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Nevada Department of Employment,
Training and Rehabilitation

JIM GIBBONS
Governor

LARRY J. MOSLEY
Director

DENNIS A. PEREA
Administrator

Monday, August 11, 2008

Case Name:

Todd Phillips

v.

Las Vegas Athletic Club

Charge No.:

0828-07-0563L

Charging Party:

Todd Phillips

~~REDACTED~~
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Respondent:

Melissa Peters, Dir. H.R.

Las Vegas Athletic Club

2655 S. Maryland Pkwy., Suite 201

Las Vegas, NV 89109

DETERMINATION

The determination on the merits of this charge is as follows:

Respondent Las Vegas Athletic Club ("Respondent") is a place of public accommodation within the meaning of Nevada Revised Statute 651.050 and timeliness and all other requirements for coverage have been met.

On August 28, 2007, Charging Party Todd Phillips filed a public accommodations complaint against Respondent. He alleges that Respondent offers a pricing policy which discriminates against men when it allows women to join free but men are charged \$10 and that Respondent maintains a "women's only" workout room which discriminates against men. He also alleges that Respondent retaliated against him by canceling his membership on May 2, 2007.

I. PRICING

Mr. Phillips' first allegation of sex discrimination by Respondent concerns its pricing practices. Respondent admits that it offered a special that allowed women to

enroll at a discounted rate in 2007. The \$99 enrollment fee was reduced to \$0 plus \$21 per month for women for three periods in 2007: from February 5 to March 11, 2007; from May 7 to June 3, 2007; and from October 7 to November 18, 2007. Although men also received a discount during the same periods, the discount was not as great. The \$99 enrollment fee was reduced to \$10 for men while the monthly fee was the same, \$21 per month. Respondent offered the same special in 2008 from February 11 to March 9, 2008.

Respondent denied that its pricing policy discriminated against Mr. Phillips because of his sex. It states that its pricing models differ depending on administrative cost and the ability to collect on installment contracts and that women have lower administrative and collection costs.

Courts are split on interpreting gender-based pricing under their public accommodations statutes. California, Florida, Pennsylvania, Iowa, Maryland, New Jersey and Colorado¹ have taken an all-or-nothing approach and have held that any gender-based price discrimination, regardless of severity or motivation, is illegal. In contrast, Illinois, Michigan and Washington have engaged in a balancing of the alleged discrimination with the motivations behind it and have found no actionable discrimination where the price-based discount was not accompanied by an improper motive.²

In *Koire v. Metro Car Wash*, 707 P.2d 195 (Cal. 1985), the California Supreme Court held that the state public accommodation statute prohibited a number of car washes and one bar from offering promotional discounts to women without offering similar discounts to men. The California statute states “[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex . . . are entitled to the full and equal accommodations, advantages, facilities, privileges or services in all business establishments of any kind whatsoever.” Cal. Civ. Code Ann. § 51. The court found the statute did not apply solely to the exclusion of persons, but also to unequal treatment that is the result of a business practice. 707 P.2d at 197.

¹*Koire v. Metro Car Wash*, 707 P.2d 195 (Cal. 1985); *City of Clearwater v. Studebaker's Dance Club*, 516 So.2d 1106 (Fla. App. Ct. 1987); *Pa. Liquor Control Bd. v. Dobrinoff*, 471 A.2d 941 (Pa. Commw. Ct. 1984); *Ladd v. Iowa W. Racing Ass'n*, 438 N.W.2d 600 (Iowa 1989); *Peppin v. Woodside Delicatessen*, 506 A.2d 263 (Md. Ct. Spec. App. 1986); *Gillespie v. J.C.B.C., Inc.*, Case No. PD12SB-02554, www.state.nj.us/lps/Gillespie.Order.06.01.04.html. Colorado does not have a published decision, but the Rocky Mountain News reported in 2007 that the Colorado Division of Civil Rights determined ladies' night drink specials violated state law.

²*The Dock Club, Inc. v. Illinois Liquor Control Comm'n*, 428 N.E.2d 735 (Ill App. Ct. 1981); *Magid v. Oak Park Racquet Club Associates*, 269 N.W.2d 661 (Mich. Ct. App. 1978); *Tucich v. Dearborn Indoor Racquet Club*, 309 N.W.2d 615 (Mich. Ct. App. 1981); *MacLean v. First Northwest Indus.*, 635 P.2d 683 (Wash. 1981).

In *Tucich v. Dearborn Indoor Racquet Club*, 309 N.W.2d 615 (Mich. Ct. App. 1981), the Michigan Court of Appeals found that a reduced-price membership for women at a racquet club did not violate the Michigan public accommodations statute. The court found that a civil action for damages under the law had to allege a "withholding, refusal or denial" of accommodations, and since the defendants had alleged only a price difference, they were not entitled to redress under the public accommodations statute. The court noted that the price differential was designed to encourage membership and make club facilities more available to both sexes. *Id.* at 619.

Nevada's public accommodation statute is unlike the state statutes at issue in the cases cited above. NRS 651.070 states: "All persons are entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation, without discrimination or segregation on the ground of race, color, religion, national origin or disability." Sex-based discrimination is not actionable under NRS 651.070. However, NRS 233.010(2) states that it is the public policy of the State of Nevada "to foster the right of all persons reasonably to seek and be granted services in places of public accommodation without discrimination, distinction or restriction because of . . . sex." The Commission has the authority under NRS 233.150(1)(a) to "investigate tension, practices of discrimination and acts of prejudice against any person or group because of . . . sex . . . and may conduct hearings with regard thereto." The Commission is authorized by the Legislature to receive, investigate, and hear complaints of discrimination in public accommodations on account of sex.

Here, Respondent has offered as its legitimate non-discriminatory reason for the "women enroll free" special that it has lower administrative and collection costs for its female customers. While this may be true, that reason is not persuasive. In *Kotre*, 707 P.2d at 204, the California Supreme Court rejected the car wash owner's business defense, ruling that a rational economic motive cannot validate an otherwise discriminatory practice. Similarly, in *Ladd v. Iowa W. Racing Ass'n*, 438 N.W.2d 600, 602 (Iowa 1989), the Iowa Supreme Court was unpersuaded by the defendant's argument that its differential pricing promotion was justified by a resultant increase in business, holding that "if discrimination on the basis of an enumerated classification occurs, that in and of itself constitutes a violation of the statute." Nevada's broad policy in NRS 233.010(2) is more similar to that found in California's and Iowa's statutes rather than the narrow Michigan statute.

Under 233.010(2), all persons have the right to be granted services in places of public accommodation without distinction because of sex. When it offered its "women enroll free" special, Respondent distinguished its services on the basis of sex. Based on the foregoing, probable cause supports the charge that Respondent's practice of offering "women enroll free" periodic discounts is discriminatory under NRS chapter 233.

II. WOMEN'S SPECIALIZED TRAINING AREAS

Respondent admits that it segregates certain areas of the club by gender: locker rooms, shower facilities, saunas, steam rooms, restrooms and women's specialized training areas. Mr. Phillips' complaint concerns the women's specialized training areas. Respondent alleges that the women's training area allows female customers the privacy to work on and address certain needs not appropriate in a co-ed environment. As an example, Respondent cites breast cancer awareness and women's health concerns. As a sponsor for Susan G. Komen's Race for the Cure, Respondent states that it provides information, both written and visual, that show specifics of breast cancer awareness and exams, which it alleges would not be appropriate in the presence of young teenage boys. Also, Respondent states training specialists consult with women members about menopause, menstruation and cramping and the effects of exercise, diet and nutrition.

Just as there is no clear consensus from the courts on gender-based pricing discounts, courts have issued differing opinions on single sex health clubs. In *Foster v. Back Bay Spas, Inc.*, 7 Mass. L. Rptr. 462 (1997), a Massachusetts lower court determined that Healthworks, a woman's only health club, had violated the state public accommodations statute and refused to carve out a privacy exception for women's health clubs. In contrast, a Pennsylvania court determined that pursuant to a "customer preference" defense, a privacy right exception allowed men to be excluded from an all-women's exercise facility. *Livingwell (North) Inc. v. Pennsylvania Human Relations Comm'n*, 606 A.2d 1287 (Pa. Commw. Ct. 1992).

In *Livingwell*, the Pennsylvania court relied on a "bona fide occupational qualification" (BFOQ) defense from employment cases. One of the BFOQs courts have recognized is that certain situations involving the individual sexes warrant exclusion of the opposite sex for privacy issues. See *Grissold v. Connecticut*, 381 U.S. 479 (1965). The privacy interest expressed involves situations where customers, due to modesty, find it uncomfortable to have the opposite sex present because of the physical condition in which they find themselves or the physical activity in which they are engaged as customers at the business entity. See *Robino v. Iranon*, 145 F.3d 1109 (9th Cir. 1998) (correction facility policy, under which only female officers were eligible for six posts, found to be a gender BFOQ and reasonably necessary to accommodate privacy interests of female inmates); *Norwood v. Dale Maintenance System, Inc.*, 590 F. Supp. 141 (N.D. Ill. 1984) (male gender is BFOQ for position of washroom attendant for men's washroom in office building). The Pennsylvania court found "where there is a distinctly private activity involving exposure of intimate body parts, there exists an implied bona fide public accommodation qualification which may justify otherwise illegal sex discrimination." 606 A.2d at 1291.

Nevada has a similar bona fide occupational qualification defense. NRS 613.350(1) states that "it is not an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his . . . sex . . . in those instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." With regard to privacy rights, Nevada has recognized a right to privacy where body parts may be exposed. See *Techtow v. City*

Council, 105 Nev. 330, 332, 775 P.2d 227, 229 (1989) (finding that ordinance requiring a window in a door of any room in which a massage or bath was to be provided violated right to privacy). Applying this rationale here, a legitimate privacy interest exists for women who want to exercise in a women's only specialized training area. Respondent has not excluded men from its entire facility, as the Healthworks gym did in the Massachusetts case. Probable cause does not support the charge that Respondent's practice of offering a specialized training area for women only is discriminatory.

III. RETALIATION

Mr. Phillips and Respondent disagree whether Mr. Phillips asked for his membership to be cancelled. According to Respondent, Mr. Phillips told them he was not happy with his membership and so they offered to cancel it. Respondent's May 25, 2007 letter states that it was exercising its right to cancel Mr. Phillips' membership. The contract allows Respondent to revoke a membership if the member fails to keep and obey any of its rules and regulations or for reasons of nuisance, disturbance of other members, moral turpitude or fraud. It is not necessary to determine who cancelled the contract because NRS chapter 233 does not contain an anti-retaliation provision with respect to public accommodation claims. Thus, the Commission has no jurisdiction over that part of Mr. Phillips' claim.

NRS 233.170(2) requires that if the Commission determines that there is reason to believe that violations have occurred, it shall endeavor to eliminate unlawful practices by informal methods of conference, conciliation, and persuasion. Having determined that there is reason to believe that violations have occurred, the Commission now invites the parties to join with it in a collective effort toward a just resolution of this matter. A representative of this office will be in contact with each party in the near future to begin the conciliation process. If the attempts at conciliation fail, the Commission may hold a public hearing pursuant to NRS 233.170(3), or close the charge and the Charging Party may pursue any potential judicial remedy.

On Behalf of the Commission



Administrator