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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MARSHEL COPPLE,

Plaintiff and Appellant,

v.

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND
REHABILITATION,

Defendant and Respondent.

G050690

(Super. Ct. No. RIC1106676)

O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County,
Matthew C. Perantoni, Judge. Request for Notice of Judgment. Judgment affirmed.
Request granted.

Marshel Copple, in pro. per., for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Alicia M. B. Fowler, Assistant
Attorney General, Christine Mersten and Evan R. Sorem, Deputy Attorneys General, for
Defendant and Respondent.

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Plaintiff and appellant Marshel Copple filed a case for unfair labor practices under the California Fair Employment and Housing Act (FEHA; Govt. Code, § 12940 et seq.; all further references are to this code unless otherwise stated) alleging religious discrimination and harassment, failure to accommodate religious practices, retaliation based on his religion, and constructive discharge for his religious practices. Plaintiff asserts defendant and respondent California Department of Corrections and Rehabilitation's requirement that he work overtime violated a tenet of his belief system, Sun Worshipping Atheism, that he sleep at least eight hours per day. Plaintiff claims Sun Worshipping Atheism, which he created and of which he is the only member, is a religion.

Plaintiff appeals from a summary judgment in favor of defendant, arguing the trial court erred in finding Sun Worshipping Atheism was not a religion entitled to protection under FEHA, that he failed to exhaust his administrative remedies, and that defendant did not take any adverse action against him.

We hold Sun Worshipping Atheism is not a protected religion under FEHA and therefore none of the causes of action are viable. We affirm the judgment.

Plaintiff filed a "Request for Notice of Judgment," which is in fact a request to augment the record. Although most of the documents are not relevant to our decision and it is unclear whether any of the documents were filed in the trial court, in the interests of justice we grant the request.

FACTS AND PROCEDURAL HISTORY¹

Plaintiff was hired as a correctional officer in July 2009, for a 12-month probationary period. In November 2009 he began working at the Ironwood State Prison in Blythe.

In December 2009 or January 2010 plaintiff defined Sun Worshipping Atheism and posted its tenets on the Web and on Facebook. In his opposition to defendant's separate statement, despite using the word invented in his deposition, plaintiff states he did not invent it but just "committed it to a website at that time." In his briefs, plaintiff argues he "first created his religion in [late] 2008," relying on deposition testimony appended to his request to augment the record. It had a different name, the Unfired Religion. Plaintiff did not believe he could follow his Sun Worshipping Atheism beliefs working for defendant and he posted them so he could formally present them to defendant.

As set forth in those postings, a Sun Worshipping Atheist "does not believe in god, but believes that the demands of nature are like a higher power that must be answered to avoid disease and unhappiness and to be morally responsible." "The name point of [Sun Worshipping Atheism] is rational worship of the sun. As beings that evolved in the sunlight there are many benefits to our health and well-being that come from sunlight and so we honor it." Sun Worshipping Atheism "derive[s] from" "ordered chaos" and "the sun."

¹ The facts are taken from evidence cited in defendant's separate statement of undisputed facts. Although plaintiff filed a response to defendant's separate statement, it had several defects. Not counting the formatting violations (Cal. Rules of Court, rule 3.1350(f)(h)), plaintiff failed to set out any evidence supporting his responses. (Code Civ. Proc., § 437c, subd. (b)(2), (3). This in itself is sufficient to grant the motion. (*Id.*, subd. (b)(3).) Where relevant, plaintiff's statements in his opposition to defendant's separate statement are cited.

In developing Sun Worshipping Atheism plaintiff reviewed scientific facts delineating “what would be appropriate actions for humans to be taking.” According to plaintiff those facts are not exclusive to Sun Worshipping Atheism; Sun Worshipping Atheism “codifie[d]” what plaintiff believed to be the most important facts. In his opposition to defendant’s separate statement, plaintiff stated that, to his knowledge, there is no other “source that offers the [same] beliefs, practices and observances.”

Sun Worshipping Atheism’s beliefs are: “Identifying a scientific reality of the existence of the universe and that human needs are evolved, that the mind, body and soul, they’re all one thing. They’re the body, so taking care of the body is the way to take care of the soul. And then specific things from there, sunlight, rest, stimulation, rest, [sic] the things that humans evolved to need and that have a significant effect on mood and brain function.”

Sun Worshipping Atheism’s practices, done to “maintain mind-body well-being” are: “(1) Pray in the sun.” “(2) Take natural fresh air daily.” “(3) Sleep eight hours or more.” “(4) Eat and drink when you need to.” “(5) Exercise frequently.” “(6) Rest each day.” “(7) Have a job.” “(8) Be social frequently.” “(9) Respect the integrity of the independent mind.” “(10) Be skeptical in all things.”

Sun Worshipping Atheism addresses the following questions: “The nature of the universe, nature of human beings, what we need to do to be moral.” The meaning of life “doesn’t have what I predict, you know, contemporary monotheistic secular Christian America indentifies [sic] as meaning of life. It’s something that this is the purpose that happens. It’s going to be realized after death. It doesn’t recognize any consciousness after death, so it doesn’t have any meaning in that sense for an ongoing meaning for an individual. The meaning for it is getting the most out of your human and social function as your [sic] conscious of it now.”

The meaning of human existence is: “I believe it’s – well, I guess it’s not necessarily the same answer. It does not identify people as being not created in the role

of a creator, so human beings didn't – weren't designed for a reason. Human beings happened because they happened. The ordered chaos of the universe led to more and more complex systems that eventually led to one – well, more than one system so complex they would have self-awareness, and in the case of humans, very elaborate, complicated physical and behavioral structures that are pretty far removed from what you can see and, you know, protons, neutrons and electrons.”

As to the purpose of human existence, “Again, I predict there's not one that is what would be expected for the modern, monotheistic, Christian, secular zeitgeist in America. Again, human life wasn't created for the purpose of some conscious God with specific purposes. It was created by the ordered chaos. It's – it's not a test of – I'm starting to compare it to religious ideas that are a bit too – too general and abstract of other people. Humans exist because they exist.”

Plaintiff, as a Sun Worshipping Atheist, believes “there's no afterlife. Death is the natural physical decomposition of things that depend on an ordered chaos that keeps them going and the rules that ordered chaos that these chemical bonds that create and maintain life decay and something that we can identify as a distinct unique organism will eventually degrade to a point that it cannot maintain its whole function and will break down to its lesser functions into something that we no longer identify as that individual whole organism.” “[T]he soul is the brain.” “There's no ethereal soul.” “[W]hat we can observe . . . is all there is to reality.”

Sun Worshipping Atheism's “structure is very loose and grass roots,” without any hierarchy. It has no church, temple, synagogue, or any other physical structure for practice of its beliefs. There are no rituals for birth, death or marriage, nor are there holidays, religious days, or days of rest. Sun Worshipping Atheism has no required ceremonies or services, although meditating in the sun may be “helpful.”

To plaintiff's knowledge, he is the only Sun Worshipping Atheist. Sun Worshipping Atheism is plaintiff's “personal philosophy” and “way of life.” In his

opposition to defendant's separate statement, plaintiff "emphasize[s] that religions are personal philosophies and ways of life for everyone."

At the time plaintiff applied to be a corrections officer, he knew there were "strict requirements," including that he would be "required to work whenever [defendant] called upon [him]" to do so. Although he did not have any specific reason to do so, plaintiff originally believed his shifts would be eight hours long. It was not until he began working at Ironwood that he learned shifts were often longer.

A document setting out specifications for correctional officers, which plaintiff reviewed on the Internet before he applied for his job, states, under "Special Personal Characteristics" (capitalization omitted), "willingness to work day, evening, or night shifts, weekends, and holidays, and to report for duty at any time emergencies arise."

Another of defendant's documents for correctional officers, entitled "Essential Functions," provides: "The Correctional Officer may be required to work in conditions that require one or all of the following essential functions: [¶] . . . [¶] Must be able to work overtime. Overtime is mandatory and could be 8 hours at one time, and on very rare occasions up to 16 hours in situations such as a riot." The document was executed in 2008, prior to the time plaintiff worked for defendant. Plaintiff claims, without any admissible evidence, he did not receive this document until after he was hired and he never agreed to it. Plaintiff understood defendant considered overtime to be an essential job requirement but he did not "feel like it was one." He thought defendant was merely making a claim it was essential "to enable [it] to do something [it] want[ed] to do but was not essential."

In January 2010, while he was still on probation, two months after he had started working at Ironwood, and the day after he posted the Sun Worshipping Atheism beliefs on the Internet, plaintiff made a verbal and then a written request that he not be required to work more than 12-hour shifts in accordance with his Sun Worshipping

Atheism beliefs. Two weeks later, plaintiff filed an Equal Employment Opportunity discrimination complaint with defendant, claiming “[d]enial of religious accommodation.” That complaint was later denied by defendant’s Office of Civil Rights, which advised plaintiff the allegations in his complaint were not sufficient to open an investigation and it would not accept the case.

In late January defendant presented a memo to plaintiff pointing out he had refused to work overtime shifts on three separate dates. It contained a “direct order” that plaintiff accept any overtime assignments and a warning that failure to do so could result in an adverse action or a failure of probation or both. Plaintiff explained that at the time he was given the memo he was told that one more refusal to work overtime would result in his termination.

Plaintiff did work several overtime shifts. He agreed his beliefs allowed him to work overtime in the case of an “unavoidable life-threatening emergency such as [a] riot,” but not as a general rule.

In March, plaintiff produced a doctor’s note asking that he work only limited duty of eight hours per day through the beginning of May due to fatigue. Defendant approved the request. In March defendant denied plaintiff’s request for religious accommodation.

In April and May plaintiff filed discrimination charges with the federal Equal Employment Opportunity Commission (EEOC) and the California Department of Fair Employment and Housing alleging variously defendant had discriminated against him based on his religious beliefs, failed to accommodate those beliefs, and constructively discharged him based on his disability, i.e., fatigue. Those claims were all denied.

In May, three days after his doctor’s note expired and while still on probation, plaintiff resigned from his position because he was required to work overtime shifts, which conflicted with his belief as a Sun Worshipping Atheist that he needed eight

hours of sleep per day. Plaintiff believed defendant would terminate him if he did not work the overtime shifts and resigned to avoid that and the consequential failure of probation.

Defendant never terminated, demoted, suspended or refused to promote plaintiff, or failed him on probation. Nor was plaintiff's salary affected.

There is evidence only two of defendant's employees made any statements about Sun Worshipping Atheism.² The warden told plaintiff the EEOC did not protect Sun Worshipping Atheism, she would not hire a person with a religious belief conflicting with job requirements, and that plaintiff had signed a document stating he had no conflicts. An assistant warden told plaintiff a couple of times Sun Worshipping Atheism was not protected as a religion and one time said "atheists don't believe anything."

Plaintiff claims defendant took action against him as follows: He received a poor performance evaluation because he would not work overtime; "false memos and accusations were brought against" him; he was "denied safety support when dealing with inmates in risky situations"; and he was "threatened with failure on probation." Nothing happened to plaintiff as a result of these actions.

Plaintiff filed a first amended complaint containing four causes of action under FEHA: religious discrimination and harassment, retaliation, failure to accommodate religious practices and constructive discharge.

DISCUSSION

1. Introduction

Code of Civil Procedure section 437c, subdivision (c), declares "summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of

² In his opposition to defendant's separate statement, plaintiff claimed it was impossible to know if only two people made any statements but he could learn if there were any more if defendant cooperated.

law.” A defendant may bring a motion on the ground there is a complete defense to the action or that the plaintiff cannot prove one of the required elements of the case. (Code Civ. Proc., § 437c, subds. (o)(2),(p); *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 203.) If defendant meets that burden, the burden shifts to the plaintiff to produce evidence there is a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (o)(2); *Caldwell*, at p. 203.)

“There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted.) “[A] party . . . ‘must produce admissible evidence raising a triable issue of fact. [Citation.]’ [Citation.]” (*Dollinger DeAnza Associates v. Chicago Title Ins. Co.* (2011) 199 Cal.App.4th 1132, 1144-1145.) We review a summary judgment de novo. (*Aguilar*, at p. 860.)

2. *Sun Worshipping Atheism is Not a Religion as Defined Under FEHA.*

The general rule under FEHA is that an employer may not refuse to hire or employ, or discharge, or discriminate against a person based on his religious beliefs unless the employer has unsuccessfully sought a reasonable means to accommodate the beliefs. (§ 12940, subds. (a), (l)(1).) Pursuant to section 12940 “[r]eligious belief or observance” “includes, but is not limited to, observance of a Sabbath or other religious holy day or days, reasonable time necessary for travel prior and subsequent to a religious observance, and religious dress practice and religious grooming practice as defined in” section 12926, subdivision (q).

Section 12926, subdivision (q) provides: “‘Religious creed,’ ‘religion,’ ‘religious observance,’ ‘religious belief,’ and ‘creed’ include all aspects of religious belief, observance, and practice, including religious dress and grooming practices.” Under California Code of Regulations, title 2, section 11060 (former section 7293.1; regulation 11060), “‘Religious creed’ includes any traditionally recognized religion as

well as beliefs, observances, or practices, which an individual sincerely holds and which occupy in his or her life a place of importance parallel to that of traditionally recognized religions.”

Friedman v. Southern Cal. Permanente Medical Group (2002) 102

Cal.App.4th 39 (*Friedman*) is the seminal case in defining a religion or religious creed for FEHA purposes and is most instructive. There, the defendant refused to employ the plaintiff, a vegan, after he refused to be vaccinated against mumps because the vaccine was grown in chicken embryos. In filing his FEHA complaint for discrimination based on religious creed and retaliation, the plaintiff argued veganism was a religious creed. In determining it was not, the court extensively examined federal and state statutes, cases, and regulations that defined and discussed religion and religious beliefs in a variety of contexts.

One case *Friedman* cited with approval was *Africa v. Commonwealth of Pennsylvania* (3d Cir. 1981) 662 F.2d 1025 (*Africa*). In *Africa*, the plaintiff, a prisoner, claimed he was entitled to First Amendment protection for his religious belief, promulgated by an organization called MOVE, that he eat only raw foods. The court determined MOVE was not a protected religion because it did not deal with “[f]undamental and ultimate questions” (*id.* at p. 1033) and was not “comprehensive in nature” (*id.* at pp. 1031, 1035).

Relying in part on *Africa*, *Friedman* identified three “objective guidelines” for courts to use to “make the sometimes subtle distinction between a religion and a secular belief system” for FEHA purposes. (*Friedman, supra*, 102 Cal.App.4th at p. 69.) “First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion can often be recognized by the presence of certain formal and external signs.’ [Citation.]” (*Ibid.*)

Using these factors, we determine plaintiff's belief system is not a religion for FEHA purposes. First, Sun Worshipping Atheism does not "address[] fundamental and ultimate questions having to do with deep and imponderable matters." (*Friedman, supra*, 102 Cal.App.4th at p. 69.) Rather, it deals with living a healthy lifestyle. The sun is worshipped because there are health benefits that derive from it. Plaintiff fashioned Sun Worshipping Atheism after reviewing scientific data to determine healthy practices that have a positive effect on the mind, body, and soul, which he claims are all the same thing. Plaintiff's statement that his beliefs address "[t]he nature of the universe, nature of human beings, what we need to do to be moral," is a mere conclusion, insufficient to prove this element. (*Id.* at pp. 69-70.)

As with veganism discussed in *Friedman*, although there is a set of principles on which plaintiff relies to guide his life, "it reflects a moral and secular, rather than religious, philosophy. [Citations.]" (*Friedman, supra*, 102 Cal.App.4th at p. 70.)

In *Africa*, the court determined MOVE was not a protected religious creed, despite the fact its members "share[d] a fundamental concern, namely, an all-consuming belief in a 'natural' or 'generating' way of life." (*Africa, supra* 662 F.2d at p. 1033.) The court also was not persuaded by the plaintiff's argument his "keeping 'in touch with life's vibration' amounts to a form of pantheism, wherein [¶] the entity of God is the world itself, and God is 'swallowed up in that unity which may be designated 'nature . . .'" (MOVE's) return to nature is not simply a 'preferred' state. It is the only state. It is the state of being in pure harmony with nature. This, MOVE calls godly. This is pantheism." (*Ibid.*)

The *Africa* court held the plaintiff's "mindset seems to be far more the product of a secular philosophy than of a religious orientation. His concerns appear personal (e.g., he contends that a raw food diet is 'healthy' and that pollution and other such products are 'hazardous') and social (e.g., he claims that MOVE is a 'revolutionary' organization, 'absolutely opposed to all that is wrong' and unable to accept existing

regimes), rather than spiritual or other-worldly.” (*Africa, supra*, 662 F.2d at pp. 1033-1034, fns. omitted.)

These claims are similar to those plaintiff advances here. Sun Worshipping Atheism promotes a healthy lifestyle, i.e., eating and drinking properly, getting fresh air, exercising, praying in the sun, and getting enough sleep. Likewise, it is social, promoting interacting with others, being skeptical, and respecting an independent mind. As plaintiff explains, Sun Worshipping Atheism is a “way of life” and “personal philosophy.” Plaintiff’s response that all religions are personal philosophies and ways of life does not make the reverse true.

We acknowledge plaintiff’s argument that Sun Worshipping Atheism is not the same as MOVE³ or veganism. But both *Friedman* and *Africa* set out legal principles useful to our analysis. Moreover, the facts are sufficiently similar for us to draw analogies. An identical set of facts is not necessary.

Looking at the second factor, Sun Worshipping Atheism is not comprehensive and does not express a full set of beliefs. As discussed above, its list of practices reveal that it deals with living a healthy lifestyle, “mind-body wellbeing,” based on scientific facts synthesized by plaintiff. These include eating well, exercising, and getting enough sleep. This is to “get[] the most out of your human and social function as your [*sic*] conscious of it now.”

Finally, Sun Worshipping Atheism lacks any outward signs. Although not conclusive, this is a strong indication the belief system is not a religious creed. There are no rituals, services, or religious holy days, nor is there any structure where its beliefs are observed. Moreover, there is no hierarchy or organization, not even an informal one. In fact, plaintiff is the only member.

³ Also, for the purposes of our discussion, it does not matter that *Africa* is not a FEHA case.

In conclusion, Sun Worshipping Atheism is a “personal philosophy . . . and a way of life” under FEHA’s definition. (*Friedman, supra*, 102 Cal.App.4th at p. 70.) “Under regulation [11060], purely moral or ethical beliefs that are held with the strength of religious convictions may not qualify for protection under the FEHA. Rather, the express language of regulation [11060] requires that the belief, observance, or practice occupy a place in the employee’s life of ‘importance parallel to that of traditionally recognized religions.’” (*Id.* at p. 67.) Regulation 11060 “requires something more than a strongly held view of right and wrong.” (*Id.* at p. 68.)

Plaintiff seems to rely heavily on the fact his set of beliefs is new, and contends society must be open to new religions. But even assuming the validity of this argument, plaintiff’s beliefs still do not qualify them as a religion.

The parties dispute whether plaintiff created Sun Worshipping Atheism to justify his opposition to working overtime shifts. Plaintiff insists the alleged religion was created in 2008 and merely renamed and posted on the Internet right after he began working at Ironwood. But this argument is irrelevant. We are not relying on the date of creation of Sun Worshipping Atheism as a basis for our decision.

We emphasize that we are not judging the intrinsic value of plaintiff’s beliefs or doubting the sincerity of his belief in them. But neither of these facts alone suffice to make them a religious creed under FEHA.

In *United States v. Myers* (10th Cir. 1996) 95 F.3d 1475, Myers professed a “sincere belief that his religion commands him to use, possess, grow and distribute marijuana for the good of mankind and the planet earth.” (*Id.* at p. 1479.) In ruling Myers’s beliefs, although sincerely held, were not a religion, the court stated that it could not “rely on his sincerity to conclude that his beliefs rise to the level of a ‘religion’ If [Myers] thinks that his beliefs are a religion then so be it. No one can restrict his beliefs, and no one should begrudge him those beliefs. None of this, however,

changes the fact that his beliefs do not constitute a ‘religion’ as that term is uneasily defined by law.” (*Id.* at p. 1484.) We find this reasoning persuasive.

3. Because Sun Worshipping Atheism is Not a Protected Religion, None of Plaintiff’s Causes of Action Are Sufficient.

The essence of each of plaintiff’s four causes of action under section 12940, religious discrimination and harassment, retaliation based on his religion, failure to accommodate religious practices, and constructive discharge based on his religion, is based on the premise that Sun Worshipping Atheism is a protected religious creed. Since we have determined it is not, none of the causes of action are viable. We need not rely on any other ground to affirm the judgment.

4. Plaintiff Received a Full and Fair Hearing.

Plaintiff maintains he did not have a full and fair hearing on the summary judgment motion. We have reviewed the transcript and it does not bear out this claim.

At the beginning of the hearing the court stated it intended to grant the motion, finding defendant had met its burden of proof. The court cited to plaintiff’s deposition testimony on which defendant had based its motion, finding there was no evidence Sun Worshipping Atheism was a religion but rather was a “[m]oral and secular philosophy.” Plaintiff presented no sufficient evidence to dispute that, and therefore the causes of action for religious discrimination, failure to accommodate religious practices retaliation based on practice of Sun Worshipping Atheism failed. In addition, the court explained the last cause of action for constructive discharge was based on the other three and was insufficient for that reason.

The court then asked plaintiff if he wanted to be heard. After some argument, when the court believed plaintiff had finished, it ruled plaintiff had not shown Sun Worshipping Atheism was a religion entitled to protection under FEHA and that plaintiff had not exhausted his administrative remedies. When plaintiff stated he wanted to argue further, the court allowed him to do so. Plaintiff asked the court to confirm it did

not believe Sun Worshipping Atheism was a religion and could make such a finding without a trial. The court indicated it had already explained its reasons for the rulings but would listen to whatever plaintiff wanted to argue. Plaintiff did so for 10 more pages of transcript.

At one point, toward the end of his argument, the court commented it had read plaintiff's papers and asked him to "sum up [his] most important points" and then allowed plaintiff to quote some additional case law. When plaintiff was finished, the court noted he had "done a good job in laying out [his] position" but the court did not agree with it.

There is nothing in the transcript to show the court did anything to interfere with plaintiff's ability to present his case. In fact the opposite is true. The court essentially let plaintiff argue as long as he wished. There is no requirement the court "engage" with plaintiff. Rather, it has broad discretion in conducting a hearing on a summary judgment motion, including imposing reasonable limitations on its length and subject matter. (*Brannon v. Superior Court* (2004) 114 Cal.App.4th 1203, 1211.)

5. The Attorney General Did Not Violate Ethical Rules.

Throughout the reply brief plaintiff accuses defendant's counsel of violating California Rules of Professional Conduct, rule 5-200(B), which prohibits a lawyer from "mislead[ing] the judge . . . by an artifice or false statement of fact or law." We have found no evidence that counsel made false or misleading statements of fact or law. The fact plaintiff disagrees with defendant's arguments does not make them false.

Many of the plaintiff's complaints have to do with facts he claims are contrary to the evidence on which defendant relies. But there is a fundamental problem with this argument. As noted above, plaintiff submitted no admissible evidence in his opposition to the motion for summary judgment. He did not file a declaration either stating facts known to him or providing a foundation for exhibits attached to his response to the motion. (*Lyons v. Security Pacific Nat. Bank* (1995) 40 Cal.App.4th 1001, 1006-

1007 [opposition to motion for summary judgment must be supported by admissible evidence].) However, even assuming we credit some of the “facts” in his response, they do not alter our view of the case.

DISPOSITION

The judgment is affirmed. The request for notice of judgment is granted. Defendant is entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.