercrombie* apply to any individual denied a job opportunity. *See id.* at 2031-32 (including range of adverse actions in Title VII's disparate-

treatment proscription). To hold otherwise would be to treat external job applicants better than current employees—hardly what the law intends.

The district court also found that denying Robinson the full-time position was justified because accommodating her in that job would have breached the labor agreement in contravention of *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), and CVS's purportedly reasonable substitution of a part-time job absolved it of any further accommodation duty under *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986).

But the contract defense in *Hardison* involved an accommodation that would have violated the seniority rights of other employees, an approach the union there rejected. 432 U.S. at 79 ("[T]he union was unwilling to entertain a variance [to the seniority system] over the objections of men senior to Hardison . . . ."). Unlike in *Hardison*, no other worker's rights would have been violated here; rather, it was Robinson who was entitled to the position by seniority. (*See* 2 ER 246:11-19.) And like other collectively bargained job rules that courts have required to yield to civil-rights laws, the open-availability policy must likewise give way when it conflicts with an employee's religious practice absent undue hardship. Moreover, unlike in *Hardison*, the union's support of Robinson

undercuts CVS's claim that any accommodation to the collective-bargaining agreement would have been unreasonable.

As for *Ansonia*, the Supreme Court's holding there—namely, that an employer need not adopt an employee's preferred accommodation, but can offer any reasonable accommodation—is also inapposite. Unlike in *Ansonia*, the accommodation Robinson sought in connection with the full-time position was not a mere preference among reasonable options, but, again, was her right earned through seniority. To hold otherwise would allow CVS to exclude Sabbath-observers from full-time employment no matter how long they worked there, rendering seniority rights nearly meaningless for such believers—another form of disparate treatment.

In the alternative, even if CVS's decision to place Robinson in a part-time job allowed the company to avoid disparate-treatment liability in the abstract—and it does not—this Court should at least remand to allow a jury to decide whether the part-time position was a reasonable accommodation. An accommodation is unreasonable if it fails to preserve the employee's status, or imposes significant burdens on her. And, as this Court has emphasized, assessments of reasonableness in this context are "essentially factual determinations." *Hudson v. W. Airlines, Inc.*, 851

F.2d 261, 266 (9th Cir. 1988).[1] At a minimum, this case presents a triable issue because of the differences in hours, pay, and benefits between the full-time and part-time positions; the part-time position's effect on Robinson's seniority rights; and the matter of the union's cooperation.

ARGUMENT

I. THIS COURT REVIEWS THE DISTRICT COURT'S ENTRY OF SUMMARY JUDGMENT DE NOVO.

Summary-judgment orders are reviewed de novo. *Covey v. Hollydale Mobilehome Estates*, 116 F.3d 830, 834 (9th Cir. 1997). And viewing the evidence in the light most favorable to the nonmovant, this Court must determine "whether the district court correctly applied the relevant substantive law and whether there are any genuine issues of material fact." *Balint v. Carson City*, 180 F.3d 1047, 1050 (9th Cir. 1999). Moreover, any doubts "must be resolved in favor of the opposing party." *Colores v. Bd. of Trs.*, 105 Cal. App. 4th 1293, 1305 (2003).

[1] In addressing CVS's reasonableness, the district court relied, in part, on its observation that "[a]t the hearing, the parties agreed Plaintiff's claims may be resolved as a matter of law." (1 ER 007.) But Plaintiff made no such concession, deferring instead to her response to CVS's statement of facts (which included numerous disputes) and her own summary-judgment motion (which argues only that there is no dispute such that she was entitled to judgment, not CVS). (2 ER 33:6-15, 166-182, 183-84.)

Integral to the analysis of a grant of summary judgment, of course, is whether the movant met its burden as a matter of law. *See Aguilar v. Atl. Richfield Co.*, 25 Cal. 4th 826, 851 (2001) (noting the summary-judgment burden tracks each party's burden at trial). In the religious-accommodation context, once the plaintiff establishes her need for an accommodation, the burden shifts to the defendant to show either that it reasonably accommodated the plaintiff, or that any accommodation would have caused undue hardship. *Balint*, 180 F.3d at 1050-51. And determinations about the reasonableness of accommodations "must be made in the particular factual context of each case." *Anderson v. Gen. Dynamic Convair Aerospace Div.*, 589 F.2d 397, 400 (9th Cir. 1978).

Finally, an order denying a cross-motion for summary judgment is also reviewable on appeal when "it is coupled with a grant of summary judgment to the opposing party." *Padfield v. AIG Life Ins. Co.*, 290 F.3d 1121, 1124 (9th Cir. 2002). This Court can therefore reverse both the grant of summary judgment to CVS and its denial to Robinson, and then remand with instructions to enter judgment for Robinson. *See McKeen-Chaplin v. Provident Sav. Bank*, 862 F.3d 847, 855 (9th Cir. 2017) (holding accordingly).

II. CVS ENGAGED IN ILLEGAL DISPARATE TREATMENT WHEN IT REFUSED ROBINSON A FULL-TIME POSITION BASED ON HER NEED FOR SABBATH ACCOMMODATION.

A. *Abercrombie* is unequivocal: Absent undue hardship, an employer cannot deny a job opportunity based on a candidate's need for religious accommodation.

Title VII and FEHA forbid an employer from denying an individual a job opportunity because of her religious belief or practice. 42 U.S.C. § 2000e(j), 2000e-2(a)(1); Cal. Gov't Code § 12940(a), (*l*)(1). Furthermore, as the Supreme Court recently made clear in *Abercrombie*, because the statutory definition of "religion" includes a duty to accommodate, an employer also may not deny a job opportunity "to avoid accommodating a religious practice that it could accommodate without undue hardship." 135 S. Ct. at 2031; 42 U.S.C. § 2000e(j); *see also Cook v. Lindsay Olive Growers*, 911 F.2d 233, 241 (9th Cir. 1990) ("Federal precedent applies to [FEHA] provisions analogous to Title VII."). Absent undue hardship, therefore, employers are forbidden from even considering an individual's religious conflict as a "factor in employment decisions." *Abercrombie*, 135 S. Ct. at 2033.

In light of *Abercrombie*, to establish a prima facie case of illegal disparate treatment in the accommodation context, a plaintiff must show

that (1) she held a bona fide religious belief, the practice of which conflicted with a job requirement; (2) the need to accommodate the conflict was a motivating factor in the employer's decision; and (3) the employer took adverse action because of the conflict requiring accommodation. *See Abercrombie*, 135 S. Ct. at 2032-33; *Soldinger v. Nw. Airlines*, 51 Cal. App. 4th 345, 370 (1996); Chin et al., Cal. Practice Guide: Employment Litigation ¶ 7:620 (The Rutter Group 2016).

Once an employee has established a prima facie case of disparate treatment based on the need for a religious accommodation, the burden shifts to the employer to show either that (1) it reasonably accommodated the religious observance, or (2) any reasonable accommodation would have caused undue hardship. *Opuku-Boateng v. California*, 95 F.3d 1461, 1467 (9th Cir. 1996); *Soldinger*, 51 Cal. App. 4th at 370. For Title VII purposes, courts define "undue hardship" as anything beyond "de minimis" harm. *Hardison*, 432 U.S. at 84. FEHA, on the other hand, requires more: Employers must show hardship that amounts to "significant difficulty or expense"—the same as the outer limit for disability accommodation. Cal. Gov't Code §§ 12926(u), 12940(*l*)(1).

Finally, where a collective-bargaining agreement is in play, employers need not "carve out a special exception to [that agreement's] seniority system in order to help [a plaintiff] to meet his religious obligation." *Hardison*, 432 U.S. at 83. Beyond seniority, however, courts have required exceptions to labor-contract terms where Title VII would otherwise be violated, or where a variance could be sought from the union. *See*, *e.g.*, *Cal. Brewers Ass'n v. Bryant*, 444 U.S. 598, 608-09 (1980) (allowing for modification of non-seniority term); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1245 (9th Cir. 1981) (likewise); *see also Soldinger*, 51 Cal. App. 4th at 373 (stressing union's role). The key issue is not the mere presence of a term in a collective-bargaining agreement but its relative impact on workers' rights.

B. CVS's decision to pass over Robinson and give the full-time job at the unionized store to a junior employee constitutes illegal discrimination under *Abercrombie*.

Absent a showing of undue hardship, an employer cannot deny an individual a job opportunity based on her need for a religious accommodation; under Title VII and FEHA, rather, a denial on this basis constitutes illegal disparate treatment—full stop. *Abercrombie*, 135 S. Ct. at 2033.

In *Abercrombie*, the employer refused to hire a qualified candidate because her religious headscarf violated the company's "Look Policy." *Id.* at 2031. Even though that policy applied to all employees, the Court held, Abercrombie's decision not to hire the candidate on that basis constituted illegal discrimination. *Id.* at 2033-34. Title VII, the Court urged, requires even neutral policies—those that do not single out religious practices—to "give way to the need for an accommodation." *Id.* at 2034. In short, an employer who denies a job opportunity to avoid accommodating a candidate's religious conflict violates Title VII. *Id.* at 2033.

Likewise, when the Vine Street store unionized, Robinson—as the most senior employee in the store—would have been placed in one of the new full-time positions had she been able to certify her open availability. But because she needed a religious accommodation—in this case, an exception to the open-availability policy—CVS refused her the job. By making Robinson's need for an accommodation the motivating factor in its decision not to give her a full-time position, CVS broke the law.

The district court found *Abercrombie* inapplicable because, in its view, "[t]his is not a failure to hire case." (1 ER 010.) This distinction, however, is of no moment because the disparate-treatment prohibition on

which *Abercrombie* relied—i.e., Title VII Section 703(a)(1)—contemplates the full range of adverse actions against an "individual" seeking a job opportunity, including hiring, firing, demotion, and non-promotion. 42 U.S.C. § 2000e-2(a)(1); *see also Thompson v. City of Waco*, 764 F.3d 500, 503 (5th Cir. 2014). Pertinently, and as the California Supreme Court has observed, adverse action in the Title VII context includes the "denial of an available job." *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 355 (2000). This Court has likewise noted that "it is beyond dispute that the denial of a single promotion opportunity" is actionable. *Breiner v. Nev. Dept. of Corr.*, 610 F.3d 1202, 1208 (9th Cir. 2010).

Most importantly, although *Abercrombie* involved a failure to hire someone off the street, the Court did not limit its holding to that scenario, instead holding broadly that "[a]n employer may not make an applicant's religious practice . . . a factor in *employment decisions*." 135 S. Ct. at 2033 (emphasis added). By its own terms, therefore, *Abercrombie*'s holding applies whenever an individual seeks a job opportunity. *Id.*; *see also* 42 U.S.C. § 2000e-2(a)(1) (protecting "individual[s]").

A hypothetical illustrates that the logic of *Abercrombie* is not limited to failure-to-hire cases involving entirely new employees. Imagine

an employer is hiring for a management post, and considers one internal candidate and one outside hire who each require a Sabbath accommodation. It would be anomalous if the employer were barred by our civil-rights laws from refusing to hire the outsider based on his need for accommodation, but could refuse without any consequences at all the internal candidate based on his need for the very same accommodation.

That Robinson already works at CVS does not therefore remove this case from *Abercrombie*'s broad prohibition against disparate treatment based on the need for religious accommodation. The district court's finding to the contrary must be reversed.

C. The collective-bargaining agreement was no defense to refusing Robinson the position, since she had seniority and no other worker's rights would have been violated.

The district court concluded that an exception to the open-availability rule would have been unreasonable in light of *Hardison* because the rule is found in the collective-bargaining agreement. (1 ER 009-10.) Furthermore, the court said, to give Robinson the full-time position would have deprived others of rights under the contract and given preferential treatment to Robinson and her religious reasons over

those who might be unavailable for other reasons. (1 ER 009-10.) The district court got it wrong on all counts.

The Rights of Others

First, it was not the mere existence of a collectively bargained term that led the Court in *Hardison* to conclude that the employer there did not have to accommodate. Rather, the Court focused on the harm to the rights of other employees; namely, that accommodating the Sabbath-observant plaintiff would have forced the employer to trump the seniority rights of co-workers in bidding for days off. *See Hardison*, 432 U.S. at 80-81 (rooting its holding in seniority). What is more, according to the Court's analysis in *Hardison*, even seniority is not an ironclad bar to accommodation; the Court instead allowed for the possibility that were the union willing to grant a variance—it was not there—the employer might have been required to pursue it. *See id*. at 79 (relying on union's unwillingness to make seniority exception in ruling for employer).

The district court nonetheless suggested that hiring Robinson as a full-time employee would deprive others of "contractually-established rights to be classified as full-time employees." (1 ER 010.) The court apparently presumed that, under the collective-bargaining agreement, it

is not the most senior employee who is entitled to a full-time position; rather, it is the most senior employee *among those with open availability*. But surely not every job qualification (like open availability) creates a right by virtue of its mere inclusion in a labor contract.

Seniority no doubt receives a special "measure of immunity" under Title VII, whether under the express carve-out for bona fide seniority systems under Section 703(h) or the solicitude given it in *Hardison*. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 350 (1977); *Hardison*, 432 U.S. at 81-83 (relying on 703(h) in its holding). For although seniority might disadvantage some, Congress singled it out for protection due to its value to industrial peace. *Hardison*, 432 U.S. at 79 (stressing that collective bargaining "lies at the core of our national labor policy, and seniority provisions are universally included in these contracts").

The special status Congress gave seniority systems, however, does not necessarily extend to other job qualifications placed in a collective-bargaining agreement. In the context of the bona fide seniority system carve-out of Section 703(h) of Title VII, for example, courts have insisted that contract terms unrelated to seniority are indeed subject to the law's discrimination prohibitions. In *California Brewers*, the Supreme Court

held that although the contract provision there—which established how length of service is calculated—was part of a bona fide seniority system, provisions less "core" to seniority would not be immune from Title VII. 444 U.S. at 606-09. The Court cited education, aptitude, and physical requirements as examples of collectively bargained terms that would nonetheless have to give way under Title VII. *Id.* at 609.

Similarly, in *United States v. Cincinnati* the Sixth Circuit recognized that not all terms in a collective-bargaining agreement are exempt from Title VII. 771 F.2d 161, 168 (6th Cir. 1985). The court there considered a provision requiring police-exam scores to be used as a tie-breaker for layoff order among officers who were hired on the same day. *Id.* Because that provision was not part of a seniority system, the Court held, it was therefore open to a Title VII challenge. *Id.*

In other contexts, courts have likewise indicated that non-seniority terms in labor agreements are subject to Title VII, including for religious-accommodation purposes. In *Tooley*, this Court held unreasonable the refusal of an employer and union to waive a union-shop term for three Adventists who objected to membership or dues but offered a charitable donation instead. 648 F.2d at 1241-43. Indeed, that a union can waive

contract terms as a form of accommodation at all, as the courts urged in both *Hardison* and *Soldinger*, shows their flexibility. *See Hardison*, 432 U.S. at 79 (stressing union opposition in ruling for employer); *Soldinger*, 51 Cal. App. 4th at 373 (stressing failure to seek variance from union in ruling for employee).

Like the union-membership provision in *Tooley* or the exam scores in *Cincinnati*, the Vine Street contract's open-availability term does not have the elevated status or rights-conferring power of a seniority term. Employees earn seniority, but they do not earn availability. They either have it or they do not. As *California Brewers* makes clear, Title VII does not contemplate that workers who satisfy a provision like an educational requirement, a height or weight restriction, or a physical-fitness test will become entitled to job opportunities by virtue of those qualifications in a way that would tie the employer's hands and make accommodation impossible. Similarly, no other Vine Street worker's rights would have been jeopardized had CVS made an exception to open availability.

Robinson's Rights

Second, when the Vine Street store unionized Robinson was the most senior employee, with a tenure of more than fifteen years. (2 ER

198:5-9, 218:1-3.) To accommodate her by making an exception to the open-availability rule, therefore, would have been entirely consistent with the seniority system established in the labor contract. In doing so, CVS would not have set aside the rights of any other employee, because Robinson's rights received first priority—or, as her supervisor put it, "first choice." (2 ER 246:17-19.)

Given *Hardison*'s particular embrace of collectively bargained seniority and the earned interests it reflects, it is Robinson's rights—and not those of her co-workers—that are at stake. Like other neutral job rules that do not confer rights, therefore, open availability cannot be used to exclude her. *See Abercrombie*, 135 S. Ct. at 2034 ("Title VII requires otherwise-neutral policies to give way to the need for an accommodation.").

Union Support

Third, whereas in *Hardison* the union resisted accommodating the employee, *see* 432 U.S. at 79, Robinson's union went so far as to file a grievance on her behalf and support her in arbitration (3 ER 382). And given the Court's emphasis in *Hardison* on the union's objection, its elevation of collective-bargaining agreements is therefore limited in any

event. *See Hardison*, 432 U.S. at 79 (stressing union opposition to an accommodation in holding for employer).

As the court in *Jamil v. Sessions* likewise stressed, while *Hardison* held that the employer there could not unilaterally breach the seniority provisions of that agreement, it did not address a situation where the employer refuses a religious accommodation "without even contacting the union." No. 14-CV-2355, 2017 WL 913601, at *12 (E.D.N.Y. Mar. 6, 2017); *see also Rohr v. W. Elec. Co.*, 567 F.2d 829, 830 (8th Cir. 1977) (stressing union's opposition to deviating from provisions of collective-bargaining agreement in holding for employer).

Extending *Hardison* to a situation where the employer makes no attempt to work out an accommodation with the union, the court in *Jamil* warned, would "erode even further one of this Nation's pillars of strength, our hospitality to religious diversity." *Id.* at *13 (internal quotation marks and alterations omitted). And the situation here is worse: CVS did not just fail to contact the union, the company fought the union tooth and nail. (3 ER 382.) In short, CVS cannot claim its hands were tied by a contract with the very same union that supported Robinson at every turn.

Favored Treatment

Fourth and finally, that CVS treated Robinson no worse than those with non-religious scheduling conflicts is no defense. More than mere neutrality is required when a religious practice conflicts with an employment requirement. *See Abercrombie*, 135 S. Ct. at 2034 ("Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices."). Rather, Title VII and FEHA contemplate "favored treatment" of religious practices in this context. *Id.*

The district court's concern that granting Robinson the full-time position with a Sabbath accommodation would constitute unjustified special treatment was therefore misplaced. (*See* 1 ER 010.) Specifically, the court failed to recognize the difference between *preferential* and *favored* treatment. *See Opuku-Boateng*, 95 F.3d at 1469 ("We have not read *Hardison* so broadly as to proscribe all differences in treatment.") Employers are not required to offer preferential treatment, which involves giving an employee a privilege she would not get absent her faith. *See id.* at 1469-70. Favored treatment, on the other hand, merely elevates religious reasons over secular ones when it comes to adjusting

job rules. *See Abercrombie*, 135 S. Ct. at 2034 (clarifying that employer may have no-headwear policy as a general matter, but must reasonably accommodate conflicts rooted in religious, as opposed to secular, reasons).

Likewise, CVS is entitled to have an open-availability policy as a general matter, but that policy must give way when it conflicts with an employee's religious belief or practice. It is of no concern that Robinson's religious conflict might be treated differently than another employee's secular scheduling preferences; on the contrary, the law requires it.[2]

D. CVS's interpretation of the labor agreement amounts to a policy that Sabbatarians can never work there full-time—a result fundamentally at odds with the law.

Regardless of whether the duty to accommodate under Title VII requires employers to alter a collective-bargaining agreement, practices

[2] The district court raised a further concern over an exception to the open-availability policy—namely, it would give Robinson an "absolute right not to work on the Sabbath and still maintain full-time status." (1 ER 010.) The court's objection was apparently based on *Estate of Thornton v. Caldor, Inc.*, which invalidated under the Establishment Clause a state statute giving employees an absolute right not to work on their Sabbath. 472 U.S. 703 (1985). But as Justice O'Connor clarified in concurrence, the accommodations Title VII requires pose no such problem. *Id.* at 712 (O'Connor, J., concurring) ("Title VII calls for reasonable rather than absolute accommodation . . . ."). Offering an exception to open availability would not give Robinson an absolute right not to work on her Sabbath, but a qualified one subject to any undue hardship CVS can show.

that would flout public policy are not immune from attack just because they happen to be found in a union contract. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) ("Title VII's strictures are absolute . . . . Of necessity, the rights conferred can form no part of the collective bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII."); *Soldinger*, 51 Cal. App. 4th at 372-73 ("California's anti-discrimination statutes, which include [FEHA], demonstrate California's intent not to allow its laws to be circumvented by private contracts."). This makes good sense. Were it otherwise, an employer could contract around its employees' civil rights.

The district court found, in effect, that it would have been per se unreasonable for CVS to make an exception to the open-availability policy because to do so would have been inconsistent with the labor agreement. (*See* 1 ER 009.) But if it were true that any rule found in a collective-bargaining agreement is inviolable, employers would have a foolproof workaround to Title VII and FEHA. Under this theory, merely by putting its no-headwear policy into a labor contract, Abercrombie could evade any duty to accommodate a headscarf-wearing job candidate.

And any employer who wants to insist on open availability could do the same.[3]

CVS's open-availability requirement amounts to a sign in the Vine Street window reading: "Adventists, Jews, and Muslims need not apply." *Cf.* Susan Gellman & Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause)*, 10 U. Pa. J. Const. L. 665, 692 (2008) (discussing Adventist, Jewish, and Muslim Sabbath practice). Indeed, no one who refrains from work on a Sabbath—or, for that matter, follows any other weekly, time-bound religious commitment—may ever work there full-time. Such a radical extension of *Hardison* would leave Title VII and FEHA with no teeth at all. *See*, *e.g.*, Cal. Gov't Code § 12940(*l*)(1) (protecting "observance of a Sabbath or other religious holy day or days" by name).

Unlike the collective-bargaining agreement in *Hardison*, moreover, CVS's interpretation of its union contract violates public policy when applied to Robinson. In *Hardison*, it was "coincidental that in plaintiff's

[3] Collective bargaining itself provides little protection against employers avoiding the accommodation of Sabbath observance and other minority religious practices. After all, such bargaining is designed to protect the majority—hence the vital importance of statutory protection of minority interests. *Jamil*, 2017 WL 913601, at *13.

case the seniority system acted to compound his problems in exercising his religion." 432 U.S. at 82. There, the company's seniority policy did not lock out employees with Hardison's religious beliefs and practices across the board; once he accrued more seniority, Hardison would have been able to take the day off for his Sabbath. *See id.* at 67 ("The most senior employees have first choice for job and shift assignments . . . .").

But the *Hardison* Court agreed with the district court in that case that a seniority system would be suspect if in fact it "act[ed] to lock members of any religion into a pattern wherein their freedom to exercise their religion was limited." *Id.* at 82 (quoting *Hardison v. Trans World Airlines*, 375 F. Supp. 877, 883 (W.D. Mo. 1974)). And that is effectively how the open-availability policy operates in Robinson's case: No matter how much seniority she accrues, Robinson can never earn a full-time position at CVS. Under CVS's interpretation of the collective-bargaining agreement, she will always have to choose between her faith and her need to provide for her family.

Title VII and FEHA aim to alleviate exactly this kind of pressure on the consciences of those concerned—particularly religious minorities.

E. CVS's invocation of cases rejecting an employee's right to choose among reasonable accommodations is inapt. Robinson was not denied a preference but a right.

The district court also agreed with CVS that the statutory inquiry ended when it found the company reasonably accommodated Robinson by offering her a part-time position. (1 ER 009.) The court based its conclusion on the Supreme Court's holding in *Ansonia* that "where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end." 479 U.S. at 68.

Regardless of whether the part-time position was reasonable in the abstract, however—something we dispute in detail below—Robinson's situation is distinct from *Ansonia*. Specifically, CVS was in fact required to prove that Robinson's proffered accommodation—a full-time position with an exception to the open-availability provision—was unreasonable, because unlike *Ansonia* this case does not turn on competing preferences, with the employer favoring one accommodation option and the employee insisting on another. *See id.* at 64-65 (describing employer's preference of providing unpaid leave versus employee's preference for a modified paid-leave approach). Rather, Robinson was contractually entitled to the full-time post by her seniority. *Ante* 27-28. Notwithstanding *Ansonia*,

therefore, CVS must show placing Robinson in the full-time position to which she was entitled would have been unreasonable or caused undue hardship.

CVS cannot make that showing. Giving Robinson the position would not have been unreasonable under *Hardison*, because due to her seniority CVS would not have violated any other employee's rights by exempting her from any open-availability term. *See ante* 24-27; *see also Hardison*, 432 U.S. at 80 (emphasizing that the employee's proffered accommodation there would deprive more senior co-workers of their rights). Moreover, CVS was able to accommodate Robinson's inability to work on the Sabbath in the past and has not claimed it would have been infeasible, practically speaking, to do so in the full-time position. (*See* 2 ER 223:14-16.)

In sum, CVS committed illegal disparate treatment as outlined in *Abercrombie* because it denied Robinson a job to which she was entitled, and no other worker's rights would have been violated, nor any employer interests jeopardized, had CVS given her the job. This Court must reverse judgment for CVS and remand to the district court with instructions to enter judgment for Robinson.

III. AT A MINIMUM, THIS COURT SHOULD REVERSE AND REMAND FOR A JURY TO DETERMINE WHETHER CVS'S PLACEMENT OF ROBINSON IN A PART-TIME POSITION CONSTITUTED A REASONABLE ACCOMMODATION.

A. In addition to not engaging in disparate treatment based on the need for a Sabbath accommodation, an employer must reasonably accommodate the practice.

In addition to forbidding as an act of illegal disparate treatment an employer's denial of a job opportunity based on the need for religious accommodation, Title VII and FEHA's anti-discrimination provisions also each require an employer to reasonably accommodate an employee's religious practice unless the employer is able to demonstrate that doing so would cause it undue hardship. 42 U.S.C. § 2000e(j), 2000e-2(a)(1); Cal. Gov't Code § 12940(a), (*l*)(1). To establish a prima facie case to that end, the employee must show that (1) she held a sincere religious belief; (2) the employer knew about the belief; and (3) the belief conflicted with a work requirement for which the employee would need accommodation. *Fair Emp't & Hous. Comm'n v. Gemini Aluminum Corp.*, 122 Cal. App. 4th 1004, 1011 (2004).

Once the employee has established a prima facie case, the burden shifts to the employer to show either that it initiated good-faith efforts to

reasonably accommodate the employee, or no reasonable accommodation was possible absent undue hardship. *Soldinger*, 51 Cal. App. 4th at 370; 42 U.S.C. § 2000e(j); Cal. Gov't Code § 12940(*l*)(1).

For summary-judgment purposes, it is critical to note that it is the employer's burden to demonstrate as a matter of law that it acted reasonably, or in the face of undue hardship. *See Balint*, 180 F.3d at 1050-51 (describing employer obligations); *see also Aguilar*, 25 Cal. 4th at 851 (stressing that the parties' respective burdens on summary judgment track those at trial). Moreover, as we noted at the outset, any doubts on summary judgment "must be resolved in favor of the opposing party." *Colores*, 105 Cal. App. 4th at 1305.

In assessing reasonableness, courts have considered, for example, whether the employer tried to find substitutes, arrange shift swaps, or consult with the union or legal counsel. *E.g.*, *Cook*, 911 F.2d at 241; *Soldinger*, 51 Cal. App. 4th at 373. And even where a collective-bargaining agreement creates an obstacle, an employer must still explore other available options. *See Balint*, 180 F.3d at 1053 (stressing that a collective-bargaining agreement is not the end of the matter for purposes of determining an employer's duty to reasonably accommodate).

As for undue hardship, it is not assessed in the abstract but is pegged to the particular employer's size, resources, and options. FEHA lists five factors to consider: (1) the nature and cost of the accommodation; (2) the number of employees and the financial resources of the facilities in play; (3) the employer's overall size and resources; (4) the nature of its work; and (5) the distribution of the employer's physical locations. Cal. Gov't Code §§ 12926(u), 12940(*l*)(1). And again, the FEHA test for hardship in the religion context is "significant difficulty or expense," the same exacting standard used for disability accommodation. *Id.*

In the context where an employer's supposed accommodation of a current employee does not require her to violate her faith, the inquiry is not over. Rather, whether an employer has offered an accommodation at all and whether it is a reasonable one are two distinct matters. *See Am. Postal Workers Union*, 781 F.2d at 776-77 (separating these two questions); *see also* Cal. Gov't Code § 12940(*l*)(1) (requiring an employer to explore "any available reasonable alternative means" of resolving the conflict between job rules and the religious practice).

In other words, the reasonableness of an accommodation turns on how costly it makes it for an employee to practice her religion. In this

situation, therefore, the inquiry reduces to whether the employer's effort "reasonably preserves the affected employee's employment status." *Am. Postal Workers Union*, 781 F.2d at 776-77; *see also Hudson*, 851 F.2d at 266 (affirming trial court's finding of reasonable accommodation—after a bench trial—where it eliminated the religious conflict *and* preserved the employee's status). Relatedly, accommodations can also be unreasonable if effectuating them places a "significant work-related burden" on the employee. *Cosme v. Henderson*, 287 F.3d 152, 160 (2d Cir. 2002).

B. Whether a chosen accommodation is reasonable is a fact-intensive question that, in the context of a current employee, depends on whether it preserves her status.

No matter the various attendant factors, determining whether an employer has in fact met its burden to reasonably accommodate an employee's religious practice depends on "the particular factual context of each case." *Am. Postal Workers Union*, 781 F.2d at 775. Absent compelling circumstances, therefore, this inquiry should be left to the fact-finder. *See Hudson*, 851 F.2d at 266 (observing that judgments on the reasonableness of religious accommodation are "essentially factual determinations"). As the Tenth Circuit urged just a few weeks ago in reversing a grant of summary judgment to the employer in a Sabbath-

accommodation case, "whether an accommodation is reasonable in a given circumstance is ordinarily a question of fact to be decided by the fact finder." *Tabura v. Kellogg USA*, 880 F.3d 544, 555 (10th Cir. 2018).

Furthermore, the inquiry of whether a given "accommodation reasonably preserves [an employee's] employment status" involves, in turn, a host of fact-dependent considerations. *Am. Postal Workers Union*, 781 F.2d at 776-77. Compensation, benefits, and other conditions or privileges of employment are among those factors considered as part of the status-preservation inquiry. *Id.* at 776. Additionally, seniority rights—or, for that matter, their utility—are included in the assessment. *See*, *e.g.*, *United States v. N.Y.C. Transit Auth.,* No. 04-4237, 2010 U.S. Dist. LEXIS 102704, at *51 (E.D.N.Y. Sept. 24, 2010) (finding religious accommodation could not be deemed reasonable as a matter of law in light of evidence it denied employees certain benefits of their seniority).

Finally, in the unusual circumstance where the employer (1) eliminates the plaintiff's current job, (2) denies her the replacement job she seeks because of the need for an accommodation, and (3) assigns her to a third job instead, the point of reference to which her new status is compared is the position she was denied. *See, e.g.*, *McIntosh v. White*

Horse Vill., Inc., 249 F. Supp. 3d 796, 800 (E.D. Pa. 2017) (using the full-time status plaintiff was denied, after implementation of a new policy that modified her old job, as the comparator for her new status).

And while reassignments within the same job classification can be reasonable, those that change the employee's classification have typically been found reasonable only where every other alternative would cause undue hardship. *See Cook*, 911 F.2d at 241 (emphasizing that only after numerous other efforts to accommodate failed was employee reassigned to a different job classification); *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 519 (6th Cir. 1975) (insisting that where accommodation adversely impacts a worker's status, the "employer first must attempt to accommodate the employee within his current job classification").

C. Differences in pay, hours, and seniority rights between the full-time job Robinson sought and the part-time job she received raise a triable issue on reasonableness.

In its order, the district court found that CVS reasonably accommodated Robinson as a matter of law in substituting the part-time job for the full-time job she sought and inviting her to try to find hours at other stores. (1 ER 008.) The court's conclusive finding of reasonableness,

however, misses the mark in several important ways that require this Court, at a minimum, to remand for jury consideration.

Among the results of CVS's decision to substitute a full-time post for a part-time one are context-dependent consequences for Robinson in the following important areas: (1) compensation losses; (2) benefits differentials; and (3) diminished seniority rights. Moreover, the option CVS gave Robinson of hunting for hours at other stores, with no guarantees and minimal facilitation, likewise requires a careful look by the fact-finder. We address each factor in turn.

Pay

An accommodation's impact on the employee's income is a central consideration in determining its reasonableness. *See Am. Postal Workers Union*, 781 F.2d at 776 (listing "compensation" first in suggested litany of status-preservation factors). An accommodation that causes an employee to miss out on an unreasonable amount of income, therefore, is likewise unreasonable. *See Sanchez-Rodriguez v. AT&T Wireless*, 728 F. Supp. 2d 31, 41 (D.P.R. 2010) ("[R]easonable preservation of compensation [is] a significant aspect of a reasonable accommodation.");

see also Ansonia, 479 U.S. at 70-71 (stressing minimal amount of income loss in upholding occasional unpaid leave as a holy-day accommodation).

In her part-time position, Robinson is guaranteed only 24 hours per week; she is generally scheduled to work between 24 and 30; and even with the extra hours she might be able to pick up either at Vine Street or elsewhere, she works only a total of 32 on average. (1 ER 009; 2 ER 282; *see generally* 3 ER 296-365.) That is a far cry from the 40 that a full-time employee would be guaranteed. (*See* 2 ER 281.) Based on an average of 32 hours per week, an hourly rate of $16.15, and a 50-week work-year, Robinson is losing out on more than $6,000 a year—or a 20% income loss (32 out of 40 hours a week). (*See* 2 ER 202:7-20, 217:18-23.)

In addressing Robinson's deprivation of income, the district court found "[t]he fact that Plaintiff's total income may have decreased from working less hours" does not mean the part-time accommodation was not reasonable. (1 ER 008.) But the court gets it backwards, because the decrease in Robinson's hours did not result from her absence from work on the Sabbath, but rather from her rejection for the full-time post. The court's reliance on *Ansonia* shows the fallacy, as the (limited) lost pay there was due to unpaid leave on religious holy days, not the rest of the

week. *See* 479 U.S. at 70-71. By contrast, CVS denies Robinson additional hours of work far beyond the time she needs off for her religious observance.

Also, in dismissing Robinson's financial loss, the district court cited cases that involved accommodations with either a vastly lower, if any, pay differential, or a lower-paying job as a last resort. (*See* 1 ER 008-09.) These included: *Ansonia*, 479 U.S. at 70-71 (occasional unpaid leave on holy days); *Sanchez-Rodriguez v. AT&T Mobility P.R., Inc.*, 673 F.3d 1, 12-13 (1st Cir. 2010) (lower-paying new job offered, but along with other options in current job); *Kelly v. County of Orange*, 101 F. App'x 206, 207 (9th Cir. 2004) (pay increase); *Cook*, 911 F.2d at 241 (transfer to lower-paying position as a last resort, but with increased gross pay); *Eversley v. MBank Dallas*, 843 F.2d 172, 176 (5th Cir. 1988) (transfer to lower-paying job only after employer unsuccessfully asked other employees to switch shifts); *Pinsker v. Joint Dist. No. 28J of Adams & Arapahoe Ctys.*, 735 F.2d 388, 390-91 (10th Cir. 1994) (occasional unpaid leave on holy days).

The district court also cited *Morrisette-Brown v. Mobile Infirmary Medical Center*, 506 F.3d 1317 (11th Cir. 2007), but the court there was

affirming a post-trial judgment in a situation that also involved a plethora of accommodation efforts in the plaintiff's current job.

Benefits

A diminution in benefits can also render an accommodation unreasonable. *Cosme*, 287 F.3d at 160; *N.Y.C. Transit Auth.*, 2010 U.S. Dist. LEXIS 102704, at *51. And insisting that an employee lose a benefit "enjoyed by all other employees who do not share the same religious conflict" only deepens the problem because such a denial is, in effect, its own form of discrimination. *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1379 (6th Cir. 1994) (rejecting as unreasonable the forced use of accrued vacation as a Sabbath accommodation).

Here, CVS's refusal of the full-time position to Robinson resulted in her receiving three fewer weeks of paid vacation and a loss of three hours of pay on each of CVS's nine recognized holidays—or nearly a month's worth of compensation. (*See* 2 ER 217:18-23, 225:2-5, 287-89.) The part-time job accommodation also led Robinson to draw from her accrued paid time off to offset income losses, and to reduce contributions to her defined-contribution plan given her income. (2 ER 273 ¶¶ 19-20.) Robinson's need to observe the Sabbath was the only reason she had to

suffer this diminished financial and personal situation; an employee without a Sabbath conflict would not have experienced these same losses. *See Cooper*, 15 F.3d at 1379 (rejecting differential treatment of vacation).

In discussing Robinson's benefits, however, the district court omitted the vacation and holiday-pay disparities. (*See* 1 ER 008-09.) And in addressing Robinson's drawdown of paid time off, the court repeated its fallacious use of *Ansonia*, which held only that it was reasonable for an employer to offer an employee unpaid leave on holy days—not that it was reasonable to reduce an employee's hours on days he was available to work. (*See* 1 ER 008-09 (citing *Ansonia*, 479 U.S. at 70-71; *Pinsker*, 735 F.2d at 390-91).) The unpaid leave there was the accommodation, not its consequence. Here, by contrast, in addition to giving Robinson unpaid time off for her Sabbath, CVS cut her hours across the board. *Ansonia* does not support a finding that this was reasonable as a matter of law.

Finally, the district court rejected Robinson's four-fold decrease in her 401(k) contributions as a self-inflicted wound since it involved her contributions, not any reduced matching. (1 ER 009.) Significantly, however, the reason for Robinson's decreased retirement contribution is her income loss. (2 ER 273 ¶ 20.) A jury would therefore be able to find

that losing this benefit also diminishes Robinson's employment status. *See Am. Postal Workers Union*, 781 F.2d at 776 (insisting on reasonable preservation of all aspects of employee compensation and benefits).

Seniority

In addition to the difference in hours, income, and benefits, one of the most significant consequences of Robinson's part-time substitution is its diminution of her seniority. Although Robinson may have retained her years of service on paper, they became almost meaningless since seniority at Vine Street is valuable chiefly because of the full-time status to which it entitles employees under the collective-bargaining agreement. (2 ER 280); *see also* Benjamin Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 Harv. L. Rev. 1532, 1534 (1962) ("Seniority is a system of employment preference based on length of service; employees with the longest service are given the greatest job security and the best opportunities for advancement.").

Typically, seniority is valuable for providing first choice in shifts or job assignments. *See, e.g.*, *Hardison*, 432 U.S. at 66 ("The most senior employees have first choice for job and shift assignments . . . ."); *Teamsters*, 431 U.S. at 343 (observing that seniority determined order for

bidding for jobs, layoffs, and recall from layoffs). Seniority at CVS is valuable primarily for getting an employee full-time status—without that, it is virtually meaningless. (2 ER 280.)

By the time the Vine Street store unionized, Robinson had earned the seniority to give her "first choice" for the full-time position—together with all of its rights and benefits, e.g., a 40-hour workweek, more holiday pay, and increased vacation. (2 ER 198:5-9, 218:1-3, 246:17-19, 281, 285-89.) CVS's decision to instead put her in a part-time post that lacked these rights and benefits stripped her of what she had earned by seniority.

Whether CVS could have done more to make up for the gap is a further triable issue warranting reversal and remand. *See*, *e.g.*, *N.Y.C. Transit Auth.*, 2010 U.S. Dist. LEXIS 102704, at *51 (holding that the employer's accommodation could not be found reasonable as a matter of law given evidence that it denied employees certain benefits of seniority).

Makeshift Hours

CVS's proposal that Robinson try to find hours at other stores across Los Angeles also cannot be found reasonable as a matter of law, and not only because that approach failed to maintain Robinson's status,

but also in light of its imposing a significant work-related burden on her—yet another reason warranting presentation to a jury. *See Cosme*, 287 F.3d at 160 (rejecting accommodations that impose a "significant work-related burden on the employee without justification"); *see also Haliye v. Celestica Corp.*, 717 F. Supp. 2d 873, 880-81 (D. Minn. 2010) (rejecting summary judgment for employer, finding the extent of burden imposed on employee is "quintessentially a fact-bound inquiry").

CVS's patchwork "hunting for hours" accommodation puts enough of a burden on Robinson to be a triable issue. Robinson incurs personal hardship in piecing together hours—e.g., bus commutes of up to two hours. (2 ER 273 ¶¶ 16-17.) Moreover, none of these other hours are guaranteed but are dependent on other stores' weekly needs, leading to further gaps and uncertainty for Robinson. (2 ER 265:7-8, 272 ¶ 15, 273 ¶ 18.) What is more, the ad hoc approach has often proved unworkable in practice because Robinson's Vine Street manager has scheduled her such that it is difficult for her to pick up shifts elsewhere—i.e., the very thing,

apart from benefits (which are forever deprived to her as a part-timer), that she needs to be made whole.[4] (2 ER 273 ¶ 18.)

As with the compensation issue, the district court cited a series of distinguishable cases in finding the week-to-week approach reasonable. (*See* 1 ER 008.) These cases, however, involved either accommodation in the plaintiff's current location, thorough employer facilitation, or clear-error review after a trial. They include: *Morrisette-Brown*, 506 F.3d at 1323 (post-trial review and many facilitated options); *Cook*, 911 F.2d at 241 (more shifts made available in same location); *Hudson*, 851 F.2d at 266-67 (post-trial review and a plethora of options); *Pinsker*, 735 F.2d at 390-91 (limited loss of pay in same location); *Benefield*, 630 F. Supp. at 82 (post-trial review and full complement of hours made available in same location); *Soldinger*, 51 Cal. App. 4th at 373 (suggesting range of options in same location).

At a minimum, the (literal) makeshift approach CVS imposed on Robinson cannot be found to be reasonable as a matter of law.

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[4] The district court notes that Robinson at first resisted the offer to find hours elsewhere, citing her belief that it was unfair given her length of service to the company. (1 ER 008; *see* 2 ER 272 ¶ 15; 3 ER 436:2-11.) But the record demonstrates she took up the offer, and also supports a finding she did her best to make it work. (2 ER 273 ¶ 16.)

D. CVS's failure to facilitate an accommodation with the union also raises a triable issue on reasonableness.

Finally, a jury should be permitted to decide whether CVS failed to reasonably accommodate Robinson based on the lack of evidence that the company either reached out to the union before denying her the full-time position or otherwise worked with the union to preserve her employment status. To the contrary, the evidence suggests CVS fought the union every step of the way. (*See* 3 ER 367-68).

As the court in *Jamil v. Sessions* clarified, *Hardison* nowhere holds that "an employer will be deemed to have reasonably accommodated an employee who is affected by a collective-bargaining agreement when the employer denies the employee an accommodation without even contacting the union." 2017 WL 913601, at *12; *see also EEOC v. Chemsico, Inc.*, 216 F. Supp. 2d 940, 953 (E.D. Mo. 2002) (accommodation could not be found reasonable as a matter of law where employer failed to seek attendance-policy variance from union). FEHA authority is in accord. *See Soldinger*, 51 Cal. App. 4th at 373 (stressing employer's failure to seek variance from union in rejecting its motion for summary judgment).

Whether CVS failed to act reasonably by not contacting the union but instead unilaterally, and in the face of union opposition, refusing to accommodate Robinson—either in the full-time position to which she was entitled or otherwise—is a question that should at least be put to a jury.

CONCLUSION

This Court should reverse the grant of summary judgment to CVS and direct entry of judgment for Robinson instead, because CVS violated Title VII and FEHA by denying her a full-time position as a result of her need for a Sabbath accommodation and with no showing of hardship. Robinson did not merely prefer the full-time position, she earned it.

Alternatively, and at a minimum, this Court should reverse and remand for trial because it cannot be found as a matter of law that CVS's accommodation was reasonable in light of its fact-dependent impact on Robinson's employment status and the work-related burdens it imposed.[5]

[5] Special thanks to Liz Klein and Rami Koujah, bar-certified law students in the Stanford Law School Religious Liberty Clinic, for their assistance in preparing this brief.

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STATEMENT OF RELATED CASES

We are not aware of any pending appeals related to this appeal.

See 9th Cir. R. 28-2.6.

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS [FED R. APP. P. 32(a)(7)(C)]

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I hereby certify that on this 2nd day of March, 2018, I electronically filed the foregoing **APPELLANT'S OPENING BRIEF (filed concurrently with APPELLANT'S EXCERPTS OF RECORD, Volume 1 – 3)** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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