Gender, Employment, and Sexual Harassment Issues in the Golf Industry[1]

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> "Women are welcome as guests, they may play anytime they like, they have a lovely changing room, but the club is for men. What could possibly be wrong with that?" statement by Ian Brooks, a member of the Honourable Company of Edinburgh Golfers.[2]

Discrimination exists in many forms in our society. Overt discrimination based on classifications such as race and religion is socially frowned upon, and is prohibited by the federal Constitution. However, more covert discrimination, based on social class and economic status, clearly exists, as does discrimination based on gender. Although golf originated as a game for the masses, the golf club has always been the province of the social elite.[3] Discrimination and exclusivity at golf clubs continues as an accepted practice in our society.

This article will focus on gender discrimination in the golf industry. The first section will address gender discrimination in membership and operational policies at golf clubs. The second section will look at gender discrimination in employment in the golf industry. Related to discrimination in employment is the specific issue of sexual harassment, which will be addressed in the third section. The fourth section focuses on competitive opportunities for women in golf.

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1. This article has been updated and revised from a manuscript appearing in the September 2005 North Carolina Bar Association Sports and Entertainment Law Section Annual Meeting Materials.

2. Michael Bamberger, *She Means Business: A Letter Asking August National to Admit Women Set Off the Boss of the Masters, and a Firestorm that continues to Burn*, SPORTS ILLUSTRATED, July 29, 2002, at 1.

3. *A History of Golf since 1497*, GOLFEUROPE.COM, *available at* http://www.golfeurope.com/almanac/history/history1.htm—the Scottish population's addiction to golf led the parliament to ban it in 1457, 1470 and 1491 although the population largely ignored it. Golf's status spread by the royal endorsement of King Charles I.

I. GENDER DISCRIMINATION AT GOLF CLUBS

Gender discrimination in the golf industry is a long-standing tradition. The long-standing joke in country clubs is that GOLF stands for "Gentlemen Only, Ladies Forbidden." This section will first examine the sociological factors that contribute to gender discrimination in the golf industry. Next, the inadequacies of constitutional and legislative remedies are discussed. State and municipal legislation has been able to address some of these deficiencies, but other avenues are explored for potential efficacy in eliminating sex discrimination.

A. Social Issues

While social and political pressure, as well as media attention, has forced clubs to end racial discrimination in their membership policies, our culture is conflicted about discrimination based on sex. Men and women are biologically different, and many believe that it is "natural" to treat men and women differently because of those physical differences. The law mirrors this societal conflict in creating a middle category of scrutiny to determine whether governmental discrimination based on sex is justified.[4] However "natural" it may seem to treat men and women differently, in situations when physical differences are not a factor, discrimination based on gender perpetuates stereotypes and harms not only women, but society in general.

As golf clubs are institutions of tradition, there are many common practices that may not be immediately recognized as discriminatory. Typical discriminatory practices, listed in order from most overt to least, include:

- The exclusive men's club which prohibits women from the grounds entirely, exemplified by Burning Tree Club in Bethesda, Maryland, whose membership includes the heads of federal agencies, senators, lawyers, lobbyists, and businessmen.[5]
- Prohibiting women from becoming members, but allowing them to play as guests, as is the policy at Augusta National, host of the Master's.[6]

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4. Craig v. Boren, 429 U.S. 190, 197 (1976).

5. Nancy Kamp, *Gender Discrimination at Private Golf Clubs*, 5 SPORTS LAW J. 89 (1998); *See also Boys Will Be Boys*, WASHINGTONIAN, Oct., 2002, *availabile at* http://www.bobcullen.com/burningtree.htm.

6. Scott R. Rosner, *Reflections on Augusta: Judicial, Legislative and Economic Approaches to Private Race and Gender Consciousness*, 37 U. MICH. J.L. REFORM 135, 136 (2003).

- Offering limited capacity memberships for women, such as auxiliary or WORM (Wives of Regular Members) designations without full voting rights or the ability to sit on the Board of Directors or club management committees.[7]
- Prohibiting members from passing survivorship rights to their daughters.[8]
- Designating "Men's Only" grill rooms or club rooms where women or wives and children are expressly prohibited.[9]
- Restricting tee times to certain days or times, even if women are playing with men.[10]

Gender discrimination challenges our ethical, moral and social consciousness and has economic and legal implications. American society has not been overly concerned about equal treatment of women, particularly women in the professional environment.[11] The acceptance of discriminatory practices sends mixed messages about the value of women. When Martha Burk publicly pressured Augusta National to open it's doors to women as full members, one writer defended chairman William "Hootie" Johnson stating that he "wants to welcome women to his club the old-fashioned way: he'll court them when he's ready, not the other way around."[12] Stereotyping women as a trophy to be won classifies women as subservient rather than recognizing women as equals. Instead of discrediting the practices at Augusta National, the writer perpetuates the myth that women are reliant on men and are not in control of their own destiny. The end result is a denial of equal opportunity that contributes to a lack of social integration.[13]

Discrimination based on gender stereotypes forces women to function under unfounded assumptions. Sociologically, segregation and stereotyping

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7. Kamp, *supra* note 5, at 90.

8. *Id.*

9. Charles P. Charpentier, *Comment: an Unimproved Lie: Gender Discrimination Continues at Augusta National Golf Club,* 11 VILL. SPORTS & ENT. L. FORUM 111, 125 (2004) (Muirfield, the site of the British Open prevents women from entering the clubhouse). *See also* Albright v. Southern Trace Country Club, 879 So. 2d 121 (La. 2004).

10. *See* Kamp, *supra* note 5, at 90. Many clubs may not believe that this practice is discriminatory because limitations are "balanced" by reserving tee times for women only. However, these times are *generally* a weekday morning based on the stereotype that women are non-working housewives.

11. *See* Thomas H. Sawyer, *Private Golf Clubs: Freedom of Expression and the Right to Privacy*, 3 MARQ. SPORTS L.J. 187 (1993).

12. *See* Frank J. Ferraro, *Prerogative or Prejudice?: The Exclusion of Women from Augusta National,* 1 DEPAUL J. SPORTS L. CONTEMP. PROBS. 39, 41 (2003).

13. *See* Sawyer, *supra* note 11, at 202-204.

lead to a general lack of understanding between individuals and perpetuate social discord.[14] The psychological effects of discrimination include feelings of worthlessness, hopelessness, depression, and lowered self-esteem.[15] These effects deprive women of their individual dignity and deny society the benefits of wide participation in political, economic, and cultural life.[16]

The economic benefits and importance of golf clubs to business, industry, and political leaders is well documented.[17] The golf course and grill have become an extension of the boardroom, offering access to influential members and the ability to network and cultivate business relationships.[18] The Professional Golfers' Association (PGA) recognizes the importance of these out-of-office connections and offers a "For Business and Life" program.[19] The LPGA has partnered with the Executive Women's Golf Association (EWGA) offering clinics that introduce businesswomen to the fundamentals of golf[20], but having the skills to play are useless if you do not have access to the course.

There are tangible benefits to golf club membership as well. Employers, recognizing the importance of building relationships with influential members, often pay membership dues and expenses as a perquisite of employment.[21] Individuals may also qualify for income tax deductions for entertaining.

Forty one percent of female executives from Fortune 1000 companies indicate that lack of access to informal networks curtails their career advancement.[22] Golf was the most important informal network identified.[23]

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14. *See* Rosner, *supra* note 6, at 143.

15. *Id.*

16. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 625 (1984).

17. *See* Rosner, *supra* note 6, at 136; *Boys Will Be Boys, supra* note 5.

18. Ironically, this is evidenced by many of the sexual harassment cases cited in the third section of this paper. For example: *Quinn v. Consolidated Freightways Corp. of Delaware,* 283 F.3d 572 (3rd Cir. 2002) (the defendant/employee tackled the plaintiff/employee on a golf course, and pinned her beneath him on the ground in the presence of two clients); *Durand-Graves v. Unisys Corp.*, C8-95-2664, 1996 Minn. App. LEXIS 1077 (Ct. App. Minn. 1996) (discussions about employee performance occurred on a golf course).

19. *See Golf for Business and Life*, THE PGA FOUNDATION, *available at* http://www.pgafoundation.com/golfforbusiness.cfm. The Golf for Business and Life program is a university academic initiative designed to teach and improve the golf skill of college juniors, seniors, and graduate students and to suggest ways in which students can use golf as a business tool as they enter the professional world.

20. *See About Us*, EXECUTIVE WOMEN'S GOLF ASSOCIATION, *available at* http://www.ewga.com/8-About_Us/Golf_Industry.htm.

21. Kamp, *supra* note 5, at 91.

22. Marilyn Gardner, *On Par with Men*, THE CHRISTIAN SCIENCE MONITOR, May 23, 2005, at 13.

The inability to gain access to the networks at the upper end of the socioeconomic sphere excludes women from the marketplace, keeps them under the glass ceiling and prohibits them from succeeding socially and economically.[24] The bottom line is that businesses, and the women that work for them, are harmed when women are excluded from this opportunity to network.[25]

B. Legal Implications of Gender Discrimination

i. Constitutional Law

The Equal Protection Clause of the Fourteenth Amendment states "No State shall. . .deny to any person within its jurisdiction the equal protection of the laws."[26] Classifications based on gender are not expressly prohibited by the Constitution, and therefore are subjected to an intermediate scrutiny test.[27] Gender-based distinctions must be *substantially related* to achievement of *important* governmental objectives.[28] The State must have intent to discriminate which can be shown as facial discrimination,[29] discriminatory application,[30] or discriminatory motive.[31] The government bears the burden of proving "exceedingly persuasive justification" that gender discrimination is substantially related to an important government interest.[32] The government also has to prove that the justification for categorizing on the basis of gender is genuine and not hypothesized based on overbroad generalizations about men and women that perpetuate the legal, social and economic inferiority of women.[33]

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23. *Id.*
24. Kamp, *supra* note 5, at 91.
25. *Id.*
26. Equal Protection Clause, U.S. CONST. Amend XIV.
27. *See Craig*, 429 U.S. at 197.
28. *Id.* (emphasis added).
29. *See generally* Strauder v. West Virginia, 100 U.S. 303 (1880).
30. *See generally* Batson v. Kentucky, 476 U.S. 79 (1986).
31. *See generally* Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256 (1979).
32. *See* U. S. v. Virginia, 518 U.S. 515, 531 (1996).
33. *Id.*

1. State Action

Constitutional rights are only protected from government interference, so state action becomes a threshold requirement. State action is certainly present at public or resort golf courses, and most public courses have eliminated any policies or practices that discriminate on the basis of gender. The socio-economic advantages sought through private golf club membership are not generally present in public course settings, and it is difficult to prove state action exists at private golf clubs.

State action can be established in three ways. First, a private entity may be a state actor when it is serving a public function.[34] A private golf club generally does not serve a public function, but it has been argued that the extensive intermingling of government and business leaders at private clubs creates a forum for government decision making.[35] Second, the state compulsion theory requires that the government is so involved in a private entity that it encourages or requires conduct.[36] An example of this would be if the state enacted legislation that would authorize private clubs to discriminate.[37] However, state activities such as leasing or monopolistic use of publicly-owned land, liquor licensing, government granting of tax benefits, and government control over a club's labor practices do not rise to the level of state action according to some courts.[38] Third, the nexus or joint action theory looks at whether there is meaningful state participation in the activity.[39] It is unlikely that the operation of most private golf clubs would rise to the degree of state action.

2. Freedom of Association

For the sake of argument, assume that state action is present. The private golf club is most likely to claim fundamental rights of privacy and freedom of association. This creates a conflict between the fundamental rights of equality and liberty. The fundamental right of equality is to be free from unlawful discrimination, while liberty is the club members right of privacy and freedom of association.[40]

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34. *See* Marsh v. Alabama, 326 U.S. 501 (1946).
35. Kamp, *supra* note 5, at 93.
36. *See* Reitman v. Mulkey, 387 U.S. 369 (1967).
37. *See* Burning Tree Club, Inc. v. Bainum, 305 Md. 53 (Md. App. 1985).
38. *See* Kamp, *supra* note 5, at 93.
39. *See* Shelley v. Kramer, 334 U.S. 1 (1948).
40. Rosner, *supra* note 6, at 140.

Freedom of association is not an enumerated right in the Constitution, but is a judicially created right belonging to the bundle of interests represented by the concept of liberty. The first case to recognize the right of freedom of association was *NAACP v. Alabama ex rel. Patterson*.[41] The freedom to associate, for the purpose of advancing ideas and beliefs, was an integral part of the liberty assured by the Due Process Clause of the Fourteenth Amendment, which embraced freedom of speech. This case held that freedom of association should share the same status as those rights specifically enumerated in the Constitution.[42]

The Supreme Court again emphasized the importance of protecting association in *Roberts v. U.S. Jaycees*.[43] "Moreover, the constitutional shelter afforded such relations reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability to define one's identity that is central to any concept of liberty."[44] The Court also indicated that freedom of association includes the right not to associate with others: "There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire."[45] However, the Court's decisions on freedom of association have generally been limited in scope, and they do not recognize a general right of "social association."[46]

a. Intimate Association

Freedom of association is further defined by distinguishing two types of association – intimate and expressive. Intimate association originates from the right to privacy implied in the Due Process Clause of the Fourteenth Amendment. [47] It is characterized by its relative smallness, high degree of selectivity and seclusion of others.[48] Intimate association is highly valued and protected by the courts: "Choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the state

41. 357 U.S. 449 (1958).

42. *NAACP*, 357 U.S. 449, 461.

43. 468 U.S. 609.

44. *Id.* at 618-619.

45. *Id.* at 623.

46. *See* Dallas v. Stanglin, 490 U.S. 19 (1989).

47. The Supreme Court laid the foundation for right to privacy when deciding several cases in the 1920's. *See* Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

48. *See Roberts*, 468 U.S. at 620.

because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme."[49] However, these cases have generally been related to intimate family matters such as marriage[50], contraception[51], abortion[52], family housing[53], raising children[54], and homosexuality.[55] In another case, although a golf club was highly selective and exclusive, the Maryland Court held that Burning Tree Club was not protected by freedom of association because there was no intimate association attached to members of a club that play golf together.[56]

b. Expressive Association

Expressive association is based on the "right to engage in activities protected by the First Amendment. . .to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[57] It is characterized by the size of the group, its purpose, its policies, its selectivity, and congeniality.[58] Expressive association allows an individual to join with others to pursue goals that are independently protected by the First Amendment such as political advocacy, speech, and religious worship.[59]

However, the right to associate for expressive purposes is not absolute.[60] The government may interfere with expressive association if there is a compelling state interest that is being achieved by the least restrictive means.[61] Preventing discrimination is a compelling social objective that may warrant governmental interference in private affairs.[62] If eliminating the discriminatory practice will not affect the organizations ability to carry out its expressive purposes in any significant way, the Court is likely to infringe on the right of

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49. *See id.* at 617-618.

50. Griswold v. Connecticut, 381 U.S. 479 (1965).

51. Eisenstadt v. Baird, 405 U.S. 438 (1972).

52. Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Casey, 505 U.S. 833 (1992).

53. Moore v. East Cleveland, 431 U.S. 494 (1977).

54. Smith v. Org. of Foster Families for Equality & Reform, 431 U.S. 816, 855-56 (1977).

55. Bowers v. Hardwick, 478 U.S. 186 (1986); *See also* Lawrence v. Texas, 123 S. Ct. 2472 (2003).

56. State v. Burning Tree Club, Inc., 554 A.2d 366, 378-81 (Md. 1989).

57. *Roberts*, 468 U.S. at 622.

58. *Id.* at 620.

59. *Id.* at 622.

60. *Id.* at 623.

61. *Id.*

62. *Id.*; Bd. of Dir's of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987).

association.[63] Because golf clubs are generally formed for social purposes, it is unlikely that they would be protected by expressive association.

ii. Statutory Protections

The Civil Rights Act of 1964 was landmark legislation that provided stronger protection for rights guaranteed by the Constitution. The Act was passed during the Johnson administration as part of a program to upgrade the status of minorities and has been quite successful in eliminating many forms of overt discrimination.[64]

1. 42 U.S.C. 1981

42 U.S.C. 1981 provides "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts. . ."[65] As many private club memberships are contractual in nature, it seems that 42. U.S.C. 1981 might offer some protection from discriminatory club practices. 42 U.S.C. 1981(b) explains that the statute includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.[66] This also looks promising when membership benefits and privileges are based on a discriminatory classification. 42 U.S.C. 1981(c) further explains that the rights protected by the statute are protected against impairment by non-governmental discrimination and impairment under color of state law, thus eliminating the threshold of state action.[67] However, the definition of "all persons" apparently does not include women as the courts

63. *See Bd. of Dir's of Rotary Int'l*, 481 U.S. at 548 (1987).

64. Rosner, *supra* note 6, at 158.

65. Civil Rights Act of 1964, 42 U.S.C. § 1981(a) (2005). The entire text reads:

§ 1981. Equal rights under the law. (a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

66. 42 U.S.C. § 1981(b). The definition of "make and enforce contracts" is as follows; "For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

67. 42 U.S.C. § 1981(c). The definition of "protection against impairment" is as follows; "The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

have determined that the statute was intended to protect against racial discrimination and not sex.[68]

2. 42 U.S.C. 1982

42 U.S.C. 1982 provides for equal protection of property rights.[69] The courts have found that membership in private clubs create a property right that is protected by the statute. In *Tillman v. Wheaton-Haven Recreation Association*, a private residential swimming pool violated Section 1982 when it refused to allow an African-American guest from using the pool.[70] This holding could provide hope for female guests that wish to use male-restricted areas, such as dining with business associates in the men's grill.

In *Wright v. Salisbury Club, Ltd.*, membership in a private club that was tied to home ownership in a private community was found to establish property rights.[71] In this case, a home owner in a private residential community was denied membership in the recreational club because of race.[72] Significant findings included that membership in the club was a part of the bundle of rights associated with home ownership and that denial of membership denied the homeowner the full value and enjoyment of his property.[73] Female homeowners in private residential communities would seemingly be protected by Section 1982, however purely residential golf clubs do not generally have the socio-economic networking impacts solely because they are limited to access of the residents of the community.

In *Sullivan v. Little Hunting Park, Inc.*, private recreational facilities were owned by a non-profit company which provided a leasehold stake in the club to members.[74] The company refused to approve a transfer of a member's leasehold interest to an African-American, and expulsed the member from the company board for defending the African-American.[75] The Court held that

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68. *See* Rackin v. Univ. of Pennsylvania, 386 F. Supp. 992 (E.D. Pa. 1974); Wisconsin NOW v. Wisconsin, 417 F. Supp. 978 (W.D. Wis. 1976); Mills v. Nat'l Distillers Prod's Co., 435 F. Supp. 72 (S.D. Ohio 1977); Balmes v. Bd. of Educ., 436 F. Supp. 129 (N.D. Ohio, 1977).

69. 42 U.S.C. § 1982 (2005), states "Property rights of citizens. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

70. Tillman v. Wheaton-Haven Recreation Assoc., 410 U.S. 431, 437 (1973).

71. Wright v. Salisbury Club, Ltd., 632 F.2d 309, 315-16 (4th Cir. 1980).

72. *Id.*

73. *Id.*

74. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 236 (1969).

75. *Id.*

Section 1982 reached beyond state action and included the unofficial acts of private individuals.[76] This holding could have implications for members that wish to transfer membership property rights to wives, daughters, or other women.

Although Section 1982 looks as if it might offer some protection for women who would be denied property rights at private golf clubs, all of the relevant cases protect on the basis of race, not sex. Although sex has not been expressly denied as a protected category, as it has for Section 1981 claims, the protection would appear to be limited to residential or cooperative community facilities.

3. 42 U.S.C. 1983

42 U.S.C. 1983 which provides equal protection under color of state law is not particularly useful because of the need for state action. As was described previously in the state action section of this paper, activities such as leasing publicly owned land, liquor licensing, preferential tax treatment and government control over labor practices generally do not rise to the level of state action.[77] However, in *Citizens Council on Human Relations v. Buffalo*, individuals and organizations sued a private yacht club for discrimination based on race, religion and sex.[78] The court found state action under Section 1983 using the state compulsion theory.[79] State action occurred because the city made an agreement to renew a long-term, exclusive lease to the club on public land for one dollar, which the court viewed as significant state involvement.[80]

4. Title IX

Routinely heralded as the champion for women's rights in athletics, Title IX[81] is the sole federal civil rights legislation that expressly fights against

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76. *Id.*

77. *See generally* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972)

78. *See* Citizens Council on Human Relations v. Buffalo, 438 F. Supp. 316 (W.D.N.Y. 1977).

79. *Id.* at 318-319.

80. *Id.*

81. 20 U.S.C. § 1681 (2005). "Sex. (a) Prohibition against discrimination; exceptions. No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . ."

gender discrimination.[82] Although female athletes are the most publicly known beneficiaries of the legislation, Title IX was enacted to provide equal opportunity to women in all educational settings.[83] As such, protection is limited to educational institutions that receive federal funding. Unless a private club satisfied these requirements, Title IX is of no help at all in addressing gender discrimination in a private club setting. One possible link to a Title IX claim could come from the PGA "For Business and Life" program.[84] Because this program is a university academic initiative, the link to educational institutions required for Title IX compliance is there. However, it is the school, rather than the golf club, that would most likely be the defendant for any discrimination occurring within the program. It is unknown whether an academic institution that holds it course at a club with discriminatory policies would be liable under Title IX.

5. Title II

Title II of the Civil Rights Act prohibits discrimination in places of public accommodation.[85] It states: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." Places of public accommodation include hotels, restaurants, movie theaters, concert halls, sport stadiums, and large entertainment venues that affect commerce.[86] On its face, Title II application

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82. Sawyer, *supra* note 11, at 199.

83. 20 U.S.C. § 1681 defines an educational institution as

any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

84. *See Golf for Business and Life, supra* note 19.

85. Civil Rights Act of 1964, 42 U.S.C. § 2000a (2005).

86. 42 U.S.C. § 2000a defines places of public accommodation as:

(b) Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments. Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five

appears limited as sex is not a class expressly protected by the legislation[87] and private golf clubs may not qualify as a place of public accommodation.

a. Public Accommodation

In order for Title II to apply, the golf club must be both a place of public accommodation and affect commerce.[88] Numerous cases demonstrate that it is fairly easy to show that the private club affects commerce. In *Warfield v. Peninsula Golf & Country Club*, the regular business transactions related to club events such as golf and tennis tournaments, wedding receptions, bar mitzvahs, fashion shows, and special luncheons and dinners made the club functionally equivalent to a commercial caterer or a commercial recreational resort in the eyes of the court.[89] In *U.S. v. Lansdowne Swim Club*, the fact that the private swim club's sliding board was manufactured out of state and that out of state guests were sources of revenue proved that the club affected commerce.[90] The mere hosting of an annual golf tournament attended by out of state professionals and club members[91] and the fact that an out of state golf team played on the course once a year[92] was enough to satisfy the commerce requirement for courts in two other cases.

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rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

87. *See* Seidenberg v. McSorleys' Old Ale House, Inc., 308 F. Supp. 1253 (SD NY 1969); Slaby v. Fairbridge, 3 F. Supp. 2d 22 (D.C. 1998).

88. 42 U.S.C. § 2000a(b)1-4; *See also* Jennifer Jolly-Ryan, *Chipping Away at Discrimination at the Country Club,* 25 PEPP. L. REV. 495, 506 (1997).

89. Warfield v. Peninsula Golf & Country Club, 896 P.2d 776 (Cal. 1995).

90. U.S. v. Lansdowne Swim Club, 713 F. Supp. 785, 792 (E.D. Pa. 1989).

91. *See* Brown v. Laudoun Golf & Country Club, Inc., 573 F. Supp. 399, 402 (E.D. Va. 1983).

92. *See* Evans v. Laurel Links, Inc., 261 F. Supp. 474, 477 (E.D. Va. 1966).

b. Private Club Exemption

Perhaps the biggest barrier in trying to prove that a private golf club is a place of public accommodation is the private club exemption written into the legislation. Title II provides an exemption from its provisions for bona fide private clubs stating that the legislation "shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b)."[93]However, this exemption is not an insurmountable obstacle, as the term "private club" is not defined in the legislation and the Supreme Court has not ruled creating a definitive definition. The lower courts have provided a remedy to many victims of discrimination by a private club's exclusionary policies by broadly defining "public accommodation" and very narrowly construing "private club."[94]

The burden of proof is on the club to show that it qualifies for the private club exemption.[95] In federal and state courts, a number of criteria are considered in finding that a club is a bona fide private club, including:

- Size of the club – smaller clubs are more likely to be private.[96]
- Selectivity in membership – more exclusive clubs are more likely to be private whereas clubs that advertise for members are likely a public accommodation.[97]
- Substantiality of dues – higher fees are more likely to be private.[98]
- Procedural formalities followed by the club – an absence of procedures most likely indicates a public accommodation.[99]

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93. 42 U.S.C. § 2000a(e).

94. *See* Jolly-Ryan, *supra* note 88, at 507.

95. *See* U.S. v. Richberg, 398 F.2d 523 (5th Cir. 1968); Nesmith v. Y.M.C.A., 397 F.2d 96 (4th Cir. 1968); Wright v. The Cork Club, 315 F. Supp. 1143 (S.D. Tex. 1970).

96. *See Brown*, 573 F. Supp. 399; *Lansdowne Swim Club*, 713 F. Supp. at 792.

97. *See Sullivan*, 396 U.S. at 236; Daniel v. Paul, 395 U.S. 298 (1969); *Moose Lodge No. 107*, 407 U.S. 163; *Tillman*, 410 U.S. at 437; *Brown*, 573 F. Supp. at 402; *Lansdowne Swim Club*, 713 F. Supp. at 797; *Nesmith*, 397 F.2d at 101; Durham v. Red Lake Fishing & Hunting Club, Inc., 666 F. Supp. 954 (W.D. Tex. 1987); Clover Hill Swimming Club, Inc. v. Goldsboro, 219 A.2d 161 (N.J. 1966); U.S. v. Jordan, 302 F. Supp. 370, 376 (E.D. La. 1969); *Wright*, 632 F.2d 309.

98. *Lansdowne Swim Club*, 713 F. Supp. at 797.

99. *See Brown*, 573 F. Supp. 399; Stout v. YMCA, 404 F.2d 687 (5th Cir. 1968); Solomon v. Miami Woman's Club, 359 F. Supp. 41 (D.C. Fla. 1973); *Wright*, 632 F.2d 309; U.S. v. Trustees of Fraternal Order of Eagles, Milwaukee Aerie No. 137, 472 F. Supp. 1174 (D.C. Wis. 1979); Vidrick v. Vic Tanny Intern. Inc., 301 N.W.2d 482 (Mich. App. 1980); Welsh v. Boy Scouts of Am., 724 F. Supp. 1413 (N.D. Ill. 1990).

- Members control over governance of the club – a lack of membership participation is likely to indicate a public accommodation.[100]
- Use of the club's facilities by non-members – liberal guest policies or rental by non-members is likely to indicate a public accommodation.[101]
- The club's history and purpose – the predominance of a profit motive is likely to indicate a public accommodation.[102]
- Member's property interest – members with an ownership stake may indicate a private club while clubs owned by corporations are more likely to be a public accommodation.[103]

None of the factors listed above is individually dispositive: the court must consider all of the factors to determine whether the balance supports a finding of private club or public accommodation.[104] The Supreme Court decisions indicate that a private club is non-profit, member-owned and controlled, and selective as to membership and use of club facilities.[105]

iii. State Constitutions

State Constitutions may offer significantly greater protection against sex discrimination than the intermediate protection provided by the Equal Protection Clause of the Federal Constitution. Some states have included sex as a protected classification within the body of the State Constitution.[106] Other states have enacted Equal Rights Amendments that protect against discrimination based on sex.[107] In these states, an equal protection argument for a gender discrimination claim may be elevated to a strict scrutiny analysis.

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100. *See Brown*, 573 F. Supp. 399; U.S. v. Johnson Lake, Inc., 312 F. Supp. 1376 (S.D. Ala. 1970); Smith v. YMCA, 462 F.2d 634 (Ala. 1972).

101. *See Brown*, 573 F. Supp. 399; *Lansdowne Swim Club*, 713 F. Supp. at 792; Anderson v. Pass Christian Isles Golf Club, Inc., 488 F.2d 855 (Miss. 1974).

102. *See Brown*, 573 F. Supp. 399; Cornelius v. Benevolent Protective Order of Elks, 383 F. Supp. 1182 (D.C. Conn. 1974); Bell v. Kenwood Golf & Country Club, Inc., 312 F. Supp. 753 (D.C. Md. 1970).

103. *See Daniel*, 395 U.S. 298; *Bell*, 312 F. Supp. 753; *Smith*, 462 F.2d 634; *Johnson Lake, Inc.*, 312 F. Supp. 1376.

104. *Wright*, 315 F. Supp. at 1150.

105. *Id.* at 1151.

106. Illinois (ILL. CONST., art. 1, § 18; Louisiana (LA. CONST. art. I, § 12), Utah (UTAH CONST. Art. IV, § 1), and Wyoming (WYO. CONST. Art. 1, § 3).

107. These states are: Alaska (ALAS. CONST., art. 1, § 3); Colorado (COLO. CONST., art. 2, § 29); Connecticut (CONN. CONST. art. I, § 20); Hawaii (HAW. CONST. art. I § 4); Maryland (MD.

In Louisiana, Article I, Section 12 of the state constitution guarantees freedom from discrimination based on race, religion, or national ancestry and from arbitrary, capricious, or unreasonable discrimination based on age, sex, or physical condition.[108] This constitutional protection, coupled with a narrow definition of a private club, allowed female members of the Southern Trace Country Club to successfully challenge the club's gender segregated dining facilities.[109]

Southern Trace Country Club of Shreveport, Louisiana, was developed as a full blown country club with swimming, tennis, golf and related facilities.[110] Adjacent to the men's locker room was a spacious "Men's Grille" and adjacent to the women's locker room was a smaller food service area called the "Ladies' Card Room."[111]The Men's Grille was the only dining facility open on Sundays.[112] Although there were no other dining options available, four female members of the club were refused service at the Men's Grille.[113] As they were being escorted from the Men's Grille, a male club member called out "Don't let the door hit you on the ass on your way out."[114] The female members asked the manager of the club to open the Men's Grille to all adult members and their guests, regardless of gender, but this request was rejected with the explanation that the atmosphere in the Men's Grille would offend the "ladies because all those men do in there is spit, scratch, and cuss."[115] The court determined that Article I, Section 12 of the Louisiana Constitution was applicable to Southern Trace after finding the club a public facility because it was owned and managed by a corporation, solicited membership, had no member requirements other than the ability to pay fees and dues, had no membership control over policy or governance, and was created and sustained by a profit motive.[116]

DECLARATION OF RIGHTS, art. 46); Massachusetts (Art. 106, MASS. CONST.); Montana (MONT. CONST. art. II, § 4); New Hampshire (N.H. CONST. art. II); New Mexico (N.M. CONST. art. II, § 18); Pennsylvania (PA. CONST. art. I, § 28); Texas (TEX. CONST. art. I, § 3a); Virginia (VA. CONST., art. I, § 11); Washington (WASH. CONST. art. 31 § 1).

108. LA. CONST. art. I, § 12.

109. *Albright,* 879 So. 2d 121.

110. *Id.* at 125.

111. *Id.*

112. *Id.* at 126.

113. *Id.*

114. *Albright*, 879 So. 2d at 126.

115. *Id.*

116. *Id.* at 128.

The Club argued that market factors, privacy, and male preference justified the gender restrictions.[117] The Court found that none of these motives was appropriate. A "country club's desire to make more money is not a valid reason to discriminate when its increased revenue is derived from discrimination."[118] In rendering judgment the court cautioned that it must carefully avoid the "inherent risk of reinforcing the stereotypes about the proper place of women and their need for special protection."[119] The Court found that Southern Trace's exclusionary policy was based "on an inaccurate, stereotypical depiction of male behavior which veils the discrimination as an attempt to protect women."[120] In finding absolutely no basis (rational, intermediate, or strict) for the discriminatory policy, the court declared: "In the 21st Century, it is simply archaic to cite protection of women from the sights and sounds of a locker room environment as an excuse for excluding them from a dining area."[121]

iv. State Legislation

Regardless of whether a state has an Equal Rights Amendment, most states have enacted their own Civil Rights legislation.[122] State and local laws are more likely to include gender as a protected category and often define public accommodations more broadly than the federal legislation.[123] Forty states and the District of Columbia have banned sex discrimination in public accommodation, and only 16 of these states have private club exemptions.[124] Also, many state statutes are not limited to state action and do not require a

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117. *Id.* at 131.

118. *Albright*, 879 So. 2d at 135.

119. *Id.* at 137.

120. *Id.*

121. *Id.* at 138.

122. *See* Kamp, *supra* note 5, at 95; but *See* Miriam A. Cherry, *Exercising the Right to Public Accommodations: The Debate over Single-Sex Health Clubs,* 52 ME. L. REV. 97, 118 n. 133 (2000) (Nine states have no protection from gender based discrimination).

123. *Id.*

124. Paula Finlay, *Note: Prying Open the Clubhouse Door: Defining the "Distinctly Private"' Club After* New York State Club Association v. City Of New York, 68 WASH. U. L.Q. 371, 383 (1990); However, five states—Georgia, Arkansas, Mississippi, North Carolina, and Texas—do not have a public accommodation statute that addresses private country clubs. *See* Charpentier, *supra* note 8, at 135. The closest that North Carolina comes to addressing gender discrimination in public accommodation is a statute addressing eligibility for the tourist-oriented directional sign (TODS) program. *See* N.C. GEN. STAT. § 136-140.16 (2005).

nexus to interstate commerce, thus tipping the equality versus liberty scale in favor of equality.

A few states have adopted laws that specifically address discrimination in private country clubs. For example:

- Connecticut comprehensive equal access law requires that any private country club with at least twenty members and a nine-hole golf course that either receives revenues from non-members or holds a liquor license refrain from discrimination in its membership or access policies on the basis of race, religion, color, national origin, ancestry, sex, marital status or sexual orientation.[125]
- In Michigan, a Private club cannot discriminate against its members by refusing to grant them access to any of the club's facilities.[126]
- Kansas prohibits discrimination in private clubs with over 100 members if the club provides regular meal service and receives payments from non-members.[127]

Florida includes private clubs in anti-discrimination legislation if they have over 400 members.[128]

Like the federal government, most states do not specifically define "private club." Louisiana is the only state to legislate a definition, and chose the following factors:

1. selectiveness of the group in adding new members;
2. existence of formal membership procedures
3. membership governance
4. history of the organization
5. use of club facilities by non-members
6. substantiality of dues
7. advertisement of the organization
8. predominance of a profit motive.[129]

Where it exists, state legislation seems to be the best legal option explored thus far for addressing gender discrimination in golf clubs. Three Supreme Court decisions in the 1980s held that states with public accommodation laws

125. CONN. GEN. STAT. § 52-571d (2006).
126. MICH. COMP. LAWS ANN. § 37.2302(a) (2005).
127. KAN. STAT. ANN. § 44-1002(i) (2005).
128. FLA. STAT. § 760.60(1) (2005).
129. LA. REV. STAT. § 49:146(3) (2005).

have a compelling interest in prohibiting discrimination which outweighs the private clubs' asserted right of freedom of association. Two of these cases involved state civil rights legislation, the third was a municipal civil rights act.

Roberts v. U.S. Jaycees was the first case decided by the Supreme Court that addressed discriminatory membership policies of private organizations in conflict with state anti-discrimination laws.[130] The United States Jaycees is a non-profit national membership organization whose objective is to promote and foster the growth and development of young men's civic organizations.[131] Regular membership is limited to young men between the ages of 18 and 35.[132] Two local chapters in Minnesota had been admitting women as regular members for years, citing compliance with the Minnesota Human Rights Act.[133] The national organization had imposed a number of sanctions on the local chapters and threatened to revoke their charters.[134] The members of both chapters filed discrimination charges with the Minnesota Department of Human Rights, alleging that the exclusion of women from full membership violated the Minnesota Human Rights Act.[135] The national organization sued Minnesota state officials to prevent enforcement of the Human Rights Act, claiming that application of the Act by requiring local chapters to accept women as regular members would violate the male members' constitutional rights of free speech and association.[136]

A state hearing officer decided against U.S. Jaycees, and the district court certified to the Minnesota Supreme Court the question whether the organization is "a place of public accommodation."[137] The Court confirmed that the organization did fall within the definition of a place of public accommodation, and the US Jaycees amended its federal complaint to claim that the Minnesota Supreme Court's interpretation of the Act rendered it unconstitutionally vague and overbroad.[138]

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130. *Roberts*, 468 U.S. 609.

131. *Id.* at 612.

132. *Id.* at 613.

133. *Id.* at 614.

134. *Id.*

135. *Roberts*, 468 U.S. at 615. The Minnesota Human Rights Act states: "It is the public policy of this state to secure for persons in this state freedom from discrimination...(3) in public accommodations because of race, color, creed, religion, national origin, sex, sexual orientation, and disability." MINN. STAT. § 363A.02 (2005).

136. *Roberts*, 468 U.S. at 615.

137. *Id.*

138. *Id* at 616.

After trial, the district court entered judgment in Minnesota's' favor.[139] The court of appeals reversed, holding that application of the Minnesota Human Rights Act to the Jaycees membership policies would produce a "direct and substantial" interference with their freedom of association guaranteed by the First Amendment.[140]

The U.S. Supreme Court confirmed that the Jaycees were a place of public accommodation because local chapters lack the distinctive characteristics – they were neither small nor selective and employed no criteria for judging applicants for membership—that might afford constitutional protection to their members' decision to exclude women.[141] It further held that freedom of association was not abridged because many of the activities central to the formation and maintenance of the association involved the participation of non-members, and that women regularly participated in a substantial portion of the activities.[142] Because the Court found no basis in the record for concluding that admission of women as full voting members would impede the Jaycees ability to engage in its constitutionally protected civic, charitable, lobbying, fundraising, and other activities or to disseminate its preferred views, Minnesota had applied the least restrictive means of achieving the compelling interest of eliminating discrimination against female citizens.[143]

Three years later, the Supreme Court ruled on another almost identical case. In *Board of Directors of Rotary International v. Rotary Club of Duarte,* the Duarte, California Rotary Club's international membership was terminated because it admitted women to active membership.[144] The Duarte club and two of its female members sued claiming violation of California's Unruh Act.[145] The state trial court entered judgment for Rotary International, concluding that it was not a "business establishment" within the meaning of the Unruh Act.[146] The state court of appeal reversed, finding that both Rotary International and the Rotary Club of Duarte are business establishments.[147] They also rejected

139. *Id.*

140. *Id.* at 617.

141. *Roberts*, 468 U.S. at 618-622.

142. *Id.*

143. *Id.* at 622-629.

144. *Bd. of Dirs. of Rotary Int'l*, 481 U.S. 537.

145. CAL. CIV. CODE 51(b) (2005), states, "All persons. . .are free and equal, no matter what their sex, race, color, religion, ancestry, national origin, or disability are entitle to full and equal accommodations, advantages, facilities, privilege, or services in all business establishments of every kind whatsoever."

146. *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 562.

147. *Id.*

Rotary's assertion that the policy of excluding women was protected by the First Amendment.[148]

The Supreme Court echoed the analysis of *Roberts* in finding that the large size of local clubs, the high turnover rate among club members, the inclusive nature of each club's membership, the public purposes behind clubs' service activities, and the fact that the clubs encourage the participation of strangers in, and welcome media coverage of, many of their central activities was not sufficiently intimate to warrant constitutional protection.[149] Similarly, the Court found that the Rotary Club's right of expressive association would not be violated as admitting women would not affect in any significant way the existing members' ability to carry out their service activities.[150] Ultimately, the Court held that California's compelling interests in eliminating discrimination against women and in assuring them equal access to public accommodations, which included the acquisition of leadership skills and business contacts as well as tangible goods and services, was justified over a slight infringement of members' rights.[151]

In both of these cases, the court indicated that conflicts between the competing equality and liberty interests would be fact specific and addressed on a case by case basis.[152]

Although state constitutions and state legislations provide broader protection against gender discrimination, there are limitations on what is considered discrimination "because of sex." *McNamara v. Tournament Players Club of Connecticut, Inc.* is an interesting case where the wife of a club member whose membership had been terminated, applied for membership in her own name.[153] The club board of directors indicated that the applicant was rejected because "she was a woman who is married to . . . Brian McNamara."[154] Susan McNamara sued making several claims including sex discrimination, discrimination based on marital status, and intentional infliction of emotional distress.[155] The trial court granted summary judgment to the defendant golf club, and the Supreme Court upheld the trial

148. *Id.* at 543.

149. *Id.* at 544-549.

150. *Id.* at 548-549.

151. *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 548-549.

152. Charpentier, *supra* note 9, at 124.

153. McNamara v. Tournament Players Club of Connecticut, Inc., 270 Conn. 179 (2004).

154. *Id.* at 182.

155. *Id.* at 183.

court ruling.[156]The marital status claim was wholly rejected because Susan was not rejected because of her marital status, but because of whom she was married to.[157] Granting membership to Mrs. McNamara would have given privileges to her husband, who had been banned from the club.[158] Because the club had never previously rejected a woman's application, the court also found no evidence of gender discrimination.[159]

It is also important to note that winning the battle against gender discrimination does not necessarily guarantee a good outcome. Nine women successfully sued the Haverhill Golf and Country Club for its discriminatory practices in membership, initiation fees, tee times and food service.[160] Although the litigation was for the benefit of all female members, the negative backlash had substantial emotional, social and financial costs.[161] The women were treated as social pariahs, given the cold shoulder in what would have normally been a relaxed social setting.[162] The economic incentives of club membership were eliminated as many lost business relationships, and even spouse's businesses suffered the revenge of other club members.[163] Several of the successful litigants have resigned as members as a result of the hostile climate.[164]

v. Municipal Legislation

The third significant case decided by the Supreme Court in the 1980s looked at New York City's Human Rights Law.[165] A 1984 amendment (Local Law 63) broadened the scope of the legislation to include any "institution, club or place of accommodation," other than a benevolent order or a religious corporation, if it "has more than four hundred members, provides regular meal service and regularly receives payment . . . directly or indirectly from or on

156. *Id.* at 182.

157. *Id.* at 195.

158. *Id.* at 182.

159. *Id.* at 198.

160. Borne v. Haverhill Golf & Country Club, 11 Mass. L. Rep. 85 (Mass. Super. Ct. 1999).

161. Rosner, *supra* note 6, at 187-188; Marcia Chambers, *The High Price of Victory*, N.Y.TIMES, Apr. 4, 2001 at D1.

162. Rosner, *supra* note 6, at 188.

163. *Id.*

164. *Id.*

165. N.Y. State Club Ass'n, Inc. v. City of New York, 487 U.S. 1 (1988). New York City's Human Rights Law forbids discrimination based on race, creed, sex, and other grounds by any "place of public accommodation, resort or amusement," but specifically exempts "any institution, club or place of accommodation which is in its nature distinctly private." *Id.* at 5.

behalf of nonmembers for the furtherance of trade or business."[166] A non-profit consortium of 125 private New York City clubs and associations filed a state-court suit against the city and some of its officials, claiming that the law was unconstitutional on its face under the First and Fourteenth Amendments.[167] The trial court entered a judgment upholding the law, and the intermediate state appellate court and the Court of Appeals of New York affirmed.[168] In comparing this case to *Roberts v. United States Jaycees* and *Rotary International v. Duarte*, the court found that the municipalities criteria conferring public status on "private" clubs was no different than the criteria applied in the earlier cases which failed to indicate intimate association.[169] Similarly, the Court found no credence in the consortium's claims that the law affected every club member's right of expressive association as since there was no evidence of any club, let alone a substantial number of clubs, for whom the law impaired the ability to associate or to advocate public or private viewpoints.[170] The unique aspect of this case related to the consortium's claim that the "benevolent orders and religious corporations" exemption was a violation of equal protection.[171] Applying rational basis review, the Court found that the City Council could have reasonably believed that the exempted organizations are different in kind from the consortium's members, in the crucial respect of whether business activity was prevalent among them.[172] The ruling addressed the heart of the issue: although private clubs claim to be formed for a social purpose, they are a vital part of the business world, and discrimination in determining membership puts those in excluded groups at a severe business disadvantage.[173]

New York City is not the only municipality with a Human Rights Act. Atlanta has a similar city ordinance prohibiting discriminatory practices by private clubs.[174]

166. *Id.* at 6.
167. *Id.* at 7.
168. *N.Y. State Club Ass'n, Inc.*, 487 U.S. at 7-8.
169. *Id.*
170. *Id.* at 10-15.
171. *Id.*
172. *Id.*
173. *See* Rosner, *supra* note 6, at 154.
174. Charpentier, *supra* note 9, at 135.

vi. Other Options

So far, the legal focus of this article has been on traditional legal equal protection and legislative solutions. Are there other potential avenues that would eradicate gender discrimination in private golf clubs?

1. Federal Equal Rights Amendment

In a best case scenario, enacting a federal Equal Rights Amendment would elevate gender to a suspect category. The proposed federal Equal Rights Amendment would have barred the federal government and all state governments from denying "equality of rights under the law. . .on account of sex."[175] Of course, the legislation itself would not directly address the issue of gender discrimination at private clubs because of the lack of state action, but it would stigmatize gender discrimination at the federal level sending a clear message that this type of discrimination is no longer condoned. It is possible that private clubs would conform to new social standards in the same way that most have voluntarily prohibited racial discrimination.

2. Federal Legislation under the Commerce Clause

Another unlikely but effective possibility would be to create legislation at the federal level under the commerce clause that would specifically forbid country clubs from discriminating on the basis of gender. This would require recognition that the business benefit of club membership generally outweighs the social aspect of the club. It would also legislate the Supreme Court finding in *Roberts v. U.S. Jaycees*: "Once an association chooses to enter the commercial marketplace its ability to discriminate on the basis of gender is limited."[176]

3. Removal of private club exemptions

Removal of the private club exemption from the federal Civil Rights Act would broaden protection against discrimination in private clubs, but because sex is not a protected category in the Act, it would do little to eliminate the discriminatory membership and operations policies at private golf clubs.

None of these three proposed solutions is very likely to occur. Considering the current political climate and that many politicians belong to

175. H.R.J. Res. 208, 92d Cong., 2d Sess., 118 CONG. REC. 9598 (1972).

176. *Roberts*, 468 U.S. at 636.

the all male Burning Tree Club, enacting this type of legislation would be against their self interest because it would help to level the playing field. This type of legislation would also likely alienate the wealthy political backers who are members of private clubs, proposing the legislation would be risking political suicide. At the federal level, equality loses the battle to liberty.[177]

4. Equal Rights Amendment in State Constitution

As has been previously described, states have done a much better job of valuing equality over liberty. State adoption of an Equal Rights Amendment making gender a suspect category, state civil rights acts that prohibit sex discrimination as a category, and state legislation that holds private clubs within the definition of public accommodations, or eliminates the private club exemption all offer broader protection against gender discrimination. Again, state legislators may face the same problems with self interest and financial support that federal legislators might have. It is also unlikely, given the list of states that currently do not sponsor any gender-based protections, and the conservative tradition of these states, that they will advance gender equity at any time soon.

5. Legislative/Economic Solutions

Private golf clubs may be persuaded to change their policies if legislation exists that will affect their bottom line.

a. Liquor Licensing

The fact that the state grants a liquor license to the private club is not enough to warrant state action, but states can refuse to grant licenses to establishments that have discriminatory policies.[178] Connecticut, Illinois, Maine, Michigan, New Hampshire, New Jersey, and Utah currently have such statutes.[179] The impact of refusing a liquor license would be devastating. It

177. *See* Rosner, *supra* note 6, at 172-173.

178. *See* BPOE Lodge No. 2043 v. Ingraham, 297 A.2d 607, 608-616, 619-620 (Me. 1972); Vaspourakan, Ltd. V. Mass. Alcoholic Beverages Control Comm'n, 516 N.E. 2d 1153, 1154-55 (Mass. 1987); Beynon v. St. George-Dixie Lodge No. 1743, BPOE, 854 P.2d 513, 514-19; Coalition for Open Doors v. Annapolis Lodge No. 622, BPOE, 635 A.2d 412, 413 (Md. 1994); Elks Lodges Nos. 719 & 2021 v. Utah Dep't of Alcoholic Beverage Control, 905 P.2d 1189, 1200 (Utah 1995).

179. 235 ILL. COMP. STAT. ANN. 5/6-17 (West 2005); ME. REV. STAT. ANN. Tit. 17, 1301-A (West Supp. 2005); UTAH CODE ANN. 32A-5-102(3)(a), -102(3)(b), - 103(7), -105(2)(c) (2005); CONN. GEN. STAT. 52-571d (West Supp. 2005); 13 N.H. REV. STAT. ANN. 178:4 (2005); MICH. COMP. LAWS ANN. 37.2301-2304 (West 2005); N.M. STAT. ANN. s. 46-10-13.1 (Michie, 2005).

would most likely kill the socializing aspect of the club, and the loss of sales of alcohol would put tremendous financial burden on the club to generate revenue from other sources, likely through increasing membership fees. Members would be unhappy with paying more for less benefit, and membership would likely decrease.

b. Taxes

Private country clubs that are classified as non-profit organizations are exempted from federal and state income tax liability.[180] This is a tremendous financial benefit to the members of a private club at the expense of the taxpayers, including those individuals who are directly discriminated against as long as the club's discriminatory policies are unwritten.[181] In order to meet the criteria for tax exempt status, an organization cannot discriminate on the basis of race, color or religion, but it does not ban discrimination on the basis of sex.[182] Eliminating tax benefits seems to be a particularly favorable method of curtailing discriminatory behavior on the federal level.[183] From an ethical perspective, making taxpayers subsidize organizations that engage in invidious behavior is certainly unfair, particularly if the taxpayer is a member of the class that is discriminated against. The financial impact of losing tax exempt status might be enough to motivate private clubs to change their policies, unless they would be willing to generate additional revenues – likely in the form of assessments, dues, or initiation fees—to make up for the tax liability.

Another federal tax policy approach would be to look at allowable business entertainment expenses and deductions. Individuals are not allowed to deduct membership dues or initiation fees as business expenses,[184] but can deduct 50% of expenses directly related to or associated with business.[185] However, allowable expenses do include entertainment and meals at any private club including those that discriminate.[186] Because this lowers the total

180. I.R.C. §§ 501(a) & 501(c)(7) (2005): "clubs organized for pleasure, recreation, and other non-profitable purposes, substantially all of the activities of which are for such purposes and no part of the net earnings of which inures to the benefit of any private shareholder."

181. Rosner, *supra* note 6, at 174; *See* McGlotten v. Connally, 338 F. Supp. 448, 457-58 (D.D.C. 1972).

182. I.R.C § 501(i).

183. Rosner, *supra* note 6, at 175.

184. I.R.C. § 274(a)(3) (2005).

185. I.R.C. § 274(n).

186. Rosner, *supra* note 6, at 176.

amount of income tax liability for the private club member, the end result is that taxpayers are again subsidizing discriminatory practices.[187]

The Ending Tax Breaks for Discrimination Act of 2005 bill was sponsored by Carolyn Maloney (D-NY) and proposed to the House on April 6, 2005.[188] The rationale for the bill is that it is wrong for corporations to take tax deductions for entertainment, meetings, and advertising at clubs that discriminate against women.[189] As Rep. Maloney explained, "Men play and women pay."[190] It will be interesting to see what happens with this legislation, as a similar bill proposed in 2003 died in the Ways and Means Committee.[191]

The state of Kentucky tried to address this issue by prohibiting personal income tax deductions by taxpayers in any amount "paid to any club, organization, or establishment which has been determined by the courts or an agency. . .charged with enforcing the civil rights laws. . . not to afford full and equal membership and full and equal enjoyment of its goods, services, facilities, privileges, advantages or accommodations to any person because of race, color, religion, national origin, or sex.[192] There are several problems with this type of legislation. First, it is moot since the IRS has eliminated these deductions. Second, it might not be constitutional under state constitutions that provide private club exemptions from public accommodations laws.[193] Third, it could be an administrative nightmare to determine which clubs discriminate and whether the deductions should be allowed or not.

States may also try to regulate private club behavior through property tax exemptions. Many private clubs that operate golf courses receive generous abatement under state "open spaces" laws.[194] If private clubs had to pay

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187. *Id.*

188. 151 CONG. REC. E 569.

189. *Id.*

190. *Id.*

191. *See* Tax Breaks for Discrimination Act of 2003, H.R. 2418.

192. KY. REV. STAT. ANN. § 141.10(11)(d) (2005).

193. *See* Louisville Country Club v. Kentucky Comm'n on Human Rights, Nos. 97-5758 & 97-5829, 1999 U.S. App. LEXIS 7828 (6th Cir. 1999).

194. For example, MINN. STAT. §273.112.3 (2005) denies property tax deferments to private country clubs with 50 or more members and more than 5 acres of property if they discriminate in membership requirements or selection, or limit access to golf, beverage, or dining facilities on the basis of sex or marital status. Clubs must make an affirmative showing that they do not discriminate in their bylaw, rules and regulations in order to qualify for the deferments every year MINN. STAT. §273.112.6 (2005); *See also* MD. CODE ANN., Tax-Prop. § 8-212 -214 (2005) which denies tax abatement to country clubs that discriminate on the basis of race, color, creed, sex or national origin in membership or guest privileges. *See also*, Commonwealth of Kentucky v. Pendennis Club, Inc., 153 S.W. 3d 784 (KY 2004).

standard taxes on land that was properly assessed, the club would need to generate additional revenues to make up for the tax liability – likely in the form of assessments, dues, or initiation fees.[195] Policies that grant preferential treatment only to those clubs that do not discriminate could be enough incentive for clubs to change their policies, although it is possible that some clubs would prefer to take the financial hit rather than changing their ways.[196]

In Burning Tree Club, Inc. v. Bainum, the issue was whether Maryland Code, Article 81, Section 19(e)(4) which conditionally gave preferential tax assessment to private country clubs operated with the primary purpose of serving or benefiting members of a particular sex, violated the Equal Rights Amendment of the Maryland Declaration of Rights (Article 46).[197] Burning Tree Club is a private men's golf club – women are not allowed to become members, participate as guests, or even enter or use the clubhouse.[198] The court held that the primary purpose provision was unconstitutional under the Equal Rights Amendment; therefore preferential tax assessment could not be given to private country clubs that discriminate on the basis of sex.[199]

6. Lobby in the Court of Public Opinion

When all legal channels have failed, lobbying and exerting social pressure on the governing bodies, tours, professional athletes, and sponsors might yield results.

Lawsuits and negative publicity forced the PGA to eliminate racial discrimination and change the Constitution and Bylaws of the organization.[200] Similarly the USGA, PGA of America, PGA Tour and Ladies Professional Golf Association (LPGA) Tour have all revised their tournament site selection policies to require that country clubs hosting events demonstrate that they do not discriminate on the basis of race, religion or sex.[201] These policies have been fairly effective to eliminate racial discrimination, but have had little impact on club policies regarding sex. And private clubs always have the

195. Rosner, *supra* note 6, at 178.

196. *See State of Md.,* 493 U.S. 816.

197. *Burning Tree Club, Inc.,* 305 Md. 53.

198. *Id.* at 59.

199. *Id.* at 80.

200. *See* Rosner, *supra* note 6, at 178, "From 1943-1961 the PGA constitution and bylaws stated: Professional golfers of the Caucasian race, over the age of eighteen years, residing in North or South America, and have served at least five years in the profession. . .shall be eligible for membership."

201. Charpentier, *supra* note 9, at 132.

option of forsaking the opportunity to host tour events rather than amending their membership policies.[202]

A recent, highly publicized example of club defiance of political pressure is the situation between Augusta National and the National Council of Women's Organizations (NCWO). Augusta National Golf Club, home of the prestigious Masters Golf Tournament, is a male-only private club whose members are a virtual "Who's Who" of the Fortune 100 companies.[203] Even more important than helping high ranking women past the glass ceiling, the NCWO was concerned that the acceptance of gender discrimination by powerful corporate leaders affects not only the women working in those corporations, but female consumers and stockholders as well.[204] In June 2002, the NCWO sent a private letter to Augusta National Golf Club asking the club to change its discriminatory membership policies.[205] Augusta National responded in a public press release defending their right to privacy and to determine their own membership policies without interference from outside groups.[206]

The NCWO then turned to the corporate sponsors of the Masters, Coca Cola, Citigroup, Cadillac/General Motors, and IBM, urging them to suspend sponsorship of the tournament.[207] Sponsors responses generally took the approach that sponsorship of the Masters Tournament, a public event, was separate from the Augusta National Golf Club, a private entity, and refused to withdraw sponsorship.[208] This, of course, is flawed reasoning as the Masters Tournament is owned by Augusta National and does not exist outside of the club grounds. Augusta National responded by voluntarily releasing the major sponsors from their commitments to the tournament so that the corporations would not be negatively effected by the publicity.[209] Corporate sponsors and

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202. Kenneth L. Shropshire, *Private Race Consciousness,* 1996 DET. C.L. REV. 629, 635 (1996).

203. National Council of Women's Organizations, *Hall of Hypocrisy:The Augusta National Controversy, available at* http://www.augustadiscriminates.org/pages.cfm?ID=52 (last visited December 30, 2005).

204. *Id.*

205. *Id.*

206. National Council of Women's Organizations, *Hall of Hypocrisy: NWCO Takes On Augusta National Golf Club, available at* http://augustadiscriminates.org/pages.cfm?ID=63 (last visited December 30, 2005).

207. The complete list and text of correspondence between NCWO and sponsors can be accessed at National Council of Women's Organizations, *Hall of Hypocrisy:History and Documents, available at* http://63.135.104.152/pages.cfm?ID=38 (last visited December 30, 2005).

208. *Id.*

209. Rosner, *supra* note 6, at 189.

corporate hospitality at the Masters has taken a low profile approach in 2004 and 2005, and the NCWO continues to keep the debate over August alive by focusing on discrimination in the corporations represented by Augusta membership.[210] A class action complaint was served March 30, 2005 on Citigroup's Smith Barney alleging nationwide sex discrimination at the firm.[211]

The NCWO also urged the PGA tour to "adhere to its written policy on discrimination by discontinuing its recognition of any kind from the Masters Golf Tournament. . ."[212] Although the Masters is not an official part of the PGA tour, prize money won at the Masters is counted by the PGA in a player's season earnings.[213] The PGA Tour refused, claiming that the lack of a contractual relationship with the Masters prohibited them from pressuring Augusta National to comply with the host club policy.[214] In refusing to withhold recognition of the Masters winnings on the Tour money list, the PGA cited the importance of the tournament.[215]

Completing the public pressure on all entities associated with the Masters, the NCWO asked CBS to suspend broadcasting the tournament.[216] The NCWO position was that CBS would fail to realize a profit on a broadcast without sponsors, making the company an active underwriter of an organization that discriminates against half of its viewers.[217] The CBS response did not recognize the discrimination claim, and cited service to the "millions of men and women who eagerly anticipate and avidly watch" the tournament each year as justification for continued broadcast.[218] However, the

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210. Jennifer Friedlin & Karen Shugart, *The Augusta National Club Story: 2004: NCWO Protect Continues*, NATIONAL COUNCIL OF WOMEN'S ORGANIZATIONS, *available at* http://www.womensorganizations.org/pages.cfm?ID=93 (last visited December 30, 2005).

211. *Invitation to Tandem Press Conferences: National Financial Corporations Charged with Sex Discrimination in Federal Court*, NATIONAL COUNCIL OF WOMEN'S ORGANIZATIONS (March 30, 2005), *available at* http://ncwo-online.org/data/images/SmithBarneyPressRelease.pdf.

212. National Council of Women's Organizations, *Letter to Mr. Tim Finchem, available at* http://augustadiscriminates.org/pdfs/augustletter_PGATour.pdf (July 30, 2002).

213. *Id.*

214. PGA Tour, *Letter to Martha Burk, available at* http://augustadiscriminates.org/pdfs/augustaletter_PGATour_response.pdf (August 20, 2002).

215. *Id.*

216. National Council of Women's Organizations, *Letter to Sean McManus, available at* http://augustadiscriminates.org/pdfs/augusta_CBS.pdf (September 18, 2002).

217. *Id.*

218. CBS Sports, *Letter to Martha Burk, available at* http://augustadiscriminates.org/pdfs/augusta_CBS_response.pdf (September 19, 2002).

public pressure did result in CBS Chairman Thomas Wyman publicly resigning his membership at Augusta National because of the issue.[219]

7. Professional Ethics

It is easy to point the finger at the leadership and management of golf clubs and expect them to "do the right thing." The long tradition of exclusivity is deeply ingrained in the culture of the private club, and one need only look as far as Augusta National and Burning Tree to see that members are quite resistant to changing membership policies. The Haverhill case is an excellent example of members who sought to change club policy from within and encountered significant negative consequences from social ostracism to a loss of business.[220] Is it a breach of professional ethics for an attorney to be a member of a private club that engages in discriminatory practices? Would or should a member attorney risk the social and financial consequences and initiate a lawsuit against an organization whose membership includes business, political and community leaders?

The Model Code of Judicial Conduct prohibits a federal judge from being a member of any discriminatory organization because "invidious discrimination gives rise to perceptions that the judge's impartiality is impaired."[221] It is likely that Justices Anthony Kennedy and Harry Blackmun resigned their memberships to men-only clubs for this reason.[222] The Code explains that an organization "discriminates invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex or national origin persons who would otherwise be admitted to membership."[223] The commentary cautions that it is not always obvious by looking at the membership roll whether the club discriminates, so judges should be sensitive to the issue.[224]

Membership in a discriminatory club could potentially imperil a candidate for a federal judgeship's confirmation or tarnish the reputation of other political appointees.[225] Treasury Secretary John W. Snow resigned his

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219. National Council of Women's Organizations, *The Augustua National Club Story: 2003, available at* http://www.womensorganizations.org/pages.cfm?ID=92 (last visited December 30, 2005).

220. Rosner, *supra* note 6, at 187; Chambers, *supra* note 161, at D1.

221. MODEL CODE OF JUDICIAL CONDUCT, Canons 1-5 (1990).

222. Kamp, *supra* note 5, at 91.

223. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 221, Canon 2.

224. *Id.* Canon 2(c) commentary.

225. Kamp, *supra* note 5, at 91.

membership to Augusta National prior to undergoing Senate confirmation hearings.[226] Interestingly, during the publicity surrounding the impending appointment, White House spokesman Ari Fleischer noted that President Bush does not judge membership at Augusta National to be a disqualifying factor.[227]

Lawyers, as a professional group, are subject to a strict code of ethics. However, unlike the judicial code of ethics, there are no rules that prohibit membership in private organizations that discriminate. Seemingly, the only ethical issue for lawyers relates to potential conflict of interest if a client seeks to file suit against a private club that an attorney belongs to or represents.

Private discrimination is and always has been central to racial, religious and gender subordination. [228] Little attention is paid to the issue of gender discrimination, particularly because the general population tolerates if not condones the caste system these policies create.[229] However, the effects of private discrimination harm all Americans— perpetuating the all-male private club judicially validates discrimination, denies equal opportunities for all citizens, and retards social integration.[230] For these reasons, club management, lawyers, local, state, and federal legislatures should intervene to end these practices.

II. EMPLOYMENT DISCRIMINATION

Although women may have to battle to enter the golf club as full members, some women have always been able to get in the club door – probably the back door – as employees. Several pieces of legislation address gender discrimination in the workplace. Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Pregnancy Discrimination Act, and the Equal Pay Act all are significant for golf industry employers.

A. Title VII of the Civil Rights Act of 1964

Since the passage of Title VII of the Civil Rights Act of 1964 discrimination on the basis of sex is illegal in the workplace. Title VII was

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226. Associated Press, *Treasury Secretary Nominee Resigns Augusta Membership*, GOLF DIG., Dec. 10, 2002, p 1.

227. *Id.* at p. 4.

228. Sawyer, *supra* note 12, at 190.

229. Kamp, *supra* note 5, at 91.

230. Sawyer, *supra* note 12, at 202.

enacted to prevent employment discrimination on the basis of race, color, religion, sex or national origin. Title VII states:

> It shall be an unlawful employment practice for an employer
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants from employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[231]

Title VII prohibits employment discrimination by employers of 15 or more employees that work at least 20 weeks during the year.[232] However, several cases indicate that an employer-employee relationship is not needed in order to satisfy the statute.[233]

In *Naismith v. The PGA*, one of the substantive issues in dispute was whether the defendant, the Georgia Section of the PGA, and the plaintiff, Naismith, were in an employer-employee relationship or, if not, the relationship otherwise satisfied the requirements of the statute.[234] In this case, a female golfer, Barrie Naismith, complained that the PGA and the Georgia Section discriminated against her under Title VII by requiring her to compete in playing events from the men's tees.[235] Although the plaintiff and defendant were not in a traditional employer-employee relationship, the Georgia Section of the PGA did control access to employment, which the court found was enough to satisfy the requirement under the statute.[236]

Title VII was enacted as a comprehensive prohibition of private acts of employment discrimination, thus eliminating the need to prove state action. However, the United States government, some departments of the District of Columbia, Native American tribes and bona fide membership clubs, such as

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231. 42 U.S.C. § 2000e-2(a) (2005).

232. *Id.*

233. *See* Naismith, et. al, v. The PGA, et al, 85 F.R.D. 552 (1979); Sibley Mem'l Hosp. v. Wilson, 160 U.S. App.D.C. 14 (D.C. Cir. 1973); Puntillo v. New Hampshire Racing Assn., 375 F. Supp. 1089 (D.N.H. 1974).

234. *Naismith*, 85 F.R.D. at 558 (1979).

235. *Id.* at 554.

236. *Id.* at 560.

country clubs, are exempted from the legislation.[237] A bona fide private membership club is defined as one that has tax exempt status under Section 501(c) of the Internal Revenue Code.[238]

The legislation also allows for differential treatment when sex is a bona fide occupational qualification, meaning an actual job requirement, not merely a customer or employer preference.[239] A bona fide occupational qualification must be reasonably necessary to the normal operation of the business, and the employer must prove that members of the excluded class could not safely and effectively perform essential job duties.[240] For example, if you are hiring a ladies locker room attendant that would be available to female members during operating hours, requiring the attendant to be female would be a bona fide occupational qualification. However, if you were hiring someone to clean the ladies locker room after hours, the gender of the employee would not be a bona fide occupational qualification. It is unlikely that a club manager could justify hiring only male golf instructors because members felt more comfortable taking instruction from a man, as being male is not a bona fide occupational qualification, but merely perpetuation of a stereotype contributing to discrimination.[241]

The administration of Title VII is the responsibility of the Equal Employment Opportunity Commission, a five-member, presidential-appointed administrative agency.[242] The EEOC may independently investigate charges of employment discrimination and attempt to reconcile the situation.[243] If the EEOC is not successful, the private party may file a private lawsuit.[244] The EEOC may also file suit in federal district court to enforce Title VII.[245] The EEOC also promulgates regulations and guidelines for the interpretation of Title VII.[246]

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237. 42 USCS s. 2000e(b)(2).

238. *Id.*

239. *Id.*

240. Lisa Pike Masteralexis, *Gender Equity: Coaching and Administration, in* LAW FOR RECREATION AND SPORT MANAGERS 573 (Doyice Cotton & John Wolohan, eds., 2003).

241. *See* Morris v. Bianchini, et al., 43 Fair Emp. Prac. Cases 647 (E.D. Va. 1987).

242. 42 U.S.C. § 2000e-5.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

The courts have established four theories of liability under Title VII: individual disparate treatment, systemic disparate treatment, disparate impact and retaliation.[247]

a. Disparate Treatment

Individual disparate treatment occurs when the employer intentionally discriminates against an employee or applicant. The plaintiff bears the burden of proving intentional discrimination. If the plaintiff is a job applicant, he or she must prove the following to establish a prima facie case:

1. that the applicant is a member of a protected class
2. that the applicant applied for a job for which the employer was seeking applicants
3. that the applicant was qualified to perform the job
4. that the applicant was not hired
5. that the employer filled the position with the opposite gender or continued to search.[248]

If the plaintiff is an employee, he or she must prove the following to establish a prima facie case:

1. that the employee is a member of a protected class
2. that the employee was performing the job satisfactorily
3. that the employee was discharged or adversely affected by a change in working conditions
4. that the employee's work was assigned to a person of the opposite sex.[249]

The burden of proof then shifts to the defendant to produce evidence that the plaintiff was rejected and someone else preferred for a legitimate, nondiscriminatory reason.[250] The employer does not have to prove that the chosen applicant or employee was superior to the plaintiff, instead the employer merely must show that there were legitimate, nondiscriminatory reasons to justify the decision.[251]

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247. Masteralexis, *supra* note 240, at 575.

248. 42 U.S.C. § 2000e-2(k).

249. *Id.*

250. *Id.*

251. *Id.*

The burden then shifts back to the plaintiff to prove that the legitimate, nondiscriminatory reason was in fact a pretext for intentional discrimination by:

1. providing direct evidence of prejudice toward the plaintiff or members of the protected class;
2. presenting statistical evidence of an unbalanced work force;
3. presenting evidence of a rejection of a high number of protected class members; and
4. proving that the articulated reason for rejection has not been consistently applied to members of the majority as it has to protected class members.[252]

Systemic disparate treatment occurs when an employer displays a pattern or practice of discrimination.[253] The plaintiff's initial burden is to establish by a preponderance of the evidence that discrimination is standard operating procedure rather than an unusual occurrence.[254] Plaintiffs will generally use statistical data supported by individual testimony.[255] The burden then shifts to the employer to demonstrate why an inference of discriminatory intent should not be drawn from the plaintiff's evidence.[256] The employer can either attack the plaintiff's statistical evidence as inaccurate or insignificant, or the employer may seek to provide a non-discriminatory explanation.[257] The burden then shifts back to the plaintiff to persuade the court that the employers stated explanation is merely a pretext for discrimination.[258]

b. Disparate Impact

Disparate impact exists when a seemingly neutral employment practice has a discriminatory effect upon a protected class.[259] The plaintiff has the burden of proving that he or she is a member of the protected group that the

252. Masteralexis, *supra* note 240, at 575-576; *See generally Durand-Graves*, 1996 Minn. App. LEXIS 1077, as an example of adequate proof of discrimination, and rebuttal of the employer's reasons showing them to be pretext for illegal discrimination. An interesting fact in this case is that the plaintiff testified that being excluded from meetings affected her ability to do her job – some of these meetings occurred on a golf course.

253. *Id.* at 578.

254. *See* Lowery v. Circuit City, 158 F.3d 742 (1998).

255. Masteralexis, *supra* note 240, at 578.

256. *Id.*

257. *Id.*

258. *Id.*

259. 42 U.S.C. § 2000e-2(k).

employment practice or policy adversely affects.[260] Again, this is generally supported by statistical evidence.[261] The employer must then rebut the claim, generally by attacking the statistical analysis or by proving that the practice is job related.[262] In this situation, the employer must prove that the challenged employment practice is necessary to achieve some legitimate business objective, the practice actually achieves that objective and that there is no reasonable method of accomplishing the objective without a discriminatory impact on the protected class.[263] The burden then shifts back to the plaintiff to prove that the barrier is a pretext for discrimination, usually by showing that there are other means which accomplish the same objectives but do not discriminate.[264]

c. Retaliation

Retaliation occurs when an employer discriminates against an employee because that employee has opposed a discriminatory employment practice, or because he or she made a claim, testified, assisted or participated in any manner in an investigation or hearing.[265] The plaintiff bears the burden of proving by a preponderance of the evidence that:

1. the plaintiff engaged in a statutorily protected activity
2. adverse action was taken against the plaintiff by the employer subsequent to or contemporaneously with that activity, and
3. a causal link exists between the protected activity and the adverse action.[266]

As in all other Title VII claims, the employer then has the burden of proving legitimate, non-retaliatory reasons for the conduct, and the burden shifts back to the plaintiff to show that the employers reasons were merely pretext for covering up the unlawful retaliation.[267]

Retaliation is one of the fastest growing claims filed with the EEOC.[268] Only 7,900 retaliation charges were filed with the EEOC in 1991 compared to

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260. *Id.*
261. *Id.*
262. *Id.*
263. Masteralexis, *supra* note 240, at 579.
264. *Id.*
265. 42 U.S.C. § 2000e-3(a).
266. *See* Jalil v. Advel Corp., 873 F.2d 701 (3rd Cir. 1989).
267. Masteralexis, *supra* note 240, at 579.
268. Martha Neil, *A Trap for Employers*, ABA JOURNAL, Aug. 2005, at 20.

22,690 in 2003.[269] One of the difficulties for employers is that a successful retaliation claim does not require proof of the initial discrimination claim.[270] Retaliation cases are also difficult because judges and juries tend to believe the plaintiff that the employer acted in anger to get even with the employee.[271]

d. Remedies

Title VII provides the court with the power to remedy employment discrimination in the following ways. When the employer is found to have intentionally discriminated, the court may enjoin the employer from continuing the unlawful employment practice. The court may also order affirmative action which could include reinstatement of employees with back pay or hiring of employees.[272] In mixed motives cases, the court may grant declaratory relief, injunctive relief, and attorney's fees, but will not award damages or injunctions requiring reinstatement, hiring, promotion or back payment.[273]

B. Civil Rights Act of 1991

The Civil Rights Act of 1991 extended the rights of claimants to receive punitive damages when it is shown that the defendant employer engaged in intentional discrimination with malice or with reckless indifference to the federally protected rights of the plaintiff.[274] Actual or compensatory damages are not required as an underlying condition of an award of punitive damages.[275]

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269. *Id.*

270. *Id.*

271. *Id.*

272. 42 U.S.C. § 2000e-5(g)(1) (2005).

273. 42 U.S.C. § 2000e-5(2)(b)(i)-(ii) (2005).

274. 42 U.S.C. § 1981, reads:

> Damages in cases of intentional discrimination in employment (a) Right of recovery. (1) Civil rights. In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5 [or 2000e-16]) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3 [or 2000e-16]), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [*42 USCS § 2000e-5(g)*], from the respondent.

275. *See generally* Corti v. Storage Techn. Corp., 304 F.3d 336 (4th Cir. 2002) for a description of punitive damages in a sex discrimination case. One of the interesting facts of this case was a

The Civil Rights Act of 1991 also made mixed motives unlawful. The burden of proof is complicated when the situation involves a mixed motive.[276] A mixed motive occurs when a decision is partially based on a legitimate motive and partly on a discriminatory one.[277] For example: There is a woman on your grounds keeping crew that does not wear make-up, and walks, talks and swears like a man. She has been an excellent employee and is up for promotion to Head Groundskeeper. The Head Groundskeeper sits on a Membership Complaint Committee, and you are afraid that her unladylike behavior might offend some members. You promote a male groundskeeper that has fewer credentials but more manners. Are your actions illegal? According to the EEOC Guidelines - YES! Although your concern about offending members is legitimate, the influence of the stereotypical view of how a woman should behave is discriminatory.

C. Pregnancy Discrimination Act

Employers also need to be aware of another important piece of gender-related discrimination legislation. In 1978, Congress amended Title VII of the Civil Rights Act of 1964 to include the Pregnancy Discrimination Act (PDA), which provides protection for women against discrimination based on pregnancy or pregnancy-related conditions.[278] The analysis required to prove a pregnancy discrimination claim mirrors that of Title VII sex discrimination claims.[279] To establish a prima facie case of disparate treatment under the PDA, a plaintiff must show that

(1) she is a member of a group protected by Title VII;
(2) she was well qualified for the position;
(3) she suffered an adverse effect on her employment; and
(4) she suffered from differential application of work or disciplinary rules.[280]

The employer then must offer evidence proving legitimate, non-retaliatory reasons for the conduct, and the burden shifts back to the plaintiff to show that

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comment from a supervisor that the female member of an account team should go shopping because golf was a "guy thing".

276. THOMAS H. SAWYER, GOLF AND THE LAW 89 (2005).

277. *Id. See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

278. 42 U.S.C. s. 2000e(k).

279. Maddox v. Grandview Care Ctr., Inc., 780 F.2d 987, 989 (11th Cir. 1986).

280. Armstrong v. Flowers Hosp., 33 F.3d 1308, 1314 (11th Cir. 1994).

the employer's reasons were merely pretext for covering up the unlawful retaliation.[281]

D. Equal Pay Act

The Equal Pay Act (EPA) prohibits employers from discriminating on the basis of sex between employees at the same establishment who perform equal work in equivalent positions under similar working conditions.[282] A plaintiff establishes a prima facie case under the Equal Pay Act by proving that she received lower compensation than a male co-employee for performing substantially the same work under similar working conditions. The burden then shifts to the defendant to show by a preponderance of the evidence that the wage differential resulted from one of the exceptions set forth in the statute: seniority, merit, quantity or quality of production, or a factor other than sex. The plaintiff must then rebut the defendant's showing.[283]

One of the shortcomings of the EPA from the plaintiff's perspective is the necessity to find an equal comparator. The analysis of whether jobs are substantially equal is based on four elements: (a) Equal Skills, (b) Equal Effort, (c) Equal Responsibility, and (d) Equal Working Conditions.[284] In a golf club setting, it may be extremely difficult to find two individuals with comparable positions.

It is important to note that those employers who use the "factor other than sex" defense must show that sex is not an underlying element either expressly or by implication.[285] The following justifications have been asserted to justify paying a male employee more than a comparable female employee: market sensitivity, salary is based on prior salary, superior experience, education and ability, and more duties.[286]

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281. *Id.*

282. 29 U.S.C. § 206(d)(1) (2005).

283. *See generally* Brinkley v. Harbour Recreation Club, Inc., Case Number: 4:97-CV-84-BO(1), 1998 U.S. Dist. LEXIS 14525 (E.D. N.C. 1998) for an example of an employer meeting the burden of proving legitimate, nondiscriminatory reasons for pay disparity.

284. 29 U.S.C. § 206(d)(1).

285. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE ON SEX DISCRIMINATION IN THE COMPENSATION OF SPORT COACHES IN EDUCATIONAL INSTITUTIONS (Oct. 29, 1997), *available at* http://www.eeoc.gov/policy/docs/coaches.html.

286. *See Brinkley*, 1998 U.S. Dist. LEXIS 14525.

III. SEXUAL HARASSMENT

Sexual harassment is an important sub-category of gender discrimination that requires closer attention in the golf industry, both from the membership and employment perspectives. Sexual harassment is "discrimination because of sex" under Title VII. The Equal Employment Opportunity Commission (EEOC) defines sexual harassment as:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when
>
> 1. submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment
> 2. submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or
> 3. such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.[287]

The first two conditions are typically referred to as quid pro quo sexual harassment, and the third condition is commonly known as hostile environment sexual harassment.[288] Quid pro quo harassment may evolve from a single incident.[289] Hostile environment behaviors are characterized by multiple and varied combinations and frequencies of offensive exposures, which places the burden of proof on the plaintiff to demonstrate that under a totality of the circumstances, the offensive conduct would have affected a reasonable employee's work performance.[290] Harassment behaviors include, but are not limited to, lewd comments, condescending or patronizing behavior, pinching, touching, caressing, sexual jokes, or intimidating sexual remarks.[291] (See Table 1).

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287. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (June 18, 1999), *available at* http://www.eeoc.gov/policy/docs/harassment.html.

288. *Id.*

289. Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986).

290. *Id.*

291. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *supra* note 285.

Table 1. Sexually Harassing Behaviors[292]

Visual
Ogling, leering, staring, posters, cartoons, graphics, magazines, flyers, pin-ups, gestures, mooning, flashing

Verbal
Request for dates, asking personal questions, lewd comments, dirty or sexual jokes, whistling, cat-calling, obscene calls, sexual rumors

Written
Love letters, poems, obscene letters, cards, notes

Touching
Violation of personal space, patting, rubbing, pinching, bra-snapping, caressing, blocking movement, kissing, groping, grabbing, tackling, hazing

Power
Retaliation, using position to request dates or suggest sexual favors, gender-directed favoritism, disparate treatment, hazing rituals

Threats
Quid pro quo demands, conditioning evaluations or references on sexual favors, retaliation for refusal to comply with requests

Force
Attempted rape or assault, rape, assault, pantsing, stripping, extreme forms of hazing, stalking, sexual abuse, physical abuse.

Williams v. Saxbe was the first case in which sexual harassment was determined to be a form of sex discrimination.[293] The defendant Williams was subjected to quid pro quo sexual harassment by her supervisor.[294] The Supreme Court ruled that sexual harassment is a form of sex discrimination actionable under Title VII, if the harassment places an artificial barrier on employment.[295]

292. Adapted from SAWYER, *supra* note 276.
293. Williams v Saxbe, 413 F. Supp. 654 (1976).
294. *Id.* at 657.
295. *Id.* at 657-658.

The precedent for hostile environment sexual harassment was set by the cases *Ellison v. Brady* in 1991 and *Harris v. Forklift Systems, Inc.,* in 1993.[296] In both of these cases the courts ruled that hostile environment harassment has occurred if the conduct is "sufficiently severe or pervasive as to alter the conditions of a victim's employment and to create an abusive working environment. . . an environment that a reasonable person would find hostile or abusive."[297] They further ruled that "discriminatory, abusive work environments can exist, without affecting an employee's psychological well-being, by detracting from an employee's job performance, discouraging remaining on the job, or keeping employees from advancing in their careers."[298]

A. Employer Liability

The courts have been relatively consistent in their rulings about employer liability. Employers must have a sexual harassment protocol in place that is precisely followed when incidents arise. Further, employees must be made aware of and educated about the policy, and resources must be made available to victims who wish to report harassing behavior.[299] Mismanagement of a sexual harassment claim can lead to serious ramifications down the road, including civil suits and significant punitive damages.[300] Additionally, the resulting publicity from these incidents can severely damage the reputation of the organization involved.

In *Meritor Savings Bank v. Vinson,* the Supreme Court provided some guidance on how to determine if harassing conduct is unwelcome, as well as the level of employer liability.[301] The Court established five elements required to raise an actionable claim:

1) the employee belongs to the protected category;
2) the employee is subject to unwelcome harassment;
3) the harassment was based on sex;
4) the harassment affected the term, condition, or privilege of employment; and

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296. Ellison v. Brady, 924 F.2d 872 (1991); Harris v. Forklift Systems, Inc., 114 S. Ct. 367 (1993).

297. *Harris,* 114 S. Ct. at 372.

298. *Id.* at 371.

299. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *supra* note 287.

300. *Id.*

301. Meritor Savings Bank v. Vinson, 106 S. Ct. 2399 (1986).

5) the employer knew or should have known of the harassment and failed to take prompt, effective remedial action.[302]

In response the EEOC issued additional guidelines in 1990.[303] The guidelines clearly stipulate that employers are responsible for providing a harassment free environment in four ways:

1) having a policy that prohibits sexual harassment and making employees aware of the policy;
2) addressing complaints of sexual harassment in a prompt and effective manner;
3) taking corrective action to end the harassment, and
4) providing remedial compensation to the victim(s).[304]

In cases where employers fail to minimally follow these four requirements, the EEOC Guidelines make it clear that they will be held liable.[305]

The EEOC again issued guidelines in 1999 to provide further clarifications on employer liability.[306] An employer is always liable for actions of a supervisor that results in a tangible negative effect on employment status of the victim.[307] The EEOC recommendations for avoiding employer liability require a detailed thorough planning process, a well-written policy and complaint procedure, and a significant effort by the employer to publish and advertise the policy.[308] The Guidelines also reiterate the EEOC's prior guidance on employer liability for harassment by co-workers by stating that "the employer is liable if it knew or should have known of the misconduct, unless it can show that it took immediate and appropriate corrective action."[309]

In cases of hostile environment harassment, the employer can raise an affirmative defense if it can show: 1) reasonable care was exercised to prevent and promptly correct harassment; and 2) the employee failed to take advantage of the resources provided by the employer.[310] In order to show reasonable care to prevent and correct harassment, the employer must have established,

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302. *Id.*

303. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (March 19, 1990), *available at* http://www.eeoc.gov/policy/docs/currentissues.html.

304. *Id.*

305. *Id.*

306. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *supra* note 287.

307. *Id.* § IV.

308. *Id.*

309. *Id.* § V(c).

310. *Id.*

publicized, and enforced anti-harassment policies and grievance procedures prior to the complaint of harassment.[311] This includes handing out a copy of the policy and complaint procedure to every employee, posting them in central locations, and including them in employee handbooks.[312] The policy and procedures should include a clear explanation of prohibited conduct, an assurance of protection from retaliation for the complainant, a clearly described complaint process, a promise of confidentiality, and a "prompt, thorough, and impartial investigation, and assurance that immediate and appropriate corrective measures will be taken."[313] The complaint procedure should also provide accessible contact people, not the complainant's supervisors, to receive complaints, and a reasonable time frame for investigation.[314] As soon as an employer learns of a complaint, it should determine whether an investigation is necessary, and launch the investigation as soon as possible.[315] In the meantime, the employer must initiate intermediate protective measures against further harassment.[316] If it is determined that harassment has occurred, the employer must take immediate corrective/disciplinary action to effectively end the harassment.[317]

The burden is not solely on the employer, as the Guidance also established that the employee must exercise reasonable care by taking advantage of complaint procedures.[318] A failure to complain about persistent harassment would effectively diminish the employer's liability if the employee opted to file a civil suit.[319]

A recent California Supreme Court ruling expanded the scope of hostile environment sexual harassment to include supervisor's relationships with other employees, even if the plaintiff is not the target of sexually harassing behaviors.[320] In this case, two female employees complained that they had been passed over for promotion by three women employees who had sexual affairs with their supervisor.[321] The California Supreme Court unanimously

311. *Id.*
312. *Id.*
313. *Id.*
314. *Id.*
315. *Id.*
316. *Id.*
317. *Id.*
318. *Id.* § V(d).
319. *Id.*
320. *See* Miller v. Dep't of Corrections, 36 Cal. 4th 446, 451 (2005).
321. *Id.* at 450.

held that a hostile environment may be created even if the plaintiff is never subjected to sexual advances.[322] Citing the *1990 EEOC Guidance*, the court explained that "an employee may establish an actionable claim of sexual harassment. . .by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment."[323]

Employee unions and collective bargaining agreements may confuse the employer as to liability for sexual harassment. In *Foster v. Richardson,* plaintiff Foster was an employee of Royal Contracting working as a service engineer at the Waikapu golf course.[324] Her supervisor's conduct prompted her to file a grievance with her union.[325] Royal Contracting claimed that it was immune from a Title VII sexual harassment claim because of the collective bargaining agreement.[326] The court held that under Hawaii law, the right to be free of discrimination is a non-negotiable right that is fully independent of any collective bargaining agreement between an employer and a union.[327]

B. Peer and Third Party Harassment

Although the law is clear regarding liability for employer/employee harassment and employee/employee harassment, it is possible that the club could be liable for acts of sexual harassment by members to employees or by member to member. Under Title VII, it is clear that individuals are not liable for sexual harassment, only the employer is liable.[328] Under common law agency principles, the employer is liable for acts of harassment by non-

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322. *Id.* at 464.

323. *Id.* The EEOC Guidance states

> if favoritism based upon the granting of sexual favors is widespread in a workplace, both male and female colleagues who do not welcome this conduct can establish a hostile work environment in violation of Title VII regardless of whether any objectionable conduct is directed at them and regardless of whether those who were granted favorable treatment willingly bestowed the sexual favors.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *supra* note 303.

324. Foster v. Richardson, 843 F. Supp. 625 (Dist. Haw. 1994).

325. *Id.* at 627.

326. *Id.* at 628-629.

327. *Id.* at 629.

328. *See* Morehouse v. Berkshire Gas Co., 989 F. Supp. 54 (Dist. Mass. 1997); Hangebrauck v. Deloitte & Touche, No. 92 C 3328, 1992 U.S. Dist. LEXIS 17506 (N.D. Ill. 1992) – the harassing comments in this case included "women don't belong on the golf course" and "women shouldn't be hired due to their ignorance about sports."

employees if the employer is aware of the harassment and does not respond in a reasonable and appropriate manner to correct it.[329]

State legislation may also impact the liability of the employer and individual employees. In *Morehouse v. Berkshire Gas Co.,* obscenely defaced photos of plaintiff Sheryl Morehouse were posted at the Berkshire Gas Company Fall Classic Golf Tournament (one was hung at the first tee, another was affixed to a garbage barrel at the 5th tee and was urinated on, another was attached to the flag at the 9th hole, and at least five more defaced photos were recovered from various other spots).[330] Under Mass. Gen. Laws ch. 151B, Section 4(5) individuals may be held liable for aiding or abetting discriminatory conduct that is prohibited under state law.[331] The court found that management is liable for the acts of employees if they had knowledge of ongoing sexual harassment but failed to act, and where that failure to act caused injury.[332] This type of state legislation makes it obvious that club members are individually liable for their behavior, as well as the behavior of their guests as aiders or abettors. This state legislation also extends the scope of responsibility of the employer even when the supervisory employees are not acting within the scope of their employment (such as socially golfing at an outing).[333]

IV. GENDER DISCRIMINATION AND COMPETITIVE OPPORTUNITIES IN GOLF

The final aspect of gender discrimination in the golf industry examined in this paper is probably the most interesting from a social and public policy perspective, but perhaps the least interesting from a legal standpoint. Annika Sorenstam, Michelle Wie, and Suzy Whaley have drawn significant media attention by competing in men's professional events. Unfortunately, the media spotlight also aroused significant criticism, most notably the comments of

329. B. Glenn George, *Employer Liability for Sexual Harassment: The Buck Stops Where?* 34 WAKE FOREST L. REV. 1, at 20 (1999).

330. *Morehouse*, 989 F. Supp. 54.

331. MASS. GEN. LAWS ch. 151B, § 4(5) (2005): "it is unlawful for any person, whether an employer or an employee or not, to aid, abet, incite compel or coerce the doing of any of the acts forbidden under this chapter or to attempt to do so."

332. *See Morehouse*, 989 F. Supp. at 61.

333. *Id.*

PGA professional Vijay Singh.[334] What is the harm when women want to physically challenge themselves by competing against men?

A woman competing professionally with men is not a new phenomenon.[335] Professional baseball is well represented from 1898, when Lizzie Arlington played a game as pitcher for the Philadelphia Reserves.[336] Alta Weiss pitched in the early 1900s for the Vermilion Independents, a men's semi-pro team in Ohio.[337] Jackie Mitchell once struck out Babe Ruth and Lou Gehrig.[338] Peggy O'Neill was a regular on an otherwise all-male team, the Tammany Tigers of New York.[339] More recently, Ila Borders, a left-handed pitcher, reported to training camp with the St. Paul Saints, an independent-league, as the first woman to play in a regular-season minor league game.[340]

Women have competed against men in other professional sports as well. In 1986, Nancy Lieberman was the first woman to play in a men's professional basketball league.[341] Julie Krone became the first woman to win the Belmont Stakes and Kentucky Derby.[342] Manon Rheaume plays goaltender for the Tampa Bay Lightning in the NHL.[343] In 2005, Danica Patrick became the first women to take the lead in the Indianapolis 500.[344]

Participation of women and girls in sport has grown significantly over the past thirty years.[345] Although social attitudes have grown more accepting of

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334. Women's Sports Foundation, *Discrimination: Co-ed Participation - Comments by Vijay Singh on Annika Sorenstam Playing in the PGA: The Foundation Position,* (May 13, 2003), *available at* http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/disc/article.html?record=951. Singh commented to the media that he would withdraw from competition if he was paired with Annika Sorenstam in the Colonial tournament.

335. Dana Robinson, *Comment: A League of Their Own: Do Women Want Sex-Segregated Sports?,* 9 J. CONTEMP. LEGAL ISSUES 321 (1998).

336. *Id.*

337. *Id.*

338. Melissa M. Beck, *Fairness on the Field: Amending Title VII to Foster Greater Female Participation in Professional Sports*, 12 CARDOZO ARTS & ENT. L.J. 241, 245 n.32.

339. Robinson, *supra* note 335.

340. *Id.*

341. *Athletes: Nancy Lieberman*, WOMENSSPORTSFOUNDATION.ORG, *available at* http://www.womenssportsfoundation.org/cgi-bin/iowa/athletes/record.html?record=589 (last visited January 23, 2006).

342. Beck, *supra* note 338, at 245 n.20.

343. Robinson, *supra* note 335, at 322.

344. *Athletes: Danica Patrick*, WOMENSSPORTSFOUNDATION.ORG, *available at* http://www.womenssportsfoundation.org/cgi-bin/iowa/athletes/record.html?record=1135 (last visited January 23, 2006).

345. LINDA JEAN CARPENTER & R. VIVIAN ACOSTA, WOMEN IN INTERCOLLEGAITE SPORT: A LONGITUDINAL, NATIONAL STUDY TWENTY SEVEN YEAR UPDATE 1977-2004, *available at*

females as athletes, that acceptance often ends when women seek to compete against men. Sport is the part of american culture that is supposed to be sex segregated – natural differences between men and women are articulated, developed, and perpetuated in the sports arena.[346] The pervasive cultural message is that women are physically incapable and inferior compared to men.[347]

From a legal perspective, it is fairly straightforward whether women have any legal rights to compete in men's professional golf tournaments. In a public tournament, there is state action. Therefore, an equal protection claim could be made, which would be reviewed under intermediate scrutiny. Gender based distinctions must be substantially related to achievement of important governmental objectives.[348] Past litigation has focused on the physiological differences between men and women to determine whether those differences were sufficient to legally exclude girls from boys teams.[349] However, as there is no physical contact between golfers, and male golfers represent a full range of shapes and sizes, it is doubtful that a modern court would find physical differences an important interest. Sparing the feelings of men who are embarrassed when they are beaten by a woman is probably not that important compared to redressing past discrimination of women.

Separate but equal has been a socially acceptable format for men's and women's sport participation and competition.[350] It has been suggested that a proper analysis would be to apply the test used in *Virginia Military Institute (VMI) v. United States*.[351] Using this analysis, the excluded sex must be allowed to participate when there are tangible and intangible benefits that are far greater than those offered by the event for the excluded sex. The analysis becomes an evaluation of the degree of difference between the benefits offered by the men's team compared to the women's team.[352] In professional golf, the

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http://www.womenssportsfoundation.org/binary-data/WSF_ARTICLE/pdf_file/906.pdf (last visited December 30, 2005).

346. Beck, *supra* note 338, at 242.

347. *Id.* at 244.

348. *Craig*, 429 U.S. at 197.

349. Beck, *supra* note 338, at 249. Most of these cases have dealt with youth sport and team settings, which obviously distinguishes them from adults in an individual, non-contact sport setting. *See* Nat'l Org. for Women v. Little League Baseball, Inc., 318 A.2d 33 (N.J. 1974); O'Connor v. Board of Educ. of Sch. Dist. 23, 545 F. Supp. 376 (N.D. Ill. 1982); Israel v. W. Va. Secondary Sch. Act. Comm'n, 388 S.E.2d 480, 484 (W. Va. 1989).

350. Robinson, *supra* note 335, at 355.

351. *Id.*; *See* Virginia Military Inst. v. U.S., 508 U.S. 946.

352. Robinson, *supra* note 335, at 355.

number of events, amount of prize money, and media coverage are all substantially greater for men's events than women's events. Under a *VMI* analysis, women should be allowed to participate, even though there is an opportunity for them to play in women's events.

The typical "equal protection" reaction to allowing women to compete in men's only events is that men should then be allowed to compete in women's only events. Under equal protection analysis, protecting women's sporting opportunities for women only redresses past discrimination, certainly an important government objective. The fact that the average man has a physical advantage over the average woman would displace mostly women if the sexes were allowed to compete together, therefore, keeping women's events women-only is substantially related to the important government interest. Under a *VMI* analysis, the outcome is probably more obvious – when weighing the degree of difference between the benefits offered by the men's tour compared to the women's tour, the men's tour offers the better experience.

As many PGA Tour events are private, rather than public, entities, there is no equal protection claim. Successfully arguing that the events are a "public accommodation" allows protection under Title II, but Title II does not protect on the basis of sex, so you have no claim.[353] Similarly, Title IX does not apply because it only protects opportunities in school sports, and professionals would be ineligible to compete in school sports programs.[354]

At least one author argues that female professional athletes should be able to assert a Title VII employment discrimination claim.[355] Melissa M. Beck advocates that the definition of sexual harassment under Title VII assists women in professional sports because "it acknowledges that harassment can be prompted simply because of gender. . ."[356] Although the historical exclusion of women from professional sports, the pervasiveness of sex role stereotypes in professional sports, and the cultural meaning attached to male participation in professional sports has generally not been considered by the courts, Title VII jurisprudence has acknowledged that these factors should be considered in discriminatory circumstances.[357] This theory might be more persuasive in professional team sports situations. To apply it to individual sports, the formidable barrier of proving an employer-employee relationship would have

353. *See* discussion on Title II and public accommodation on p. 34-37 of this article.

354. Title IX, 20 U.S.C. §§ 1681-1688 (2005).

355. Beck, *supra* note 338, at 254-265.

356. *Id.* at 256.

357. *Id.*

to be overcome.[358] Professional golfers are generally considered independent contractors, not employees of the professional association, tour, or tour events.[359]

The historical cultural biases against women competing in professional sport, and for female athletes in general, are misguided. Gender integration of sport does not de-masculinize sport. Encouraging women to challenge themselves, to grow stronger, and to compete allows them to experience all of the tangible and intangible benefits of sport. This gain benefits all of society.

From an economic perspective, the more women that play, the bigger the game of golf grows. And as golf grows, so does our economy grow, both in the golf industry and through the business networking opportunities developed on the golf course. (never addressed in any way I would change this to be a conclusion to the issues developed in the paper itself).

The joke acronym, GOLF: Gentlemen Only, Ladies Forbidden, is an understood truth in many segments of the golf industry. From the private club, to employment opportunities, in the working relationships between men and women, and in competition, the status quo remains that women are not equals. There are few legal options for obtaining equality, but perhaps the economic perspective is more compelling. The more women play, the bigger the game of golf grows. From the employment perspective, it is good business to employ the best qualified individuals, no matter their sex. Non-golf related businesses benefit from a non-discriminatory golf industry through the business networking opportunities developed on the golf course. The golf industry also benefits from the added media attention when female professionals compete against males, bringing more money into the sport. When looking at the bottom line, when everybody plays, everybody wins.

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358. 42 U.S.C. § 2000e(b) (2005); *See also Naismith*, 85 F.R.D. at 558-560.

359. *Naismith*, 85 F.R.D. at 558.

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