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Steven A. Holzbaaur

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2001]

DRIVING INTO THE ROUGH: CONFLICTING DECISIONS ON THE
RIGHTS OF DISABLED GOLFERS IN *MARTIN v. PGA TOUR, INC.*
AND *OLINGER v. UNITED STATES GOLF ASS'N*

I. INTRODUCTION

Upon hearing that Jack Nicklaus, arguably the greatest golfer of all time, was considering using a golf cart on the Senior Professional Golf Association ("PGA") Tour, Casey Martin poetically suggested to him, "[s]wallow your pride and ride."¹ Jack Nicklaus needing to ride a cart to compete is somewhat ironic, considering Nicklaus was one of many golfers who were outspokenly opposed to using carts during professional golf competitions.² Commentary over whether disabled professional golfers Casey Martin and Ford Olinger should be permitted to ride golf carts during competitions has been prevalent in political, social and academic circles.³ When President George H.W. Bush signed into law the Americans

1. *Martin to Nicklaus: Swallow Pride, Take a Ride*, COLUMBUS DISPATCH, Mar. 10, 1999, at 2G.

2. See Tanya R. Sharpe, *Casey's Case: Taking a Slice Out of the PGA Tour's No-Cart Policy*, 26 FLA. ST. U. L. REV. 783, 784 (1999) (discussing journalists' responses to testimony by Jack Nicklaus and Arnold Palmer during Martin's trial); Clifton Brown, *Nicklaus Says Carts Shouldn't Be Allowed*, N.Y. TIMES, Jan. 17, 1998, at C2 (noting Jack Nicklaus' statement that walking is physically part of game of golf and that allowing Martin or anyone else to ride golf carts would discriminate against other players on tour); *Pros Question Martin Ruling*, TAMPA TRIB., Feb. 12, 1998, available at 1998 WL 2764712 (describing Paul Azinger's and Fred Couples' criticism of golf cart use during tournament competitions); Chuck Schoffner, *Palmer Disses Cart Use in Competitive Golf*, ASSOC. PRESS, July 7, 1999, available at 1999 WL 17821941 (noting Arnold Palmer's statement that golf carts are good for weekend golfers, but not for use in competitive golf); Curtis Strange, *Strange Views: Protecting the Game*, GOLF MAG., Mar. 1998, at 32 (stating that for "the good of the game" no carts must be allowed on tour).

3. See, e.g., Sharpe, *supra* note 2, at 807-08 (stating that courts should take liberal interpretation of ADA and intimating that *Martin* was correctly decided); Christopher M. Parent, Note, *Martin v. PGA Tour: A Misapplication of the Americans with Disabilities Act*, 26 J. LEGIS. 123, 136 (2000) (arguing that permitting Martin to use golf cart is not proper application of ADA); Thomas Bonk, *Much Is Riding on Wheels of Justice Jurisprudence*, L.A. TIMES, Jan. 25, 1998, at C1 (noting United States Senator Tom Harkin's statement that modifying PGA's no-cart rule for Martin is reasonable accommodation under ADA and does not give Martin unfair advantage over other players); *Dole Supports Disabled Golfer*, ST. LOUIS POST-DISPATCH, Jan. 29, 1998, at D1 (noting statement of then-U.S. Senator Bob Dole that "PGA does not mean 'Please go away,'" and discussing Dole's support of Casey Martin); Terence Moore, *Ruling Allowing Martin to Use Cart Disregards the Essence of Golf*, ATLANTA J. CONST., Feb. 13, 1998, at E3 (disagreeing with district court's ruling in *Martin v. PGA Tour, Inc.*, comparing ruling's significance to *Marbury v. Madison* and *Brown v. Bd. of Ed.*). See generally Dina Marie Pascarelli, Note, *Casey Martin v. PGA Tour, Inc.: A New Significance to a Golfer's Handicap*, 8 DEPAUL-LCA J. ART & ENT. L. & POL'Y 303 (1998) (examining district court's decision in *Martin*).

with Disabilities Act of 1990 ("ADA"),⁴ it was conceived to be the most innovative and far-reaching federal civil rights legislation ever enacted on behalf of disabled persons.⁵ The ADA's purpose was to protect all disabled persons from all types of discrimination.⁶

Disabled athletes participating in major athletic competitions is not a new development.⁷ Recently, the United States Courts of Appeals for the Ninth and Seventh Circuits decided cases involving disabled professional golfers challenging their respective golf associations' rules regarding the ability to ride a cart during tournaments.⁸ On March 6, 2000, the Ninth Circuit upheld a district court decision permitting Casey Martin, who has a degenerative circulatory disorder in his right leg, to ride a golf cart during PGA tournaments.⁹ The Ninth Circuit's decision distinguished Martin as

4. 42 U.S.C. §§ 12101-12213 (1994).

5. See Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 413-14 (1991) (describing political leaders' opinions on enactment of ADA). At the signing ceremony, President George H.W. Bush stated that "with today's signing of the landmark Americans with Disabilities Act, every man, woman, and child with a disability can now pass through the once-closed doors into a bright new era of equality, independence, and freedom." *Id.* at 414 n.3 (citing President George Bush, Remarks by the President During Ceremony for the Signing of the Americans with Disabilities Act of 1990 2 (July 26, 1990) (on file with the *Harvard Civil Rights-Civil Liberties Law Review*)).

6. See Keri K. Gould, *And Equal Participation for All . . . The Americans with Disabilities Act in the Courtroom*, 8 J.L. & HEALTH 123, 123-24 (1993-94) (discussing purpose of ADA).

7. See Ted Curtis, 'Cart' Blanche?: A Decision Requiring Accommodation for a Disabled Golfer Has Sports Lawyers Wondering What's Next, A.B.A. J., Apr. 1998, at 34 (discussing careers of professional baseball player Jim Abbott and professional football player Kenny Walker). Jim Abbott, who was born absent a right hand and petitioned the American League for permission to play with an oversized glove, had a successful career as a pitcher in the major leagues for the New York Yankees and Anaheim Angels. See *id.* (recounting Abbott's story). Kenny Walker enjoyed a successful career with the Denver Broncos of the National Football League, despite being deaf and requiring a sign language interpreter on the sidelines. See *id.* (recounting Walker's story).

8. See *Martin v. PGA Tour, Inc.*, 204 F.3d 994, 1002 (9th Cir.), cert. granted, 69 U.S.L.W. 3223 (U.S. Sept. 26, 2000) (No. 00-24) (holding that disabled golfer Casey Martin was entitled to use golf cart during PGA Tour competitions); *Olinger v. United States Golf Ass'n*, 205 F.3d 1001, 1007 (7th Cir. 2000) (concluding that disabled golfer Ford Olinger was not entitled to use golf cart during United States Open qualifying rounds). Casey Martin was the first disabled professional athlete to sue an athletic association for violations under the ADA. See Kathleen Adams et al., *Milestones: Awarded, Casey Martin*, TIME, Feb. 23, 1998, 11 (stating that Martin was "the first professional athlete to sue successfully under the Americans [w]ith Disabilities Act"); see also Mark Conrad, *After Martin Decision, the Debate Rages On*, N.Y. L.J., Mar. 1998, at 5 (noting significance of Martin's case and its application of ADA to Tour Rules); Todd A. Hentges, *Driving in the Fairway Incurs No Penalty: Martin v. PGA Tour, Inc. and Discriminatory Boundaries in the Americans with Disabilities Act*, 18 L. & INEQ. 131, 148 (2000) ("Casey Martin and Ford Olinger are the only two athletes to claim that the ADA should apply to the playing of professional sports.").

9. See *Martin*, 204 F.3d at 1002 (intimating conclusion).

the first disabled professional athlete to successfully sue a sports league under the ADA.¹⁰ The next day, the Seventh Circuit declared that Ford Olinger, who also has a degenerative disorder that severely inhibits his ability to walk, was not entitled to ride a golf cart during a United States Golf Association ("USGA") competition, specifically the United States Open qualifying rounds.¹¹ The Ninth and Seventh Circuits disagreed as to whether allowing disabled golfers to ride carts during tournaments fundamentally altered the nature of the competitions or was simply a reasonable accommodation under the ADA.¹²

This Note discusses the Ninth and Seventh Circuit holdings in light of other courts' decisions concerning the ADA. Part II summarizes the history of the ADA, including relevant caselaw regarding what amounts to a reasonable accommodation under the ADA.¹³ Part III describes how Casey Martin and Ford Olinger attempted to challenge PGA and USGA rules regarding carts.¹⁴ Part IV analyzes and critiques the reasoning used by the Ninth and Seventh Circuits in reaching their decisions and concludes that the Seventh Circuit likely mischaracterized the effect of allowing Olinger to ride a cart based on the nature of the competition.¹⁵ Finally, Part V focuses on the impact of *Martin* and *Olinger* and anticipates what the United States Supreme Court may do now that it has granted the PGA's petition for a writ of certiorari.¹⁶

10. For a discussion about other sports associations and the ADA, see *infra* notes 62-63 and accompanying text.

11. See *Olinger*, 205 F.3d at 1007 (stating holding).

12. Compare *Martin*, 204 F.3d at 1000 (holding that permitting Martin to use golf cart during Nike and PGA Tour events would not fundamentally alter nature of competitions), with *Olinger*, 205 F.3d at 1006 (concluding that district court's decision allowing Olinger to ride golf cart during United States Open qualifying rounds was not reasonable accommodation under ADA because it fundamentally altered nature of competitions). See generally Patricia Manson, *Disabled Golfer Here Barred from Using Cart at U.S. Open*, CHI. DAILY L. BULL., Mar. 8, 2000, at 1 (noting split in federal circuits on application of ADA to professional golf competitions).

13. For a further discussion of the development of disability law and the implementation of the ADA, see *infra* notes 17-83 and accompanying text.

14. For a further discussion of the challenges that Casey Martin and Ford Olinger proposed to their respective golf associations, see *infra* notes 84-127 and accompanying text.

15. For a further discussion of the Ninth and Seventh Circuits' reasoning and conclusions, see *infra* notes 128-93 and accompanying text.

16. See *Martin v. PGA Tour, Inc.*, 69 U.S.L.W. 3223 (U.S. Sept. 26, 2000) (No. 00-24) (granting certiorari). For a further discussion of the impact the conflicting decisions in *Martin* and *Olinger* have had on the rights of the disabled and also the Supreme Court's possible interpretation of the issues in *Martin*, see *infra* notes 194-205 and accompanying text.

II. BACKGROUND

A. *The Rehabilitation Act of 1973*

Before the ADA was passed, several statutes provided limited protection for the rights of the disabled in the United States.¹⁷ As the Civil Rights Movement spread throughout the United States during the 1960s and 1970s, various legislation was proposed in an attempt to provide governmental protection against discrimination based on race, sex and disability.¹⁸ Congress' first significant attempt to curtail disability discrimination was its enactment of the Rehabilitation Act of 1973.¹⁹ Sec-

17. See Alex B. Long, *A Good Walk Spoiled: Casey Martin and the ADA's Reasonable Accommodation Requirement in Competitive Settings*, 77 OR. L. REV. 1337, 1341 (1998) (commenting that "[p]rior to the passage of the ADA, there was little to prevent employers from discriminating against the disabled"); Parent, *supra* note 3, at 124-26 (discussing disability acts prior to passage of ADA). Congress first addressed concerns over the rights of the disabled when it enacted the Act of June 10, 1948, which "prohibited employment discrimination based on physical handicaps within the United States Civil Service." *Id.* at 124 (citing Act of June 10, 1948, Pub. L. No. 617, ch. 434, 62 Stat. 351). Congress passed the Act to assist veterans disabled during World War II. See *id.* (describing congressional purpose behind Act of June 10, 1948). In 1968, Congress passed the Architectural Barriers Act, which "required buildings constructed, altered, or financed by the federal government to be accessible to those with disabilities." *Id.* (citing Act of Aug. 12, 1968, Pub. L. No. 90-480, § 1, 82 Stat. 718 (codified as amended in 42 U.S.C. §§ 4151-4157 (1988))).

18. See Diane Heckman, *Athletic Associations and Disabled Student-Athletes in the 1990's*, 143 ED. L. REP. 1, 6-8 (2000) (discussing anti-discrimination legislation enacted prior to ADA). Two of the most important pieces of legislation arising out of this movement were Title IX (prohibiting discrimination in education based on sex) and section 504 of the Rehabilitation Act of 1973 (prohibiting discrimination based on disability). See *id.* at 6 (describing statutes). Title IX provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ." 20 U.S.C. § 1681(a) (1994). See generally Martha Craig Daughtrey, *Women and the Constitution: Where We Are at the End of the Century*, 75 N.Y.U. L. REV. 1 (2000) (discussing Title IX's impact on leveling playing field for women).

19. See Jason L. Thomas, Note, *Through the ADA and the Rehabilitation Act, High School Athletes Are Saying "Put Me in Coach": Sandison v. Michigan High School Athletic Ass'n*, 65 U. CIN. L. REV. 727, 730-31 (1997) (describing Rehabilitation Act); see also RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY I (1984) (commenting that non-discrimination provisions of Rehabilitation Act, found in section 504, are widely thought of "as the first major civil rights legislation" protecting people with disabilities); W.S. Miller, *Ganden v. NCAA: How the NCAA's Efforts to Clean Up Its Image Have Created an Ethical and Legal Dilemma*, 7 MARQ. SPORTS L.J. 465, 467 (1997) ("[T]he Rehabilitation Act of 1973 was the first piece of legislation which treated disabled Americans as a whole, unified group, not merely separate groups based upon a person's particular disability."). By enacting section 504, Congress hoped to achieve "the tragically overdue goal of full integration of . . . handicapped [persons] into normal community living, working, and service patterns." 118 CONG. REC. 3320 (1972) (statement of Sen. Williams). Senator Hubert Humphrey commented that section 504 was enacted to "firmly establish the right of [handicapped] Americans to dignity and self-respect as equal and contributing members of society, and to end the virtual

tion 504 of the Rehabilitation Act provided that “[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be . . . subjected to discrimination under any program or activity receiving Federal financial assistance.”²⁰

The Act prohibited all federal government employers and contractors associated with the government from discriminating against persons with disabilities.²¹ Moreover, the Act’s legal prerogative required “federally funded programs to make reasonable accommodations of disabled persons.”²² Such employers and programs could not “limit, segregate, or classify applicants or employees or participants in any way that adversely affected their opportunities or status because of handicap.”²³ The Act also prohibited intentional discrimination as well as any actions or policies that had a disproportionate impact on disabled persons.²⁴ Under the Act, employers had to accommodate an employee’s disability unless an employer could demonstrate that the accommodation would impose an undue hardship on his or her operations.²⁵ Four elements comprised a cause of ac-

isolation of millions of children and adults from society.” *Id.* at 32,310. Congress “made a commitment to the handicapped that, to the maximum extent possible, they shall be fully integrated into the mainstream of life in America.” S. REP. NO. 95-890, at 39 (1978).

20. Anna Phipps Engh, Note, *The Rehabilitation Act of 1973: Focusing the Definition of a Handicapped Individual*, 30 WM. & MARY L. REV. 149, 149 (1988) (alteration in original) (quoting 29 U.S.C. § 794 (1982 & Supp. III 1985)). Similar standards are applicable to the Rehabilitation Act and the ADA. See *Clarkson v. Coughlin*, 145 F.R.D. 339, 348 (S.D.N.Y. 1993) (equating proof required by ADA to proof required by Rehabilitation Act section 504); 28 C.F.R. §§ 35.103(a), 36.103(a)-(b) (2000) (prescribing similar forms of proof).

21. See 29 U.S.C. § 794(b) (1994) (defining parties that are prohibited from discriminating under Act).

22. Thomas, *supra* note 19, at 736. Various provisions of the Rehabilitation Act require mandatory or prohibitive federal action. See, e.g., 29 U.S.C. § 791(b) (1994) (mandating federal agencies and departments adopt “affirmative action” programs to hire, place and advance individuals with disabilities); 29 U.S.C. § 793(a) (1994) (providing that federal government must require private contracting party to have affirmative action plan for disabled before awarding contract for over \$10,000); 29 U.S.C. § 794 (prohibiting all federally assisted programs from discriminating on basis of disability). Employers have an affirmative duty under the Act to “make reasonable accommodations to the known physical or mental limitations of an otherwise qualified handicapped applicant [or] employee.” 29 C.F.R. § 32.13(a) (1994); see also *Sch. Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 288 (1987) (stating that court’s necessary inquiry is “whether the employer could reasonably accommodate the employee under the established standards”).

23. 29 C.F.R. § 32.12(a)(2) (2000); see also 29 C.F.R. § 32.12(b)(1)-(9) (2000) (listing specific activities of employers subject to Rehabilitation Act).

24. See *Alexander v. Choate*, 469 U.S. 287, 299 (1985) (refusing to hold that all disparate-impact showings constitute prima facie case under Act). Instead, the Court held that the Rehabilitation Act “reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped.” *Id.*

25. See 29 C.F.R. § 32.13(b) (2000) (listing criteria to determine undue hardship). In analyzing whether an accommodation would impose an undue burden, the court should consider the following factors:

tion under section 504.²⁶ First, the plaintiff must have been “disabled” under the definition provided by the Act.²⁷ Second, the plaintiff must be “otherwise qualified” for participation in the program or activity.²⁸ Third,

- (1) The overall size of the recipient’s program with respect to number of employees, number of participants, number and type of facilities, and size of budget;
- (2) The type of the recipient’s operation, including the composition and structure of the recipient’s workforce, and duration and type of training program; and
- (3) The nature and cost of the accommodation needed.

Id. Reasonable accommodations do not include “mak[ing] ‘fundamental’ or ‘substantial’ modifications to accommodate the handicapped.” *Alexander*, 469 U.S. at 300.

26. *See, e.g.*, *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 406 (1979) (clarifying “otherwise qualified” element for cause of action under Rehabilitation Act); *Wagner by Wagner v. Fair Acres Geriatric Ctr.*, 49 F.3d 1002, 1009 (3d Cir. 1995) (stating elements for cause of action under Rehabilitation Act); *Bowers v. NCAA*, 9 F. Supp. 460, 490 (D.N.J. 1998) (same); *Dennin v. Conn. Interscholastic Athletic Conference, Inc.*, 913 F. Supp. 663, 667 (D. Conn. 1996) (same), *vacated as moot* 94 F.3d 96 (2d Cir. 1996); *Pahulu v. Univ. of Kan.*, 897 F. Supp. 1387, 1389 (D. Kan. 1995) (same); *Sandison v. Mich. High Sch. Athletic Ass’n*, 863 F. Supp. 483, 488 (E.D. Mich. 1994) (same), *rev’d*, 64 F.3d 1026 (6th Cir. 1995); *see also, e.g.*, Julia V. Kasperski, Comment, *Disabled High School Athletes and the Right to Participate: Are Age Waivers Reasonable Modifications Under the Rehabilitation Act and the Americans with Disabilities Act?*, 49 BAYLOR L. REV. 175, 177-81 (1997) (describing criteria for disabled student athletes to establish prima facie case under Rehabilitation Act).

27. *See Engh, supra* note 20, at 149 (quoting Rehabilitation Act’s definition of disabled individual). Section 504 defines a handicapped individual as someone who: “(i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.” *Id.* (quoting 29 U.S.C. § 706(8)(B) (1982 & Supp. III 1985)). The Rehabilitation Act protects essentially the same disabilities as the ADA. *Compare* 42 U.S.C. § 12102(2) (1994) (defining “disability”), *with* 29 U.S.C. § 706(8)(B) (1982 & Supp. III 1985) (defining “individual with a disability”). In 1992, Congress amended the wording of the Rehabilitation Act by substituting the language “a disability” for the term “handicaps.” *See Rehabilitation Act Amendments of 1992*, Pub. L. No. 102-569, § 102, S7(8), 106 Stat. 4344, 4348. “Handicap” was replaced with the word “disability” to reflect the most currently acceptable terminology, but the same substantive meaning was retained. *See Coleman v. Zatechka*, 824 F. Supp. 1360, 1367 n.17 (D. Neb. 1993) (noting change in wording, but no change in substantive definition); 28 C.F.R. pt. 35, app. A, at 478-79 (2000) (attributing no change in definition or substance to “phraseology” change); *see also* Robert John Maselek, Jr., Note, *Employee Medical Screenings Under the Americans With Disabilities Act of 1990*, 26 SUFFOLK U. L. REV. 653, 671 (1992) (discussing Rehabilitation Act’s definition of “handicap”).

28. *See Davis*, 442 U.S. at 406 (holding that “‘otherwise qualified person’ is one who is able to meet all of a program’s requirements in spite of his handicap”); *see also Bradley v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 3 F.3d 922, 924 (5th Cir. 1993) (holding “‘otherwise qualified’ person can perform the essential functions of the job”); *Brennan v. Stewart*, 834 F.2d 1248, 1261 (5th Cir. 1988) (emphasis added) (stating that “‘otherwise qualified’ . . . refers to a person who has the abilities or characteristics sought by the grantee; but . . . cannot refer only to those [persons] already capable of meeting all the requirements . . . or else no reasonable requirement could ever violate” statute); *Plummer by Plummer v. Branstad*, 731 F.2d 574, 577 (8th Cir. 1984) (noting in making determination whether disabled individuals are “otherwise qualified” to participate in program or activity in

the plaintiff must have been excluded from participation in the program or activity solely by reason of disability.²⁹ Finally, the relevant program or

action under section 504, court examines "their physical, emotional, or psychological abilities, their educational or experiential backgrounds, or their financial or personal needs"). In addition, the federal regulations rephrased the description to read "qualified [disabled] person." 34 C.F.R. § 104.3(k) (2000) (modifying characterization of "otherwise qualified").

29. See, e.g., *Pushkin v. Regents of the Univ. of Colo.*, 658 F.2d 1372, 1387-91 (10th Cir. 1981) (holding that analysis under Rehabilitation Act was whether plaintiff was otherwise qualified individual who was excluded from program solely on basis of his or her handicap; record indicated that plaintiff was qualified for psychiatric residency program apart from his multiple sclerosis and that defendants' reasons for rejecting plaintiff "were based on incorrect assumptions or inadequate factual grounds"). The United States Court of Appeals for the Tenth Circuit restated the requirements set forth by the United States Supreme Court in *Southeastern Cmty. Coll. v. Davis*:

1) The plaintiff must establish a prima facie case by showing that he or she was an otherwise qualified handicapped person apart from his handicap, and was rejected under circumstances which gave rise to the inference that his rejection was based solely on his handicap.

2) Once plaintiff establishes a prima facie case, defendants have the burden of going forward and proving that plaintiff was not an otherwise qualified handicapped person, that is one who is able to meet all of the program's requirements in spite of his handicap, or that his rejection from the program was for reasons other than his handicap.

3) The plaintiff then has the burden of going forward with rebuttal evidence showing that the defendants' reasons for rejecting the plaintiff are based on misconceptions or unfounded factual conclusions, and that reasons articulated for the rejection other than the handicap encompass unjustified consideration of the handicap itself.

Id. at 1387.

Despite the Tenth Circuit's analysis in *Pushkin*, few courts have attempted to define the term "solely by reason of" disability. See *Sandison*, 64 F.3d at 1031 (noting lack of explanation on third prong of section 504 inquiry). Due to the lack of attention by the courts, courts dealing with this issue use two Supreme Court decisions for guidance: *Southeastern Community College v. Davis* and *Wimberly v. Labor & Industrial Relations Commission*. *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397 (1979); *Wimberly v. Labor & Indus. Relations Comm'n*, 479 U.S. 511 (1987). See Colleen M. Evale, Note, *Sandison v. Michigan High School Athletic Association: The Sixth Circuit Sets Up Age Restrictions as Insurmountable Hurdles for Learning-Disabled High School Student-Athletes*, 5 SPORTS L.J. 109, 113 (1998) (noting that courts generally follow Supreme Court decisions in *Davis* and *Wimberly* to interpret "solely by reason of disability" language under Rehabilitation Act). In *Davis*, the Court held that section 504 requires that an otherwise qualified individual should not be excluded from participation in program "solely by reason of" his or her disability. See *Davis*, 442 U.S. at 405 n.6 (interpreting "solely by reason of disability" prong of section 504); Evale, *supra*, at 113-14 (examining Supreme Court's analysis in *Davis*). In *Wimberly*, the Court relied in part on *Davis* and held that a Missouri statute did not deny unemployment benefits solely on the basis of plaintiff's pregnancy. See *Wimberly*, 479 U.S. at 517-22 (evaluating Missouri statute and language of section 504). Furthermore, a defendant's reasons to exclude a disabled person may not be based on any stereotype about his disability, although the person's disability can be considered when determining whether or not he is capable of performing the program's requirements. See *Pesterfield v. Tenn. Valley Auth.*, 941 F.2d 437, 443 (6th Cir. 1991) (stating that "[t]he Rehabilitation Act forbids discrimination based on stereotypes about a handicap, but it does not forbid decisions based on

activity must have received federal financial assistance.³⁰

The Rehabilitation Act of 1973 posed a problem, though, for disabled plaintiffs working for private employers who were not subject to the Act's protections.³¹ Congress recognized that the Act left large groups of disabled persons unprotected and subsequently enacted legislation attempting to address those areas not covered by the Act.³² Unfortunately, these

the actual attributes of the handicap"); see also *Davis*, 442 U.S. at 407 n.7 (deciding that some physical requirements may be legitimate prerequisites for participation in program). One commentator noted that "[w]hen a disabled person is capable of meeting [a] program's requirements, either with or without reasonable modifications, [the person] may not be excluded from a program simply because he is disabled." Kasperski, *supra* note 26, at 181.

30. See 29 U.S.C. § 794(b) (1994) (stating that section 504 applies to private and public programs and activities, including those run by private and public educational institutions, when either institution or program receives some federal financial assistance); see also *Davis*, 442 U.S. at 400 (noting that petitioner was state institution that received federal funds).

31. See 29 U.S.C. § 794(b) (defining applicable parties). The Act imposed dissimilar burdens on employers, making its application for disabled employees inconsistent. Compare 29 U.S.C. § 794 (requiring private employers receiving federal funds to make reasonable accommodations for their disabled workers), with 29 U.S.C. § 791 (1994) (requiring federal agencies to make reasonable accommodations for their disabled workers, but also requiring that federal agencies create affirmative action plans to increase number of disabled workers they employ).

32. See, e.g., Education for All Handicapped Children Act of 1975 (now known as the Individuals with Disabilities Education Act), Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400-1491 (1994)) (assisting "[s]tate and local efforts to provide programs to meet the educational needs of children handicapped in order to assure equal protection of the law"); Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (codified as amended at 20 U.S.C. § 1415 (1994)) (awarding attorney's fees to prevailing parties in suits brought to protect interests in development of early intervention services for infants and toddlers); Orphan Drug Act of 1983, Pub. L. No. 97-414, 96 Stat. 2049 (codified as amended at 21 U.S.C. §§ 301, 355, 360aa-ee & 42 U.S.C. §§ 236, 241, 255, 262 (1994)) (encouraging development of orphan drugs through series of economic incentives and special assistance with drug approval process, leading to enormous increases in number of drugs that are available to treat rare diseases); Technology-Related Assistance for Individuals with Disabilities Act of 1988, 29 U.S.C. §§ 2201-2288 (1994) (requiring states and territories to develop statewide, consumer-responsive programs of technology-related services for individuals with disabilities of all ages), *repealed by* Assistive Technology Act of 1998, Pub. L. No. 105-394, Title IV, § 401, 112 Stat. 3661 (codified at 29 U.S.C. §§ 3001-3058 (1994 & Supp. 1998)); Voting Accessibility for the Elderly and Handicapped Act of 1984, Pub. L. No. 98-435, 98 Stat. 1678 (codified as amended at 42 U.S.C. § 1973ee (1994)) (providing accessible voting places for federal elections); Civil Rights of Institutionalized Persons Act of 1980, Pub. L. No. 96-247, 94 Stat. 349 (codified at 42 U.S.C. § 1997 (1994 & Supp. 1998)) (providing that prisoner suits may be stayed for ninety days to require exhaustion of grievance mechanism if procedures are in compliance with requirements of law); Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified at 42 U.S.C. §§ 3601-3631 (1994)) (providing statutory assistance to challenge housing discrimination); Developmental Disabilities Assistance and Bill of Rights Act, Pub. L. No. 98-527, 98 Stat. 2662 (1984) (codified as amended at 42 U.S.C. §§ 6000-6083 (1994)) (providing federal funding to states that implement protection and advocacy program for rights of individuals with developmental disabilities); Protection and Advocacy for

laws were “premised upon federal involvement in the programs and activities they cover[ed], i.e., the activities covered by the nondiscrimination obligations [were] either those conducted by the federal government itself or those funded in whole or in part by federal grants, contracts or other forms of federal financial assistance.”³³ As a result, activities and programs not funded by the federal government were still able to discriminate against the disabled.³⁴ Congress decided to combat the shortcomings of the Rehabilitation Act and the gaps in the supplemental federal legislation by enacting the Americans with Disabilities Act of 1990.³⁵

Mentally Ill Individuals Act of 1986, Pub. L. No. 99-319, 100 Stat. 478 (codified as amended at 42 U.S.C. § 10801 (1994)) (providing protection and advocacy groups access to records of mentally ill individuals); Air Carrier Access Act of 1986, Pub. L. No. 99-435, 100 Stat. 1080 (codified as amended at 42 U.S.C. § 14705 (1994)) (prohibiting discrimination against people with disabilities by all air carriers). It should be noted, however, that these acts still only provided limited protection to all disabled individuals. See Burgdorf, *supra* note 5, at 428-29 (examining federal legislation enacted subsequent to Rehabilitation Act).

33. Burgdorf, *supra*, note 5 at 428-49. Two exceptions were the Air Carrier Access Act and the Fair Housing Amendments Act. See *id.* at 429 (noting exceptions to disability statutes’ requirement of federal financial assistance). Moreover, “[i]n the 1970s and 1980s, the absence of any federal statutory prohibition on [disability] discrimination outside the federal sphere led advocates to propose amendments to other titles of the civil rights laws.” *Id.* Specifically, Burgdorf describes Representative Charles Vanik’s attempts to amend Title VI of the Civil Rights Act of 1964 to prohibit discrimination on the basis of “physical or mental handicap.” See *id.* at 429 n.88 (citing H.R. 12154, 92d Cong., (1st Sess. 1971); 117 CONG. REC. 45,945 (1971)).

34. See *id.* at 429 (explaining statutes’ inability to protect disabled individuals in private sector employment); see also THE BUREAU OF NATIONAL AFFAIRS, INC., THE AMERICANS WITH DISABILITIES ACT: A PRACTICAL AND LEGAL GUIDE TO IMPACT, ENFORCEMENT, AND COMPLIANCE 26-28 (1990) (discussing how federal laws prior to ADA did not significantly reduce widespread discrimination against disabled).

35. See 42 U.S.C. §§ 12101-12213 (1994) (prohibiting all discrimination against persons with disabilities). Although the Rehabilitation Act made some progress in reducing disability discrimination, Congress recognized that the Rehabilitation Act missed much of the “day-to-day” discrimination faced by disabled individuals; therefore, Congress enacted the ADA and extended the Rehabilitation Act’s anti-discrimination provisions to cover most of private sector employment. See 42 U.S.C. § 12101(b)(4) (explaining that purpose of exercising congressional authority was “to address the major areas of discrimination faced day-to-day by people with disabilities”); S. REP. NO. 101-116, at 6 (1989) (finding that disability discrimination “still persists in such critical areas as employment in the private sector”). Furthermore, “while most states have laws that prevent some forms of discrimination against handicapped persons, these laws vary tremendously in scope and effect, and in many—or most—cases provide merely superficial relief.” Bonnie P. Tucker, *The Americans With Disabilities Act: An Overview*, 1989 U. ILL. L. REV. 923, 923 n.6 (1989); see also Barbara A. Lee, *Reasonable Accommodation Under the Americans with Disabilities Act: The Limitations of Rehabilitation Act Precedent*, 14 BERKELEY J. EMP. & LAB. L. 201, 205 (1993) (noting that “[i]n addition to the federal Rehabilitation Act, forty-seven states and the District of Columbia have enacted laws prohibiting private sector employers from discriminating against individuals with disabilities”).

B. *The Americans with Disabilities Act of 1990*

Congress enacted the Americans with Disabilities Act of 1990 “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”³⁶ The ADA recognized that physical and mental disabilities affect more than forty-three million Americans whom society has tended to isolate and segregate because of their disabilities.³⁷ In passing the ADA, Congress concluded that despite previously enacted legislation, more comprehensive protection was needed because individuals with disabilities were a “discrete and insular minority” subjected to purposeful unequal treatment and were also in a position of political powerlessness.³⁸ Congress contemplated that the United States should “assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such [disabled] individuals.”³⁹ Congress also found that discrimination against the disabled had a detrimental effect on the federal economy.⁴⁰

The ADA is divided into five separate titles.⁴¹ Title I prohibits discrimination by any employer against a qualified individual with a disability.⁴² Title II prohibits state or local entities that provide programs,

36. 42 U.S.C. § 12101(b)(1). A vote of 377 to 28 in the House of Representatives and a vote of 91 to 6 in the Senate resulted in the passage of the ADA in July, 1990. See 136 CONG. REC. H4629 (daily ed. July 12, 1990) (reporting House vote); 136 CONG. REC. S9695 (daily ed. July 13, 1990) (reporting Senate vote). In attempting to accomplish its goal, Congress proposed to “invoke the sweep of congressional authority, including the power to enforce the Fourteenth Amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.” 42 U.S.C. § 12101(b)(4).

37. See *Anderson v. Little League Baseball, Inc.*, 794 F. Supp. 342, 344 (D. Ariz. 1992) (citing 42 U.S.C. §§ 12101(a)(1), (a)(2)). In *Anderson*, the United States District Court for the District of Arizona held that under the ADA, the policy of excluding little league baseball coaches in wheelchairs from being on the field required an individualized assessment of the severity of the risk to players. See *id.* at 345-46 (explaining holding). The court also stated that the discrimination against plaintiff based on his disability was “clearly contrary to public policy as well as to the interests of society as a whole.” *Id.* at 345 (noting that discrimination harms interests of plaintiff and other participants in little league activities).

38. See 42 U.S.C. § 12101(a)(7) (describing Congress’ findings); 42 U.S.C. § 12101(a)(2) (noting inadequacy of prior legislation enacted to protect disabled persons).

39. 42 U.S.C. § 12101(a)(8).

40. See 42 U.S.C. § 12101(a)(9) (explaining that “the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis . . . , and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity”).

41. See 42 U.S.C. §§ 12111-12213 (1994) (enumerating Title I through Title V of ADA).

42. See 42 U.S.C. §§ 12111-12117 (1994) (stating provisions). Title I establishes the general rule that “[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of

services or activities from discriminating against disabled individuals.⁴³ Title III prohibits discrimination against the disabled in places of public accommodation, commercial facilities and services offered by private entities.⁴⁴ Title IV covers telecommunication and common carrier accessibility requirements for disabled persons.⁴⁵ Title V generally contains various antidiscrimination provisions.⁴⁶

Unfortunately, the ADA has not been able to provide a solution for every disability or address all of the potentially reasonable accommodations.⁴⁷ To assist employers and other entities in interpreting the ADA, the Act requires the Equal Employment Opportunity Commission ("EEOC") and the Department of Justice ("DOJ") to issue various regulations and guidelines.⁴⁸ The EEOC issues regulations and guidelines governing Title I, and the DOJ issues regulations covering Titles II and III.⁴⁹ Another important guide for interpretation under the ADA is the Rehabil-

employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.* at § 12112(a).

43. See 42 U.S.C. §§ 12131-12165 (1994) (stating provisions of Title II).

44. See 42 U.S.C. §§ 12181-12189 (1994) (enumerating provisions of Title III).

45. See 42 U.S.C. §§ 12141-12165 (providing regulations for public transportation systems); 42 U.S.C. §§ 12182(b)(2)(B)-(C), 12184-12186 (providing regulations for privately operated systems).

46. See 42 U.S.C. §§ 12201-12213 (1994) (addressing miscellaneous provisions and exemptions).

47. See Parent, *supra* note 3, at 127 (noting that instead of addressing all issues, "the ADA offers broad definitions and systematic guidelines with which to approach problems involving discrimination against disabled individuals").

48. See 28 C.F.R. §§ 35-36 (2000) (enumerating DOJ regulations for public non-transportation compliance with ADA's provisions, and for compliance by private businesses providing goods and services); 29 C.F.R. § 1630 (2000) (providing text of EEOC's regulations regarding employment compliance with provisions of ADA); 49 C.F.R. § 37 (2000) (providing Department of Transportation's regulations for compliance of transportation providers with ADA's provisions); see also W. Kent Davis, *Why Is the PGA Teed Off at Casey Martin? An Example of How the Americans with Disabilities Act (ADA) Has Changed Sports Law*, 9 MARQ. SPORTS L.J. 1, 7 (1998) (discussing requirement that EEOC and DOJ promulgate regulations and guidelines for interpretation of ADA).

49. See Davis, *supra* note 48, at 7 (noting ADA's requirements); see also Diane L. Kimberlin & Linda Ottinger Headley, *ADA Overview and Update: What Has the Supreme Court Done to Disability Law*, 19 REV. LITIG. 579, 580 (2000) (describing EEOC's responsibility for processing and investigating disability discrimination charges brought under ADA). The exception to the ADA's requirement that the DOJ and EEOC promulgate regulations is the Department of Transportation's issuance of regulations enforcing the transportation provisions of Title III. See Davis, *supra* note 48, at 7 n.41 (discussing exception).

itation Act of 1973.⁵⁰ Both the PGA in *Martin v. PGA Tour, Inc.*⁵¹ and the USGA in *Olinger v. United States Golf Ass'n*⁵² argued that the golf courses on which the competitions are held are not places of public accommodation under Title III, and even if they were, permitting disabled golfers to ride carts was not a reasonable accommodation under the ADA.⁵³ Because both cases focus solely on Title III of the ADA, the next section of this Note will analyze that Title.

C. Title III

To establish a discrimination claim under Title III of the ADA, a plaintiff must prove three elements.⁵⁴ First, the plaintiff must show that he or she has a disability as defined under the ADA.⁵⁵ Second, the plaintiff must demonstrate that the defendant is a "private entity" engaged in the ownership, leasing or operation of a place of "public accommodation."⁵⁶ Third, the plaintiff must demonstrate that the entity denied the plaintiff access to the accommodation because of his or her disability.⁵⁷

50. See 42 U.S.C. § 12117(b) (providing that agencies coordinate ADA standards with Rehabilitation Act standards so as not to produce inconsistent or conflicting requirements); *Wooten v. Farmland Foods*, 58 F.3d 382, 385 n.2 (8th Cir. 1995) (noting that because standards under both acts are largely similar, cases construing one statute are instructive in construing other); *Vande Zande v. Wis. Dep't of Admin.*, 851 F. Supp. 353, 359 (W.D. Wis. 1994) (noting that ADA was to be interpreted "consistently with the Rehabilitation Act"), *aff'd*, 44 F.3d 538, 542 (7th Cir. 1995); see also ROBERT L. BURGDORF, JR., *DISABILITY DISCRIMINATION IN EMPLOYMENT LAW* 39 (1995) (noting Rehabilitation Act of 1973 laid "conceptual foundation" for ADA).

51. 204 F.3d 994 (9th Cir. 2000).

52. 205 F.3d 1001 (7th Cir. 2000).

53. See *Olinger*, 205 F.3d at 1005-06 (discussing USGA's arguments); *Martin*, 204 F.3d at 996-98 (describing PGA's arguments).

54. See *Mary Carol Joly, Doe and Smith v. Mutual of Omaha Insurance Company: The Possible Impact of Insurance Caps on HIV-Infected Individuals*, 4 DEPAUL J. HEALTH CARE L. 193, 203-04 (2000) (citing 42 U.S.C. § 12182(a)-(b) (1994)); see also *Bowers v. NCAA*, 9 F. Supp. 2d 460, 480 (D.N.J. 1998) (explaining requirements for Title III claim). Section 12182 provides as a general rule that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a) (1994).

55. See *Joly*, *supra* note 54, at 203; see also 42 U.S.C. § 12182(a) (describing rule prohibiting discrimination by public accommodation).

56. *Joly*, *supra* note 54, at 203; see also 42 U.S.C. § 12182(a) (describing rule prohibiting discrimination by public accommodation).

57. *Joly*, *supra* note 54, at 203-04; see also 42 U.S.C. § 12182(a) (describing rule prohibiting discrimination by public accommodation).

1. *Disability Defined*

A plaintiff has standing under the ADA if he or she falls within the ADA's definition of "disabled."⁵⁸ One problem facing potential ADA plaintiffs is that often it is difficult to prove that they suffer from a disability recognized by the ADA.⁵⁹ Under the ADA, disability is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."⁶⁰ The determination as to whether an individual is "disabled" will be made on a case-by-case basis.⁶¹ The DOJ defines a physical and mental impairment as "[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss . . . [and] [a]ny mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities," among others.⁶² The regulations also define "major life activities" to include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."⁶³ Even if an individual is not currently impaired, he or she still may qualify as disabled under the ADA if that person has a history of disabilities.⁶⁴ An individual also qualifies as disabled if a

58. See Davis, *supra* note 48, at 8 (stating that plaintiff must prove he or she is disabled under ADA).

59. See *id.* (noting that proving disability under ADA can be burdensome and confusing for plaintiffs).

60. 42 U.S.C. § 12102(2) (1994).

61. See Joly, *supra* note 54, at 201 (noting that courts make case-by-case evaluation of claims under ADA).

62. 28 C.F.R. § 36.104 (2000). Also included as physical and mental impairments are "such contagious and noncontagious diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism." *Id.* Homosexuality and bisexuality are not impairments under Title III. See 42 U.S.C. § 12211(a) (1994) ("For purposes of the definition of 'disability' in section 12102(2) of this title, homosexuality and bisexuality are not impairments and as such are not disabilities under this chapter.").

63. 28 C.F.R. § 36.104. The ADA requires that the impairment "substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2); see also *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998) (concluding that reproduction is "major life activity" under ADA). See generally Sean Baker, Comment, *The Casey Martin Case: Its Possible Effects on Professional Sports*, 34 TULSA L.J. 745, 762 (1999) (noting that courts construe scope of major life activity ambiguously in cases in which courts require fulfillment of all three elements of ADA's definition of disability); Parent, *supra* note 3, at 128 (discussing difficulty of defining whether impairment limits major life activity due to ADA's vague language and varying interpretations by courts).

64. See *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 509 (7th Cir. 1998) (noting that people qualified as disabled include "people who have recovered from previously disabling conditions (cancer or coronary disease, for example) but who may remain vulnerable to the fears and stereotypes of their employers"). To establish that an employee has a history of disabilities, the employee must provide

private entity perceives him or her as disabled.⁶⁵ Finally, the United States Supreme Court qualified the disability definition by limiting the ADA to those individuals for whom medications or some other measure can correct or control their disabilities.⁶⁶

2. *Place of Public Accommodation*

The ADA limits Title III claims to those in which the defendant owns, leases or operates a place of public accommodation.⁶⁷ ADA section

sufficient documentation showing that he or she has a history of, or has been misclassified as, being disabled. See *Weber v. Strippit, Inc.*, 186 F.3d 907, 915 (8th Cir. 1999), cert. denied, 120 S. Ct. 794 (2000); see also 28 C.F.R. § 36.104 (“The phrase *has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.”). Courts have rendered documentation insufficient when the employer knows and acknowledges that an employee suffers from an impairment, but the employer also expects the employee to return to work after adequately healing. See, e.g., *Taylor v. Nimock’s Oil Co.*, 214 F.3d 957, 961 (8th Cir. 2000) (holding that “[employer’s] mere knowledge of [employee’s] heart attack, coupled with the sending of a get-well card and note about her job duties” does not constitute sufficient record of impairment under ADA).

65. See 42 U.S.C. § 12102(2)(b) (defining disability to mean “being regarded as having such an impairment”); 28 C.F.R. § 36.104 (same). The DOJ defines “*regarded as having an impairment*” as follows:

The phrase *is regarded as having an impairment* means—

- (i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a private entity as constituting such a limitation;
- (ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
- (iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by a private entity as having such an impairment.

28 C.F.R. § 36.104.

66. See Joly, *supra* note 54, at 201 nn.63-64 (explaining that Supreme Court recently held ADA applies only to those individuals with “substantial limitations after any mitigating medical measures are in place”). Joly discusses the Supreme Court’s decisions in three cases: *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); and *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999). See *id.* (discussing cases). Joly notes that in each of these cases, the Court considered “examples of mitigating measures including corrective lenses, and blood pressure medication.” See *id.* (describing cases). Joly states that:

The Court advised that the inquiry into whether a specific mitigating measure constituted a ‘corrected condition’ should be made on a case by case basis, and pointed out that prong three of the definition of disability or the ‘regarded as’ prong would still be a valid context within which to bring an ADA claim.

Id. (citations omitted).

67. See 42 U.S.C. § 12182 (1994) (stating requirement that defendant own, lease or operate place of public accommodation). Section 12189 also provides that “[a]ny person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible

12181(7) provides an extensive list of facilities that qualify as places of public accommodation.⁶⁸ Nevertheless, this language provides limited guidance to courts as to whether the defendant “operates a place of public accommodation,” because the ADA does not provide a definition, and the language itself is ambiguous.⁶⁹ Public accommodations are generally defined as physical places.⁷⁰ In a few cases individuals have asserted unsuccessfully that particular sports entities are places of public

arrangements for such individuals.” 42 U.S.C. § 12189 (1994); *see also* Davis, *supra* note 48, at 12 n.72 (noting that section 12189 was relevant to district court’s reasoning in favor of Casey Martin because PGA conducts qualifying school for players wishing to join professional tour).

68. *See* 42 U.S.C. § 12181(7) (1994) (providing list of places of public accommodation). Section 12187 defines the following private entities as places of public accommodations provided that these “entities affect commerce”:

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theatre, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, *golf course*, or other place of exercise or recreation.

Id. (emphasis added). Congress intended that this list of public accommodations be exhaustive. *See* H.R. REP. NO. 101-485, pt.4, at 56 (1990), *reprinted in* 1990 U.S.C.C.A.N. 512, 545 (discussing intention that readers of provision consider stated categories of public accommodations exhaustive).

69. *See* Tatum v. NCAA, 992 F. Supp. 1114, 1121 (E.D. Mo. 1998) (stating that “phrase ‘operates a place of public accommodation’ is not clear and unambiguous,” and therefore DOJ’s interpretation of phrase is “helpful”).

70. *See* Bowers v. NCAA, 9 F. Supp. 2d 460, 483 (D.N.J. 1998) (holding that public accommodation must be “physical place”) (citing *Ford v. Shering-Plough Corp.*, 145 F.3d 601, 612 (3d Cir. 1998)) (holding that public accommodation must be “place”); *see also* Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1010-11 (6th Cir. 1997) (holding that public accommodation must be “physical place”). *But see* Carparts Distribution Ctr., Inc. v. Automotive Wholesaler’s Ass’n of New Eng., Inc., 37 F.3d 12, 19 (1st Cir. 1994) (declaring that public accommodation is not limited to “actual physical structures”).

accommodation.⁷¹ On the other hand, favorable results have occurred in suits by college students against the National Collegiate Athletic Association ("NCAA").⁷²

3. *Discrimination on the Basis of Disability*

After establishing that the private entity is a public accommodation or owns, leases or operates a place of public accommodation, the plaintiff must demonstrate that the defendant discriminated against him or her in a manner prohibited under Title III.⁷³ Title III outlines five types of discrimination that are sufficient to satisfy an ADA claim.⁷⁴ First, the private entities, including owners, lessors, lessees and operators of places of public accommodation, must impose "eligibility criteria" that select disabled individuals.⁷⁵ Second, private entities must fail "to make reasonable modifications in policies, practices, or procedures" affecting "goods, services, facilities, privileges, advantages, or accommodations" to disabled individuals.⁷⁶ These modifications, however, must not "fundamentally alter the

71. See *Stoutenborough v. NFL, Inc.*, 59 F.3d 580, 583 (6th Cir. 1995) (holding that National Football League, its member club and media are not "'places' of public accommodation" under Title III of ADA); *Cortez v. NBA*, 960 F. Supp. 113, 116 (W.D. Tex. 1997) (concluding that National Basketball Association ("NBA") is not operator of place of public accommodation and did not exercise control over conduct complained of by plaintiffs); *Elitt v. U.S.A. Hockey*, 922 F. Supp. 217, 223 (E.D. Mo. 1996) (holding national and local hockey organizations are not "places of public accommodation" under ADA because they are only organizations); see also *Baker*, *supra* note 63, at 757-62 (discussing decisions in *Stoutenborough*, *Elitt* and *Cortez* and noting relevance of cases to Martin's case).

72. See *Tatum*, 992 F. Supp. at 1121 (determining that NCAA "operates a place of public accommodation" in light of its significant control over athletic facilities of member institutions); *Bowers*, 9 F. Supp. 2d at 483, 489 (holding that NCAA was not "place of public accommodation," but it possibly operated place of public accommodation); *Ganden v. NCAA*, No. 96C-6953, 1996 WL 680000, at *11 (N.D. Ill. Nov. 21, 1996) (denying student's request for preliminary injunction, but finding that ADA may apply to NCAA). In *Ganden*, the United States District Court for the Northern District of Illinois stated that if a membership organization has a close connection to a particular facility, the organization could possibly be classified as a place of public accommodation for purposes of Title III of the ADA. See *id.* at *10 (discussing possibility that Title III of ADA applies to membership organization). The *Ganden* court determined that for plaintiff to demonstrate a close connection, plaintiff must prove that "(1) the organization is affiliated with a particular facility, and (2) membership in (or certification by) that organization acts as a necessary predicate to use of the facility." *Id.*

73. See 42 U.S.C. § 12182(b)(2)(A) (1994) (designating what constitutes discrimination under Title III of ADA); *Davis*, *supra* note 48, at 12 (noting that disabled individual must prove that he or she suffered discrimination in manner prohibited by Title III).

74. See 42 U.S.C. § 12182(b)(2)(A)(i)-(v) (stating what constitutes discrimination).

75. See 42 U.S.C. § 12182(b)(2)(A)(i) (prohibiting entity from establishing screening criteria to discriminate against disabled).

76. 42 U.S.C. § 12182(b)(2)(A)(ii) (stating that private entity discriminates against disabled individuals unless reasonable modifications are made).

nature of such . . . accommodations.”⁷⁷ Third, private entities must fail to incorporate necessary measures to ensure that “no individual with a disability is excluded, denied services, segregated, or otherwise treated differently . . . because of the absence of auxiliary aids and services.”⁷⁸ These measures need not be taken when implementing them would “fundamentally alter the nature of such . . . accommodation being offered or would result in an undue burden.”⁷⁹ Fourth, the private entities must fail “to remove existing architectural, and communication barriers that affect access for disabled persons when such removal is “‘readily achievable.’”⁸⁰ Finally, even if removal of the architectural or communication barriers is not “readily achievable,” discrimination still can occur if the private entities fail to provide “accommodations . . . through alternate methods if

77. 42 U.S.C. § 12182(b)(2)(A)(ii)-(iii) (requiring that private entity make reasonable modifications and provide any necessary auxiliary aids and services unless entity can demonstrate that modifications will “fundamentally alter the nature of such goods, services, facilities . . . or accommodations”).

78. 42 U.S.C. § 12182(b)(2)(A)(iii) (prohibiting exclusion or denial of services to disabled individuals); *see also* 42 U.S.C. § 12102(1) (defining auxiliary aids and services to include interpreters for hearing impaired, readers for visually impaired and other similar services); *People v. Mid Hudson Med. Group*, 877 F. Supp. 143, 144 (S.D.N.Y. 1995) (discussing claim filed by New York State Attorney General alleging that defendants discriminated by refusing to provide sign language interpreters at medical examinations).

79. 42 U.S.C. § 12182(b)(2)(A)(iii) (stating that owner, lessor, lessee or operator is required to make reasonable modifications unless entity can show that modifications will impose “undue burden”); 28 C.F.R. § 36.104 (2000). (listing factors for determining whether modification would impose undue burden).

80. 42 U.S.C. § 12182(b)(2)(A)(iv) (providing requirement that entities remove barriers for disabled if “readily achievable”). Section 12181 defines “readily achievable” as “easily accomplishable and able to be carried out without much difficulty or expense.” 42 U.S.C. § 12181(9) (1994). Section 12181 also provides factors to consider when determining if the modification is readily achievable:

(A) the nature and cost of the action needed under this chapter;

(B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;

(C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C. § 12181(9)(A)-(D). *See generally* *Fiedler v. Am. Multi-Cinema, Inc.*, 871 F. Supp. 35, 38 (D.D.C. 1994) (noting that defendant acknowledged “that dispersion of wheelchair seating throughout [the cinema] is ‘readily achievable’”); Karen E. Field, Note, *The Americans with Disabilities Act “Readily Achievable” Requirement for Barrier Removal: A Proposal for the Allocation of Responsibility Between Landlord and Tenant*, 15 *CARDOZO L. REV.* 569 (1993) (discussing cost concerns of removing barrier between landlord and tenant).

such methods are "readily achievable."⁸¹ Whether the modification is reasonable depends on the facts of the case and the balance between the "efficacy of the modification . . . [and the] cost of implementation."⁸² Generally, "[a] modification will be deemed unreasonable if, when looking at the overall operations, it alters the essential nature of the facility and a financial burden will result."⁸³

81. 42 U.S.C. § 12182(b)(2)(A)(v) (requiring alternative methods if initial proposal to modify architectural and communication barriers is not "readily achievable").

82. *Staron v. McDonald's Corp.*, 51 F.3d 353, 355-56 (2d Cir. 1995) (describing balancing test to determine whether modification is reasonable); Joly, *supra* note 54, at 207 (evaluating requirements of reasonable modification). The reasonable modification analysis under Title III is parallel to the reasonable modification analysis of the ADA's other titles. See Joly, *supra* note 54, at 355-56 (discussing reasonable modification analysis); see also *Johnson v. Gambrinus Co./Spoetzel Brewery*, 116 F.3d 1052, 1059 (5th Cir. 1997) (noting that no difference exists between burden of proof under Title I and Title III claims because of similarity in statutory language). Finally, "due to the fact-specific nature of the necessary inquiry, the question of whether a modification is reasonable will generally be one which has to be answered at trial and not at the summary judgment stage." Joly, *supra* note 54, at 207 (citing *Crowder v. Kitagawa*, 81 F.3d 1480, 1486 (9th Cir. 1996)); see also *Staron*, 51 F.3d at 356 (stating that "the determination of whether a particular modification is 'reasonable' involves a fact-specific, case-by-case inquiry that considers, among other factors, the effectiveness of the modification in light of the nature of the disability in question and the cost to the organization that would implement it"); *Heather K. v. City of Mallard*, 946 F. Supp. 1373, 1388 (N.D. Iowa 1996) (noting that reasonableness requirement is "fact question").

Another factor the courts must consider when balancing the "efficacy of the modification . . . [and the] cost of implementation" is whether the modification will impose a direct threat to the health and safety of others. See 42 U.S.C. § 12182(b)(3) (stating individual cannot request modification "where such individual poses a direct threat to the health or safety of others"); see also *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998) (noting that "existence, or nonexistence of a significant risk must be determined from the standpoint of the person who refuses the treatment or accommodation, and the risk assessment must be based on . . . objective evidence"). Plaintiffs often pursue their cases under section 12182(b)(3) because defendants fail to assess a disabled person's individual capacities. Cf. *Anderson v. Little League Baseball*, 794 F. Supp. 342, 345 (D. Ariz. 1992) (concluding that individualized assessment of disabled person's capabilities is required before disabled individual is excluded as threat to other's safety). Instead, defendants make generalized assessments of what disabled individuals can and cannot do based on class stereotypes. Cf. *Sch. Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 287 (1987) (discussing necessity of individualized inquiry and making appropriate findings of fact); *Anderson*, 794 F. Supp. at 345 (same). But see *McPherson v. Mich. High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 462 (6th Cir. 1997) (rejecting individualized determination when it would impose undue burden on athletic association to sort out legitimate from non-legitimate requests for waivers of eight semester rule).

83. Joly, *supra* note 54, at 207; see also *Easley v. Snider*, 36 F.3d 297, 305 (3d Cir. 1994) ("The test to determine the reasonableness of a modification is whether it alters the essential nature of the program or imposes an undue burden or hardship in light of the overall program"). See generally *Sandison v. Mich. High Sch. Athletic Ass'n*, 64 F.3d 1026 (6th Cir. 1995) (defining reasonable modification as one connoting moderate change).

III. FACTS AND PROCEDURAL HISTORY

A. *Martin v. PGA Tour, Inc.*

Casey Martin is a professional golfer who suffers from Klippel-Trenaunay-Weber Syndrome.⁸⁴ Because of this disorder, Martin endures severe pain and atrophy in his right leg.⁸⁵ This affliction renders Martin unable to walk for extended periods of time.⁸⁶

The PGA is a non-profit association of professional golfers.⁸⁷ The PGA supports three competitive tours: (1) the PGA Tour; (2) the Nike Tour; and (3) the Senior PGA Tour.⁸⁸ Golfers qualify for the PGA Tour or the Nike Tour by competing in a competition known as the qualifying school.⁸⁹ At that competition, the best finishers qualify for the PGA Tour, and the next-best finishers qualify for the Nike Tour.⁹⁰

In 1997, Martin attempted to qualify for the PGA Tour by competing in the qualifying school.⁹¹ The rules of the competition permit participants to use golf carts only during the first two rounds of the competition.⁹² Martin used a golf cart and played well enough to qualify for the third and final round of the competition.⁹³ Martin then requested that the PGA Tour allow him to use a cart for the final round.⁹⁴ The PGA

84. See *Martin v. PGA Tour, Inc.*, 204 F.3d 994, 996 (9th Cir. 2000) (describing Martin's ailment). Klippel-Trenaunay-Weber Syndrome is "a congenital, degenerative circulatory disorder" that has resulted in a malformation of [Martin's] right leg." *Id.* (explaining syndrome's effect on Martin).

85. See *id.* (noting Martin's discomfort resulting from disorder).

86. See *id.* (describing difficulties Martin experiences while walking). By walking, Martin runs the risk of his leg fracturing or hemorrhaging. See *id.* (considering possible risks).

87. See *id.* (describing PGA).

88. See *id.* (describing PGA's three competitive tours). The Nike Tour is a step down from the PGA Tour, and the Senior PGA Tour permits only professional golfers age fifty and over. See *id.* (discussing Nike Tour and Senior Tour). Senior Tour players are permitted to use carts during competition. See *id.* at 996 n.4 (noting Senior PGA Tour policy). In 1999, Nike Co. ended its sponsorship of the Nike Tour, and the tour is now named the Buy.Com Tour. See John Reger, *PGA Developmental Tour Gets New Sponsor, Name*, ORANGE COUNTY REG., Oct. 26, 1999, at D14 (describing change in sponsorship and name). Nevertheless, this Note will refer to the tour as the Nike Tour.

89. See *Martin*, 204 F.3d at 996 (discussing qualifying school). The qualifying school consists of three stages. See *id.* (explaining qualifying school). Players are permitted to use golf carts during the first two stages; however, in the third stage, and in the PGA and the Nike Tours themselves, players are required to walk the courses. See *id.* (describing permissible cart use during qualifying school).

90. See *id.* (explaining how tours receive their players). Nike Tour players "may qualify for the PGA Tour by winning three Nike Tour tournaments in one year or by being in the top fifteen money-winners in the Nike Tour." *Id.*

91. See *id.* (discussing Martin's attempt to qualify for PGA tour through qualifying school).

92. See *id.* (explaining that rules limit use of golf carts at certain points at qualifying school).

93. See *id.* (noting Martin's results at qualifying school).

94. See *id.* (stating Martin's request and PGA's response).

Tour denied his request.⁹⁵ Martin filed suit against the PGA Tour in the United States District Court for the District of Oregon, claiming that the denial of his request violated the ADA.⁹⁶ The district court issued a temporary restraining order, thereby permitting Martin to use a golf cart during the final round.⁹⁷ Martin played well enough to qualify for a spot on the 1998 Nike Tour.⁹⁸ Subsequently, the district court granted partial summary judgment for Martin and held that the PGA “owns, operates and leases golf courses, which the ADA identifies as places of public accommodation.”⁹⁹ A bench trial followed, after which the district court held that the PGA violated the ADA because “modifying the walking rule for Martin was a reasonable accommodation that did not fundamentally alter the nature of PGA golf tournaments.”¹⁰⁰ The court then issued a permanent injunction requiring the PGA to permit Martin to use a golf cart in the PGA Tour and the Nike Tour, and in any qualifying rounds for those tours.¹⁰¹ The PGA appealed the district court’s ruling to the United States Court of Appeals for the Ninth Circuit.¹⁰²

B. *Olinger v. United States Golf Ass’n*

Ford Olinger is a professional golfer who aspired to compete in the United States Open (“U.S. Open”).¹⁰³ Olinger suffers from bilateral avascular necrosis, a degenerative condition that affects his ability to walk.¹⁰⁴

The USGA is a private, non-profit association of member golf clubs and golf courses.¹⁰⁵ The USGA legally controls only its own championships.¹⁰⁶ Nevertheless, the golf community regards the USGA as the gov-

95. *See id.* (explaining PGA’s response).

96. *See id.* (describing Martin’s suit under ADA).

97. *See id.* (discussing district court’s order that allowed Martin to use golf cart).

98. *See id.* (describing Martin’s success in qualifying by using golf cart in final round).

99. *Id.*

100. *Id.* at 996-97.

101. *See id.* at 997 (describing permanent injunction allowing Martin to ride cart in Nike Tour and PGA Tour tournaments).

102. *See id.* (noting appeal).

103. *See Olinger v. United States Golf Ass’n*, 205 F.3d 1001, 1001 (7th Cir. 2000) (noting Olinger’s attempt to qualify for U.S. Open). In 1988, Olinger received his professional title by certification from the PGA. *See id.* (describing Olinger’s status as professional golfer).

104. *See id.* (stating Olinger’s condition).

105. *See id.* at 1002 (discussing United States Golf Association (“USGA”)). The USGA was chartered for “the purpose of promoting and conserving the best interests and the true spirit of the game of golf.” *Id.*

106. *See id.* (describing extent of USGA’s control). Each year the USGA conducts championships in thirteen designated categories, including the U.S. Amateur, U.S. Senior Open and U.S. Women’s Open. *See id.* (listing tournaments provided by USGA).

erning body of golf in the United States.¹⁰⁷ The USGA promotes the integrity of the game of golf and produces an official *Rules of Golf*.¹⁰⁸

The USGA conducts the U.S. Open each year to determine the men's national championship of golf in the United States.¹⁰⁹ Each year, the venue for the U.S. Open differs.¹¹⁰ Over 7000 players usually submit U.S. Open applications.¹¹¹ Each player must meet USGA qualifications to play in local qualifying rounds.¹¹² Golfers who qualify from the local qualifying rounds are sent to sectional qualifying rounds.¹¹³ About 100 golfers will get past the sectional qualifiers to gain a spot in the U.S. Open field.¹¹⁴ Golfers participating in the U.S. Open face a stiff challenges—the U.S. Open is arguably “the greatest test in golf.”¹¹⁵

The *Rules of Golf* govern the qualifying, sectional and final rounds of U.S. Open competition.¹¹⁶ The rules do not expressly prohibit the use of

107. *See id.* (noting reputation of USGA).

108. UNITED STATES GOLF ASSOCIATION, OFFICIAL RULES OF GOLF, 2000-2001 (2000). The Royal and Ancient Golf Club of St. Andrews, Scotland (“R&A”), is also responsible for the creation of the *Rules of Golf*. *See id.* (commenting on R&A's contribution to *Rules of Golf*). The court stated that the *Rules of Golf* is a “staple in the bag of all true golfers.” *Id.*

109. *See Olinger*, 205 F.3d at 1002 (discussing U.S. Open). “The U.S. Open has been conducted yearly since 1895, with the exception of the war years 1917-1918 and 1942-45.” *Id.*

110. *See id.* (describing U.S. Open venues). This year the U.S. Open was contested at the Pebble Beach Golf Course in California. *See* Dan Jenkins, *A League of His Own: Tiger Woods Turns the 100th U.S. Open into a Runaway*, GOLF DIGEST, August 2000, at 161 (describing Tiger Woods' win at 2000 U.S. Open conducted at Pebble Beach).

111. *See Olinger*, 205 F.3d at 1002 (noting number of yearly U.S. Open applicants).

112. *See id.* (explaining U.S. Open qualifications). All professional golfers and amateur golfers who carry at least a 1.4 certified USGA handicap index are able to play in local qualifying rounds. *See id.* (describing participants eligible for U.S. Open qualifying).

113. *See id.* (discussing sectional qualifying rounds). In May, the local qualifying rounds are conducted, which will decrease the field of 7000 golfers down to about 750 participants for sectional qualifying. *See id.* (stating typical results of local qualifying). Local and sectional qualifying occur at different golf courses every year. *See id.* (noting that USGA uses variety of venues for qualifiers as well as its championships).

114. *See id.* (stating number of sectional qualifying participants that proceed to U.S. Open tournament). These one-hundred golfers will join approximately sixty players who were exempt from participating in preliminary qualifying because of certain published criteria. *See id.* (describing makeup of U.S. Open field).

115. *See id.* at 1002-03 (commenting on difficulty of competition in U.S. Open). For U.S. Open competition, the USGA maintains the host golf course in difficult conditions. *See id.* at 1003 (noting USGA's maintenance of U.S. Open venues). The USGA narrows the course's fairways, heightens the rough around the fairways and cuts the greens so tight that the greens often are lightning fast. *See id.* (illustrating different course conditions that make U.S. Open championship wearisome for its participants).

116. *See id.* (describing governing rules for U.S. Open competition). The *Rules of Golf* consists of 34 separate rules and appendices that total 144 pages. *See*

golf carts during competitions; however, the rules do allow the tournament competition committees to establish the conditions for an event, including whether or not to preclude the use of carts by participants.¹¹⁷ Since 1955, “the entry forms for every U.S. Open include a provision stating that ‘[p]layers shall walk at all times during a stipulated round.’”¹¹⁸ A similar prohibition is in effect for all but two of the thirteen national championships that the USGA conducts.¹¹⁹ The USGA lacks an established procedure for waiving the prohibition against carts.¹²⁰ Additionally, since 1895, only one player has ridden in a cart while playing in the U.S. Open.¹²¹

Olinger applied to play in the 1998 U.S. Open and requested that the USGA waive its prohibition against the use of carts.¹²² The USGA rejected Olinger’s request, and Olinger sued under the ADA four days before local qualifying began in South Bend, Indiana.¹²³ The United States District Court for the District of Indiana granted Olinger a temporary restraining order, thereby allowing Olinger to ride a cart during the local qualifier.¹²⁴

id. (describing content of *Rules of Golf*). For further clarification, the USGA publishes hundreds of interpretations of the rules, applying them to different facts and circumstances. *See id.* (explaining USGA’s publication of interpretations). The *Rules of Golf* sets forth the physical restrictions on golf clubs and balls, identifies the number of different clubs players may use during a round and governs golfers’ behavior while playing. *See id.* (listing various requirements that *Rules of Golf* governs).

117. *See id.* (citing Rule 8, USGA *Official Rules of Golf*, 1999-2000). Moreover, players in each USGA championship receive a set of “Local Rules and Conditions of Competition for USGA Championships” and a “Notice to Competitors” that pronounces the local rules adopted by the USGA Championship Committee. *See id.* (explaining that U.S. Open participants receive supplemental rules).

118. *Id.* “The USGA requires competitors to walk the course because it believes that their physical endurance and stamina are important parts of the competition.” *Id.*

119. *See id.* at 1002 n.5 (noting USGA’s use of rule in other competitions). The USGA permits competitors to use carts in the U.S. Senior Amateur and the U.S. Senior Women’s Amateur. *See id.* (discussing lack of walking requirement in two USGA-sponsored competitions).

120. *See id.* at 1003 (noting absence of procedure). One commentator noted that “since 1986 the USGA has received twelve requests from eleven different [golfers] seeking waivers of the prohibition against using carts in the U.S. Open.” *Id.*

121. *See id.* (recognizing that only one participant has used cart during U.S. Open); *see also* Joseph Huber, *Golf Cart Use and Individuals with Disabilities—Will the PGA Tour Ask the Supreme Court*, PALAESTRA, Mar. 22, 2000, at 57 (noting that in 1998, Casey Martin became first player to ride cart while playing in U.S. Open).

122. *See Olinger*, 205 F.3d at 1004 (describing Olinger’s application and request).

123. *See id.* (explaining USGA’s response to Olinger’s request and Olinger’s subsequent action).

124. *See id.* (describing Olinger’s request and court’s grant of temporary restraining order).

Nevertheless, Olinger failed to advance to the sectionals.¹²⁵ After a full trial, the district court ruled in favor of the USGA.¹²⁶ Olinger appealed the district court decision to the United States Court of Appeals for the Seventh Circuit.¹²⁷

IV. ANALYSIS

A. Narrative Analysis

1. *The Ninth Circuit's Reasoning in Martin v. PGA Tour, Inc.*

The Ninth Circuit began by analyzing whether the host golf courses of the PGA Tour and the Nike Tour events are places of public accommodation subject to Title III of the ADA.¹²⁸ The court first examined the terms of the ADA and the statute's basic anti-discrimination clause.¹²⁹ After noting various types of private entities that qualify as public accommodations for purposes of Title III, the court stated that golf courses are clearly "places of public accommodation" under Title III.¹³⁰

The court then rejected the PGA's arguments that a golf course during a PGA tournament is not a place of public accommodation.¹³¹ First, the court rejected the PGA's assertion that the competitor's area "behind the ropes" is not a place of public accommodation because the public may not enter it during tournaments.¹³² The court also stated that cases in-

125. *See Golfer Uses Cart in U.S. Open Qualifier*, TULSA WORLD, May 19, 1998, at 5 (stating that Olinger failed to qualify for U.S. Open after shooting eighty-three, which placed him eighteen shots behind leader).

126. *See Olinger*, 205 F.3d at 1004 (noting district court conclusion that favored USGA).

127. *See id.* at 1001 (discussing procedural history of case).

128. *See Martin v. PGA Tour, Inc.*, 204 F.3d 994, 997 (9th Cir. 2000) (analyzing courses as places of public accommodation). The district court held that, as a matter of law, Title III of the ADA applied to the PGA and the Nike Tour competitions. *See id.* (restating district court holding).

129. *See id.* (examining ADA). The court noted that 42 U.S.C. § 12182(a) is the basic anti-discrimination clause for Title III of the ADA. *See id.* (restating statute).

130. *See id.* ("There is nothing ambiguous about [42 U.S.C. § 12181(7)(L)]; golf courses are places of public accommodations."). Section 12181(7)(L) defines the following private entities as places of public accommodation: "a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation." 42 U.S.C. § 12181(7)(L) (1994).

131. *See Martin*, 204 F.3d at 997 (rejecting PGA's argument).

132. *See id.* (refusing to adopt PGA's assertion that area "behind the ropes" is not place of public accommodation). The court determined that the PGA's argument was not meritorious because it too narrowly construed the nature of what is a place of public accommodation under the ADA. *See id.* (describing problems with PGA's argument). The court agreed that the general public was not allowed "inside the ropes" during tournaments, but noted that "competitors, caddies, and certain other personnel can [enter the area]." *Id.* The court reasoned that even if a golf course during a tournament is not being used as a "place of exercise or recreation" within the meaning of 42 U.S.C. § 12181(7)(L), the course is at least a "place of exhibition or entertainment" and therefore qualifies as a place of public

volving disabled student athletes held that Title III applied to the playing field, not just to the stands.¹³³ Next, the court disagreed with the PGA's contention that it may compartmentalize golf courses during tournaments.¹³⁴ The court rejected the PGA's statement that its compartmentalizing is analogous to either a "mixed use facility" or a factory that allows public tours.¹³⁵ Finally, the court disregarded PGA's assumption that there is nothing public about the competition itself.¹³⁶ The court refused

accommodation. *See id.* (noting that 42 U.S.C. § 12181(7)(C) includes "[a] theater, . . . stadium or other place of exhibition or entertainment" in its definition of "public accommodation" (citing 42 U.S.C. § 12181(7)(C))). The court determined that the ADA "does not restrict [the] definition [of "public accommodation"] to "portions of the place of exhibition that are open to the general public." *Id.* The court noted that the facility does not lose its status as a public accommodation simply because entry to a part of the facility is limited, such as to the executive suites contracted by businesses in an arena. *See id.* at 997-98 (explaining rationale and citing *Indep. Living Res. v. Or. Arena Corp.*, 982 F. Supp. 698, 759 (D. Or. 1997)).

133. *See Martin*, 204 F.3d at 998 (explaining that cases exist consistent with its rationale and citing *Bowers v. NCAA*, 9 F. Supp. 2d 460, 483-90 (D.N.J. 1998); *Tatum v. NCAA*, 9 F. Supp. 1114, 1121 (E.D. Mo. 1998); *Ganden v. NCAA*, No. 96C-6953, 1996 WL 680000, at *8-11; *Anderson v. Little League Baseball, Inc.*, 794 F. Supp. 342, 344 (D. Ariz. 1992)).

134. *See id.* (disagreeing with PGA's argument that it compartmentalizes golf courses during tournaments).

135. *See id.* (rejecting PGA's analogy). PGA argued that a large hotel with a separate residential wing was analogous to the golf course while PGA operated a golf tournament. *See id.* (stating PGA's argument). The Ninth Circuit explained that the separate residential wing is not a place of public accommodation, but the hotel wing is a place of public accommodation because it falls under the definition of public accommodation in 42 U.S.C. § 12181(7)(A) (1994). *See id.* (comparing separate residential wing to hotel wing under Title III); *see also* 42 U.S.C. § 12181(7)(A) (defining "an inn, hotel, motel, or other place of lodging" as places of public accommodation). The court determined that in the hotel example, the separate residential wing of the hotel was not being used as a hotel; however, the golf course during a tournament is still being used as a golf course. *See Martin*, 204 F.3d at 998 (distinguishing separate residential wing of hotel from golf course during tournament).

Furthermore, the court also rejected the PGA's second attempt to distinguish its golf courses from places of public accommodation. *See id.* (determining PGA's second example also lacked merit). PGA argued that their operation of a golf course during tournaments was analogous to a commercial facility—such as a factory—that allows public tours at specific places and times, which are not considered places of public accommodation. *See id.* (noting PGA's factory example). The court stated that this example is unpersuasive for two reasons. First, the court stated that the executive order exempting factories is "only applicable to commercial facilities 'not otherwise a place of public accommodation.'" *Id.* (citing 28 C.F.R. ch. 1, pt. 36, app. B, at 624 (1999)). Moreover, the court explained that this example would only be analogous if Martin were a spectator who attempted to ride a cart through the competitor's area of the tournament. *See id.* (stating second reason for refusing to adopt PGA's analogy).

136. *See Martin*, 204 F.3d at 998-99 (disagreeing with PGA's claim that tour is not public). PGA argued that because of the highly selective process they use to allow golfers to qualify for the tour, the courses on which those qualified golfers play tournaments could not be places of public accommodation. *See id.* at 998 (noting PGA's argument). The court explained that solely because users of a facil-

“to draw a line beyond which the performance of athletes becomes so excellent that a competition restricted to their level deprives its situs of the character of a public accommodation.”¹³⁷

After deciding that the golf courses during PGA tournaments are places of public accommodation, the court addressed the issue of whether allowing Martin to ride a cart was a reasonable accommodation under Title III.¹³⁸ The court first concluded that allowing Martin to use a cart is reasonable under the ADA.¹³⁹ The court affirmed the district court’s finding that Martin’s use of a golf cart is necessary because his disability makes it almost impossible for him to walk the course.¹⁴⁰ The court next determined that walking is not fundamental to the general game of golf.¹⁴¹

ity are highly selected, it does not follow that the facility is not a place of public accommodation. *See id.* (dismissing PGA’s theory). The court’s reasoning analogized Title III’s coverage of “secondary, undergraduate, or postgraduate private schools.” *See id.* (citing 42 U.S.C. § 12181(7)(J)). Although competition between students wishing to attend private schools is intense, the high level of competition does not remove the universities from Title III’s application. *See id.* (examining competition between students). The court determined that the students admitted to the schools are members of the public and use the universities as places of public accommodation. *See id.* (noting treatment of university). Finally, the court stated that Title III does not provide “access to a place where the individual is not entitled to be; the rejected applicant for admission is not entitled to access to the university, and the spectator is not entitled to access to the tees, fairways and greens during a PGA golf tournament.” *Id.* at 999 n.7.

137. *Id.* at 999. The court noted that “[a]ny member of the public who pays a \$3,000 entry fee and supplies two letters of recommendation may try out in the qualifying school.” *Id.* Accordingly, the court concluded that the golf courses on which the selection of PGA golfers begins are places of public accommodation. *See id.* (concluding initial qualifying courses are places of public accommodation). The court also rejected drawing a distinction between use of a place of public accommodation for pleasure and use in the pursuit of a living. *See id.* (stating refusal to draw lines).

138. *See id.* (analyzing reasonable accommodation issue). Title III also defines discrimination as:

a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages or accommodations.

42 U.S.C. § 12182(b)(2)(A)(ii) (1994).

139. *See Martin*, 204 F.3d at 999 (concluding that use of cart is reasonable). The court stated that permitting Martin to use a cart would solve Martin’s problem of access to the competition, and because carts are used in other competitions, such as on the senior tour, it would not be a practical difficulty for PGA to allow their use in PGA Tour competitions. *See id.* (explaining reasons for concluding that Martin’s use of cart was reasonable).

140. *See id.* (explaining district court’s finding that Martin could not walk course was supported by sufficient evidence). The court commented that Martin’s inability to walk the course is no longer disputed. *See id.* (noting lack of dispute as to impact of Martin’s leg condition on his ability to walk course).

141. *See id.* (discussing fundamental nature of game). The court based its determination that walking was not fundamental to the general game of golf on

The court, however, agreed with PGA's assertion that they offer not just a generalized game of golf on the PGA and Nike Tours, but rather a particular competition.¹⁴²

In addressing the issue of whether modifying the no-cart rule to permit Martin to ride a cart would fundamentally alter the PGA and Nike Tour competitions, the court decided not to disturb the factual findings of the district court.¹⁴³ Based on the district court's findings, the court concluded that granting Martin the use of a golf cart in the PGA and Nike Tour competitions would not fundamentally alter the nature of those competitions.¹⁴⁴ The court stated that "[a]ll that the cart does is permit Martin access to a type of competition in which he otherwise could not engage because of his disability. That is precisely the purpose of the ADA."¹⁴⁵ The PGA argued that its "substantive" rules should not be sub-

two factors: (1) The *Rules of Golf* promulgated by the USGA and the Royal and Ancient Golf Club of St. Andrews, Scotland, do not require golfers to walk; and (2) PGA allows players to use carts during the first two rounds of the qualifying school and on the Senior Tour. *See id.* (explaining reasons).

142. *See id.* at 999-1000. (describing PGA's argument). The court noted that "PGA provides, in the Conditions of Competition for its PGA and Nike Tours, that '[p]layers shall walk at all times during a stipulated round unless permitted to ride by the PGA TOUR Rules Committee.'" *Id.* The court observed instances when the Committee has allowed players to ride, such as: (1) when all players must be shuttled from the ninth green to the tenth tee when the distance is too great; and (2) when players are given rides from the fairway back to the tee because the players lose a ball and must hit it again. *See id.* at 1000 (describing instances when players may ride). The court stated that when the Committee allows players to ride, the waiver applies to all players. *See id.* (noting universal application of waivers).

143. *See id.* at 1000 (addressing issue of accommodation fundamentally altering competition). The court noted that the district court made the following findings: (1) PGA was injecting a fatigue factor into the shot-making of the game by requiring players to walk; (2) "the fatigue factor injected into the game of golf by walking the course cannot be deemed significant under normal circumstances"; (3) the stamina factor in the competitions was due to mostly psychological phenomenon such as stress and motivation; (4) players in other tours, when given the choice to walk or ride, usually choose to walk; and (5) in events where PGA permits players to use carts, "it assigns no handicap penalty to those who ride as opposed to those who walk." *See id.* (describing district court findings). The court also stated that Martin still has to walk about twenty-five percent of the course, and endures considerable pain while doing so. *See id.* (explaining that Martin must walk certain areas of course because he cannot be brought nearer to his ball in many instances). The court noted that after examining all of these factors, the district court concluded that Martin "easily endures greater fatigue even with a cart than his able-bodied competitors do by walking." *Id.* (quoting district court opinion). The court concluded that the district court's determination that the fatigue factor injected into the game was insignificant was not clearly erroneous. *See id.* at 1001 (concluding that district court's determination not clearly erroneous).

144. *See id.* (stating conclusion). The court explained that permitting Martin to use a cart would not alter the central aim of the competition in shot-making. *See id.* (noting accommodation would not affect shot-making ability).

145. *Id.* (footnote omitted).

ject to exceptions to accommodate disability, but the court determined that the PGA was misinterpreting the statute.¹⁴⁶

Finally, the court disagreed with the PGA's assertion that allowing Martin to ride a cart would open the floodgates for future decisions in favor of disabled athletes.¹⁴⁷ The court also rejected the PGA's argument that individualized determinations would impose an intolerable burden on the PGA.¹⁴⁸ Accordingly, the court held that the district court did not

146. *See id.* (evaluating PGA's argument). The PGA admitted that some athletic rules may be subject to accommodations for the disabled, such as dress codes or uniform requirements, but contended that rules intended to affect competition cannot be subjected to an exception. *See id.* (explaining PGA's argument). The court reasoned that PGA's interpretation essentially removed the word "fundamentally" out of the statutory language, making any alteration of the competition fundamental. *See id.* at 1000-01 (rebutting PGA's argument). The court noted that the statute requires "an inquiry into whether a particular exception to a rule would 'fundamentally alter' the nature of the good or service being offered." *Id.* at 1001. Therefore, the court determined that the inquiry should not be whether players' use of carts generally would fundamentally alter the competition, but whether permitting Martin to use a cart would do so. *See id.* (stating proper inquiry). The court noted that "[t]he evidence must 'focus on the specifics of the plaintiff's or defendant's circumstances and not on the general nature of the accommodation.'" *Id.* (quoting *Johnson v. Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052, 1060 (5th Cir. 1997)). Moreover, the court stated that "[t]he mere fact that PGA has defined walking to be part of the competition cannot preclude inquiry, or PGA will have been able to define itself out of reach of the ADA." *Id.*

147. *See id.* (rejecting floodgates argument). The PGA stated that allowing Martin to use a golf cart would open the door to "future decisions requiring that disabled swimmers or runners be given a head start in a race, or that a growth-impaired basketball player be allowed to shoot three-point baskets from inside the three-point line." *Id.* The court expressed its confidence that in these examples stated by PGA, the courts' fact-based inquiry would result in holdings that these modifications would fundamentally alter the competitions. *See id.* (responding to PGA's slippery slope argument). The court admitted that if Martin were seeking to "use a special golf ball that carried farther than others, or was seeking to play a shorter course than his competitors," those accommodations would fundamentally alter the competitions. *See id.* (distinguishing use of cart from accommodations that would fundamentally alter golf competitions).

148. *See id.* at 1001-02 (rejecting PGA's contention). PGA had refused to consider Martin's condition while maintaining that permitting him to ride a cart would fundamentally alter the competition. *See id.* at 1001 (discussing PGA's refusal to consider Martin's condition). PGA also stated that allowing players to ride carts would place an undue burden on the PGA to determine whether disabled players riding carts have an advantage over non-disabled walking players. *See id.* (repeating PGA's undue burden argument). The court determined that the cases the PGA cited in support of its argument, circuit court cases upholding age and semester limits on school students' athletic eligibility, were distinguishable from Martin's situation. *See id.* (distinguishing *McPherson v. Mich. High Sch. Athletic Ass'n*, 119 F.3d 453 (6th Cir. 1997); *Sandison v. Mich. High Sch. Athletic Ass'n*, 64 F.3d 1026 (6th Cir. 1995); *Pottgen v. Mo. State High Sch. Activities Ass'n*, 40 F.3d 926 (8th Cir. 1994)). The court concluded that:

[t]he foundation of these cases . . . was a finding, or evidence compelling a finding, that the rule against older or more experienced high-school athletes was necessary to protect the competition in the lower age group, and to prevent "red-shirting" of athletes to permit them to compete when older and more experienced than the others. The record in this case is

err in determining that allowing Martin to use a cart was a reasonable accommodation to his disability and that Martin's use of a cart did not fundamentally alter the nature of the PGA and Nike Tour Tournaments.¹⁴⁹

2. *The Seventh Circuit's Reasoning in Olinger v. United States Golf Ass'n*

Unlike the Ninth Circuit, the Seventh Circuit limited its analysis to the issue of whether permitting Olinger to use a cart would fundamentally alter the nature of the tournaments, finding it unnecessary to decide the public accommodation issue.¹⁵⁰ In addressing Olinger's contention that the USGA failed to present sufficient proof that a cart would fundamentally alter the nature of the event, the court explained that the concept of "fundamentally alter" was derived from the United States Supreme Court's decision in *Southeastern Community College v. Davis*,¹⁵¹ interpreting the Rehabilitation Act of 1973.¹⁵² The *Olinger* court then determined that different court holdings, subsequent to the Supreme Court's decision in *Davis*, have held that "the ADA does not require entities to change their basic nature, character, or purpose insofar as that purpose is rational, rather than a pretext for discrimination."¹⁵³

The court next analyzed the district court's conclusion that permitting Olinger to ride a cart would fundamentally alter the nature of the

quite different; the district court found that the fatigue factor introduced by walking was not significant.

Id. at 1001-02 (citation omitted).

149. *See id.* at 1002 (stating conclusion).

150. *See Olinger v. United States Golf Ass'n*, 205 F.3d 1001, 1005 (2000) (describing focus of holding). The court did not analyze whether the golf courses operated by the USGA for its championships are places of public accommodation. *See id.* ("While there may be some logic to [USGA's contention that golf course is a "mixed use" facility], we hesitate to embrace it for we can resolve this appeal . . . on a more narrow ground [that allowing Olinger to ride a cart fundamentally alters the nature of the competition].").

151. 442 U.S. 397, 410 (1979) (originating concept of "fundamental alteration" under Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended throughout 29 U.S.C. § 794 (1994))).

152. *See Olinger*, 205 F.3d at 1005 (stating origin of "fundamentally alter"). The court noted in *Olinger* that the Supreme Court held that a reasonable accommodation did not include lowering or substantially modifying existing standards to accommodate a handicapped person. *See id.* at 1005 (describing Supreme Court's definition of a reasonable accommodation); *see also Davis*, 442 U.S. at 410 (explaining that this would be "more than the 'modification' the regulation requires").

153. *Olinger*, 205 F.3d at 1005. The court also determined that the accommodation must not impose an undue financial and administrative burden on the entity. *See id.* at 1006 (citing Rehabilitation Act of 1973; *Nassau County Sch. Bd. v. Arline*, 480 U.S. 273, 287 n.17 (1987); *Sandison*, 64 F.3d at 1035 (applying ADA)). The Sixth Circuit upheld an age limit for high school athletes because "[i]t is plainly an undue burden to require high school coaches and hired physicians to determine whether [various] factors render a student's age an unfair competitive advantage It is unreasonable to call upon coaches and physicians to make these near-impossible determinations." *Sandison*, 64 F.3d at 1035.

competition.¹⁵⁴ The court examined the district court's reasoning that eliminating the walking rule would "remove the stamina from the set of qualities designed to be tested in this competition."¹⁵⁵ The court agreed with the district court's determination that Olinger's accommodation is reasonable in a general sense, but would "alter the fundamental nature of that competition."¹⁵⁶ The court also stated that the record aptly supported the district court's findings.¹⁵⁷ Finally, the court concluded that the district court properly reasoned that allowing Olinger to use a cart would provide the USGA with the administrative burden of making sure every applicant for a cart truly needs one.¹⁵⁸

Limiting their analysis to whether the USGA must allow Olinger to compete using a golf cart rather than walking, the court did not address the broader issue of whether the USGA should "give seriously disabled, but otherwise well-qualified, golfers a chance to compete."¹⁵⁹ The court

154. See *Olinger*, 205 F.3d at 1006 (evaluating district court's conclusions).

155. *Id.* The court quoted the following language from the trial court opinion: "[c]onditions that now affect a golfer's performance, but which lie beyond the golfer's ability to control—the fatigue born of hills, of heat, of humidity—would lessen in importance to the competition." *Id.*

156. *Id.* The court noted that the district court had focused on the particularity of the U.S. Open and concluded "[t]he point of an athletic competition . . . is to decide who, under conditions that are about the same for everyone, can perform an assigned set of tasks better than (not as well as) any other competitor." *Id.* (quoting district court decision, *Olinger*, 55 F. Supp. 2d at 937 (N.D. Ind. 1999)). Moreover, the district court determined that "[t]he set of tasks assigned to the competitor in the U.S. Open includes not merely striking a golf ball with precision, but doing so under greater than usual mental and physical stress." *Id.* (quoting district court decision, *Olinger v. United States Golf Ass'n*, 55 F. Supp. 2d 926, 937).

157. See *id.* at 1006-07 (evaluating district court's conclusions in light of record). The court found that the testimony by professional golfer and now CBS Television analyst Ken Venturi was "particularly persuasive." See *id.* (examining Venturi's testimony). Venturi won the 1964 U.S. Open despite having to walk thirty-six holes on the final day of the competition in 100-degree weather (with ninety-seven percent humidity). See *id.* at 1006 (discussing 1964 U.S. Open). Venturi almost collapsed because of the heat, and after the first eighteen holes, he was advised by his doctor to discontinue playing. See *id.* (describing conditions of Venturi's victory). Venturi testified that physical and mental fatigue along with a uniform set of rules for all golfers are integral parts of championship-level golf. See *id.* (discussing Venturi's testimony). Venturi also described Ben Hogan's win in the 1950 U.S. Open after Hogan was involved in an automobile accident the previous year and was told that he would never walk again. See *id.* at 1007 (describing Venturi's account of Hogan's win in 1950). The court also pointed to the testimony of two medical professionals (one of which was Olinger's own witness), who stated that physical endurance and stamina are critical factors to determine the winner of national-level golf competitions. See *id.* at 1006 (describing medical testimony).

158. See *id.* at 1007 (explaining district court's second rationale for ruling in favor of USGA). The court agreed with the district court that it would be overly burdensome to ask the USGA "to develop a system and a fund of expertise to determine whether a given applicant truly needs, or merely wants, or could use but does not need, to ride a cart to compete." *Id.* (quoting district court decision, *Olinger*, 55 F. Supp. 2d at 937).

159. *Id.*

left to the USGA the decision of whether to adjust the rules of the game to accommodate Olinger.¹⁶⁰

B. Critical Analysis

1. Place of Public Accommodation

The first issue addressed by the Ninth and Seventh Circuits was whether the golf courses on which the PGA and the USGA conducted their competitions were places of public accommodation.¹⁶¹ Due to the outcomes in their respective cases, the Seventh and Ninth Circuits addressed this issue differently. Both the PGA and the USGA asserted that the courses were "mixed use" facilities and therefore not fully subject to Title III.¹⁶² They essentially argued that the areas "inside the ropes" were not places of public accommodation under Title III because the players inside the ropes were not entitled to the same rights as the public "outside the ropes."¹⁶³

In addressing this issue, the Seventh Circuit hinted that there might have been some merit to the USGA's contention that the courses were not places of public accommodation, but the *Olinger* court did not resolve the issue and assumed on appeal that the golf courses were places of public accommodation.¹⁶⁴ Because Olinger's claim depended on the Seventh Circuit's determination that the courses were places of public accommodation and that the accommodation would not fundamentally alter the nature of the activity, the *Olinger* court could assume that the golf courses were places of public accommodation and decide the case on a narrower ground.¹⁶⁵ Unlike the Ninth Circuit, which had to evaluate both issues to

160. *See id.* (leaving decision to USGA). The court also commented that Olinger was a highly skilled golfer, and hypothesized that given the choice, Olinger would probably prefer to walk the course without pain instead of ride. *See id.* (evaluating Olinger's situation).

161. *See id.* at 1004-05 (evaluating whether USGA-controlled golf courses are places of public accommodations); *Martin v. PGA Tour, Inc.*, 204 F.3d 994, 997-99 (9th Cir. 2000) (indicating examination of public accommodation requirement).

162. *See Olinger*, 205 F.3d at 1004-05 (examining USGA's claim that tournament golf courses are being used as mixed use facilities); *Martin*, 204 F.3d at 998-99 (evaluating PGA's claim that its tournament courses are being used as mixed use facilities); *see also* 28 C.F.R. ch. 1, pt. 36, app. B, at 624-26 (illustrating that sections of "mixed use" facilities that are not open to general public are not subject to requirements for public accommodations).

163. *See Olinger*, 205 F.3d at 1004-05 (discussing USGA's argument); *Martin*, 204 F.3d at 998 (describing PGA's argument).

164. *See Olinger*, 205 F.3d at 1004-05 (assuming golf courses were places of public accommodation for purposes of appeal). The district court had concluded that the USGA operated places of public accommodation based on its determination that the USGA restricted the normal operations of its competitive events by "supervis[ing] the play, provid[ing] the rules, officiat[ing] the play, set[ting] up the golf course, and determin[ing] the groupings of the players and their tee times." *Olinger*, 55 F. Supp. 2d at 931-32.

165. *See Olinger*, 205 F.3d at 1005 (assuming that competitive part of golf course on which U.S. Open is played is place of public accommodation). If a court

conclude that Martin should be permitted to ride a cart, the Seventh Circuit could limit its analysis to the reasonable accommodation issue, as the disposition of that issue effectively terminated Olinger's claim.¹⁶⁶

In its analysis of the public accommodation issue, the Ninth Circuit correctly rejected the PGA's argument that the courses could be qualified as "mixed-use facilities" and observed that Title III does not restrict its coverage to members of the public.¹⁶⁷ The court also correctly noted that a golf course is listed within the statute as one of the places of public accommodation.¹⁶⁸ The court rejected the PGA's assertion that its courses are not places of public accommodation because the PGA restricts its competitions to the nation's best golfers.¹⁶⁹ Accordingly, the Ninth Circuit correctly concluded that "golf courses remain places of public accommodations while a PGA tournament is being conducted on them."¹⁷⁰ Therefore, although the Seventh Circuit did not directly address the issue of whether the golf courses during competition act as places of public accommodation, for the disposition of the second issue, both circuits treated the golf courses as places of public accommodation under the ADA.¹⁷¹

2. *Reasonable Modification (Accommodation)*

The second issue addressed by both Circuits was whether permitting Olinger and Martin to ride golf carts during the tournaments was a reasonable accommodation under Title III.¹⁷² Both courts agreed that the accommodation that Olinger and Martin sought was at least reasonable in

finds that the accommodation fundamentally alters the nature of the program or activity, the accommodation is not reasonable under the ADA and the plaintiff loses, regardless of whether the private entity operates a place of public accommodation. See 42 U.S.C. § 12182(b)(2)(A)(ii)-(iii) (1994) (proscribing that private entity make reasonable modifications and provide any necessary auxiliary aids and services unless entity demonstrates that modifications "fundamentally alter the nature of such goods, services, facilities").

166. See *Olinger*, 205 F.3d at 1005 (noting that court need not address whether golf course is place of public accommodation because of conclusion that allowing use of cart fundamentally alters nature of competition).

167. See *Martin*, 204 F.3d at 998 (distinguishing PGA's examples of other mixed-use facilities). The court also noted that Title III does not restrict its coverage to the public, but provides that "no individual shall be discriminated against." *Id.* n.7 (quoting 42 U.S.C. § 12182(a)).

168. See *id.* at 997 (examining ADA); see also 42 U.S.C. § 12181(7)(L) (1994) (defining "a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation" as places of public accommodation).

169. See *Martin*, 204 F.3d at 998-99 (rejecting PGA's argument).

170. *Id.* at 999.

171. See *Olinger*, 205 F.3d at 1005 (assuming that golf course was place of public accommodation); *Martin*, 204 F.3d at 999 (concluding that golf course was place of public accommodation).

172. See *Olinger*, 205 F.3d at 1005-07 (same); *Martin*, 204 F.3d at 999-1002 (analyzing whether permitting cart use is reasonable modification under Title III); see also Jeffrey A. Rosenthal, *Should High Court Review Case of Disabled Golfer?*, N.Y. L.J. Aug. 7, 2000, at 9-10 (noting Ninth and Seventh Circuits split on reasonable modification issue).

a general sense.¹⁷³ The Seventh Circuit began by analyzing the Supreme Court's definition of "fundamental alteration" in *Southeastern Community College v. Davis*.¹⁷⁴ In *Davis*, the Court held that the Rehabilitation Act of 1973 was not intended to accommodate individuals who are unable to "meet all of a program's requirements in spite of a handicap."¹⁷⁵ The Court also cited relevant precedent holding that various accommodations were not reasonable if the accommodations impose an undue financial or administrative burden on the defendant. The *Olinger* court, however, suspiciously ignored its own precedent in *Washington v. Indiana High School Athletic Ass'n*,¹⁷⁶ and inappropriately decided that it did not have to make the individualized determination *Olinger* requested.¹⁷⁷

On the other hand, the Ninth Circuit correctly recognized that the prior cases stating that the ADA does not require individualized determinations were inapplicable to the issue before them.¹⁷⁸ The court noted that in the high school age-eligibility exception cases, the deciding factors were either that the rule was necessary or that an individualized determination would impose an undue burden on the high school coaches and officials.¹⁷⁹ The court distinguished *Martin's* case by reasoning that un-

173. See *Olinger*, 205 F.3d at 1003 (noting prevalence of carts on golf courses); *Martin*, 204 F.3d at 999 (explaining that allowing *Martin* to ride cart is reasonable because it solves *Martin's* problem of access to competition and golf carts are used in other competitions, such as on Senior Tour).

174. See *Olinger*, 205 F.3d at 1005 (analyzing *Davis*).

175. *Id.* (citing *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 397 (1979)). In *Davis*, a deaf nursing student asked the college to permit her to substitute work for the clinical work she couldn't complete because of her disability. See *Davis*, 422 U.S. at 397 (describing story of disabled student).

176. 181 F.3d 840 (7th Cir.), *cert. denied*, 120 S. Ct. 579 (1999).

177. See Rosenthal, *supra* note 172, at 10 (noting that Seventh Circuit ignored prior precedent). In *Washington*, a learning-disabled high school athlete requested that the Indiana High School Athletic Association waive its eight-semester rule. See *Washington*, 181 F.3d at 842-43 (describing *Washington's* petition for waiver of rule). The eight-semester rule provided that a student's athletic eligibility only extended for eight semesters following the student's commencement of ninth grade. See *id.* at 842 (discussing rule). The court refused to follow earlier circuit court precedent and adopted an individualized determination approach for handling cases with disabilities. See *id.* at 851 (explaining individualized approach was more consistent with congressional intent and Supreme Court's decision in *Nassau County Sch. Bd. v. Arline*, 480 U.S. 273 (1987)).

178. See *Martin v. PGA Tour, Inc.*, 204 F.3d 994, 1001-02 (9th Cir.), *cert. denied*, 69 U.S.L.W. 3223 (U.S. Sept. 26, 2000) (No. 00-24) (examining cases where courts concluded that individualized determinations were not required under ADA); see also Rosenthal, *supra* note 172, at 10 (noting that PGA's argument that Ninth Circuit erred in making individualized determination was based on dicta, and court actually made decision without determination).

179. See *Martin*, 204 F.3d at 1001-02 (distinguishing cases); Rosenthal, *supra* note 172, at 10 (noting distinction between *Olinger*, *Martin* and the high school age-limit eligibility cases); see also Heckman, *supra* note 18, at 23-32 (discussing impact of cases involving high school students challenging athletic associations' age requirements and eight-semester rules).

like age in the high school eligibility cases, the district court here found that the fatigue from walking was not significant.¹⁸⁰

The Ninth Circuit also correctly rejected the PGA's assertion that the courts should not interfere with an athletic association's "substantive" rules and correctly determined that the PGA's characterization of the walking rule as "substantive" was not conclusive.¹⁸¹ The PGA was attempting to imply that because it characterized the walking rule as "substantive," referring to how the game was to be played rather than who played it, the rule should be deemed fundamental to the game and not disturbed by the courts.¹⁸² Moreover, the Ninth Circuit properly limited its analysis to whether it would be a reasonable accommodation for Martin to ride a cart, not whether carts are reasonable in general.¹⁸³ By limiting its analysis to whether allowing Casey Martin to ride a cart fundamentally alters the nature of the game of golf, and not broadening the scope of the inquiry, the Ninth Circuit corresponded with an earlier Fifth Circuit holding.¹⁸⁴

The Seventh Circuit noted that the district court offered two reasons in support of the USGA, which the Seventh Circuit found were "amply supported in the record."¹⁸⁵ First, the stories of professional Hall-of-Fame golfers Ben Hogan and Ken Venturi emphasized "the importance and tradition of walking in championship-level tournament golf competition."¹⁸⁶ Second, the district court concluded that forcing the USGA to allow some players to use carts would impose an undue burden on the USGA by forcing them to evaluate any number of requests.¹⁸⁷ In upholding both of

180. See *Martin*, 204 F.3d at 1000 (discussing district court's holding).

181. See *id.* at 1000-01 (rejecting PGA's argument that courts cannot modify substantive rules of athletic association); see also Rosenthal, *supra* note 172, at 10 (explaining that just because PGA's rule is self-defined as "substantive," rule is not any more fundamental). But see Parent, *supra* note 3, at 140-43 (stating that deference should be given to sports association rules because interference by courts or other outside parties will destroy physical landscape of sports, where different rules apply to different players based upon their physical disabilities).

182. See *Martin*, 204 F.3d at 1000-01 (discussing PGA's argument).

183. See *id.* at 1001 (stating that inquiry must be whether use by Martin will fundamentally alter nature of activity).

184. See *id.* at 1001 (citing *Johnson v. Gambrinus Co./Spoetzel Brewery*, 116 F.3d 1052 (5th Cir. 1997)). In the Fifth Circuit decision in *Johnson v. Gambrinus Co./Spoetzel Brewery*, a blind plaintiff brought an action against the owner of a beer brewery alleging that the brewery's refusal to allow him to take a public brewery tour with his guide dog violated the ADA. See *Johnson*, 116 F.3d at 1055-56 (describing background of case). The court concluded that Johnson properly demonstrated that allowing his guide dog was reasonable, and that the defendant did not demonstrate the permitting the dog on the tour would fundamentally alter the nature of the activity. See *id.* at 1064-65 (stating conclusion). The *Martin* court found that their focus on Martin's individual circumstances and not on the general nature of the accommodation followed the persuasive analysis set forth in *Johnson*. See *Martin*, 204 F.3d at 1001 (citing *Johnson*, 116 F.3d at 1060).

185. *Olinger v. United States Golf Ass'n*, 205 F.3d 1001, 1006 (7th Cir. 2000).

186. *Id.* at 1006-07.

187. See *id.* at 1007 (noting district court's second rationale for deciding in favor of USGA).

these findings, the Seventh Circuit avoided enforcing the purpose of remedial statutes like the ADA.¹⁸⁸

By examining the cases of these two players, the *Olinger* court focused on whether the USGA should permit players to ride carts during its events, instead of examining whether it would be a reasonable modification to allow Olinger to ride a cart.¹⁸⁹ The court retold very powerful stories about Hogan and Venturi, two people who overcame great odds to win major tournaments, but the stories do not signify that walking is essential to the game of golf.¹⁹⁰ If walking were *essential* to the game of golf, golfers would not be allowed to use carts during the first two rounds of the qualifying school, Senior PGA Tour players would not be riding carts during tournaments and the USGA would not allow women golfers to ride carts during the United States Women's Amateur.¹⁹¹ As for the argument that such allowances would impose an undue burden on the USGA to administer all of the applications for waiving the cart rule, the Ninth Circuit found that it was not an intolerable burden on the PGA to administer the process.¹⁹² Because the USGA is also considered the governing body of golf, it should not be difficult for the *governing body* of golf to administer the considerably smaller number of players that will request carts in the future.¹⁹³

V. IMPACT/CONCLUSION

As of the date of this Note, the Ninth Circuit decision still stands, and Casey Martin is riding his cart during PGA and Buy.com Tour tournaments.¹⁹⁴ The most common criticism of this holding is that there will be a slippery slope of cases resulting from the Ninth Circuit's holding in *Mar-*

188. See *Alexander v. Choate*, 469 U.S. 287, 288 (1985) (noting that remedial statutes such as Rehabilitation Act of 1973 provide "evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from" services or activities offered by covered entities). The Supreme Court did state, however, that transferring benefits are not done "simply to meet the reality that the [disabled] have greater medical needs." *Id.* at 303.

189. See *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 483 (1999) (concluding that court must make individualized inquiry to determine if person is disabled); *Anderson v. Little League Baseball, Inc.*, 794 F. Supp. 342, 345 (D. Ariz. 1992) (holding that under ADA, policy of excluding Little League baseball coaches in wheelchairs from being on field required individualized assessment of severity of risk to players).

190. See generally *Parent*, *supra* note 3, at 140-41 (describing the Supreme Court's interpretations of "fundamental" and "essential").

191. For discussion of exceptions to the no-cart rules of the PGA and USGA, see *supra* notes 89-91, 116-17 and accompanying text.

192. See *Martin v. PGA Tour, Inc.*, 204 F.3d 994, 1002 (9th Cir.), *cert. granted*, 69 U.S.L.W. 3223 (U.S. Sept. 26, 2000) (No. 00-24) (noting that it would not be intolerable burden for PGA to conduct individualized determination).

193. For a discussion on the USGA's governing power, see *supra* note 105-09 and accompanying text.

194. See Charles Lane, *High Court to Hear Disabilities Act Case: Golfer's Suit Against PGA Put on Agenda*, WASH. POST, Sept. 27, 2000, at A8 (noting that until

tin.¹⁹⁵ Some commentators have argued that courts should not interfere with athletic associations' substantive rules because that might change the landscape of athletics.¹⁹⁶ A difficulty with these cases under the ADA is that each individual's disability is to be judged on a case-by-case basis; however, it is not likely that an overwhelming number of lawsuits will be initiated by individuals suing professional sports associations.¹⁹⁷ Possibly the most difficult aspect in addressing the reasonable accommodation requirement in competitive settings is that "the ADA essentially requires a court to measure an unquantifiable factor (the level of Casey Martin's fatigue vs. the fatigue of able-bodied golfers) in a program based on quantification (professional tournament golf)."¹⁹⁸

The Supreme Court granted the PGA's petition for a writ of certiorari on September 26, 2000 and heard argument on the case on January 17, 2001.¹⁹⁹ The Court has heard numerous cases in the last couple of years requiring their interpretation of the ADA.²⁰⁰ Recently, the Court provided a restricted view of the ADA's protected class.²⁰¹ The Court has also tended to "textualize" statutory interpretation under the ADA.²⁰² The

issue is decided by Supreme Court, PGA contends that it will continue to abide by Ninth Circuit ruling permitting Martin to ride golf cart during competitions).

195. See Baker, *supra* note 63, at 763 (explaining that commentators have suggested that as result of *Martin* holding "one-armed pitchers could possibly sue to force Major League Baseball to provide a 'designated fielder,'" and that NBA players could sue for right to use roller skates); see also Laurie Asseo, *Supreme Court to Hear Appeal by PGA Tour, The Tour Contends That Allowing Casey Martin to Use Golf Cart Violates Its Ability to Set and Enforce Rules for Competition*, PORTLAND OREGONIAN, Sept. 27, 2000, at C1 (repeating PGA's statement that *Martin* decision "open[s] the door to workplace discrimination lawsuits by independent contractors and other non-employees").

196. See Parent, *supra* note 3, at 140-43 (describing failure of district court in *Martin* to give proper deference to PGA Tour rules, and discussing possible results).

197. See Sharpe, *supra* note 2, at 807 (noting rarity of *Martin* case because issue in most ADA cases is whether plaintiff meets ADA's definition of disability).

198. Long, *supra* note 17, at 1378.

199. See *U.S. Supreme Court*, WESTLAW BULLETIN, Sept. 26, 2000 (noting Court's grant of writ of certiorari in *Martin*). The questions presented are: (1) "whether Title III of the ADA regulates standards established for competitors in athletic competitions held at places of public accommodation," and, if so, (2) "whether Title III requires professional sports organizations to grant selective waivers of their substantive rules of athletic competition in order to accommodate disabled competitors." *Id.* See generally Rosenthal, *supra* note 172, at 10 (noting Court's periodic interest in sports cases, and recognizing that some Justices are avid golfers).

200. See Rosenthal, *supra*, note 172, at 10 n.38 (discussing recently decided Supreme Court cases concerning ADA).

201. See *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 492-93 (1999) (holding that ADA's anti-discrimination provisions do not cover individuals with corrective impairments that are not presently substantially limited in any major life activities).

202. See Hentges, *supra* note 8, at 152 (noting recent Supreme Court decisions taking textual approach, not remedial approach, to statutory interpretation).

Court has not, however, had any significant cases dealing with Title III of the ADA.²⁰³

No matter how the Supreme Court decides, Casey Martin's and Ford Olinger's cases have helped enlighten the battle of not only disabled athletes, but also disabled individuals in general. The cases have also led the path for other disabled golfers to challenge established golf associations.²⁰⁴ The *Martin* case will give the Supreme Court another chance to clarify the reach of the ADA.²⁰⁵ Hopefully, the Court will not push the ADA out of the reach of other disabled athletes.

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203. *See id.* at 161 n.188 (explaining that only Title III case that Court has heard was *Bragdon v. Abbott*, but Court in that case based its holding in other areas of ADA).

204. *See* Rosenthal, *supra*, note 172, at 10 (describing story of Ja Ro Jones). The United States District Court for the Western District of Texas, in *Jones v. United States Golf Ass'n, Inc.*, followed the *Martin* decisions and enjoined the USGA from prohibiting Ja Ro Jones from using a golf cart during the Senior U.S. Open. *See id.* (citing Civ. No. A-00-Ca-278 JN, Order dated June 15, 2000). Jones is a former teaching professional who has post-polio syndrome, a disease causing leg and shoulder muscles to atrophy, resulting in fatigue. *See* Natalie Gott, *Disabled Golfer Can Use Cart*, ASSOC. PRESS, Aug. 31, 2000 (describing Jones' condition), available at 2000 WL 25992739.

Another story involves a twenty-five year old assistant professional from Orlando Florida who can only hit golf balls with his right arm. *See* Mike Purkey ed., *Seen & Heard*, GOLF MAG., Oct. 2000, at 24-29 (describing Ryan Ely's story). Ryan Ely has restricted use of the left side of his body because of a "near fatal breech delivery at birth that deprived his brain of oxygen for a few seconds." *Id.* at 24.

Ely is attempting to enter the PGA of America's Golf Professional Training Program ("GPTP"), which is a three-year program providing instruction for young professionals hoping to gain employment within the golf industry. *See id.* (describing GPTP). For Ely to be admitted to the GPTP, he must pass a playing ability test ("PAT"). *See id.* (noting that Ely must pass PAT). To pass the PAT, Ely would probably have to play thirty-six holes in one day and shoot a pre-determined score based on the golf course's USGA rating. *See id.* (explaining PAT). Ely's problem is that even his best scores are not low enough to pass the PAT. *See id.* (stating that despite fact that Ely can hit 240 yard drives while using only his right arm, and that Ely has respectable sixteen handicap, his disability essentially prevents him from shooting scores required by PGA).

PGA informed Ely that they would not waive the PAT for him. *See id.* (noting PGA's denial of waiver). According to Ely's father, the PGA's executive director informed Ryan that he could choose a course where he could ride a cart, would not have to play thirty-six holes in one day, and the course could be shortened to about six thousand yards. *See id.* (describing statements allegedly made to father by PGA official). Barring any problems in the future, Ryan Ely does not want to pursue the matter legally, however, hoping that he and PGA will come to an amicable arrangement. *See id.* (noting Ely's wish that his case does not become like Casey Martin's).

205. *See* Lane, *supra* note 194, at A8 (commenting that Court's intent to clarify scope of ADA is emphasized by their review of *Martin*); David G. Savage, *The Law Justices Agree to Tee One Up*, L.A. TIMES, Sept. 27, 2000, at A5 (stating that *Martin* will allow Court to clarify ADA).