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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MARC ANGELUCCI et al., Plaintiffs and Appellants, v. CENTURY SUPPER CLUB, Defendant and Respondent.	B173281 (Los Angeles County Super. Ct. No. BC278640)

APPEAL from a judgment of the Superior Court of Los Angeles County. Joseph R. Kalin, Judge. Affirmed.

Law Offices of Morse Mehrban for Plaintiffs and Appellants.

Law Offices of Steven L. Martin for Defendant and Respondent.

On July 30, 2002, in Superior Court case number BC2786410, plaintiffs and appellants Mark Angelucci, Edgar Pacas, Elton Campbell, and Jeff Kent sued respondent Century Supper Club L.P. and many other clubs for violation of the Unruh Act (Civ. Code, § 51)[1] and the Gender Tax Repeal Act (Civ. Code, § 51.6).[2] Appellants alleged that on specified dates they went to the Century Supper Club and were charged a higher admission fee than women were charged. Angelucci and Pacas alleged that on June 14, 2002 they were charged $20, although the admission fee for women was $15, and that on June 16, 2002, they were charged $20, although women were admitted free. Campbell went to the club seven times in June and July and had similar experiences. Kent went three times and had similar experiences. Plaintiffs alleged that they were charged the higher price because they were men.

Shortly thereafter, Campbell sued respondent in another case, BC281386, filed on October 7, 2002. This case also included many other defendants. As to respondent, Campbell alleged that he went to the Supper Club on July 20 (a date which was not the subject of his allegations in the earlier case), paid $20 admission although women were admitted free, and was subjected to a physical body search although women were not searched. The cases were consolidated.[3]

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[1] That statute provides that "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (Civ. Code, § 51, subd. (b).)

[2] That statute provides that "No business establishment of any kind whatsoever may discriminate, with respect to the price charged for services of similar or like kind, against a person because of the person's gender." (Civ. Code, § 51.6, subd. (b).)

[3] Another case, BC284595, was also part of the consolidation order. ~(AA 20)~ Our record does not include a copy of the complaint in that case, or any other information about it.

Respondent moved for judgment on the pleadings. For purposes of that motion, the parties agreed that plaintiffs did not ask to be admitted free, as women were, or at the price women were charged. Citing *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, respondent contended that without such requests, plaintiffs could not recover. The trial court agreed, and entered judgment for respondent.

Discussion

In *Koire v. Metro Car Wash, supra,* 40 Cal.3d 24, a male plaintiff visited car washes on "Ladies' Day," asked to be charged the same discounted price as women were charged, and was refused. He also went to a nightclub which had advertised free admission for women aged 18-21, asked to be admitted free, and was refused. (*Id*. at p. 27.) He sued, contending that the car washes and bars had violated the Unruh Act by charging men more than they charged women. The trial court entered judgment for defendants after finding that sex-based price discounts did not violate the Unruh Act. The Supreme Court reversed, finding that the Unruh Act prohibits businesses from offering sex-based price discounts. (*Id. at p.* 38.)

The Court also noted that "There was conflicting testimony at trial about whether defendant State College Car Wash refused to wash plaintiff's car for the reduced 'Ladies' Day' price. The trial court did not resolve the factual dispute, since it held as a matter of law that 'Ladies' Day' discounts do not violate the Unruh Civil Rights Act. State College Car Wash does not deny that it advertises special 'Ladies' Day' prices. *At a minimum, men who wish to be charged the same price as women on 'Ladies' Day' must affirmatively assert their right to equal treatment*." (*Koire v. Metro Car Wash, supra,* 40 Cal.3d at p. 27, fn. 2, emphasis added.)

Plaintiffs argue that *Koire* merely describes State College Car Wash's policy, and contend that the case holds that State College Car Wash violated the Unruh Act, even though the factual dispute was not resolved. We do not agree. The Supreme Court made the statement in a footnote, and the footnote appended to the sentence that tells us that most of the car washes refused plaintiff's request for the discounted price. The

Supreme Court reversed the judgment in favor of the defendants and remanded the case to the trial court "for further proceedings consistent with the views expressed herein." The Court thus directed the trial court to resolve the factual dispute in light of the holding that sex-based price discounts violate the Unruh Act. By so doing, it implicitly held that a denial of services (the requirement in the Gender Tax Repeal Act) is necessary to state a claim for sex-based price discrimination under the Unruh Act. Further, the "at a minimum" language, following as it does the statement that "State College Car Wash does not deny that it advertises special 'Ladies Day' prices," establishes that mere advertising a sex-based price discount does not violate the Unruh Act.

As respondent argues, *Koire* holds that an Unruh Act plaintiff seeking to recover for sex-based price discounts must, at a minimum, plead and prove a request for equal treatment. The parties do not separately address the Gender Tax Repeal Act, perhaps because they believe, as we conclude, that whatever *Koire's* holding is, it applies equally to that statute.

Koire recognizes that the legislative object of the Unruh Act was "to prohibit *intentional* discrimination in access to public accommodations," so that "a plaintiff must . . . plead and prove a case of intentional discrimination to recover under the Act." (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1148.)

The legislative objective of the Gender Tax Repeal Act was to eliminate the gender tax, defined as "the additional amount women pay for similar goods or services due to gender-based discrimination in pricing." The Legislature acted after an Assembly Committee held hearings and concluded that "adult women effectively pay a gender tax which costs each woman about $1,351, annually."

At that time, the Legislature was aware that *Koire* had determined that gender-based price discounts violate the Unruh Act. Both the Assembly and Senate Committee analyses of the bill (Assem. Bill No. 1100 of the 1995 legislative session) discuss the case, noting that "Opponents of the bill contend that the bill is unnecessary because discriminatory practices are already generally prohibited under the Unruh Civil Rights

Act. However, the only published California case which relies on the Unruh Civil Rights Act to disallow price discrimination does so in the narrow context of special discounts for "Ladies Night" at a bar and 'Ladies Day' at a car wash," citing *Koire*. (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1100 (1995-1996 Reg. Sess.) as amended May 3, 1995.)

The Legislative intent was thus to extend *Koire* to all forms of gender tax and all businesses. The Legislature, fully aware of the holding of that case, did not specify that under the new statute, unlike the old, no request for equal services would be necessary.

Moreover, as a matter of logic, we would not have expected them to do so. If the Legislature disagreed with *Koire*'s reading of the Unruh Act, it would have amended that Act. We thus conclude that the Legislature approved of *Koire*'s request requirement. Given that, exclusion of the request requirement from the Gender Tax Repeal Act would have resulted in an oddity, or, indeed, an unfairness. Insofar as gender-based price discounts are concerned, the Unruh Act and the Gender Tax Repeal Act are parallel statutes. They prohibit the same conduct and are addressed to the same societal evils, and thus are subject to the same pleading and proof requirements.

They are also governed by the same statute concerning remedies. Under Civil Code section 52, "Whoever denies . . . or makes any discrimination or distinction contrary to," the Unruh Act or the Gender Tax Repeal Act is liable for treble damages or a minimum of $4,000, and, if the court so rules, the attorney's fees incurred by "any person denied the rights" set out in the statute. (Civ. Code, § 52, subd. (a).)

Koire's holding that there must be an affirmative assertion of the right to equal treatment is based on the fact that there cannot be a discrimination or a denial of services unless services are requested. The principle is consistent with long-standing California law, cited by respondent, which holds that a plaintiff cannot sue for discrimination in the abstract, but must actually suffer the discriminatory conduct.

In *Weaver v. Pasadena Tournament of Roses* (1948) 32 Cal.2d 833, the allegation was that plaintiffs waited in line for Rose Bowl tickets, but were not able to buy them because fewer tickets were available for public sale than had been

promised. Plaintiffs sought to sue in the name of all individuals who waited on line but were denied tickets. The Court concluded that the case was not cognizable as a representative suit because "[t]he question, as to each individual plaintiff, is whether *he* 'as a person over the age of twenty-one years' presented himself and demanded admittance to the game, whether *he* tendered the price of the ticket, . . ." (*Weaver v. Pasadena Tournament of Roses, supra,* 32 Cal.2d at p. 838.)

The plaintiff in *Orloff v. Hollywood Turf Club* (1952) 110 Cal.App.2d 340 was admitted to, then ejected from, a racetrack turf club for a reason which he alleged to be unlawful. He was told that he would never again be admitted, or, if admitted, would be ejected. He sued under an earlier version of the Unruh Act, seeking damages for his non-admission or ejection on each day the track was open, and arguing that the statement that he would be ejected meant that he could sue without actually seeking admittance. The Court found that the plaintiff failed to state a cause of action. (*Orloff v. Hollywood Turf Club, supra,* 110 Cal.App.2d 340.)

The fact that those cases arose in the class action context should not obscure their meaning: a plaintiff can only sue for discrimination after actively seeking equal treatment.

Here, plaintiffs alleged that women were charged less, but not that they asked for equal treatment. The rule announced in *Koire* applies. The trial court was thus correct that respondent was entitled to judgment on the pleadings.

Finally, *Koire's* holding that a plaintiff must request equal treatment before filing suit ensures that the statutes will be used to redress genuine grievances and to punish genuine misconduct, not by those who seek to exploit the law for financial gain. (See *Reese v. Wal-Mart Stores, Inc.* (1999) 73 Cal.App.4th 1225, 1236 ["self-generated" nature of Unruh and Gender Tax Repeal Acts injury relevant to class certification].)

Disposition

The judgment is affirmed.

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ARMSTRONG, J.

We concur:

TURNER, P.J.

MOSK, J.