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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

B. BIRGIT KOEBKE et al., Plaintiffs and Appellants, v. BERNARDO HEIGHTS COUNTRY CLUB, Defendant and Respondent.	D041058 (Super. Ct. No. GIC767256)

APPEAL from a judgment of the Superior Court of San Diego County, Charles R. Hayes, Judge. Affirmed in part and reversed in part.

Lambda Legal Defense and Education Fund, Inc., Jon W. Davidson; and H. Paul Kondrick for Plaintiffs and Appellants.

Jordan C. Budd for ACLU Foundation of San Diego & Imperial Counties; James D. Esseks and Romana Mancini for ACLU Foundation Lesbian & Gay Rights Project; Miranda D. Junowicz and Steven C. Sheinberg for Anti-Defamation League; Nancy Hogshead-Makar for Women's Sports Foundation; Nancy M. Solomon for California

Women's Law Center; and Shannon Minter and Courtney Joslin for National Center for Lesbian Rights as Amici Curiae on behalf of Plaintiffs and Appellants.

Morrison & Foerster, John R. Shiner and Rick Bergstrom for Defendant and Respondent.

SUMMARY OF HOLDING

On this appeal from an order granting summary judgment, we must decide whether the defendant Bernardo Heights Country Club (BHCC) engaged in discrimination under the Unruh Civil Rights Act (hereafter Unruh) (Civ. Code, § 51)[1] or the San Diego Municipal Code based upon gender, sexual orientation or marital status against plaintiffs B. Birgit Koebke and Kendall E. French (together sometimes, plaintiffs), a lesbian couple who are registered domestic partners, when it refused to grant the same membership privileges at its golf and country club to plaintiffs that it grants to married, heterosexual couples. We further must decide whether, even if BHCC's membership bylaws on their face were not discriminatory, Koebke and French have nevertheless raised a triable issue fact that BHCC applied these bylaws in a discriminatory manner. Specifically, Koebke and French assert that their evidence established a triable issue of fact that the BHCC granted unmarried, heterosexual couples family membership privileges, while denying those same privileges to them.

We conclude that BHCC's policies, as written, do not discriminate on the basis of gender or sexual orientation, only marital status. We further conclude, applying the

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1 All further statutory references are to the Civil Code unless otherwise specified.

principles of the California Supreme Court's decision in *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142 (*Harris*), that Unruh does not preclude a country club from limiting membership benefits based upon marital status. We therefore uphold the court's summary adjudication of those claims and that portion of the judgment entered in BHCC's favor.

However, we also conclude that Koebke and French presented sufficient evidence to raise a triable issue of material fact on their claim that BHCC applied its membership bylaws in a discriminatory manner by granting unmarried, heterosexual couples family membership privileges, while denying those same privileges to them, and we therefore reverse the judgment entered in favor of BHCC as to this claim.

INTRODUCTION

In 1987, Koebke purchased a membership in BHCC. Such memberships, while issued to an individual, are for the member and his or her "family." This entitles a "member's legal spouse and unmarried sons and daughters under the age of twenty-two (22) residing with them" to use BHCC's facilities, including its golf course, without having to pay any additional fees for the spouse or children. By contrast, guests of a member are not allowed to play golf more than six times a year, more than once every two months, and must pay a green fee of between $40 and $75 dollars each time they use the course. Further, a membership may only be transferred to a legal spouse or child upon the member's death.

BHCC refused to recognize French as a family member within its membership bylaws and informed Koebke and French that the only way French could have full

member benefits was for her to purchase an additional membership. According to Koebke and French, BHCC at the same time allowed unmarried, heterosexual couples to enjoy family membership benefits, and allowed other members to play golf with individuals who were not within the definition of a family member under the membership rules. Koebke and French also contend that they were subjected to hostility and harassment at BHCC because of their sexual orientation and sex.

In May 2001, Koebke and French filed a complaint, which they amended twice.[2] The complaint set forth five causes of action: (1) violation of Unruh by discriminating against Koebke and French on the basis of their sexual orientation,[3] marital status and gender; (2) violation of San Diego Municipal Code section 52.9601 et seq. by discriminating against them on the basis of their sexual orientation; (3) violation of section 53 by imposing discriminatory restrictions on the use or transfer of real property; (4) fraud and misrepresentation; and (5) declaratory relief seeking a declaration that certain BHCC bylaws and policies were void and that certain actions by BHCC violated its own bylaws.

BHCC brought a motion for summary judgment, asserting that it treated individuals differently based not upon their sex or sexual orientation, but on the basis of

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2 All further references to the complaint filed in this action shall be to the second amended complaint.

3 We use the term "sexual orientation," as opposed to "sexual preference," the phrase used by BHCC in its brief, to refer to this claimed discrimination. This is the term used in California's antidiscrimination laws. (See Civ. Code, § 51.7; Ed. Code, § 32228; Ins. Code, § 10140.)

their marital status, which it argued was lawful. Koebke and French opposed the motion, asserting that Unruh prohibited marital status discrimination and that they were actually discriminated against based upon their sexual orientation, sex and marital status. The court granted BHCC's motion, finding as a matter of law that BHCC did not provide membership privileges to Koebke and French that were different than those provided to other unmarried couples.

On this appeal Koebke and French assert that the court erred in granting BHCC's motion for summary judgment because (1) triable issues of fact exist as to whether they were discriminated against on the basis of their sexual orientation and gender because BHCC enforced its membership bylaws in a discriminatory manner; and (2) even assuming BHCC applied its membership policies in a manner that treated all unmarried couples the same, as written, they discriminated against Koebke and French on the basis of marital status, sexual orientation and gender. For the reasons discussed below, we reverse that portion of the judgment entered in favor of BHCC on Koebke and French's claim that BHCC granted unmarried, heterosexual couples family membership privileges, while denying those same privileges to them, and therefore we reverse the judgment entered in favor of BHCC as to this claim.

FACTUAL AND PROCEDURAL BACKGROUND

In discussing the factual background of this case, we must view the evidence in the light most favorable to the losing parties (here Koebke and French), resolving any evidentiary doubts or ambiguities in their favor. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768 (*Saelzler*).)

A. *The Plaintiffs*

Koebke and French, who are lesbians, have been domestic partners for over 10 years, have entered into a "Statement of Domestic Partnership," and have registered with the state as domestic partners.[4] They are executors and sole beneficiaries of each other's wills, have executed estate planning documents and durable powers of attorney allowing for health care decisions and management of their assets by one another, have agreed to common ownership of their real property, have committed to "sharing with one another the joys and difficulties" of life as each other's family, and would legally marry one another if they could.

B. *The Defendant*

BHCC is a social and recreational club located in San Diego that is owned by its approximately 350 "regular" or equity members. Each member has an equal ownership interest in all of the real property and other assets of BHCC and is liable to it for capital and operational assessments as well as dues and other charges. The facilities at BHCC include a golf course, driving range, putting greens, clubhouse, restaurant, bars, meeting facilities, and pro shop.

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4 Pursuant to Family Code sections 297 and 298.5, "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring" may, subject to certain requirements, register as domestic partners with the State of California, which entitles them to certain benefits and obligations to each other. However, registration as a domestic partner does not establish, or diminish, any rights other than as expressly provided in the Family Code or any other provision of law specifically referring to domestic partners. (Fam. Code, § 299.5, subd. (a).)

All memberships at BHCC are for a member and his or her "family." Junior executive (those under age 35) and regular members are entitled to play golf without limitation and without paying green fees. Further, according to BHCC's bylaws, "Membership entitlements extend to [a] member's *legal spouse* and unmarried sons and daughters under the age of twenty-two (22) residing with them." (Italics added.) All other individuals are treated as "guests" of a member. Guests are limited to playing golf at BHCC six times in any one year and not more than once every two months. Further, guests must pay a green fee of between $40 and $75 every time they play golf.

The bylaws also provide that "[i]n the event of the death of a sole owner of a Regular membership . . . not survived by a spouse, son or daughter, the membership shall terminate," along with all property rights that belong to members. If, however, the member was married or had children, "[t]he legal representative of such person . . . may . . . transfer such membership to the spouse . . . or a son or daughter of the decedent, without payment of any transfer fee to [BHCC]," provided the transferee is accepted for membership.

C. *The Dispute*

In 1987, Koebke purchased a membership in BHCC. Koebke originally joined as a junior executive member and in 1991 converted to a regular membership. The purchase price of a regular membership was $18,000. Members were also required to pay monthly dues and quarterly minimum food charges.

On several occasions, Koebke requested through BHCC's board of directors that she and French be given the same membership privileges as married couples. Koebke

and French also thereafter provided BHCC with a copy of their statement of domestic partnership. However, BHCC refused Koebke's request. BHCC informed Koebke that the only way that she could enjoy "spousal" membership privileges was if she married someone of the opposite sex or if French bought her own membership.

D. *The Complaint*

Koebke and French's complaint stated five causes of action. The first cause of action alleged a violation of Unruh (§ 51), asserting that BHCC discriminated against them on the basis of their gender, sexual orientation and marital status by (1) not allowing Koebke's membership to be transferred upon her death to French because she is female and based on her sexual orientation; (2) refusing to recognize French as Koebke's spouse for purposes of membership benefits despite the fact that they were domestic partners and considered themselves to be each other's spouses; and (3) by allowing unmarried heterosexual couples to have all the benefits of club membership denied to them. In the complaint, Koebke and French cited several examples as evidence that BHCC's bylaws were discriminatory. First, the complaint identified 10 allegedly unmarried heterosexual couples that it asserted were allowed the benefits of membership denied Koebke and French. The complaint identified 26 couples that were allegedly allowed to hold their memberships jointly, when BHCC memberships were individual. The complaint also alleged that while French was required to register as a guest when she played golf at BHCC, other guests were not. It alleged that BHCC restricted women's golf events to weekdays. The complaint also alleged that BHCC's couples events were limited to married and unmarried heterosexual couples. The complaint also alleged that BHCC was

a public accommodation and business establishment subject to prohibitions on discrimination contained in Unruh and the San Diego Municipal Code.

The second cause of action alleged a violation of the San Diego Municipal Code section 52.9601 et seq., which prohibits business establishments that are wholly or partially funded or otherwise supported by the City of San Diego from discriminating against individuals based upon their sexual orientation. The third cause of action alleged a violation of section 53, which prohibits restrictions on the transfer of real property based upon discriminatory reasons. The fourth cause of action alleged fraud and misrepresentation by BHCC because it allegedly represented to Koebke that her membership included her family, without a restriction to a "legal spouse" being able to share her membership benefits.[5] The fifth cause of action sought declaratory relief, requesting a declaration that BHCC's bylaws and policies discriminated against members on the basis of sex, sexual orientation and marital status and were void, their restrictions on conveyances of the membership property interest also discriminated on the basis of sex, sexual orientation and marital status, and its policy of allowing grandchildren to play golf with members without charge violated its bylaws.

E. *Motion for Summary Judgment*

BHCC filed a motion for summary judgment or, alternatively, for summary adjudication of issues, seeking to dispose of the complaint in its entirety. For the

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5 Koebke and French are not pursuing the third and fourth causes of action on this appeal.

purposes of its motion, BHCC did not contest the fact that it was a business establishment wholly or partially funded or otherwise supported by the City of San Diego, so as to come within the terms of Unruh and the San Diego Municipal Code. Rather, it argued that it did not treat individual members differently on the basis of their sex or sexual orientation, but rather on the basis of their marital status, which BHCC claimed was lawful. Further, the motion submitted evidence disputing Koebke and French's claims that they were treated differently than other members who were heterosexual couples.

BHCC submitted the declarations of Buzz Colton, its general manager, and several members of BHCC, as well as excerpts of Koebke's deposition. With regard to the 10 allegedly unmarried couples that Koebke and French alleged were allowed family membership benefits, Colton's declaration stated that two of the identified couples were only social members that had no golf privileges. According to Colton, of the eight identified remaining members, seven were married. Those seven members filed declarations confirming their marital status. Colton admitted that one member, Jeff O'Connor, was not married to his partner, Jodi, but stated that O'Connor represented that he was married to her on his membership application, and that Jodi did not play golf at BHCC. BHCC also submitted a copy of O'Connor's membership application, which stated that Jodi was his "legal spouse." Colton stated that it was only after the filing of this litigation that he became aware that O'Connor was not married, and thereafter requested that O'Connor complete a new application for membership. BHCC submitted O'Connor's declaration, wherein he admitted that Jodi was incorrectly listed on his application as his legal spouse.

As to the 26 couples that Koebke and French identified as holding memberships together, Colton stated that 25 of the memberships were issued to an individual, and one was issued to the couple's trust, an action allowed by BHCC's bylaws. Colton also submitted membership certificates for those individuals, confirming that the memberships were issued to individuals.

Colton also addressed Koebke and French's claim that BHCC required French, but not other guests, to register when she played golf at BHCC. Colton stated that BHCC required members to sign in for guests at the Pro Shop before golfing and submitted a copy of the guest book for 2001 to verify that practice.

According to Colton, BHCC did not restrict women's golf events to weekdays. Rather, they were scheduled by the Women's Golf Association, according to the wishes of those participating in the competition. Colton also addressed the claim that Koebke and French were not allowed to participate in couples' tournaments. Colton explained that they were allowed to participate, but had to play in a foursome with two males because couples foursomes had to consist of two males and two females, similar to mixed doubles in tennis.

Koebke opposed the motion for summary judgment, submitting, among other evidence, her declaration and excerpts from her deposition. Koebke stated that she considered French and herself to be legally married and that she requested in 1995 that that BHCC permit her and French to enjoy the same membership privileges as other spouses. She stated that at the time the majority of other San Diego country clubs allowed membership privileges for "significant others," regardless of the person's sex or

sexual orientation. Koebke stated that after she requested that BHCC allow membership privileges to French, the board of directors proposed amending its bylaws to allow a member's "significant other" to enjoy all membership privileges. However, the definition of significant other was one who was "the opposite sex of the member."

Koebke stated that in 1998 she and French entered into their statement of domestic partnership and that year she again requested that BHCC allow French to enjoy membership benefits. BHCC informed her that the fact she had a domestic partnership agreement was of no concern to BHCC. Koebke was also informed at that time that she could not pass on her membership to French upon her death. She appeared before BHCC's board in December 2000 to request that member privileges be extended to French. BHCC responded in writing that because there was "no provision on the bylaws for a non-spousal partner to have any of the benefits of membership, and the board of directors may not unilaterally change the bylaws," her request would not be granted. The denial also stated that "[t]he board does not view your situation as a gay issue but it is in the same category of other single members who have sought membership privileges for non-spousal partners," and that "[BHCC] does not discriminate against gays." BHCC did state that it would be willing to accept an application from French to join on her own. Koebke also received a letter in 2001 from Thomas Monson, BHCC's attorney and a member of BHCC, stating: "The board of directors recognizes the State of California's strong public policy favoring marriage and believes that BHCC supports that policy as a family-oriented organization." In Koebke's opinion, the "general undertone" of BHCC's board of directors was that if they let Koebke and French share membership privileges,

they would have to "let all gays and lesbians in." According to Koebke, the board and membership's concern was that if she and French were allowed to join as a couple "the flood gates would open" and BHCC would be known as "gay-friendly."

Koebke cited instances in which BHCC allegedly treated nonmarried heterosexual spouses differently than she and French. Koebke stated that a female member, Joni Wexler, informed her that BHCC did not care if couples used its facilities, regardless of whether they were married or not married, as long as the couples were heterosexual. Koebke stated that BHCC knew or should have known that O'Connor and his partner Jodi were not married, and also that Jodi's daughter was allowed to use the facilities without charge even though she was not O'Connor's daughter. Koebke identified a member, Elizabeth Burkholder, who was an LPGA professional golfer, and who, according to BHCC's minutes, BHCC permitted to play golf with her "coach/manager/friend . . . without paying green fees on days Ms. Burkholder plays." Koebke identified Joni and Michael Wexler as, according to what Joni Wexler told her, a couple who played golf together on Michael Wexler's membership before they were married, and BHCC "would just wink, and Joni would play golf." Joni Wexler told Koebke that BHCC knew that she and Michael Wexler were not married when they played golf. According to Koebke, member Larry Simon would play golf with his nonmember neighbor "free all the time, anytime that he wishe[d]." Koebke complained to BHCC, and thereafter "[a]ll hell broke loose" and Simon "made life very difficult for [her] at the club."

Koebke also stated that BHCC's purported "guest policy" was not published until after she filed her lawsuit in 2001, and that the guest sign-in book submitted by BHCC did not have any entries predating her lawsuit. Koebke stated that in her experience, not all guests were required to sign in, but rather this requirement was only enforced when she and French were playing. Indeed, it was not enforced when Koebke brought male guests, only when she brought French to play.

BHCC allowed the Rancho Bernardo High School boys golf team to play at BHCC free of charge. BHCC also allowed the grandson of a member to have the same privileges as a child, even though not allowed by the bylaws.

Koebke referenced a petition drive started to grant her and French the same membership privileges as other couples. However, according to Koebke, when member Astrid Connit tried to put forward the petition she stopped because other members put pressure on her. According to Koebke, since she filed the lawsuit she has played little golf because of the rude treatment she received from other members, including their ignoring her and not letting her hit through if she was golfing by herself. Koebke stated that since she attempted to change BHCC's polices she has been subjected to hostility. In this regard, Koebke referenced an incident when she, French and two clients of Koebke went into the bar after a round of golf and "the mood of the entire room changed so drastically that both of [her clients]" commented on it. Koebke also testified that she was singled out for wearing stirrup pants as being a violation of the dress code and that when she was playing alone she was criticized for playing two golf balls, even though BHCC's president sometimes played two balls.

On the date set for the hearing on the summary judgment motion the court, at Koebke and French's request, continued the hearing to allow them time to conduct further discovery. The court also ordered that supplemental opposition and reply be filed.

In Koebke and French's supplemental opposition, they filed additional declarations and other evidence. They submitted a declaration from member O'Connor, who stated that he was not provided with a copy of BHCC's bylaws when he filled out his membership application. He stated that although not officially married, he considered his partner Jodi to be his spouse or wife, they owned property together, and he considered himself the guardian of Jodi's daughter, Alexis. After he became a member, he would golf with Jodi's daughter, and Jodi would often drive the golf cart. According to O'Connor, he never hid the fact that he was not married, and some members of BHCC knew this fact and that Alexis was not his daughter. Most important, in March 2002, Colton, the general manager of BHCC, told O'Connor that there were other member couples at BHCC who were not in fact married, but played under one membership, and that Koebke had not yet discovered that fact through her lawsuit.

In February 2002, Colton asked O'Connor if he was married to Jodi, and he responded that he was not. After that, he received a new membership application with a letter explaining that only a legal spouse could use the golf course and other facilities at BHCC. Up to that point, he had never been informed that BHCC considered membership benefits as only extending to legal spouses. Upon receiving that information, he elected to discontinue his membership. O'Connor also stated that the atmosphere at BHCC was hostile to Koebke. As an example, he cited an instance when members on the putting

green were discussing the fact that Koebke was a lesbian and asked whether they should invite her over and pay her for putting on a show with her lesbian partner.

Koebke and French also submitted the declaration of Judy Stillman, a member and LPGA golf professional. She stated that there was a strong sense of hostility toward Koebke and French at BHCC. She stated that after she golfed with Koebke, a member told her that she would not have a friend at BHCC if she played with Koebke and French. She also referenced a comment made by a club member who stated that they should get Koebke and French to put on a skit to show them how they do it with their toys, and that they could charge an admission price to help pay for the lawsuit. Stillman also stated that grandchildren and social members were allowed to golf even though such was prohibited by the bylaws. She stated that BHCC did not require members to sign in guests in a guest registration book as claimed by BHCC.

Koebke and French also submitted deposition testimony from Joni Wexler, who stated that her husband told her that he was given permission by then-president of BHCC Don Collett to play golf with Joni before they were married without paying a guest charge. She also testified in her deposition that she was unaware of any guest registration book to sign in guests. Wexler also testified that members stopped playing golf with Koebke after she requested spousal privileges for French and alleged that they had been subjected to discrimination. Excerpts of the deposition of Astrid Connit, a member of the membership committee at BHCC, were submitted. Connit was unaware of any guest registration book at BHCC and had never seen a guest book like the one submitted as evidence by Colton in support of his declaration.

Koebke and French submitted excerpts from the deposition of BHCC's general manager, Colton. In his deposition he admitted that BHCC did not have a member registration book before the lawsuit was filed and did not presently maintain such a book. BHCC made Koebke and French sign in to the guest book when they played together.

In its supplemental reply to Koebke and French's supplemental opposition, BHCC objected to much of the evidence submitted on the basis that it was irrelevant or inadmissible. BHCC also submitted a supplemental declaration from Colton, as well as deposition excerpts from Colton and other members. In Colton's declaration, however, he did not deny that he told O'Connor that there were other unmarried spouses that Koebke had not discovered who received family membership privileges. BHCC also did not submit excerpts from Colton's deposition denying this claim. Rather, BHCC only responded to this evidence by arguing that it was inadmissible hearsay.

In the deposition excerpts of Colton submitted by BHCC, he admitted that the guest registration book did not exist until May 2001, shortly after Koebke and French filed their complaint. Further, while Colton claimed BHCC had another method of having guests sign in prior to May, 2001, he testified he did not have any documents to support that claim as the documents had been "thrown out."

F. *Court's Ruling*

In June 2002, the court granted BHCC's motion for summary judgment, finding:

> "1. The evidentiary objections submitted by the Parties were considered by the Court. The Court disregards all those portions of the evidence it considers to be inadmissible, and therefore declines to give a written ruling on the evidentiary objections. [Citation.] [¶] 2. Defendant's Motion for Summary Judgment is granted. The

> evidence shows that: [¶] a. Defendant did not provide different privileges to the Plaintiffs than to other unmarried couples. Two of the ten couples are Social Members and not entitled to golf privileges. Of the 8 remaining couples, 7 are married and 1 mis-represented their marital status on the application. [Citation.] The fact that Ms. Elizabeth Burkholder, a member of the LPGA, was allowed to play golf with her coach without paying green fees is not persuasive and does not create a triable issue of material fact. [¶] b. Many guests beside French have been required to sign the guest registration book. [Citation.] The member had to inform staff that they were playing with a guest. [¶] c. Women's golf events are scheduled by the Women's Golf Association. [Citation.] [¶] d. Ms. Koebke admits that she and Ms. French have not been prohibited from playing in the couples tournaments. Rather, they were required to play in a foursome with two men. [Citation.] This requirement is imposed on all foursomes. [Citation.]"[6]

Koebke and French requested oral argument. At oral argument BHCC did not request that the court rule on its evidentiary objections and the court made no evidentiary rulings on its own. The court took the matter under submission, after which it confirmed its telephonic ruling. Judgment was entered in BHCC's favor and this appeal follows.

DISCUSSION

I. *Standard of Review*

On an appeal from an order granting summary judgment, we independently examine the record to determine whether a triable issue of material fact exists. (*Saelzler, supra,* 25 Cal.4th at p. 767.) In performing our review, we view the evidence in the light most favorable to the losing parties (here Koebke and French), resolving any evidentiary doubts or ambiguities in their favor. (*Id.* at p. 768.)

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6 We have omitted that portion of the decision discussing the fraud claim as Koebke and French are not pursuing that claim on this appeal.

"[T]he party moving for summary judgment [(here BHCC)] bears the burden of persuasion that there is no triable issue of material fact and that [it] is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted (*Aguilar*).) "A defendant [moving for summary judgment] bears the burden of persuasion that 'one or more elements of' the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense' thereto. [Citation.]" (*Ibid.*; Code Civ. Proc., § 437c, subd. (o).)[7] In such a case, the defendant bears the "initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact." (*Aguilar, supra,* 25 Cal.4th at p. 850.)

If the defendant meets its burden of production, the burden shifts to the plaintiff to make its own prima facie showing of the existence of a triable issue of material fact. (*Aguilar, supra,* 25 Cal.4th at p. 850.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid*., fn. omitted.)

Further, although plaintiffs combined their claims of gender, sexual orientation and marital status discrimination within single causes of action for violation of Unruh, violation of the San Diego Municipal Code, and declaratory relief, we may summarily

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7 Code of Civil Procedure section 437c, subdivision (o) provides: "A cause of action has no merit if either of the following exists: [¶] (1) One or more of the elements of the cause of action cannot be separately established, even if that element is separately pleaded. [¶] (2) A defendant establishes an affirmative defense to that cause of action."

adjudicate any, or all, of them. This is because, for purposes of a motion for summary adjudication, separate wrongful acts are considered separate causes of action, whether they are pleaded within the same cause of action or not. (*Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1854.)

II. *Governing Authority*

A. *Unruh*

Unruh guarantees to "'[a]ll persons within the jurisdiction" of California, "no matter what their *sex, race, color, religion, ancestry, national origin, disability, or medical condition*," the "full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (§ 51, subd. (b), italics added.) Unruh further provides, however, that it "shall not be construed to confer any right or privilege on a person that is conditioned or limited by law or that is *applicable alike to persons of every sex, color, race, religion, ancestry, national origin, disability or medical condition*." (§ 51, subd. (c), italics added.)

Unruh's codification of specific protected categories (sex, race, color, religion, ancestry, national origin, disability, and medical condition) does not make those named categories the only ones protected by its terms. Rather, the statutory classifications were construed as only illustrative of the kinds of discrimination prohibited by the Act. (*In re Cox* (1970) 3 Cal.3d 205, 212, 216-217; *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 725, 730-736 (*Marina Point*).) For example, it has long been acknowledged that Unruh prohibits discrimination based upon sexual orientation, although that category is not expressly enumerated in Unruh. (*Stoumen v. Reilly* (1951) 37 Cal.2d 713, 716-717;

Rolon v. Kulwitzky (1984) 153 Cal.App.3d 289, 291-292; *Curran v. Mount Diablo Council of the Boy Scouts* (1983) 147 Cal.App.3d 712, 733-734.)

Indeed, at one point California cases interpreted Unruh so broadly that it was construed as protecting *all* persons from *all* forms of arbitrary discrimination by a business establishment. (*In re Cox, supra,* 3 Cal.3d at p. 216 [Unruh prohibits discrimination based on long hair and unconventional dress]; *Marina Point, supra,* 30 Cal.3d at p. 724 [Unruh bars rental discrimination against families with children]; *Vaughn v. Hugo Neu Proler International* (1990) 223 Cal.App.3d 1612, 1619 [retaliatory action for pursuing Unruh claim is itself arbitrary discrimination in violation of Unruh].)

However, in *Harris, supra***,** 52 Cal.3d 1142, the California Supreme Court reexamined its earlier decisions giving Unruh such a broad interpretation. In that case the plaintiff claimed a violation of Unruh discrimination based upon a landlord's rental policy of only renting to tenants with a certain minimum income. (*Id.* at p. 1148.) The high court rejected this claim, reexamining its position that Unruh prohibited all "arbitrary discrimination" by a business enterprise. (Id. at p. 1154.) The court held that Unruh's scope was limited to invidious discrimination based on "personal characteristics" or "personal traits"—i.e., such things as a person's geographical origin, physical attributes, or personal beliefs. (*Id.* at pp. 1160-1162.)

However, despite its narrower approach, *Harris* did not overturn previous holdings that Unruh's statutory classifications are not exclusive. Rather, the court held that future expansion of prohibited categories must be carefully balanced to ensure a result consistent with legislative intent. (*Harris, supra,* 52 Cal.3d at pp. 1159-1160.) Now, a

three-step inquiry is required to determine whether a new classification is protected under the Act. Courts must consider (1) the language of Unruh; (2) the defendant's legitimate business interests; and (3) the consequences of allowing the new discrimination claim. (*Id.* at pp. 1159-1169; see also *Hessians Motorcycle Club v. J.C. Flanagans* (2001) 86 Cal.App.4th 833, 836 ["In the wake of *Harris*, courts have consistently followed this three-part analysis when determining whether discrimination which implicates a 'new' classification is prohibited by the Act"].)

Further, as already discussed, section 51, subdivision (c) provides that a restriction is not violative of Unruh if it applies equally to all persons, regardless of their sex, color, race, religion, ancestry, national origin, disability or medical condition. Thus, a landlord's policy limiting rental access does not violate Unruh so long as the policy is applied uniformly to all persons regardless of race, color, sex, religion, etc. (*Harris, supra,* 52 Cal.3d at p. 1155; see also *Hessians Motorcycle Club v. J.C. Flanagans, supra,* 86 Cal.App.4th at pp. 837-838.)

In *Beaty v. Truck Ins. Exchange* (1992) 6 Cal.App.4th 1455 (*Beaty*), the Court of Appeal addressed a discrimination claim similar to that presented by Koebke and French here. The Court of Appeal concluded that a restriction in an insurance policy limiting its issuance to married persons did not discriminate against same sex couples, and also that a claim for marital status discrimination was not cognizable under Unruh. (*Id.* at p. 1457.)

In *Beaty*, the plaintiffs, a cohabitating same sex couple, alleged that an insurer violated Unruh when it refused to offer them the same insurance policy and at the same premium that it regularly offered to married couples. (*Beaty, supra,* 6 Cal.App.4th at p.

1457.) The plaintiffs had lived together for 18 years, owned a home as joint tenants, maintained a joint credit card account and a joint bank account, jointly owned two cars and the furnishings in their home, and had wills and life insurance policies naming each other as primary beneficiary. (*Id.* at p. 1458.) They also had joint homeowners and automobile insurance policies issued by defendant insurer. However, to provide extended additional protection, they applied to the insurer for a joint umbrella liability insurance policy in the amount of $1 million. (*Ibid.*) The insurer refused to issue such a policy for a single premium because such policies were only issued to married couples. Instead, the defendant offered the plaintiffs separate umbrella policies, each with its own premium. (*Ibid.*)

The *Beaty* plaintiffs filed an action seeking damages and injunctive and declaratory relief, contending that the insurer's conduct constituted arbitrary and unlawful discrimination in violation of Unruh. (*Beaty, supra,* 6 Cal.App.4th at p. 1458.) The Court of Appeal affirmed a judgment for the insurer on its demurrer to the complaint. (*Id.* at pp. 1458-1459.) In support of its decision the Court of Appeal first cited to *Hinman v. Department of Personnel Admin.* (1985) 167 Cal.App.3d 516, an action brought by the same plaintiffs, wherein the court rejected plaintiffs' claims, pointing out that the insurer's denial of coverage was not on the basis of sexual orientation but on the basis of marital status, and holding that the classification was valid. (*Beaty, supra,* 6 Cal.App.4th at p. 1459.) As the court in *Beaty* stated, referring to the *Hinman* case: "No evidence was presented showing the denial of coverage to Beaty was on the basis of his or Hinman's sexual orientation. Indeed, the record in that case revealed all unmarried employees

received identical treatment. The distinction was simply 'on the basis of married and unmarried employees . . . not between heterosexual or homosexual ones.' [Citation.]" (*Ibid.*)

The plaintiffs argued that since *Hinman* was decided under the equal protection clause of the California Constitution, the decision was not controlling on the issue of interpretation of Unruh. However, the Court of Appeal in *Beaty* held that the same conclusion must be reached on either theory: "To the extent plaintiffs were treated differently than a 'married couple,' it is because they are not married, not because they are homosexuals." (*Beaty, supra,* 6 Cal.App.4th at p. 1460.) The court further noted that, "'Homosexuals are simply a part of the larger class of unmarried persons . . . . [Defendant's policies] have the same effect on the entire class of unmarried persons. Rather than discriminating on the basis of sexual orientation, [defendant's policies] distinguish eligibility on the basis of marriage. There is no difference in the effect of the eligibility requirement on unmarried homosexual and unmarried heterosexual employees.' [Citsation.]" (*Id.* at p. 1461.)

The Court of Appeal also rejected the plaintiffs' claim that the defendant's action constituted arbitrary discrimination on the basis of marital status in violation of Unruh. The court first noted that while marital status was not specifically enumerated in section 51 as a prohibited form of discrimination, Unruh had been extended to include categories not expressly stated in section 51. However, as the court explained, "no court has extended [Unruh] to claimed discrimination on the basis of marital status and we shall not be the first to do so." (*Beaty, supra,* 6 Cal.App.4th at p. 1462.) The court cited *Harris,*

supra, 52 Cal.3d at pages 1156-1162, wherein the court made it clear that future expansion of prohibited categories should be carefully weighed to ensure a result consistent with the legislative intent. (*Beaty, supra,* 6 Cal.App.4th at p. 1462.) According to *Beaty,* expanding Unruh to include "marital status" discrimination would be contrary to the "strong policy in this state in favor of marriage . . . . It is for the Legislature, not the courts, to determine whether nonmarital relationships such as that involved in this case 'deserve the statutory protection afforded the sanctity of the marriage union.' [Citation.]" (*Id.* at pp. 1462-1463.)

The *Beaty* court also relied on the fact that while there were several statutes in which the Legislature included marital status in antidiscrimination legislation, it chose not to do so in Unruh: "Clearly the Legislature knows how to designate marital status as a prohibited category of discrimination when inclined to do so. Because it has not done so in the Unruh Act, we refuse to do so on our own accord." (*Beaty, supra,* 6 Cal.App.4th at p. 1463.)[8]

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8 For example, the California Fair Employment and Housing Act (FEHA), Government Code section 12900 et seq., specifically prohibits discrimination on the basis of marital status in obtaining housing and employment. (Gov. Code, §§ 12940, 12955; *Smith v. Fair Employment & Housing Com.* (1996) 12 Cal.4th 1143, 1150 (*Smith*).) Moreover, statutes prohibit insurers from declining insurance coverage on the basis of sex, marital status, or sexual orientation. (Ins. Code, § 679.71 (prohibiting insurers from discriminating in issuing coverage on the basis of marital status); Health & Saf. Code, § 1365.5 (prohibiting health care service plans, which include employer-provided health benefits, from declining coverage on the basis of sex, marital status, or sexual orientation). The insurance commissioner has promulgated a regulation prohibiting discriminatory denials of coverage on the basis of sex, marital status, or sexual orientation. (Cal. Code Regs., tit. 10, § 2560.4.)

The court also relied on section 51, subdivision (c) in holding that the plaintiffs could not state a claim under Unruh. The court held that that section's language that it "shall not be construed to confer any right or privilege on a person which is conditioned or limited by law or which is applicable alike to persons of every sex, color, race, religion, ancestry, national origin or blindness or other physical disability" indicated that Unruh "was not intended to create a right of insurance access so long as the insurer's policy is applicable alike to all persons regardless of race, color, sex, religion, etc." (*Beaty, supra,* 6 Cal.App.4th at p. 1463.)

Relying on *Harris, supra,* 52 Cal.3d 1142, the *Beaty* court held that "before extending the categories set forth in the Unruh Act, the court must consider the consequences of allowing the type of claim sought by the plaintiffs . . . . What plaintiffs seek to achieve by this litigation is that both defendant and this court treat them as if they were in fact married. The result would be that all de facto couples would be treated as a married unit. [¶] Any such holding would be contrary to the strong policy in this state favoring marriage [citation] and would ignore the fact that de facto couples are not generally entitled to the benefits afforded married couples. Indeed, married couples receive special consideration in a number of areas not available to unmarried individuals, including the right to bring a wrongful death action if a third party kills one spouse [citations], the right to sue for loss of consortium and negligent infliction of emotional distress [citation], the marital communications privilege [citation], and community property laws, including the right to divide community property and to seek spousal support on the termination of marriage [citations]." (*Beatty, supra,* 6 Cal.App.4th at pp.

1465-1466.) "In the final analysis, plaintiffs' 'real quarrel is with the California Legislature if they wish to legitimize the status of a homosexual partner. Plaintiffs may achieve the reform they seek here only by attacking Civil Code section 4100 [now Fam. Code, § 300], which defines marriage to be a civil contract "between a man and a woman."' [Citation.]" (*Beaty, supra,* 6 Cal.App.4th at p. 1466.)

In *Brown v. Smith* (1997) 55 Cal.App.4th 767 (*Brown*), we recognized the conclusion in *Beaty* that Unruh should not be expanded to include marital status as an additional category of prohibited discrimination. (*Brown, supra,* 55 Cal.App.4th at p. 787.) Relying on *Beaty* and *Harris,* we held that Unruh should not be expanded to include claims of sexual harassment. (*Brown, supra,* 55 Cal.App.4th at p. 787-788.)

In *Smith, supra,* 12 Cal.4th 1143, the California Supreme Court was presented with a claim that Unruh prohibited discrimination based upon marital status, but declined to address the issue as determination of that issue was unnecessary to its holding. In *Smith,* the high court held that a landlord who refused to rent an apartment to an unmarried heterosexual couple based upon the landlord's strong religious beliefs violated the terms of the FEHA, which makes it unlawful for "the owner of any housing accommodation to discriminate against any person because of the . . . marital status . . . of such person." (Gov. Code, § 12955, subd. (a).) As the court explained, "The usual and ordinary meaning of the words 'marital status,' as applied to two prospective tenants, is that a landlord may not ask them whether they are married or refuse to rent to them because they are, or are not." (*Smith, supra,* 12 Cal.4th at p. 1155, fn. omitted.) The court rejected the argument that the landlord's refusal to rent to the plaintiffs was based

upon assumptions about their sexual conduct rather than their marital status. Relying on prior interpretations of the FEHA by courts and administrative agencies, as well as other statutes that used the words "marital status," the high court concluded that refusing to rent an apartment to a couple on the basis that they were unmarried and cohabitating violated the FEHA. (*Smith, supra,* at pp. 1156-1160.)

However, the court also held that because it was basing its decision on the claimed violation of the FEHA, it was "unnecessary to decide whether [Unruh] . . . has the same effect." (*Smith, supra,* 12 Cal.4th at pp. 1160-1161, fn. 11.) In doing so, the high court compared the *Beaty* holding that Unruh did not bar discrimination based upon marital status with dictum in two cases predating *Harris* (*Marina Point, supra,* 30 Cal.3d at p. 736 & *Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 95 (*Frantz*)) indicating that Unruh might bar discrimination based upon marital status. (*Smith, supra,* 12 Cal.4th at pp. 1160-1161, fn. 11.)

B. *San Diego Municipal Code*

San Diego Municipal Code section 52.9605, subdivision (a)(1) provides in part that "[it] shall be an unlawful business practice for any person to deny any individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any business establishment on the basis (in whole or in part) of such individual's sexual orientation . . . ." (Italics omitted.) Subdivision (b), under the title, "Subterfuge," states: "It shall be unlawful to do any of the acts mentioned in this Section for any reason that would not have been asserted, wholly or partially, but for the sexual orientation . . . of any individual." (Italics omitted.) San Diego Municipal Code section

52.9606, subdivision (a)(3) provides in part: "It shall be an unlawful service practice for any person to deny any individual the full and equal enjoyment of, or to impose different terms and conditions upon the availability of, any service, program or facility wholly or partially funded or otherwise supported by the City of San Diego, on the basis (in whole or in part) of such individual's sexual orientation . . . ." (Italics omitted.) Section 52.9606 of the San Diego Municipal Code also has a subdivision prohibiting such discrimination by "subterfuge."[9]

III. *Analysis*

A. *Discrimination Based Upon Gender and Sexual Orientation*

BHCC's bylaws, limiting membership benefits to "legal spouses" does not violate Unruh. Such a restriction does not, as plaintiffs contend, discriminate against them on the basis of sex or sexual orientation. It treats all unmarried individuals, male or female, and regardless of sexual orientation, the same. *No* unmarried couples are entitled to family membership benefits, regardless of the sex or sexual orientation of the partners comprising those couples. (*Beaty, supra,* 6 Cal.App.4th at p. 1461.) The bylaws segregate those entitled to benefits from those that are not based upon their marital status, not their sex or sexual orientation. "There is no difference in the effect of the eligibility requirement on unmarried homosexual and unmarried heterosexual employees." (*Ibid.*)

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9 As noted, *ante*, BHCC, for the purposes of its summary judgment motion and this appeal, does not argue that it is not within the definition of a business establishment under Unruh or the San Diego Municipal Code or that it is funded or otherwise supported by the City of San Diego.

Koebke and French assert that even if BHCC's bylaws on their face only discriminate against unmarried couples of whatever sexual orientation, they in practice discriminate against same sex unmarried couples because, under California law, same sex couples may not marry. (Fam. Code, §§ 300, 308.5.)[10] This contention is unavailing for several reasons.

First, to the extent that this argument is asserting that BHCC's laws have a disparate *impact* upon same sex couples (or women), it is not actionable. Claims for disparate impact discrimination are not actionable under Unruh. (*Harris, supra,* 52 Cal.3d at pp. 1170-1175.) Rather, plaintiffs seeking relief under Unruh must plead and prove *intentional* discrimination against them. (*Id.* at p. 1175.)

Koebke and French deny that they are asserting an adverse impact theory, but rather assert that "[a] policy or a classification, in itself permissible, may nevertheless be illegal if it is merely a device employed to accomplish prohibited discrimination." (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 538.) However, this contention goes to the issue, discussed, *post*, of whether there is a triable issue of fact as to whether, despite the fact BHCC's bylaws apply equally to all unmarried persons, BHCC in fact applied the policies in a discriminatory manner. The bylaws themselves only intentionally discriminate against unmarried persons as a class.

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10 Family Code section 300 provides in part: "Marriage is a personal relation arising out of a civil contract *between a man and a woman* . . . ." (Italics added.) Family Code section 308.5, added in 2000 pursuant to Proposition 22, California's Defense of Marriage Act, provides that "[o]nly marriage *between a man and a woman* is valid or recognized in California." (Italics added.)

We are mindful of plaintiffs' assertion that but for state law they would be married and hence enjoy the same benefits as heterosexual married couples. However, this is not because BHCC's bylaws treat them differently than heterosexual couples, but rather it is because state statutes bar them from becoming legally recognized as married persons. BHCC's bylaws only differentiate between married and unmarried couples. It is state law, and its stated public policy supporting marriage as being only between a man and a woman, that results in the alleged disparate treatment of Koebke and French. (*Beaty, supra,* 6 Cal.App.4th at pp. 1465-1466**.**) BHCC's bylaws do not deny membership privileges based upon gender or sexual orientation.

B. *Discrimination Based on Marital Status*

We also conclude, as did the Court of Appeal in *Beaty*, that Unruh does not prohibit disparate treatment based upon marital status. As discussed, *ante*, the California Supreme Court in *Harris, supra,* 52 Cal.3d 1142, limited Unruh's scope to discrimination based on "personal characteristics" or "personal traits"—i.e., such things as a person's geographical origin, physical attributes, or personal beliefs. (*Id.* at pp. 1160-1162.) The high court also held that future expansion of prohibited categories must be carefully balanced to ensure a result consistent with legislative intent. (*Id.* at pp. 1159-1160.) As already discussed, a three-step inquiry is required to determine whether a new classification is protected under the act. Courts must consider (1) the language of Unruh; (2) the defendant's legitimate business interests; and (3) the consequences of allowing the new discrimination claim. (*Id.* at pp. 1159-1169.)

Here, it is clear that discrimination based upon persons being unmarried is not based upon conduct, but rather a person's status. (*Smith, supra,* 12 Cal.4th at p. 1155.) However, it is not the type of "personal characteristic" envisioned by Unruh, as are such categories as race, sex, age, disability, etc. An unmarried person could fit into any or all of those categories. Being unmarried appears to be a category closer to that which the high court rejected in *Harris*—economic status.

Plaintiffs assert that the California Supreme Court in *Smith, supra,* 12 Cal.4th 1143, by comparing *Beaty* with two pre-*Harris* opinions that indicated in dictum that marital status might be a protected category under Unruh, was indicating that the issue remained unresolved. However, this argument ignores the fact that the two earlier cases (*Marina Point, supra,* 30 Cal.3d 721 & *Frantz, supra,* 189 Cal.App.3d 91) predated *Harris*, and its restrictive view on expansion of the coverage of Unruh in the future. Dictum from those cases is thus not persuasive.

Further, we note, as did the court in *Beaty*, that while the Legislature has in several antidiscrimination statutes included marital status as a protected category, it has chosen not to do so in Unruh. This evidences an intent not to include marital status as a protected category. (*Beaty, supra,* 6 Cal.App.4th at p. 1463.)

Indeed, since the *Beaty* decision was published the Legislature has amended Unruh on three occasions. (See Stats. 1992, ch. 913, § 3, pp. 4283-4284; Stats 1998, ch. 195, § 1, p. 751; Stats. 2000, ch. 1049, § 2, pp. 5812-5813.) Each time, the Legislature declined to add marital status as a protected category, leaving the *Beaty* court's construction of the statute intact. As the California Supreme Court in *Harris* explained:

"'[W]hen the Legislature amends a statute without altering portions of the provision that have previously been judicially construed, the Legislature is presumed to have been aware of and to have acquiesced in the previous judicial construction. Accordingly, reenacted portions of the statute are given the same construction they received before the amendment.' [Citation.]" (*Harris, supra,* 52 Cal.3d at p. 1155.)

Additionally, opinions since *Beaty* have cited its construction of Unruh with approval. (*Brown, supra,* 55 Cal.App.4th at p. 787; *Hessians Motorcycle Club, supra,* 86 Cal.App.4th at p. 836.)

BHCC also has a legitimate business interest in distinguishing membership privileges between married and unmarried couples. If they were compelled to adopt a "significant other" or "domestic partner" policy, they could be placed in the position of investigating or policing whether a person golfing with a member is truly a "significant other" or merely a guest, and, if the policy were abused by members, it could lead to substantial loss of revenue and added expenses from increased use of BHCC's facilities, for which members would have to pay in dues and assessments.

Finally, we must consider the consequences of allowing this type of claim. As the law stands now, a marriage is defined as a union between a man and a woman. Plaintiffs desire that their domestic partnership be placed on an equal footing. This would run contrary to the policy, as engrained in state statutes, supporting the institution of

marriage. (Fam. Code, §§ 300, 308.5.) In sum, we decline to extend the protections of Unruh to one's marital status.[11]

C. *Discriminatory Application of Bylaws*

Plaintiffs assert that even if BHCC's bylaws on their face do not run afoul of Unruh or the San Diego Municipal Code, they discriminate against them on the basis of their sex and sexual orientation because of the discriminatory manner in which they were applied. We conclude that Koebke and French presented sufficient evidence to raise a triable issue of material fact on their claim that BHCC applied its membership rules in a discriminatory manner by granting unmarried, heterosexual couples family membership privileges, while denying those same privileges to them, and we therefore reverse the judgment entered in favor of BHCC as to this claim.

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11 *Beaty* also found support for denying protection under Unruh in the greater rights accorded married persons as compared to domestic partners. (*Beaty, supra,* 6 Cal.App.4th at pp. 1465-1466.) However, since the *Beaty* decision was published in 1992, domestic partners have been given many of the same rights as married persons, including the right to make medical decisions for incapacitated loved ones, adoption of a partner's child, use of sick leave to care for a partner, the right to seek damages for wrongful death, and the right to be named a conservator of a will. (Historical and Statutory Notes, 29C West's Ann. Fam. Code (2004 supp.) foll. § 297, pp. 21-22.) Indeed, legislation enacted in 2003, that will take effect on January 1, 2005, will provide that "[r]egistered domestic partners *shall have the same rights, protections, and benefits,* and shall be subject to the same responsibilities, obligations, and duties *under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.*" (Fam. Code, § 297.5, subd. (a), eff. Jan. 1, 2005, italics added.) Therefore, that portion of *Beaty's* analysis is of minimal support to our conclusion in this matter.

1. *Evidentiary issues*

Before we reach the merits of this issue, we must first address BHCC's objections to much of the evidence submitted by Koebke and French in opposition to its motion for summary judgment. While BHCC interposed written objections to much of the evidence submitted by plaintiffs, at the hearing on the motion BHCC did not request that the court rule on its evidentiary objections. Further, the court, instead of ruling on those objections when it issued its ruling, stated that it disregarded "all those portions of the evidence it considers to be inadmissible, and therefore decline[d] to give a written ruling on the evidentiary objections." (Citing *Biljac Associates v. First Interstate Bank* (1990) 218 Cal.App.3d 1410, 1419 (*Biljac*), superseded by statute on another ground as stated in *Scheiding v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64, 72.) Koebke asserts that because BHCC failed to make a request for a ruling on its objections at the hearing on the summary judgment motion, and because the court failed to rule on the specific objections, we must treat BHCC's objections as having been waived and consider all evidence submitted by plaintiffs.

At first blush, plaintiffs' assertion appears to have some merit. In *Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225 (*Sambrano*), we held that it was not enough for a trial court to state that it has only considered admissible evidence, rejecting the holding of *Biljac, supra,* 218 Cal.App.3d 1410. Rather, we held in *Sambrano* that it is incumbent upon the trial court to make specific rulings on a party's objections to evidence and, if the party making the objections does not make a request that the court rule on them at the hearing, the objections are deemed waived and all evidence may be

considered by the reviewing court. (*Sambrano, supra,* 94 Cal.App.4th at pp. 234-239.) However, despite that conclusion, in *Sambrano* we elected not to treat the objections to the plaintiffs' evidence as having been waived. We held that this was proper as we could determine from the record that the evidence would have been inadmissible as a matter of law. (*Id.* at p. 241.)

In this case, we also need not decide whether to consider all objected-to evidence submitted by plaintiffs in opposition to the summary judgment motion. That is because, as the following section will demonstrate, plaintiffs submitted admissible evidence sufficient to raise a triable issue of fact as to whether BHCC in fact applied its bylaws in a discriminatory manner as to Koebke and French.

2. *Triable issues of fact as to discriminatory treatment*

In addressing whether plaintiffs submitted sufficient evidence to raise a triable issue of fact that unmarried, heterosexual couples were granted membership privileges to which they were not entitled, we again stress that in performing our review, we must view the evidence in the light most favorable to the Koebke and French, resolving any evidentiary doubts or ambiguities in their favor. (*Saelzler, supra,* 25 Cal.4th at p. 767.) "If the evidence is in conflict, the factual issues must be resolved by trial." (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 839.) With these principles in mind, we address the evidence creating a triable issue of fact that BHCC treated Koebke and French differently than other unmarried couples.

This claim is based upon the rule that "[a] policy or a classification, in itself permissible, may nevertheless be illegal if it is merely a device employed to accomplish

prohibited discrimination." (*Roth v. Rhodes, supra,* 25 Cal.App.4th at p. 538.) Thus, Koebke and French can defeat BHCC's motion for summary judgment if they can produce evidence creating an inference that BHCC's facially neutral policies were applied in a discriminatory manner. (*Everett v. Superior Court* (2002) 104 Cal.App.4th 388, 394 [reversing grant of summary judgment on Unruh claim].)

While much of plaintiffs' allegations were successfully rebutted by BHCC and much of the evidence submitted did not show discriminatory treatment, some of plaintiffs' evidence, given the applicable standard of review, was sufficient to raise a triable issue of fact that BHCC applied its bylaws against Koebke and French in a discriminatory manner. First, according to O'Connor, BHCC's general manager Colton told him in March 2002 that there were other member couples at BHCC who at that time were not married, but nevertheless played under one membership and that Koebke "had not 'found that out yet' through her lawsuit." In addressing this statement attributed to Colton, BHCC did not dispute that this statement was in fact made. BHCC did not submit a declaration from Colton denying he made the remark, nor deposition excerpts from Colton to the same effect. Thus, this evidence was essentially undisputed by BHCC.

Also, according to Koebke, the guest book which she and French were made to sign when they played together did not exist before she filed her lawsuit, was not used for other members with guests, and she was not required to sign in when she was golfing with male guests. This was supported by two other members who were unaware of any guest book used at BHCC. Further, although Colton contended that it was used for all

members, the evidence shows that it only was put in place shortly after Koebke and French filed suit, and BHCC submitted no evidence that they ever required guests to register before that time. Colton claimed that evidence was "thrown out." This evidence also creates an inference that Koebke and French were treated in a discriminatory manner and that BHCC may have attempted to hide that fact by creating the guest registration book.

This evidence is sufficient to a raise a triable issue of fact as to whether BHCC applied its bylaws in a discriminatory manner. It was sufficient to defeat summary adjudication of this claim as Koebke and French submitted evidence "sufficient to support an inference" that BHCC's policies were applied in a discriminatory manner. (See *Everett v. Superior Court, supra,* 104 Cal.App.4th at p. 394 [reversing grant of summary judgment on Unruh claim].) Indeed, the admission of Colton, BHCC's general manager, that there were other unmarried member couples that were allowed to golf as a family and that Koebke had simply not been able to discover their identities through the lawsuit, standing alone could support a violation of Unruh if believed by a jury. That fact alone is sufficient to raise a triable issue of fact so as to preclude summary judgment in favor of BHCC.

BHCC's only response to Colton's alleged statement is in a footnote in their respondent's brief, where they claim it was inadmissible hearsay. However, Colton's statement would fall under the exception for admissions of a party opponent. Colton, as the general manager, whose declaration BHCC submitted detailing the policies of BHCC in support of its motion for summary judgment, was authorized to speak for and bind

BHCC. Therefore, the statement, though hearsay, was admissible as an admission by BHCC. (Evid. Code, § 1222; *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1077 [""""whatever is said by an agent . . . within the scope of his authority, . . . is, in legal effect, said by his principal, and admissible as evidence,""" italics omitted].)

BHCC also responds to this evidence by arguing that the "particular member couples who fall within this category" have not been identified. However, this statement misses the point. The identity of these members was within *Colton's* knowledge, and, as Colton himself stated, plaintiffs had not yet discovered their identities through the litigation.

BHCC also complains that Koebke and French's evidence would "hardly establish a pattern of intentional discrimination." However, neither Unruh nor the San Diego Municipal Code requires that plaintiffs establish a "pattern" of discrimination. (Civ. Code, § 51; San Diego Mun. Code, §§ 52.9604-52.9606.) It only requires a single instance of discriminatory treatment. (See *Green v. Rancho Santa Margarita Mortgage Co.* (1994) 28 Cal.App.4th 686, 690 [mortgage broker refused to find home loan for plaintiffs because they were Black].)

BHCC also argues that that it did not discriminate against Koebke and French because they would have allowed French to purchase her own separate membership. That fact is irrelevant, as plaintiffs can state a claim if BHCC charged them more to use its facilities than other unmarried couples. (See *Koire v. Metro Car Wash* (1985) 40

Cal.3d 24, 29 [charging some customers more than others based on their sex violates Unruh, even though customers were not excluded from service altogether].)

DISPOSITION

The judgment is reversed on Koebke and French's claim that BHCC's bylaws were applied in a discriminatory manner. In all other respects the judgment is affirmed. Appellants shall recover their costs on appeal.

CERTIFIED FOR PUBLICATION

NARES, J.

WE CONCUR:

BENKE, Acting P.J.

McINTYRE, J.