BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation of the DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING v. MARION'S PLACE, a California Business Entity form Unknown; MARY ANN LOPEZ DEWITT, dba MARION'S PLACE; MARION LOPEZ, dba MARION'S PLACE, Respondents. FRANCIS ARREOLA, Complainant.	Case No. U-200203 C-0008-00-s C 03-04-070 06-01-P DECISION

The Fair Employment and Housing Commission hereby adopts the attached Proposed Decision as the Commission's final decision in this matter and designates it precedential, pursuant to Government Code section 12935, subdivision (h), and California Code of Regulations, Title 2, section 7435, subdivision (a).

The Commission, *nunc pro tunc*, corrects the following errors in the decision: page 8, paragraph 1, line 5, is amended to read "under the age of 18" in lieu of "under the age 18;" page 9, paragraph 4, line 3 is amended to read "Court held that" in lieu of "Court that;" and page 17, paragraph 4, line 4 is amended to delete the following text, as indicated in strike-through: "~~along with a notice of customers' rights and obligations regarding unlawful discrimination under the Act (Attachment B)~~."

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5, and California Code of Regulations, title 2, section 7437. Any petition for judicial review and

related papers shall be served on the Department, the Commission, respondents, and complainant.

DATED: February 1, 2006

GEORGE WOOLVERTON	HERSCHEL ROSENTHAL
PATRICK ADAMS	LINDA NG
BRENDA ST. HILAIRE	

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In the Matter of the Accusation of the DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING v. MARION'S PLACE, a California Business Entity Form Unknown; MARY ANN LOPEZ DEWITT, dba MARION'S PLACE; MARION LOPEZ, dba MARION'S PLACE, MARION'S PLACE, INC., a California Corporation, Respondents. FRANCIS ARREOLA, Complainant.	Case No. U-200203-C-0008-00-s C 03-04-070 PROPOSED DECISION

Administrative Law Judge Caroline L. Hunt heard this matter on behalf of the Fair Employment and Housing Commission on February 22 and 23, 2005, in Salinas, California. Jennifer Woodford-Gittisriboongul, Senior Staff Counsel, represented the Department of Fair Employment and Housing. John Viljoen, Esq., represented respondents Marion's Place, Inc., Marion Lopez and Mary Ann Lopez Dewitt. Christopher Daley, Esq., of the Transgender Law Center, participated in after-hearing briefing as amicus curiae. Complainant Francis Arreloa and respondents Marion Lopez and Mary Ann Lopez Dewitt attended the hearing. Maria D. Cruz served as the Spanish-speaking interpreter at hearing.

After receipt of the hearing transcripts, and timely filing of the parties' and amicus curiae's post-hearing and supplemental briefs, the last of which was received on November 7, 2005, the case was deemed submitted on that date.

After consideration of the entire record, the administrative law judge makes the following findings of fact, determination of issues, and order.

FINDINGS OF FACT

Procedural Setting

1. On May 5, 2003, Francis Arreola (Arreola or complainant) filed written, verified complaints with the Department of Fair Employment and Housing (Department) against Muriano's [sic] Club, Marion's Place, a California business entity – form unknown, Mary Ann Lopez Dewitt dba Marion's Place, and Marion Lopez dba Marion's Place. The complaints alleged that, within the preceding year, Marion Lopez (Lopez), owner of Muriano's [sic] Club and Marion's Place, located at 494 and 487 E. Market Street, Salinas, California, denied complainant full and equal privileges because of complainant's sex (male) and gender identity (transgender). The complaints alleged that Marion's Place denied entry to Arreola, who was wearing a dress, based on a "trousers only" dress code, and told Arreola to use only the men's restroom, and that this conduct constituted unlawful practices in violation of the Fair Employment and Housing Act (FEHA or Act), incorporating Civil Code section 51. (Gov. Code, § 12900 et seq., Civ. Code § 51.)

2. The Department is an administrative agency empowered to issue accusations under Government Code section 12930, subdivision (h). On May 4, 2004, Jill Peterson, in her then official capacity as Interim Director of the Department, issued an accusation against Marion's Place, a California business entity form unknown, Mary Ann Lopez Dewitt, dba Marion's Place, and Marion Lopez, dba Marion's Place (respondents). The accusation alleged that respondents denied complainant full and equal accommodations, advantages, facilities, privileges and services based on complainant's actual or perceived sex, gender identity, and sexual orientation,[1] in violation of Civil Code section 51, as incorporated into the FEHA by Government Code section 12948. The accusation alleged that respondents denied complainant entry into their business establishment, Marion's Place, unless complainant adhered to the men's dress code by wearing pants, rather than a dress. The accusation further alleged that in March 2003, respondents permitted complainant into the nightclub but told Arreola that "she must use the 'bathroom at the gas station across the street.'"

3. In October 2004, respondents incorporated their nightclub business, forming Marion's Place, Inc., which received all of the assets and equipment of Marion's Place. Marion's Place, Inc., maintained the same employees, the same principals and managerial staff, and operated continuously under the same business name for the nightclub, in the same line of business, and at the same location, at 487 E. Market Street, Salinas, California.

4. On January 6, 2005, Suzanne Ambrose, in her official capacity as Director of the Department, filed a first amended accusation, adding Marion's Place, Inc., as a respondent in this proceeding.

[1] In its post-hearing brief, the Department dropped its claim of arbitrary discrimination based on sexual orientation.

5. On January 21, 2005, the Department filed a second amended accusation, deleting the allegation that respondents told complainant she had to use the gas station bathroom. In the second amended accusation, the Department also amended the prayer for relief, moving its prayer for treble damages and attorney's fees, under Civil Code section 52, into the prayer seeking compensatory damages for emotional distress.

6. On August 12, 2005, on written application by the Transgender Law Center, a California non-profit law firm providing legal services to transgender people, for leave to file an amicus curiae brief after hearing, the undersigned administrative law judge issued an Order Re: Amicus Brief, granting such leave and in addition, granting respondents' right of reply. (Cal. Code Regs., tit. 2, § 7426.)

7. On October 5, 2005, the undersigned administrative law judge requested that the parties file supplemental briefs on the effect of Assembly Bill 1400 (Stats. 2005, ch. 420, § 3) on the issues presented in this case. Such briefs were timely filed by the parties and amicus curiae.

Factual Setting

8. Complainant Arreola identifies herself as a male-to-female transgender. She was born Francisco Arreola, a biological and anatomical male, on February 11, 1973, in Michoacan, Mexico. From an early age, Arreola considered herself female. In Mexico, she faced harassment and ostracism as a result of her sexual identity. On her arrival in the United States in about 1998, Arreola began publicly identifying herself as female in her daily life, by wearing women's clothes, jewelry, make-up and hair styles.

9. Arreola underwent hormone therapy, taking female hormones prescribed by her doctor. Arreola considered but, primarily for financial reasons, had not undergone sex reassignment surgery.

10. At the time of the acts alleged in this case, Marion's Place was a nightclub owned and run, for about 38 years, by respondent Marion J. Lopez (respondent Lopez). Marion's Place catered to a predominantly Hispanic, seasonal farm worker clientele. It offered a venue for drinking and dancing, with live music and cover charge on Friday, Saturday and Sunday nights. As a nightclub serving alcohol, Marion's Place was restricted to customers over 21 years of age. The nightclub had two bars, a dance floor, and a seating area. It held about 250 customers and was popular and crowded, especially on weekends.

11. Both prior to and after incorporation of the business, respondent Lopez managed the nightclub, supervising all employees. He and his daughter, Mary Ann Lopez Dewitt, also bartended each Saturday night. The club employed a host, wait staff, bartenders, musicians and security staff, a total of about 20 employees. After incorporation, Dewitt also served as the chief financial officer of Marion's Place, Inc.

Transgender Customers at Marion's Place

12. Starting in about 2000, Marion's Place began to attract a transgender clientele, in addition to its existing customers and clients. By mid-to late 2002, the number of transgender customers at Marion's Place averaged around 25 on a Saturday night. Some of the male-to-female transgender customers wore dresses or skirts, clothing associated as traditionally "feminine" clothing, at the nightclub. Some women and transgender customers wore skirts or dresses that were very closely tailored and revealing, referred to as "mini skirts."

13. On occasion, fights or arguments took place at Marion's Place, at times involving verbal threats or physical altercations. The nightclub's security staff was headed by Alejandro (Alex) Gomez. Members of the security staff, including Gomez, were responsible for checking customers' identification documents (IDs) at the front entrance, checking for concealed weapons or alcohol, and intervening in the event of arguments and fights among clientele.

14. In both 2001 and 2002, several altercations at Marion's Place involving heterosexual and transgender patrons required intervention by Alex Gomez. In one such incident, a male customer became angry and physically violent on realizing that his dance partner was transgender. Gomez intervened to prevent a fistfight. In other incidents, transgender customers were assaulted or yelled at. From time to time, certain male customers became irate when they put their hands up the skirt of the person they were with, to discover that person was transgender. Each time, Gomez responded quickly to prevent an escalation to any further physical violence.

15. Marion's Place management and security personnel also dealt with a number of non-transgender females' soliciting sex acts both inside the club and outside in the parking lot.

16. Sometime in about 2002 at Marion's Place, a transgender, not identified in the record, came to the nightclub wearing a skirt without underwear. Several non-transgender customers complained and left, threatening never to return, when the transgender individual danced in a provocative manner, showing male genitalia. Gomez discussed this incident with respondent Lopez, who responded, "No more guys with skirts."

17. In late 2002, respondents instituted a dress code for its clientele. The dress code provided that:

> Women can wear a dress or pants. Men can wear pants but not dresses or skirts. Tank tops on men are prohibited. Shoes are required.

18. On adoption of the dress code at Marion's Place, transgender individuals who were perceived by the security staff at the door of the club to be males were not permitted entry to the club if they were wearing dresses or skirts. Male-to-female transgender

individuals were still welcomed as customers at Marion's Place, as long as they abided by the male dress code, and wore pants.

19. One evening in November 2002, complainant Arreola went to Marion's Place for the first time. She was accompanied by a friend, Jesus Morales. Arreola wore a skirt, blouse, scarf, and nylons. At the entrance of the nightclub, Arreola was stopped by security and told that she needed to wear pants, not a skirt, because of the rules of the club. Arreola and Morales then left the nightclub.

20. Arreola was upset that respondents would not allow her into the nightclub wearing a skirt. She felt humiliated. This humiliation was particularly acute because she had been identified by respondents as a man, rather than as a woman, in front of her friend.

21. The next day, Arreola returned to the club with Jesus Morales to speak to the owner, respondent Lopez. Lopez told Arreola that at Marion's Place, under the club's rules, men had to wear pants, not dresses.

22. Arreola's treatment at Marion's Place led to her experiencing simultaneous feelings of impotence and anger. She cried when she reflected on how she had been humiliated. She had been trying to live her life as a woman, had even applied for political asylum, and now the rejection and humiliation by Marion's Place rendered her both powerless and angry. She felt that respondents' security personnel had ridiculed her because of her gender identity. Previously, she had enjoyed dressing up to look her best, to go out with friends. She no longer enjoyed confidence in her appearance because of her treatment at the nightclub.

23. After six to seven months, Arreola reluctantly returned to Marion's Place, at the urging of her friends. When she went back, however, in about May 2003, she did not feel confident enough to dress in a skirt. Instead, she wore pants, because she feared being embarrassed once more at the club if she wore a skirt or dress. That evening, she was admitted to the club.

24. Arreola visited the nightclub two additional times later in 2003. She remained fearful of being embarrassed, so wore pants, not a skirt, and each time was admitted to the nightclub.

25. Some time prior to the events alleged in the accusation, Arreola applied for political asylum with the then United States Immigration and Naturalization Service (I.N.S.), based on the persecution she faced in Mexico as a transgender. On about June 4, 2003, the I.N.S. issued Arreola an Employment Authorization Card. The I.N.S. designated complainant's sex as "female." On August 15, 2003, Arreola was issued a California Department of Motor Vehicles ID card. That ID also designated Arreola as "female."

26. At the time of hearing, respondents continued to maintain their dress code policy at Marion's Place, prohibiting prospective customers respondents considered to be men from

entering the club wearing skirts or dresses. There were still fights and verbal disputes at the nightclub from time to time**.** Of approximately 25 fights at Marion's Place in the past five years, about two or three involved transgenders in skirts or dresses. In at least two incidents after adoption of the dress code, transgenders wearing pants were subjected to physical attacks.

DETERMINATION OF ISSUES

Liability

Complainant Arreola, as a male-to-female transgender individual, asserts her right to wear traditionally feminine clothing, i.e., a skirt or a dress, as a customer in Marion's Place.

The Department alleges that respondents' refusal to allow complainant Arreola to enter Marion's Place when dressed in a skirt constituted arbitrary discrimination under the Unruh Civil Rights Act, as incorporated into the FEHA by Government Code section 12948. (Civ. Code, § 51, Gov. Code, § 12948.) Both the Department and amicus curiae argue that complainant is protected under the Unruh Civil Rights Act based on her sex and gender identity, and that respondents' dress code barring men from wearing a dress or skirt violates the Act's prohibition against arbitrary, discriminatory conduct by a business establishment.

Respondents deny any violation of the Unruh Civil Rights Act or the FEHA, asserting that they have never discriminated against transgender individuals, and that respondents' dress code prohibiting men from wearing skirts or dresses is reasonable and justified for legitimate business reasons.

The Unruh Civil Rights Act

At the time of the acts alleged in the second amended accusation,[2] Civil Code section 51, subdivision (b), stated: "All persons within the jurisdiction of this state are free and

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[2] Effective January 1, 2006, Civil Code section 51, subdivision (b), was amended to include marital status and sexual orientation as enumerated protected bases under the Unruh Civil Rights Act and to define sex to include gender and gender identity. (Added by Stats. 2005, ch. 420, § 3 (Assembly Bill 1400, Laird) [A.B. 1400].) With the enactment of these amendments to section 51, the parties argue respectively for and against retroactivity, with the Department and amicus curiae arguing that the amendments "clarify" the Unruh Civil Rights Act and do not change existing law. Respondents argue that, to the contrary, A.B. 1400 is a change in the law extant prior to January 1, 2006.

In *North Coast Women's Care Medical Group v. Super. Ct.* (Dec. 5, 2005) _ Cal.App.4th _ [2005 WL 3251789], the first appellate court to consider the issue held that A.B. 1400 was a change to the existing law and to be applied prospectively only (analyzing the effect of A.B. 1400's adding "marital status" as an enumerated category in Civil Code section 51.) Thus, under *North Coast Women's Care Medical Group*, the amendments do not apply retroactively to incorporate gender and gender identity expressly into Civil Code section 51's statutory definition of sex. The issue remains whether respondents' dress code discriminates on the basis of "sex" as it existed prior to the passage of A.B. 1400. This decision concludes below that it does.

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." [3]

Enacted in 1959, the Unruh Civil Rights Act amended a California 1897 statute declarative of a common law doctrine requiring business establishments "to serve all customers on reasonable terms without discrimination and ... to provide the kind of product or service reasonably to be expected from their economic role." (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 839 (*Koebke*), citing *In re Cox* (1970) 3 Cal.3d 205 (*Cox*).

It is well settled that a bar or nightclub, such as the one at issue in this case, qualifies as a "business establishment." (*Stoumen v. Reilly* (1951) 37 Cal.2d 713, 716 [criticized on other grounds in *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1154-1155, [*Harris*]; *Gayer v. Polk Gulch, Inc.* (1991) 231 Cal.App.3d 515, 519.) Thus, Marion's Place is a business establishment within the meaning of the Unruh Civil Rights Act.

It is important to recognize that the issue of barring all transgenders from the nightclub is not presented in this case. It is the mode of attire of customers, specifically transgender customers, that is being regulated. On its face, respondents' dress code delineates permissible attire for customers expressly and unambiguously based on their sex—whether they are men or women. Respondents' intent in adopting the policy, however, and the effect of the dress code as applied at Marion's Place, were to regulate the dress of transgender customers. (See *Harris, supra,* 52 Cal.3d at p. 1175 [the Unruh Civil Rights Act requires a showing of intentional discrimination, and the Title VII or FEHA's disparate impact analysis does not apply; however, relevant evidence of disparate impact may be probative of intentional discrimination in the appropriate case."].) Respondents' dress code, in effect, precludes male-to-female transgender customers from patronizing Marion's Club if they choose to dress in the clothing most traditionally associated in this culture with exclusively female attire—a dress or skirt.

The Unruh Civil Rights Act is to be liberally construed to effectuate the purposes for which it was enacted and to promote justice. (*Rotary Club of Duarte v. Bd. of Directors of Rotary Internat., et al.* (1986) 178 Cal.App.3d 1035, 1046-1047; *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 28; *Winchell v. English* (1976) 62 Cal.App.3d 125, 128.) One of the policies underlying the enactment of the Unruh Civil Rights Act is the eradication of sex discrimination by business establishments in the furnishing of "accommodations, advantages, facilities, privileges, or services." (Civ. Code, § 51; *Rotary Club of Duarte v. Bd. of Directors of Rotary Internat., et al., supra,* 178 Cal.App.3d at p. 1047; *Koire v. Metro Car Wash, supra,* 40 Cal.3d at p. 36; *Winchell v. English, supra,* 62 Cal.App.3d at p. 128.) The Unruh Civil Rights Act is "clearly a declaration of California's public policy mandate and

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[3] Civil Code section 51 is incorporated into the FEHA by Government Code section 12948, making it an "unlawful practice" under the FEHA to deny the rights created by Civil Code section 51. (Gov. Code, § 12948; Civ. Code, § 51.)

objective that men and women be treated equally." (*Koire v. Metro Car Wash, supra*, 40 Cal.3d at p. 37.)

California courts have held that, in addition to the particular forms of discrimination specifically enumerated in the statute, the Unruh Civil Rights Act also protects judicially recognized classifications: unconventional dress or appearance (*Cox, supra,* 3 Cal.3d at p. 217); family status (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721); sexual orientation (*Rolon v. Kulwitzky* (1984) 153 Cal.App.3d 289, 292); and persons under the age 18 (*O'Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790, 794). (*Hessians Motorcycle Club v. J .C. Flanagans et al.* (2001) 86 Cal.App.4th 833, 836 [*Hessians Motorcycle Club*].)

Thus, in addition to making arbitrary sex discrimination by a business unlawful, the Unruh Civil Rights Act also prohibits a business establishment's barring a prospective customer solely on that individual's manner or mode of dress or unorthodox appearance. (*Cox, supra,* 3 Cal.3d at p. 217.)[4] In *Cox*, the California Supreme Court held that the Unruh Civil Rights Act protected prospective customers with long hair and unconventional dress from arbitrary exclusion from a shopping center. (*Cox, supra,* 3 Cal.3d at p. 217.)[5]

This is not to suggest that dress codes *per se* are unlawful. As the *Cox* Court notes, "[a] business establishment may, of course, promulgate reasonable deportment regulations that are rationally related to the services performed and the facilities provided." (*Cox, supra,* 3 Cal.3d at p. 217; see *Orloff v. Los Angeles Turf Club* (1951) 36 Cal.2d 734, 740-741.)

In *Harris*, the Supreme Court adopted a three-part analysis, subsequently consistently followed by the courts, to determine the future reach of the Unruh Civil Rights Act consistent with legislative intent. (*Harris, supra,* 52 Cal.3d at pp. 1159-1169; *Hessians Motor Cycle Club, supra,* 86 Cal.App.4th at p. 836.) In determining whether the dress code in issue in this case violates the Unruh Civil Rights Act, this decision follows the *Harris* three-part analysis by examining first, the language of the statute, second, the legitimate business interests asserted by the defendants, and finally, the consequences of allowing the discrimination claim. (*Ibid*.)

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[4] The Supreme Court's decision in *Cox* predated the Legislature's adding "sex" to the enumerated categories protected under the Unruh Civil Rights Act, in 1974. (Added by Stats. 1974, ch.1193, p. 2568, § 1.)

[5] Notwithstanding the Supreme Court's admonition in *Harris, supra,* 52 Cal.3d at pp. 1148-1155, cautioning against courts' future expansion of the Unruh Civil Rights Act's reach, the *Harris* Court did not overrule *Cox* or other earlier decisions where courts had treated the statute's list of statutory classifications as "illustrative rather than restrictive." (*Harris, supra,* 52 Cal.3d at p. 1152; *Hessians Motorcycle Club, supra,* 86 Cal.App.4th at p. 836; *Scripps Clinic v. Superior Ct.* (2003) 108 Cal.App.4th 917, 932.)

Application of *Harris*' Three-Part Analysis

1. Sex as a Protected Basis Under the Language of the Statute

By its clear and unambiguous wording, respondents' dress code expressly bars "men" from wearing dresses or skirts. "Women" are permitted to wear either pants or dresses. Thus, the dress code, on its face, treats prospective customers differently based on their sex.

Such a sex-based dress code in a business establishment may violate the Unruh Civil Rights Act. In *Hales v. Ojai Valley Inn and Country Club* (1977) 73 Cal.App.3d 25, 28, the court held that a male patron in a "leisure suit" who was refused service at the country club because he was not wearing a tie, while female patrons in leisure suits were served food and drink, stated a cause of action for sex discrimination under the Unruh Civil Rights Act.[6]

The Department and amicus curiae assert that respondents' dress code, as applied specifically and intentionally against transgenders, is a form of sex stereotyping. They argue that such sex stereotyping constitutes unlawful discrimination based on sex, as recognized by the United States Supreme Court in the Title VII employment case *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 250-251. In *Price Waterhouse*, the Supreme Court held that being treated differently by one's employer for not conforming to sex stereotypes of "femininity" is cognizable as sex discrimination under Title VII [42 U.S.C. § 2000e et seq.]. (*Ibid.*) [7]

The Unruh Civil Rights Act prohibits "all forms of stereotypical discrimination…." (*Koire v. Metro Car Wash, supra,* 40 Cal.3d at pp. 35-36.) In *Koire*, the California Supreme Court that a business establishment's policy of charging men and women different prices

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[6] The court in *Hales* reversed the trial court's sustaining of a demurrer without leave to amend, stating, "Whether the requirement that men wear ties but women need not is arbitrary or reasonable … requires a factual showing as to what is meant by the term "leisure suit" and by a factual determination, based on the nature of defendant's establishment and on local community standards of dress for both sexes. (*Hales v. Ojai Valley Inn and Country Club, supra,* 73 Cal.App.3d at pp. 28-29.)

[7] Under Title VII, it is unlawful to fire a woman because she does not "look like a woman" if that entails imposing a stereotyped view of what constitutes "feminine appearance." (See *Price Waterhouse v. Hopkins, supra,* 490 U.S. at 235-37 [stating that supervisor's view that female employee should "dress more femininely" evidences sex stereotyping and discrimination].) Current federal jurisprudence, post-*Price Waterhouse,* has applied the Supreme Court's analysis to recognize the rights of transgenders and transsexuals to be protected from discrimination based on sex. (See for example, *Schwenk v Hartford* (9th Cir. 2000) 204 F.3d 1187 [transsexual prisoner assaulted by guard stated a claim for sex discrimination based on *Price Waterhouse*]; *Rosa v. Park West Bank & Trust Co.* (1st Cir. 2000) 214 F.3d 213 [bank customer in "feminine "attire, whose loan application was refused because he was not dressed in masculine clothes, stated a claim for sex discrimination, citing *Price Waterhouse*]; *Smith v. City of Salem* (6th Cir. 2004) 378 F.3d 566 [transsexual fire department officer who manifested a "feminine" appearance stated a claim for sex stereotyping under *Price Waterhouse*]; *Barnes v. City of Cincinnati* (6th Cir. 2005) 401 F.3d 729 [transsexual police officer established a prima facie case of sex discrimination involving sex stereotyping, as recognized in *Price Waterhouse*].)

constituted "sex-based discounts [which] impermissibly perpetuate sexual stereotypes," in violation of the Unruh Civil Rights Act. (*Ibid.*)[8]

Here, respondents' policy is both based on and promulgates the sex stereotype that men should not wear clothing traditionally associated with exclusively "feminine" attire. As such, the policy is a form of discrimination on sex-based stereotypes.[9] And as the Department and amicus persuasively argue, under the Unruh Civil Rights Act, the exclusion of a prospective customer for failing to conform to such sex stereotypes is unlawful, under *Koire v. Metro Car Wash*, unless it can be justified by a legitimate business reason.

Moreover, to the extent that dresses or skirts are not conventionally, in this culture, worn by men, respondent's dress code on its face also regulates "unconventional" dress or appearance, a protected category first recognized by the California Supreme Court in *Cox.* (*Cox, supra,* 3 Cal.3d at p. 217.)

Whether respondents' dress code is arbitrary discrimination that violates the Unruh Civil Rights Act, however, requires analysis of the legitimacy of respondents' business interests underlying the dress code and whether there is a rational relationship between the dress code and respondents' club and facilities. (*Harris, supra,* 52 Cal.3d at pp. 1162-1163; and *Cox, supra,* 3 Cal.3d at p. 217.)

2. Legitimate Business Reasons

Respondents assert that their dress code is justified for legitimate business reasons relating to the safety and security of the nightclub. Specifically, respondents assert that prior to institution of the dress code, customers mistook "men wearing dresses" for anatomical females, and fights resulted. Respondents also assert that some transgenders wearing skirts danced provocatively and offended other customers. Respondents next assert that some of the transgender individuals at the club were involved in acts of solicitation. Finally, respondents assert that it is more difficult to check for a weapon at the door if a "man is dressed in a skirt."

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[8] The California Supreme Court has granted review of a recent Unruh Civil Rights Act decision where a club charged customers different admission fees based on their sex. (*Angelucci v. Century Supper Club*, review granted Oct. 19, 2005, S136154.)

[9] Respondents cite *Hessians Motor Cycle Club, supra*, 86 Cal.App.4th at p. 836, and *Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744, upholding, respectively, a sports bar's ban on wearing motorcycle club colors, and a county fair's ejection of a member of the Hell's Angels who refused to take off motor cycle club insignia. Respondents argue that these cases authorize respondents' dress code as a mere regulation of clothing. The Department, however, persuasively argues that these cases are distinguishable, because they apply to all individuals, regardless of any protected bases under the Unruh Civil Rights Act. This is a significant distinction. (Gov. Code, § 51, subd. (c).) Neither case regulates the right of entry on the basis of sex-based dress code, as occurred here.

The Department disputes the legitimacy of respondents' claimed business reasons, asserting that they lack evidentiary support in the record and that the business reasons are themselves based on impermissible sex and gender stereotypes.

While a business must take reasonable steps to preserve the safety and security of their place of business (*Cox, supra,* 3 Cal.3d at p. 217), the security issues identified by respondents here relate to customers' conduct, not their attire. The offending individuals, none of whom was identified in the record, were all customers at the club whose behavior deviated from socially acceptable norms—dancing lewdly or provocatively, fighting, carrying weapons or soliciting sex acts. Respondents' dress code is misguided, because it focuses on attire, not the underlying problem behavior. And notably, the record showed that it was non-transgender customers who instituted most of the objectionable conduct at the nightclub.

It is significant that there was never a suggestion or even a hint of evidence in the record that complainant Arreola ever participated in any improper conduct, whether at Marion's Place or elsewhere.

As the Court noted in *Cox,* "Clearly, an entrepreneur need not tolerate customers who damage property, injure others, or otherwise disrupt his business." (*Cox, supra,* 3 Cal.3d 205, at p. 217.) However, an individual who has committed no misconduct cannot be excluded solely because he or she falls within a class of persons whom the owner believes is more likely to engage in misconduct than other classes. (*Marina Point, Ltd. v. Wolfson, supra,* 30 Cal.3d at p. 725; *Orloff v. Los Angeles Turf Club, supra,* 36 Cal.2d at pp. 740-741; *Stoumen v. Reilly* (1951) 37 Cal.2d. at p. *716; Rolon v. Kulwitzky, supra,* 153 Cal.App.3d at p. 292.)[10] Thus, under established Unruh case law, complainant may not be excluded simply because other customers, even transgender customers in skirts, engaged in misconduct.

Furthermore, the evidence in this case does not support respondents' assertion that the dress code bears a rational relationship to the safety and security of the business. The record showed, for example, that non-transgender female prostitutes came to respondents' club and solicited sex acts on the premises. Respondents, however, did not impose a dress code to regulate female prostitutes' clothing. Respondents further assert that the dress code prevented fights. The record showed, however, that most fights at the club did not involve transgenders in skirts. Respondents next assert that it is men who carry weapons, and that if men are allowed to wear skirts, security can not perform weapons searches. This argument is unpersuasive. Respondents, of course, have a legitimate interest in preventing customers' from bringing weapons into their club, but how a skirt thwarts an effective search was not made clear.

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[10] As the California Supreme Court noted in *Stoumen v. Reilly, supra,* 37 Cal 2d at p. 716:

> Members of the public of lawful age have a right to patronize a public restaurant and bar so long as they are acting properly and are not committing illegal and immoral acts; the proprietor has no right to exclude or eject a person 'except for good cause,' and if he does so without good cause he is liable in damages. (See Civ. Code, §§ 51, 52).

Respondents also objected to lewd and provocative dancing by certain transgender individuals wearing short skirts. Respondent Lopez testified that these individuals would "wiggle their butts and it didn't look right," indicating that respondents' objection had more to do with subjective opinion on what was "appropriate," rather than issues of safety or security. One particular incident shortly preceded respondents' adoption of the dress code. Alex Gomez, head of security, testified that one night a transgender dancing in a very short skirt bared male genitalia, and that when Gomez informed respondent Lopez of the incident, Lopez announced, "No more guys in skirts." Respondents' decision at that time was to bar all "men in skirts," rather than address the conduct of that particular individual to prohibit nude displays of genitalia.

As applied, respondents' dress code requires that respondents' security personnel at the club entrance exercise the power to ascertain a prospective customer's sex. As amicus persuasively argues, "Short of performing genital checks on all patrons … wearing a dress or a skirt, … security staff is forced to rely on unlawful sex stereotypes in order to enforce this dress code." Such reliance on subjective perceptions of who appears "sufficiently feminine" or "too masculine" runs the inherent danger of arbitrarily imposing unlawful sex stereotypes to bar or permit a prospective customer into the club if wearing a skirt.

In sum, respondents' articulated business reasons of safety and security are not shown in this case to be rationally related to respondents' adoption of the dress code.

3. Consequences of Recognizing This Claim

The Department asserts that recognizing this claim furthers the purpose of the Unruh Civil Rights Act to guarantee access to public accommodations by all persons, regardless of their sex or other protected characteristic that has "no bearing on a person's status as a responsible consumer." (*Harris, supra,* 52 Cal.3d at p. 1168.) Respondents argue that if their dress code is found to violate the Unruh Civil Rights Act "no business owner may impose any dress code."

The Department's argument is persuasive. Recognizing complainant's right not to be excluded from respondents' club based on her apparel upholds the intent and underlying purposes of the Unruh Civil Rights Act. (*Harris, supra,* 52 Cal.3d at p. 1168.) The evidence did not establish that complainant's wearing a dress or skirt had any bearing on her being a responsible customer in the nightclub.

Moreover, contrary to respondents' dire predictions, the right of a business to regulate the conduct of its business by reasonable deportment regulations is preserved.[11] This decision is a narrow one, finding that dress codes *per se* are not unlawful; however, where a dress code impermissibly and arbitrarily discriminates on the basis of sex, as occurred here, and is not justified by legitimate business reasons, it is in violation of the Unruh Civil Rights Act.

Thus, based on the foregoing, the Department established that respondents' dress code violates the Unruh Civil Rights Act, Civil Code section 51, as incorporated in the FEHA by Government Code section 12948.

Respondents' Liability

The Department's second amended accusation charges Marion's Place, Inc., Marion Lopez dba Marion's Place, and Mary Ann Lopez Dewitt dba Marion's Place as respondents in this proceeding. The evidence established that Marion Lopez founded and owned the business known as Marion's Place in partnership with his late wife. The club business was incorporated in 2004, after the filing of the original accusation in this case.

The evidence showed that Marion's Place, Inc., acquired all of Marion's Place's assets and equipment, kept the same employees, principals and managers, and operated continuously in the same line of business and at the same location. Thus, Marion's Place, Inc., qualifies as a successor-in-interest business establishment under the FEHA. (See *DFEH v. La Victoria Tortilleria, Inc.* (Apr. 4, 1985) No. 85-04, 17-18, FEHC Precedential Decs. 1984-85, CEB 13 [1985 WL 62883 (Cal.F.E.H.C.)].) Accordingly both respondent Marion Lopez, as the owner at the time of the acts alleged herein, and Marion's Place, Inc., the successor entity, are liable for the violation of complainant's rights under the Unruh Civil Rights Act as incorporated in the FEHA.

The evidence was insufficient, however, to determine any liability of respondent Mary Ann Lopez Dewitt as an owner or in a capacity doing business as Marion's Place. Accordingly, the accusation against her will be dismissed.

Remedy

Having established that respondents violated the Act, the Department is entitled to whatever forms of relief are necessary to make complainant whole for any loss or injury she

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[11] Notably, the Legislature has recognized California employers' right to impose dress codes in the workplace, consistent with their employees' gender identity, as follows:

> Nothing in this part relating to gender-based discrimination affects the ability of an employer to require an employee to adhere to reasonable workplace appearance, grooming, and dress standards not precluded by other provisions of state or federal law, provided that an employer shall allow an employee to appear or dress consistently with the employee's gender identity. (Gov. Code, § 12949.)

suffered as a result. The Department must demonstrate, where necessary, the nature and extent of the resultant injury, and respondent must demonstrate any bar or excuse it asserts to any part of these remedies. (Gov. Code, § 12970, subd. (a); Cal. Code Regs., tit. 2, § 7286.9*; Donald Schriver, Inc. v. Fair Empl. & Hous. Com.* (1986) 220 Cal.App.3d 396, 407; *Dept. Fair Empl. & Hous. v. Madera County* (Apr. 26, 1990) No. 90-03, FEHC Precedential Decs. 1990-91, CEB 1, pp. 33-34 [1990 WL 312871 (Cal.F.E.H.C.)].)

The Department's second amended accusation seeks compensatory damages for emotional distress, out-of-pocket losses, attorney's fees, an administrative fine, and affirmative relief.

A. Make-Whole Relief

1. Compensatory Damages for Emotional Distress

The Department seeks an award of compensatory damages as a result of emotional injury complainant suffered as a result of respondents' unlawful conduct. The Department seeks three times the amount of actual damages, citing Civil Code section 52 as authority for the Commission to treble any such damages awarded. The Department argues that Civil Code section 52 applies to Commission proceedings because Government Code section 12970, subdivision (a)(3), permits the Commission to order "actual damages as may be available in civil actions."

Government Code section 12970, subdivision (a)(3), added to the FEHA as part of broad revisions to the Commission's remedial authority on January 1, 1993 (Stats. 1992, ch. 911), provides that the Commission, on finding that a respondent has engaged in an unlawful practice, may order, *inter alia*:

> The payment of actual damages as may be available in civil actions under this part, except as otherwise provided by this section.
> (Gov. Code § 12970, subd. (a)(3).)

"In analyzing statutory language, we seek to give meaning to every word and phrase in the statute to accomplish a result consistent with the legislative purpose, i.e., the object to be achieved and the evil to be prevented by the legislation. [citations omitted] (*Kizer v. Hanna* (1989) 48 Cal. 3d 1, 8 [citations omitted] 'If a statute's language is clear, then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.'].)" (*Harris, supra*, 52 Cal.3d at p. 1159.)

The plain language of Government Code section 12970, subdivision (a)(3), is self-limiting. The Legislature expressly qualified the Commission's remedial authority under subdivision (a)(3) to reach actual damages awardable in civil proceedings under *this part*. "This part" is Part 2.8, the FEHA, Government Code sections 12900, et seq. Civil proceedings that can be maintained under "this part," as an alternative to the Commission's administrative proceedings, are found at Government Code sections 12965, subdivisions (b),

(c) and (d); 12980, subdivision (h); 12989; 12989.1; 12989.2 and 12989.3. The FEHA does not incorporate damages that may be awardable by a civil court under Civil Code section 52.

Moreover, in Government Code section 12970, subdivision (a)(3), the Legislature expressly excepted actual damages "as otherwise provided by this section." This exception includes the statutory measure for compensatory damages for emotional distress awardable in administrative proceedings before the Commission. (Gov. Code § 12970, subd. (a)(3).)

As the Department is seeking compensatory damages for complainant's emotional distress, and as such damages are expressly provided for at Government Code section 12970, subdivision (a)(3), the Department's argument that Civil Code section 52 provides the measure of damages in this case, including the trebling of actual damages, is unavailing.[12]

Accordingly, Government Code section 12970, not Civil Code section 52, governs the award of damages by the Commission under Government Code section 12948, incorporating the Unruh Civil Rights Act.

Government Code section 12970, subdivision (a)(3), authorizes the Commission to award damages to compensate for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses in an amount not to exceed, in combination with any administrative fines imposed, $150,000 per aggrieved person per respondent. (Gov. Code, § 12970, subd. (a)(3).) In determining whether to award damages for emotional injuries, and the amount of any award for these damages, the Commission considers relevant evidence of the effects of discrimination on the aggrieved person with respect to: physical and mental well-being; personal integrity, dignity, and privacy; ability to work, earn a living, and advance in his or her career; personal and professional reputation; family relationships; and, access to the job and ability to associate with peers and coworkers. The duration of the injury and the egregiousness of the discriminatory practice are also factors to be considered. (Gov. Code, § 12970, subd. (b); *Dept. Fair Empl. & Hous. v. Aluminum Precision Products, Inc.* (Mar. 10, 1988) No. 88-05, FEHC Precedential Decs. 1988-89, CEB 4 [1988 WL 242635 (Cal.F.E.H.C.)].)

The evidence at hearing established that Arreola was humiliated and angry by being denied admission into Marion's Place because she was dressed in a skirt. She felt embarrassed and humiliated to be judged a man, and felt ridiculed by the security staff. These feelings were particularly acute because it had happened in front of her friend, Jesus Morales. Up to that point, Arreola had very much enjoyed dressing her best to go out with her friends at a club. She no longer enjoyed confidence in her appearance because of her treatment at respondents' nightclub. The rejection by Marion's Place also made Arreola cry with feelings of powerlessness and anger, as for so many years she had been trying to

[12] The Department's second amended accusation also seeks complainant's "reasonable attorney's fees" under Civil Code section 52. Even if the Commission were authorized to apply Civil Code section 52, complainant was not represented by counsel in this proceeding.

live her life as a woman and had applied for political asylum, based on her transgender identity.

It was more than six or seven months before Arreola, with some reluctance, and only after being urged by friends, went back to Marion's Place. Too afraid to wear a skirt, she instead wore tailored pants, and was admitted to the nightclub. Arreola visited Marion's Place twice more in 2003. She remained fearful of being rejected at the door and embarrassed, so wore pants, not a skirt, and was admitted to the nightclub.

Considering the facts of this case in light of the factors set forth in Government Code section 12970, subdivision (a)(3), respondents will be ordered to pay complainant $2,500 in actual damages for her emotional distress. Interest will accrue on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment.

2. Out of Pocket Losses

The Department sought an order directing respondents to pay complainant all costs and expenses incurred in filing and pursuing her complaint of discrimination.

Complainant credibly testified that she missed two days of work in order to attend the hearings, and that she normally worked an eight-hour shift and was paid at the hourly rate of $7.25. To compensate complainant's out of pocket losses, she will be awarded $116 in lost wages. Interest shall accrue on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment.

B. Administrative Fine

The Department seeks an order of an administrative fine for respondents' "willful, intentional and purposeful discrimination." The Commission has the authority to order administrative fines where it finds, by clear and convincing evidence, a respondent guilty of oppression, fraud, or malice, express or implied, as required by Civil Code section 3294. (Gov. Code, § 12970, subd. (d).) The amount of an administrative fine, in combination with any amount awarded to compensate for emotional distress, can not exceed $150,000 per respondent. (Gov. Code, § 12970, subd. (a)(3).) The monies derived from any administrative fine awarded are to be deposited in the state's General Fund. (Gov. Code, § 12970, subd. (d).)

In determining the appropriate amount of an administrative fine, the Commission shall consider relevant evidence of, including but not limited to, the following: willful, intentional, or purposeful conduct; refusal to prevent or eliminate discrimination; conscious disregard for the rights of the complainant; commission of unlawful conduct; intimidation or harassment; conduct without just cause or excuse, or multiple violations of the Act. (Gov. Code, § 12970, subd. (d).)

Here, respondents' imposition of a dress code in an attempt to address issues between some of its transgender and heterosexual customers, while misconceived and arbitrary, and found in this decision to be in violation of the Unruh Civil Rights Act, does not rise to the level of willful, malicious, oppressive or fraudulent conduct envisaged under Government Code section 12970 or Civil Code section 3294. Thus, this proposed decision will not order an administrative fine.

C. Affirmative Relief

The Department asks that respondents be ordered to: cease and desist from discriminating against complainant and all other of their customers on the bases of actual or perceived sex, sexual orientation or gender identity; develop and implement a written policy prohibiting discrimination; conduct training for all owners, managers, supervisors and employees regarding that policy; develop and implement a formal complaint process for customers; and the posting of notices, as forms of affirmative relief, under the Act.

The Act authorizes the Commission to order affirmative relief, including an order to cease and desist from any unlawful practice, and an order to take whatever other actions are necessary, in the Commission's judgment, to effectuate the purposes of the Act. (Gov. Code, § 12970, subd. (a)(5).)

Respondents will be ordered to cease and desist from imposing its dress code to the extent that it discriminates against individuals based on sex. Respondent will also be ordered to post a notice acknowledging its unlawful conduct toward complainant (Attachment A) along with a notice of customers' rights and obligations regarding unlawful discrimination under the Act (Attachment B). Finally, respondents will be ordered to provide training on discrimination under the Unruh Civil Rights Act to its corporate president, directors and officers, current managers and supervisors, and all employees currently working at Marion's Place.

ORDER

1. The accusation against respondent Mary Ann Lopez Dewitt only is dismissed.

2. Respondents Marion Lopez and Marion's Place, Inc., shall immediately cease and desist from arbitrarily discriminating against customers and prospective customers based on sex.

3. Within 60 days of the effective date of this decision, respondents Marion Lopez and Marion's Place, Inc., jointly and severally, shall pay to complainant Francis Arreola the amount of $2,500 in emotional distress damages. Interest shall accrue on this amount at the rate of ten percent per year, compounded annually, running from the effective date of this decision to the date of payment.

4. Within 60 days of the effective date of this decision, respondents Marion Lopez and Marion's Place, Inc., jointly and severally, shall pay to complainant Francis Arreola the amount of $116 in lost wages. Interest shall accrue on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment.

5. Within 60 days of the effective date of this decision, respondent Marion's Place, Inc., shall develop a written policy prohibiting discrimination and conduct training for all owners, managers, supervisors and employees currently working at Marion's Place, regarding that policy, at respondents' expense.

6. Within 10 days of the effective date of this decision, respondent Marion's Place, Inc.'s president or other authorized representative of respondent Marion's Place, Inc., shall complete, sign and post a clear and legible copy of the notice conforming to Attachment A. This notice shall not be reduced in size, defaced, altered or covered by any material. Attachment A shall be posted for a period of 90 working days.

7. Within 100 days after the effective date of this decision, respondents Marion Lopez and Marion's Place, Inc., shall notify the Department and the Commission in writing of the nature of their compliance with sections three though six of this Order.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5 and California Code of Regulations, title 2, section 7437. Any petition for judicial review and related papers should be served on the Department, Commission, respondent, and complainant.

DATED: January 9, 2006

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CAROLINE L. HUNT
Administrative Law Judge

ATTACHMENT A

MARION'S PLACE, INC.

NOTICE TO ALL PROSPECTIVE CUSTOMERS

Posted by Order of the
FAIR EMPLOYMENT AND HOUSING COMMISSION
An Agency of the State of California

After a full hearing, the California Fair Employment and Housing Commission has found that Marion's Place, Inc.'s dress code violated the Fair Employment and Housing Act and Unruh Civil Rights Act as a form of arbitrary discrimination against a prospective customer based on sex. (Gov. Code, § 12948, Civil Code § 51.) (*Dept. Fair Empl. & Hous. v. Marion's Place, Inc., et al.* (2006) No. 05-_____.)

As a result of the violation, Marion Lopez and Marion's Place, Inc., have been ordered to post this notice and to take the following actions:

1. Cease and desist from arbitrarily discriminating against individuals based on sex in violation of the provisions of the Unruh Civil Rights Act as incorporated into the Fair Employment and Housing Act.

2. Pay the customer compensatory damages for emotional distress and out of pocket damages.

3. Adopt a policy of customers' rights and remedies regarding discrimination based on sex and conduct training about these rights.

4. Post a notice concerning customers' rights and remedies regarding discrimination based on sex.

Dated: _____ By: _____
Authorized Representative for Marion's Place, Inc.

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL REMAIN POSTED FOR NINETY (90) CONSECUTIVE WORKING DAYS FROM THE DATE OF POSTING AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.