IS THE DEATH KNELL RINGING FOR LADIES' NIGHTS?

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As Nevada residents, we know that sex sells. It is a very successful business model, exploited to the maximum by our business-savvy marketing professionals. The hugely popular and recognized motto coined by the Las Vegas Convention and Visitors Authority, "What Happens in Vegas Stays in Vegas," and many of the commercials that depict the possible exploits one might engage in while visiting Las Vegas, capitalize on the idea quite well. It could be said that "Ladies' Nights" promotions also employ this marketing model. For example, a nightclub or bar might offer free entrance and/or discounted drinks to ladies, thereby hoping to attract women, who will thereby attract men to the venue, or so the theory goes.

Are these seemingly benign marketing schemes actually in violation of Nevada or federal anti-discrimination laws?

The LVAC Example

The Las Vegas Athletic Club (LVAC) is a business that operates six sports and exercise facilities in southern Nevada. It was the target of a complaint in front of the Nevada Equal Rights Commission (NERC) charging that its "Ladies Join Free" for a limited time promotion, while requiring a $10 registration fee from men, was in violation of state law prohibiting discrimination in places of public accommodation.[1]

LVAC defended the practice by arguing that "its pricing models differ depending on administrative costs and the ability to collect on installment contracts," i.e., that women have lower administrative and collection costs than men.[2] NERC found that LVAC's justification for the gender-based pricing model was not persuasive, and that it violated Nevada's public policy against discrimination.[3]

If NERC's position is correct, it could mean the end to a marketing practice that has almost become a Nevada institution – forcing owners of sports, exercise and entertainment establishments to rethink a big part of how they do business.

What is Sex Discrimination Under the Law?

It is useful to consider the federal and state statutory frameworks that form the springboard for sex discrimination cases as a way to understand the different strategic paths that are available to the potential plaintiff and the paths that have thus far proven unsuccessful.

Federal Law[4]

Plaintiffs alleging discrimination stemming from gender-based pricing promotions such as the one utilized by LVAC have not prevailed on the federal front, despite several attempts based on the Civil Rights Act of 1964 and the Equal Protection Clause.

Title II – Public Accommodation

Title II of the Civil Rights Act of 1964 (Title II) protects persons from discrimination in places of public accommodation based on: race, color, religion and national origin.[5] Sex is not a protected class under this statute.

Courts have interpreted the language of the statute strictly, refusing to infer that Congress intended sex to be included as well, despite requests by plaintiffs for courts to do so. In *DeCrow v. Hotel Syracuse Corp.*, plaintiff was refused service at the defendant's bar because she was an unescorted woman, even though she was "sitting quietly and in no way disturbing other patrons."[6] The District Court of New York found that Title II did not prohibit discrimination on the basis of sex, and the court "should not gratuitously do what Congress has not seen fit to do."[7]

Plaintiffs in the Southern District of New York faced the same reading of the law in *Seidenberg v. McSorley's Old Ale House, Inc.*, 317 F.Supp. 593 (S.D.N.Y. 1970). In that case, plaintiffs, unescorted women, entered the alehouse and seated themselves at the bar.[8] The bartender refused to serve them based upon the alehouse's 114-year-old policy that women were not to be served under any conditions.[9] The court agreed with the *DeCrow* court and refused to recognize sex as a protected class under Title II, the federal public accommodations statute.[10]

These cases are some examples of plaintiffs who have not been successful with sex discrimination claims based on the federal public accommodations statute, Title II.

The Equal Protection Clause

Where there is a plausible connection to state action, a plaintiff may be able to bring a sex discrimination claim under the Equal Protection Clause of the Fourteenth Amendment in conjunction with 42 U.S.C. §1983.[11]

This argument, however, was recently shot down. The Southern District of New York was singularly unimpressed by this theory in application to "Ladies' Nights" promotions.[12] In *Copacabana*, the defendant nightclubs offered Ladies' Night promotions whereby women received free or discounted admission and/or were allowed more time than men to take advantage of the reduced prices.

Plaintiff claimed that these promotions were a form of "invidious discrimination against men" violative of the Equal Protection Clause. Plaintiff's specific theory was that "New York's regulatory scheme is so pervasive that any entity open to the public with an alcohol license is an agent or instrumentality of the state, such that any and all of its actions can be fairly treated as state actions." The court rejected that theory, finding that there was no causal relation between the state activity and the discrimination alleged. Finding no state action was involved, the court dismissed all of plaintiff's claims.

State Laws

Apparently because the options available to sex discrimination plaintiffs via federal statutes are so limited, most states have enacted legislation to address those gaps. The statutes have included state equal rights

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amendments and public accommodations statutes that include the classification "sex."[13] California has even enacted the Gender Tax Repeal Act of 1995, which prohibits pricing schemes based solely on a customer's gender.[14]

Nevada's Public Accommodations Statute

Nevada has not enacted an equal rights amendment. It does, however, have a public accommodations statute. NRS 651.070 reads:

> All persons are entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation, without discrimination or segregation on the ground of race, color, religion, national origin or disability.

Nevada's public accommodation statute closely mirrors the federal equivalent, but adds disability as an additional category. "Places of public accommodation" are defined in NRS 651.050 and include such establishments as hotels, restaurants, bars, casinos and gymnasiums. Like the federal statute, "sex" is not a protected category under Nevada's public accommodation statute. So how, then, did NERC find probable cause that LVAC's pricing scheme was discriminatory?

NERC Relied on a "Declaration of Public Policy"

NERC acknowledged that Nevada's public accommodations statute fails to include sex as a protected class.[15] Because NERC could not rely on NRS 651.050 to find discrimination on the basis of sex, it looked instead to NRS 233.010(2):

> It is hereby declared to be the *public policy* of the State of Nevada to protect the welfare, prosperity, health and peace of all the people of the State, and to foster the right of all persons *reasonably* to seek and be granted services in places of public accommodation without discrimination, distinction or restriction because of race, religious creed, color, age, sex, disability, sexual orientation, national origin or ancestry (emphasis added).

According to NERC, "Under 233.010(2), all persons have the right to be granted services in places of public accommodation without distinction because of sex."[16] It is subject to debate, however, whether this interpretation is accurate.

NRS 233.010 Is Modified By The Word "Reasonably"

As a matter of statutory interpretation, the "right" of all persons to be granted services without distinction in NRS 233.010 is modified by the word "reasonably." "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error."[17] In the LVAC decision, NERC apparently did not consider the impact of the word "reasonably" on the construction of the statute.

Instead, NERC analogized Nevada's declaration of public policy to the public accommodations statutes of California and Iowa. The California statute at issue reads in relevant part as follows:

> All persons within the jurisdiction of this state are free and equal, and no matter what their sex... are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever...[18]

Similarly, the Iowa statute reads:

> 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: (a) To refuse or deny to any person because of... sex... the accommodations, advantages, facilities, services, or privileges

> thereof, or otherwise to discriminate against any person because of...sex...in the furnishing of such accommodations, advantages, facilities, services, or privileges.[19]

NERC relied on gender-based pricing scheme cases from California and Iowa that found that the practices were discriminatory – based upon the public accommodations statutes outlined above. Further, NERC did not consider LVAC's proffered legitimate, nondiscriminatory justification for the pricing scheme, that it has lower administrative and collection costs for its female customers.

It is questionable as to whether a Nevada court, construing the Nevada public accommodations statues, would rely on the California and Iowa cases cited by NERC. First, the California and Iowa statutes are those states' actual public accommodations statutes. They are not declarations of public policy with no enforcement value, as is NRS 233.010(2). The wording of the California and Iowa statues is much stronger than the Nevada statute as well. The statutes do not contain a qualifier similar to the "reasonably" language included in the Nevada statute. Therefore, unlike NERC, a Nevada court might give weight to LVAC's rational business justification argument and uphold such pricing schemes.

The Operative Statute Is NRS 651.070

In addition, a court might give some deference to the conspicuous absence of "sex" as a category protected under NRS 651.070. After all, where particular language is used in one section but not another, the term or its equivalent should not be implied where excluded.[20] Moreover, NRS 651.090 allows for civil and criminal penalties for a violation of NRS 651.070. No such equivalent exists for NRS 233.010.

This is not to say that NERC does not have authority to investigate sex-based claims of discrimination in cases of public accommodation. On the contrary, pursuant to NRS 233.150(1)(a), NERC may "investigate tensions, practices of discrimination and acts of prejudice against any person or group because of race, color, creed, sex, age, disability, sexual orientation, national origin or ancestry, and may conduct hearings with regard thereto." In investigating the charge against LVAC, NERC did exactly what it was supposed to do under the statute.

A complaint was filed against the LVAC on August 28, 2007.[21] NERC investigated the charge for a full year, and issued a determination on August 11, 2008 that found probable cause that violations had occurred. It thereafter engaged in an effort to mediate between the parties. After attempts at conciliation failed, NERC held a public hearing on November 7, 2008.[22] After the public hearing, NERC voted three to one that the ruling should be upheld.[23] To date, no further action has been taken, but according to a press release dated November 5, 2008, NERC will issue

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an order requiring the LVAC to cease and desist its practice of offering membership promotions based on sex.

If LVAC fails to comply with the cease and desist order, NERC may apply to the District Court for an order compelling compliance.[24] This is where it would get really interesting, because it is unknown how a Nevada court would view LVAC's gender-based pricing scheme under Nevada law, as set forth above.

Section 2 of 233.010 Must Be Read in Conjunction with Section 3

If NRS 233.010(2) is not enforceable in District Court, then why would the Legislature have bothered to define what public policy should be, and why would it have given NERC the ability to investigate claims of discrimination based upon the classifications in 233.010 that are not included in 651.070?

The answer is simple – one need only look to subsection 3 of NRS 233.010:

> It is recognized that the people of this State should be afforded full and accurate information concerning actual and alleged practices of discrimination and acts of prejudice, and that such information may provide the basis for formulating remedies of equal protection and opportunity for all citizens in this State.

In other words, the Legislature provided an administrative and statutory scheme whereby a public discourse could be had that would inform the laws relating to discrimination in Nevada. This statute can be seen as an acknowledgement by the Legislature of the disparity between NRS 651.070 and NRS 233.010, and an invitation by the Legislature for additional discourse related thereto. Depending on how the LVAC case shakes out, such discourse will be readily available during the 75th regular session of the Nevada Legislature, in session as this goes to print.

What Does All This Mean For Sports- and Entertainment-Focused Businesses?

For the time being, businesses should exercise caution in utilizing gender-based pricing scheme promotions. While the ability of a plaintiff to succeed on such a claim in district court remains unknown, NERC has the ability to pursue such claims on the administrative level. Therefore, businesses should engage in a cost-benefit analysis, keeping in mind that they might have to spend time and resources defending a sex discrimination charge in front of NERC or elsewhere. NL

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1 The LVAC was also accused of unlawfully providing a separate workout area for women and not for men, and of retaliation against the complaint. Neither of these two charges were upheld by NERC, so they will not be discussed herein.
2 NERC Determination at p.2. See NERC Determination issued by Dennis Perea, August 11, 2008 at p.2; determination upheld by Commission, as reported in "Ruling On Gyms To Have Big Effect On Nightclubs, Too," Liz Benston, Las Vegas Sun, November 10, 2008.
3 *Id.*
4 Due to space constraints, the discussion regarding federal sex discrimination law is not a comprehensive overview but merely serves to remind the reader about the categories of discrimination statutes available to the potential plaintiff in a sex and pricing scheme-based discrimination case.
5 42 U.S.C. § 2000a.
6 *DeCrow v. Hotel Syracuse Corp.*, 288 F. Supp. 530, 531 (N.D.N.Y. 1968) (internal citations omitted).
7 *DeCrow*, 288 F. Supp. at 532.
8 *Seidenberg*, 317 F. Supp. at 595.
9 *Id.*
10 *Id.*
11 See U.S. Const. am. 14; 42 U.S.C. §1983; *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 n.2 (2001).
12 *Hollander v. Copacabana Nightclub*, 580 F. Supp. 2d 335 (S.D.N.Y. 2008).
13 See "Is Ladies' Night Really Sex Discrimination?: Public Accommodation Laws, De Minimis Exceptions, and Stigmatic Injury," 36 Seton Hall L. Rev. 223, 228 (2005).
14 Cal Civ. Code § 51.6.
15 NERC Determination at p.3.
16 NERC Determination at p.3.
17 *Tomlinson v. State*, 110 Nev. 757, 761 (1994).
18 Civ. Code, § 51, cited in *Koire v. Metro Car Wash*, 707 P.2d 195, 196 (Cal. 1985).
19 Iowa Code § 601A (1985), cited in *Ladd v. Iowa West Racing Association*, 438 N.W.2d 600, 601 (Iowa 1989).
20 *FTC v. Sun Oil Co.*, 371 U.S. 505, 514-15 (1963).
21 See generally, NERC Determination.
22 See NERC Press Release dated November 5, 2008.
23 See "Ruling On Gyms To Have Big Effect On Nightclubs, Too," Liz Benston, *Las Vegas Sun*, November 10, 2008.
24 NRS 233.170(4).