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 REPLY BRIEF

ROSENFELD, MEYER & SUSMAN
TODD W. BONDER (Bar No. 116482)
LISA M. JACOBSEN (Bar No. 142802)
STACY J. BARANCIK (Bar No. 162717)
9601 Wilshire Boulevard, Fourth Floor
Beverly Hills, California 90210
(310) 858-7700

GREINES, MARTIN, STEIN & RICHLAND
BARBARA W. RAVITZ (Bar No. 86665)
BARRY M. WOLF (Bar No. 73202)
9601 Wilshire Boulevard, Suite 544
Beverly Hills, California 90210-5215
(310) 859-7811

Attorneys for Plaintiff and Appellant
GERALDINE SOLDINGER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

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.

APPELLANT'S REPLY BRIEF

INTRODUCTION

In her opening brief, plaintiff Geraldine Soldinger explained why the trial court erred in finding her religious discrimination causes of action and her intentional infliction of emotional distress claim preempted. (Appellant's Opening Brief ("AOB") 20-32.) Ms. Soldinger also demonstrated that the trial court erred both in finding that her employer accommodated her religious beliefs as a matter of law (AOB 33-38) and in ruling that Ms. Soldinger failed to exhaust her administrative remedies in regard to her retaliation claims. (AOB 38-42.)

Defendant Northwest Airlines' response begins by attempting to transmute Ms. Soldinger's civil rights claims into a garden variety labor dispute in order to invoke federal preemption. Another division of this court, in rejecting Railway Labor Act (RLA) preemption of a civil rights action, strongly cautioned against "[i]nflexible application of the [preemption] doctrine . . . especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme." (Evans v. Southern Pacific Transportation Co. (1989) 213 Cal.App.3d 1378, 1382, internal quotation marks omitted.)

Not surprisingly, defendant concedes that there are "many types of discrimination claims that are not preempted, most notably those involving claims of race discrimination." (Respondent's Brief ("RB") 8.) More importantly, defendant fails to cite a case from any jurisdiction in which federal labor law was held to preempt a racial or religious discrimination claim.[1/] Defendant's failure is easily explainable since "courts almost never preempt . . . claims of discrimination on the basis of race, age, gender, or some other protected classification." (Van Wezel Stone, The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System (1992) 59 U.Chi.L.Rev. 575, 608-609; see also Lingle v. Norge Div. of Magic Chef, Inc. (1988) 486 U.S. 399, 412, 108 S.Ct. 1877, 1885, 100

1/ Defendant incorrectly cites Felt v. Atchison, Topeka & Santa Fe Railway Co. (C.D.Cal. 1993) 831 F.Supp. 780 for the proposition that a "plaintiff's discrimination claim was preempted in circumstances similar to those here." (RB 12.) See detailed discussion on pp. 17-18.

L.Ed.2d 410 [recognizing that the Labor Management Relations Act ("LMRA") "does not preempt state anti-discrimination laws . . . "].)

Defendant nonetheless contends that Ms. Soldinger's religious discrimination claims are preempted because they are purportedly "minor disputes" within the meaning of the Railway Labor Act and require "interpretation" of the collective bargaining agreement ("CBA"), which is not permitted because it might adversely affect the uniform interpretation of nationwide collective bargaining agreements. (RB 6-17.) These contentions are wrong. Ms. Soldinger's religious discrimination claims are founded on fundamental, non-negotiable state law rights and cannot be characterized as "minor disputes," which "do[] not involve rights that exist independent of the CBA." (Hawaiian Airlines, Inc. v. Norris (1994) 114 S.Ct. 2239, 2250, 129 L.Ed.2d 203.) And although the factfinder might refer to CBA provisions in deciding some of Ms. Soldinger's claims, the factfinder would not have to interpret these provisions, because the extent of Ms. Soldinger's rights under the CBA are not at issue and her claims will be decided under state law standards that are completely independent of the CBA. Therefore, Ms. Soldinger's religious discrimination claims can be decided without affecting federal labor law in any way.

Defendant next asserts that Ms. Soldinger's cause of action for intentional infliction of emotional distress (IIED) is preempted because whether defendant's behavior could be found "extreme and outrageous" under California law depends on the extent to which the CBA justifies the employer's actions. (RB 18-21.) Defendant cites several cases decided prior to Norris in support of this point. However, in Norris, the Supreme Court rejected a defendant's contention that a dispute would be deemed

minor, and thus subject to preemption under the RLA simply because an employer's actions were "arguably justified" under the CBA. The Fifth Circuit relied on Norris in holding that an employee's IIED cause of action arising out of sexual harassment was not preempted by the RLA. (Hirras v. National R.R. Passenger Corp. (5th Cir. 1995) 44 F.3d 278.) Given the narrowing of RLA preemption accomplished by Norris, Ms. Soldinger's claim cannot be deemed preempted. Moreover, as discussed in Ms. Soldinger's opening brief, IIED claims based on abusive conduct such as that which occurred here have long been deemed non-preemptible. (AOB 32.)

Defendant then contends that even if Ms. Soldinger's accommodation claims are not preempted, defendant was properly granted summary judgment on those claims because the CBA's vacation and seniority procedures were purportedly in and of themselves a reasonable accommodation as a matter of law. (RB 21-22.) However, none of the cases defendant cites to support this assertion held that a CBA provided a reasonable accommodation as a matter of law; instead, the holdings in all of these cases were based on findings of fact that related to the parties' behavior as well as to the CBA. Because in this case there was a triable issue of fact on the question of reasonable accommodation, summary judgment was improper. Additionally, defendant contends that because the CBA was a reasonable accommodation, defendant discharged its duty to Ms. Soldinger. This contention might have been correct had Ms. Soldinger brought her case under federal law. However, she brought her case under California law, which requires an employer to explore "any available 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

. . . ." (Gov. Code § 12940, subd. (j), emphasis added.) Because defendant did not explore alternative means of accommodation when the CBA procedures proved useless, summary judgment was improper under state law even if the CBA itself constituted one form of reasonable accommodation.

Finally, defendant contends that Ms. Soldinger's retaliation claims are barred because she failed to exhaust her administrative remedies. (RB 17-18.) However, defendant does not even attempt to distinguish the case law cited by Ms. Soldinger, which establishes that the retaliation claims set forth in her statutory cause of action were not barred because they were sufficiently related to Ms. Soldinger's administrative charges, and that the retaliation claims set forth in her non-statutory causes of action were not barred because the exhaustion of administrative remedies doctrine does not apply to those claims.

Ultimately, defendant's position is based on its belief that Ms. "Soldinger's 'sour grapes' view of the result she obtained at arbitration is not a legally sufficient reason to allow her to try again here." (RB 15.) In making this statement, defendant reveals that it completely fails to understand the importance of Ms. Soldinger's state law right not to be discriminated against, a right which she holds independently of her status as a union member. Ms. Soldinger trusts that this court will not make the same mistake, but will reverse the summary judgment granted in defendant's favor.

ARGUMENT

I.

THE RAILWAY LABOR ACT DOES NOT PREEMPT MS. SOLDINGER'S STATE LAW RELIGIOUS DISCRIMINATION CLAIMS BECAUSE THESE CAUSES OF ACTION ARE NOT "MINOR DISPUTES" DECIDED BY INTERPRETING THE COLLECTIVE BARGAINING AGREEMENT.

Plaintiff Geraldine Soldinger has brought statutory and public policy religious discrimination claims based on defendant Northwest Airlines' failing to accommodate her religious beliefs, treating her differently than other employees because of these beliefs, and retaliating against her because she exercised these beliefs. Defendant contends that Ms. Soldinger's claims are preempted because they are "minor disputes" under the RLA that cannot be decided without interpreting the CBA. (RB 6-17.) This contention is incorrect because Ms. Soldinger's religious discrimination claims are not based on the CBA, but on non-negotiable state-created rights independent of the CBA. Her claims therefore are not "minor disputes" under the RLA and can be decided without interpreting the CBA.[2/]

2/ Defendant also contends that because Ms. Soldinger arbitrated contractual religious discrimination claims under the CBA, "the RLA bars her from proceeding a second time in court." (RB 15.) This assertion is frivolous, regardless of whether it is based on preemption or collateral estoppel. (Alexander v. Gardner-Denver Company (1974) 415 U.S. 36, 50, 59, 94 S.Ct. 1011, 1020, 1025, 39 L.Ed.2d 147 [because statutory and contractual rights are "distinctly separate," a court must give de novo consideration to Title VII cause of action brought after arbitration under anti-discrimination clause of CBA].)

A. Ms. Soldinger's Religious Discrimination Claims Are Not "Minor Disputes" Under The Railway Labor Act.

The RLA was intended "to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes." (Hawaiian Airlines, Inc. v. Norris, supra, 114 S.Ct. at 2243, emphasis added.) Two types of labor disputes are arbitrated under the RLA: "Major" disputes, which "relate to the formation of collective bargaining agreements or efforts to secure them," and "minor" disputes, which "grow out of the grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions." (Id. at 2244, internal quotation marks deleted.) "Thus, major disputes seek to create contractual rights, minor disputes to enforce them." (Ibid., emphasis added.)

The Supreme Court has made it clear beyond question that "the RLA's mechanism for resolving minor disputes does not pre-empt causes of action to enforce rights that are independent of the CBA." (Hawaiian Airlines, Inc. v. Norris, supra, 114 S.Ct. at 2246, emphasis added; Allis-Chalmers Corp. v. Lueck (1985) 471 U.S. 202, 213, 105 S.Ct. 1904, 1912, 85 L.Ed.2d 206 [causes of action based on "nonnegotiable state-law rights . . . independent of any right established by contract" are not preempted, emphasis added].) Such causes of action cannot be characterized as "minor disputes" because "[t]he distinguishing feature of a minor dispute is that the dispute may be conclusively resolved by interpreting the existing CBA." (Hawaiian Airlines, Inc. v. Norris, supra, 114 S.Ct. at 2245, emphasis added.)

Ms. Soldinger's religious discrimination claims do not stem from the CBA, and cannot be conclusively resolved by interpreting the CBA, but are instead based on non-negotiable state law rights. (Judson Steel Corp. v. Workers' Comp. Appeals Bd. (1978) 22 Cal.3d 658, 665, fn. 5 [union cannot bargain away its employees' rights to be free from discrimination].) Therefore, her religious discrimination claims cannot be characterized as "minor disputes" preempted under the RLA. To hold otherwise would deprive Ms. Soldinger--and all other workers subject to the RLA--of the benefit of state civil rights laws our Supreme Court deems fundamental. (Commodore Home Systems, Inc. v. Superior Court (1982) 32 Cal.3d 211, 220 ["The policy that promotes the right to seek and hold employment free of prejudice is fundamental"].) Not surprisingly, defendant cites no cases where religious or racial discrimination claims based on state law have been preempted as "minor disputes" under the RLA.

Courts have flatly rejected similar attempts to transform actions based on anti-discrimination statutes or other state substantive law into "minor disputes" under the RLA. In Norris, the Supreme Court refused to preempt as a "minor dispute" an aircraft mechanic's claim that he was discharged in violation of the Hawaii statute protecting whistleblowers after refusing to certify the safety of a plane he considered unsafe and reporting the problem to the Federal Aviation Administration. In so holding, the Court noted that "the category of minor disputes contemplated by § 151a [of the RLA] are those that are grounded in the collective-bargaining agreement." (Hawaiian Airlines, Inc. v. Norris, supra, 114 S.Ct. at 2245.) The Court rejected the defendant's contention that a dispute would be deemed minor if an employer's actions were "arguably justified" under the CBA. (Id. at 2250-2251.) Like the plaintiff in Norris, Ms. Soldinger's claims

are based on state law, not grounded in the collective-bargaining agreement, and defendant's contentions that the CBA justified its actions do not transform her religious discrimination claims into a "minor dispute."

The Court of Appeal rebuffed an attempt to treat a racial discrimination claim as a "minor dispute" in Evans v. Southern Pacific Transportation Co., supra, 213 Cal.App.3d 1378. The court noted that "the RLA does not preclude a court's jurisdiction over claims based on federal civil rights statutes" and concluded that claims based on state civil rights statutes should be treated similarly. (Id. at 1384, 1385; see also Rodriguez v. United Airlines, Inc. (N.D.Cal. 1992) 812 F.Supp. 1022, 1025, 1027 [claim for racial discrimination violative of California public policy would not be deemed a "minor dispute" even though it would "require some tangential analysis of workplace rules"]; McAlester v. United Air Lines, Inc. (10th Cir. 1988) 851 F.2d 1249, 1255 [statutory racial discrimination tort claim "cannot be a 'minor dispute'"]; United Transp. Unions 385 & 77 v. Metro-North Commuter (S.D.N.Y. 1994) 862 F.Supp. 55 [practice that allegedly violated federal statute could not be deemed a "minor dispute"]; Cooper v. Norfolk and Western Ry. Co. (S.D.W.Va. 1994) 870 F.Supp. 1410, 1423 ["discrimination does not arise out of the employment relationship just because that is where it happens to raise its ugly head. Therefore, this [racial discrimination] claim is not a minor contractual dispute . . . .]."")

Ms. Soldinger's claims, like those of the plaintiffs in the above cited cases, are based on fundamental, non-negotiable state law rights, not the CBA, and therefore cannot be characterized as "minor disputes."

B. Ms. Soldinger's Religious Discrimination Claims Do Not Require Interpreting the CBA.

Defendant further asserts Ms. Soldinger's religious discrimination claims are preempted because "the trier of fact must necessarily interpret the CBA to resolve them." (RB 8) This contention is incorrect because it is based on a misunderstanding of the word "interpret" in the RLA preemption context. This misunderstanding stems from a failure to comprehend the purpose of federal labor law preemption, which is designed to promote the uniformity of "'an evolving federal common law grounded in national labor policy.'" (Allis-Chalmers Corp. v. Lueck, supra, 471 U.S. at 211, 105 S.Ct. at 1911.) The Allis-Chalmers Court made it clear that only disputes centering on the meaning of a contract provision would be preempted, stating:

> "The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that meaning given a contract phrase or term be subject to uniform federal interpretation. Thus, questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law . . . ." (Ibid., emphasis added.)

Under this standard, the Court has preempted state law claims only where the claim derived from and was strongly dependent on the language of the CBA, so that the claim could not be resolved without determining the extent of the employee's rights

under the CBA. (See Andrews v. Louisville & Nashville Railroad Company (1972) 406 U.S. 320, 324, 92 S.Ct. 1562, 1565, 32 L.Ed.2d 95 ["wrongful discharge" claim preempted because the employee contended that the CBA required the employer to restore him to the duties he'd performed prior to a car accident, and the Court concluded that the CBA was the "only source of petitioner's right not to be discharged . . ."]; Allis-Chalmers Corp. v. Lueck, supra, 471 U.S. at 213-216, 105 S.Ct. 1912-1913 [claim for bad faith based on an employer's alleged mishandling of disability payments preempted because the CBA governed the manner in which payments were to be made].)

Not surprisingly, the Court has equated the necessity for "interpretation" of a CBA with the existence of a "minor dispute," characterizing "a minor dispute as one that can be 'conclusively resolved' by reference to an existing collective-bargaining agreement." (Hawaiian Airlines, Inc. v. Norris, supra, 114 S.Ct. at 2249, emphasis added.) As demonstrated above, Ms. Soldinger's state law religious discrimination claims are not a "minor dispute" because they are based on non-negotiable state law rights and cannot be "conclusively resolved" by reference to a collective bargaining agreement. As discussed below, all of Ms. Soldinger's religious discrimination claims can be resolved without interpreting the CBA.

1. Ms. Soldinger's accommodation claims are subject to the standard imposed by state law and therefore can be resolved without interpreting the CBA.

Ms. Soldinger's religious discrimination causes of action are based in part on defendant's failure to reasonably accommodate her religious beliefs pursuant to California law. (AOB 25-28.) Defendant contends such allegations are preempted because the trier of fact "must necessarily interpret the CBA to resolve them." (RB 8.) This is incorrect, because while the trier of fact might at most have to refer to the CBA's provisions, no "interpretation" is required to resolve Ms. Soldinger's accommodation claims, which must be decided under the standard set by state law. (Cf. Ramirez v. Fox Television Station, Inc. (9th Cir. 1993) 998 F.2d 743, 748 ["Fox errs in equating 'reference' with 'interpret'"].)

As Ms. Soldinger demonstrated, she can establish a prima facie case of discrimination based on a failure to accommodate her beliefs by showing that she had a bona fide belief that working on Passover would be contrary to her faith, that she informed the airport manager (Steve Holme) of this, and that Holme fired her for refusing to work on Passover. (AOB 25-26.) Defendant does not dispute that these facts, none of which requires even referring to the CBA, are sufficient to establish a prima facie case of employment discrimination.

Defendant contends however, that in order to evaluate its accommodation defense, the factfinder must make a "determination of Soldinger's vacation and transfer rights under the CBA." (RB 8.) Defendant alleges as well that "the trier of fact must

also weigh Soldinger's rights under the CBA against the rights of other Northwest employees." (RB 8-9.) Both contentions are wrong.

The factfinder does not have to "determine" Ms. Soldinger's vacation and transfer rights under the CBA because Ms. Soldinger is not arguing that the CBA entitled her to take Passover off; she is instead stating that firing her for refusing to work on Passover violated state law because it was not a reasonable accommodation of her religious needs. (Ramirez v. Fox Television Station, Inc., supra, 998 F.2d at 748-749 [employee's claim that she had been racially discriminated against because she was rejected for certain assignments was not based on a claimed "'right'" to these assignments, but on state anti-discrimination law, so no interpretation of the CBA was necessary although the CBA might be referred to].) While defendant here might request the factfinder to refer to the clauses in the CBA that describe vacation and transfer arrangements, there is no argument over the meaning of these clauses; the only dispute is whether these arrangements alone were sufficient to satisfy state law, which imposes its own standard for when an accommodation is reasonable. Because the factfinder does not have to determine Ms. Soldinger's rights under the CBA, there is no risk of impairing federal labor law uniformity regarding "what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement . . . ." (Allis-Chalmers Corp. v. Lueck, supra, 471 U.S. at 211, 105 S.Ct. at 1911.) Therefore, no "interpretation" of the CBA is required.

Nor is there any need to "weigh" Ms. Soldinger's rights under the CBA against those of other employees. Ms. Soldinger is not arguing that the CBA accorded her greater rights than other employees, but is contending that state law required defendant

to accommodate her religious beliefs. Under California law, "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." (Best v. California Apprenticeship Council (1984) 161 Cal.App.3d 626, 636; Cook v. Lindsay Olive Growers (9th Cir. 1990) 911 F.2d 233, 240 ["Even where an employer acts according to a policy applied reasonably to other individuals with different religious beliefs, it might nevertheless violate § 12940(a) . . ."].) Because the court is not required to determine Ms. Soldinger's rights under the CBA vis à vis other employees, no interpretation of the CBA is required.

Moreover, under California law, an employer is required to demonstrate 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" unless the employer can demonstrate hardship. (Gov. Code § 12940, subd. (j), emphasis added.) Because the CBA did not accommodate Ms. Soldinger's needs, the trier of fact need not even consider the CBA, but could simply assess whether defendant explored any other "available reasonable alternative means" of accommodation.[3/]

3/ Defendant suggests that California anti-discrimination law can't apply to workers covered under the RLA because individual state laws requiring deviations from a CBA threaten the "federal interest in uniform nationwide interpretation and application of collective bargaining agreements." (RB 13.) The Supreme Court rejected this argument more than half a century ago. (See Hawaiian Airlines, Inc. v. Norris, supra, 114 S.Ct. at 2246, citing Terminal Railroad Assn. of St. Louis v. Brotherhood of Railway Trainment (1943) 318 U.S. 1, 63 S.Ct. 420, 87 L.Ed. 571 [RLA did not preempt a state railway commission's order requiring cabooses on all trains although the CBA required cabooses only on some trains].)

Because defendant's "accommodation" efforts will be evaluated under state law, and the scope and meaning of the CBA is not at issue, preemption is unwarranted. (Miller v. AT&T Network Systems (9th Cir. 1988) 850 F.2d 543, 548-549 [handicap discrimination claim was not preempted because plaintiff's ability to perform a job was determined by reference to statutory criteria, so there was no need to interpret CBA standards governing job assignments and discharges]; Ackerman v. Western Elec. Co., Inc. (9th Cir. 1988) 860 F.2d 1514, 1518 [handicap discrimination under California law was not preempted by the LMRA because the California statute was "indistinguishable in all relevant respects" from the Oregon statute involved in Miller].)

Defendant attempts to distinguish Miller and Ackerman on the ground that the trier of fact in these cases was not "required to interpret the collective bargaining agreement." (RB 13.) However, Ms. Soldinger's claims do not require the CBA to be interpreted for precisely the reason set forth explicitly in Miller and implicitly in Ackerman: claims brought under a state statute imposing standards that are independent of the CBA don't require interpretation of the CBA. Defendant also contends that neither Miller and Ackerman "addressed the issue of reasonable accommodation or involved a claim of religious discrimination." (RB 13-14.) However, both the Oregon statute involved in Miller and the California handicap discrimination statute relied on in Ackerman require that a reasonable accommodation be made; therefore the issue of whether the accommodation made was "reasonable" was necessarily involved in these cases. (Miller v. AT&T Network Systems, supra, 850 F.2d at 548 [citing Oregon statute § 659.425]; Ackerman v. Western Elec. Co., Inc., supra, 860 F.2d at 1516 [citing California Government Code section 12940].) The fact that

neither Miller nor Ackerman involved religious discrimination does not vitiate the applicability of these cases' rationale that preemption is unwarranted when state law can be applied without interpreting the CBA. (See Cook v. Lindsay Olive Growers, supra, 911 F.2d at 240 [rejecting preemption of religious discrimination claim brought under Government Code section 12940, subdivision (a) because that statute "has articulated a clear standard that does not require interpretation of the CBA"].)[4/]

Defendant cites several cases, all of which are distinguishable. In O'Brien v. Consolidated Rail Corp. (1st Cir. 1992) 972 F.2d 1, 5-6, a handicap accommodation claim was held preempted because the CBA set forth definitions of fitness and ability and state law did not, so the court could not determine whether a plaintiff was a "'qualified handicapped person'" without construing the CBA. In Croston v. Burlington Northern Railroad Co. (9th Cir. 1993) 999 F.2d 381, 388-389, another handicap discrimination claim was held preempted when the court would have had to decide whether plaintiff was entitled to benefits under the CBA before deciding whether he was discriminated against. In these cases, unlike Miller, Ackerman, and the present case, the plaintiffs' rights under state law arguably could not have been determined without resolving the meaning of CBA provisions.[5/]

4/ Defendant also claims that Miller and Ackerman are distinguishable because the CBA in this case "constituted a reasonable accommodation . . . ." (RB 14.) As discussed below, this assertion is incorrect under California law. Moreover, whether a CBA satisfies an independent state law standard is not a preemption issue, but goes to the substance of an accommodation claim. (See, e.g., Trans World Airlines, Inc. v. Hardison (1977) 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113 [evaluating whether CBA was reasonable accommodation under federal anti-discrimination law].)

5/ Even if O'Brien and Croston were not distinguishable from the present case; defendant concedes their continued validity has been thrown into question by the

(continued...)

Defendant also cites Calvert v. Trans World Airlines, Inc. (8th Cir. 1992) 959 F.2d 698 and Felt v. Atchison, Topeka & Santa Fe Railway Co. (C.D.Cal. 1993) 831 F.Supp. 780. Calvert is inapposite because it did not involve discrimination claims; moreover, like O'Brien and Croston, its continued vitality was questioned in Taggart. Felt, now on appeal to the Ninth Circuit (Case No. 93-56265), is likewise neither apposite nor correct. Technically, Felt did not involve preemption at all because plaintiff's federal civil rights claim was dismissed on the ground that the arbitration under the Federal Arbitration Act was plaintiff's exclusive remedy. (Id. at 782.) More importantly, Felt was not decided under the federal labor law preemption doctrine that defendant relies on here, but instead attempted to extend to an RLA context Gilmer v. Interstate/Johnson Lane Corp. (1991) 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26, which held that federal statutory rights could be subjected to compulsory arbitration under the Federal Arbitration Act ("FAA"). Felt was moreover wrongly decided because Gilmer distinguished preemption under the FAA from federal labor law preemption pursuant to CBA's. (111 S.Ct. at 1656-1657.) The latter type of preemption is governed by Alexander v. Gardner-Denver Company, supra, 415 U.S. 36, 94 S.Ct. 1011, where the Court had held that an employee who arbitrated contractual rights (including the right not to be discriminated against) under a CBA could later bring an action based on state statutory rights, which is precisely what Ms. Soldinger is doing here. The Court reaffirmed the continuing validity of Alexander in Livadas v. Bradshaw (1994) 114 S.Ct. 2068, 2080, fn. 21, 129

5/(...continued)
Supreme Court's subsequent decision in Norris. (See RB 13, fn. 5, citing Taggart v. Trans World Airlines, Inc. (8th Cir. 1994) 40 F.3d 269.) In Taggart, the court rejected preemption of a handicap discrimination claim and noted that Norris "narrowed the scope of RLA pre-emption." (Id. at 274.)

L.Ed.2d 93, emphasizing Alexander's "basic consistency" with Gilmer; see also Spellman v. Securities, Annuities & Ins. Services, Inc. (1992) 8 Cal.App.4th 452, 461 [distinguishing between individual agreements to arbitrate under the FAA and CBA's for purposes of deciding whether statutory claims for racial discrimination are arbitrable].)

Defendant lastly argues that even if its vacation and seniority system is not per se a reasonable accommodation, "the trier of fact would be required to interpret the CBA to decide if Soldinger's beliefs could have been reasonably accommodated by any other means." (RB 9.) Defendant then cites several CBA provisions pertaining to staffing levels, and to overtime and part-time employees, and contends these provisions would have to be interpreted to determine if Northwest should have permitted Ms. Soldinger to take the day off or brought in other employees to cover her shift. (RB 9-10.)

This argument does not deserve consideration because defendant claims it reasonably accommodated Ms. Soldinger, and does not argue in the alternative that other means of accommodations would have imposed hardships. (RB 21-25.) Regardless, the argument is wrong for several reasons. First, the trier of fact, without even referring to the CBA, could find that defendant violated its duty to "explore[] any available reasonable alternative means of accommodating [Ms. Soldinger's] religious belief or observance . . . ." (Gov. Code § 12940, subd. (j).) The record discloses that Holme did not even attempt to explore any potential accommodation, but simply told Ms. Soldinger to report for work on her religious holiday or be fired. (AOB 10-11.) Such conduct in and of itself violates California's statutory and public policy against discrimination.

Alternatively, the trier of fact could find, again without referring to the CBA, that there was a "reasonable alternative means of accommodation" available. The record shows that another employee, Chris Canale, wanted to take the same day off, and there is evidence that his supervisor actively sought out workers who could trade shifts with that employee. (AOB 11-12.) The fact finder could conclude that such efforts would have been a reasonable means of accommodating Ms. Soldinger, and that Holme's failure to take similar action violated California's statutory and public policy against discrimination.

Finally, the trier of fact could evaluate the employer's hardship contentions without interpreting the CBA by hearing the testimony of other Northwest employees. These employees testified in their depositions that defendant routinely finds replacements for other employees on very short notice, defendant did not even attempt to find employees to cover Ms. Soldinger's shift until the day of her absence, and defendant's operations were not in any event adversely impacted by Ms. Soldinger's one-day absence. (AOB 12-13.) The arbitration panel relied on testimony and completely ignored the CBA in finding that defendant covered Ms. Soldinger's shift with "ease" (J.A. 824) and that "[t]here is no evidence that this reassignment cost the Company money, involved overtime or adversely impacted the work of the reassigned employees." (J.A. 822.) A fact finder could do the same. As with the CBA's vacation and transfer clauses, there would be no dispute about the meaning of these clauses, so no interpretation would be required.

For the above-stated reasons, Ms. Soldinger's religious discrimination claims pertaining to accommodation should not have been preempted.

2. Ms. Soldinger's disparate treatment claims are subject to the standard imposed by state law and therefore can be resolved without interpreting the CBA.

Ms. Soldinger has contended that defendant treated her differently from other employees on the basis of her religion because she was not permitted to take off March 31, 1991, and because she was fired although defendant failed to punish similar behavior of other employees. (AOB 28-29.) Defendant responds to the first contention by asserting that it was obligated to treat Chris Canale (a co-worker whose supervisor secured a replacement for him on March 31) more favorably than Ms. Soldinger under the CBA. (RB 10.) Defendant therefore contends that "the individual contractual rights of Canale and Soldinger (and hence Soldinger's discrimination claim) cannot be resolved without interpretation of the CBA's vacation and seniority provisions." (Ibid.)[6/]

Defendant's disparate treatment argument is misguided because it is not Ms. Soldinger's rights under the CBA that are at issue, but her state law right not to be discriminated against on the basis of her religious beliefs. In order to prevail on her disparate treatment claim, Ms. Soldinger need only show that religious discrimination influenced the employer's actions, a purely factual determination requiring no interpretation of the CBA. (See Mixon v. Fair Employment & Housing Commission (1987) 192 Cal.App.3d 1306, 1319 [plaintiff's burden is not to prove that "racial animus was the sole motivation behind the challenged action, he must prove by a

---

6/ Defendant does not specifically address whether preemption is appropriate in regard to Ms. Soldinger's disparate treatment allegation that she was fired for behavior other employees were not punished for.

preponderance of the evidence that there was a causal connection between the employee's protected status and the adverse employment decision," emphasis added, internal quotation marks omitted]; Watson v. Department of Rehabilitation (1989) 212 Cal.App.3d 1271, 1290 [citing the Fair Employment and Housing Commission's requirement that "the sole inquiry in each case is whether a preponderance of all the evidence demonstrates that the adverse employment action was caused at least in part by a discriminatory motive," emphasis added]; cf. Page v. Superior Court (1995) 31 Cal.App.4th 1206, 1214 ["we give great weight to the FEHC's interpretation of its own regulations and the statutes under which it operates," internal brackets and quotation marks omitted].)

A trier of fact could find that Ms. Soldinger was discriminated against regardless of what her rights were under the CBA. The trier of fact could infer discrimination from the fact that Mr. Canale's supervisor actively attempted to find a replacement for him, whereas Holme did not make similar efforts, but told Ms. Soldinger she would be fired if she did not show up for work on March 31. Additional evidence favoring an inference of discrimination is supplied by Holme's asking Ms. Soldinger: "Well, what makes you think it's more important for you to have your holiday off than someone celebrating Easter?" (AOB 11.) In short, while defendant can cite the CBA as justifying more favorable treatment for Mr. Canale, the trier of fact could find that defendant's actions were to some extent motivated by discrimination. The CBA need not be interpreted and preemption is unwarranted. (Hawaiian Airlines, Inc. v. Norris, supra, 114 S.Ct. at 2248 ["purely factual questions about an employee's conduct or an employer's conduct and

motives do not require a court to interpret any term of a collective bargaining agreement," internal quotation marks and brackets omitted].)

Federal courts have repeatedly rejected arguments similar to defendant's. (See Ramirez v. Fox Television Station, Inc., supra, 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., supra, 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"]; Cooper v. Norfolk and Western Ry. Co., supra, 870 F.Supp. at 1422 [racial discrimination claim not preempted under the RLA despite the employer's contention that defendant had "legitimate, non-discriminatory reasons for its actions" because while the issues "may involve certain aspects of Plaintiff's contract, they are primarily concerned with conduct, intent and circumstantial evidence of discrimination"]; Spears v. Northwest Airlines, Inc. (E.D. Mich. 1992) 798 F.Supp. 436, 441 [defendants' argument that they had the right to discipline and discharge plaintiff under the CBA did not require preemption because "plaintiff's race discrimination claim did not stem from the CBA; nor is adjudication of her discrimination claim substantially dependent upon analysis of the terms of the CBA"]; Chmiel v. Beverly Wilshire Hotel Co. (9th Cir. 1989) 873 F.2d 1283, 1286 [age discrimination action held not preempted by the LMRA "because the right is defined and enforced under state law without reference to the terms of any collective bargaining agreement"]; Jackson v. Southern California Gas. Co. (9th Cir. 1989) 881 F.2d 638, 644 [racial discrimination claim based on California anti-

discrimination statute was not preempted by LMRA].) The rationale underlying this line of cases was best summed up in Ramirez, where the Ninth Circuit stated: "[Plaintiff] cannot be discriminated against under certain conditions; hence it would be nonsensical to look to the terms of the Bargaining Agreement to determine if the alleged discrimination against [plaintiff] is excusable under the terms of that agreement." (Ramirez v. Fox Television Station, Inc., supra, 998 F.2d at 749.)

Another division of this court rejected RLA preemption under similar circumstances. In Evans v. Southern Pacific Transportation Co., supra, 213 Cal.App.3d 1378, the plaintiff was ostensibly discharged for violating the CBA by possessing alcohol or being intoxicated while on duty. (Id. at 1381.) He sued for racial, as well as handicap discrimination. The Court held plaintiff's racial discrimination claim not preempted, 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 . . . ." (Id. at 1385.) Just as Evans' claim did not depend upon whether he could lawfully be fired under the CBA provision prohibiting alcohol possession, but instead hinged on whether racial animus was a factor in his dismissal, Ms. Soldinger's disparate treatment claim does not depend upon her rights under the CBA, but turns on whether religious discrimination influenced her inferior treatment.

Not surprisingly, defendant fails to cite any case law holding that differential treatment claims brought pursuant to state anti-discrimination law are preempted by the RLA, LMRA or any other federal labor statute. Nor does defendant even mention Evans, although Ms. Soldinger cited this case in her opening brief. (AOB 28-29.) Ms.

Soldinger also cited the Ramirez and Rodriguez cases, both of which hold that the RLA and the LMRA do not preempt disparate treatment allegations under California's anti-discrimination law. (AOB 29.) Defendant does not contend these cases are incorrectly decided and in fact does not even address them in the context of Ms. Soldinger's disparate treatment claims. (See RB 14-15, fn. 6.)

For the above-cited reasons, Ms. Soldinger's religious discrimination claims pertaining to disparate treatment should not have been preempted.

3. Ms. Soldinger's retaliation claims are subject to the standard imposed by state law and therefore can be resolved without interpreting the CBA.

True to form, defendant contends Ms. Soldinger's retaliation claims are preempted because they "cannot be resolved without interpretation and application of the CBA." (RB 16.) Defendant argues that such interpretation is necessary to determine if Northwest was justified in refusing to reinstate Ms. Soldinger to return to Operations or permit her to immediately bid for vacation. (Id. at 16-17 and fn. 7.) Defendant is wrong for the for the usual reason: the trial court is not required to determine the extent of Ms. Soldinger's rights and defendant's prerogatives under the CBA, but is only required under state law to determine whether defendant acted with a retaliatory motive, and the CBA need not be interpreted to make such a determination.

In Norris, the Supreme Court rejected an argument virtually identical to that made by defendant. The defendant in that case contended that preemption of the plaintiff's

retaliatory discharge claim was required because "the state tort claims require a determination whether the discharge, if any, was justified by respondent's failure to sign the maintenance record, as the [CBA] required him to do." (Hawaiian Airlines, Inc. v. Norris, supra, 114 S.Ct. at 2251.) The Court disagreed, stating that while such an inquiry would have been necessary on the plaintiff's claim for breach of the CBA (which had been dismissed), "[t]he state tort claims, by contrast, require only the purely factual inquiry into any retaliatory motive of the employer." (Ibid.; see also Lingle v. Norge Div. of Magic Chef, Inc., supra, 486 U.S. at 407, 108 S.Ct. at 1882 [no preemption of statutory retaliatory discharge claim of employee allegedly fired for filing a false workers' compensation claim because a court could determine if the employer "had a nonretaliatory reason for the discharge" without interpreting the CBA].)

The Norris court's determination that a claim for retaliatory discharge, unlike a breach of contract claim, does not require interpreting that segment of the CBA allegedly justifying the employer's action highlights the difference between "interpretation"--which is necessary to decide claims under the CBA--and mere "reference" to the CBA in the course of deciding a retaliatory discharge claim. In order to decide plaintiff's breach of contract claim in Norris, a court would have had to determine whether the CBA permitted the employer to discharge an employee for refusing to sign a maintenance record. Such a finding would seemingly involve contract interpretation. In contrast, a court could decide the plaintiff's retaliatory discharge claim without determining whether the employee's discharge was proper under the CBA because the court would simply have to determine whether the employer acted with an improper motive. Although the court might refer to the CBA provision potentially

justifying such a firing, the operant question would not be whether the firing was justified under the CBA, but whether the employer's motive in firing the employee was to retaliate against the employee. (See Crosby v. State of Hawaii Department of Budget & Finance (1994) 76 Haw. 332, 342, 876 P.2d 1300, 1310 [employee suing under the Hawaii whistleblowing statute must show a "causal connection between the alleged retaliation and the 'whistleblowing,'" emphasis added].)

As in Hawaiian Airlines, the CBA need not be interpreted to decide Ms. Soldinger's retaliation claims. For reasons discussed above, the employee suing under California anti-discrimination law (like an employee suing under the Hawaiian whistleblower statute) need only show that the outlawed conduct influenced the employer's actions, a purely factual determination requiring no interpretation of the CBA. Because the factfinder need not interpret the CBA to find that retaliation played a part in Ms. Soldinger's dismissal, her retaliation cause of action cannot be preempted. (See also Rodriguez v. United Airlines, Inc., supra, 812 F.Supp. 1022, 1025-1027 [RLA did not preempt FEHA cause of action, which included a claim for retaliation]; Cooper v. Norfolk and Western Ry. Co., supra, 870 F.Supp. at 1422 [plaintiff's retaliation claim was not preempted by the RLA although defendant contended it had "legitimate non-discriminatory reasons for its actions" because "[w]hile these questions may involve certain aspects of Plaintiff's contract, they are primarily concerned with conduct, intent and circumstantial evidence of discrimination"].)[7/]

7/ Defendant suggests that Ms. Soldinger did not "truly believe[]" she had been retaliated against by being deprived of certain rights because she (and the Union) did not attempt to "approach[] the arbitrator to have him clarify his original ruling." (RB 16-17.) Defendant's inference that an individual faced with continued discrimination

(continued...)

For these reasons, Ms. Soldinger's religious discrimination claims pertaining to retaliation should not have been preempted.

II.

THE RAILWAY LABOR ACT DOES NOT PREEMPT MS. SOLDINGER'S INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM BECAUSE THIS CAUSE OF ACTION IS NOT A "MINOR DISPUTE" DECIDED BY INTERPRETING THE COLLECTIVE BARGAINING AGREEMENT.

Ms. Soldinger asserted that her cause of action for intentional infliction of emotional distress (IIED) was not preempted because it was based squarely on religious discrimination, and the CBA need not be interpreted in order to find such conduct "extreme and outrageous" under California law. (AOB 31-32.) Defendant responds by contending that whether its behavior can be deemed extreme and outrageous depends on the extent to which the CBA justifies the employer's actions, so the CBA must be interpreted to decide Ms. Soldinger's IIED claim.[8/]

7/(...continued)
doesn't really believe she is being discriminated against because she chooses to file an action at law defies all logic. Moreover, defendant cites no evidence that Ms. Soldinger, rather than the Union, decided against a return to arbitration.

8/ Defendant also alleges that Ms. Soldinger's IIED claim is "based upon the same conduct as her discrimination claims and is preempted for the same reasons." (RB 18.) This assertion is contradicted by the very cases defendant cites to support its IIED argument. (See Cook v. Lindsay Olive Growers, supra, 911 F.2d at 240 [preempting plaintiff's IIED claim was consistent with not preempting plaintiff's religious discrimination claim based on failure to accommodate because the latter claim did not require the court to decide "whether [the employer's] actions were reasonable under the CBA"];
(continued...)

Defendant cites several pre-Norris Ninth Circuit cases to support its position. (RB 18-21.) However, Norris's narrowing of RLA preemption strongly indicates that these cases are no longer good law insofar as they preempt IIED causes of action. As discussed above, Norris established that preemption applied only to cases involving "minor disputes," which were "grounded in the CBA," as opposed to cases involving rights whose source was independent of the CBA. (Hawaiian Airlines, Inc. v. Norris, supra, 114 S.Ct. at 2245-2247.) Norris also expressly rejected the principle that a "minor dispute" exists whenever an employer's action is "arguably justified" by a CBA's terms, which is essentially what defendant contends. (Id. at 2250-2251; see also Taggart v. Trans World Airlines, Inc., supra, 40 F.3d at 274 [Norris rejected the "'arguably justified'" test for preemption].)

The Fifth Circuit relied on Norris in reversing a prior holding in the same case that an employee's IIED cause of action, which arose out of sexual harassment, was preempted by the RLA. (Hirras v. National R.R. Passenger Corp., supra, 44 F.3d 278.) The court had initially accepted the defendant's contention that Hirras' IIED claim was preempted because the CBA would have to be construed in order to determine the actions defendant was required to take in response to Hirras' complaints that she was being harassed. (See Hirras v. National R.R. Passenger Corp. (5th Cir. 1994) 10 F.3d 1142, 1149.) The Supreme Court subsequently vacated and remanded Hirras "for

---

8/(...continued)
Miller v. AT&T Network Systems, supra, 850 F.2d at 548-551 [holding IIED claim preempted while refusing to preempt handicap discrimination].) As demonstrated above, the CBA, which cannot justify religious discrimination, need not be interpreted to determine if defendant discriminated against Ms. Soldinger; therefore Ms. Soldinger's religious discrimination claims are not preempted even if her IIED claim is preempted.

further consideration in light of Hawaiian Airlines, Inc. v. Norris [citation]." (Hirras v. National R.R. Passenger Corp., supra, 114 S.Ct. 2732, 129 L.Ed.2d 855.) On remand, the Fifth Circuit held Hirras's IIED claim not preempted, stating:

> "Even if the resolution of Hirras' claim involved a reference to the rights and duties created by the CBA, the Court in Hawaiian Airlines emphasized that 'when the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished.'" (Hirras v. National R.R. Passenger Corp., supra, 44 F.3d at 283, fn. 10.)

Hirras expressly distinguished cases where the IIED claim is based on refusal to operate in accordance with procedures (e.g., those pertaining to job transfer) under the CBA. (Id. at 283-284.) Thus, Hirras is perfectly consistent with DeTomaso v. Pan American World Airways, Inc. (1987) 43 Cal.3d 517, in which our Supreme Court 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]." (Id. at 530.) Because Ms. Soldinger's IIED claims do not arise from defendant's failing to correctly follow procedures specified under the CBA, DeTomaso is distinguishable and preemption is not warranted.

Ms. Soldinger also cited cases holding that IIED claims based on abusive conduct are not preempted. (AOB 32.) Defendant attempts to distinguish these cases, stating that those courts found the defendants' conduct "so outrageous that no national

labor policy would be served by preempting these claims." (RB 21, fn. 9.) The Ninth Circuit provided a ready-made answer to defendant's contention when it held that a plaintiff's IIED claim brought under California law was not preempted by the LMRA insofar as it was based on allegations that defendant's behavior constituted sexual harassment, because no reference to the CBA was required. "The CBA does not govern the offending behavior. The resolution of these claims depends on a purely factual inquiry into the conduct and motivation of the employer." (Perugini v. Safeway Stores, Inc. (9th Cir. 1991) 935 F.2d 1083, 1088.)

In the present case, as in Perugini, the trier of fact need not refer to the CBA to determine that the "offending behavior" constituted the intentional infliction of emotional distress. Therefore, Ms. Soldinger's IIED claim should not be deemed preempted even if Norris has not narrowed the scope of RLA preemption.

III.

TRIABLE ISSUES OF MATERIAL FACT EXIST AS TO WHETHER DEFENDANT REASONABLY ACCOMMODATED MS. SOLDINGER.

Ms. Soldinger set forth a number of triable issues of material fact that should have precluded summary judgment on her religious accommodation claims. (AOB 33-38.) Defendant does not dispute that there were triable issues of fact in regard to the elements Ms. Soldinger was required to adduce in order to establish a prima facie case. However, defendant contends that summary judgment was appropriate because

Northwest's seniority and vacation procedures were purportedly in and of themselves a reasonable accommodation as a matter of law. (RB 21-25.)[9/]

Defendant bases its argument on three cases decided under federal law. However, none of these cases held that a CBA provided a reasonable accommodation as a matter of law; instead, all of these cases were based on findings of fact that related to the parties' behavior as well as to the CBA. In reality, "[w]hether an employer has met its statutory burden to initiate good-faith efforts to accommodate an employee's religious belief is a question of fact." (E.E.O.C. v. Hacienda Hotel (9th Cir. 1989) 881 F.2d 1504, 1512, emphasis added, citing Trans World Airlines, Inc. v. Hardison (1977) 432 U.S. 63, 77, 97 S.Ct. 2264, 2273, 53 L.Ed.2d 113.)

In Hardison, cited by defendant, the Court did not hold that the CBA in and of itself was a reasonable accommodation to plaintiff's need to refrain from working on his Sabbath as well as special religious holidays. The Court instead found that "TWA made reasonable efforts to accommodate." (Trans World Airlines, Inc. v. Hardison, supra, 432 U.S. at 77, 97 S.Ct. at 2273.) Unlike defendant here, TWA accommodated the plaintiff's observance of his special religious holidays, held several meetings with him and authorized the union steward to find someone who would swap shifts, leading the trial court to conclude that "TWA established as a matter of fact that it did take appropriate action to accommodate as required by Title VII." (Ibid.) The Supreme Court explicitly relied on this finding in holding that TWA had reasonably accommodated the plaintiff. (Ibid.)

9/ Defendant contends only that the CBA in and of itself constituted a reasonable accommodation to Ms. Soldinger's religious beliefs, not that further efforts to accommodate Ms. Soldinger would have resulted in hardship to defendant.

Defendant also cites Hudson v. Western Airlines, Inc. (9th Cir. 1988) 851 F.2d 261, another case where a defendant was found on the facts to have accommodated a Sabbatarian plaintiff. As in Hardison, defendant's personnel made real efforts to accommodate plaintiff by finding another employee to trade with her on one occasion and granting her emergency leave on another, despite little advance notice. (Id. at 263-264.) The Hudson court expressly rejected the proposition that the CBA "inherently established a reasonable accommodation without regard to the facts of the case." (Id. at 265.)

The third case defendant cites is Ansonia Board of Education v. Philbrook (1986) 479 U.S. 60, 107 S.Ct. 367, 93 L.Ed.2d 305. In Ansonia, the Supreme Court remanded the case because it found that "the ultimate issue of reasonable accommodation cannot be resolved without further factual inquiry." (Id. at 66, 107 S.Ct. at 371, emphasis supplied.) On remand, the trial court was to make factual findings regarding the way the CBA's policies were actually applied. (Id. at 71, 107 S.Ct. at 373.)[10/]

The federal case most similar to Ms. Soldinger's is E.E.O.C. v. Hacienda Hotel, supra, 881 F.2d at 1504, cited in Ms. Soldinger's opening brief at page 36. As in this case, the defendant in Hacienda Hotel argued that the CBA satisfied its duty to accommodate plaintiffs. The Ninth Circuit rejected this argument, stating that Hardison "recognized that at a minimum, the employer was required to negotiate with the

---

10/ Even if the Supreme Court had held the Ansonia CBA to provide a reasonable accommodation as a matter of law, the holding would not support defendant's assertion that its CBA reasonably accommodated Ms. Soldinger as a matter of law. The Supreme Court deemed it significant that the CBA in Ansonia gave plaintiff the option of taking unpaid leave. (Id. at 70, 107 S.Ct. at 373.) By contrast, Ms. Soldinger's request for such leave was denied. (AOB 10; J.A. 470.027:3-12.)

employee in an effort reasonably to accommodate the employee's religious beliefs." (Id. at 1513.) Moreover, the employer was not allowed to use "the collective-bargaining agreement as a shield against its statutory obligation to reasonably accommodate its employees' religious needs." (Ibid.)

Contrary to defendant's assertion, Ms. Soldinger does not contend that Hacienda Hotel "required Northwest to make additional last minute efforts to accommodate her claim by asking individual employees to work overtime or exchange shifts with her." (RB 24, emphasis added.)[11/] Ms. Soldinger does assert, however, that Hacienda Hotel stands for the principle that the trier of fact must decide whether defendant reasonably accommodated Ms. Soldinger's needs. Such a determination is particularly warranted in the present case, where (contrary to defendant's assertion) Ms. Soldinger has not always been able to accommodate her religious beliefs within the procedures set forth in the CBA, but on one occasion had to appeal to another airport manager by leaving a note similar to the note she left Holme. (AOB 10; J.A. 1263:1 - 1264:23.)

Toward the close of its accommodation argument, defendant contends the CBA might have been sufficient to accommodate Ms. Soldinger had she submitted a request for a DAT (day at a time) day off more than two weeks before March 31, and that Ms. Soldinger also erred by not stating the reason for her request and by subsequently

---

11/ Defendant also appears to contend that Hacienda Hotel is distinguishable because "one of the plaintiffs had arranged for her sister to cover her shift on the Sabbath [Citation]. However, the defendant refused to permit the transfer." (RB 25, fn. 12.) This distinction does not appear significant; moreover, other plaintiffs who did not have similar arrangements were also denied accommodation, as was Ms. Soldinger here. (E.E.O.C. v. Hacienda Hotel, supra, 881 F.2d at 1512-1513.)

waiting until a few days prior to March 31 before seeking a trade. (RB 25.)[12/] That defendant makes these arguments illustrates another reason why summary judgment was inappropriate. Defendant is essentially arguing that the CBA provisions would have accommodated Ms. Soldinger had she used them properly. That is a question only a trier of fact can decide, especially as it would inevitably involve evaluations of credibility and motives. (Cf. Smith v. Pyro Mining Co. (6th Cir. 1987) 827 F.2d 1081, 1089 ["It was apparent to th[e] [trial] Court that from the testimony and demeanor of defendant's witnesses at trial that [defendant] had no real desire to accommodate [plaintiff's] religious beliefs and flat out refused to lend him any significant assistance"].) Therefore, summary judgment should not have been granted.

Lastly, defendant asserts that because it provided "at least one reasonable accommodation," it discharged its duties to Ms. Soldinger. (RB 25.) But even assuming arguendo that the CBA was a reasonable accommodation as a matter of law, defendant was required under California law to find other reasonable accommodations when the CBA procedures proved insufficient and Ms. Soldinger brought her problem to defendant's attention. (See AOB 33-35.) Defendant's position might have been correct had Ms. Soldinger's claims been brought pursuant to Title VII of the 1964 Civil Rights Act because an employer discharges its Title VII obligations "by providing at least one reasonable accommodation . . . . " (Wright v. Runyon (7th Cir. 1993) 2 F.3d 214, 217, cited at p. 25 of the Respondent's Brief.) However, Ms. Soldinger's claims were

---

12/ Ms. Soldinger's supervisor testified at her arbitration that DAT requests were not supposed to be submitted more than fourteen days in advance of the day the employee wanted to take off. (J.A. 470.054:11-15.)

brought under California law.[13/] As discussed above, an employer cannot merely present one means of accommodation to the employee and do nothing more if that accommodation proves unsatisfactory. Instead, the statute requires the employer to explore "any available means of accommodation," and specifically mentions the alternative of excusing the employee from work. Only if the employer would suffer undue hardship--a claim defendant has not made and that would in any case be a question of fact--can the employer lawfully refuse at least to explore alternative accommodations. Because defendant did not attempt to explore alternative means of accommodation when the CBA procedures did not resolve Ms. Soldinger's problem, summary judgment was improper even if the CBA constituted a reasonable accommodation.

IV.

MS. SOLDINGER'S RETALIATION CLAIMS ARE NOT BARRED FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

Ms. Soldinger contended that her retaliation claims were not barred for failure to exhaust administrative remedies because she had exhausted her administrative remedies with respect to her statutory cause of action and she was not required to

---

13/ Although courts construing the Fair Employment and Housing Act, may, in appropriate circumstances, look to federal decisions interpreting Title VII, "it is not appropriate to follow federal decisions where the distinct language of the FEHA evidences a legislative intent different from that of Congress." (Page v. Superior Court, supra, 31 Cal.App.4th 1206, 1215-1216.)

exhaust her administrative remedies with respect to her non-statutory causes of action. (AOB 38-41.)

With respect to the statutory cause of action, defendant asserts that neither of the two Charges of Discrimination Ms. Soldinger filed with the Department of Fair Employment and Housing (DFEH) "deals with the alleged conduct on which Soldinger's new retaliation claims are based." (RB 17.) However, as Ms. Soldinger demonstrated, her retaliation claims are sufficiently related to her Charges of Discrimination to preclude any argument that she failed to exhaust administrative remedies. (AOB 39-40.) Ms. Soldinger will not repeat the arguments set forth in her opening brief, but notes instead that defendant did not even attempt to distinguish the case law plaintiff cited or rebut her contentions that she exhausted her administrative remedies under the legal standard set by these cases.

With respect to the non-statutory causes of action, defendant misconstrues Ms. Soldinger's argument. According to defendant, Ms. "Soldinger argues that she was not required to exhaust her administrative remedies because her retaliation claim is really a nonstatutory wrongful discharge claim." (RB 18.) However, Ms. Soldinger did not contend that her retaliation claim was "a non-statutory wrongful discharge claim." Instead, Ms. Soldinger contended that, insofar as her retaliation claims were embodied in non-statutory causes of action for violation of public policy and IIED, she did not have to exhaust her administrative remedies. (AOB 39; see also J.A. 32:3-17 and 37:12-16.)

In Rojo v. Kliger (1990) 52 Cal.3d 65, our Supreme Court permitted the plaintiff to bring non-statutory claims based on precisely the same conduct as his statutory claims, although the latter were barred for failure to exhaust administrative remedies. (Id. at 71,

88.) Like the plaintiff in Rojo, Ms. Soldinger has alleged non-statutory causes of action for violation of public policy and IIED based on the same conduct (in this case, retaliation) as plaintiff's statutory cause of action. (Id. at 71.) Like the plaintiff in Rojo, she is not required to exhaust her administrative claims in order to bring these causes of action.

CONCLUSION

For the reasons stated above and in Ms. Soldinger's opening brief, the summary judgment in defendant's favor should be reversed.

Dated: May 22, 1995

ROSENFELD, MEYER & SUSMAN
TODD W. BONDER
LISA M. JACOBSEN
STACY J. BARANCIK

GREINES, MARTIN, STEIN & RICHLAND
BARBARA W. RAVITZ
BARRY M. WOLF

By _____
Barry M. Wolf

Attorneys for Plaintiff and Appellant
GERALDINE SOLDINGER