

STATE OF COLORADO

DEPARTMENT OF REGULATORY AGENCIES
Division of Civil Rights

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LADIES NIGHT

Colorado Civil Rights Commission Resolution – July 23, 2007

LADIES NIGHT PROMOTIONS MAY NOT INVOLVE PRICE DIFFERENTIALS OR OTHER DIFFERENTIAL TREATMENT BASED ON A PROTECTED CLASS, WHATEVER THE INTENT. THE COMMISSION STRONGLY DISCOURAGES LADIES NIGHT PROMOTIONS AND RECOMMENDS INSTEAD THAT ESTABLISHMENTS CONSIDER NEUTRAL PROMOTIONS INVOLVING PERHAPS FREE OR REDUCED ADMISSIONS TO A LIMITED NUMBER OF CUSTOMERS WHO APPEAR BEFORE A CERTAIN TIME.

1. The Colorado Civil Rights Commission may investigate and study the existence, character, causes and extent of unfair or discriminatory practices as defined in the Colorado Revised Statutes. The Commission may also formulate plans for the elimination of such unfair or discriminatory practices by educational or other means, pursuant to section 24-34-305(1)(c).

2. Over the years, the Commission has received discrimination complaints regarding gender based pricing or differential pricing based on other protected classes. Today, the Commission would like to address the issue of differential pricing as it pertains to Ladies Night promotions.

3. Section 24-34-601(2) of the Colorado Revised Statutes makes it a discriminatory practice and unlawful "directly or indirectly, to refuse, withhold from, or deny an individual or a group, because of . . . sex, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation."

4. The Colorado Revised Statutes specifically disallow such action and therefore the Commission felt it necessary to more widely publicize such prohibition by discussing it in our public meeting and formulating a plan for the elimination of gender based pricing.

5. Gender based pricing has been a source of debate throughout the country and the issue is further complicated by the lack of a national standard. Almost all, if not all, of the cases have been decided by state courts under state public accommodation statutes.

6. In 2004 an administrative law judge for the Division of Civil Rights in New Jersey ruled that although a ladies' night discount for women in a bar did not constitute a personal hardship or menace to the state, the practice still violated the state anti-discrimination statute because the statute did not provide for a *de minimus* defense (i.e., based on "triviality" or just a trifling matter). Although discrimination may arise from many sources, varying in degree from innocuous to pernicious and it can even accompany a legitimate purpose, a meaningful line cannot be drawn on any ground and a *de minimus* exception for prohibited discrimination is not viable.

7. In another case from 2004 a California court found that no violation occurred when a business sponsoring an auto show gave free roses and chocolates to women whereas male patrons had to affirmatively request the gifts. The court noted that a business does not violate the statute when it offers a modest token to women, but requires that men who wish to obtain the same gift affirmatively request it.

8. In Colorado, after a finding of a violation of the state public accommodations statute the Colorado Civil Rights Commission may order the following relief of the business or entity found to have engaged in such discriminatory practice:

- a. To rehire, reinstate, and provide back pay to any employee or agent discriminated because of a refusal to comply with the employer's discriminatory practice;
- b. To make reports as to the manner of compliance with the order of the commission;
and
- c. To take affirmative action, including the posting of notices setting forth the substantive rights of the public under the State Public Accommodation statute.
- d. The Commission may also order the business or entity to cease and desist from such discriminatory or unfair practice.

9. Courts have rejected and discounted respondents' typical arguments that the reason for the differential pricing was stimulation or promotion of business. Respondents' intent is not relevant.

10. As noted above, the Commission does not have statutory authority to impose an award for punitive damages or for the imposition of any monetary compensation. The Commission views the issue of Ladies Night promotions as being dissimilar to other more pernicious types of public accommodation violations.

11. However, the Commission does want to be proactive by notifying bar owners' organizations and bars in Colorado that Ladies Night promotions are an illegal practice and the Commission urges public establishments to immediately cease and desist such practices.