



Dora

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Charge No. P20140027X

Vito Marzano



Charging Party

Denver Wrangler, Inc.
1700 Logan St.
Denver, CO 80203

Respondent

DETERMINATION

Under the authority vested in me by Colo. Rev. Stat. § 24-34-306(2), I conclude from our investigation that there is sufficient evidence to find that the Respondent discriminatorily denied the Charging Party the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations in a place of public accommodation due to the Charging Party's sex and sexual orientation. As such, I hereby issue a **Probable Cause** determination.

The Respondent, Denver Wrangler, Inc., maintains a place of public accommodation within the meaning of Colo. Rev. Stat. § 24-34-601(1). The timeliness and all other jurisdictional requirements pursuant to Title 24, Article 34, Parts 3 and 6 have been met.

The Charging Party alleges that on or about August 31, 2013, the Respondent denied him services based on his perceived/actual sexual orientation (transgender) and sex (male). The Respondent denies the allegations and avers that the Charging Party was refused service because his appearance did not match the identity on his driver's license.

The legal framework under which civil rights matters are examined is as follows: The initial burden of proof rests on the Charging Party to prove his case. Each key or essential element ("prima facie") of the particular claim must be proven, through a majority ("preponderance") of the evidence. If the Charging Party meets this initial burden of proof, then the Respondent has the next burden of explaining, with sufficient clarity, a business justification for the action taken. This is in response to the specific alleged action named in the charge. In addition, the Respondent has the burden of production of sufficient documents and other information requested by the administrative agency during the civil rights investigation. If the Respondent offers a legitimate business reason, then the burden once again shifts back to the Charging Party to prove that this proffered legitimate business reason is a pretext for discrimination. At this

stage, the Charging Party must prove, again through sufficient evidence, that the true and primary motive for the Respondent's actions is unlawful discrimination.

"Unlawful discrimination" means that which is primarily based on the asserted protected group or status of the Charging Party. The Respondent's stated reasons for its actions are presumed to be true, unless and until the Charging Party, again through competent evidence found in this investigation, adequately shows that the Respondent's reason is pretext; is not to be believed; and that the Charging Party's protected status was the main reason for the adverse action taken by the Respondent. The Charging Party does not need to submit additional evidence, in response to the Respondent's position, but the available evidence must be legally sufficient so that a reasonable person would find that the Respondent intended to discriminate against the Charging Party because of his protected civil rights status. Colorado Civil Rights Commission v. Big O Tires, Inc., 940 P.2d 397 (Colo. 1997); Ahmad Bodaghi and State Board of Personnel, State of Colorado v. Department of Natural Resources, 995 P.2d 288 (Colo. 2000).

The Respondent is a bar and nightclub that serves the gay community and operates in the State of Colorado. More specifically, the Respondent caters to a gay subculture known as "Bears," which are bisexual or gay males which tend to place importance on presenting a hypermasculine image and often shun interaction with men who exhibit effeminacy. This is evident from the pictures and statements made by employees regarding the "Bear" culture of the club and several links on the Respondent's webpage referencing "Bear" clubs, such as bearunderground.net and bearguide.net. The Owner of the establishment is Christopher J. Dawkins ("Dawkins") (sexual orientation unknown). Phil Newland ("Newland") (gay), General Manager, and Pat Steimer ("Steimer") (gay), Assistant Manager, were involved in the alleged discriminatory incident referenced by the Charging Party.

The Respondent has three policies in place: (i) Code of Conduct, (ii) Identification, and (iii) Dress Code.

The Code of Conduct states: "No loud screaming, Visibly intoxicated patrons will be asked to leave, You must have a drink at all times (soda, juice, and water are acceptable), No 'begging' for drinks, No bad attitudes."

The Identification policy states that "staff and management must be able to easily guarantee that the identification presented does indeed belong to the individual presenting it."

Finally, the Dress Code policy states:

- NO HIGH HEELED SHOES
- NO WIGS OR APPEARANCE ALTERING MAKE-UP*
- NO STRONG PERFUMES

*THEMED PARTIES AND HALLOWEEN EXCEPTED. YOU MAY BE ASKED TO REMOVE WIGS AND MAKE-UP AT ANY TIME TO GAIN ENTRY INTO THE CLUB.

The Charging Party alleges that on or about August 31, 2013, he attempted to enter the Respondent's place of business, and that the Respondent refused to permit him to enter the premises. The Charging Party contends that he was refused service based on his gender presentation because he was dressed as a woman, in "drag." It should be noted that the Charging Party is not transgender, nor does he claim to be transgender. The Charging Party filed this claim because it is his belief that the Respondent's identification policy is discriminatory towards females and effeminate males who do not fit the hypermasculine persona associated with Bears.

The Respondent denies the allegations and avers that transgender persons frequently patronize the establishment. The Respondent also denies that it discriminates against women. In reference to the incident at issue, the Respondent states that Steimer attempted to verify that the Charging Party was indeed the individual pictured on the driver's license since the Charging Party had on make-up, false eyelashes, and sunglasses. According to the Respondent, Steimer could not match the Charging Party to the identification he provided. Consequently, Steimer refused to allow the Charging Party to enter. The Charging Party, however, alleges that he removed his wig and sunglasses to facilitate identification when he first attempted to enter the club. The Charging Party further alleges that he has used the same identification to enter the club on other occasions in which he was not dressed in drag.

The Respondent defends its policies and states that they are in place for the safety of its patrons and to ensure it complies with the State's dram shop laws. The Respondent asserts that properly matching the identification to the person presenting it is the only means by which it can verify a patron's legal drinking age and protect itself from underage customers attempting to enter the club. The evidence demonstrates that in January and July 2013, the Respondent was cited for serving alcohol to a minor (January) and "sale or service to a visibly intoxicated person" (July). The Respondent states that based on these violations, it took "drastic and immediate action" to address these issues by strictly enforcing its policies, regardless of the customer's age or known frequency of patronage. The evidence, however, demonstrates that the Respondent's previous identification policy, known as the Gender-Matching Identification policy, required that the gender of the person presenting the identification match the gender noted on the identification. According to Newland, this policy became the Appearance-Matching policy after sexual orientation protection was added to the Colorado Anti-Discrimination Act.

The Division interviewed Newland to gain clarification regarding the Respondent's Dress Code policy, which appears to target women. Newland stated that high-heeled shoes are not permitted for safety reasons. According to Newland, the inside floors are concrete and tile, and are not designed for stiletto shoes. Newland alleges that he is concerned with a patron falling while wearing high-heeled shoes and intoxicated. Newland also stated that the no make-up policy is in place so that patrons can be easily identified. When asked about the Respondent's ban on strong perfumes, Newland stated that he is allergic to Patchouli oil, a plant-based fragrance, which is why he implements this policy. Newland further stated that he finds strong perfumes offensive and overbearing.

The Charging Party, as well, alleges that the Respondent's identification policy is pretext to exclude effeminate males, men dressed in drag, and male-to-female transgender persons. According to the Charging Party, the Respondent strives to maintain an environment of hyper-

masculinity. This is supported by the type of clientele to which the Respondent markets to and caters as demonstrated by the links and references to “Bears” on the Respondent’s webpage. Additionally, the Charging Party points to the fact that he took off his wig to facilitate Steimer’s identification as stated in the Dress Code policy; nevertheless, Steimer continued to refuse to permit the Charging Party to enter the Respondent’s facility. The Respondent however indicates that the Charging Party removed his wig during his second attempt at entering the club, not his first. By this time, Newland notes, the Charging Party was noticeably intoxicated and had become visibly agitated. The Respondent asserts that the Charging Party was denied entry at that time based on his “behavior, aggression, and what was perceived to be over-intoxicated.”

The Charging Party submitted signed witness statements, a video, and transcripts of the video to support his allegations. The video recorded the Charging Party’s second attempt at entry. However, it was in a format that was not viewable by the Division. Nevertheless, the video was accessible through the following link: <http://vimeo.com/74775642>.

A signed statement from a witness indicates that the Charging Party removed his wig and sunglasses during his first attempt to enter the Club, not the second attempt. The video, as well, does not reflect that the Charging Party took off his wig and sunglasses during his second interaction with the Respondent. The video shows the interaction among the Charging Party, Steimer, and Newland. In it, the Charging Party asks Steimer if he is being denied entry “because my [the Charging Party] ID does not match my....” The Charging Party’s sentence ends at this point. Steimer begins nodding. However, it is unclear what Steimer is nodding to because the Charging Party did not finish his sentence. Thus, the evidence from the video does not definitively demonstrate the Respondent stating that the Charging Party was denied entry because his gender expression did not match the gender on his identification. The video does, however, shed light on the Charging Party’s behavior. The evidence demonstrates that the Charging Party is upset at having been denied entry into the club and subsequently not being provided with a satisfactory response. Though the video does not demonstrate the Charging Party slurring his words or stumbling—generally, signs of intoxication—it is not definitive evidence of whether or not the Charging Party was intoxicated or the degree of intoxication.

The evidence from the video also demonstrates Newland describing an event to the Charging Party, which the Respondent is known for, “Beer Bust.” According to Newland, Beer Bust is a men’s special only in which a male patron purchases a beer for \$10, and from 4:00 p.m. to 8:00 p.m., is permitted to drink free beer. However, Newland states in the video, that if a female-to-male transgender wishes to participate in Beer Bust, he may do so as long as his identification matches his appearance, even though “legally,” he may be a female. Newland does not elaborate on what the Respondent’s policy would be for a male-to-female transgender individual.

The Respondent also submitted a signed statement from a patron of the club. The witness, Shawn Smith (“Smith”) (gay), details the events prior to the incident that evening. Smith states that he was with the Charging Party at another establishment prior to the Charging Party going to the Respondent’s club. Smith is a member of the Denver Rush Rugby team. The team was holding a fundraising whereby a number of the players were performing in drag. The Charging Party also dressed in drag to show support for his former team. Smith stated that he was recruited to assist with costumes and make-up for the performers. Smith further stated that as the

night progressed, the Charging Party was becoming increasingly intoxicated. Smith explains that when the performers decided to continue celebrating at the Respondent's bar, he reminded everyone to change back into their regular clothes. Smith asserts that they were all aware of the Respondent's "Appearance Matching" form of identification, and thus, wanted to ensure that everyone would be permitted entry. Smith says that the Charging Party refused to change and, at this time stated, "IF they don't let me in...then I'm going to cause some SHIT!" Smith explained in his statement that he believed that the Charging Party's intention was to "cause a fight."

The Charging Party denies that this interaction with Smith took place. The Charging Party, as well, submitted a signed statement from a witness who was present at the fundraiser and refutes Smith's statement. Given that both parties provided witness statements in support of their position, the Division made general inquiries of patrons who have gone to the Respondent's bar. Among the comments made were that females are not welcome in the club, that the Beer Bust excludes women, and that it is well known within the gay community that the Respondent discriminates against women and effeminate men. Though women are not explicitly excluded from the club, the evidence from the witness statements and dress policy supports that women displaying hyperfeminine attributes are not permitted in the club. These statements, in addition to the Respondent's policies, support the Charging Party's allegations that he was denied entry based on his feminine appearance.

Denial of Service

To prevail on a claim of discriminatory denial of goods, services, benefits, or privileges, the evidence must show that: (1) the Charging Party is a member of a protected class; (2) the Charging Party sought services or goods from the Respondent; (3) the Charging Party is otherwise a qualified recipient of the goods and services of the Respondent; (4) the Charging Party was denied services or goods by the Respondent; (5) under circumstances that give rise to an inference of unlawful discrimination based on a protected class.

The Charging Party is a member of a protected class based on his sexual orientation and sex. On or about August 31, 2013, the Charging Party sought entrance into the Denver Wrangler, a place of public accommodation maintained by the Respondent. The Respondent, through its employee, denied the Charging Party entrance to the establishment. These facts are undisputed.

The Respondent denies that the Charging Party was qualified to enter the establishment based on its position that the Charging Party's appearance did not match the identification presented by the Charging Party. As stated above, the Charging Party was dressed in drag at the time he sought entry into the club. The evidence demonstrates, however, that during the Charging Party's first attempt at entry, he removed his wig and sunglasses to facilitate identification pursuant to the Respondent's Dress Code policy. The Charging Party had in the past, entered the Respondent's establishment with the same identification while dressed as a man. Thus, the evidence demonstrates that, without a wig and sunglasses, the Respondent found the Charging Party's identification sufficient. The Respondent claims that the second time that the Charging Party attempted to enter he was denied entry based on his behavior. Even if the Respondent's

account is accurate, there does not appear to be a reasonable explanation as to why the Charging Party was denied entry the first time, once his wig and sunglasses were removed.

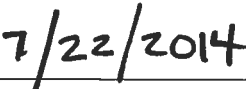
At face value, the Respondent's policies appear legitimate and non-discriminatory. However, the evidence indicates that the Respondent uses its policies to select patrons whose appearance is masculine, whether or not they are male or female, for entry into its club. In other words, a female with a masculine gender presentation would be permitted to enter, whereas, a male presenting as a female would be denied entry. This is evident from the Respondent's Dress Code policy, which does not permit high-heeled shoes, appearance altering make-up, or strong perfumes. The Respondent, additionally, states that it makes exceptions to its make-up rule for "themed-parties" and Halloween, which is generally when gay men dressed in drag are more likely to be accepted. Yet, the Respondent at these times does not seem concerned about "easily guaranteeing" that the identification matches the person presenting it. In viewing the totality of the evidence, i.e., Beer Bust, the Dress Code policy and its exceptions, and prior history of using a Gender-Matching Identification policy, it is reasonable to conclude that the Respondent's Appearance-Matching Identification policy demonstrates a discriminatory animus towards individuals whose appearance and qualities are effeminate. These policies are consistent with the "Bear" culture of the club on the above reasons, there is sufficient evidence to demonstrate that the circumstances of the denial raise a reasonable inference of unlawful discrimination based on protected classes.

Based on the evidence contained above, I determine that the Respondent has violated Colo. Rev. Stat. §24-34-601(2) with respect to the Charging Party's claim of unlawful discrimination in a place of public accommodation. In respect to this Probable Cause determination, and in accordance with Colo. Rev. Stat. 24-34-306(2)(b)(II), the Director hereby orders the Parties to attempt amicable resolution of this claim by compulsory conciliation. The Division will contact the Parties to schedule this process.

On Behalf of the Colorado Civil Rights Division



Steven Chavez, Director
or Authorized Designee



Date