

ASSEMBLY THIRD READING
AB 1084 (Low and Cristina Garcia)
As Amended April 28, 2021
Majority vote

SUMMARY

Requires a retail department store with 500 or more employees that sells childcare items, children's clothing, or toys, to maintain a gender neutral section or area.

Major Provisions

- 1) Requires a retail department store with 500 or more employees that offers childcare items, children's clothing, or toys for sale to maintain a gender-neutral section or area, to be labeled at the discretion of the retailer, in which a reasonable selection of the items, articles and toys for children it sells shall be displayed, regardless of whether they have been traditionally marketed for either girls or for boys.
- 2) Provides, beginning on January 1, 2024, a retail department store that fails to comply with this requirement is liable for a civil penalty not to exceed \$250 for a first violation or \$500 for a subsequent violation, and which may be assessed and recovered in a civil action by the Attorney General (AG) or a district attorney (DA) or city attorney, in any court of competent jurisdiction.
- 3) Requires, if the AG, DA or city attorney prevails, the court to order the AG, DA or city attorney reasonable attorney's fees and costs.

COMMENTS

The Unruh Civil Right Act prohibits discrimination by public accommodations. The state's Unruh Civil Rights Act prohibits business establishments from discriminating against any person based on a number of protected characteristics, including but not limited to, a person's sex or gender. (See Civil Code Section 51.) The Act defines "sex" discrimination to include discrimination based on gender identity. (*Id.* at Section 51 (e)(5).) In order to establish a valid claim under Unruh, "a plaintiff . . . must plead and prove intentional discrimination." (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal. 3d 1142, 1175.) Facts showing that a facially neutral policy has a disparate impact on a protected class "may be probative of intentional discrimination," but alone are insufficient to establish liability. (*Ibid.*)

Special discounts or privileges that provide benefits to some based upon their sex or gender also violate the Unruh Act. As the California Supreme Court noted in *Koire v. Metro Car Wash*, the language of the Unruh Act, "is clear and unambiguous" and prohibits a business establishment from denying any person "full and equal accommodations, advantages, facilities, privileges, or services" on the basis of sex. (*Koire v. Metro Car Wash* (1985) 40 Cal. 3d 24, 28.) Although the business defendants in *Koire* argued that the Unruh Act only prohibited the "exclusion" of a member of a protected class from a business establishment, and allowed them to offer special discounts or incentives to one gender, the California Supreme Court rejected this narrow reading, noting that the Act not only guarantees access but, once there, "full and equal advantages, facilities, privileges, or services." (*Id.* at 30.) The Legislature's choice of words, the Court reasoned, shows concern "not only with access to business establishments, but also with equal treatment of patrons in all aspects of the business." (*Id.* at 29.) The Court added that price

discrimination based on sex not only harmed the male plaintiff, it was "generally detrimental to both men and women because it reinforces harmful stereotypes." (*Id.* at 34.)

However, the Unruh Act does not prohibit a department store from offering or displaying children's goods in sections of the store in a manner that indicates they are intended for just one gender. Nor does it explicitly prohibit charging different prices for products that are *substantially* the same but marketed towards customers of different genders. The Unruh Act *would*, however, prohibit a retailer from charging different prices to customers for the same product based upon the gender or gender identity of the customer. (See *Koire v. Metro Car Wash, supra.*)

Under current law – and under this bill, should it become law – children of all genders (or more realistically their parents) are free to purchase children's toys, care products, and clothing offered for sale in a retail store, regardless of the area or section of the store in which those items are displayed. More broadly, children and parents may enter a department store (or not) and buy any products on display there (or not), regardless of gender or gender identity. Nevertheless, some children and parents may feel unwelcome or uncomfortable shopping in some areas of department stores that are segregated on the basis of gender, especially if the children are struggling with their gender identity, or do not wish to identify with one gender.

According to the Author

This bill is sponsored by *The Phluid Project*. According to the Author, "Unjustified differences in similar products that are traditionally marketed either for girls or for boys can be more easily identified by the consumer if similar items are not separated by gender. Combining boy's and girl's departments at retail stores with 500 or more employee's into a "kids" department or creating a gender neutral section will most definitely make all kids feel welcomed."

Arguments in Support

The Phluid Project, sponsor of this bill, writes that it "supports policies that empower consumers while creating safe and affirming spaces. This bill will allow consumers, both parents and children to allow for creating and freedom of self-expression."

Meanwhile, the Consumer Federation of California points out that the bill would help consumers find items with the best price because it will allow them to compare prices of similar goods and make choices that are not based upon the gender of the intended buyer, do not reinforce gender stereotypes, and possibly reduce price disparities between products marketed towards boys and girls. "This bill will allow consumers to easily identify similar children's items which will be displayed closer to one another in one, undivided area of the retail sales floor. Keeping similar items that are traditionally marketed either for girls or for boys separated makes it more difficult for the consumer to compare the products and incorrectly implies that their use by one gender is inappropriate. . . . Separating products by gender also helps to disguise the unfortunate fact that female products are often priced higher than male products."

Arguments in Opposition

According to the *Siskiyou Conservative Republicans*, "A "store" is private property no matter how many employees they employ. They are in business to sell as much merchandize as possible to as many people as possible. Merchants are in the business to sell their goods not to do social engineering. The free-market place is driven by demand of their customers not by laws made by politicians.

It is not the business of the state to parent their constituent's children nor to dictate to businesses how to organize or display their merchandise. The state has no authority to meddle in the details of how retailers market or display their products."

FISCAL COMMENTS

According to the Assembly Appropriations Committee:

- 1) Estimated costs, likely greater than \$150,000 (General Fund (GF)) annually, to the Department of Justice (DOJ) for the AG to bring enforcement actions.
- 2) Cost pressures (GF/Trial Court Trust Fund) in the mid-hundreds of thousands of dollars annually to the courts in additional workload. This bill authorizes the DOJ, a district attorney, or a city attorney to file injunctive relief. The estimated workload cost of one hour of court time is \$956. If 20 cases are filed statewide resulting 20 hours of court time for each case, costs would be approximately \$382,400. Although courts are not funded on the basis of workload, increased pressure on the courts and staff may create a need for increased funding for courts to perform existing duties. This is particularly true, given that courts have delayed hundreds of trials and civil motions during the COVID-19 pandemic resulting in a serious backlog that must be resolved. The Governor's 2021-22 budget proposes \$72.2 million dollars in ongoing GF revenue for trial courts to continue addressing the backlog of cases in order to provide timely access.

VOTES

ASM BUSINESS AND PROFESSIONS: 11-4-4

YES: Low, Arambula, Berman, Bloom, Chiu, Gipson, Holden, Irwin, McCarty, Medina, Ting

NO: Flora, Valladares, Megan Dahle, Fong

ABS, ABST OR NV: Chen, Grayson, Mullin, Salas

ASM JUDICIARY: 7-3-1

YES: Stone, Chiu, Lorena Gonzalez, Holden, Kalra, Maienschein, Reyes

NO: Gallagher, Davies, Kiley

ABS, ABST OR NV: Chau

ASM APPROPRIATIONS: 10-4-2

YES: Lorena Gonzalez, Calderon, Carrillo, Eduardo Garcia, Levine, Quirk, Robert Rivas, Akilah Weber, Holden, Luz Rivas

NO: Bigelow, Megan Dahle, Davies, Fong

ABS, ABST OR NV: Chau, Gabriel

UPDATED

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CONSULTANT: Danielle Sires / B. & P. / (916) 319-3301

FN: 0000702