STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 2579-03
DCR DOCKET NO. PD12SB-02554

DAVID R. GILLESPIE,	:	
Complainant,	:	
	:	**ADMINISTRATIVE ACTION**
v.	:	**FINDINGS, DETERMINATION**
	:	**AND ORDER**
J.C.B.C., INC., dba	:	
COASTLINE RESTAURANT,	:	
Respondent.	:	
	:	

APPEARANCES
Donna Arons, Deputy Attorney General, *for the complainant* (Peter C. Harvey, Attorney General of New Jersey)
Colleen M. Ready, Esq., *for the respondent* (Margolis Edelstein, attorneys)

BY THE DIRECTOR:

INTRODUCTION

This matter is before the Director of the New Jersey Division on Civil Rights (Division) pursuant to a verified complaint filed by the complainant, David R. Gillespie (Complainant), alleging that J.C.B.C., Inc., dba Coastline Restaurant (Respondent), unlawfully discriminated against him because of his sex in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5 -1 to -49. On April 19, 2004, the Honorable John R. Tassini, Administrative Law Judge (ALJ), issued an order granting Complainant's motion for partial summary decision, which procedurally must be treated as an initial decision under N.J.A.C. 1:1-12.5(e). That order also denied Respondent's motion for summary decision. Having independently reviewed the record and the

ALJ's decision, the Director adopts the ALJ's initial decision granting Complainant's motion for partial summary decision and denying Respondent's motion for summary decision.

PROCEDURAL HISTORY

Complainant filed a verified complaint with the Division on Civil Rights on June 22, 1998, alleging he was discriminated against based on his sex when Respondent, pursuant to its "Ladies' Night" policy, admitted women to its restaurant free of charge and gave them discounts on drinks, but charged men, including Complainant, an admission charge of $5.00 and normal drink prices. On April 29, 1999, Respondent filed an answer denying it violated the LAD. On September 3, 2002, the Director of the Division on Civil Rights issued a finding of probable cause crediting Complainant's allegations and, on May 5, 2003, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing. On October 8, 2003, Complainant filed a notice of motion for an order compelling Respondent to answer discovery requests. On October 20, 2003, the ALJ ordered Respondent to serve answers to discovery by November 20, 2003, and further advised Respondent that failure to do so would result in exclusion of evidence offered in its defense. On December 5, 2003, Complainant submitted a certification indicating Respondent had not served answers to discovery. The ALJ then notified the parties that by December 15, 2003, Respondent should file responsive papers to Complainant's motion. Again Respondent failed to respond and on December 30, 2003, the ALJ issued an order excluding Respondent's evidence. On January 6, 2004, Complainant filed papers in support of his motion for summary decision and on February 9, 2004, Respondent filed a brief in opposition to the motion. On March 5, 2004, Respondent filed papers in support of a cross-motion for summary decision, and on March 17, 2004, Complainant filed a letter brief in response to Respondent's cross-motion. On April 19, 2004, the ALJ granted

Complainant's motion for summary decision, holding the Respondent liable for violation of the LAD.

THE ALJ'S FINDINGS OF FACT

Respondent is the owner and operator of the Coastline Restaurant in Cherry Hill, where it sells food and alcoholic and non-alcoholic beverages to the public. On June 17, 1998, Respondent charged Complainant, a man, the regular admission price of $5.00 and the regular prices for beverages (i.e., $3.00 to $5.00). (Complainant's Exhibit-E)[1]. On that night, Respondent admitted women to its restaurant free and charged them reduced prices for beverages (i.e., $1.50) , consistent with its "Ladies' Night" policy (Exhibit D). However, similarly situated males did not have the benefit of free admission or reduced prices for beverages on "Ladies' Night" (ID 3).

THE ALJ'S DECISION

In granting Complainant's motion for summary decision, the ALJ observed that the LAD is an exercise of the police power of the State and should be construed liberally (ID 3-4, citing Fuchilla v. Layman, 109 N.J. 319, 334 (1988)). He next recognized that Respondent's restaurant is a place of public accommodation under the LAD, and that the LAD makes it unlawful for any place of public accommodation to discriminate based on sex (ID 4). Further, once a proprietor extends his invitation to the public he must treat all members of the public alike (ID 7, citing Evans v. Ross, 57 N.J. Super. 223, 231 (App. Div.), certif denied, 31 N.J. 292 (1959)).

Citing Hall v. St. Joseph's Hosp., 343 N.J. Super. 88 (App. Div. 2001), the ALJ set forth the burden shifting analysis typically applied in LAD claims. He indicated that when a complainant is

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[1] Hereinafter, exhibits shall refer to Complainant's exhibits; and specific references to the Initial Decision will be denoted as "ID".

a member of the protected class under the LAD, presentation of a *prima facie* case results in the presumption of wrongful discrimination. If the defense then presents sufficient evidence of a legitimate non-discriminatory reason for the challenged action, the burden of proof is then shifted back to the complainant to prove that the non-discriminatory reason alleged by the defense was a pre-text for discrimination (ID 6).

The ALJ also recognized that when the complainant is a member of a group considered to have had historical advantages over a traditionally disfavored group (e.g., a male compared to female), and he alleges that the operator of a place of public accommodation denied him an advantage made available to members of the protected class, he states a claim for reverse discrimination for which relief may be available under the LAD (ID 6, citing Bergen Commercial Bank v. Sisler, 307 N.J. Super., 333, 343 (App. Div. 1998), aff'd and remanded, 157 N.J. 188 (1999); see also Erickson v. Marsh and McLennan Co., Inc., 117 N.J. 539, 551 (1990); Rivera v. Trump Plaza & Hotel Casino, 305 N.J. Super. 596 (App.Div. 1997)). Because Respondent allowed free admission and reduced prices for beverages for females and not for males on "Ladies Night," Complainant stated a reverse discrimination claim under the LAD.

Because neither Complainant nor Respondent cited a New Jersey decision factually similar to the case at hand, the ALJ relied on several out-of-state cases in which courts held that unlawful sex discrimination had occurred in violation of the respective civil rights law or ordinance. In Ladd v. Iowa West Racing Association, 443 N.W.2d 600 (Iowa 1989), the Iowa Supreme Court held that a racetrack's denial of free admission to a male customer on Ladies Day violated Iowa's Civil Rights Act. Significantly, the court found that the Act did not provide a *de minimis* violation defense and concluded that sex-based discounts violated the Act. Similarly, in Koire v. Metro Car Wash, 707

P.2d 195 (Cal.1985), the California Supreme Court concluded that its anti-discrimination act prohibited bars and car washes from offering sex-based promotional discounts to females while denying them to males. Again, in City of Clearwater v. Studebaker's Dance Club, 516 So. 2d 1106 (Fla. Dist. Ct. App.1987), the court held that a dance club violated a city ordinance which made it unlawful for places of public accommodation to discriminate because of sex. The club had offered women membership in its "Pink Ladies' Club," which entitled members to discounted prices for drinks, but denied males the chance to apply for membership. Finally, in Pennsylvania Liquor Control Board v. Dobrinoff, 471 A.2d 941, 943 (Pa. Commw. 1984), the Commonwealth Court of Pennsylvania concluded that the practice of admitting females to a bar where go-go girls were featured without payment of the $1 cover charge that men were required to pay violated the Human Relations Act (ID 7 - 8).

The ALJ also referenced out-of-state cases which found that discounts offered to members of a protected class did not constitute unlawful discrimination. In Khan v. Thompson, 916 P.2d 1124 (Ariz. Ct. App. 1995), the complainant alleged that an age-based discount favoring senior citizens violated the local civil rights ordinance, which prohibited the refusal of services or facilities based on sex or age. The court rejected a literal construction of the statute and instead held that, based on public policy and traditions of providing benefits to older citizens, the age-based price differentials had a sufficiently rational basis to withstand complainant's challenge (ID 8). Similarly, in Sargoy v. Resolution Trust Corp., 8 Cal. App. 4th 1039 (1992), the court found that age-based discounts favoring the elderly served a legitimate purpose, and did not constitute arbitrary, invidious or unreasonable discrimination violative of the State civil rights act. In The Dock Club, Inc. v. Illinois Liquor Control Commission, 428 N.E.2d 735 (Ill. App. Ct. 1981), a licensee held "Ladies

Night" promotions and offered reduced price drinks to women and not men. The Appellate Court of Illinois held that the Dramshop Act's anti-discrimination provision prohibited only conduct that prohibited patronage, and concluded that no violation had occurred because sex-based pricing was intended to encourage female patronage, not to discourage male patronage (ID 9). The ALJ next discussed MacLean v. First Northwest Industries of America, 635 P.2d. 683, 686 (Wash. 1981), which examined the legality of promotions sponsored by a professional basketball team which offered reduced tickets prices for various groups, including women. Washington's Supreme Court found that the plaintiff, a male ticket purchaser, was not damaged and that the Ladies Night promotion had a legitimate commercial goal, and thus did not violate the State Law Against Discrimination (ID 9-10). Finally, Tucich v. Dearborn Indoor Racquet Club Assoc., 309 N.W.2d 615 (Mich. Ct. App. 1981), and Magid v. Oak Park Racquet Club Assoc., 269 N.W.2d 661 (Mich. Ct. App. 1978), involved Michigan's Public Accommodations Act, which entitled all persons to full and equal accommodations, advantages, and privileges of public accommodations. Respondent's tennis clubs charged women annual membership fees that were lower than those charged for men. In both cases, the appellate court concluded that, since there was no evidence that the male complainants were not welcomed or not solicited or that the club's facilities were withheld from men, summary judgment dismissing the complaints was properly entered (ID 10).

Observing that the discount at issue in this case does not appear to constitute the kind of "personal hardship" or "menace to the institutions and foundation of a free democratic State" to which the Legislature intended the LAD to apply, the ALJ nevertheless concluded that Respondent's "Ladies Night" policy violated the "generally accepted meaning" of the LAD (ID 10). The ALJ also concluded that the Legislature provided no *de minimis* defense to a charge of

discrimination (ID 11, citing Stevenson v. Keene Corp., 254 N.J. Super. 310, 317 (App. Div.1992) aff'd o'b., 131 N.J. 393 (1993)). Moreover, Respondent has not demonstrated any important public interest that would except its "Ladies Night" promotion from the prohibitions of the LAD. Accordingly, the ALJ granted Complainant's motion for summary decision, holding the Respondent liable for violating the LAD, and denied Respondent's cross-motion for summary decision (ID 10-11).

EXCEPTIONS

Neither party filed exceptions to the ALJ's order. Nonetheless, the Director has reviewed the ALJ's determination pursuant to N.J.A.C. 1:1-12.5(e) and 1:1-18.3(c)12.

THE DIRECTOR'S DECISION

STANDARDS FOR GRANTING SUMMARY DECISION

Under the Uniform Administrative Procedure Rules, summary decision may be granted if the papers and discovery which have been filed, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). To defeat a motion for summary decision, the opposing party must submit affidavits or other evidence that establish the existence of a genuine dispute regarding material facts that can only be resolved by an evidentiary hearing. Ibid. The standard for summary decision in an administrative hearing is substantially the same as that applied to a motion for summary judgment in the Superior Court of New Jersey pursuant to R. 4:46-2. Frank v. Ivy Club, 228 N.J. Super. 40, 62 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. denied, 498 U.S. 1073 (1991). Thus, a court must consider "whether competent evidential material presented, when viewed in the light most favorable to the non-moving party, is sufficient to permit a rational fact-finder to resolve the alleged dispute in favor of the non-moving party." Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 523, 666 A.2d 146 (1995). Because the material facts upon which Complainant's claim is based are undisputed, the Director concurs with the ALJ that this is

a proper matter for summary disposition.

STANDARDS FOR DETERMINING DISCRIMINATION

Complainant alleged that he was discriminated against based on his sex because, during a promotion called "Ladies' Night," Respondent charged him the normal price for admission and regular prices for drinks, while it charged similarly situated women no admission fee and discounted prices for drinks. The LAD specifically makes it unlawful for a place of public accommodation to "discriminate against any person in the furnishing" of the "accommodations, advantages, facilities or privileges" of a place of public accommodation on the basis of sex. N.J.S.A 10:5-12 (f) (1). Further, it is well settled that the protection under this provision is not limited to the "outright denial of access or service... [but] also renders unlawful any acts discriminating against any person in the furnishing of the public accommodation." Turner v. Wong, 363 N.J. Super. 186, 212 (App. Div. 2003). Thus, once a place of public accommodation makes its goods or services available to the public, it is bound to "treat all members of the public alike." Evans v. Ross, 57 N.J. Super. 223, 231 (App. Div.), certif. denied 31 N.J. 292 (1959).

Here, there is no dispute that Respondent's restaurant is a place of public accommodation as defined by the LAD. N.J.S.A. 10:5-5(1).[2] It is also not disputed that Respondent had a policy that designated one night a week "Ladies' Night," when it admitted female patrons to its restaurant free of charge and sold them drinks at reduced prices. On the same nights, Respondent charged male patrons the normal cover charge for admission and regular prices for drinks (ID 3, Exhibits B,

[2] The LAD defines a place of public accommodation to include "any tavern...any restaurant, eating house, or place where food is sold for consumption on the premises." N.J.S.A. 10:5-5 (l).

D, and E).[3] On one such "Ladies' Night," Respondent charged Complainant an admission fee and higher prices for drinks because he is male (ID 3). Thus, the issue presented here is whether the LAD forbids a place of public accommodation from charging different prices and offering special discounts to patrons based solely on gender. The Director concludes that Respondent's differential treatment based on gender runs afoul of the plain language as well as the legislative intent of the LAD and, therefore, Complainant's motion for summary decision was properly granted.

In support of its cross-motion for summary decision, Respondent argues that Complainant may not prevail because he is not a member of a protected class under the LAD and has failed to meet his burden to establish a claim of reverse discrimination (Rb 3-4). Respondent's argument is predicated on the burden shifting methodology established by the United States Supreme Court in McDonnell Douglas Corp. v. Green, and subsequently adopted by New Jersey courts, for analyzing employment discrimination claims using circumstantial evidence.[4] Under this approach, modified for analyzing public accommodations cases, a complainant must first make a *prima facie* case by showing that s/he is a member of a protected class; that s/he attempted to avail him/herself of the accommodations, advantages, facilities or privileges of a place of public accommodation; and that

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[3] Hereinafter, "Cb" shall refer to Complainant's brief in support of his motion for summary decision; "Rb" shall refer to Respondent's brief in support of its motion for summary decision; "Rbo" shall refer to Respondent's letter brief in opposition to Complainant's motion for summary decision; and "Cbr"shall refer to Complainant's letter brief in reply to Respondent's opposition to Complainant's motion for summary decision.

[4] Although the Division is not bound by federal precedent when interpreting the LAD, New Jersey courts have consistently "looked to federal law as a key source of interpretive authority" in construing the LAD. Grigoletti v. Ortho Pharmaceutical Corp., 118 N.J. 89, 97 (1990).

s/he was denied access or received differential treatment.[5] Once the complainant's *prima facie* claim is proffered, the burden of production shifts to the respondent, who must then articulate a legitimate nondiscriminatory reason for the adverse action. If the respondent meets this burden, then the complainant must demonstrate that the reason proffered by the respondent is a pretext for a discriminatory motive. See Hall v. Saint Joseph's Hospital, 343 N.J. Super. 88, 108 (App. Div. 2001).

Respondent's argument fails because Complainant's claim does not rely on circumstantial evidence, but rather on the unchallenged fact that Respondent charged Complainant higher prices for admission and drinks based on its policy that treated patrons differently based solely on gender. As noted by the United States Supreme Court in Texas Department of community Affairs v. Burdine, 450 U.S. 248, 256 n.8 (1981), the burden shifting analysis established by McDonnell Douglas is intended to "sharpen the inquiry into the elusive factual question of intentional discrimination." Here, the undisputed facts establish that Respondent intended to treat Complainant differently based on his gender pursuant to its "Ladies' Night"promotion. Thus, because differential treatment based on gender is admitted and supported by direct evidence, the McDonnell Douglas analysis has no application. The relevant inquiry is simply whether the discriminatory practice violates the LAD.[6]

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[5] Where, as in the present claim, the complainant is not a member of an historically disfavored group, New Jersey courts examining employment discrimination claims have modified the first prong of this test to require the complainant to demonstrate reverse discrimination by citing "background circumstances support[ing] the suspicion that the defendant is the unusual employer who discriminates against the majority." Bergen Commercial Bank v. Sisler, 157, N.J. 188, 214 (1999).

[6] As Complainant correctly points out, even if the McDonnell Douglas analysis were applicable here, Complainant would establish a prima facie case of reverse discrimination since Respondent had a policy that on its face discriminates against men (Cbr 3-4). Further, as will be discussed infra, Respondent has not

Respondent offers several arguments to support its contention that the LAD does not prohibit gender based price differentials (Rbo 1-4). First, it asserts that its policy is justified by its legitimate nondiscriminatory commercial goal to increase patronage.[7] The Director wholly rejects the argument that commercial interests provide a legitimate justification for ignoring the plain language of the LAD or for overriding its important social policy objective of eradicating discrimination, and instead concurs with the well reasoned decisions cited by the ALJ which refute Respondent's position. For example, in Koire v. Metro Car Wash, 40 Cal.3d. 24, 32 (1985), which considered a similar sex based promotional discount, the court rejected the car wash operator's business defense, ruling that a rational economic motive cannot validate an otherwise discriminatory practice. The court observed that the express language of the State's anti-discrimination statute clearly proscribed the challenged policy. Id at 39. Similarly, in Ladd v. Iowa West Racing Association, 438 N.W. 2d 600, 602 (Iowa 1989), the court was unpersuaded by the defendant's argument that its differential pricing promotion was justified by a resultant increase in business, holding that "[i]f discrimination on the basis of an enumerated classification occurs, that in and of itself constitutes a violation of the statute." See also Pennsylvania Liquor Control Board v. Dobrinoff, 471 A.2d 941,943 (Pa. Commonw. 1984) (holding that basing the collection of an admission charge solely upon a difference in gender violates the Pa. Human Relations Act as a matter of law). While increased patronage is a legitimate commercial goal and a valid objective of any commercial entity, places of

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offered a legitimate nondiscriminatory reason for its policy.

[7] In support of this argument, Respondent cites The Dock Club, Inc. v. Illinois Liquor Control Commission, 101 Ill.App.3d 673, 428 N.E.2d 735 (Ill. App. Ct. 1981) and MacLean v. First Northwest Industries of America, 96 Wash.2d 338, 635 P.2d.683, 686 (Wash. 1981), both of which found that gender based price differentials that did not discourage men and increased overall patronage were not discriminatory. As discussed in this section, subsequent cases have rejected the reasoning in these decisions.

public accommodation must achieve their commercial objectives without running afoul of the LAD. Again, once a proprietor has extended his invitation to the public he must treat all members of the public alike. Evans v. Ross, supra, 57 N.J. Super. at 212. Respondent has not proffered any legitimate governmental or social policy objective which would exempt its gender-based price differentials from the express prohibitions of the LAD. See B.C. v. Board of Education, Cumberland School District, 220 N.J. Super. 214 (1987).[8]

Respondent also contends that its "Ladies Night" policy is not unlawful under the LAD because the restaurant offers similar discounts to men on other nights (Rb 4, Rbo 4). This argument is misguided. Respondent's policy of discriminating against men can in no way be justified by subsequent discriminatory acts that disfavor women. In Novak v. Madison Motel Associates, 525 N.W. 2d 123 (Wis. App. 1994), the Wisconsin Court of Appeals addressed this argument in striking down a bar's ladies night promotion as violative of that State's anti-discrimination statute. Recognizing that the defendant's preferential treatment of women on nights designated as "ladies' nights" is a gender based act of discrimination, the court concluded that "[p]referential treatment to men on other nights does not correct that violation." Id. at 127-28. The Director endorses the sound reasoning of the Novak decision and similarly concludes that discrimination against one group on a particular night is not justified by discrimination against a different group on another night.

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Other cases relied upon by Respondent which uphold differential pricing are distinguishable from the present case. For example, Khan v. Thompson,916 P.2d 1124 (Ariz. Ct. of Appeals1996), and Sargoy v. Resolution Trust Corp., 8 Cal. App.4th 1039 (Cal. Ct. of Appeals1992), held that age based discounts were justified by important societal interests. The LAD, however, does not prohibit age discrimination in places of public accommodation for the same public policy reasons. In Tucich v. Dearborn Indoor Racquet Club Assoc., 107 Mich. App. 398, 309 N.W.2d 615 (Mich. Ct. App. 1981), and Magid v. Oak Park Racquet Club Assoc., 84 Mich. App. 522, 269 N.W.2d 661 (Mich. Ct. App. 1978), the court found that sex-based price differentials were permissible because its statute only prohibited the refusal or denial of access to the accommodation based on sex. The LAD, however, also prohibits discrimination in the furnishing of an accommodation.

The Director is likewise unpersuaded by Respondent's suggestion that the small price differentials at issue do not present the kind of harm which the LAD was intended to address. This ignores the well settled principle that "the LAD is intended to be New Jersey's remedy for unacceptable discrimination and is to be liberally construed." Franek v. Tomahawk Lake Resort, 333 N.J. Super. 206, 217 (App. Div.2000). While there is no New Jersey case law specifically addressing the legality of gender based price differentials, there is absolutely no basis in the law for asserting a *de minimis* violation defense to a charge of discrimination under the LAD. To interpret the LAD to permit such "minor"acts of discrimination would be to disregard its intended goal, which is "nothing less than the eradication of the 'cancer of discrimination.'" Fuchilla v. Layman, 109 N.J. 319, 334 (1988), quoting Jackson v. Concord, 54 N.J. 113, 124 (1969).

CONCLUSION AND ORDER

Based on the foregoing, the Director concludes that Respondent's policy of offering gender based discounts at its restaurant on "Ladies' Night" is an unlawful discrimination, and that its denial of those discounts to Complainant because he is a male violated the LAD as a matter of law. Therefore, after careful consideration of the ALJ's decision and the parties' briefs and affidavits, the Director adopts the ALJ's order granting Complainant's motion for partial summary decision on liability, and denying Respondent's motion for summary decision. The Director further orders that this matter be returned to the OAL for a hearing on the issues of the imposition of injunctive relief, the assessment of a penalty, and the award of damages and other appropriate relief.

June 1, 2004

J. Frank Vespa-Papaleo, *Director*