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## Thompson v. Asante Health Sys.

United States District Court for the District of Oregon

September 21, 2023, Decided; September 21, 2023, Filed

No. 1:23-cv-00486-CL

### Reporter

2023 U.S. Dist. LEXIS 200693 \*; 2023 WL 7348812

KIMBERLEE THOMPSON, et al, Plaintiffs, v. ASANTE HEALTH SYSTEM and DOES 1 THROUGH 50, Defendants.

**Subsequent History:** Adopted by, Dismissed by, Without prejudice [Thompson v. Asante Health Sys., 2023 U.S. Dist. LEXIS 199640, 2023 WL 7326496 \(D. Or., Nov. 7, 2023\)](#)

### Core Terms

vaccine, religious, religious belief, sincere, accommodate, employees, requests, secular, motion to dismiss, overlapping, religious conviction, prima facie case, conscientious objection, disparate treatment, similarly situated, written exceptions, reasons

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For Asante Health System, A Public Benefit Corporation, Defendant: Amanda Lapato, LEAD ATTORNEY, Schwabe, Williamson & Wyatt PC, Portland, OR; Elizabeth A. Schleuning, Matthew Singer, LEAD ATTORNEYS, Kelly S. Riggs, Nicholas Lauren, Schwabe, Williamson & Wyatt, Portland, OR.

**Judges:** MARK D. CLARKE, United States Magistrate Judge.

**Opinion by:** MARK D. CLARKE

### Opinion

#### FINDINGS AND RECOMMENDATION [\*2]

##### CLARKE, Magistrate Judge:

Plaintiffs bring religious discrimination claims under Title VII of the Civil Rights Act and Oregon law against their former employer, Defendant Asante Health System ("Asante"). They allege that Asante unlawfully terminated their employment when Plaintiffs declined, based on a religious belief, to be vaccinated against the COVID-19 virus. Defendant Asante moves to dismiss thirteen Plaintiffs from the case: Stephanie Baker, Emil Betoushana, Deanne Butterworth, Jessica Tsuchiya Duncan, Sean Henderson, Nicole Janky, Daniel Jenniches, Christina Mak, Nicole McDowell, Therese Rieber, Ruth Robinson, Jennifer Rullamas, and Tina Zoller (collectively, the "Thirteen Plaintiffs"). Asante argues that they failed to allege sincerely held religious beliefs that conflict with receiving a COVID-19 vaccine. Asante also moves to dismiss Plaintiffs' claims for disparate treatment. Because all of the Plaintiffs sufficiently allege a conflict between their sincerely held religious beliefs and receiving the vaccine, but fail to sufficiently allege one element of a disparate treatment claim, Defendant's Motion to Dismiss (#25) should be DENIED in part and GRANTED in part.

#### BACKGROUND

In August 2021, the Oregon Health [\*3] Authority ("OHA") enacted an administrative rule ("the Mandate")

requiring healthcare workers in Oregon to be vaccinated against COVID-19 by a deadline of October 18, 2021. First Amended Complaint ("SAC") (#20) □ 2. The Mandate permitted healthcare employers to grant religious exceptions to employees upon request. *Id.* □ 3. Defendant required employees to be vaccinated against COVID-19 by September 30, 2021, except employees with approved religious exception requests. *Id.* □ 4. All Plaintiffs were healthcare workers formerly employed by Defendant who sought religious exceptions to the Mandate. *Id.* □ □ 6-8. Specific facts as to each of the Thirteen Plaintiffs are discussed below.

## STANDARDS

To survive a motion to dismiss under [Fed. R. Civ. P. 12\(b\)\(6\)](#), a complaint must contain sufficient factual matter that "state[s] a claim to relief that is plausible on its face." [Bell Atl. Corp. v. Twombly](#), 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A claim is plausible on its face when the factual allegations allow the court to infer the defendant's liability based on the alleged conduct. [Ashcroft v. Iqbal](#), 556 U.S. 662, 663, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). The factual allegations must present more than "the mere possibility of misconduct." [Id.](#) at 678.

When considering a motion to dismiss, the Court must accept all allegations of material fact as true and construe those [\*4] facts in the light most favorable to the non-movant. [Burgert v. Lokelani Bernice Pauahi Bishop Trust](#), 200 F.3d 661, 663 (9th Cir. 2000). But the court is "not bound to accept as true a legal conclusion couched as a factual allegation." [Twombly](#), 550 U.S. at 555. If the complaint is dismissed, leave to amend should be granted unless "the pleading could not possibly be cured by the allegation of other facts." [Doe v. United States](#), 58 F.3d 494, 497 (9th Cir. 1995).

## DISCUSSION

Defendant's Motion (#25) should be DENIED in part and GRANTED in part.

### I. Defendant Asante's motion to dismiss the Thirteen Plaintiffs should be DENIED.

Defendant Asante moves to dismiss the Thirteen Plaintiffs for three reasons: (1) Plaintiffs fail to adequately plead that they expressed a religious conflict

with receiving the COVID-19 vaccine; (2) Asante was not required to accommodate employees who did not comply with the OHA's requirements for religious exception requests; and (3) Asante was not required to accommodate employees who did not comply with reasonable procedures for religious exception requests. For the reasons below, this motion should be DENIED.

### 1. The Thirteen Plaintiffs have pled that they expressed a religious conflict with receiving the COVID-19 vaccine in the exception requests they submitted to Asante.

Defendant argues that the Thirteen Plaintiffs failed [\*5] to plead prima facie cases of employment discrimination under Title VII, [42 U.S.C. § 2000e](#), and [ORS 659A.030\(1\)\(a\)](#).<sup>1</sup> Title VII makes it unlawful for an employer to discharge an employee because of their religion. [42 U.S.C. § 2000e-2\(a\)\(1\)](#); [Heller v. EBB Auto Co.](#), 8 F.3d 1433, 1437 (9th Cir. 1993). The term "religion" encompasses all aspects of religious practice and belief. [42 U.S.C. § 2000e\(j\)](#); [Peterson v. Hewlett-Packard Co.](#), 358 F.3d 599, 602 (9th Cir. 2004). Title VII failure-to-accommodate claims are analyzed under a two-part, burden-shifting framework. [Tiano v Dillard Dep't Stores, Inc.](#), 139 F.3d 679, 681 (9th Cir. 1998). A plaintiff must first plead a prima facie case of religious discrimination. *Id.* If an employee articulates a prima facie case, the burden shifts to the employer to show that it made good-faith efforts to reasonably accommodate the religious practice or that it could not accommodate without undue hardship. *Id.*

To assert a prima facie failure-to-accommodate claim under Title VII, Plaintiffs must allege that (1) they "had a bona fide religious belief, the practice of which conflicted with an employment duty;" (2) they "informed [their] employer of the belief and conflict;" and (3) "the employer discharged, threatened, or otherwise subjected [them] to an adverse employment action because of [their] inability to fulfill the job requirement." [Peterson](#), 358 F.3d at 606. "A bona fide religious belief is one that is 'sincerely held.'" [Keene v. City and Cnty. of San Francisco](#), No. 22-16567, 2023 U.S. App. LEXIS 11807, 2023 WL 3451687, at \*1 (9th Cir. May 15, 2023).

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<sup>1</sup> Claims brought under [ORS 659A.030\(1\)\(a\)](#) are analyzed under the same framework as claims brought under Title VII. [Detwiler v. Mid-Columbia Med. Ctr.](#), No. 22-cv-01306, 2022 U.S. Dist. LEXIS 242626, 2022 WL 19977290, slip op. at \*3 (D. Or. Dec. 20, 2022).

A court should generally [\*6] accept the assertion of a sincerely held religious belief. [2023 U.S. App. LEXIS 11807, \[WL\] at \\*2; \*Beuca v. Wash. State Univ.\*, No. 23-CV-0069, 2023 U.S. Dist. LEXIS 88221, 2023 WL 3575503, slip op. at \\*2 \(E.D. Wash. May 19, 2023\)](#) (declining to "second-guess" or "scrutinize" the plaintiff's claim that merely stated he had a religious objection to the COVID-19 vaccine). And the burden to allege a religious conflict with an employment duty is minimal. [Bolden-Hardge v. Office of the Cal. State Controller](#), 63 F.4th 1215, 1223 (9th Cir. 2023); [Collins v. Tyson Foods, Inc.](#), No. 22-CV-00076, 2023 U.S. Dist. LEXIS 54969, 2023 WL 2731047, at \*7 (W.D. Ky. Mar. 30, 2023) (ruling that a plaintiff established a prima facie case by simply identifying as a Christian who opposed the COVID-19 vaccine due to the use of fetal cell tissue).

However, a court need not take "conclusory assertions of violations of religious beliefs at face value." [Bolden-Hardge](#), 63 F.4th at 1223. A "threadbare reference" to the plaintiff's religious beliefs is insufficient to satisfy the first element of a prima facie case. [Gage v. Mayo Clinic](#), No. CV-22-02091, 2023 U.S. Dist. LEXIS 77304, 2023 WL 3230986, slip op. at \*3 (D. Ariz. May 3, 2023). Title VII does not protect medical, economic, political, or social preferences. See [Tiano](#), 139 F.3d at 682; [Detwiler](#), 2022 U.S. Dist. LEXIS 242626, 2022 WL 19977290, at \*4 (finding plaintiffs objection to regular COVID-19 antigen testing to be secular because she believed tests were carcinogenic and would cause more harm than good); [Brox v. Hole](#), 590 F. Supp. 3d 363, 366 (D. Mass. 2022).

The U.S. Equal Employment Opportunity Commission ("EEOC") provided Title VII guidance on religious accommodations to COVID-19 vaccine mandates. The EEOC explained that "an employee's request for an exemption from a COVID-19 vaccination mandate can be denied on [\*7] the grounds that the employee's belief is not truly religious in nature." *Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1180 (9th Cir. 2021). The guidance underscores that objections to COVID-19 vaccines "purely based on social, political, or economic views or personal preferences . . . (including about the possible effects of the vaccine)" are not religious beliefs under Title VII. *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* at L.2, EEOC, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (Oct. 25, 2021) (last visited July 24, 2023). However, overlapping secular and religious objections do not place a requested accommodation

outside the scope of Title VII. *Id.*

In *Rolovich v. Washington State University*, the plaintiffs complaint stated he was a "practicing Catholic" and his "study of the Bible, personal prayer, . . . advice from a Catholic priest, and the teachings of the Church . . . precluded him from receiving any available COVID-19 vaccine." [No. 22-CV-0319, 2023 U.S. Dist. LEXIS 93926, 2023 WL 3733894, slip op. at \\*3 \(E.D. Wash. May 30, 2023\)](#). The defendant moved to dismiss based on the plaintiff's alleged failure to plead how his sincerely held religious belief specifically conflicted with the COVID-19 vaccine mandate. *Id.* The district court [\*8] found the plaintiff's general assertion that his Catholic faith motivated his objection to the vaccine was satisfactory at the pleading stage to allege a religious conflict with an employment duty. *Id.* The plaintiff did not need to explain in detail how the vaccine conflicted with his Catholic faith.

Here, all of the Thirteen Plaintiffs have asserted that their faith motivated them to object to the vaccine, and that they informed Asante of their religious conflict. The explanations provided are quite minimal, but at this stage, the burden to allege a prima facie case is minimal.

Stephanie Baker submitted a written OHA exception request form on September 8, 2021, stating: "My prayers and reflection convict me to abide by faith and conscience to protect my body, mind, and soul... I have firm convictions that this vaccine is not in God's will for me." FAC Ex. B (#13). This statement sufficiently identifies a sincere religious belief and a conflict with the vaccine.

Emil Betoushana submitted a written OHA exception request form on September 1, 2021, stating: "Taking this vaccination goes against my core beliefs as a Christian." *Id.* This statement, while minimal, sufficiently identifies a [\*9] sincere religious belief and a conflict with the vaccine.

Jessica Duncan submitted a written OHA exception request form on September 7, 2021, stating her beliefs that "we are in the 'end times,'" her "allegiance is to God alone," and her "firm conviction that the Vaccine is not in God's will for me." *Id.* She also submitted a document in which she asserted that she has a "religious conviction or conscientious objection to any treatment or prophylactic measure." *Id.* This statement sufficiently identifies a sincere religious belief and a conflict with the vaccine.

Ruth Robinson submitted a written "affidavit of Religious Conviction or Conscientious Objection," on September 10, 2021, stating, "I, Ruth Laverne Robinson, have and hold a solemn, sincere, religious conviction or conscientious objection to any treatment or prophylactic measure." *Id.* This statement sufficiently identifies a sincere religious belief and a conflict with the vaccine — or at least, overlapping religious and secular objections. Asante may of course present evidence to show that this was "purely based on social, political, or economic views or personal preferences," but at this stage of the case, such a statement sufficiently [\*10] states a claim.

Jennifer Rullamas submitted a written "affidavit of Religious Conviction or Conscientious Objection," on September 20, 2021, stating, "I, Jennifer Rullamas, have and hold a solemn, sincere, religious conviction or conscientious objection to any treatment or prophylactic measure." *Id.* She also included a longer statement about her beliefs, asserting that "Asante exalts itself in purporting to place an unbeliever in a position to judge the Word of God, it is blasphemy, satanic, sinful, untruth and insulting [sic] trespass." *Id.* While somewhat confusing, the clear implication is that her religious beliefs conflict with Asante's COVID-19 vaccination requirement. This is sufficient for a prima facie case.

Tina Zoller submitted a written OHA exception request form, which she did not sign, on September 12, 2021, stating that she is a Christian "who believes in the Bible," and citing to biblical scripture, concluding: "Thus my faith prohibits me from being vaccinated for COVID 19 as proposed by the current Governor mandate." *Id.* This sufficiently identifies a religious belief and a conflict with the vaccine — or at least, overlapping religious and secular objections. Asante may [\*11] of course present evidence to show that this was "purely based on social, political, or economic views or personal preferences," but at this stage of the case, such a statement sufficiently states a claim.

Sean Henderson submitted a written OHA exception request form on August 28, 2021. His written statement includes numerous secular and religious objections to the vaccine and vaccine mandate. In the midst of these objections, he lists three "sincerely held beliefs that prevent me from using any of the available COVID vaccines":

- 1) Using aborted fetus tissue in the developments and/or production of the vaccines promotes a degradation of the value of human life...
- 2) My beliefs require that I avoid harming my body with unnecessary, dangerous, unproven,

experimental, and highly toxic substances (as proven by science) — my body is my temple,  
 3) Participating in a system of forced medical treatments violates my sacred beliefs regarding the right of the individual to choose for themselves.

Henderson also states, "I have not taken any vaccines in over 15 years and have regularly refused the flu shot for the same reasons." While Henderson clearly has overlapping religious and secular objections, [\*12] at this stage of the case, his statements to Asante sufficiently identified a religious belief and a conflict with the vaccine.

Christina Mak submitted a written exception request to Asante on October 6, 2021. In her request, she referenced her belief in God and asserted that "medical practice or treatment involving fetal cells, stem cells, anything altering [her] DNA or permanently block [her] natural immune system and or any questions in the practice of such [she] abstain[s] from," but explained that "the newness of this mandated vaccine is a primary concern." *Id.* As with several others, Mak has overlapping religious and secular objections, but at this stage of the case her statements to Asante sufficiently identified a religious belief and a conflict with the vaccine.

Therese Rieber submitted a written exception request to Asante on October 5, 2021. Rieber used the OHA Form and states: "I closely follow a philosophy and practice that are rooted in the Buddhist path of self-realization... My body is sacred to me. I eat healthy, vegetarian, organic foods. I don't drink alcohol, smoke, or take any drugs. I don't take any medications, and I practice intermittent fasting... My daily practices [\*13] and medications including Buddhist mantras guide me in choosing what is best for me, reinforcing my belief that the vaccine is not suitable for me at this time." Rieber also describes her science-based belief that the vaccine could trigger autoimmune issues such as Multiple Sclerosis. As with the others, Rieber has overlapping religious and secular objections, but at this stage of the case her statements to Asante sufficiently identified a religious belief and a conflict with the vaccine.

Nicole Janky submitted a written exception request to Asante on September 1, 2021. Janky used the OHA Form and described her alleged religious belief that her "body is a temple of the Holy Spirit" and "requirement for [her] to protect the physical integrity of [her] body against anything [she] believe[s] to be harmful to [her] body." *Id.* She further explained that she believed the

COVID-19 vaccination to be harmful because "we do not know the long-term consequences of the Covid Vaccine, it is still in the trial phase with rushed approval," and "we do not understand its long-term effects on our bodies. (God's Holy Temple)." *Id.* Janky states overlapping religious and secular objections, but at this stage [\*14] of the case her statements to Asante sufficiently identified a religious belief and a conflict with the vaccine.

Daniel Jenniches submitted a written exception request to Asante on September 8, 2021. Jenniches used the OHA Form and described his alleged religious belief that "objecting to Covid-19 vaccines because [he] believe[s] in and follow[s] God and the principles laid out in His words and [he] ha[s] a deeply held belief that this vaccine violates them." *Id.* He further asserted various references that his "body is a temple" and that he's "free to decide for [himself]" not to use an "experimental drug." *Id.* Jenniches has overlapping religious and secular objections, but at this stage of the case his statements to Asante sufficiently identified a religious belief and a conflict with the vaccine.

Deanne Butterworth submitted a written "affidavit of Religious Conviction or Conscientious Objection," on September 19, 2021, stating: "I, Deanne Butterworth, have and hold a solemn, sincere, religious conviction or conscientious objection to any treatment or prophylactic measure." (#30-1). She also submitted an additional statement: "I my [sick] trust in God the Father, Jesus Christ, and [\*15] the Holy Spirit. My faith, my hope, all my trust is in them... My God is directing me not to take this vaccination therefore I will not do so." *Id.* The statement goes on to describe her scientific and secular reasons for objecting, such as the experimental nature of the vaccine, and her natural immunity provided by a prior infection. Butterworth has overlapping religious and secular objections, but at this stage of the case her statements to Asante sufficiently identified a religious belief and a conflict with the vaccine.

Nicole McDowell submitted a written exception request to Asante on September 26, 2021, stating: "With conviction in my heart I am going to reserve my right for a religious exemption. The mandated vaccine, with various additives and ability to alter my body is not something I'm going to be able to participate in. I give honor to my Lord and my body. In that same manner I do not violate my skin. I have no tattoos. I believe in honoring my whole body inside and out." (#30-2). The statement references other biblical scripture and verses, and later states: I am willing to explore other alternatives

which includes an alternative job assignment, a requirement to wear additional [\*16] PPE, and undergo regular testing." McDowell's statement sufficiently identifies a sincere religious belief and a conflict with the vaccine, as well as a request for accommodation.

All of the Thirteen Plaintiffs have pled that they expressed a religious conflict with receiving the COVID-19 vaccine in the exception requests they submitted to Asante.

## **2. All Thirteen Plaintiffs adequately complied with the OHA's requirements for religious exception requests.**

Defendant argues that some of the Thirteen Plaintiffs are subject to dismissal because they failed to use the form prescribed by OHA. The OHA requires an employee to make a religious exception request using the OHA form or a "similar form" that contains all information required in the OHA form, including a description of a religious conflict with receiving a COVID-19 vaccine. OREGON HEALTH AUTHORITY, TEMPORARY ADMINISTRATIVE ORDER PH 42-2021 (effective Sept. 1, 2021). Defendant's argument fails. Even if some Plaintiffs did not use the OHA form, they sufficiently informed Defendant of their religious conflict with receiving the vaccine. Defendant's additional argument that Plaintiffs failed to comply with the requirements of OAR 333-019-1010 necessarily [\*17] fails based on the Court's finding today that all of them sufficiently described a sincerely held religious belief that conflicts with receiving the COVID-19 vaccine in their religious exception requests submitted to Defendant.

## **3. Whether or not the parties engaged in reasonable procedures for religious exception requests and reasonable accommodation is not an appropriate determination at this stage of the case.**

Defendant Asante claims that it was not required to accommodate employees who failed to comply with its reasonable procedures for religious exception requests. Nothing in the FAC indicates that Plaintiffs failed to comply with reasonable procedures in this way. The portion of the FAC cited by Asante states: "[Many of the Plaintiffs] answered follow-up questions from the Exception Committee and/or supplemented their religious exception requests with documents attempting to better explain the religious convictions that rendered

them unable to receive COVID-19 vaccines." FACT ¶ 85. The Court is unable to discern from the face of this pleading whether or not any of the parties engaged in the interactive process required by Title VII for religious accommodations. Any further inquiry [\*18] into whether the interactive process actually took place is not an appropriate determination for a motion to dismiss. For this reason, and all of the reasons above, Asante's motion to dismiss the Thirteen Plaintiffs should be DENIED.

## II. Defendant's motion to dismiss the Plaintiffs' disparate treatment claims should be GRANTED.

Defendant Asante also moves to dismiss all or some of the Plaintiffs' disparate treatment claims. Because Plaintiffs have not pled facts to support the fourth element of a disparate treatment claim, this motion should be GRANTED.

To state a prima facie religious discrimination disparate treatment claim, the plaintiff must plead that "(1) he is a member of a protected class; (2) he was qualified for his position; (3) he experienced an adverse employment action; and (4) similarly situated individuals outside his protected class were treated more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination." [Peterson v. Hewlett-Packard Co.](#), 358 F.3d 599, 603 (9th Cir. 2004) (internal citations omitted).

As to the fourth element, "[i]t is not enough for employees to be in similar employment positions; rather, the plaintiff and the comparator employee must be similarly situated [\*19] in all material respects." [Karthaus v. Columbia 9-1-1 Commc'ns Dist.](#), 647 F. Supp. 3d 992, 2022 U.S. Dist. LEXIS 232430, 2022 WL 17979739, at \*6 (D. Or. Dec. 28, 2022) (citing [Weil v. Citizens Telecom Services Co., LLC](#), 922 F.3d 993, 1004 (9th Cir. 2019)). Employees are similarly situated if they have "similar jobs and display similar conduct." [Vasquez v. Cnty. of Los Angeles](#), 349 F.3d 634, 641 (9th Cir. 2003). The standard at the prima facie stage requires only a minimal showing to establish that co-workers were similarly situated. See [Aragon v. Republic Silver State Disposal Inc.](#), 292 F.3d 654, 660 (9th Cir. 2002), as amended (July 18, 2002).

Here, for the fourth element, Plaintiffs allege that employees seeking medical exceptions to the vaccine mandate were "similarly situated" to Plaintiffs, who sought religious exceptions to the vaccine mandate.

This allegation fails to meet even the minimal requirements of the prima facie case because nothing indicates that seeking a medical exception is "similar conduct" to seeking a religious exception. Plaintiffs' argument that both categories of employees "breathe," "and thus display similar conduct," is inapposite. The standards by which employers are required to accommodate religious requests and medical requests for exceptions to workplace requirements are not the same. In the religious context, an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business. [Grey. DeJoy](#), 600 U.S. 447, 470, 143 S. Ct. 2279, 2295, 216 L. Ed. 2d 1041 (2023). But the Court specifically said that [\*20] conflating this standard with the medical standard and ADA caselaw would "go too far." [Id. at 471](#). With legally separate and distinct standards by which employers are evaluated for proper accommodation, then, these categories of employees are not "similarly situated."

For this reason, Plaintiffs have failed to properly allege a claim for disparate treatment.<sup>2</sup> This claim should be dismissed. It is unlikely that this claim could be cured by amendment, since the status of the Plaintiffs and the status of the employees seeking medical exemptions cannot change. However, in an abundance of caution, this claim should be dismissed without prejudice. Should Plaintiffs desire to replead this claim, a motion for leave to amend should be filed.

## SCHEDULING

This Findings and Recommendation will be referred to a district judge. Objections, if any, are due no later than fourteen (14) days after the date this recommendation is entered. If objections are filed, any response is due within fourteen (14) days after the date the objections are filed. See [Fed. R. Civ. P. 72, 6](#).

Parties are advised that the failure to file objections within the specified time may waive the right to appeal

<sup>2</sup> Defendant also asserts that Plaintiffs' disparate treatment claims are duplicative and fail to state a legally cognizable theory of religious discrimination. A claim for religious discrimination may be brought under several possible theories, including disparate treatment on account of religion or failure to accommodate religious beliefs. [Bodett v. CoxCom, Inc.](#), 366 F.3d 736, 742 (9th Cir. 2004). Therefore, this theory is cognizable, and not duplicative. Nevertheless Plaintiffs have failed to state a claim for relief.

the District Court's order. [Martinez v. Ylst, 951 F.2d 1153 \(9th Cir. 1991\)](#).

DATED this 21 day of **[\*21]** September, 2023.

/s/ Mark D. Clarke

MARK D. CLARKE

United States Magistrate Judge

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