

Appeal No. B150017

(Prior Appellate Matter: B143989)

(Related Appellate Matter: B155272)

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**IN THE COURT OF APPEALS
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE**

JEROLD DANIEL FRIEDMAN,
also known as JERRY FRIEDMAN,

Plaintiff and Appellant,

vs.

SOUTHERN CALIFORNIA PERMANENTE
MEDICAL GROUP, a California partnership;
KAISER FOUNDATION HOSPITALS, a
California corporation; KAISER FOUNDATION
HEALTH PLAN, INC., a California corporation,

Defendants and Respondents.

**From The Superior Court for Los Angeles County
Hon. Cesar C. Sarmiento, Judge
and
Hon. Ronald M. Sohigian, Judge
Superior Court Case No. BC224249**

APPELLANT'S PETITION FOR REHEARING

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APPELLANT'S PETITION FOR REHEARING

INTRODUCTION

This court's opinion for the first time sets forth a definition in California for a religion under the California Fair Employment and Housing Act ("FEHA"). Therefore, at no time did the Plaintiff have the benefit of this definition when pleading his case. At a minimum, this case should be remanded to the Superior Court to allow the Plaintiff to plead his religious discrimination FEHA claim under this new definition of "religious creed." Further, this court's opinion is predicted on the erroneous assumption that the Plaintiff did not allege facts satisfying the court's new definition of "religious creed" and that the Plaintiff's Ethical Vegan beliefs do not "occupy in his ... life a place of importance parallel to that of traditionally recognized religions ..." As we demonstrate below, the Plaintiff did in fact allege facts that

satisfied the court's new definition and the Plaintiffs' Ethical Vegan beliefs do in fact "occupy in his ... life a place of importance parallel to that of traditionally recognized religions ..." . Further, even if the Plaintiff did not satisfy this new definition, a definition that the Plaintiff could only speculate or guess as to at the time he plead his case, equity and fairness dictate that the Plaintiff be allowed the opportunity to plead his case under the newly stated definition of "religious creed."

Further, with regard to the other non-discrimination causes of action, i.e., the personal injury causes of action, this court's opinion is predicated on the erroneous assumption that the Plaintiff did not plead delayed discovery of the grounds for his personal injury claims. As we demonstrate below, the Plaintiff did in fact plead delayed discovery.

Therefore, the court should grant rehearing.

LEGAL DISCUSSION

1. The Plaintiff Has Reasonably Pled The Requirements of "Religious Creed" Discrimination Under The Court's New Definition.

While the Court acknowledges that this was a case of first impression as to what the definition of "religious creed" was under the FEHA, [Opinion ("Opn."), p. 6, §2, 1st ¶], the Plaintiff has already plead, or it can be considered reasonably plead when the complaint is viewed in a reasonable light most favorable to the Plaintiff, the requirements under such a definition.

The several tests mentioned in the opinion culminate in this court's conclusion, which is Judge Adams' three-prong test, beginning on page 34. [Opn., 34-36] "First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters." While this may not be

simple veganism, it is Ethical Veganism. Ethical Veganism asks what is the ultimate meaning of life and concludes veganism in the broadest sense, compassion for all life, amelioration of suffering, advocacy of happiness and cooperation. The query and conclusion makes it ethical. These are similar core tenets to Quakers and Buddhists and countless other denominations of a myriad of religions. While the foundation is not on a supreme being as the Quakers rely upon, it rests on a philosophy revealed by Peter Singer much like Buddhism was a philosophy revealed by Siddhartha. “Imponderable matters” is a strange qualifier as members of all sorts of traditional religions would claim their religion is ponderable--able to be precisely evaluated. Not that they would necessarily claim they would succeed. There are, for example, Christians who rely heavily on faith and those who rely heavily on formal logic, and that is why there are Christian scholars. The former claim religion is imponderable, the latter do not. If the court is asking for epistemology, the elemental meaning of Ethical Veganism, it may very well be imponderable depending on who is asked. Importantly, it should be noted that the court incorrectly states that “There is no apparent spiritual or otherworldly component to plaintiff’s beliefs.” [Opn., p. 35]. Yet, the court earlier in its opinion cites to just such allegations contained in the Plaintiff’s complaint, that “He lives each aspect of his life in accordance with this system of *spiritual beliefs* [, and] [t]his belief system[] guides the way that he lives his life[, and] [Plaintiff’s] beliefs are *spiritual* in nature and set a course for his entire way of life[, and] he would disregard elementary self-interest in preference to transgressing these tenets.” [Opn., p. 3, emphasis added; See also Appellant’s Appendix (“AA”), p. 000002-000003, ¶4]. Further, in the complaint as quoted in the opinion [Opn., pp. 3-4 See also AA, p. 000002-000003, ¶4], “violating natural law, foundational creeds, beliefs spiritual in nature, disregarding elementary self-interest, guiding the way I live my life”

are all fundamental. “Natural law, foundational creeds, and beliefs spiritual in nature” are addressing ultimate questions. “Natural law, spiritual beliefs” are matters addressing deep and imponderable matters. Plaintiff has therefore satisfied the first prong of this court’s new definition of religious creed.

“Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching.” The distinction between “comprehensive nature” and “an isolated teaching” is a question of fact. Taoism, for example, has the isolated teaching of balance which is applied comprehensively to the universe. Otherwise, is the court claiming that simple religions are unreasonable because they are not complicated? This would topple any new religion because traditional religions have hundreds or thousands of years to become comprehensive. This may be an unconstitutional test of reasonableness. Ethical Veganism is comprehensive to the Plaintiff, extending to every aspect of his life, even his dreams. A nonvegan may not think it is comprehensive, but that could also apply to others’ views of anyone else’s religion. Since the Plaintiff’s Ethical Vegan belief system encompasses all aspects and elements of not only his life, but the lives of all animals, the belief system is comprehensive and satisfies the second prong of this court’s requirements for a religious creed.

“Third, a religion often can be recognized by the presence of certain formal and external signs.” This again is biased against new religions and may also be an unconstitutional test of reasonableness. Even so, some Ethical Vegans recognize Gandhi’s birthday (October 2nd) as a holiday, and World Vegan Day is November 1st. Further, Peter Singer may be considered a founder of the compiled philosophy and may have many teachers, the equivalent of “ministers.” In fact, if the Plaintiff were allowed to amend his complaint, he could plead that in both Massachusetts and California, legal marriages licenses have been issued with the marriage being performed by an

Ethical Vegan. There are vegan songs, heroes, and many of us aim to convert others to Ethical Veganism. In this sense, Ethical Veganism is evangelical or proselytizing as are many Christian religions. The Plaintiff can allege that he has a tattoo on his left arm symbolizing Ethical Veganism, as some Christians would tattoo a crucifix. In terms of what the Plaintiff already pled in his complaint—Plaintiff pled his diet (setting forth what he cannot eat under Ethical Veganism) and clothing (setting forth what he cannot wear under Ethical Veganism) are traditional “formal and external signs” of religion. Similarly, the civil disobedience comparison to Operation Rescue is an external sign of religious faith and devotion to these values, or the great sacrifice Jehovah’s Witnesses are known to take to retain their religious purity. [AA, pp. 000002-000003, ¶4].

2. Even If the Appellant Did Not Plead the Elements of the New Definition of “Religious Creed,” as this Was a Case of First Impression, the Appellant Should Have Been Afforded Leave to Amend upon Remand to Allow Him to Plead His Case under the New Definition That the Court Has Set Forth in the Decision.

At the trial court level, the trial court provided no leave to amend the complaint after dismissing the religious creed discrimination causes of action. [AA, pp. 000161-000162 and AA, pp. 000163-000170]. As this court noted, this is a case of first impression as to defining religious creed under the FEHA. [Opn., p. 6, §2, first ¶]. Prior to dismissing the religious creed discrimination claims in the complaint, the trial court should have provided guidance in terms of what the court considered to be required in what this court even admits to be a murky area of defining what is a religion. The Ninth Circuit Court of Appeals held in *Bautista v. Los Angeles County*, 216 Fed.3d

837 (9th Cir. 2000), that a District Court must provide guidance to the Plaintiff and her counsel prior to dismissing with prejudice. Such logic would seem especially necessary in situations such as this where the rule of law has yet to be formulated by the courts. Further, the courts of this state have held that “Trial courts are vested with the discretion to allow amendments to pleadings in furtherance of justice ... That trial courts are to liberally permit such amendments, at any stage of the proceeding, has been established policy in this state ... resting on the fundamental policy that cases should be decided on their merits.” [*Hirsa v. Superior Court (Vickers)*, (1981) 118 Cal.App.3d 486, 173 Cal.Rptr. 418.] Likewise, when a new rule of law sets forth the legal requirement of pleading at the appellate level, justice should require that the case be remanded back to the trial court in order to determine whether the Plaintiff can plead the elements of that new rule of law.

Further, what is troubling is the way that the court has given short shrift to the Plaintiff’s request to amend his complaint from “vegan” to “Ethical Vegan.” In that the court’s second requirement for religious creed includes a “belief-system,” [Opn., p. 35], such an amendment to allege an “Ethical Vegan” belief-system seems to be an important amendment indeed. The one-paragraph discussion of “Leave to Amend” in the opinion seems lacking and misses the point of the amendment. [Opn., 36-37]. The amendment to change “vegan” to “Ethical Vegan” is intended to show that this Plaintiff’s views (as well as others who believe in Ethical Veganism, as opposed to mere veganism), encompass a comprehensive belief-system.

Furthermore, now that this court has set forth a rule of law as to determining what a religion for the purposes of the FEHA, equity and the maxim that all cases should generally be tried on their merits requires that this case be remanded to the trial court with instructions to allow the Plaintiff leave to attempt to amend his religious creed discrimination claims, should the

court still believe that the Plaintiff has not adequately pled his claims.

3. The Court's Rule of Law Violates the Establishment Clause, Especially in Light of the Fact That the Determination of Whether the Plaintiff's Ethical Vegan Beliefs Were a "Religious Creed" Were Determined by Demurrer, Rather than by a Fact-finder after Expert Testimony Religious Scholars.

The court's rule of law violates the Establishment Clause, especially in light of the fact that the determination of whether the plaintiff's Ethical Vegan beliefs were a "religious creed" were determined by demurrer, rather than by a fact-finder after expert testimony religious scholars. The case should have gone to a jury (or at a minimum, a judge on summary judgment), to determine factually whether the Plaintiff's Ethical Vegan beliefs qualify as a "religious creed" for *FEHA* purposes.

Starting on page 31 [Opn., p. 31], this court says the trend is to define religion more narrowly by comparing proclaimed religions to traditional religions. This is a possible violation of the Free Exercise and Establishment Clause. "Free Exercise" is not intended to only apply to "traditional religions," which at one point did not even include the Protestant Church, hence the name "Protest"-ant. Further, the court therefore favors traditional religions and disfavors non-traditional religions, a violation of the Establishment Clause which is to give no preference. Indeed, the government can only test sincerity, not reasonableness; otherwise, the court is saying that traditional religions are reasonable and untraditional religions are not. On page 32 [Opn., p. 32], "a place of importance parallel to that of traditionally recognized religions"--again may violate the Establishment Clause setting up what is a reasonable religion and those that are not reasonable (according to

the court) are not considered religions. However, Plaintiff has in any event, pled and satisfied this “requirement.”

The court’s definition of religion is heavily biased in favor of Western religions. It is questionable whether Taoism, classic Buddhism or Confucianism could satisfy the court’s requirements of “religious creed,” as set forth in the opinion of this court. And, if as it should be, Confucianism is considered a religious creed, so too should Ethical Veganism. Ethical Veganism has been around at least since 4 B.C.E. as practiced by Apollonius of Tyana -- who wore bark for sandals, refused meat and all animal products, even refusing a wax sculpture tribute to him because it came from bees. Modernly, Peter Singer (a Princeton professor of ethics) consolidated several philosophies about what it means to be human in the sense of our moral obligations. These writings have become the religious tenets of millions of Americans and others. Under Apollonius or Singer, Ethical Veganism is perfectly analogous to Confucianism, and should be considered a religion.

Both the trial court and this court should not have tested the reasonableness of Plaintiff’s religion through the above test. At a minimum, the issue of whether or not the Plaintiff’s Ethical Vegan beliefs are a “religious creed” should have been decided by a trier of fact, not as a matter of law on a demurrer.

**4. The Court Should Have Construed California “Religious Creed”
Discrimination Protections Broader than Federal Protections, Not
Narrower.**

Although the court notes that “California courts have consistently looked to federal authority,” [Opn., p. 10], the court opines that *California Code of Regulations*, Title 2, Section 7293.1 cannot be construed as broadly. [Opn., 21-22]. This overlooks the fact that California anti-discrimination

protections are generally interpreted more broadly than the federal interpretations, and when the court's do not follow this principal, the Legislature overrules the courts. [See as example *Government Code* §12941.1, rejecting the decision of *Marks v. Loral Corp.* (1997) 57 Cal.App.4th 30; See also, *Government Code* §12940(j), in particular §12940(j)(3), amended to reject the no co-worker liability rule in *Carrisales v. Department of Corrections* (1999) 21 Cal.4th 1132 (1999)]. The legislative intent is thus that *Government Code* §12940 should be interpreted broadly to provide the greatest possible protection for employees and applicants.

Thus, the court should have construed California "religious creed" discrimination protections broader than federal protections, not narrower.

5. Contrary to the Court's Decision, the Plaintiff's Tort Claims Are Not Subject to the Statute of Limitations Because Plaintiff Alleged Delayed Discovery and Delayed Accrual of His Causes of Action.

With regard to the non-discrimination causes of action, i.e., the personal injury causes of action, this court's opinion is predicated on the erroneous assumption that the Plaintiff did not plead delayed discovery of the grounds for his personal injury claims. [Opn., pp. 39-40, §D.2.]. Contrary to this statement in the Opinion, the Plaintiff did in fact allege delayed discovery and delayed accrual of his personal injury causes of action in his First Amended Complaint. [AA, pp. 000172-000199]. In particular, in the First Amended Complaint, page 10, lines 5-10, ¶50, the Plaintiff alleged:

“50. In or about July 1999, while researching medical issues related to the discrimination aspects of this case, the Plaintiff first became aware that the TB test performed on the Plaintiff previously on or about March

20, 1998, included injecting the Plaintiff with bovine (cow) serum. Based upon this knowledge that he had been unwittingly injected with bovine (cow) serum during the TB test believing it to be Vegan “friendly” the Plaintiff suffered further emotional distress and medical symptoms as a result of such knowledge.”

[AA, p. 000181, lines 5-10].

As can be seen, the Plaintiff is not subject to the statute of limitations on his personal injury claims based upon delayed discovery and delayed accrual of his personal injury causes of action, because of the July 1999 accrual date.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this court grant rehearing, either holding that Veganism or Ethical Veganism is the equivalent of a religious creed or to remand this case to the Superior Court to allow the Plaintiff to plead his case of religious creed discrimination under this court’s new standard.

Dated: September 30, 2002

Respectfully submitted,

BY: signature
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