

# SPECIAL BULLETIN

February 6, 2009

## California Court of Appeal Has Ruled That Private Religious School Is Not A Business Establishment Subject To The Unruh Act And Therefore Was Permitted To Discriminate Against Students Based On Perceived Sexual Orientation.

### Facts

The California Lutheran High School Association owns and operates a private religious high school located in Wildomar, California. The School is a nonprofit corporation that is affiliated with the Evangelical Lutheran Synod and the Wisconsin Evangelical Lutheran Synod (WELS), and offers both secular and religious classes. These synods believe that homosexuality is a sin and as such, the School maintains a policy of refusing admission to homosexual students. The School also has a "Christian Conduct" rule, which provides for student expulsion for engaging in immoral or scandalous conduct, on or off campus, including homosexual conduct. Enrollment in the School requires payment of tuition. For the 2005 to 2006 school year, the School charged tuition ranging from \$4,950 for WELS affiliated students to \$6,500 for other students.

The School allows the general public to purchase tickets to its football games and other athletic events, during which the School also sells food, beverages, T-shirts and other "spirit items." The School sells advertising space in its yearbook to the general public, and also holds fundraising auctions and golf tournaments. The School has also rented portions of its campus, such as the football field or gymnasium, to outside organizations.

In early September 2005, a student reported to a teacher that one unnamed female student had said she loved another unnamed female student. The reporting student also told the teacher that if the teacher looked at all the students' MySpace.com pages (an internet based social networking site), the teacher would be able to determine the students' identities and their feelings for each other.

The teacher visited MySpace.com and looked at all of the profiles for the School's female students. The teacher saw that one student, Mary Roe, used the screen name "Scandalous love!" and another student, Jane Doe, used the screen name "Truely [sic] in [heart] with You." Their respective pages stated that they were in love with each other. Moreover, on Mary's page, she listed her sexual orientation as "bi," and on Jane's page, she listed hers as "not sure."

On September 7, 2005, the School's principal, Pastor Bork, met with the School's Disciplinary Committee, who decided that Pastor Bork should speak with the students and determine the accuracy of the report against them. The Committee determined that if the report was true, the students should be suspended.

Jane and Mary were then pulled out of class and questioned by Pastor Bork in separate rooms. Pastor Bork asked each of them whether they were bisexual and whether they had engaged in any inappropriate behav-

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ior. According to Pastor Bork, both girls stated that they loved each other, that they had hugged and kissed each other, and that they had told other students that they were lesbians. Pastor Bork then suspended them and called their parents to pick them up. During this time, Mary and Jane were not allowed to leave, but they were allowed to use the restroom and go to their lockers while waiting for their parents.

On September 12, 2005, Pastor Bork sent Mary's and Jane's parents letters indicating that they had been suspended because they had a "bond of intimacy...characteristic of a lesbian relationship," which was in violation of the Christian Conduct rule. On October 15, 2005, the School's board of directors unanimously voted to expel Mary and Jane for engaging in a homosexual relationship.

Mary, Jane, and their parents sued. Their complaint alleged three causes of action against the School only: sexual orientation discrimination in violation of the Unruh Act; gender discrimination in violation of the Unruh Act; and unfair business practices. In addition, the complaint also alleged three causes of action against both the School and Pastor Bork, individually: public disclosure of private facts; violation of the California constitutional right to privacy; and false imprisonment.

Both sides filed motions for summary judgment, which is a request that the court rule on a party's claims based on certain facts without proceeding to a trial. The trial court granted summary judgment in favor of the School, ruling, in part, that the School was not a business establishment for purposes of the Unruh Act. Mary, Jane and their parents appealed. At issue before the Appellate Court were the (1) causes of action for violations of the Unruh Act; (2) cause of action for unfair business practice; (3) causes of action for invasion of privacy; and (4) cause of action for false imprisonment.

### **Court's Analysis**

#### **1. Causes of Action for Violations of the Unruh Act**

The Unruh Act is California's version of a public accommodation statute and can be found in Section 51 of the California Civil Code. Generally, the statute grants all California citizens, regardless of their sex, color, race, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation, full and equal accommodations, advantages, facilities, privileges or services in all business establishments of every kind whatsoever. (Cal. Civ. Code § 51(b).) The Appellate Court determined that in order to analyze Mary and Jane's claims for violations of the Unruh Act, the Court first had to ascertain whether the School was a business establishment within the meaning of the Unruh Act.

The Court began its analysis by reviewing prior court decisions that discussed whether certain organizations were business establishments for purposes of the Unruh Act. As an initial matter, it noted that an organization is not excluded from the Act simply by virtue of its nonprofit status. The Court found two cases that were particularly instructive.

In the first case, *Warfield v. Peninsula Golf & Country Club* (Cal.1995) 10 Cal.4th 594, a woman was awarded her husband's club membership upon the dissolution of their marriage. The club's bylaws only allowed memberships to be issued to males. As such, the club refused to transfer the membership to the wife and she sued the club, alleging discrimination under the Unruh Act. The club argued that it was not a business establishment for purposes of the Act. The California Supreme Court held, however, that this member-owned, nonprofit country club was a business establishment subject to the Unruh Act. Although the Supreme Court noted that generally, the Act "does not apply to truly private social clubs," (*Id.* at p. 617), the Court nonetheless concluded that "the business transactions that are conducted regularly on the club's premises with persons who are not members of the club," (*Id.* at p. 621) were sufficient to bring the club into the Act's broad reference to "all business establishments of every kind whatsoever." The Supreme Court explained that although the club does generate revenue from the dues and fees paid by its members, a significant amount of the club's revenues is generated from the use of its facilities and the purchase of goods and services on the club's premises, both by non-members. Since the club's business transactions with nonmembers were "conducted on a regular and repeated basis and constitute an integral part of the club's operations...the club falls

within the very broad category of 'business establishments' governed by [the Act]." (*Id.* at p. 599.)

The Court next looked at the case of *Curran v. Mount Diablo Council of the Boy Scouts* (Cal. 1998) 17 Cal.4th 670. In this case, the Boy Scouts rejected an applicant for a scoutmaster position on the basis of the applicant's announced homosexuality. The applicant brought an action under the Unruh Act. The California Supreme Court held that the Boy Scouts of America was not a business establishment within the meaning of the Unruh Act. In its rationale, the Supreme Court explained that generally, the Unruh Act must be reasonably interpreted to apply to organizations, even charitable ones, whose activities and attributes are equivalent to a classic place of public accommodation or amusement. The Supreme Court stated, however, that the Unruh Act cannot be interpreted to apply to an expressive social organization whose primary purpose is "the inculcation of values in its youth members." (*Id.* at p. 699.) Although the Boy Scouts did have recreational facilities and activities, they existed to enhance the organization's primary purpose. Membership in the Boy Scouts was not simply to gain access to those facilities and activities, but rather, to learn the moral principles of the organization. The Supreme Court conceded that while the Unruh Act would apply to actual business transactions with nonmembers in the Boy Scout's retail stores, such transactions were distinct from the organization's core function and did not bring the Boy Scout's membership policies and decisions within the reach of the Unruh Act.

The Court next turned its analysis to California Lutheran High School, and determined that it is also an expressive social organization whose primary function is the "inculcation of values in its youth members[.]" similar to the Boy Scouts. The Court found that the School specifically abides by Lutheran values, and makes its admissions decisions based on those values. Citing to an opinion letter from the California Attorney General, the Court determined that the admissions decisions of private religious schools are not subject to the Unruh Act because the purpose of a private religious school was to educate children in keeping with religious beliefs. As such, the Court held that the School was not a business establishment subject to the Unruh Act.

Although Mary and Jane argued that the School was a business establishment because it engaged in business transactions with the general public by virtue of its football ticket sales and similar offerings, the Court found that these transactions did not involve the sale of the basic activities and services offered by the School - to educate children and instill Lutheran values. As such, they did not bring the School into the reach of the Act.

In addition, the Court noted that Mary and Jane did not allege they were discriminated against during a business transaction such as the purchase of a sweatshirt at an athletic event. In such nonmember business transactions, the Court distinguished that the School could be prohibited by the Unruh Act from discriminating. Citing to *Curran*, the Court noted that the School could "be a business and be hence prohibited from discriminating, with respect to its nonmember transactions, yet *not* be a business, and hence *not* prohibited from discriminating, with respect to its membership decisions." (*Id.* at p. 700.) In admissions decisions, however, which are based on Lutheran values, the Court held that the School was not a business establishment subject to the Act. As such, the Court affirmed the trial court's granting of summary judgment in favor of the School on this cause of action.

## **2. Causes of Action for Unfair Business Practice**

Mary and Jane also alleged that the School, by violating the Unruh Act, also violated the Unfair Competition Law. The Court found, since the School did not violate the Unruh Act, the trial court properly granted summary judgment in favor of the School.

## **3. Causes of Action for Invasion of Privacy**

Mary and Jane also alleged that their privacy was violated based on the public disclosure of private facts and the California Constitution's right to privacy because Pastor Bork disclosed their sexual orientation to others. With regard to the claim of public disclosure of private facts, the Court stated that this right of privacy is only violated where there is "publicity" or "public disclosure," which is a communication to the public in

general, and not just to a few people. The Court found that Pastor Bork only disclosed the students' sexual orientation to the School's Disciplinary Committee and Board of Directors, which did not qualify as a disclosure to the public in general.

As further support for their claim, Mary and Jane argued that Pastor Bork also disclosed their sexual orientation to their parents. The Court found, however, that since the School could lawfully expel Mary and Jane based on their sexual orientation and their parents had a right to know the reason for their children's expulsion, the School was entitled to inform the parents.

With regard to Mary and Jane's claims based on their constitutional right to privacy, in order to prevail, Mary and Jane had to establish that (1) they had a legally protected privacy interest; (2) they had a reasonable expectation of privacy; and (3) there was conduct by the School constituting a serious invasion of privacy. The Court noted that, as an initial matter, although minors have a right to privacy that is protected by the California Constitution, the scope and application of that right is significantly different than that of adults. Moreover, minors do not have legitimate expectations to privacy to engage in consensual sexual activity. The Court further stated that even assuming that minors have a legitimate expectation of privacy regarding their sexual orientation, that expectation is diminished once they enroll in a private school whose policies prohibit homosexual conduct.

In addition, the Court reasoned that a minor student's expectation of privacy must be balanced with a school's obligation to maintain discipline. The Court compared the role of a school with that of a parent, for whom the school acts in *loco parentis*, meaning the school acts in place of the parent. The Court reasoned that since a parent would be entitled to ask a child about his or her sexual orientation, a school would be equally entitled to ask. Since Mary and Jane could not offer any alternatives that would have had a lesser impact on their privacy interests, and because Mary and Jane's expectation of privacy was outweighed by the School's countervailing interests, the Court found that the School did not violate the students' right to privacy. As such, the Court affirmed the trial court's granting of summary judgment in favor of the School on these causes of action.

#### **4. Cause of Action for False Imprisonment**

Finally, Mary and Jane also alleged that the School falsely imprisoned them by detaining them against their will for the unlawful purpose of questioning them about their sexual orientation.

The Court stated that generally, minors lack many of the fundamental rights of self determination, including the right to come and go at will. Minors are subject to the control of their parents or guardians, as well as teachers and administrators. Although the control by schools is not unfettered, as it cannot be exerted for arbitrary, capricious or unlawful purposes, schools do have certain rights, such as the right to detain a student, direct a student to go to a particular classroom, or send a student to study hall.

The Court noted that the crux of Mary and Jane's claim was that the School detained them for the unlawful purpose of questioning them about their sexual orientation. Thus, the Court determined, their false imprisonment claim fell within their Unruh Act claims. Since the Court had already determined that the School was not a business establishment within the meaning of the Unruh Act, the School could lawfully discriminate on the basis of perceived sexual orientation. As there was no unlawful purpose for the detention, the Court determined that the School did not falsely imprison Mary and Jane. As a result, the Court again affirmed the trial court's granting of summary judgment to the School.

#### **Practice Advisor**

Whether a private school is a business establishment within the meaning of the Unruh Act is a fact-based determination. The Appellate Court's reasoning that the School was not a business establishment for purposes of subjecting its admissions practices to the Unruh Act appears to distinguish between the types of busi-

ness transactions engaged in by the School. Rather than hold that the School was wholly exempt from the Unruh Act, the Court stated that in some situations, the School would be prohibited from discriminating by the Unruh Act. For example, the Court noted that the School would not be permitted to discriminate in its nonmember transactions, such as in the sale of football tickets, because of the Unruh Act.

Thus, while private religious schools' admissions and disciplinary practices may not be subject to the Unruh Act, schools should be aware that other business transactions may still be. Schools should also be aware that business transactions engaged in with the general public can also bring the schools into the reaches of the Unruh Act.

*Doe v. California Lutheran High School Ass'n* (Cal.App. 4 Dist., 2009) --- Cal.Rptr.3d ----, 2009 WL 161869.

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