

2011

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Recommended Citation

Davis, Lajuana (2011) "Beyond Xenophobia: The Role of Race and Gender Expectations Behind the LPGA's English Language Policy," *Law Raza*: Vol. 2: Iss. 1, Article 3.

Available at: <http://open.mitchellhamline.edu/lawraza/vol2/iss1/3>

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The William Mitchell Law Raza Journal

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**BEYOND XENOPHOBIA: THE ROLE OF RACE AND GENDER EXPECTATIONS
BEHIND THE LPGA'S ENGLISH LANGUAGE POLICY**

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Introduction

In 2007, a young South Korean woman, Eun-Hee Ji, became an unwitting catalyst for one of the oldest professional women's sporting organizations, the Ladies Professional Golf Association (LPGA), to adopt an English-language policy. Ji, after winning the Wegmans Tournament in Rochester, NY, spoke in Korean during her acceptance speech, which a translator then delivered in English. Ji's speech is rumored to be the spark for the LPGA's 2008 proposal making speaking English a condition of tour membership by the end of 2009.² If, after an oral proficiency exam, a LPGA player could not speak English sufficiently, she would face penalties from fines up to suspension of playing privileges from the tour. The English language policy attracted more attention and unwelcome scrutiny than the LPGA had in decades. After blistering criticism, the LPGA withdrew the suspension penalty. The tour management continued, however, to strongly encourage its players to use English during interviews and suggested the LPGA may fine players who do not. If it does so, the LPGA would be the only U.S. professional sports organization to penalize players for insufficient English speaking skills.

This essay explores the LPGA English-language policy as a case study of our commitment to anti-subordination principles when influenced by customer preference. The English language proposal indicates that LPGA players face a hidden but influential qualification test. In addition to meeting the technical qualifications for tour membership, players must also meet reaction qualifications of sponsors and customers. While customer preferences may be appropriate considerations for some job qualifications, U.S. discrimination law has yet to

² Golf writer Ron Sirak wrote that while the LPGA governing body had long considered developing an English language policy, the issue "moved to the front burner, according to a well-placed source, when Eun-Hee Ji won the Wegmans LPGA in June and was unable to deliver the victory speech in English." Ron Sirak, *Bivens speaks out about LPGA Tour's controversial English ruling*, GOLF WORLD, Sept. 1, 2008, http://sports.espn.go.com/golf/columns/story?columnist=sirak_ron&id=3564106.

identify the line between allowing private preferences to influence job opportunities. The LPGA English policy reflects tolerance for language-discrimination as a proxy for discrimination that is actually based on or influenced by impermissible factors. First, while the public discussion of the South Korean players focused on their inability to speak English, the discontent with the South Korean players appears to be a more complicated network of interconnected sentiments about race, gender expectations, and the society's limited tolerance of success of minority groups when that success threatens the dominance of traditionally-favored groups. This acceptance of some discrimination challenges our nation's collective view of itself as a place of unlimited opportunity for those who are willing to work to earn those opportunities.

The LPGA's English Language Proposal

The Ladies Professional Golf Association (LPGA) is a nonprofit women's golf organization that operates golf tournaments for female professional players.³ It is the oldest domestic based women's sports league. That stability was threatened in 2008 when the LPGA lost several tournament sponsors in a preface to the U.S. stock market crash that fall. The LPGA, like all sport leagues, faces a continued downturn as the U.S. economy trudges through a recession, but the LPGA is smarting more than other leagues. The LPGA continues to seek to fill the gaps of a few corporate and tournament sponsors to step in for those sponsors who had withdrawn financial support. It is a common story for women's sports in the United States. With the exception of the women's golf and tennis tours, women's sports organizations in the United

³ The LPGA is an organization that is "dedicated to the worldwide promotion and advancement of women's golf" through featuring women's professional golf tournaments and its professional members. LPGA.com, The LPGA Today, http://www.lpga.com/content_1.aspx?pid=6186&mid=0 (last visited March 19, 2011).

States have struggled, at varying levels, to attract fans, television coverage and corporate sponsorship money.⁴

In 2008, the LPGA tour feared losing some of its most important tournament sponsors. In the next year, the LPGA anticipated having its shortest tournament schedule since 1971.⁵ The LPGA's management was trying to find solutions to sustain the league through bad economic times.⁶ As part of those efforts, in August, LPGA officials summoned the tour's South Korean players to a mandatory meeting.⁷ LPGA officials told the players that the tour was planning several measures to improve the integration of non-English speaking players on the tour, and thus, in its view, to help retain LPGA sponsors. The LPGA would make English language instruction help available through on-line services and in-person tutoring to players who were

⁴ Mark Kreidler, *State of Uncertainty for Women's Sports*, ESPN: OUTSIDE THE LINES, July 24, 2009 ("The modern women's pro sports movement has proven dangerously vulnerable to market conditions and scandal, in ways that the major men's sports organizations could never fathom."),

http://sports.espn.go.com/espn/otl/columns/story?columnist=kreidler_mark&id=4352885.

⁵ Randall Mell, *LPGA Rescue Mission: "We're Exhausted"*, GOLFCHANNEL.COM, Nov. 18, 2009,

<http://www.thegolfchannel.com/shag-bag/lpga-rescue-mission-exhausted-33930>; Associated Press, *Officials Seek to Keep LPGA Tour Event in Tulsa Area*, ESPN GOLF, Jul. 28, 2008,

<http://sports.espn.go.com/golf/news/story?id=3505367> (withdrawal of LPGA event SemGroup Championship after SEM Group's bankruptcy); Golfweek Staff, *LPGA Tour Championship Moving to Orlando*, GOLFWEEK, July. 29, 2010,

<http://www.golfweek.com/news/2010/jul/29/lpga-tour-championship-moving-orlando/> (Stanford Financial

bankruptcy caused withdrawal of LPGA Tour Championship sponsorship); Ron Sirak, *Sources: One of Richest Tournaments, Ginn Tribute, out in '09*, GOLF WORLD (July 27, 2008), available at

<http://sports.espn.go.com/golf/news/story?id=3507608> (withdrawal of sponsor support for Ginn Open); Associated Press, *LPGA Drops Three Tournaments Over Economic Crisis*, NBCSPORTS, Nov. 19,

2008, <http://nbcsports.msnbc.com/id/27804124/>; Peter Yoon, *New Chief Michael Whan Tries to Point LPGA in Right Direction*, L.A. TIMES, March 31, 2010, <http://articles.latimes.com/2010/mar/31/sports/la-sp-lpga-20100401>; CNN.com,

LPGA Loses Corning Classic as Downturn Bites, April 21, 2008,

<http://edition.cnn.com/2009/SPORT/golf/04/21/lpga.corning/index.html>; Ron Sirak, *LPGA Facing Economic Realities*, GOLF DIGEST, Nov. 18, 2008, <http://www.golfdigest.com/golf-tours-news/2008-11/20081119sirak>.

⁶ CNN.com, *LPGA loses Corning Classic as Downturn Bites*, CNN, April 21, 2008,

<http://edition.cnn.com/2009/SPORT/golf/04/21/lpga.corning/index.html>; Ron Sirak, *LPGA Facing Economic Realities*, GOLF DIGEST, Nov. 18, 2008, <http://www.golfdigest.com/golf-tours-news/2008-11/20081119sirak>.

⁷ The English-language policy was reportedly introduced at a meeting "with South Korean players, their parents and managers at the Safeway Classic." Sirak, *supra* note 2; The players understood the meeting to be "mandatory" for the South Korean players. See ESPN.com news services, *LPGA Tour Will Suspend Memberships if Players Don't Learn English*, ESPN, Aug. 27, 2008, <http://sports.espn.go.com/golf/news/story?id=3553888>; Steve DeMeglio, *LPGA Says English is Required Language*, USA TODAY, Aug. 27, 2008, available at http://www.usatoday.com/sports/golf/lpga/2008-08-26-lpga-english_N.htm.

not fluent in English, for which the players would pay.⁸ If, at the end of 2009, non-English speaking players did not achieve a functional ability to communicate in English, they would be suspended from playing on the LPGA tour.⁹ Many of the South Korean players, who were the only group of players at the meeting when the policy was announced, left the gathering believing that the new language policy was directed at them, and that the policy was a precursor to their eventual ejection from the world's most prestigious woman's golf league.

Although then-LPGA Commissioner Carolyn Bivens denied that the policy was an English-only policy or that English proficiency would be required, the LPGA seemed to expect more than a minimal grasp of English. The test would have required players to 1) deliver an enjoyable experience in pro-ams¹⁰; 2) give winner's acceptance speeches in English, and 3) give media interviews in English.¹¹ The LPGA saw these three proficiencies as important, but the pro-am interactions, Bivens said, was the tour's "oxygen."¹² Professional-amateur golf tournaments, or pro-ams, are played by pairings of amateur and professional golfers who compete against

⁸ Language tutoring services offer instruction to players during golf tournament weeks. The players pay "\$1,000 for 20 hours of training." Beth Ann Baldry, *Choi Growing More Comfortable on LPGA*, GOLF WEEK, Sept. 9, 2010, <http://www.golfweek.com/news/2010/sep/09/choi-growing-more-comfortable-lpga/>.

⁹ Memorandum from Carolyn F. Bivens, LPGA overview regarding the effective communication in English policy, (Sept. 2, 2008), http://www.lpga.com/content_1.aspx?pid=17137&mid=4; See also Dave Kane, *State Farm Wants LPGA to Rethink English-Proficiency Policy*, NORWICH BULLETIN, Sept. 3, 2008,

<http://www.norwichbulletin.com/news/business/x256659244/State-Farm-wants-LPGA-to-rethink-English-proficiency-policy> (reprinting tour's August 25, 2008 memorandum to players that "[i]f by the end of a player's second year on Tour she does not meet the required level of communication, her membership will be suspended until she achieves the required level. For players who joined the Tour in 2008 or earlier, this will be measured as of the end of 2009. ...").

¹⁰ Christine Brennan, *Critics Should Take a Mulligan in Assessing LPGA Policy*, USA TODAY, Sept. 3, 2008, available at http://www.usatoday.com/sports/columnist/brennan/2008-09-03-lpga-policy_N.htm (quoting LPGA Commissioner Carolyn Bivens: "A pro-am is largely responsible for making LPGA events possible. It is the single largest source of revenue for a tournament. There are no domestic TV rights fees. This is our oxygen. It's that important.").

¹¹ Associated Press, *PGA Tour Players Critical of LPGA Language Rule*, GOLF CHANNEL, Aug. 28, 2008, <http://www.thegolfchannel.com/tour-insider/pgatour-players-critical-lpga-language-rule-27152> (quoting LPGA deputy commissioner Libba Galloway).

¹² See Karen Crouse, *Absences Worsen L.P.G.A.'s Headache*, N.Y. TIMES, April 1, 2010 (quoting LPGA player Heather Bowie Young who said, "pro-ams are the bloodline of the tour, the primary source of sustenance for its sponsors."); See also Bruce Berlet, *Award-Winning Writer Insightful on LPGA's 'English' Case*, Posting of Tom Yantz, On the Tee, [blogs.courant.com to http://blogs.courant.com/chip_shots/2008/08/award-winning-writer-insightful.html](http://blogs.courant.com/chip_shots/2008/08/award-winning-writer-insightful.html) (Aug. 28, 2008) ("[the LPGA's] business depends solely on the personal satisfaction of check writers based on their experiences with the pros. If the pros can't communicate, the experience is not a valid return on investment for those individuals sponsoring events and playing in pro-ams. Pro-ams and sponsorships secure tournament purses.").

other professional-amateur pairings. In golf pro-ams on the PGA and LPGA tours, amateurs commonly pay several thousand dollars to play in pro-am competitions held before official tournaments.¹³ For the LPGA, money from pro-ams helps to defray tournament expenses, and thus is critical to the tour's business.¹⁴

LPGA Commissioner Bivens said that the English language policy was driven by complaints from tournament directors: "As recently as the past two weeks, I've had tournament directors tell me they are getting complaints (about international players who cannot speak enough English to talk to their pro-am partners). We have to be aware of that, because we've had sponsors who say they have had a bad time and might pull out because of it. That's our reality." The LPGA said that it had tried to encourage its South Korean players to speak English, and several of the players were taking English language instruction. Those players were apparently not coming along quickly enough to alleviate the tour's concerns.¹⁵

When the LPGA announced the English language policy, the women's tour became the focus of unwelcome scrutiny.¹⁶ The English language policy attracted protest from many quarters, including journalists, legal organizations,¹⁷ politicians,¹⁸ and professional golfers.¹⁹ The

¹³ Matt Trowbridge, *Timing May Never Be Better for Rockford to Get LPGA Event*, RRSTAR.COM, July 3, 2010, <http://www.rrstar.com/carousel/x1849219622/Timing-may-never-be-better-for-Rockford-to-get-LPGA-event> (quoting Greg Conrad, LPGA vice president of tournament business affairs, who said that "LPGA pro-ams charge amateur players anywhere from \$1,500 to \$6,000.").

¹⁴ See Berlet, *supra* note 11.

¹⁵ See Paula Duffy, *Women's Golf Tour Says That English Will Be Spoken Here*, EXAMINER.COM, Sept. 3, 2008, <http://www.examiner.com/sports-in-national/women-s-golf-tour-says-that-english-will-be-spoken-here>. (reporting on the LPGA's policy that "[t]he LPGA tried another way to get this to happen and it failed.").

¹⁶ See PGA Players, *supra* note 11, (quoting the LPGA's deputy commissioner that LPGA management were "puzzled, if not surprised, by some of the reactions... [to what the LGPA saw as] a pro-international move.").

¹⁷ See National Asian Pacific American Bar Association, *The LPGA Should Rescind Its English Language Rule*, ASIANLIFE.COM, Aug. 27, 2008, <http://www.asianlife.com/magazine/view/articles/id/645838686> (press release of a national bar association of Asian Pacific American lawyers and law students criticizing targeting of LPGA players from certain countries and ethnicities); Lawrence Donegan, *Golf Tour Tells Players They Must Speak English*, THE GUARDIAN, Aug. 28, 2008 (quoting Howard Simon, executive director of the Florida branch of the American Civil Liberties Union, as stating that the LPGA's proposed language policy "may well violate Florida discrimination laws because language is a key element of person's national origin."), <http://www.guardian.co.uk/sport/2008/aug/27/golf/print>.

LPGA withdrew the English language suspension penalty after several weeks of controversy, and no suspensions occurred.²⁰ The LPGA's management pledged to continue to persuade players to speak English, indicating that fines "remain[ed] an option."²¹

The South Korean players, who were the focus of the policy, understandably had a more muted response to the controversy.²² The South Korean players interviewed by mainstream media supported the LPGA's desire that all players speak some English;²³ many of the South Korean players could already "communicate basic sentiments in English" or were dedicated to learning to do so.²⁴ But a key issue was that some Asian players were reluctant to speak English because they could not do so perfectly. The players seemed to be concerned, and not without reason,²⁵ that speaking less-than-correct English could be more damaging to their public images than remaining silent.²⁶

¹⁸ Associated Press, *LPGA Won't Suspend Players Over English-Speaking Requirement*, ESPN.COM (Sept. 7, 2008) (describing intentions of California state legislators Leland Yee and Ted Lieu to introduce bills to impose a state ban on sporting events that enforce a English language requirement on their participants), <http://sports.espn.go.com/golf/news/story?id=3570957>.

¹⁹ Associated Press, *PGA Tour Players Critical of LPGA Language Rule*, <http://www.thegolfchannel.com/tour-insider/pgatour-players-critical-lpga-language-rule-27152>, (quoting PGA players, K.J. Choi, a South Korean player, and Angel Cabrera, an Argentinean, who discussed their inability to speak English when they began playing in the United States).

²⁰ See Associated Press, *supra* note 18.

²¹ Doug Ferguson, *LPGA Backs Off Language Requirement*, SEATTLE-PI (Post-Intelligencer)(Sept. 8, 2008), http://www.seattlepi.com/golf/378043_lpga06.html.

²² See Seung-Yup Lim, *Racial and Sexual Discrimination Occurring to Korean Players on the LPGA Tour* 114 (Aug. 2009) (unpublished Ph.D. dissertation, University of Tennessee - Knoxville) (on file with author) (noting that some of the "Korean players were passive in perceiving racial discrimination due to their lack of fluency in English." Others simply did not want to cause trouble.).

²³ Donegan, *supra* note 7, South Korean's most renowned female golfer and World Golf Hall of Fame member Se Ri Pak, agreed with the goal of the policy, but not to the suspension penalty: "We agree we should speak some English."

²⁴ Bivens memorandum, *supra* note 9.

²⁵ The South Korean players' concerns about how they would be received if their English was not nearly perfect is not unfounded. See Cynthia Kwei Yung Lee, *Beyond Black And White: Racializing Asian Americans in a Society Obsessed with O.J.*, 6 HASTINGS WOMEN'S L.J. 165 (1995), Professor Cynthia Kwei Yung Lee discusses a pervasive stereotype of Asian-Americans: the assumption that Asian-Americans' English-speaking skills will be heavily accented and less understandable than those of Americans who are not of Asian heritage. Lee discusses Senator Alfonse D'Amato's mocking Judge Lance Ito, who presided over the trial of O.J. Simpson. "Judge Ito is a U.S.-born citizen whose parents were interned during World War II. He speaks English with a "standard American accent." Nevertheless, Senator D'Amato mocked him in a halting, ungrammatical, heavily-accented English: "Judge Ito loves the limelight. He is making a disgrace of the judicial system. Little Judge Ito Judge Ito with the wet nose." (emphasis in original).

²⁶ See Donegan, *supra* note 17 (Quoting veteran LPGA tour member and South Korean told interviewers, "When you win, you should give your speech in English. Mostly what comes out is nerves. Totally different language in front of camera. You're excited and not thinking in English."); See also, Karen Crouse, *Language Labs to Help Golfers Communicate*, N.Y.

The LPGA's conclusion that English speaking skill is a necessary part of professional golf in the United States surprised some observers, including some male professional golfers on the PGA Tour. The PGA Tour has had non-English-speaking players give victory speeches, including Angel Cabrera's 2008 victory speech in Spanish at the Masters and the media interviews with Y.E. Yang, the PGA Tour's first Asian-born major champion, who spoke to reporters through a translator after winning the PGA Championship in 2009. Both players delivered those speeches without English-speaking members of the media criticizing them. But the PGA Tour is admittedly worlds away from the LPGA in revenue, exposure, and sponsors (as an example, the total PGA Tour 2010 prize purse was 288 million dollars compared with the LPGA's total purse in 2010 of 41.1 million).²⁷

The LPGA's sense of crisis in 2008 may have been sincere as pro-am fees are a major revenue source for LPGA tournaments, but in hindsight, it is harder to see that players' lack of English proficiency significantly affected the LPGA's overall bottom line.²⁸ The LPGA's top

TIMES (Oct. 13, 2008) ("The South Korean players became more shy after a profile of Kyeong Bae in a Canadian newspaper this summer in which she referred to the cartoon character SpongeBob Square Pants as "Spongie Bob."); Eric Adelson, *LPGA Tour's English Rule Caught Many In Korean Community By Surprise*, ESPN.COM, <http://sports.espn.go.com/espn/print?id=3566159&type=story> (quoting Commissioner Bivens and discussing South Korean players who can speak serviceable or better English but are reluctant to do so because "... the majority of Koreans on the tour want only to be perfect. And when put into a high-pressure situation when they might be imperfect, many would rather be silent."); Larry Dorman, *Golf Tour's Rule: Speak English to Stay in Play*, N.Y. TIMES (Aug. 27, 2008), http://www.nytimes.com/2008/08/27/sports/golf/27golf.html?_r=1&pagewanted=print (reporting LPGA Deputy Commissioner Libby Galloway's statement that "the vast majority" of the LPGA's international players already spoke serviceable English).

²⁷ Tom Knox, *LPGA Hits Road In RV To Promote Its Tour Championship*, THE DAYTON BEACH NEWS-JOURNAL (Nov. 10, 2010), <http://www.news-journalonline.com/news/local/east-volusia/2010/11/17/lpga-hits-road-in-rv-to-promote-its-tour-championship.html>; Doug Ferguson, *PGA Tour Unveils 2011 Schedule With 45 Events, Few Changes From 2010*, ASSOCIATED PRESS, <http://www.pga.com/news/pga-tour/pga-tour-unveils-2011-schedule-45-events-few-changes-2010>. Like other men's and women's sports organizations, professional golf has a wide gap in resources between the men and women who play the sport. In addition to total prize money and sponsor revenue, the 2011 PGA schedule will have forty-five official money events; the LPGA's 2011 schedule is expected to have around twenty-six. Ferguson, *id.*

²⁸ Brennan, *supra* note 10, quoting LPGA Commissioner Carolyn Bivens: "As recently as the past two weeks, I've had tournament directors tell me they are getting complaints (about international players who cannot speak enough English to talk to their pro-am partners). We have to be aware of that, because we've had sponsors who say they have had a bad time and might pull out because of it. That's our reality."

two sources of revenue are Korean and Japanese television companies.²⁹ LPGA's anchor sponsors, which include multinational corporations such as Coca-Cola, Kia, Sybase and Kraft Nabisco, were unlikely supporters of excluding international players from their sponsored tournaments because of lack of English language proficiency³⁰; in fact, one of the tour's long-standing sponsors, State Farm Insurance, publicly criticized the policy.³¹ Moreover, in 2008, ten of the LPGA's thirty-five tournaments were played outside of the United States; only two of those foreign tournaments, the British and Canadian Women's Opens, were played in English-speaking countries.³² The foreign-domestic tournament ratio has since increased—of the LPGA's twenty-seven tournaments in 2010, eleven were held outside of the United States.³³

The English Language Policy: A “Puzzle of Discrimination”³⁴

The Uncertainty of Coverage under Antidiscrimination Law

Some observers have argued that the LPGA's desire to promote English-language capability conflicts with antidiscrimination law.³⁵ These commentators have suggested powerful

²⁹ John Paul Newport, *Women in Distress, Fighting for Its Future, the LPGA Tour Goes Global—With New Hope, but Some Reluctance*, WALL STREET JOURNAL W242 (Nov. 27, 2009), available at <http://online.wsj.com/article/SB10001424052748704888404574547943968191648.html>; Ron Sirak, *LPGA Changes Up Plans For Its Signature Event*, GOLF WORLD (Jun. 6, 2008), <http://sports.espn.go.com/golf/news/story?id=3429802>.

³⁰ Brent Kelly, *LPGA Backtracks on English-Language Policy*, ABOUT.COM-GOLF, <http://golf.about.com/b/2008/09/05/lpga-backtracks-on-english-language-policy.htm>.

³¹ Jerry Potter, *Sponser Asks LPGA to Rethink English Requirement*, USA TODAY (9/3/2008) available at http://www.usatoday.com/sports/golf/lpga/2008-09-03-sponsor-english_N.htm.

³² See 2008 LPGA Tour Schedule, <http://www.lpga.com/content/2008LPGAschedule.pdf>.

³³ Gene Yasuda, *LPGA's 2010 Schedule: 24 Events, 11 Foreign*, GOLF WEEK (Nov. 18, 2009), <http://www.golfweek.com/news/2009/nov/18/lpga-announces-2010-schedule> (noting that nearly half of the LPGA's twenty-four tournaments would be played outside of the United States). Since the publication of Yasuda's article, the LPGA added three tournaments in the United States. Of those eleven foreign tournaments in 2010, nine were played in non-English speaking countries; five of those were played in Asian countries. One of the domestic tournaments was cosponsored by a South Korean broadcasting company and South Korean automaker Kia. See 2010 LPGA Tour Schedule, *supra* note 32.

³⁴ The term “puzzle of discrimination” is taken from PETER GLICK & SUSAN T. FISKE, *SEX DISCRIMINATION: THE PSYCHOLOGICAL APPROACH*, *SEX DISCRIMINATION IN THE WORKPLACE* 155 (Faye J. Crosby, Margaret S. Stockdale & S. Ann Ropp, eds., 2007).

³⁵ See, e.g., Jonathan Stensvaag, *English-Only Rules: Title VII, Title II, and the Ladies Professional Golf Association's Proposed English-Only Rule*, 13 J. GENDER RACE & JUST. 241 (2009) (detailing discrimination claims that the LPGA's South Korean players might bring under Title VII and Title II of the Civil Rights Act); Aaron T. Lloyd, *You're Next On The Tee, Just Remember To Speak English! Could The LPGA Really Force Players To Learn And Speak English?*, 9 VA. SPORTS & ENT. L.J. 181, 186-191 (2009) (arguing that LPGA players should be considered employees under Title VII).

theories as to why federal antidiscrimination laws should apply to the LPGA's English-language policy; a convincing solution has proven elusive.³⁶ Title VII of the Civil Rights Act of 1964 prohibits discrimination in the terms or conditions of employment based on race, color, religion, sex, or national origin, but language discrimination is not a protected classification under Title VII.³⁷ But the golfers would have even more basic hurdles to address to bring a discrimination claim: showing that they are employees of the LPGA Tour and that the English-language policy was a proxy for a prohibited discriminatory factor such as race or national origin. Under current antidiscrimination law, proving either would require courts to accept theories that they thus far have been unwilling to embrace.

If the LPGA players sought protection as employees, they would have to show that they are employees, a hurdle that other players in individual sports have had little success in proving under Title VII's definition.³⁸ Tennis players, who are part of a player-member organizational structure comparable to the LPGA's, have been found to be independent contractors and not employees of the governing organization in which they are playing members.³⁹ While commentators have made cogent arguments that the LPGA regulates its members' conduct to a degree that the players could meet the common law agency definition of "employee,"⁴⁰ other

³⁶ Lloyd, *supra* note 3535, at 186-191.

³⁷ Employment discrimination claims based on factors including race, ethnicity, and national origin are typically regulated by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, which provides in pertinent part, that it is unlawful for an employer to "(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." 42 U.S.C. § 2000e-2(a)(1).

³⁸ Title VII defines "employee" as "an individual employed by an employer." 42 U.S.C. §2000e(f).

³⁹ See *Washington v. U.S. Tennis Ass'n*, 2002 WL 1732801 (E.D.N.Y. 2002) (finding that professional tennis player was not an "employee" of the U.S. Tennis Association).

⁴⁰ See *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318, 323-24 (1992) (using the common law agency definition to determine whether a hired person is an employee under Employee Retirement Income Security Act (ERISA), the Court explained, "we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the

factors weigh in favor of the players being considered independent contractors. LPGA players select the tournaments that they wish to compete in; provide their own equipment; employ their own coaches and caddies; and pay self-employment taxes. LPGA players are thus unlikely to be considered “employees” under current definitions. Moreover, the U.S. Supreme Court has sidestepped deciding whether professional golfers are employees of the tours on which they play or independent contractors. In a case brought under the Americans with Disabilities Act of 1990 (ADA), Casey Martin, a male professional golfer, sued the PGA Tour for not allowing him to use a golf cart during tournaments. Martin had a congenital disease that prevented him from walking the long distances of a golf course.⁴¹ Martin argued that the ADA required that the tour make an accommodation for his disability, and alternately, that he was being discriminated against for employment on the PGA tour. The Court found for Martin based on Title II of the Civil Rights Act’s prohibition against discrimination in a place of public accommodation without deciding Martin’s employee status.⁴²

Even if women professional golfers were found to be employees under Title VII, success challenging the LPGA’s English-language policy is far from assured. Because the LPGA disavowed any intention to discriminate against the South Korean golfers because of race or national origin, the golfers would have to present circumstantial, or indirect, evidence of discrimination.⁴³ Because the LPGA’s English language policy does not facially discriminate on

regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.” (citation omitted)).

⁴¹ PGA Tour, Inc. v. Martin, 532 U.S. 661, 679, 690 (2001) (allowing disabled golfer to use a golf cart during a PGA tournament under Title III of the Americans with Disabilities Act as a “client or customer” of the PGA and finding that use of a golf cart would not “fundamentally alter the nature” of a golf tournament).

⁴² In *Martin*, the Court also affirmed a lower court’s ruling that the PGA Tour was not a private club, but rather was a “commercial enterprise operating in the entertainment industry for the economic benefit of its members.” Thus, the PGA could not claim exempt status as a private club from antidiscrimination laws, and presumably, nor would the LPGA. 532 U.S. at 669-70, *supra* note 41.

⁴³ Direct evidence of discrimination is “evidence which if believed by the trier of fact, will prove the particular fact in

the basis of the factors traditionally regulated by Title VII, to be covered, the non-English speaking golfers would have to show that the policy was inextricably linked to a protected class such as race or national origin. While some courts and the Equal Employment Opportunity Commission guidelines recognize the salience of language to race and national origin,⁴⁴ courts routinely reject language discrimination claims as language itself is not a suspect classification under Title VII.⁴⁵ The golfers would have to amass enough evidence to establish a *prima facie* case of discrimination.⁴⁶

If found to be protected under Title VII, the golfers would then face another substantial hurdle—showing that the English-language policy was not justified by a sufficient business

question without reliance on inference or presumption.” *Cowan v. Glenbrook Security Services, Inc.*, 123 F.3d 438, 443 (7th Cir. 1997). Such evidence of an admission, Supreme Court Justice Sandra Day O’Connor once acknowledged, is “hard to come by.” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1983) (O’Connor, J., concurring). *See also* *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 141 (2000) (“[t]here will seldom be ‘eyewitness’ testimony as to the employer’s mental processes”) (quoting *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983)).

⁴⁴ See Equal Opportunity Commission, EEOC Guidelines on Discrimination Because of National Origin, 29 C.F.R. §§ 1606–1606.1 (2010) (defining national origin discrimination as “including, but not limited to, the denial of equal employment opportunity because of an individual’s, or his or her ancestor’s, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group”), *available at* http://edocket.access.gpo.gov/cfr_2010/julqtr/29cfr1606.1.htm. The EEOC Guidelines also address employers’ “Speak-English-Only” rules which provide that “[a]n employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.” 29 C.F.R. § 1606.7 (2010), *available at* http://edocket.access.gpo.gov/cfr_2010/julqtr/29cfr1606.7.htm. *See also, e.g.*, *Fragante v. City & County of Honolulu*, where the Ninth Circuit Court of Appeals stated that “accent and national origin are obviously inextricably intertwined.... It would therefore be an easy refuge in this context for an employer unlawfully discriminating against someone based on national origin to state falsely that it was not the person’s national origin that caused the employment or promotion problem, but the candidate’s inability to measure up to the communications skills demanded by the job.” 888 F.2d 597 (9th Cir. 1989).

⁴⁵ *Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983) (language not a suspect class to require Social Security Administration to provide Spanish-language forms).

⁴⁶ *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). To establish a *prima facie* case of discrimination, McDonnell Douglas requires employees to show that 1) they are members of a protected class; 2) they had the necessary qualifications for the job or were performing their jobs satisfactorily; 3) that they suffered an adverse employment action such as refusing to hire, firing, or demoting employees; and 4) that the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *Id.* If the employees succeeds in establishing a *prima facie* case, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory rationale for the adverse employment action. *See Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). If the employer is able to do so, the burden shifts back to the plaintiff to demonstrate that the articulated reason is a mere pretext for discrimination. *Id.*

reason.⁴⁷ When a claimant is able to show that a facially neutral policy has a significant adverse effect on a protected class, an employer may rebut that prima facie showing under Title VII by asserting that the policy is justified as “job related for the position in question and consistent with business necessity.”⁴⁸ Language discrimination claimants have had difficulty proving their antidiscrimination claims because employers have been able to advance some nexus between the language requirement and a business justification for the policy.⁴⁹ Ultimately, the golfers seeking to prove that language discrimination is merely a “surrogate for race” (or national origin), will likely have to show that the LPGA’s stated reasons for the policy were pretextual.⁵⁰ The challenge, Professor Mari Matsuda has noted, is determining whether the policy responds to a factor that “actually impedes job performance” or “is simply different from some preferred norm imposed, whether consciously or subconsciously, by the employer.”⁵¹ In the LPGA’s case, that preferred norm is layered by a reaction qualification based on what the LPGA perceives are customer preferences.⁵²

⁴⁷ Because the LPGA insisted that the English-language policy was not motivated by race or national origin, this essay does not discuss whether the LPGA could claim that the policy is “a bona fide occupational qualification reasonably necessary to the normal operation ... [of the employer's] business or enterprise” 42 U.S.C. § 2000e-2(e)(1).

⁴⁸ 42 U.S.C. § 2000e-2(k)(1)(A); *see also* 29 C.F.R. § 1606.7, *supra* note 44.

⁴⁹ A certain indifference to language discrimination claims is unsurprising, as both throughout U.S. history, private and public actors have made no secret of a long-standing suspicion of people who speak languages other than English. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923) (state law that prohibited teaching schoolchildren in any language other than English violated citizens’ Fourteenth Amendment liberty interests). In *Hernandez v. New York*, the U.S. Supreme Court upheld the striking of Latino venirepersons did not violate the equal protection clause because the prosecution’s concern that the venirepersons would substitute their own interpretation of witnesses’ testimony given in Spanish rather than rely upon the translation of that testimony in English by a courtroom interpreter was an acceptable race-neutral reason under *Batson v. Kentucky*, 476 U.S. 79 (1986). 500 U.S. 352 (1991).

⁵⁰ *See Hernandez*, *supra* note 49 at 371, in which the Court noted that negative responses to foreign languages “all too often result from or initiate racial hostility,” but that to find that language is a pretext for racial discrimination, a claimant may have to show incontrovertible evidence such as “a policy of striking all who speak a given language.”

⁵¹ Mari Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1352 (1991).

⁵² Since 1906, the United States has required English literacy to become a naturalized citizen. Naturalization Act of June 29, 1906, ch. 3592 §1, 34 Stat. 596 (June 29, 1906) (In the report of the House Committee on Naturalization and Immigration that recommended the bill’s passage, the committee outlined the statute’s requirements, “that before an alien can be naturalized he must be able to read, either in his own language or in the English language and to speak or understand the English language; and, second, that the alien must intend to reside permanently in the United States before he shall be entitled to naturalization.”). When Asians and Latinos immigrated to the United States in significant numbers in the 1800s, their native languages gained “outlaw” status in some communities and lead to discrimination

The Role of Reaction qualifications

The PGA justified its language policy, in large part, because of perceived customer dissatisfaction with the South Korean players during pro-ams. A key reason for the language policy, the South Korean players' not being engaging in enough bantering during pro-am rounds, is unrelated to the ability to play professional golf or even to communicate with tour officials and workers.

This type of employment-related qualification based on consumer preference has been called a "reaction qualification."⁵³ Reaction qualifications are "those abilities or characteristics which contribute to job effectiveness by causing or serving as the basis of the appropriate reaction in the recipients,"⁵⁴ which are, in the PGA's case, its pro-am customers, sponsors and media. The PGA's set of customers are slightly different than the fans that one might think of as sports consumers. Only around half of the PGA's tournaments are broadcast live. Excepting the few thousand supporters who come to golf tournaments, fewer fans are going to see PGA

against the speakers of those languages. Margaret E. Montoya, *Law and Language(s): Image, Integration and Innovation*, 7 LA RAZA L.J. 147, 148 (1994) (discussing how Spanish became an "outlaw" language through punishment in schools if students were overheard speaking Spanish); see also, *Hernandez v. Erlenbusch*, 368 F. Supp. 752 (D. Or. 1973) (finding that a bar's policy forbidding patrons to speak Spanish was unlawful discrimination under the Fourteenth Amendment). For information on Asian immigration patterns in the 1800s, see Paula C. Johnson, *The Social Construction of Identity in Criminal Cases: Cinema Verite and the Pedagogy of Vincent Chin*, 1 MICH. J. RACE & L. 347, 362-77 (1996) (describing 19th century migration of Chinese and Japanese citizens to escape from wars and bleak economic circumstances).

⁵³ Alan Wertheimer, *Jobs, Qualifications, and Preferences*, 94 ETHICS 99 (1983), quoted in Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 173, n. 25 (1992). Professor Gary Becker describes a related concept, "consumer discrimination, such as "[c]onsumers [who] may not want to buy a product from a Black salesman, order food from a Black waitress, or cheer for a team with a Black pitcher." Gary S. Becker, *The Economics of Discrimination* 39-83 (2d ed. 1971), quoted in Ilyana M. Kuziemko & Geoffrey C. Rapp, *Customer Racial Discrimination in Major League Baseball: Is There No Hope for Equal Pay?*, 7 TEX. HISP. J.L. & POL'Y 119, 123 (2001).

⁵⁴ Kuziemko & Rapp, *supra* note 53 at 123. Kuziemko & Rapp note "when the worker is part of the product he sells, as in the case of professional athletes, customer discrimination has powerful implications. Testing for the existence of customer discrimination is important because, unlike employer or coworker prejudice, competition will not eliminate this form of discrimination within an industry." (quoting Lawrence M. Kahn, *Discrimination in Baseball, Diamonds Are Forever: The Business Of Baseball* 163, 179 (Paul M. Sommers ed., 1992)).

players in action live.⁵⁵ Unfortunately, not enough eyes are on the LPGA during tournaments to make a traditional fan base to support the tour.

Some observers were thus sympathetic to the LPGA's pressuring its players to learn English because of the tour's stated revenue concerns. In the "cash-crunch for women's sports," a writer once noted, money arguments have traction.⁵⁶ The LPGA management might agree that certain "capitulations" to market forces should be made, such as setting higher standards for players' engagements with fans and media, that are not as pressing for male pros.⁵⁷ To maintain women's professional golf, the LPGA management have argued, its players have to do more to please the tour's sponsors, clients and fans.⁵⁸

"Customer discrimination," one scholar notes, "is the most invidious form of discrimination because no clear market or legal mechanism solves it."⁵⁹ Customers may realize that their discrimination is irrational, but justifying those preferences can also be a likely reaction. Customer preferences can become normatively justified—and excluding or restricting

⁵⁵ Of the twenty-two LPGA tournaments that will be broadcast on television, eleven will be shown on a tape delay; only one is scheduled to be on major network. See Ron Sirak, *LPGA needs change as new season starts*, GOLF DIGEST/GOLF WORLD (Feb. 11, 2011), <http://www.golfdigest.com/golf-tours-news/blogs/local-knowledge/2011/02/sirak-lpga-needs-change-as-new-season-starts.html>; Golf Channel Announces Broadcast Schedule Of LPGA Schedule For 2011 Season, <http://www.satellitetelevision.com/golf-channel-announces-broadcast-schedule-of-lpga-schedule-for-2011-season>. Tournaments being shown on tape delay likely adds to the tour's financial concerns, because tournament directors and sponsors are less willing to pay premium fees for an event that could end being shown on television on tape delay at midnight.

⁵⁶ See Deborah Brake, *Revisiting Title IX's Feminist Legacy: Moving Beyond the Three-Part Test*, 12 AM. U. J. GENDER SOC. POL'Y & L. 453, 469 (2004) (discussing the standing of women's sports in schools). The same constraints apply to women's sports. In sport popularity polls, which affect advertisers' willingness to invest money in television broadcasts of the sports, women's sports trail men's sports in popularity; Pollingreport.com, HARRIS POLL (Aug. 12-17, 2003), <http://www.pollingreport.com/sports.htm> (women's professional golf came in last of all U.S. collegiate and professional sports in popularity); Sports Business Journal, *Pro Football Continues Popularity Among U.S. Sports Fans*, SPORTS BUSINESS DAILY (Jan. 25, 2011), <http://www.sportsbusinessdaily.com/Daily/Issues/2011/01/Jan-25/Ratings-and-Research/Harris-Poll.aspx> (reporting results of Harris Interactive poll), (women's professional and college basketball, women's professional soccer and women's golf ranked last of most popular sports in the United States).

⁵⁷ Brake, *supra* note 56, at 469

⁵⁸ See, e.g., Stina Sternberg, *Hall-of-Famer Mann Stirs Up Controversy*, GOLF DIGEST WOMEN'S BLOG (Aug. 28, 2010), <http://www.golfdigest.com/golf-digest-woman/blogs/golf-digest-woman/2010/08> (quoting World Golf Hall of Fame member and former LPGA player Carol Mann, who said "I have friends who will turn the TV off or find other things to watch if Koreans are in the lead -- a couple of weeks ago, there were seven or eight of them. [The LPGA] has to protect the business of the future and the television package ... so I think it is terrific.").

⁵⁹ Kuziemko & Rapp, *supra* note 53 at 123.

others becomes an acceptable choice rooted in moral values rather than in discriminatory visceral reactions that customers do not recognize or may not acknowledge if they do.

Beyond xenophobia: the role of race and resentment

The resentment about the South Korean players cannot be rationally explained away by xenophobia. In present-day American sports, negative fan reaction to the presence of foreign players is not pervasive or even common. Americans expect that the best professional athletes in the world aspire to play in the United States. Some Americans also assume, perhaps myopically, that the United States is the hub of several of the world's popular sports. For example, although baseball is played throughout the world, the U.S.'s national baseball championship is named the "World Series"; until 1986, the NBA championship was called the NBA World Championship Series. The national leagues of various sports, such as soccer and hockey, depend on the excitement of recruiting foreign-born star players. While it was not always that way, American sports fans appear to have largely accepted and embraced foreign stars in domestic leagues, including male players from Asia. At the college level, foreign players can be integral to their college's sporting success,⁶⁰ notably in less popular sports if the most accomplished domestic athletes choose more popular (and professionally remunerative) sports on which to concentrate their efforts.⁶¹

⁶⁰ For example, LPGA players of the year Lorena Ochoa and Annika Sorenstam, from Mexico and Sweden, respectively, were standout All-American players at the University of Arizona. Arizona Wildcats, Women's Golf: Lorena Ochoa, http://www.arizonawildcats.com/sports/w-golf/mtt/ochoa_lorena00.html (last visited April 11, 2011); Rebecca Ruiz-McGill, *Hall of Fame Golfer Annika Sorenstam Named Commencement Speaker*, UNIVERSITY OF ARIZONA NEWS (Oct. 16, 2008)<http://uanews.org/node/22066>.

⁶¹ See, e.g., Paul Wachter, *Squashing the Ivies: President Dobelle leaves a lasting legacy*, NEW YORK TIMES (Feb. 18, 2011), available at <http://www.nytimes.com/2011/02/20/magazine/20Squash-t.html> (describing Trinity College's successful efforts to recruit foreign squash players). Football, baseball, basketball are the most popular sports among U.S. fans, followed by auto racing and hockey. Sports Business Journal, *Pro Football Continues Popularity Among U.S. Sports Fans*, SPORTS BUSINESS DAILY (Jan. 25, 2011), <http://www.sportsbusinessdaily.com/Daily/Issues/2011/01/Jan-25/Ratings-and-Research/Harris-Poll.aspx> (reporting results of Harris Interactive poll),.

In the LPGA's case, xenophobia does not seem to be the motivating factor for the unease about the South Korean players, at least in its purest form of excluding foreigners because they are not American. The LPGA's history shows that controlling the ratio of international players to U.S. players is not a supportable rationale for the English-language policy. For decades, the LPGA has had many players from Canada, Central and South America, Europe, South Africa, and Australia. But when South Korean players began to arrive and play well on the tour, some commentators and players posited that Asians frustrated U.S. fans' desire to see Americans winning tournaments. In 2010, players from Asian nations won convincingly on the LPGA tour, with seventeen Asian-born players among the twenty-one international winners hoisting trophies that season.⁶² In contrast, American players won five of the official twenty-four tournaments in 2010.⁶³ The reality, however, is that the emergence of the South Korean players hardly knocked Americans from winner's pedestals in the way that some believed. Americans have not dominated the LPGA for many years, including several years before Se Ri Pak's breakthrough win in 1998. No American has been named the LPGA player of the year for fifteen years.⁶⁴ The LPGA's choice to introduce the policy first to its South Korean players left little question about to whom the proposal was directed however, even without them being summoned to a mandatory meeting. The backdrop to the LPGA policy was a concern that players from

⁶² LPGA.com, Tour Winners 1950-Present, http://www.lpga.com/tournament_winners.aspx?mid=1&pid=38 (last visited April 11, 2011).

⁶³ *Id.*, LPGA.com, LPGA Championship Presented by Wegmans among 2010 LPGA Tour schedule highlights (Nov. 18, 2009), http://www.lpga.com/content_1.aspx?pid=22557.

⁶⁴ See Brent Kelley, LPGA Player of the Year Award Winners, about.com guide, <http://golf.about.com/cs/historyofgolf/a/lpgaplayeryear.htm>.

South Korea were targeted in part because of resentment about their recent dominance in the LPGA.⁶⁵

At the time that the policy was announced, the LPGA had 121 golfers; forty-five were from South Korea.⁶⁶ When South Korean golfer Se Ri Pak won the 1998 U.S. Open tournament as a rookie LPGA member, there were two other South Koreans playing full-time on the LPGA tour.⁶⁷ Pak's success galvanized sports fans in South Korea and inspired women and girls to try their hand at professional golf. By 2005, the number of players from South Korea had quadrupled; by 2010, South Korea contributed the second highest number of players, forty-seven, from any country represented on LPGA tour. The country contributing the next highest number of golfers, the United States, had only thirteen more players than South Korea. The strong presence of the South Korean players on the LPGA tour and in winner's circles of golf tournaments inspired grumbling from non-Korean journalists and players. U.S. journalists complained that South Korean players winning lowered American viewer interest in the LPGA tour because Americans wanted to see Americans winning on the tour.⁶⁸ Journalists noted complaints about the South Korean names on top of the LPGA's leader boards.⁶⁹

⁶⁵ Then-LPGA Tour Commissioner Carolyn Bivens "vehemently" denied the charges that the policy was a mask for racial or ethnic discrimination. Bivens said, "What I find most troubling are the baseless accusations that the LPGA is acting out of racist and intolerant motives." Bivens memorandum, *supra* note 9.

⁶⁶ Donegan, *supra* note 17.

⁶⁷ Lisa D. Mickey, Se Ri Pak Enters World Golf Hall of Fame, LPGA.com, http://lpga.com/content_1.aspx?pid=13368; John Branch, South Korea Becomes New Face of L.P.G.A., N.Y. Times (July 6, 2006), <http://www.nytimes.com/2006/07/06/sports/golf/06lpga.html>.

⁶⁸ See Donegan, *supra* note 17 (noting that "the Korean influence has grown [on the LPGA tour], with its nationals regularly winning events - a trend that has helped the LPGA's profile in the Far East but which, it is widely assumed, damaged its commercial appeal in the US."); Carl Steward, *LPGA Tour's Global Appeal Leaves American Players Lagging*, MERCURYNEWS.COM (Oct. 13, 2010), http://www.mercurynews.com/breaking-news/ci_16333218?nclick_check=1 (quoting LPGA player Christie Kerr that "[i]t's been a long time since an American has had the ability to end the year at No. 1. I think it's important. We need to start growing our fan base in the United States again, so we can grow and have more tournaments and sponsors here. ... With more success by Americans, I think we'll get a lot more fans, a lot more people interested.").

⁶⁹ Lisa D. Mickey, *Uniting The Kims, Parks and Lees With The Joneses and Smiths*, LPGA FUTURES TOUR.COM <http://webcache.googleusercontent.com/search?q=cache:JnKJM4HqmEJ:www.lpgafuturestour.com/NewsRoom.asp%3Fpage%3DBlogs/MickeyalaCart6.ssi+Uniting+The+Kims,+Parks+and+Lees+With+The+Joneses+and+Smiths&hl=en&client>

Media members were not alone in expressing frustration about the presence of the South Korean players on the LPGA. Veteran LPGA player Jan Stephenson, an Australian, said, “Asians are killing our tour, absolutely killing it. Their lack of emotion, their refusal to speak English when they can speak English. They rarely speak. We have two-day pro-ams where people are paying a lot of money to play with us, and they say hello and goodbye. Our tour is predominantly international and the majority of them are Asian. They’ve taken it over.... If I were commissioner, I would have a quota on international players and that would include a quota on Asian players... As it is they’re taking American money.”⁷⁰ Stephenson’s comments might have been taken as an outlier position, but her remarks won support from journalists and fans.⁷¹ The LPGA tour did not officially censure Stephenson’s comments.⁷² Stephenson later said that she felt “vindicated” for those comments when the LPGA announced the English-language policy five years later.⁷³ Pleasing American sponsors and fans by having U.S. players win more

=firefox-a&gl=us&strip=1 (last visited April 11, 2011)(former tour player and journalist discussing reactions to the tour’s South Korean players: “How many times have I heard someone jokingly ask, “Which Kim, Park or Lee is leading this week?” It’s as if it is OK to make fun of the South Korean players who are so prominent in women’s professional golf... it’s perfectly fine to practice bigotry when it applies to women in golf.”); *See also* Don Hunsberger, *Can the LPGA Tour be fixed?*, DAILY COMMERCIAL.COM (July 18, 2009) (stating “[N]ames are part of the problem” of the reaction to the South Koreans winning tournaments and reporting a fan’s comment from a disgruntled fan posted on a blog devoted to the Tour stating that, “When I look at a leader board and can’t figure out how to pronounce most of the names, my eyes glaze over,’ one disgruntled fan posted on a blog devoted to the Tour.”), <http://www.dailycommercial.com/718lpga>.

⁷⁰ *See* ESPN.com News Services, *Longtime Pro Critical of Commission Too*, ESPN GOLF, (Oct. 11, 2003), <http://sports.espn.go.com/golf/news/story?id=1635065>; *See also*, Roy Johnson, *Foreign Policy: Stephenson’s ‘Quota’ Comments Smack Of Discrimination*, SI VAULT (Oct. 11, 2003), <http://sportsillustrated.cnn.com/vault/article/web/COM1033356/index.htm>.

⁷¹ Bob Harig, *Absurdity Aside, Stephenson Does Have a Point*, ESPN.COM (Oct. 14, 2003) (“But Stephenson does have a point when she says Asian players are doing themselves and the tour a disservice if they don’t attempt to learn our culture and language. This is a touchy area, of course. It is no easy task learning a foreign language and then becoming comfortable enough to cut up with strangers.”), <http://sports.espn.go.com/golf/news/story?id=1637368>; Gary Van Sickle, *Jan Stephenson On LPGA English-Only Rule*, SI VAULT (Sept. 4, 2008) (describing the support that Stephenson received from LPGA members and media after making the comments about Asians on the tour: “The [English language] rule, clearly aimed at the growing number of Asian players dominating the tour, seemed to confirm that Stephenson, a Hall of Fame golfer, was not alone in the sentiments that got her in trouble five years ago.”), <http://sportsillustrated.cnn.com/vault/article/web/COM1145013/index.htm#ixzz151aD6H7x>.

⁷² Eric Adelson, *Stephenson’s Comments Grossly Unchallenged*, ESPN MAGAZINE (Oct. 14, 2003), <http://sports.espn.go.com/golf/news/story?id=1637830>.

⁷³ *Id.*

tournaments became a concern only when Asians began to dominate winner's circles. The LPGA's dominant group has not necessarily been American, but it has been white.⁷⁴

The LPGA's English-language policy was presented in neutral language, but did not veil underlying resentments that Asian players were displacing the traditionally-dominant group of white players. The LPGA's South Korean players, because of their numbers, became the targeted "Asians."⁷⁵ Despite claims that the tour's targeting of South Koreans has nothing to do with their race or ethnicity, racial concerns about the South Korean players were expressed freely by influential players and sportswriters. In an account in a national newspaper of a LPGA tournament, one sportswriter wrote, "Whomever decided that The Golfer Formerly Known As Ju-Yun Kim would be renamed Birdie should be awarded a lifetime supply of kimchi. (Along with the person who persuaded Jung Yeon Lee to become Sarah Lee.)"⁷⁶ Had a sportswriter mocked an ethnic-sounding name of a black athlete and suggested that she be awarded a lifetime supply of watermelon for changing her name to Susan, that writer would likely face public scorn and disciplinary action from her employer.⁷⁷

⁷⁴ Since Althea Gibson became the first black player to earn full membership on the LPGA tour in 1964, there have been only three other black players who have played as full-time members on the LPGA in its sixty-year history. See Pete McDaniel, *Why is Tiger Woods the Only Black on the Green*, BNET, (Mar.-Apr. 2004), http://findarticles.com/p/articles/mi_qa4081/is_200403/ai_n9364150/

⁷⁵ Lee, *supra* note 25 at 198. Professor Lee describes the phenomena of racial resentment and sense of displacement when Asian Americans perform well: "the image of Asian Americans as the hard-working intelligent minority has led to resentment against Asian Americans by other minorities and whites. On college campuses, non-Asian students joke that M.I.T. means "Made in Taiwan" and that U.C.L.A. means "United Caucasians Lost Among Asians." The student body president at the University of California at Berkeley once remarked, "some students say if they see too many Asians in a class, they are not going to take it because the curve will be too high." When asked why he performed poorly on an exam, a Stanford University student replied, "[w]hat do you think I am, Chinese?"

⁷⁶ Jon Saraceno, *Interest in LPGA is going below par*, USA TODAY, Sports, 2C (Mar. 23, 2007), available at http://www.usatoday.com/sports/columnist/saraceno/2007-03-22-lpga_N.htm; See also *supra* note 29.

⁷⁷ Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded as" Black, and Why Title VII Should Apply Even If Lakisha and Jamal are White*, 2005 WIS. L. REV. 1283, 1301 (2005) (noting studies showing that job applicants with ethnic-sounding names such as Nyasha "may be excluded on the basis of discrimination caused by racial stereotyping due to her ethnic-sounding name... [which can] signal to hiring decision-makers that she was black or even the "wrong kind" of White."); *Orhorhaghe v. I.N.S.*, 38 F.3d 488, 503 (9th Cir. 1994) (in case in which immigrant's legal status in the United States was investigated because of his "Nigerian-sounding name," court noted that "like one's appearance, one's name is frequently correlated with one's racial or ethnic background, and in both instances the racial or ethnic background which results in adverse action by immigration officers almost always is that of people of color."). In

Race is necessarily a part of the issue about the Korean players, but the LPGA and some supporters of the English-language policy denied that the policy had any relationship to race. Both players and some sportswriters, however, took a relaxed view toward referring to the players' race and ethnically-linked characteristics in ways that would be considered racist if applied to more numerous minorities such as blacks and Latinas. The permissive attitude toward Asian racial references and stereotyping was quite direct.

When the South Korean players were singled out by veteran players and the media, the LPGA could have used the controversies as opportunity to showcase the tour's international strength and influence—that the LPGA was the tour where the world's best wanted to play—a strategy that worked for the Women's Tennis Association.⁷⁸ Instead, the LPGA's management ended up appearing to cosign the sentiment behind the comments, not just by tolerating direct racial insults, but by seeming to give the complaints credence by announcing the English-language policy. The South Korean players were part of the LPGA's changed landscape and became a convenient reason for the tour's declining fortunes.

The significant numbers of South Korean players on the LPGA tour is a not problem because they are international players—the problem is a deeper interplay of race, cultural characteristics, and gender expectations. This difficulty of identifying and defining sources of discrimination when there are multiple identities at work is discussed in intersectionality theory. Intersectionality, as discussed by Professor Kimberlé Crenshaw in her pioneering critique of

comparison, racial remarks in other sports frequently results in league discipline and loss of sponsorship. See Richard Sandomir, *Zoeller Learns Race Remarks Carry a Price*, N.Y. TIMES (Apr. 24, 1997), available at http://www.nytimes.com/1997/04/24/sports/zoeller-learns-race-remarks-carry-a-price.html?ref=fuzzy_zoeller.

⁷⁸ The Women's Tennis Association (WTA), one of the world's most powerful and profitable women's sports organizations, has its roots in the Virginia Slims Series, which was formed in 1970 with nine women tennis players who signed contracts for \$1. Now, forty-years later, the WTA has grown to include 2,200 players from ninety-six countries who compete for eighty-six million dollars annually. Women's Tennis Association website, About the WTA, <http://www.wtatennis.com/page/AboutTheTour/0..12781.00.html> (last visited April 12, 2011).

rigid categories in antidiscrimination law, explains that women of color experience discrimination at the “intersection” of multiple identities such as class, race, gender, and ethnicity.⁷⁹ Professor Crenshaw uses the metaphor of a traffic intersection to how women of color experience oppression and disempowerment at the intersection of multiple identities, not just as women.⁸⁰ Intersectionality theory documents the law’s suspicion of compound claims of race, gender, and ethnicity.

For the LPGA’s South Koreans, there are several cross streets in their experience. An important example of the multiple factors that the LPGA provision raised can be found in one of the justifications that the LPGA gave for the language policy. Then-Commissioner Bivens told the press that the LPGA’s efforts would benefit the South Korean players in two ways: by enhancing their attractiveness for personal sponsorship and by creating some independence for those players whose fathers were accompanying them on tour in the United States.⁸¹ Bivens felt that the South Korean players’ lack of English proficiency meant that they were over-dependent on their fathers which in turn blocked the players’ integration into the tour and their ability to communicate with tour officials independently.⁸² In this instance, the LPGA policy sought to address more than just the language barrier, but also sought to solve a situation created by

⁷⁹ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989), available at <http://aapf.org/wp-content/uploads/2010/07/Demarginalizing-the-Intersection-of-Race-and-Sex.pdf>.

⁸⁰ *Id.* at 149.

⁸¹ In an interview with *Golf World*, Commissioner Bivens argued that the English policy could increase players’ sponsorship opportunities: “If these players don’t take this step [and learn English], their ability to earn a living is reduced. They will be cut out of corporate and endorsement opportunities. I can’t imagine that someone who has thought this through does not realize that in opposing this measure they are penalizing the very people they are trying to help.” Ron Sirak, *Bivens Speaks Out About LPGA Tour’s Controversial English Ruling*, *GOLF WORLD* (Sept. 1, 2008), http://sports.espn.go.com/golf/columns/story?columnist=sirak_ron&id=3564106. Discussing the impact that the lack of English fluency has on the relationships between South Korean fathers and daughters on the tour, Bivens said in a later *New York Times* interview that, “[t]he language is part of the control the parents have over their young daughters. If they don’t even know survival English, they’re totally dependent on the dad.”). Karen Crouse, *Koreans Learn To Speak LPGA’s Language*, *N.Y. TIMES* (Nov. 2, 2008), available at <http://www.nytimes.com/2008/11/02/sports/02iht-GOLF.1.17442766.html>.

⁸² Crouse, *supra* note 81.

cultural differences, and very likely, touches upon gender in attempting to protect (adult) female players from being dominated by their fathers.

Gender Role Expectations

Another puzzle piece in the task of indentifying and defining the issue here is the LPGA's expectation for its players to be more than skillful golfers. In justifying the English-language policy, tour officials criticized the South Korean players for not being entertaining enough during pro-am rounds. No one suggested that the South Korean players were unkind to their pro-am partners, but in a business model that "depends solely on the personal satisfaction of check writers based on their experiences with the pros," reserved or introverted personalities can be seen as a serious threat to the tour's vitality.⁸³ A LPGA tour official emphasized, "For an athlete to be successful in the sports entertainment market we live in, they need to be great performers on and off the course, and being able to communicate effectively with sponsors and fans is a big part of this."⁸⁴

LPGA tour officials demand that players skillfully entertain sponsors and fans during and outside of tournament rounds to a degree that is uncommon for male professional athletes. While both LPGA and PGA golfers may spend four to six hours playing golf with amateur foursomes in pre-tournament pro-am rounds, the LPGA wants its pro-am partners, customers and fans entertained at a micro-level—promising a pro-am experience where "participants not only walk inside the ropes with the stars of the LPGA Tour, but also compete and socialize with them as

⁸³ Lisa D. Mickey, *What's Not Lost In Translation, Duramed Futures Tour*, MICKEY'S BLOGS (Sept. 1, 2008) <http://webcache.googleusercontent.com/search?q=cache:ZMawiYC1gTMJ:www.lpgafuturestour.com/NewsRoom.asp%3Fpage%3DBlogs/MickeyalaCart8.ssi+Lisa+D.+Mickey,+What%E2%80%99s+Not+Lost+In+Translation,+Duramed+Future+s+Tour&cd=7&hl=en&ct=clnk&gl=us&client=firefox-a&source=www.google.com>, ("If the pros can't communicate, the experience is not a valid return on investment for those individuals sponsoring events and playing in pro-ams. Pro-ams and sponsorships secure tournament purses. Without the purses, there are no tournaments. And without tournaments, there are no tours.").

⁸⁴ Jason Lim, *LPGA Masquerade*, THE KOREA TIMES (Opinion Page) (Sept. 1, 2008), available at http://www.koreatimes.co.kr/www/news/opinon/2011/02/168_30360.html.

teammates.”⁸⁵ In 2010, for example, the LPGA sent its players documents with the names and photographs of key tournament sponsors “with the goal of encouraging a better relationship between the players and the people paying the bills.”⁸⁶ The PGA pro-am relationships are reportedly a more mixed bag, and PGA pro-am participants seem to be ready for anything during their pairings with players, varying from cordiality to aloofness.⁸⁷

LPGA expresses its expectations in its “brand promise” to “showcase the best of women’s professional golf.”⁸⁸ The template for that brand promise is the tour’s “Five points of celebrity.”⁸⁹ The LPGA’s five points of celebrity charges the members to attain and maintain high standards of 1) sporting performance; 2) approachability (“A successful celebrity professional/member must be fan, sponsor and media friendly both on and off the course (facility and community)”; 3) passion (“A successful celebrity professional/member must exhibit passion and joy for her sport”; 4) appearance (“A successful celebrity professional/member must maintain a professional and attractive appearance. Webster defines attractive as having the power to attract... that's what the LPGA wants.”); and 5) relevance (“A successful celebrity

⁸⁵ LPGA, *Play with the Pros*, LPGA.COM (2010), http://www.lpga.com/content_1.aspx?pid=18343&mid=1.

⁸⁶ Dottie Pepper, *A New Plan*, SPORTS ILLUSTRATED (Apr. 26, 2010),

<http://sportsillustrated.cnn.com/vault/article/magazine/MAG1168670/index.htm#ixzz1FPGn97BK>

⁸⁷ For various accounts of fans playing in PGA Tour pro-ams, see Larry Olmsted, *Playing in a Pro-Am: An Amazing Once-in-a-Lifetime Golf Experience* (Jul. 19, 2010), <http://larrygolfttheworld.com/golf/golf/753/playing-in-a-pro-am-an-amazing-once-in-a-lifetime-golf-experience>; Monte Burke, *You, Too, Can Play in a PGA Tour Pro-Am*, FORBES.COM (Feb. 24, 2011), <http://blogs.forbes.com/monteburke/2011/02/24/you-too-can-play-in-a-pga-tour-pro-am>; Tony Dear, *Playing in a PGA Tour Pro-Am*, CYBERGOLF, http://www.cybergolf.com/golf_news/playing_in_a_pga_tour_proam (last visited April 12, 2011). In terms of measurements of sporting performance and skill, men’s and women’s golf are quite comparable. On the golf course, women play from advanced positions and on average do not drive golf balls as far as men, but outside of driving from the tee, there is no significant difference between men and women in the skills needed for the rest of a golf round. Off the course it is quite a different matter. The expected performance roles for LPGA female professional golfers appears quite different than for male PGA pros. The PGA imposes some requirements for its male pros, but those seem to center around showing up on time, being minimally civil to pro-am partners, speaking to the media after tournament rounds (a common requirement of team and individual sporting professionals), and limiting offensive behavior such as spitting during tournaments. The PGA Tour’s requirements to interact with fans, sponsors, and pro-am partners seem minimal compared with the LPGA’s.

⁸⁸ LPGA.com, *Your Career Caddie*, http://www.lpga.com/content_1.aspx?pid=6186&mid=0.

⁸⁹ *Id.*

athlete/member must establish a connection with fans/clients at a higher level, beyond her success on the course (playing, teaching, coaching, managing)").⁹⁰

The LPGA has a different vision of what their players should do that is quite different than the PGA's expectations of male players. As "celebrities," LPGA members are to be approachable, cheerful, attractive, and attentive to fans and customers.⁹¹ This vision markets women golfers as "celebrities," rather than emphasizing their athletic skill. This marketing vision invokes traditional gender roles of women as most acceptable when they display stereotypically feminine traits of being accommodating and nurturing.⁹²

The LPGA's "five points of celebrity" reflects cultural gender expectations in the United States in ways that can be culturally dissonant from what the players from other countries are comfortable doing.⁹³ Some of the South Korean players, for example, have struggled with dress and grooming requests from LPGA officials to compete in short skirts and to wear makeup.⁹⁴ While these requests are not mandatory, the LPGA reportedly pushes players to look as feminine as possible while competing.⁹⁵

Other sports organizations have imposed grooming codes, such as the National Basketball Association's well-publicized implementation of a league dress code that require its

⁹⁰ *Id.*

⁹¹ Meg Gehrke, *Is Beauty the Beast?*, 4 S. CAL. REV. L. & WOMEN'S STUD. 221, 236-37 (discussing the importance of physical attractiveness and "appearance" in employers' "hire appeal" criteria).

⁹² Seung-Yup Lim, *Racial and Sexual Discrimination Occurring to Korean Players on the LPGA Tour 101-02* (Aug. 2009) (unpublished Ph.D. dissertation, University of Tennessee – Knoxville, on file with author) (detailing LPGA officials' advice to players on "ways in which tour players could outwardly present their femininity," such as wearing short skirts, makeup, and attractive hair styles on the golf course and describing a phone call that a South Korean player received from a LPGA official when the player cut her hair in a short style: "Well, when Eun-Sook [a pseudonym for a Korean player] had cut her hair short, the LPGA told her like, "You are playing in the ladies tour, why is your hair like that?").

⁹³ *Id.* at 102 (describing a phone call that a South Korean player received from a LPGA official when the player cut her hair in a short style: "Well, when Eun-Sook [a pseudonym for a Korean player] had cut her hair short, the LPGA told her like, "You are playing in the ladies tour, why is your hair like that?").

⁹⁴ *See id.* at 101-02.

⁹⁵ *Id.*

players to wear business-casual attire.⁹⁶ These grooming codes may address clothing, grooming or accessories that are not inherently objectionable or inappropriate, but may reflect the characteristics and culture of the wearer. In the NBA example, sport jerseys or large gold chains, are not abnormal dress in a sports entertainment environment or among basketball fans, but could have carried a “negative,” “hood,” “hip-hop” image in the minds of NBA policymakers.⁹⁷ In the NBA example, like other grooming codes, the target seems to be to remove cultural references that strike a discordant note with the dominant (non-hip-hop) culture.

Similarly, the LPGA grooming requests that players wear and style themselves according to the appeal of the dominant culture. Like the NBA codes, the LPGA applies pressure to mold its players into persons that they believe sponsors and advertisers wish to see at the sacrifice of who the players actually are.⁹⁸ The grooming requests for the LPGA players may actually affect their performance as, again, the players are asked to do more than play well—they need to look good too. For the LPGA, grooming requests may seek to substitute traditional notions of feminine attractiveness for what others may perceive that players’ choices reflect—a lack of concern about sacrificing beauty for comfort during a tournament.

Conclusion

The LPGA’s struggles to retain sponsors in a down-market economy evoke sympathy. While we judge professional athletes on their abilities and performances, professional athletes do

⁹⁶ See D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got To Do with It?*, 79 U. COLO. L. REV. 1355, 1360-94 (2008) (arguing that characteristics commonly associated with a particular racial or ethnic group should fall into Title VII’s protected categories of race, color, and national origin).

⁹⁷ *Id.* at 1357.

⁹⁸ The pressure to “feminize” players may be a part of an attempt to disassociate the LPGA from the past stereotype of being a “lesbian” sport. One golfer discussed the tour’s image, “They [the media and the industry] still think we’re at 25 years ago when the tour was full of, you know, a lot of dykes and unattractive females nobody wanted to watch.” Kethevane Gorjestani, *Opening the Last Closet*, COLUMBIASPORTSJOURNALISM.COM, <http://columbiasportsjournalism.com/?p=11> (quoting LPGA player Anna Rawson). The LPGA is not the only women’s league to try to feminize its image: the Women’s National Basketball Association once offered rookie players makeup and fashion classes as part of its orientation program.

not play sports in a vacuum. The organizations that athletes play for in the American sport system can provide the money which, in turn, largely comes from a network of corporate sponsorship, television broadcast revenues and customer revenue. Sports organizations are therefore heavily invested in attracting corporate sponsors and keeping those sponsors satisfied so that they will continue to fund the sport. In a recession, corporate sponsorship and television revenue become vital as less money may be coming from fans, some of whom will undoubtedly cut back on entertainment spending. Given this economic reality, questions about how much the law should permit sponsors and customers to influence who gets to play will invoke larger implications for society. The LPGA's English language policy brings into play the issue of how much any organization should alter its qualifications, particularly those that can be seen as proxies for race, gender, or national origin, to suit sponsors and customers.