2d Civil No. B084660

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

GERALDINE SOLDINGER,

Plaintiff and Appellant,

vs.

NORTHWEST AIRLINES, INC.,

Defendant and Respondent.

Appeal from the Superior Court of Los Angeles County
Honorable David A. Workman, Judge

APPELLANT'S OPENING BRIEF

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APPELLANT'S OPENING BRIEF

INTRODUCTION

This case involves odious religious discrimination against a Jewish employee who was fired after taking a day off to observe an important religious holiday. Defendant Northwest Airlines, Inc., refused to accommodate plaintiff Geraldine Soldinger's religious beliefs, treated her differently than other employees, retaliated against her for asserting her Constitutional and statutory rights not to be discriminated against and intentionally inflicted emotional distress upon her. Ms. Soldinger filed this action to obtain redress through state statutory and common law remedies. The trial court wrongly granted summary judgment for defendant, primarily on the mistaken ground that Ms. Soldinger's state law causes of action were preempted by federal labor law. In so ruling, the court

used federal labor laws designed to shield workers as a sword against Ms. Soldinger, and nullified important civil rights protections granted by state law. Because the trial court erred in doing so, and because the court's alternate bases for granting summary judgment were also incorrect, the judgment must be reversed.

On April 8, 1991, defendant Northwest Airlines summarily fired Ms. Soldinger after 14 years of unquestionably excellent service. Ms. Soldinger, a Conservative Jew whose husband is a concentration camp survivor, was terminated because she refused to work on the first two days of a major Jewish religious holiday--Passover. Ms. Soldinger had never worked on the first two days of Passover during the time she was employed by defendant, but in 1991 she was not able to obtain a day off on the second day of Passover (March 31, which was also Easter), despite making strenuous efforts to do so. Ms. Soldinger had experienced a similar problem in 1987 when she was working in Memphis, Tennessee, and her manager had arranged for her to obtain a day off. However, this time, when Ms. Soldinger informed Steve Holme (Northwest's Los Angeles Airport manager) of the conflict between her work schedule and her religious beliefs, he made no effort to accommodate Ms. Soldinger, but told her to report for work on March 31 or be fired. He also asked her, "'Well, what makes you think it's more important for you to have your holiday off than someone celebrating Easter?'" (Joint Appendix ("J.A.") 1272:3-5.) Although Holme refused to make any effort to accommodate Ms. Soldinger's request, another supervisory employee arranged for one of Ms. Soldinger's colleagues who had also been unable to obtain March 31 off to take that day off so he could go to the mountains.

Ms. Soldinger did not report to work on March 31 and was fired, despite the fact that defendant not only was able to find employees to work Ms. Soldinger's shift, but was so unconcerned about her intended absence that no arrangements were made to replace her until the thirty-first. Although Northwest assertedly fired Ms. Soldinger for being "AWOL" and "insubordinate," other employees who committed similar offenses were not fired and those employees fired during 1991 did not commit similar offenses.

Ms. Soldinger filed charges with the California Department of Fair Employment and Housing as well as the United States Equal Employment Opportunity Commission, which found that defendant did not undergo any undue hardship due to Ms. Soldinger's absence. Ms. Soldinger's union filed a grievance pursuant to the collective bargaining agreement in force between the union and defendant. An arbitration panel found "any Company efforts to assist [Ms. Soldinger] in finding an accommodation to her religious objection to working on Passover were largely inadequate." (J.A. 824.) The panel reinstated Ms. Soldinger with no loss of seniority, but with loss of back pay and fringe benefits during the year-long period between her termination and her reinstatement. After Ms. Soldinger returned to work, defendant retaliated against her by denying her a position in Operations and refusing to permit her to bid for vacation benefits to which she was entitled.

Ms. Soldinger therefore filed the present action alleging that defendant had discriminated against her in violation of the Fair Employment and Housing Act, had tortiously discharged her and retaliated against her in violation of public policy, and had intentionally inflicted emotional distress on her. The trial court granted summary judgment for defendant on the grounds that all of Ms. Soldinger's causes of action were

preempted by the Railway Labor Act, that her causes of action failed because defendant accommodated her religious beliefs as a matter of law, and that her retaliation allegations failed because she had not exhausted her administrative remedies.

The trial court, which issued its decision prior to a recent United States Supreme Court decision emphasizing the limitations on preemption under the Railway Labor Act (Hawaiian Airlines, Inc. v. Norris (1994) ___ U.S. ___, 114 S.Ct. 2239, 2243, 129 L.Ed.2d 203), was wrong on all three grounds. First, the Railway Labor Act did not preempt Ms. Soldinger's action because her action was based on California law that granted her substantive rights and not on the collective bargaining agreement in force between Ms. Soldinger's union and defendant. Second, defendant could not be said to have accommodated Ms. Soldinger as a matter of law because the undisputed evidence demonstrated defendant did not even attempt to accommodate Ms. Soldinger's religious beliefs after she informed defendant of the conflict between those beliefs and her work schedule. Third, Ms. Soldinger could bring her non-statutory claims even without exhausting her administrative remedies, and she could bring her statutory claim because she did exhaust her administrative remedies by filing two charges, one of which included retaliation allegations, with the California Department of Fair Employment and Housing. For these reasons, the summary judgment in defendant's favor should be reversed with regard to each of plaintiff's causes of action.

Ms. Soldinger testified in this case that she did not work on the first two days of Passover 1991 because "I wanted to observe my religious holiday. I felt compelled not to go to work. I felt that I shouldn't have to choose between my religion and my job."

(J.A. 1324:11-13.) Ms. Soldinger should not have been forced to make this choice, and she deserves the chance to tell a jury why.

STATEMENT OF THE CASE

A. Substantive Fact Summary.

The bulk of the facts produced below were undisputed. With respect to the facts that were disputed, this statement of facts presents the evidence in the light most favorable to Ms. Soldinger, in accord with settled law. (Bert G. Gianelli Distributing Co. v. Beck & Co. (1985) 172 Cal.App.3d 1020, 1034 ["Since plaintiffs challenge the lower court's grant of summary judgment, this court must liberally construe the evidence contained in plaintiffs' declarations and, viewing the admissible factual evidence in the light most favorable to plaintiffs, we must determine whether evidence was presented which, if true, would support a triable issue of fact as to each cause of action"].)

1. Plaintiff Geraldine Soldinger is a religious Jew who has always observed the three major religious Jewish Holidays--Yom Kippur, Rosh Hashanah and Passover--during her fourteen years as an exemplary employee with Northwest Airlines.

Geraldine Soldinger has worked for Northwest Airlines or airlines acquired by Northwest since 1977. (J.A. 132:25 - 133:2; 134:22 - 135:7; 136:7-14.) According to the

Arbitration Panel that reinstated Ms. Soldinger, she "was an exemplary employee until the incident which caused her termination"; she had received "numerous complimentary letters" over the years and she had been promoted to supervisor just prior to her termination. (J.A. 812.)

Ms. Soldinger is a "[C]onservative" Jew, one of the several "categorizations" of Jewish religious groups. (J.A. 1318:24-25; 1326:10-16.) Ms. Soldinger's husband, who survived five years in the Motthausen concentration camp, is also a Conservative Jew with beliefs "much the same as" Ms. Soldinger's, and "is very much a believer in keeping the Jewish religion and our traditions." (J.A. 1325:4-22.) The Soldingers raised their children in a "religious home" and they were educated in "religious school." (J.A. 1321:6-7.) The Soldingers keep a kosher home. (J.A. 1319:18-19.)[1/] Although Ms. Soldinger testified she did not consider herself "devout," she also explained that she equates the term "devout" with "very religious" Jews who are "Orthodox or Hassidic." (J.A. 1317:21 - 1318:2; 1326:24 - 1327:4.)

During her fourteen years with Northwest, Ms. Soldinger never worked on Rosh Hashanah, Yom Kippur or the first two days of Passover. (J.A. 143:18-23 and 1236:5-11.) These days are deemed "high holidays"--holidays that are set forth in the Torah (the first five books of the Bible), which was "given by God," and thus are distinguishable from holidays "made by man." (J.A. 1319:21 - 1320:8; Howard Fast, The Jews: Story of a People (1968) p. 39.) On high holidays, there is usually a family gathering. There are "special meals, special ways of preparation. The men always go to the synagogue,

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1/ The term "kosher" refers to food. (J.A. 1327:7.)

sometimes the women, the children if they are old enough." (J.A. 1321:14-17.) Ms. Soldinger further described these holidays:

> "[I]t's a day of observance. We don't get in the car and drive. We don't answer telephones. We don't pick up pencils. Children are limited to what they can do and not do as far as playing games. We don't watch TV. It's strictly a day of remembering who we are. Many times the men, as well as the women, always the men, sit around the table discussing the Torah." (J.A. 1321:19 - 1322:1.)

A rabbi who appeared on Ms. Soldinger's behalf during her arbitration hearing described Passover as:

> "a Holy Day that is a time for the gathering of family. There are services in the Temple but they are probably not the highlight of the event. The Seder which takes place the first night of Passover and second night of Passover, this is a very religious event, family orientated and can last several hours and it commemorates the Exodus of the Jewish People from Egypt. So it is a time of celebration but it is also a type of Holy Day where there are limitations that are placed on individuals as to what they can do, what they cannot do and it is very prominent in our Faith to the extent that everyday in

our daily prayers we remember the Exodus from Egypt." (J.A. 470.074:1-12.)[2/]

The rabbi further testified that observant Jews are supposed to take time off from work on Passover. (J.A. 470.078:13-15.) Ms. Soldinger emphasized the importance of observing Passover, testifying: "I think that we have to carry on these traditions . . . . for our younger generation; and if we as adults don't carry our traditions and train our young, then our heritage will be lost." (J.A. 1322:22 - 1323:1.)

2. Ms. Soldinger was unable to obtain a day off on March 31, 1991, the second day of Passover, by using the methods normally available to defendant's employees.

Passover is an eight-day holiday for Conservative and Orthodox Jews outside of Israel. (Random House Unabridged Dictionary (2d ed. 1987) p. 1418.) The first two days of Passover "are the most significant." (J.A. 470.078:10-12.) In 1991, March 31 was the second day of Passover. (J.A. 470.098:11-20.) It was also Easter Sunday. (J.A. 813.)

Northwest Airlines does not have a written policy regarding time off for religious holidays. (J.A. 1210.) Ms. Soldinger made several attempts to obtain a day off on March 31. In December of 1990, Ms. Soldinger tried to obtain as vacation the week that

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2/ Volume III of the Joint Appendix contains pages 470.001 - 470.153. These pages are numbered with decimals because they were inadvertently omitted from the initial Bates stamping process.

included March 31, 1991, by "bidding" pursuant to the "vacation bid procedure" contained in the collective bargaining agreement ("CBA") in force between plaintiff's union and defendant. (J.A. 146:16-19; 149:9-21; and 150:12-18.) Ms. Soldinger was unsuccessful, because the week had been selected by employees with higher seniority. (150:23-151:4.) So on or before March 18, 1991, Ms. Soldinger submitted a request to take a vacation day on March 31. (J.A. 153:5 - 154:2.) Such requests are termed "DAT" (day at a time days) and the CBA requires that they be submitted not more than 14 days in advance of the requested day off. (J.A. 470.054:11-15.)

On March 24, Ms. Soldinger learned that her DAT request had been denied. (J.A. 158:15-18.) That same day, Ms. Soldinger posted a note on a bulletin board of the only "passenger service agents" lunchroom, "stating a plea for the day off."[3/] (J.A. 162:9-12.) The note stated: "'Desperate' . . . . 'Need Sunday, March 31 off. Will pay back Thursday, Friday Saturday.'" (J.A. 162:25 - 163:3.) Such trades were permitted under company policy. (J.A. 163:9-11.) Ms. Soldinger made additional attempts to trade days with other employees so that she could take off March 31. She asked several employees who she knew had Sundays off to see if they would trade days with her. (J.A. 164:5-12; 169:21 - 170:10.) She also used two of her lunch hours to go to the ticket counter and ask everyone: "'Do you have Sunday off? So you have Sunday off? I'm desperate. I'm desperate. I need Sunday off.'" (J.A. 165:11-15.) She spoke with at least ten people on these occasions. (J.A. 168:25 - 169:8.) None of these attempts were successful. (J.A. 166:16 - 171:17.)

3/ Ms. Soldinger was at this time a "customer service agent." (J.A. 139:2-6.) This term appears to be synonymous with "passenger service agent."

3. After failing to obtain March 31 off, Ms. Soldinger contacted airport manager Steve Holme, who refused to even try to accommodate her religious beliefs.

On March 24, Ms. Soldinger told Administrative Supervisor Wilma Bourne that she was "desperate," and Ms. Bourne told her to "'[s]ee management.'" (J.A. 155:2-14 and 20-25; 789:6-11.)[4/] A few minutes later, Ms. Soldinger asked to see Steve Holme, then Manager of Station Operations at the Los Angeles International Airport ("LAX"), later transferred to Minneapolis, Minnesota and demoted to service manager. (J.A. 155:15-21; 470.017:13-16; 1350:5-11.) Holme was not in his office, so Ms. Soldinger told his secretary, "'I need to speak to him'"; she also left a note for him. (J.A. 156:7 - 157:1.) The note stated that she would be taking off March 31, 1991, "as it is a Jewish Holiday"--without pay if necessary. (J.A. 470.027:3-12.) In 1987, Ms. Soldinger had left a similar note for another manager in Memphis, Tennessee, and he had arranged for Ms. Soldinger to take a high holiday off. (J.A. 1263:1 - 1264:23.)

On March 27, Holme called Ms. Soldinger into his office and spoke with her regarding her note. (J.A. 1269:22-24; 470.026:24 - 470.027:30.) Holme "pointed several times" to the note, "beat[] his finger on the desk" and asked "[w]hat is this?" (J.A. 1271:2-7.) He then stated, "'You're not at work, you're fired.'" (J.A. 1271:13-15.) Ms. Soldinger testified that the following colloquy then ensued:

4/ Ms. Soldinger initially testified that she had seen Ms. Bourne on March 25. (J.A. 155:2-14 and 20-25.) However, it is clear from her later testimony that these events took place on March 24, which was the day her DAT request was denied. (J.A. 155:20-24 and 156:24 - 158:18.)

"I said, 'Steve, I think you are misreading what I am trying to tell you.' I said, 'It's a religious holiday and I can't come to work that day.' I said, 'I've tried to get someone here to work for me.' I said, 'I can't be here.'"

"So he said, 'You're not here, you're fired.'"

"I said, 'I'm sorry but I can't come to work on Sunday.'"

"So he replied, 'Well, what makes you think it's more important for you to have your holiday off than someone celebrating Easter?'"

"And I said, 'Steve this is something that didn't come up in 1991 [for the first time]. I have never worked this religious holiday.' I said, 'I'm sorry. I can't come to work on Sunday.'"

"So he said, 'If you're not here, you're fired.'"

"And I turned and walked from his office." (J.A. 1271:20 - 1272:12.)

4. Although Steve Holme refused to accommodate Ms. Soldinger's request to observe her religious holiday, another supervisory employee arranged for one of Ms. Soldinger's non-Jewish co-workers, who had also initially been unsuccessful in obtaining a day off on March 31, 1991, to get that day off so he could go to the mountains.

At the time of the incident in question, Ms. Soldinger worked in Operations. (J.A. 1274:20-21.) Chris Canale was another Northwest employee who worked in Operations. (J.A. 775:28 - 776:9.) Canale (who is also referred to as "Chris Canacel") is not Jewish.

(J.A. 1259; 1337:23 - 1338:22.) Like Ms. Soldinger, Canale had also unsuccessfully sought to obtain a day off on March 31, 1991. (J.A. 775:14-24.) Canale spoke to Rick Simpson, his supervisor, stating that "he needed the day off, he was going with his family to the mountains, and he was desperate for the day off." (J.A. 1312:2-5; 1343:8-13.) Simpson asked Deborah Swanke to change her shift on March 31, 1991, so that Canale's request could be accommodated. (J.A. 1337:23 - 1338:20.) Swanke agreed and Canale's request was granted. (J.A. 1339:4-9; 776:6-9.)

5. Defendant fired Ms. Soldinger although defendant routinely finds replacements for employees who give much shorter notice that they will not be reporting to work, and defendant easily covered Ms. Soldinger's shift without even seeking replacement workers before March 31.

On March 27, Ms. Soldinger told Steve Holme she would not be reporting to work on March 31. Defendant has to replace an agent absent from his or her shift almost daily, sometimes because of personal problems within the family or because an employee "just doesn't want to come to work." (J.A. 1391:6-14.) Defendant asks the employee to "call us before the start of their shift." (J.A. 1391:16-17.) One agent testified that she had been asked "lots" of times to cover an employee's shift. (J.A. 1421:15-20.) Supervisors asked people "just about every day" to cover the shift of someone who wanted to take the day off for an "important" reason, "not because they want to go shopping . . . ." (J.A. 1423:3-12.) Sometimes just a day's notice is given to

the employee who is asked to cover the shift. (J.A. 1423:13-17.) During 1991, Northwest relied upon part-time as well as full-time employees to cover shifts. (J.A. 1427:11-19.) Some of these part-time employees were trained in Operations. (J.A. 1428:9-11.) Sometimes the shift is not covered "and people manage." (J.A. 1424:4-5.)

On March 30, 1991, Rick Simpson spoke with the managers in Operations and asked them how they were going to cover Ms. Soldinger's absence, if it occurred. The managers "said they were not going to do anything about it until that day, until something actually happened. They were not preparing for anything to happen." (J.A. 783:14-16; emphasis supplied.)

On March 31, Ms. Soldinger did not report for work because she was observing Passover. (J.A. 1278:16-19; 470.098.) Defendant sent two employees to replace her in Operations. (J.A. 1279:15-17 and 23-25.) About 50 to 60 people were working the day shift on March 31, 12 of them in Operations. (J.A. 470.067:22-25; 470.069:12-14.) Eight people were qualified but not assigned to work in Operations that day. (J.A. 470.069:15-19.) Deborah Swanke, an employee of defendant who worked in Operations, testified in Ms. Soldinger's arbitration hearing that defendant's operations did "not appear to be" crippled by Ms. Soldinger's absence. (J.A. 470.069:20-22.) The United States Equal Employment Opportunity Commission ("EEOC"), with which Ms. Soldinger had filed a charge, later determined that defendant did not undergo any "undue hardship" as a result of Ms. Soldinger's actions. (J.A. 1259.) The arbitration panel found that defendant covered Ms. Soldinger's shift with "ease." (J.A. 824.) Nonetheless, defendant fired Ms. Soldinger on April 8, 1991. (J.A. 811.)

6. Although Defendant assertedly fired Ms. Soldinger for being "AWOL" and "insubordinate," other employees who committed similar offenses were not fired and those employees fired during 1991 did not commit similar offenses.

Defendant claims to have fired Ms. Soldinger "in part" because she was absent without leave (AWOL) and "in part" because she was insubordinate. (J.A. 1219:24 - 1220:9 and 1221:1-8.) Nine other customer service agents were fired in 1991, none of them for being "insubordinate" or "AWOL." (J.A. 1259.) Defendant's employee Deborah Swanke had never heard of anyone other than Ms. Soldinger being terminated for being AWOL or insubordinate. (J.A. 1371:24 - 1372:6.) Defendant's employee Renee Kaufman knew of six or seven people who had been AWOL and none were fired or even suspended. (J.A. 1415:21 - 1416:6 and 1417:5-11.) Ms. Kaufman knew of no one who had been terminated for missing one day of work. (J.A. 1417:2-4.)

Other allegedly "insubordinate" employees either had not been punished or had a letter placed in their file. (J.A. 1286:15-18; 1289:3-6.) One of these employees told her supervisor he was a "fucking idiot" who didn't "have the brains to walk around with" when he reprimanded her for being late for work. (J.A. 1286:21 - 1287.1.) Her supervisor then called her "insubordinate" and told her to "[g]o home," which she refused to do. (J.A. 1287:2-5.) This employee received a letter in her file, and told Ms. Soldinger it was "not the first letter of insubordination I have had." (J.A. 1287:24 - 1288:8.) Three other employees who refused to obey orders from their supervisors received letters of insubordination. (J.A. 1289:8 - 1291:15.) A supervisor who swore at

a passenger, was punished for that, and made the same comment to the person who ordered the punishment, was given three days off without pay. (J.A. 1372:19-25.)

7. Ms. Soldinger was reinstated, but suffered retaliation for having asserted her right not to be discriminated against because of her religion.

On April 12, 1991, Ms. Soldinger filed a complaint with the California Department of Fair Employment and Housing ("DFEH") charging that she had been discriminated against because of her religion. (J.A. 468.) Ms. Soldinger also filed a complaint with the EEOC and a second complaint with the DFEH alleging that she was denied a promotion in retaliation for filing a previous charge of discrimination. (J.A. 1258-1260; 470.) The union filed a grievance based on Ms. Soldinger's "discharge for observing a religious holiday." (J.A. 798.) As a result of arbitration, Ms. Soldinger was reinstated to her job with no loss of seniority, though she lost nearly a year of back pay and fringe benefits during the period between her termination and her reinstatement. (J.A. 184:11-18; 820; 828; 1296:9-10.)

Ms. Soldinger returned to work on March 16, 1992. (J.A. 1296:9-10.) Within five days, Dick Schukraft, Northwest's passenger service manager, told Ms. Soldinger's union representative that Soldinger "should never have gotten [her] job back and he didn't want [her] in the station." (J.A. 1295:20-21; 1314:17-25; 1334:17 - 1335:2; 1402:5-14.) Schukraft had made a number of anti-semitic comments, including a statement to one employee that she should "take care of [her] people" when problems were

occurring with passengers from New York. (J.A. 1398:22 - 1400:6.) He told the same employee, "'You really don't need to work overtime,'" which she took as "referring to that I was Jewish and I had money." (J.A. 1400:7-10.) This employee testified during her deposition in the present action, "I don't believe he [Schukraft] likes Jews." (J.A. 1405:3-4.)

Ms. Soldinger attempted to return to Operations, which required her to be re-certified. (J.A. 1296:11-13.) Schukraft refused to permit her to undergo the required training, claiming that no one was being trained for Operations because the airport had adopted "a centralized computerized weight and balance . . . ." (J.A. 1296:21-25; 1297:11-14.) However, four Operations positions were subsequently offered, and people were trained for these positions. (J.A. 1298:19-22; 1299:16 - 1300:13; 1452:23-25.)

When Ms. Soldinger attempted to bid for vacation, Schukraft told her that he had decided she could not "bump" anyone from their vacation, but could bid only for open vacation days. (J.A. 1302:13-20.) Schukraft made this decision despite the fact that the arbitration panel had restored Ms. Soldinger's full seniority rights, so she could "bump into any shift that [her] seniority would hold and also [her] vacation . . . ." (J.A. 1316:12-15.) Ms. Soldinger complained to her union representative, but was told that "it's policy. He [Schukraft] doesn't have to let you do that." (J.A. 1316:4-11.) Ms. Soldinger also unsuccessfully bid for a temporary supervisor position. Schukraft gave the position to an employee who had lower seniority, telling Ms. Soldinger, "'When it's a

temporary position, management can decide who they want to be the supervisor.'" (J.A. 1304:16 - 1305:22.)[5/]

B. Procedural Facts.

Ms. Soldinger sued Northwest Airlines and Steven Holme (who was not served) on the following causes of action in the operative complaint: (1) tortious discharge and retaliation in violation of the public policy expressed in the Fair Employment and Housing Act (Government Code section 12940) and Article 1, Section 4 of the California Constitution; (2) religious discrimination in violation of Government Code section 12940; and (3) intentional infliction of emotional distress. (J.A. 31:22 - 32:2; 34:13-28; 37:17-23.) All of these causes of action included allegations that defendant had discriminated against Ms. Soldinger by failing to reasonably accommodate her religious beliefs, firing her for behavior that was normally tolerated, and retaliating against her for taking legal action. (J.A. 28:23 - 34:2; 34:13 - 35:8; 37:12-16; 37:24 - 38:15.)

On January 21, 1994, Northwest Airlines moved for summary judgment, or in the alternative, for summary adjudication, contending that all of Ms. Soldinger's causes of action failed as a matter of law because they were preempted by the Railway Labor Act and because Northwest Airlines reasonably accommodated Ms. Soldinger. (J.A. 49:25-50:25; 51:3-18.) Northwest also claimed that Ms. Soldinger's cause of action for Tortious Discharge and Retaliation in Violation of Public Policy failed as a matter of law because Ms. Soldinger did not exhaust her administrative remedies. (J.A. 50:26 - 51:2.)

5/ Further facts will be discussed as they become relevant.

The trial court granted summary judgment, ruling that there were no triable issues of fact and defendant was entitled to summary judgment for three reasons. First, all of Ms. Soldinger's causes of action were preempted by the Railway Labor Act. Second, Northwest had reasonably accommodated Ms. Soldinger's religious precepts. Third, Ms. Soldinger's "claim for retaliation" failed as a matter of law because she had not exhausted her administrative remedies. (J.A. 1657:19 - 1659:8.) On March 30, 1994, the trial court entered judgment for defendant Northwest Airlines. (J.A. 1663.) On April 20, 1994, Ms. Soldinger filed a notice of appeal from that judgment. (J.A. 1666-1668.)[6/]

6/ The judgment, which disposes of all issues between the parties, is appealable under Code of Civil Procedure section 904.1, subdivision (a).

STANDARD OF REVIEW

"[S]ummary judgment is a 'drastic measure' because it deprives the losing party of a trial on the merits." (Security Pacific Nat. Bank v. Bradley (1992) 4 Cal.App.4th 89, 97.) "[I]f there is any issue of material fact to be tried, summary judgment must be denied." (Woodland Hills Homeowners Organization v. Los Angeles Community College Dist. (1990) 218 Cal.App.3d 79, 88-89.) "A defendant moving for summary judgment has the burden of establishing a complete defense or negating each of the plaintiff's theories and establishing the action is without merit." (Colvin v. City of Gardena (1992) 11 Cal.App.4th 1270, 1275-1276.) The Court of Appeal has stated that while it independently determines the legal significance of facts, "we apply the same legal standard as the trial court." (California Aviation, Inc. v. Leeds (1991) 233 Cal.App.3d 724, 731; emphasis supplied.) This standard is as follows: Summary judgment is proper if there is "no triable issue as to any material fact and . . . the moving party is entitled to summary judgment as a matter of law." (Code Civ. Proc., § 437c.) Thus, "summary judgment law turns on issue finding rather than issue determination. [Citation]. We construe the moving party's affidavits strictly, the opponent's affidavits liberally, and resolve doubts about the propriety of granting this disfavored motion in favor of the party opposing it." (California Aviation, Inc. v. Leeds, supra, 233 Cal.App.3d at 731.)

ARGUMENT

I.

THE RAILWAY LABOR ACT DOES NOT PREEMPT MS. SOLDINGER'S ACTION BECAUSE HER CAUSES OF ACTION ARE BASED ON STATE LAW, NOT A COLLECTIVE BARGAINING AGREEMENT.

A. Ms. Soldinger's Causes Of Action For Violation Of Statute And Public Policy Are Not Preempted.

Ms. Soldinger stated causes of action for violation of Government Code section 12940, which is part of the Fair Employment and Housing Act ("FEHA")[7/], and violation of public policy embodied in the FEHA (as well as in Article I, Section 4 of the California

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7/ Government Code section 12940 states that "It shall be an unlawful employment practice . . .

> (j) For an employer or other entity covered by this part to . . . . discharge a person from employment . . . . or to discriminate against a person in compensation or in terms, conditions or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer or other entity covered by this part demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties that conflict with his or her religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship on the conduct of the business of the employer or other entity covered by this part. Religious belief or observance, as used in this section, includes, but is not limited to, observance of a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance." (Emphasis supplied.)

Constitution, which guarantees religious freedom).[8/] The trial court held these causes of action were preempted by the Railway Labor Act ("RLA"), 45 U.S.C. § 151 et. seq.[9/] The trial court was wrong. These causes of action were based on rights granted by the FEHA and the California Constitution. As the United States Supreme Court has recently reaffirmed in Hawaiian Airlines, Inc. v. Norris, supra, 114 S.Ct. 2239, the RLA does not preempt such actions because they do not require interpretation of a collective bargaining agreement entered into under the RLA.

Since Congress has never "exercised authority to occupy the entire field in the area of labor legislation . . . . the question of whether a certain state action is pre-empted by federal law is one of congressional intent." (Allis-Chalmers Corp. v. Lueck (1985) 471 U.S. 202, 208, 105 S.Ct. 1904, 1909-1910, 85 L.Ed.2d 206.) Although the RLA "provides a comprehensive framework for the resolution of labor disputes . . ." in the rail and air carrier industries, it does not "deal with the subject of tort liability." (Atchison, T. & S.F.R. Co. v. Buell (1987) 480 U.S. 557, 562, 107 S.Ct. 1410, 1414, 94 L.Ed.2d 563.) The RLA therefore has no preemptive effect "'where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.'" (Id. at 565, 107 S.Ct. at 1415 [RLA did not preempt action under the Federal Employer's Liability Act].) Because the FEHA, under which

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8/ Ms. Soldinger also stated a cause of action for intentional infliction of emotional distress. This cause of action is not preempted for reasons discussed in subsection (B), below.

9/ The RLA was enacted in 1926 to provide a comprehensive statutory framework regulating the commerce, operations and labor management of rail and air carriers in the United States. (See 45 U.S.C. § 151 [definitions], § 151a [general purposes] and § 181 [applicability of RLA to air carriers].)

Ms. Soldinger sued, not only grants "minimum substantive guarantees" to workers, but vindicates the very important state interest in prohibiting employment discrimination, the RLA does not preempt actions based on this statute or the public policy embodied in this statute. (Evans v. Southern Pacific Transportation Co. (1989) 213 Cal.App.3d 1378, 1383-1384, 1387-1388 [the RLA "'is not basically a fair employment practice act nor has it been utilized as such,'" and did not preempt a FEHA action for employment discrimination based on race and handicap]; cf. Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc. (1963) 372 U.S. 714, 83 S.Ct. 1022, 10 L.Ed.2d 84 [RLA did not preempt state law prohibiting racial discrimination in employment]; Hawaiian Airlines, Inc. v. Norris, supra, 114 S.Ct. at 2243 ["preemption of employment standards 'within the traditional police power of the State' 'should not be lightly inferred'"].)

As noted, the Supreme Court has recently reaffirmed that the RLA does not preempt causes of action based on statutes such as the FEHA, holding that "a state-law cause of action is not pre-empted by the RLA if it involves rights and obligations that exist independent of [a] collective bargaining agreement." (Hawaiian Airlines, Inc. v. Norris, supra, 114 S.Ct. at 2247 [plaintiff's state tort claims for unlawful termination in violation of a whistleblower's statute and public policy were not preempted].) Because the Court found the test for RLA preemption to be "virtually identical" to the preemption standard employed in cases involving section 301 of the Labor Management Relations

Act ("LMRA"), the Court held the LMRA standard applies to RLA preemption. (Id. at 2249.)[10/]

The LMRA does not preempt state law claims if they "can be resolved without interpreting the [collective bargaining] agreement itself . . . ." (Lingle v. Norge Division of Magic Chef, Inc. (1988) 486 U.S. 399, 407, 410, 108 S.Ct. 1877, 1882, 1883, 100 L.Ed.2d 410 [plaintiff's action for wrongful discharge was not preempted because plaintiff could establish the elements of her case by adducing evidence on "purely factual questions pertain[ing] to the conduct of the employee and the conduct and motivation of the employer"].) LMRA preemption is therefore justified only when the "tort claim is inextricably intertwined with consideration of the terms of the labor contract," making "resolution of a state-law claim . . . substantially dependent upon analysis of an agreement made between parties in a labor contract." (Allis-Chalmers Corp. v. Lueck, supra, 471 U.S. at 213, 220, 105 S.Ct. at 1912, 1916, emphasis added; cf. Caterpillar, Inc. v. Williams (1987) 482 U.S. 386, 395, 107 S.Ct. 2425, 2431, 96 L.Ed.2d 318 [holding plaintiff's state law claims were not completely preempted under § 301 of the LMRA because, among other things, they were not, "substantially dependent upon interpretation of the collective bargaining agreement"].)

10/ Section 301 of the LMRA makes collective bargaining agreements enforceable in a federal court. (See 29 U.S.C. § 185(a) ["Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties"].) The LMRA is not applicable to "any matter which is subject to the provisions" of the RLA. (29 U.S.C. § 182).

Preemption under the LMRA and RLA is limited because its purpose is "to ensure uniform interpretation of collective bargaining agreements and thus to promote the peaceful, consistent resolution of labor-management disputes." (Lingle v. Norge Division of Magic Chef, Inc., supra, 486 U.S. at 404, 108 S.Ct. at 1880.) The Supreme Court has therefore "been careful to distinguish between state laws that require interpretation of labor contract terms and state laws that preclude parties from imposing a particular term in their contract. Section 301 does not preempt state laws that alter the 'substance of what private parties may agree to in a labor contract.'" (Miller v. AT&T Network Systems (9th Cir. 1988) 850 F.2d 543, 547.) Because section 301 "does not grant the parties to a collective-bargaining agreement the ability to bargain for what is illegal under state law," only "state-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement of private parties, are preempted." (Allis-Chalmers Corp. v. Lueck, supra, 471 U.S. at 212, 213, 105 S.Ct. at 1912; emphasis added.) The Supreme Court has expressly disclaimed any intention to "hold that every state-law suit asserting a right that relates in some way to a provision in a collective-bargaining agreement . . . is preempted by [LMRA] § 301." (Allis-Chalmers Corp., supra, 471 U.S. at 220, 105 S.Ct. at 1916.) Moreover, the fact that the right in question may also be enforceable through a collective bargaining agreement is also irrelevant. (Lingle v. Norge Division of Magic Chef, Inc., supra, 486 U.S. at 408-410, 108 S.Ct. at 1882-1883.)

Like the plaintiffs in Norris and Lingle, Ms. Soldinger has brought statutory and public policy causes of action based on non-negotiable rights granted under state law. Ms. Soldinger has claimed in connection with each of these causes of action that

defendant discriminated against her by failing to accommodate her religious beliefs, treating her differently than other employees and retaliating against her for taking legal action to enforce her rights. The trial court held all of Ms. Soldinger's causes of action preempted, explicitly relying on sections of defendant's Separate Statement of Undisputed Facts that discussed either the CBA or Ms. Soldinger's efforts to obtain March 31 off. (J.A. 1658:3-12.) However, as all of the claims underlying Ms. Soldinger's statutory and public policy causes of action can be resolved without interpreting the CBA, these causes of action are not preempted.

1. The RLA does not preempt Ms. Soldinger's claims that defendant failed to accommodate her religious beliefs.

Ms. Soldinger has claimed that defendant failed to reasonably accommodate her religious beliefs. (J.A. 28:23 - 32:2; 33:26-34:2; 34:13 - 35:8.) Insofar as Ms. Soldinger's causes of action were based on this failure, the trial court's preemption finding was wrong because Ms. Soldinger's "failure to accommodate" claims do not require interpreting the CBA, which merely describes the procedures for taking time off. (See Statement of the Case, supra, § A.2.)

In order to establish a prima facie case of discrimination based on a failure to accommodate her religious beliefs, Ms. Soldinger need only show that she had a bona fide belief that working on Passover would be contrary to her faith, that she informed Steve Holme (defendant's employee) of this, and that Holme fired her for refusing to

work on Passover. (See Anderson v. General Dynamics Convair Aerospace Division (9th Cir. 1978) 589 F.2d 397, 401 [employee who had bona fide religious beliefs that precluded his paying union dues, who informed his employer and the union of this belief and who was fired for not paying these dues had stated a prima facie case of religious discrimination].)[11/] If Ms. Soldinger can establish a prima facie case of failure to accommodate, defendant can prevail only by showing that it made "good faith efforts to accommodate [Ms. Soldinger's] religious beliefs or . . . [was] unable to reasonably accommodate [her] beliefs without undue hardship." (Anderson v. General Dynamics Convair Aerospace Division, supra, 589 F.2d at 401.) All of these determinations involve "purely factual questions pertain[ing] to the conduct of the employee and the conduct and motivation of the employer" that can be resolved without interpreting the CBA. (Cf. Lingle v. Norge Division of Magic Chef, Inc., supra, 486 U.S. at 407, 108 S.Ct. at 1882.)

In granting summary judgment, the trial court ignored persuasive authority from the United States Court of Appeals for the Ninth Circuit, which has repeatedly held that federal labor law does not preempt "failure to accommodate" claims under Government Code section 12940 and similar statutes.[12/] In Cook v. Lindsay Olive Growers (9th Cir. 1990) 911 F.2d 233, the plaintiff alleged that his employer's requiring him to work on his sabbath instead of accommodating his religious needs constituted discrimination violating section 12940. (Id. at 235-236.) The court rejected the defendant's argument

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11/ Although Anderson was decided under federal law, it has been cited by the Court of Appeal as "applying a federal statute analogous to Government Code section 12940 . . . ." (Best v. California Apprenticeship Council (1984) 161 Cal.App.3d 626, 634.)

12/ All further statutory references will be to the Government Code unless otherwise indicated.

that section 301 of the LMRA preempted the plaintiff's cause of action for religious discrimination, stating that "the right not to be discriminated against on the basis of religion cannot be removed by private contract. Section 12940 confers a right that is nonnegotiable and applies to unionized and nonunionized workers." (Cook, supra, 911 F.2d at 240.) The court also noted that the plaintiff's "§ 12940 claim does not require us to decide whether [the defendant's] actions were reasonable under the CBA. Even when an employer acts under a policy applied reasonably to other individuals with different religious beliefs, it might nevertheless violate § 12940(a); no discriminatory motive is required." (Ibid.; see also Miller v. AT&T Network Systems, supra, 850 F.2d at 548 [section 301 of the LMRA does not preempt an Oregon state discrimination claim based on a failure to accommodate a handicapped employee by granting him a transfer "merely because certain aspects of the collective bargaining agreement govern work assignments and discharges"]; Ackerman v. Western Electric Co., Inc. (9th Cir. 1988) 860 F.2d 1514, 1517-1518 [court cites Miller in holding that § 301 of the LMRA did not preempt a section 12940 handicap discrimination claim based on failure to accommodate].)

The above-cited case law demonstrates that the trial court's grant of summary judgment on preemption grounds was incorrect regarding Ms. Soldinger's statutory and public policy causes of action insofar as they allege discrimination through the failure to accommodate.

2. The RLA does not preempt Ms. Soldinger's claims that defendant treated her differently because of her religion.

Ms. Soldinger has alleged that defendant treated her differently because of her religion, asserting that, unlike Christian employees, she was not permitted to take March 31, 1991 off, and she was fired although defendant failed to punish similar behavior of Christian employees. (J.A. 29:14-15; 30:17-19; 30:20-25; 33:25 - 34:2.) Like Ms. Soldinger's "failure to accommodate" claims, her disparate treatment claims cannot be deemed preempted because they, too, can be resolved without interpreting the CBA.

A disparate treatment discrimination claim is established by showing that "the employer treated the employee differently because of the employee's race, color, religion, sex or national origin." (Clark v. Claremont University Center (1992) 6 Cal.App.4th 639, 658, fn. 3.) The Supreme Court has stated that "'[d]isparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin." (International Brotherhood of Teamsters v. United States (1977) 431 U.S. 324, 335, fn. 15, 97 S.Ct. 1843, 1854, fn. 15, 52 L.Ed.2d 396.)

The Court of Appeal has held that the RLA will not preempt FEHA claims alleging racial discrimination. (Evans v. Southern Pacific Transportation Co., supra, 213 Cal.App.3d at 1381, 1385.) In Evans, the court held that the plaintiff's FEHA action was not preempted insofar as he alleged he was fired because of his race, stating that "plaintiff asserts a statutory right independent of the contractual right, under the collective bargaining agreement and the RLA, to challenge his dismissal. The RLA does

not purport to cover claims of racial discrimination . . . ." (Evans, supra, 213 Cal.App.3d at 1385.) Evans clearly precludes preemption of Ms. Soldinger's claims of disparate treatment based on religious discrimination because the RLA is just as irrelevant to religious discrimination claims as it is to racial discrimination claims.

The Ninth Circuit and the United States District Court for the Northern District of California have specifically held that the LMRA and the RLA do not preempt disparate treatment allegations under the FEHA. (Ramirez v. Fox Television Station, Inc. (1993) 998 F.2d 743, 749 [plaintiff's allegation that only Hispanics were required to submit jury service verification forms could not be resolved by interpreting the CBA, which could have been "ignored" or "applied . . . in a discriminatory manner"]; Rodriguez v. United Airlines, Inc. (N.D.Cal. 1992) 812 F.Supp. 1022, 1027 [discrimination claims including disparate treatment would not be deemed preempted although their resolution required "some tangential analysis of workplace rules"].)

Like the plaintiffs in Evans, Ramirez and Rodriguez, Ms. Soldinger has alleged discrimination claims under the FEHA that are not subject to preemption.

3. The RLA does not preempt Ms. Soldinger's claims that defendant retaliated against her for taking legal action to enforce her right not to be discriminated against because of her religion.

Ms. Soldinger has alleged that defendant retaliated against her because she took legal action to enforce her right not to be discriminated against because of her religion.

(J.A. 32:3-17; 33:26 - 34:2.) Ms. Soldinger's retaliation claims, like her "failure to accommodate" and disparate treatment claims, are not preempted.

The Supreme Court has made it clear beyond question that retaliation claims cannot be preempted by the RLA or the LMRA. In Hawaiian Airlines, Inc. v. Norris, supra, the plaintiff alleged a retaliatory discharge, and the defendants claimed it was necessary to determine whether the discharge was justified by the plaintiff's failure to sign a maintenance record, as the CBA required. The Court rejected the defendants' argument, stating that the plaintiff's state tort claims for violation of a whistleblowers statute and public policy "require only the purely factual inquiry into any retaliatory motive of the employer." (Hawaiian Airlines, Inc. v. Norris, supra, 114 S.Ct. at 2251.) Similarly, in another case, the Court refused to hold a retaliatory discharge claim preempted because the claim could be resolved by considering "purely factual questions pertain[ing] to the conduct of the employee and the conduct and motivation of the employer. Neither of the elements requires a court to interpret any term of a collective bargaining agreement." (Lingle v. Norge Division of Magic Chef, Inc., supra, 486 U.S. at 407, 108 S.Ct. at 1882.)

Norris and Lingle are indistinguishable from this case insofar as Ms. Soldinger's retaliation claims are concerned; therefore, they preclude preemption of these claims.

B. Ms. Soldinger's Cause Of Action For Intentional Infliction of Emotional Distress Is Not Preempted.

Ms. Soldinger has alleged a cause of action for intentional infliction of emotional distress ("IIED"). (J.A. 37:9 - 39:19.) Because Ms. Soldinger's IIED claim is based squarely on the religious discrimination she suffered, it is not preempted.

Like Ms. Soldinger's other claims, her IIED claim will be deemed preempted only if it requires interpretation of the CBA. (See DeTomaso v. Pan American World Airways, Inc. (1987) 43 Cal.3d 517, 526, 533 [IIED and defamation claims preempted because their resolution required an interpretation of a CBA]; Cook v. Lindsay Olive Growers, supra, 911 F.2d at 239 ["[a]n emotional distress claim is not preempted when it can be resolved without examination or interpretation of the CBA"].) Ms. Soldinger has alleged that defendant:

> "knew the significance of Passover to plaintiff and her family, yet engaged in extreme and outrageous conduct by maliciously, fraudulently and oppressively refusing to allow plaintiff to observe Passover in accordance with the dictates of her religion. Defendants despicably subjected plaintiff to cruel and unjust hardship in conscious disregard of plaintiff's rights by insisting that plaintiff work on Passover in violation of her religious beliefs . . . ." (J.A. 38:2-10.)

These allegations do not require interpretation of the CBA; in fact, they have nothing to do with the CBA.

Courts have repeatedly refused to preempt California IIED claims based on similar tortious misconduct. In Tellez v. Pacific Gas and Electric Co. (9th Cir. 1987) 817 F.2d 536, the Ninth Circuit held that section 301 of the LMRA did not preempt an IIED claim based on a manager's circulating to eleven other managers a report that the plaintiff had purchased cocaine on the job. The court stated:

> "[I]ntentional infliction of emotional distress hinges on state of mind, causation and injury. It requires extreme and outrageous behavior when, as in the present case, no physical injury is alleged. [Citation.] The collective bargaining agreement does not envision such behavior and its grievance mechanism is not equipped to redress it." (Tellez, supra, 817 F.2d at 539.)

(See also McCann v. Alaska Airlines (N.D. Cal. 1991) 758 F.Supp. 559, 566-567 [RLA did not preempt IIED claim based on false imprisonment, verbal abuse, slander and assault]; Zaks v. American Broadcasting Co., Inc. (C.D. Cal. 1985) 626 F.Supp. 695, 697-698 [IIED claim based on abusive conduct not preempted].)

DeTomaso, by contrast, held that the RLA preempted a defamation claim based on conduct occurring during the defendant's investigation of the plaintiff for theft because the conduct was "inextricably intertwined with the investigation and discharge procedures mandated by the [CBA]." (DeTomaso v. Pan American World Airways, Inc., supra, 43 Cal.3d at 530.) The conduct Ms. Soldinger complains of here had nothing to do with the CBA; therefore her IIED cause of action is not preempted.

II.

THE TRIAL COURT ERRED IN HOLDING THERE WERE NO TRIABLE ISSUES OF MATERIAL FACT REGARDING WHETHER DEFENDANT REASONABLY ACCOMMODATED MS. SOLDINGER.

Ms. Soldinger has alleged in regard to each of her three causes of action that defendant failed to accommodate her religious beliefs. (J.A. 28:23-32:2; 33:26-34:2; 34:13 - 35:8; 37:12-16; 37:24 - 38:15.) In addition to finding all three causes of action preempted, the trial court also ruled that these causes of action "fail[ed] as a matter of law for the additional reason that Northwest accommodated the precepts of Soldinger's religion." (J.A. 1658:22-26.) In so holding, the court explicitly relied on sections of defendant's Separate Statement of Undisputed Facts that discussed either the CBA or Ms. Soldinger's efforts to obtain March 31 off. (J.A. 1658:26 - 1659:3.) The trial court was mistaken in holding that Ms. Soldinger's religious beliefs had been reasonably accommodated as a matter of law, because there were triable issues of material fact regarding this question.[13/]

Government Code section 12940, subd. (j), makes it unlawful for an employer to discriminate against a person "because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer . . . demonstrates

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13/ The trial court's determination was also incorrect because Ms. Soldinger's causes of action were based on disparate treatment and retaliation as well as failure to accommodate her religious beliefs; therefore, the court could not have granted summary judgment on these claims even if Ms. Soldinger had been reasonably accommodated.

that it has explored any available reasonable alternative means of accommodating the religious belief or observance . . . , but is unable to reasonably accommodate the religious belief or observance without undue hardship . . . ." This section specifically defines "religious belief or observance" to include "observance of a Sabbath or other religious holy day or days . . . . "

Under this statute, Ms. Soldinger was required to adduce a prima facie case by showing that she had a bona fide belief that working on Passover would be contrary to her faith, that she informed Steve Holme (defendant's employee) of this, and that Holme fired her for refusing to work on Passover. (See Anderson v. General Dynamics Convair Aerospace Division, supra, 589 F.2d at 401 [employee who had bona fide religious beliefs that precluded his paying union dues, who informed his employer and the union of this belief and who was fired for not paying these dues had stated a prima facie case of religious discrimination].) Defendant would then have the burden of showing that it made "good faith efforts to accommodate [Ms. Soldinger's] religious beliefs or . . . [was] unable to reasonably accommodate [her] beliefs without undue hardship." (Ibid.)

The evidence adduced demonstrated that, at the very least, there were triable issues of fact in regard to all the elements Ms. Soldinger and defendant were required to prove. Evidence was adduced that Ms. Soldinger had a genuine religious belief that prevented her from working on the Jewish high holiday of Passover, that she informed Steve Holme of this belief, and that Holme fired her for refusing to work on Passover. (Statement of the Case, §§ A.1, 3 and 5.) Defendant therefore was not entitled to summary judgment unless it could show that, as a matter of law, that it either made good faith efforts to accommodate Ms. Soldinger or it could not have done so without

undue hardship. However, the evidence adduced revealed triable issues of fact regarding both defenses.

With respect to good faith accommodation efforts, defendant offered no evidence of that it made any efforts to accommodate Ms. Soldinger after she brought the problem to defendant's attention. However, defendant's efforts on behalf of Mr. Canale and the similar efforts provided to Ms. Soldinger in 1987 demonstrate that defendant could at least have attempted to accommodate Ms. Soldinger. (See Statement of the Case, supra, § A.4; J.A. 1263:1 - 1264:23.) It is not surprising that the arbitration panel concluded that "any Company efforts to assist [Ms. Soldinger] in finding an accommodation to her religious objection to working on Passover were largely inadequate." (J.A. 824.)

The evidence relevant to whether accommodating Ms. Soldinger would have caused defendant an undue hardship showed that defendant commonly must replace employees who are absent from their shifts, and requires only that the employee call prior to the start of the shift. (Statement of the Case, supra, § A.5.) Sometimes the shift is not covered "and people manage." (J.A. 1424:4-5.) The evidence further showed that although Ms. Soldinger informed Holme on March 27 that she would not be working on March 31, supervisor Rick Simpson did not even inquire regarding replacement coverage for Ms. Soldinger until March 30, and he was told at that time that those responsible for finding coverage "were not going to do anything about it until that day, until something actually happened. They were not preparing for anything to happen." (J.A. 783:14-16.) One Northwest employee testified that defendant's operations did "not appear to be" crippled by Ms. Soldinger's absence. (J.A. 470.069:20-22.) Perhaps

most significantly, defendant accommodated another employee (Chris Canale) who had also been initially denied permission to take off March 31. (Statement of the Case, supra, § A.4.) This evidence was more than sufficient to create a triable issue of material fact regarding whether defendant could not have accommodated Ms. Soldinger without undue hardship; as noted previously, the EEOC found that defendant could have accommodated Ms. Soldinger without undue hardship and the arbitration panel found that defendant covered Ms. Soldinger's shift with "ease." (J.A. 1259 and 824.)

Case law interpreting federal and state statutes similar to section 12940 demonstrates that the evidence adduced in this case was far more than sufficient to preclude granting defendant summary judgment.[14/] In E.E.O.C. v. Hacienda Hotel (9th Cir. 1989) 881 F.2d 1504, the Ninth Circuit upheld the trial court's determination that a defendant who had made no effort to reasonably accommodate employees' Sabbath observances failed to show undue hardship when it alleged that any attempt to accommodate the employees would have interfered with the seniority system established pursuant to a collective bargaining agreement. (Id. at 1513.) Like the defendant in Hacienda Hotel, defendant here simply relies on its CBA as a substitute for individual negotiation to resolve its employee's conflict between the demands of religion and work. But as the court held in Hacienda Hotel, "at a minimum, the employer was required to negotiate with the employee in an effort reasonably to accommodate the employee's religious beliefs." (Ibid.)

14/ Federal decisions are relevant because "[t]he objectives of the FEHA and title VII of the Federal Civil Rights Act (42 U.S.C. § 2000e et seq.) are identical and California courts have relied upon federal law to interpret analogous provisions of the state statute." (Walker v. Blue Cross of California (1992) 4 Cal.App.4th 985, 997-998.)

Similarly, in Heller v. EBB Auto Co. (9th Cir. 1993) 8 F.3d 1433, judgment for the defendant was reversed because the plaintiff had adduced a prima facie case that the defendant failed to accommodate him, and the evidence showed neither that defendant sufficiently attempted to accommodate plaintiff nor that any accommodation would have imposed an undue hardship. (Id. at 1440; see also Anderson v. General Dynamics Convair Aerospace Division, supra, 589 F.2d at 401-402 [when a worker was fired because he refused to pay dues to a union on religious grounds, but offered to pay equivalent sums to charity, his discharge was improper because neither the worker's employer nor union offered any accommodation to him]; compare Trans World Airlines, Inc. v. Hardison (1977) 432 U.S. 63, 77, 97 S.Ct. 2264, 2273, 53 L.Ed.2d 113 [employer reasonably accommodated plaintiff by holding held several meetings with him in an attempt to accommodate his needs to observe his sabbath, and by authorizing the union steward to search for someone who would swap shifts with plaintiff].)

California case law also supports the conclusion that summary judgment for defendant was inappropriate here. In Best v. California Apprenticeship Council, supra, 161 Cal.App.3d 626, the Court of Appeal held that the objectives of diversified training and assurance that an employer got a fair share of apprentices did not justify compelling an employee to work at a nuclear plant in violation of his religious beliefs. The court noted that under Government Code section 12940, "It is well settled an individual's religious beliefs must be accommodated even where it means making an exception to a rule which is reasonably applied to other individuals with different beliefs." (Id. at 636; see also Rankins v. Commission on Professional Competence (1979) 24 Cal.3d 167, 170, 175-176 [school district had to permit a teacher to be absent several days a year to

observe his church's holy days; the district's having to hire a substitute did not establish a "sufficiently severe" hardship to justify disqualifying the teacher from employment]; Jaffe v. Unemployment Insurance Appeals Board (1984) 156 Cal.App.3d 719 [a teacher could not be denied a week's unemployment benefits simply because he would have taken two religious holidays off; the school district would have had to reasonably accommodate plaintiff's religious beliefs if he had been employed].)

The above-cited case law confirms that it was error to grant summary judgment on Ms. Soldinger's causes of action insofar as they alleged defendant failed to accommodate Ms. Soldinger, because the undisputed evidence demonstrated defendant did not even attempt to accommodate Ms. Soldinger after it became aware that her religious beliefs required her to abstain from work on Passover.

III.

THE TRIAL COURT ERRED IN HOLDING MS. SOLDINGER'S RETALIATION CLAIMS WERE PRECLUDED FOR FAILURE TO EXHAUST HER ADMINISTRATIVE REMEDIES, BECAUSE THERE IS NO EXHAUSTION REQUIREMENT WITH REGARD TO NON-STATUTORY CLAIMS, AND MS. SOLDINGER EXHAUSTED HER ADMINISTRATIVE REMEDIES WITH RESPECT TO HER STATUTORY CLAIMS.

Ms. Soldinger has alleged in regard to each of her three causes of action that defendant retaliated against her. (J.A. 32:3-17; 33:26 - 34:2: 35:12-16.) The trial court, which held that all of Ms. Soldinger's causes of action failed because they were

preempted and because defendant had accommodated Ms. Soldinger, also ruled that "Soldinger's claim for retaliation fails as a matter of law for the additional reason that she failed to exhaust her administrative remedies before the California Department of Fair Employment and Housing." (J.A. 1658:13-16.) The trial court was incorrect.

California law requires that a plaintiff must exhaust her administrative remedies under FEHA before bringing civil claims based on statute, but not before bringing non-statutory claims. (Rojo v. Kliger (1990) 52 Cal.3d 65, 71, 88 [plaintiffs could bring causes of action for IIED and violation of public policy without exhausting administrative remedies].) Therefore, the trial court mistakenly ruled that the retaliation claims embodied in Ms. Soldinger's non-statutory causes of action for violation of public policy and IIED were barred due to her purported failure to exhaust her administrative remedies.

In addition, the trial court incorrectly barred the retaliation claims embodied in Ms. Soldinger's statutory cause of action for violation of section 12940 because Ms. Soldinger did exhaust her administrative remedies. On April 12, 1991, Ms. Soldinger filed a charge with the DFEH alleging she had been discriminated against because she had requested to take leave to observe Passover, her request was denied and she was terminated, and "Mr. Holme asked me why I thought Passover was more important than Easter." (J.A. 468.) On April 23, 1991, the DFEH notified Ms. Soldinger that it would not be issuing an accusation and she had the right to bring a civil action. (J.A. 469.) On June 30, 1993, Ms. Soldinger filed a second charge with the DFEH alleging that on May 27, 1993, she was denied a promotion to the position of Customer Service Supervisor in retaliation for filing a previous charge of discrimination. (J.A. 470.) On

June 30, 1993, the DFEH informed Ms. Soldinger that no accusation would be filed and she could file suit. (J.A. 470(a).) On September 15, 1993, Ms. Soldinger filed her Third Amended Complaint, in which she alleged for the first time that defendant retaliated against her after she returned to work by denying her a position in Operations, refusing to permit her to bid for vacation benefits, and subjecting her to anti-semitic remarks and continuing hostility. (J.A. 32:3-17; 33:26 - 34:2; 37:12-16; Compare Second Amended Complaint (J.A. 1-15.).)

Under California law, the first of the DFEH charges sufficed to exhaust Ms. Soldinger's administrative remedies in regard to her retaliation allegations brought pursuant to statute. In Baker v. Children's Hospital Medical Center (1989) 209 Cal.App.3d 1057, the Court of Appeal held that the plaintiff's allegation of retaliation was not barred for failure to exhaust administrative remedies even though the plaintiff's charge of discrimination filed with the DFEH did not allege retaliation, but simply claimed the plaintiff had been denied an opportunity given to a caucasian employee. In so holding, the court cited a federal decision holding that "allegations in a judicial complaint filed pursuant to Title VII may encompass any kind of discrimination like or related to allegations contained in the charge and growing out of such allegation during the pendency of the case before the EEOC." (Id. at 1064, citing Sanchez v. Standard Brands, Inc. (5th Cir. 1970) 431 F.2d 455, 465-466; internal brackets and quotation marks omitted.) Since Ms. Soldinger, like the Baker plaintiff, alleged discrimination in her initial DFEH charge, this charge was sufficiently related to the retaliation allegations of her civil complaint to preclude dismissal for failure to exhaust administrative remedies.

Even if Ms. Soldinger had not exhausted her administrative remedies by filing the first charge with the DFEH, she would have exhausted those remedies by filing the second DFEH charge, which alleged defendant refused to promote her because she had previously filed a charge of discrimination. Civil plaintiffs are deemed to have exhausted their administrative remedies if allegations in their administrative charge were "'like or reasonably related'" to the charges in their civil complaint, because to do otherwise would "create a 'needless procedural barrier' to enforcement of FEHA." (Sandhu v. Lockheed Missiles & Space Corp. (1994) 26 Cal.App.4th 846, 858, 859 [holding complaint alleging race and national origin discrimination could not be dismissed for failure to exhaust administrative remedies even though the plaintiff had not alleged discrimination on the basis of national origin in his charge filed with the DFEH].)

In the present case, Ms. Soldinger alleged for the first time in her Third Amended Complaint (filed after the second DFEH charge) that she was denied a position in Operations, that she was refused the opportunity to bid for vacation benefits, and that she had been subjected to anti-semitic remarks, hostility and harassment. Because Ms. Soldinger's administrative retaliation allegation was no less "reasonably related" to her civil retaliation allegations than were the administrative and civil allegations in Sandhu, she clearly exhausted her administrative remedies.

Ms. Soldinger did not need to exhaust her administrative remedies to bring her non-statutory claims; at any rate, she exhausted her administrative remedies with respect to all her claims. Therefore, none of her claims for retaliation should have been barred.

CONCLUSION

Religious tolerance is one of the cardinal principles of American life and law. This principle is especially important in regard to minority religions, particularly those whose adherents have suffered and continue to suffer persecution for their beliefs. California has embraced this principle in both its constitutional and statutory law. The egregiousness of the facts in this case provides a particularly good demonstration of why religious tolerance is so important, and what can happen when such tolerance does not exist. Defendant's attempt to evade the consequences of its failure to exercise tolerance cannot be justified under the law and should be rejected by this court, which should reverse the summary judgment granted in defendant's favor.

Dated: November 17, 1994

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