

Are Career Plaintiffs Crippling Golf's Growth?

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Introduction

The golf course is not always an inviting place for women – sometimes they are not even allowed through the front gate. The Royal & Ancient, one of golf's governing bodies, recently found itself embroiled in controversy for hosting The Open Championship at World famous Muirfield, a mens-only club. Scottish First Minister Alex Salmond boycotted the event in his homeland – saying “This is not only about golf, it's about women's place in society...excluding women from joining excludes them from some important circles of influence...I can see nothing honorable in their continued exclusion of women.” In addition to the exclusionary membership policies of many private clubs, many courses without explicit anti-female policies remain uninviting to women – and oftentimes overtly discourage female play. Meanwhile, those invested in the health of the sport and business of golf have identified women as an underrepresented demographic and one that with increased participation could stem the industry's recent decline.

The golf industry has been fighting recent declines in overall participation. Efforts to increase participation are widespread, some more successful than others, but nearly all focusing at least in part on broadening the game beyond its traditional white male base. According to the National Golf Foundation, women represent only roughly 20% of golfers in the United States,¹ which is not particularly surprising given the game's sometimes exclusionary history. It doesn't take a genius to figure out that discouraging one half of the overall population is not a recipe for increased participation – so industry growth efforts often identify engaging women as a crucial driver for new golfers and to fuel the golf business. The PGA of America recently launched a nationwide “Connect With Her” strategy as one of the key pillars of its “Golf 2.0” initiative designed to stop the decline in golf interest over the past decade – with one of the key facets of that initiative to make women feel more welcome and invited at golf facilities across the United States. Unfortunately, some golf course owners and operators have had female-friendly promotions challenged by over-eager plaintiffs and sometimes invalidated by potentially overbroad anti-discrimination laws.

By examining this issue through the lens of one golf company that was discouraged from initiating a female-friendly promotion, this article examines gender-based price discounts, the status of various state laws in the United States, and the impact of such laws on companies promoting initiatives designed to encourage female participation. Ultimately, despite the potential abuse of these types of promotions, this article will make the case that gender-specific promotions (especially when designed to encourage the

¹ *Golf Industry Overview-2012*, National Golf Foundation, available at <http://www.ngf.org/>.

participation of underrepresented demographics like women in golf) should be allowed within reason. This article will also warn in-house counsel that their business leaders must be wary of potential discrimination claims – particularly within certain states in the United States.

About GolfNow

GolfNow is the largest digital golf business in the world, partnering with over 5,000 golf courses in over 80 markets to promote and sell their tee time inventory to GolfNow's active databases of golfers. GolfNow also provides reservation management and other technology to over 2,500 golf courses throughout the world. GolfNow is powered by Golf Channel, a multimedia, golf entertainment and services company based in Orlando, Florida and available in more than 120 million homes and 83 countries worldwide.

GolfNow and its partner courses rely on golfer demand in order for their businesses to be profitable – and therefore are incentivized to encourage all golfers to play more often. In order to do so, GolfNow works to lower some of golf's many barriers of entry. GolfNow has attempted to dispel the myth of golf being a game for the elite by promoting availability of discounted rates at off-peak days and times – and by displaying inventory at more affordable courses. GolfNow also strives to combat the common complaint that golf takes too long by encouraging courses to promote and sell cheaper 9-hole rounds; giving golfers the opportunity to “Play Fast” by reserving the first tee time of the day; and by promoting various initiatives designed to get golfers to speed up play. Golf courses are able to attract golfers looking to “Play Nine” or “Play Fast” by specifically tagging certain tee time inventory through the web and allowing users to search for and purchase those times.

Ancillary to these efforts, GolfNow has also sought to make the game more fun and accessible to traditionally underrepresented demographics: minorities, young people, and women. Recently GolfNow investigated creating a special category of tee time inventory on its web portals that would be designed for women – by promoting certain female-friendly golf courses or by allowing courses to display special female-only rates and times. Before this initiative got off the ground, GolfNow learned that it might be getting itself into legal hot water if it were to go forward and market such female only specials. GolfNow shifted its attention to other “grow-the-game” initiatives after learning that a golf club in California was sued for its “Ladies Day” promotion, where women were given discounted rates.² The plaintiff in this case claimed the club discriminated against male golfers by charging men higher prices, regardless of skill level. Rather than parsing through a 50 state analysis of gender discrimination law, GolfNow decided to look for other initiatives to grow the game and encourage female participation without exposing itself to potential litigation.

The Frye Cases

In December of 2010, Steve Frye played golf at Eagle Vines Vineyards & Golf Club in Napa, California. On that day, a Monday, the club offered a Ladies' Day promotion that provided women with a discounted rate of \$30 to play the course – while their male counterparts paid \$44 for the same services. The promotion, designed to attract more women to the game, is not a unique concept in the world of golf – or other industries - but Mr. Frye claimed discrimination based on the notion that citizens should not be treated differently because of their gender, race, or other protected personal characteristic. Mr. Frye's complaint in the Eagle Vines case, relying on California's Unruh Act, argues that

² *Golfer alleges sex discrimination at Eagle Vines*, Napa Valley Register.com (April 15, 2013), http://napavalleyregister.com/news/local/golfer-alleges-sex-discrimination-at-eagle-vines/article_936c2678-2a04-11e1-b94b-0019bb2963f4.html.

charging men a higher rate to play golf is “as illegal and repugnant as...charging African-American patrons a higher price than Caucasian patrons.”

In a similar case, Mr. Frye, apparently carrying the torch for all unfairly treated male golfers across the United States, subsequently sued U.S. golf retail companies Golf Galaxy and Golfsmith, along with a who’s who of the largest golf club manufacturers.³ In this case, Mr. Frye and other plaintiffs claimed that “Women’s Night” promotions at Golf Galaxy Stores unfairly and arbitrarily discriminated against men, because “female millionaires such as Nancy Pelosi or Sarah Palin would have been allowed into Golf Galaxy’s stores and provided with [the promotional items] while male consumers, who may have recently lost their jobs, would have been denied entry.”

Rob Harris, noted commentator on legal issues impacting the game of golf and author of the popular Golf Dispute Resolution Blog (golfdisputeresolution.com), writes of these cases – as juxtaposed to the male-only policies of Muirfield and (until very recently) Augusta National: “Whatever the underlying legal arguments that allow for disparate treatment, there is an inescapable irony to the way our legal system and society permit the debasing exclusion of women from private clubs, while subjecting clubs such as Eagle Vines and retailers such as Golf Galaxy to judicial sanction for modest attempts to further the interests of women in golf.”

As much as we might like to laugh Mr. Frye’s lawsuits out of court and dismiss them as yet another example of the ills of the American judicial system, it is not quite so easy to do so. Moderating a healthy debate on his dispute resolution blog, Mr. Harris notes that many readers – indeed a large number of female commenters – do not find issue with the California law or the ensuing lawsuits. A. Kimberly Hoffman, a partner at Morris James law firm in Delaware, believes that there are other more significant barriers to female participation, including child care and other time constraints. Ms. Hoffman also states that laws like California’s Unruh Act exist because “the government does not have the enforcement resources or political will to go after each and every incident of discrimination” so these laws serve to keep all businesses accountable by creating “an alternate police force of entrepreneurial lawyers” and that it is too difficult to separate acceptable preferential treatment from more offensive discrimination. To the extent that such laws are meant to prevent “bad” discrimination – how can we draw the line between seemingly “frivolous” cases like Mr. Frye’s and more sinister cases of discrimination where reasonable people would agree the law should intervene? States in the U.S. have struggled with this question and have handled the matter in a variety of different ways, with some finding that a blanket prohibition like California’s is the easiest way to prevent all types of preferential treatment based on gender.

California’s Prohibition of Gender-Based Discounts

The concept of prohibiting gender based promotions for women is not unique to golf. In perhaps the seminal case on the matter, the Supreme Court of California held a car wash and nightclub could not provide discounts and free admission to ladies without offering the same discounts to men.⁴ The case found that according to California’s Unruh Civil Rights Act: “all persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, ancestry, national origin, disability...are entitled to the

³ Mr. Frye’s attorney on both cases has apparently developed a cottage business related to this topic – including suing the Oakland A’s baseball team for giving away hats to female fans on the day before Mothers’ Day.

⁴ *Koire v. Metro Car Wash*, 40 Cal.3d 24 (1985). See also Unruh Civil Rights Act (Cal. Civ. Code § 51 (West 2013)); Gender Tax Repeal Act of 1995 (Cal. Civ. Code § 51.6 (West 2013)), which prohibits different pricing based on a customer’s gender.

full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.”

The Unruh Act also provides for attorney’s fees and statutory damages of three times the actual damages or \$4,000 per offense (whichever is greater). The result of those fees and damages are that businesses cannot simply discontinue impermissible promotions when they receive a complaint. Instead, promotions must be thoroughly vetted so as to avoid potential damages. Perhaps because of these greater incentives for plaintiffs, cases like Mr. Frye’s are not uncommon and the Unruh Act has been heavily litigated, establishing California as the state with easily the most case law on this subject. According to such case law, California prohibits:

- free admission, discounts, or promotional items to only one sex;
- charging men and women different prices for similar services;
- maintaining “women only” or “men only” exercise areas of a fitness club or gym and excluding or discouraging the opposite sex from those areas;
- establishing a “women only” or “men only” business establishment which would otherwise be completely open to the public;
- excluding one sex from business sites during certain times; posting signs or adopting policies for “women recommended” or “men preferred”;
- requiring members of one sex to succumb to searches to gain admittance to a business establishment while providing admittance to members of the opposite sex without the same level or degree of search;
- promoting a business with “ladies night” discounts on admission and services; and denying access to a business or giving preference to one sex over the other.⁵

Interestingly, California does allow certain types of promotions where the intent is for gift purposes.⁶ In dismissing a case similar to the Frye cases related to a Mother’s Day promotion at a baseball game, a California court seemed to indicate that not all discrimination cases are created equal, stating that “it is imperative we not denigrate [the Unruh Act’s] power and efficacy by applying it to manufactured injuries.”⁷ California also offers examples for how businesses may still offer promotional discounts, such as offering reduced prices to all customers one day of the week or offering discounts to any customer who meets a condition that anyone could meet (presenting a coupon, wearing a specific color, etc.).⁸

Prohibitions in Other States

California is not the only state to have examined this issue. Other states that prohibit gender-based price discounts include: Florida, Iowa, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, South Dakota and Wisconsin. In Iowa, the Supreme Court held a racetrack was not allowed to give female customers free admission and discounts on concessions and souvenirs.⁹ New Jersey and Pennsylvania have both

⁵ State of California Department of Fair Employment & Housing, <http://www.dfeh.ca.gov/res/docs/Publications/UnruhActBrochure.pdf>

⁶ *Cohn v. Corinthian Colleges, Inc.*, 169 Cal. App. 4th 523, 530 (2008).

⁷ *Id.* At 526. Interestingly, the *Cohn* Court goes a bit further in dismissing the action, stating that “Cohn’s complaint gathers further suspicion because Cohn, his friends, and his counsel have been involved in numerous of what have been characterized as ‘shake down’ lawsuits.” 529.

⁸ *Koire*, 40 Cal.3d at 36.

⁹ *Ladd v. Iowa West Racing Ass’n*, 43 N.W.2d 600 (Iowa 1989). See also Iowa Code Ann. § 216.7 (West 2013): It shall be an unfair or discriminatory practice for any owner, lessee, sublessee, proprietor, manager, or superintendent of any public accommodation or any agent or employee thereof: to refuse or deny to any person because of race, creed, color, sex, sexual orientation... the accommodations, advantages, facilities,

rejected free admission and reduced drink prices for women.¹⁰ New York's State Human Rights Appeal Board struck down the New York Yankees' "Ladies Day Promotion."¹¹

Massachusetts, South Dakota and Wisconsin specifically prohibit gender-based pricing by express language in their state statutes. Massachusetts' state statute makes it unlawful to make distinctions based on sex in regards to admission.¹² South Dakota's law provides, "It shall be an unfair or discriminatory practice for any person engaged in the provision of public accommodations because of... sex... to accord... unequal treatment to any person with respect to... price... under which the same are made available..."¹³ Wisconsin has also struck down a promotion giving free drinks to women, with a statute stating that a public place of accommodation or amusement cannot deny or charge another a higher price than the regular rate for full and equal enjoyment because of sex.¹⁴

Florida and Maryland each have county or city ordinances that specifically proscribe gender-based pricing, but the state public accommodation statutes have not been analyzed by courts. For example, in *City of Clearwater v. Studebaker's Dance Club*, 516 So.2d 1106 (Fla. Dist. Ct. App. 1987), Lawrence Liebling applied to become a member of the "Pink Ladies Club" and was denied. The Studebaker's Dance Club offered females discount prices on alcoholic beverages. The court held the club violated the City of Clearwater's ordinance which states, "It shall be an unlawful discriminatory practice for any...place of public accommodation, resort, or amusement, because of the...sex... of any person directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof, that are afforded the other customers".¹⁵ The court stated the ordinance "clearly and unambiguously" proscribed discrimination.¹⁶

The Florida State Statute has not been interpreted by any court, but its language suggests that a court might interpret it in a similar fashion at the Clearwater city ordinance and therefore would prohibit promotional discount pricing on the basis of gender.

Maryland is similar in that it seems like it would fall in line with Florida, California and other states that prohibit gender-based promotions, but the only state case law thus far has only thus far interpreted a Montgomery County ordinance on the issue. The Maryland Court of Special Appeals struck down a creative subversion of the statute by holding that a fifty percent discount on meals to customers who wore a skirt or gown was an extension of a ladies' night and violated a local county ordinance and the state constitution.¹⁷ The Montgomery County Code, Human Relations Law, § 27-9 (West 2013) makes it unlawful for an owner, operator, manager, etc. of a place of public accommodation to make any

services or privileges thereof, or otherwise to discriminate against any person because of race, creed, color, sex... in furnishing of such accommodations, advantages, facilities, services or privileges.

¹⁰ *David R. Gillespie, Complainant*, 2004 WL 1476932 (N.J. Adm. June 10, 2004). See also N.J. Stat. §§ 10:5-5, 5-4, which provide that all persons have the chance to obtain all accommodation, advantages, privileges, etc. of any public accommodation regardless of race, national origin, sex, etc. and an owner, manager, etc. that refuses, withholds, or denies advantages because of sex, national origin, etc. is guilty of unlawful discrimination; *Com., Pennsylvania Liquor Control Bod. v. Dorbinoff*, 80 Pa. Comwlth. 453 (1984); 43 Penn. Stat. § 955 (West 2013).

¹¹ *Abosh v. New York Yankees, Inc.* (1972) No. CPS-25284, Appeal No. 1194.

¹² Mass. Gen. Laws. Ch. 272 § 98 (West 2013) provides "whoever makes any distinction, discrimination or restriction on account of race, color, religious creed, national origin, sex, sexual orientation... relative to the admission of any person to, or in his treatment in any place of public accommodation, resort, or amusement... shall be punished."

¹³ S.D. Codified Laws § 20-13-23 (2013).

¹⁴ *Novak v. Madison Motel Associates*, 188 Wis.2d 407 (Ct. App. 1994); Wis. Stat. Ann. § 106.52 (West 2013).

¹⁵ *Id.* at 1108.

¹⁶ *Id.*

¹⁷ *Peppin v. Woodside Delicatessen*, 67 Md. App. 39 (1986).

distinction based on race, color, sex, marital status, etc. in connection with admission to service or sales in, or price, quality or use of any facility or service of any place of public accommodation, resort or amusement in the county.¹⁸ The Maryland state statute, MD. Code Ann. § 20-304 (West 2013), is very similar but only goes so far as to state that public accommodations “may not refuse, withhold from, or deny to any person any of the accommodations, advantages, facilities, or privileges” because of the person’s race, sex, age, color, creed, national origin, marital status, sexual orientation, or disability. The key difference between the Maryland state statute and that of the Montgomery County ordinance is that the County ordinance specifically proscribed preferred pricing, while the State statute speaks only of refusal or denial of the accommodation on the basis of gender. Would promotional pricing based on gender be allowable under Maryland’s state law because men would not be refused or denied accommodations, but merely required to pay more?

In Minnesota, the State has essentially acknowledged that it will not seek out bars that engage in “ladies’ night” promotions, even though it regards the practice as discriminatory.¹⁹ Other states have enacted public accommodation statutes but have not held if pricing differences based on gender are permitted or prohibited.

Permissible Gender-Based Discounts

Arizona, Illinois, Michigan, Ohio and Washington explicitly allow gender-based discounts. In Arizona, a liquor licensee put restrictions on entry for male customers and not females. This practice was found not to be a violation of the state’s public accommodation statute.²⁰ Illinois upholds gender-based price discounts that do not discourage the sex not receiving the discount from enjoying the establishment.²¹ In Michigan, an indoor racquet club charged different membership prices for males and females.²² The Michigan Court of Appeals held the differential pricing encouraged membership and made the club more available to both sexes.²³ In Ohio, a court also held charging women prices less than men was proper.²⁴ Lastly, Washington has upheld a baseball team owner’s practice of admitting females to games for half the regular established price.²⁵ The Washington court distinguished the promotion at issue from “real” discriminatory practices and stated that “to decide important constitutional questions upon a complaint as sterile as [allowing women promotional prices to a basketball game] would be apt to erode public respect for the Equal Rights Amendment and deter rather than promote the serious goals for which it was adopted.”²⁶ The majority of states are thus far silent on the issue.

How to Avoid Litigation

These types of laws raise a few questions for in-house lawyers and companies that want to encourage more representation from women or other underrepresented groups. Chief among these questions are: 1) what is a company to do if it wants to encourage female participation (whether golf-related or not) without subjecting itself to potential litigation?;

¹⁸ *Id.* at 41.

¹⁹ *In re On-Sale Liquor License, Class B.*, 763 N.W.2d 359 (Minn. Ct. Ap. 2009).

²⁰ Op. Atty. Gen. No. 184-045.

²¹ *See Dock Club, Inc. v. Illinois Liquor Control Com.*, 101 Ill. App.3d 673 (1981) (court found the price charged to male customers was regular established price and reduced drink price charged to women did not deny men the equal enjoyment of the facilities).

²² *Tucich v. Dearborn Indoor Raquet Club*, 107 Mich. App. 398 (1981).

²³ *Id.* at 405.

²⁴ *In re Ferguson*, CRC 4422 (5-13-97) (holding lower fees for women are proper but women must be able to use exercise equipment as often as men).

²⁵ *MacLean v. First Northwest Industries, Inc.*, 96 Wash.2d 338 (1981).

²⁶ *Id.* at 347.

and 2) in light of the potential for litigation, how may companies permissibly encourage involvement from underrepresented groups without drawing discrimination claims?

In states that discourage gender-based discounts, or for in-house attorneys that wish to be more conservative, there are other ways to promote female participation. One option is to seek out gender-neutral introductory offers meant to capture all new golfers. Backed by the PGA of America and other golf organizations, The Get Golf Ready Program is not specifically tied to encouraging female play, but is designed to encourage new participation from all interested would-be golfers. The program provides discounted group lessons rates on an introductory basis – thereby encouraging participation without singling out specific genders. Early results suggest that golfers introduced through this program are very likely to continue with the game.

If women are truly the desired demographic, owners and operators can look for other means of making their venues more inviting to women other than simply lowering prices. The National Women's Golf Alliance (NWGA) implemented "Rolling Out the Green Carpet" which is a certification program for facilities to promote courses that offer the best customer experience for women. The program rates courses on five (5) areas: golf course play-ability, customer service, course amenities, facility amenities and golf programs. The NGWA has done this to help facilities attract more women to their properties and the game of golf. Courses that score eighty percent (80%) or higher receive the certification and can use it in their marketing.

Similarly, according to "The Right Invitation: 2011 Women's Golf Longitudinal Research" a study conducted by the National Golf Course Owners' Association, there are certain practices that result in higher sales and loyalty from women players. These practices include:

- Four or more sets of tees to all golfers to reach greens in regulation
- A golf shop in size of at least 500 sq. ft. with a selection of women's clothing and equipment and a dedicated women's department
- Male and female staff in the golf shop
- Ample directional signage on the course
- Plenty of drink water available
- Male and female staff available for golf instruction
- Availability of childcare

Golf Digest's "Top 50 Courses for Women" says that the "we want you here" intangible attitude is crucial for golf courses to make women feel at home. This attitude can be displayed simply by hosting tournaments for women; flexible playing options (9 and 6 hole loops); and indicators from apparel in the shop to design of the course that makes clear women are more than an afterthought.

By implementing tactics such as those listed above, golf organizations can still target women without running afoul of state anti-discrimination protections. Price incentives are still a great tool, but these other tactics can be used to achieve similar results – particularly in states where gender-based price promotions may be dangerous. Further, to the extent that golf needs to grow new golfers (regardless of gender) perhaps it makes more sense to focus not on women specifically, but on making golf generally more inviting to newcomers. If golf courses look to designate certain days (or certain times of day) as "beginner-friendly," they could perhaps achieve some of the same goals of increasing participation and may attract more female pay by being less intimidating – without overtly targeting women.

Conclusion

GolfNow's female-friendly rate promotion died on the vine due to legitimate concerns about potential career plaintiffs and their attorneys actively monitoring for payday opportunities. Nonetheless, GolfNow and other progressive golf other companies will continue to seek new and creative ways of making the game of golf more inviting for all people interested in learning the game. Certain marketing tools will be able to encourage female participation without drawing discrimination suits (female-friendly outings, including concepts like promoting golf along with fashion shows, "wine and nine", etc...), while other initiatives may be more focused on finding new golfers or making golf more enjoyable for existing players. Companies outside of golf that are interested in promoting to women and other underrepresented groups should be similarly creative, as price discounts might run afoul of certain state anti-discrimination statutes and it appears that there are men like Mr. Frye who are on the lookout for promotions that might nominally favor women over men – and allow observant men (and their lawyers) to exact a healthy windfall in the courts.

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Golf Channel, co-founded by Arnold Palmer in 1995 and now part of the NBC Sports Group, is a multimedia, golf entertainment and services company based in Orlando, Florida and available in more than 120 million homes and 83 countries worldwide. Exclusive partnerships with the world's top tours allow Golf Channel to feature more live golf coverage than all other networks combined, as well as a programming schedule distinguished by golf's highest-quality news, instruction and original programming.

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