3-1-2006

Fame, Fortune, and ... Fourteen-Hour Days - Open Casting Calls for Reality TV Contestants Are Pre-Employment Tests and Public Accommodations under the Americans with Disabilities Act

Carley G. Mak

FAME, FORTUNE, AND . . . FOURTEEN-HOUR DAYS? OPEN CASTING CALLS FOR REALITY TV CONTESTANTS ARE PRE-EMPLOYMENT TESTS AND PUBLIC ACCOMMODATIONS UNDER THE AMERICANS WITH DISABILITIES ACT

I. INTRODUCTION

As the eighty-third richest person in America,[1] Donald Trump can hardly be blamed for having discriminating tastes—as long as they stay within the confines of the law. Since 2004, millions of Americans[2] have seen how fastidious he can be on *The Apprentice*, as he whittles down a group of contestants from all walks of life competing for an executive post within his business empire.[3] Those who do not measure up to "The Donald's" standards are summarily dismissed with the harsh, dreaded phrase: "You're fired!"[4] The weekly elimination ritual is a familiar scheme in the competitive reality television genre, but with an employment opportunity as the grand prize, *The Apprentice* is essentially a corporate recruitment program and is, therefore, subject to federal laws governing employment, such as the Americans with Disabilities Act ("ADA").[5] While Trump can "fire" contestants based on their sub-par performance, nothing entitles him to engage in employment discrimination when it comes to selecting the contestants. As a business establishment that invites the public to attend casting calls, Trump's production company must

1. *Flashbacks*, FORBES, Oct. 10, 2005, at 44.

2. *See, e.g.*, Steve Rogers, *NBC's 'Apprentice' Finale Seen by 40 Million Viewers*, REALITYTVWORLD.COM, (Apr. 19, 2004), http://www.realitytvworld.com/news/nbc-apprentice-finale-seen-by-40-million-viewers-2495.php.

3. About The Apprentice 4, NBC.com, http://www.nbc.com/The_Apprentice_4/about (last visited Oct. 23, 2005). Each week, contestants are assigned to a wide spectrum of projects, ranging from selling lemonade to running celebrity golf tournaments. Reuters, *USA Today Web Site Names Wrong 'Apprentice,'* SIGNONSANDIEGO.COM, (Apr. 16, 2004), http://www.signonsandiego.com/news/business/20040416-0823-media-usatoday-apprentice.html.

4. *The Apprentice FAQ*, TELEVISION WITHOUT PITY, http://www.televisionwithoutpity.com /faq.cgi?show=125&q=2009 (last visited Feb. 17, 2006).

5. 42 U.S.C. §§ 12111–12117 (2000).

comply with the ADA by providing reasonable accommodations to would-be contestants with disabilities.[6] Unfortunately, when the show's producers developed their auditioning procedures, they did not meet the requirements of the ADA. The producers failed to comply with ADA rules regarding employment and failed to provide the requisite public accommodations. Hence, the contestant selection process of *The Apprentice* is illustrative of how persons with disabilities are excluded—often through inadvertent legal violations—from fair employment and equal participation in society.

One major problem with *The Apprentice* contestant screening process is a requirement that contestants be in "excellent physical and mental health."[7] According to those who have auditioned for the show, the vigorous process begins with a single tough question drawn from a wide range of subject areas; contestants who answer it well are invited for a call-back a few days later.[8] The initial test appears to probe a potential contestant's ability to engage others and think on their feet.[9] While it is conceivable that a person hired to oversee the operations of a renowned organization must have a high degree of mental acuity, it is much harder to justify a requirement for "excellent" physical health. The terms of the "good health" requirement are rather vague. What does "good health" mean? Does it require a good physical condition to the extent necessary to participate in the show, or is it a device for weeding out applicants considered by producers as too "troublesome" to put on the show because of a disability? James Schottel, an attorney who is quadriplegic and uses a wheelchair, believed the latter when he filed a lawsuit against the producers of the show.[10] He claimed that the show's "good health" requirement was discriminatory and violated the ADA.[11] Schottel sought a preliminary injunction to force the show's producers to drop the health requirement for the fourth installment's auditions.[12]

Schottel's lawsuit was settled shortly after it was filed.[13] As part of the settlement, producers of *The Apprentice* agreed to change the language

---

6. *Id.* § 12182(b)(2)(A)(ii)–(iii).

7. Complaint at 4, Schottel v. Trump Prod. LLC, No. 4:05cv00231ERW, 2005 WL 693341 (E.D. Mo. Feb. 4, 2005) [hereinafter Complaint].

8. *See* L. A. Johnson, *Wanted: Business Savvy; Several Sweat Out 'Apprentice' Auditions*, PITTSBURGH POST-GAZETTE, July 24, 2005, at B1.

9. *See id.*

10. Terry Rombeck, *Baker Alumnus Sues 'Apprentice,'* LAWRENCE J.-WORLD (Kansas), Feb. 10, 2005, http://www2.ljworld.com/news/2005/feb/10/baker_alumnus_sues/.

11. Complaint, *supra* note 7, at 5.

12. Rombeck, *supra* note 10.

13. *Quadriplegic Settles 'Apprentice' Lawsuit,* MSNBC.COM, (Mar. 9, 2005), http://www.msnbc.msn.com/id/7141917/.

on application forms so that persons with disabilities would be encouraged to try out for the show.[14] Nonetheless, the Schottel lawsuit begs the question of what may have happened if the lawsuit had been fully litigated. The answer carries enormous implications for *The Apprentice's* future and for reality programming in general. To continue the franchise's dominance of the airwaves, producers of *The Apprentice* have rolled out a second edition of the show featuring Martha Stewart.[15] In shows such as *American Idol* and *America's Next Top Model*, contestants are essentially vying for employment as recording artists and models, respectively. Given the persistence of career-centered reality shows, disability-related issues may very well be in the news again.

Now is the time for reality programmers to seriously observe the ADA, especially in light of trends in traditional, scripted shows. Historically, characters with disabilities have been stock characters for pity or comic relief; generally, they are not sufficiently developed to be taken seriously.[16] When they are not portrayed as helpless or "innocent fools," persons with disabilities are often visible in the media only as novelties.[17] For example, a blind character is more likely to be found in an "inspirational true story" than a comedy about six twenty-somethings living in New York. Only in recent decades have writers started to create more realistic characters whose disabilities are incidental to their roles. On *ER*, Kerry Weaver is a doctor with complex emotions.[18] Although she uses a cane, her disability is not central to her character; in fact, the cause of it was not revealed until the show's eleventh season.[19] *House*, a stand-out new series of the 2004–2005 season, features the eponymous doctor (Gregory House, who is played by Hugh Laurie) with a mobility impairment and drug addiction.[20] Although House is very much defined by his disability[21] and is quite unpleasant, he is popular for his acerbic wit.[22]

---

14. *Id.* The form now reads: "All applicants who believe they meet our criteria, including persons with disabilities, are welcome and encouraged to apply to be a participant." *Id.*

15. *See* Bill Carter, *Trump Redevelops His Own Series*, N.Y. TIMES, Aug. 31, 2005, at E1.

16. *See generally* Daniel B. Wood, *Projecting Images: Disabled are Proving to be Healthy Role Models*, CHI. TRIB., July 9, 1989, at Arts 29.

17. *See generally* Kathi Wolfe, *He's Your Inspiration, Not Mine*, WASH. POST, July 1, 2001, at B4.

18. *See Cast Biographies: Laura Innes*, NBC.COM, http://www.nbc.com/ER/bios/Laura_Innes.html (last visited Apr. 4, 2006) (touting Kerry Weaver as a "physically challenged yet fiercely independent" doctor).

19. Greatest Disabled TV Character, http://www.bbc.co.uk/ouch/yourspace/tvvote/kerry.shtml (last visited Feb. 22, 2006).

20. *See* Jewels Richardson, *He's in the House!*, BLOGCRITICS.ORG, (Sept. 9, 2005), http://blogcritics.org/archives/2005/09/19/025139.php.

21. *See* Jennifer Armstrong et al., *The Must List*, ENT. WKLY, June 24/July 1, 2005, at 36,

If the appeal of reality shows is drawn from the "real world," then programmers should include "real people," including those with disabilities. After all, scripted programming such as *ER* and *House* already demonstrates that viewers can relate to disabled characters without referencing their impairments.

This Comment explores why and how the ADA applies to reality programs as both employers (Title I) and public accommodations (Title III), and what factors increase the likelihood of success in a lawsuit such as Schottel's. Treating *The Apprentice* as a televised job interview rather than a public accommodation seems fitting in light of the grand prize, but may not be the best strategy for challenging preliminary auditioning practices. A plaintiff's success in an ADA employment action depends on one's ability to (1) define the functions of the job awarded as a grand prize, (2) explain why health guidelines employed in auditions are not essential in evaluating an applicant's job-related skills, and (3) demonstrate how the employer discriminated on the basis of disability.[23] The last prong of the prima facie case is difficult to prove because employment decisions are often subjective, especially early in the selection process.[24]

By contrast, it would be easier to sue the producers of *The Apprentice* under Title III because the legal tests for Title III are easier to meet. The major hurdle for a Title III challenge, such as demonstrating that the reality show production process will not be dramatically altered by a change in the "good health" requirement, is much more achievable than the elements of Title I. Additionally, a Title III challenge is preferable because case precedents are much more favorable to employees.[25] However, if a contestant progressed further in the auditioning process, he or she will have a greater likelihood of prevailing under Title I because there would likely be more evidence to prove bias by the producers. Part II provides an overview of the ADA and judicial interpretations of the ADA in employment, sports, and entertainment contexts.

Part III analyzes how statutory and common laws apply specifically to operations of reality programming. Finally, Part IV reviews what producers should do to ensure that their auditioning process is proper, and how would-be contestants who were discriminated against can vindicate

---

Gregory House is often described as "emotionally/physically broken." *Id.* Such terms suggest disability is a condition to be pitied, yet House's limp is also described as an attractive part of his character. *See id.*

22. *See* Richardson, *supra* note 20.

23. *See infra* Part III.B.

24. *See infra* Part III.B.

25. *See infra* Part II.B.2.

their rights.

II. BACKGROUND

A. The Americans With Disabilities Act—Statutory Provisions

In 1990, there were an estimated 43,000,000 Americans with mental or physical disabilities.[26] Congress recognized that Americans with disabilities are traditionally segregated, isolated, and discriminated against, with very few opportunities to address their grievances.[27] While some instances of discrimination were intentional, other discrimination occurred as an effect of policies and practices that simply did not account for the needs of Americans who are disabled.[28] As a means of eliminating discrimination, Congress enacted the ADA, using a set of "clear, strong, consistent, enforceable standards,"[29] implemented nationwide through the Interstate Commerce Clause and the Fourteenth Amendment.[30]

The ADA consists of three major components. Title I governs employment,[31] Title II concerns governmental entities,[32] and Title III focuses on private entities that are open to the public (also known as public accommodations).[33] Since the entertainment industry is privately operated, Title II does not apply. Therefore, this comment will focus only on Titles I and III. The scope of this discussion is limited to would-be contestants still in the audition process whose disabilities are known to television producers.[34]

Title I prohibits employers from discriminating against employees in the application process, hiring, promotions, discharges, and other "privileges of employment."[35] This article will addresses two types of discrimination under Title I. The first involves situations of disparate treatment, where an employer makes an adverse employment decision

26. 42 U.S.C. § 12101(a)(1) (2000).

27. *Id.* § 12101(a)(2)–(3).

28. *Id.* § 12101(a)(5).

29. Id. § 12101(b)(2).

30. *Id.* § 12101(b)(4).

31. *Id.* §§ 12111–12117.

32. 42 U.S.C. §§ 12131–12134.

33. *Id.* §§ 12181–12189.

34. The ADA protects individuals who are "regarded as" disabled from discrimination based on stereotypical assumptions. *See id.* §§ 12101(a)(7), 12102(2)(C). For simplicity's sake, this comment will keep discussion of the "regarded as" provision to a minimum.

35. Id. § 12112(a).

against a person with a disability because of an intentional or unintentional bias against the disability.[36] The second type of discrimination takes place when an employer refuses to make "reasonable accommodations" for an otherwise qualified individual.[37]

A number of specific ADA provisions apply to the hiring process. For example, employers must not use discriminatory "standards, criteria or methods of administration."[38] A test for employment, administered to an applicant with sensory, manual, or speech impairments must accurately and effectively reflect the applicant's skills and aptitude for the desired position, rather than gauging the applicant's disability.[39] Furthermore, the standards used cannot be designed to screen out, or tend to screen out, individuals with disabilities, unless the test is "job-related for the position in question and is consistent with business necessity."[40] Upon request, employers are also required to make accommodations for job applicants unless accommodations would create "undue hardship."[41] Employers cannot deny employment opportunity to a disabled job applicant, if the decision is based on the need to provide accommodation.[42]

On the other hand, the wording of Title I makes bringing and prevailing on a claim for employment discrimination difficult. Judicial interpretation of the statutory language also adds to the plaintiff's difficulty. First, the plaintiff must be a "qualified" person with a disability—that is, he or she must be able to perform "essential functions of the employment position" being applied for "with or without reasonable accommodation."[43] However, if reasonable accommodations create either an "undue hardship on the operation of the business"[44] or create a "direct threat"[45] to the health and safety of others, then employers are justified in not providing them. The "undue hardship" language allows employers to invoke the exception readily since an employer merely needs to show that accommodations involve "significant difficulty or expense."[46] "Direct threat" is much more narrowly defined than "undue hardship," but whether a particular individual poses a "direct threat" on the job is open to

36. *See id.* § 12112(b)(1)–(4), (6).
37. *Id.* § 12112(b)(5).
38. 42 U.S.C. § 12112(b)(3).
39. *Id.* § 12112(b)(7).
40. *Id.* § 12112(b)(6).
41. *Id.* § 12112(b)(5)(A).
42. *Id.* § 12112(b)(5)(B).
43. *Id.* § 12111(8).
44. 42 U.S.C. § 12112(b)(5)(A).
45. 29 C.F.R. § 1630.2(r) (2004).
46. 42 U.S.C. § 12111(10)(A).

interpretation.[47]

During the application process, employers may even utilize a test that screens out or tends to screen out disabled applicants as long as it is "job-related," "consistent with business necessity," and "cannot be accomplished by reasonable accommodations," making it difficult for job applicants to challenge an allegedly discriminatory pre-employment test.[48] These terms suggest that employers have a great deal of discretion in determining what is "necessary" or "job-related." In other words, the job applicant has the burden to prove that the employer's criteria are neither necessary nor job-related.

Finally, an employer can refuse or terminate employment to ensure that "an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."[49] Again, "direct threat" is a very malleable term, which the employer is thought to best assess given the needs of the workplace. Consequently the employer is implicitly authorized to define "direct threat."[50] The United States Supreme Court has adopted this broad interpretation.[51]

Title III prohibits discrimination 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."[52] The term "public accommodation" is defined in terms of twelve categories, ranging from hotels and restaurants to transportation depots.[53] The categories that especially pertain to entertainment include "a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment."[54] Both architectural barriers, such as rampless entries, and

47. 29 C.F.R. § 1640(r) (defining "direct threat" as "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation," but "[t]he determination that an individual poses a 'direct threat' shall be based on an individualized assessment").

48. 42 U.S.C. § 12113(a).

49. *Id.* § 12113(b).

50. *See* Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 85 (2002) (agreeing with EEOC's policy to give discretion to employers in assessing threats in the workplace, since the employer's "decision to hire would put Congress's policy in the ADA . . . at loggerheads with the competing policy of OSHA, to ensure the safety of 'each' and 'every' worker.").

51. *See id.* at 79–86 (rejecting a narrow interpretation of the boundaries of the "direct threat" defense).

52. 42 U.S.C. § 12182(a).

53. *Id.* § 12181(7). The twelve categories, in general terms, are (1) temporary lodging places such as hotels; (2) places that serve food and drink; (3) performance spaces; (4) places of public gathering; (5) retail locations; (6) businesses that provide services; (7) transportation depots; (8) places housing display collections, such as museums; (9) places of recreation; (10) educational institutions; (11) social services centers; and (12) sporting facilities. *Id.*

54. *Id.* § 12181(7)(C).

non-physical barriers, such as discriminatory practices or policies, are covered by Title III.[55] Like Title I, Title III also prohibits practices that "screen out, or tend to screen out an individual with [disabilities]," unless the criteria is absolutely necessary.[56] A public accommodation must provide "reasonable modifications" or "auxiliary aids" necessary to enable equal enjoyment and participation.[57]

However, there are also exceptions from Title III coverage. For example, religious organizations and private clubs are exempt from Title III.[58] An exception also exists for situations where accommodations would pose a "direct threat to health or safety,"[59] or constitute a fundamental alteration of the "goods, services, facilities, privileges, [or] advantages" in question.[60]

B. Judicial Interpretations of Statutory Language

The key terms used in Title I and Title III—such as "reasonable," "necessary," "fundamental alteration," "undue hardship," and "public accommodation,"—are broad in scope, covering many different types of discrimination without overly burdening employers and businesses. Yet, the lack of bright line rules has also resulted in an excess of litigation.[61] Because reality television is a relatively new phenomenon, however, cases directly related to reality TV are nonexistent; in fact, *Schottel v. Trump LLC*[62] is believed to be the first in asserting a Title I claim against producers of a reality television show.[63] Only one Title III case, *Rendon v. Valleycrest Productions, Ltd.*,[64] is directly on point with respect to television programs. Therefore, it is necessary to examine ADA cases in other forms of entertainment, or fields outside of entertainment, for interpretations of vague statutory terms.

---

55. *Id.* § 12182(b)(2)(A).

56. *Id.* § 12182(b)(2)(A)(i).

57. *Id.* § 12182(b)(2)(A)(ii)–(iii).

58. 42 U.S.C. § 12187.

59. *Id.* § 12182(b)(3).

60. *Id.* § 12182(b)(2)(A)(ii)–(iii).

61. Steven B. Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act*, 48 VAND. L. REV. 391, 397, 400–45 (1995).

62. Complaint, Schottel v. Trump Prod. LLC, No. 4:05CV00231ERW05cv00231, 2005 WL 693341 (E.D. Mo. Feb. 4, 2005).

63. *Trump Settles Discrimination Lawsuit Against 'The Apprentice,'* 29 DISABILITY COMPLIANCE BULLETIN 10, at 7 (2005).

64. Rendon v. Valleycrest Prods., Ltd., 294 F.3d 1279 (11th Cir. 2002).

1. Pre-employment Screening Cases

A plaintiff must satisfy three elements to establish a *prima facie* case for employment discrimination under Title I. One must (1) be a disabled person under the ADA, (2) be otherwise qualified to perform the job, and (3) suffer adverse employment action on the basis of disability.[65] The first step—determining whether the plaintiff has a disability within the meaning of the ADA—is not as simple as it appears. "Disability" is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual,"[66] but terms such as "substantially limits" and "major life activities" are not defined by statute. Federal regulations give meaning to some of the statutory terms. For example, "major life activities" typically refers to functions such as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[67] In the employment context, one's disability must "significantly [restrict] . . . the ability to perform either a class of jobs or a broad range of jobs."[68] For the most part, further judicial intervention is necessary to define the ground rules for statutory interpretation.

In *Sutton v. United Air Lines, Inc.*,[69] two sisters applied to become commercial airline pilots with United Air Lines ("United").[70] The applicants met United's "basic age, education, experience, and . . . [FAA] certification qualifications."[71] They were severely myopic (20/200 or worse); however, their corrected visions were 20/20 or better.[72] United invited both applicants for interviews and a flight simulator test, but later told them that a mistake had occurred because neither met United's minimum uncorrected vision requirement of 20/100.[73] They filed an ADA claim against United, alleging that the airline discriminated against them on the basis of actual or perceived disabilities.[74] The trial court held that the plaintiffs' vision impairment had not "substantially limited . . . major life activities" because their disability could be corrected. Furthermore, their

65. Rizzo v. Children's World Learning Ctrs., Inc., 84 F.3d 758, 763 (5th Cir. 1996).

66. 42 U.S.C. § 12102(2)(A) (2000).

67. 29 C.F.R. § 1630.2(i) (2004).

68. Id. § 1630.2(j)(3)(i).

69. Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).

70. *Id.* at 475.

71. *Id.* at 475–76.

72. *Id.* at 475.

73. *Id.* at 476.

74. *Id.* (stating that severe myopia is an actual "substantially limiting" impairment, or is perceived by United as such).

allegations were insufficient to show United foreclosed their possibility of employment in the airline industry.[75] The Tenth Circuit and the United States Supreme Court affirmed.[76] The Supreme Court held that, in determining whether a disability "substantially limits" a major life activity, the disability should be evaluated in light of potential corrective measures.[77] Here, because the job applicants' visions were correctable with aids, they were not "substantially limited."[78]

The *Sutton* Court declined to resolve whether working is a "major life activity."[79] There was no need for the Court to answer that question because the sisters only alleged that United perceived them as being unable to perform as "global airline pilot[s]" as opposed to being substantially limited in their abilities to work in the airline industry in general.[80] The Court held that the inability to work in one job is not a limitation to a major life activity.[81] Nevertheless, the Court "assume[d] without deciding" that working does fall into the "major life activit[ies]" category.[82]

The second prong of the *prima facie* case requires that a prospective employee meet certain qualifications of the position[83], which may or may not include physical fitness guidelines. The Supreme Court in *Sutton* delineated how employers can and cannot use physical attributes and conditions in their eligibility criteria.[84] Generally, the ADA allows employers to prefer certain physical characteristics and to set physical requirements.[85] Employers are free to decide which limiting factors, such as height or build, make certain applicants less desirable than others.[86] However, employers are not permitted to make decisions based on an impairment that *substantially* limits major life activities.[87] Although these distinctions are not very clear, they suggest the existence of a sliding scale between the more "trivial" physical characteristics and traits that we

75. *Sutton*, 527 U.S. at 476–77.

76. *Id.* at 494.

77. *Id.* at 488.

78. *Id.* at 488–89.

79. *See id.* at 492.

80. *Id.* at 493; *see also* 29 C.F.R. § 1630.2(j)(3)(i) (2004) (defining the term "substantially limits").

81. *Sutton*, 527 U.S. at 493 (stating that the job applicants failed to show that United believed the applicants were unqualified to work in the airline industry altogether, including positions such as regional pilot or pilot instructor).

82. *Id.* at 492.

83. Bekker v. Humana Health Plan, Inc., 229 F.3d 662, 670 (7th Cir. 2000).

84. *Sutton*, 527 U.S. at 490–91.

85. *Id.* at 490.

86. *Id.* at 490–91.

87. *Id.*

commonly perceive as part of an "actual" disability. This distinction is especially applicable in the entertainment industry because casting directors often look for people who are attractive, have a particular personality, or who possess some unique physical trait.[88]

Another important inquiry in employment-based ADA claims is whether pre-employment screening tests involving physical abilities actually relate to the "essential functions" of the job for which one is applying.[89] A test involving a person's physical functioning must, at the very least, have some objectivity and relate to an applicant's ability to perform on-the-job tasks.[90] Such minimum physical requirements are typical in fields such as law enforcement or commercial transportation. A number of cases have dealt with the extent to which employers in these fields can use these requirements in hiring decisions.

In *Valle v. City of Chicago*,[91] the Chicago Police Department hired plaintiff as a probationary police officer.[92] He enrolled in the requisite physical education classes, but was unable to fulfill a running requirement due to a muscle condition that causes muscle to break down under "heavy physical exertion."[93] Following this failure, the plaintiff was reassigned to clerical duty, and after another failed attempt to complete the training program, he asked for a leave of absence to pursue a "'physical reconditioning' program prescribed by his doctor."[94] He also asked for a relaxation of the running requirement to accommodate his disabilities, but the police department denied his request.[95] The police department eventually dismissed him.[96] The plaintiff then filed suit on the basis that the police department discriminated against him by failing to accommodate his disability.[97]

The trial court held that the plaintiff was clearly disabled because the inability to withstand "heavy physical exertion" interferes with the major life activity of working not only as a policeman, but a wide class of jobs

88. *See About The Apprentice*, *supra* note 3. The show prides itself in selecting contestants who have beauty, brains, and a variety of experiences. *Id.*

89. *See* Van Buskirk v. Ind. Fire Dept., 02-0889-C-T/K, 2004 U.S. Dist. LEXIS 19589, at *31 (S.D. Ind. May 12, 2004).

90. *See id.* at *29.

91. Valle v. City of Chicago, 982 F. Supp. 560 (N.D. Ill. 1997).

92. *Id.* at 562.

93. *Id.* Police recruits had to demonstrate the ability to run one and a half miles in less than fifteen minutes.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Valle*, 982 F. Supp. at 562.

that require "heavy physical exertion."[98] Although the police department argued that the requirement to run a mile and a half within a certain time was an "essential function" of being a probationary officer, the court disagreed.[99] Instead, the court distinguished threshold requirements for obtaining a job (such as the running requirement) from requirements that are essential to doing the job.[100] Since the running requirement had the effect of screening out persons with disabilities, the police department had the burden of proving the running test was job-related and comported with business necessity.[101]

Once the plaintiff establishes this second prong, the third prong of the *prima facie* case requires that the plaintiff suffer adverse employment action on the basis of disability.[102] When the plaintiff is suing for lack of reasonable accommodation, it is not necessary to prove adverse employment action if the plaintiff meets the other elements of the *prima facie* case.[103] Oftentimes, plaintiffs mount facial challenges to employment policies or actions on the theory that they were treated differently than their non-disabled peers.

Two methods can be used to show that employment discrimination arose out of a bias against disabled applicants. The plaintiff can either provide direct or indirect evidence that "the employment decision was motivated by the employer's discriminatory animus."[104] Direct evidence "in and of itself suggests" that the employer was "animated by an illegal employment criterion."[105] With such direct evidence, the court presumes that the employer intentionally discriminated against the plaintiff.[106] The employer then must overcome the presumption of intentional discrimination by offering legitimate, non-discriminatory reasons for an adverse employment decision.[107]

Unfortunately, there is often no "smoking gun" evidence in employment discrimination cases,[108] especially in an entertainment industry that routinely uses highly subjective casting criteria. Under such

98. *Id.* at 565.

99. *See id.* at 566.

100. *Id.*

101. *Id.*

102. *Bekker*, 229 F.3d at 670.

103. *See* Nawrot v. CPC Int'l, 259 F. Supp. 2d 716, 723 (N.D. Ill. 2003).

104. *Bekker*, 229 F.3d at 670 (quoting Bellaver v. Quanex Corp., 200 F.3d 485, 492 (7th Cir. 2000)).

105. *Id.* (quoting Venters v. City of Delphi, 123 F.3d 956, 972 (7th Cir. 1997)).

106. *See* Nighswander v. Henderson, 172 F. Supp. 2d 951, 957–59 (N. D. Ohio 2001).

107. *See id.* at 957.

108. *See* Robin v. Espo Eng'g Corp., 200 F.3d 1081, 1088 (7th Cir. 2000).

circumstances, a plaintiff may use indirect evidence of intentional discrimination to prove, beyond the standard *prima facia* elements, that: (1) the employer knew or had reason to know of the plaintiff's disability, and (2) similarly situated persons without disabilities were treated differently.[109] Once plaintiffs demonstrate these elements, "the defendant must offer a legitimate reason for the defendant's actions."[110] However, plaintiffs must still prove that any explanation from the defendant is "false or pretextual."[111]

Adverse employment actions necessarily involve either formal or informal checklists of qualities dictating whether an applicant is desirable or not. When an employer uses a test that screens out or tends to screen out persons with disabilities, the employer must demonstrate a compelling business-related reason for doing so. In *Morton v. United Parcel Service, Inc.*,[112] a warehouse worker for the United Parcel Service ("UPS") sued the company for failing to provide adequate accommodations.[113] The employee, who had severe hearing impairments, had applied for the position of "package car driver."[114] Although she passed UPS's written and driving tests, the employee's disability precluded her from receiving the Department of Transportation ("DOT") certification UPS required for package driver applicants.[115] The employee requested that UPS hire her to drive vehicles that did not require DOT certification ("non-DOT vehicles") as an accommodation for her disability, but UPS denied the request.[116] UPS claimed that the DOT certification was necessary for all drivers, including those who drove non-DOT vehicles; because the plaintiff was not able to obtain certification, she was unable to perform "essential functions" of the job.[117]

In its majority opinion, the Ninth Circuit Court of Appeals held that there was a question of fact as to whether the DOT requirement was related to the "essential functions" of driving non-DOT vehicles,[118] and reversed the district court's summary judgment ruling in favor of UPS.[119] The court found there was a lack of evidence on the record that such requirements

109. *Nighswander*, 172 F. Supp. 2d at 958.
110. *Id.*
111. *Id.*
112. Morton v. United Parcel Service, Inc., 272 F.3d 1249 (9th Cir. 2001).
113. *Id.* at 1252.
114. *Id.* at 1251.
115. *Id.*
116. *Id.*
117. *Id.* at 1253.
118. *Morton*, 272 F.3d at 1256.
119. *Id.* at 1265.

related to risk factors that affected the driving of non-DOT vehicles.[120] Therefore, UPS could not demonstrate as a matter of law a "business necessity" in using an across-the board screening test that tended to exclude disabled workers who could not obtain DOT certification.[121] The court remanded the case to the district court for further fact development.[122]

As *Morton* demonstrates, employers are limited in how they can consider an applicant's disability in assessing performance ability and in the way they can use a job applicant's health as a factor in final hiring decisions. First, employers cannot refuse to hire a person simply because the employer assumes the applicant's health would make him or her unfit for the position.[123] If an employer decides not to hire a person because of past or present health problems, it must be out of a "business necessity," or the applicant's condition must pose a "direct threat" to the safety and health of others.[124] The factors a court considers in determining what constitutes a "direct threat" are: "(1) [t]he duration of the risk, (2) [t]he nature and severity of potential harm, (3) [t]he likelihood that the potential harm will occur, and (4) [t]he imminence of the potential harm."[125]

In *Equal Employment Opportunity Commission v. Blue Cross Blue Shield of Connecticut*,[126] the government sued on behalf of a job applicant who was offered a dishwasher position by Blue Cross contingent upon the results of a physical examination performed by a Blue Cross doctor.[127] Blue Cross offered the applicant the job because they had been pleased with his work experience, but upon learning that the applicant had a kidney disorder (which Blue Cross perceived as a disability), Blue Cross rescinded the offer.[128] Blue Cross stated that it required all applicants for positions involving physical labor to submit to a physical examination to ensure that the prospective employee did not have a communicable disease, and therefore was not a "direct threat" to others.[129] In this case, however, the disease was not communicable, and thus, the only person endangered by the kidney condition was the applicant. The parties were in dispute over

120. *Id.*

121. *See id.* at 1263.

122. *Id.* at 1265.

123. *See* Olson v. Gen. Elec. Astrospace, 101 F.3d 947, 955 (3d Cir. 1996).

124. Equal Opportunity Employment Comm'n v. Exxon Corp., 203 F.3d 871, 873 (5th Cir. 2000).

125. 29 C.F.R. § 1630.2(r) (2004).

126. Equal Opportunity Employment Comm'n v. Blue Cross Blue Shield of Connecticut, 30 F. Supp. 2d 296 (D. Conn. 1998).

127. *Id.* at 297–98.

128. *Id.*

129. *Id.* at 298.

whether Blue Cross received subsequent notification from the applicant's own doctor stating that the applicant's condition was not as serious as was previously thought, and that, in the opinion of his doctor, the applicant was fully employable.[130] This disputed fact was material because an employer's determination that an employee posed a "direct threat" must be based on a "reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence."[131] If Blue Cross did not receive the additional information from the applicant's personal physician, the rescission would have been appropriate because the job demands presented significant risks to the applicant's health; employers are not required to wait until a definitive diagnosis is made before making a hiring decision.[132] However, if Blue Cross had been notified by the applicant's doctor, its decision to rescind the offer would not have been reasonable, nor would it have been based on the most current medical information.[133]

If an employer makes inquiries about a person's health, the questions must be closely related to essential job functions and be narrowly tailored in this regard. Several Title II cases involving bar examinations address the medical disclosure issue. In *Clark v. Virginia Board of Bar Examiners*,[134] the plaintiff took the Virginia bar examination and passed it, but was denied a license because she refused to answer a question on the Board's character and fitness questionnaire.[135] The question she refused to answer, question 20(b), asked whether the applicant had been "treated or counseled [sic] for a mental, emotional or nervous disorders" for the past five years, and if so, to provide more detailed information about the treatment.[136] An affirmative answer to the question had never resulted in the denial of a license.[137] The court acknowledged the importance of screening out those who are unfit to practice law, but held that the test question offered no value in evaluating the applicant's present and future ability to practice law because it was too broad.[138]

In *Doe v. Judicial Nominating Commission for the Fifteenth Judicial*

130. *Id.* at 299–300.

131. *Id.* at 306 (quoting 29 C.F.R. § 1630.2(r)).

132. *Blue Cross Blue Shield of Connecticut*, 30 F. Supp. 2d at 307.

133. *See id.*

134. Clark v. Virginia Bd. of Bar Exam'rs, 880 F. Supp. 430 (E.D. Va. 1995).

135. *Id.* at 433.

136. *Id.*

137. *Id.* at 437 (noting that the Board recovered only 47 affirmative responses to question 20(b) out of over 2000 applicants, a number well below the expected hit rate based on the general population).

138. *Id.* at 435–36.

Circuit of Florida,[139] the plaintiff sought to enjoin the commission, which was responsible for selecting applicants to fill judicial vacancies, from asking certain questions that violated the ADA.[140] The questions ranged from a very general question of an applicant's current state of health to whether the applicant had been treated for any form of mental illness or emotional disturbances in the past five years.[141] The commission argued that these questions were needed to ensure that applicants had a "wide range of cognitive skills and physical endurance" because judges are vested with such enormous powers and responsibilities.[142] The court agreed that the business necessity exception justified the Commission's use of "criteria which screen out, or tend to screen out, individuals with a disability," provided that the questions were reasonable and narrowly drawn.[143] However, by asking for *any* instances of mental illness, emotional disorders, or hospitalizations for mental health reasons, the Commission probed aspects of the applicant's health that had nothing to do with job performance.[144] Therefore, the Commission was enjoined from using those questions.[145]

2. Public Accommodations

While the employment aspect of television auditions is relatively novel, the public accommodation component is hardly new to the entertainment industry. Although *Rendon v. Valleycrest Prod.*[146] is the only case pertaining to television auditions, there is a solid body of common law based on sports, which is analogous to the competitive nature of reality TV shows.[147]

Rendon is a class action suit brought by potential contestants of the TV game show *Who Wants to Be a Millionaire* ("*Millionaire*").[148] The plaintiffs alleged that the contestant selection process screened out, or tended to screen out, those with mobility and hearing impairments.[149] The

139. Doe v. Judicial Nominating Comm'n, 906 F. Supp. 1534 (S.D. Fla. 1995).

140. *Id.* at 1537.

141. *Id.*

142. *Id.* at 1540.

143. *Id.* at 1541.

144. *Id.* at 1544.

145. *Judicial Nominating Comm'n*, 906 F. Supp. at 1545.

146. *Rendon*, 294 F.3d 1279.

147. *See, e.g.*, PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001) (regarding competitive sports, the ADA, and accommodations).

148. *Rendon* at 1280.

149. *Id.*

defendants included the American Broadcasting Corporation ("ABC") and Valleycrest, a production company that operated the phone-based contestant selection system.[150] The "fast finger" contestant selection process operated as follows: first, aspiring contestants were invited to call a toll-free number, which lead to an automated telephone answering system.[151] Then, the system would prompt callers to answer a series of questions "by pressing the appropriate keys on their telephone keypads" within a short time frame.[152] The plaintiffs claimed that the system was discriminatory because persons with mobility disabilities would never qualify due to the fact that they could not move their fingers fast enough.[153] Furthermore, they alleged that those who are deaf or hearing impaired were unable to participate at all because the system was not accessible through TDD.[154]

The only legal question *Rendon* addressed was whether the contested system constituted a public accommodation within the meaning of Title III of the ADA.[155] There was no discussion of what modification would be reasonable such that disabled individuals could participate without imposing an undue burden on the defendants.[156] The trial court dismissed the suit on the grounds that an automated telephone system was not administered as a "palpable public accommodation."[157] In reversing the judgment, the Eleventh Circuit held that the selection process was a public accommodation.[158] If there were any criteria that had to be met by a phone system before it qualified as a "public accommodation," at most it would be "a nexus between the challenged service and the premises of the public accommodation."[159] Although the telephone process did not take place within a fixed physical space, the court held that a nexus clearly existed because the plaintiffs tried to gain a chance to compete—a privilege provided at the ABC studios.[160] The defendants' practices amounted to an intangible barrier blocking the entrance to the studio where the contest took

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 1280–81.

154. TDD stands for Telecommunications Devices for the Deaf, a service that helps people who are deaf make telephone calls. *Rendon*, 294 F.3d at 1280–81 n.1.

155. *See id.* at 1282.

156. *Id.*

157. *Id.* at 1281.

158. *See id.* at 1286.

159. *Id.* at 1285 n.8.

160. *Rendon*, 294 F.3d at 1285 n.8. The chance to compete for one million dollars was held to be an "advantage" or "privilege" under Title III. *Id.* at 1283.

place.[161]

Since *Rendon* did not resolve the issue of what type of accommodations are reasonable when screening for contestants, lawyers must look to cases outside of the television context. Sports cases serve as a fitting analogy to reality TV programs. Both sports and reality TV shows involve competition between individuals, and both are broadcast through the same medium. There is nothing closer to "reality" than sports, because viewers see the competition on the athletic field in realtime. Rules and eligibility requirements are inherent in competitions, ensuring a level playing field; hence, "reasonable accommodations" become relevant.[162] On the one hand, accommodations are necessary to ensure that individuals with disabilities have an equal chance to participate.[163] On the other hand, accommodations must be made with caution, lest they change the rules to such a degree that the competition becomes something else entirely.[164] Worse yet, as some critics claim, accommodations may confer an unfair advantage.[165]

Several cases discuss accommodations in the realm of the eligibility requirements in scholastic sports. With regard to requirements that participants be in good health, courts have ruled in favor of school officials on health and safety grounds. In *Pahulu v. University of Kansas*,[166] a college football player was barred from further competition after he was diagnosed with a congenital disorder in his cervical vertebrae, which predisposed him to a high risk of neurological injury.[167] Pahulu lost his ADA claim because his impairment was not a disability within the meaning of the ADA.[168] The court added that, even if it was, he did not meet basic requirements that were essential to participation, namely health

161. *See id.*

162. *See* Henry T. Greely, *Disabilities, Enhancements, and the Meanings of Sports*, 15 STAN. L. & POL'Y REV. 99, 122–25 (2004).

163. 42 U.S.C. § 12101(a)(8) (2000).

164. *See PGA Tour*, 532 U.S. at 682.

165. *See id.* at 671.

166. Pahulu v. Univ. of Kansas, 897 F. Supp. 1387 (D. Kan. 1995).

167. *Id.* at 1388–89.

168. *See id.* at 1393; *see also* 42 U.S.C. § 12102(a) (defining disability as a physical or mental impairment which "substantially limits one or more of the major life activities"). For something to be considered a "major life activity," it must involve basics of daily living, such as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 28 C.F.R. § 35.104 (2004). Although the Court recognizes playing football as a "major life activity" because it is a form of learning, the school's actions were held not to be a "substantial limitation" of Pahulu's opportunity to learn, since his athletic scholarship was not cut off and he could participate in the football program in other capacities. *Pahulu*, 897 F. Supp. at 1393.

clearance.[169] The trial court declined to second-guess the disqualification decisions since they were reasonable and substantiated by medical evidence.[170]

In *Doe v. Woodford County Board of Education*,[171] officials at a high school placed a "hold" on the athletic eligibility of a student who was diagnosed with hepatitis B and hemophilia, an action contrary to a school policy of automatically selecting all ninth-graders as members of junior varsity teams.[172] The Sixth Circuit found that the school made its decision in order to determine whether allowing the student to play would endanger fellow players.[173] Although aware of the need to protect the student's rights under the ADA, the court deferred to the school's judgment.[174]

For eligibility requirements other than health, the analysis is more complex. In *Matthews v. National Collegiate Athletic Association*,[175] a college football player with a learning disability challenged the National Collegiate Athletic Association's ("NCAA") minimum academic requirement after he was declared academically ineligible.[176] Matthews requested a waiver of the requirement on the basis of disability.[177] After his request was denied, he sued the NCAA under Title III, alleging that the NCAA failed to provide reasonable accommodations.[178] The court used a four-part test requiring the plaintiff to demonstrate that: (1) he had a qualifying disability, (2) he met the "essential eligibility requirements . . . with or without accommodation," (3) his disability was the only thing preventing him from participation, and (4) the defendant was an entity covered under the ADA.[179]

Although Matthews met the first requirement, the court held that the NCAA was not a "public accommodation" because it was not specifically affiliated with a particular location open to the public.[180] Additionally, since one of the NCAA's primary purposes is to ensure student-athletes do

169. *Pahulu*, 897 F.Supp. at 1394.

170. *See id.*

171. Doe v. Woodford County Bd. of Educ., 213 F.3d 921 (6th Cir. 2000).

172. *Id.* at 923.

173. *Id.* at 926.

174. *Id.*

175. Matthews v. NCAA, 79 F. Supp. 2d 1199 (E.D. Wash. 1999).

176. *Id.* at 1201–02. Student-athletes are required to take at least 75% of their classes during the academic year, no more than 25% during summer school. *Id.* at 1202. Matthews was ruled ineligible because he only took 64% of his classes during the regular academic year. *Id.*

177. *Id.*

178. *Id.* at 1203.

179. *Id.* at 1204.

180. *Id.* at 1204–05.

well both in the classroom and on the field, academic criteria are essential to eligibility.[181] The NCAA already made reasonable accommodations by providing two prior waivers, after which Matthews still failed to meet the minimum requirements.[182]

A leading case for reasonable accommodations in sports is *PGA Tour v. Martin*.[183] Under rules established by the Professional Golf Association ("PGA"), which sponsors professional golf tournaments, a player may use a golf cart during open qualifying rounds, but is required to walk during the final qualifying round and during tournaments.[184] Casey Martin was a professional golfer who had a circulation disorder that made walking extremely painful.[185] Due to the progression of his condition, Martin became unable to walk the entire eighteen-hole course.[186] He made a request to the PGA "for permission to use a golf cart [for] the third stage," but the PGA refused to revise the walking rule or even to review Martin's request.[187]

The trial court granted Martin's motion for a preliminary injunction to use the golf cart in the last qualifying round and in tournaments.[188] The PGA lost its appeal to the Ninth Circuit and appealed again to the United States Supreme Court.[189] The PGA argued that Martin's claim was not actionable under Title III because Martin was not a "client or customer" seeking "goods or services."[190] Rather, it argued that Martin was a provider of entertainment, which meant his claim was "job-related," and thus only within the purview of Title I.[191] The PGA further argued that because Martin essentially was an independent contractor, he had no claim even under Title I.[192] The Supreme Court rejected these arguments and found Title III applicable.[193] Since golfers had to pay $3,000 to enter the tournament, they effectively became "clients" who purchased the "privileges" to participate in and watch the tournament.[194]

---

181. *See Matthews*, 79 F. Supp. 2d at 1206.
182. *Id.* at 1206–07.
183. *PGA Tour*, 532 U.S. 661.
184. *See id.* at 666–67.
185. *Id.* at 668.
186. *Id.*
187. *Id.* at 669.
188. *Id.*
189. *See PGA Tour*, 532 U.S. at 673–74.
190. *Id.* at 678.
191. *Id.*
192. *Id.*
193. *Id.* at 679–80.
194. *Id.*

Next, the PGA conceded that a golf cart may be a "reasonable accommodation" given Martin's condition, but it asserted that providing one would be inappropriate because it constituted a "fundamental alteration" of tournament play.[195] This argument also failed to persuade the Court.[196] In determining whether an accommodation was a "fundamental alteration," the Court focused on whether the rule or policy being modified affected an "essential" aspect of the game.[197] Such would be the case if either the change conferred advantages exclusively to a disabled individual, or if the change was so drastic that it became unacceptable, even if everyone was affected equally.[198] First, the Court examined whether the use of carts was "inconsistent with the fundamental character of the game[.]"[199] It determined that walking to a hole was not an essential attribute of golf.[200] Second, the Court addressed whether an accommodation would confer an unfair advantage over the other players.[201] The PGA argued that Martin's fellow competitors would be more fatigued by walking and thus be at a serious disadvantage.[202] The Court disagreed, finding fatigue from walking insignificant.[203] Nevertheless, instead of instituting a blanket rule, the Court urged an individual assessment of each request for accommodation in order to determine what is reasonable for a given situation.[204]

While the Court in *Martin* based its decision on public accommodations, the Court addressed a Title I concern regarding tryouts in dicta.[205] The Court stated that not everyone who "seeks a job" by playing at an "open tryout" would be a "customer"[206] since golfers need only commit to fifteen tournaments and are "not bound by any obligations typically associated with employment."[207] In addition, the Court asserted that it did not consider the qualifying rounds as a "hiring" process; rather,

195. *PGA Tour*, 532 U.S. at 682.

196. *Id.* at 683.

197. *Id.* at 683 n.38.

198. *Id.* at 682–83.

199. *Id.* at 683.

200. *See id.* at 683–85. The whole point of golf, as governed by the Rules of Golf, is to hit a ball with a club into a hole. The Court noted that nothing in the Rules of Golf penalizes the use of a golf cart; the walking rule is merely an "optional condition buried in an appendix to the Rules of Golf." *PGA Tour*, 532 U.S. at 683–85.

201. *Id.* at 686–87.

202. *Id.* at 686.

203. *Id.* at 687.

204. Id. at 688.

205. *Id.* at 680 n.33.

206. *PGA Tour*, 532 U.S. at 680 n.33.

207. *Id.* at 680.

the rounds simply narrowed the field of participants in tournaments.[208] This dicta is irrelevant to the reality TV contestant auditioning process because the field of play is narrowed through competition during the show, rather than at an earlier point.

III. APPLICATION TO REALITY PROGRAMMING

For reality programs that award a job as a grand prize, the criteria and practices used in selecting contestants can be challenged under Titles I or III.[209] Since producers of reality shows invite the public to try out, the audition can be treated as a public accommodation under Title III in the same manner as *Rendon*.[210] At the same time, the auditioning process and the reality program itself may be treated as an unorthodox series of job screening tests. Therefore, criteria used to select contestants must comport with Title I of the ADA. If the criteria screen out applicants who have disabilities, the rejected applicants can either attack the criteria as being facially discriminatory or as lacking in reasonable accommodation.

A. Title III Litigation Strategies

Challenging a "good health" requirement under Title III is the more straightforward approach for two reasons: (1) there is no question that entertainment falls under the purview of the ADA, with prior cases on sports and entertainment serving as favorable precedents;[211] and (2) there is also no need to spend time convincing a court that a reality show is also a job interview. Consequently, the only legal question is whether changing the "good health" requirement is a reasonable accommodation. The answer is a resounding "yes."

Rendon firmly established that public auditions constitute public accommodations;[212] by the same rationale, *The Apprentice* auditions are also public accommodations. Although activities on *The Apprentice* take place at multiple locations, the show closely parallels *Rendon* because rejected applicants are denied a chance to compete in "the Boardroom," a fixed location closely identified with the show where the ultimate prize is awarded.[213] While *The Apprentice* auditions do not present the same type

208. *Id.*

209. *Supra* Part II.A.

210. *Supra* Part II.B.2.

211. 42 U.S.C. 12181(7) (2000); *see also PGA Tour* 523 U.S. at 677; *Rendon*, 294 F.3d at 1283.

212. *Supra* Part II.B.2.

213. *See* The Apprentice: About the Show, http://apprentice.tv.yahoo.com/03/theshow/

of equal-access impediment as *Rendon*, the "good health" requirement nonetheless exists as a barrier to participation since its vague nature can be misinterpreted by both would-be contestants and casting directors alike.

With respect to standards, the ADA specifically forbids methods of administration that effectively discriminate on the basis of disability.[214] However, different casting directors may have varying ideas about the meaning of "good health." Inconsistent application may screen out persons with disabilities. Due to the continual bombardment of images of tanned, chiseled bodies as paragons of "health," and given the high value society places on exercise and athleticism, a casting director may easily mistake muscular tone or lifestyle activities such as running, biking, or surfing as being the paragon of "good health." A person who uses a wheelchair may be athletic and in "good health," but not meet the "good health" standard because he or she is unable to perform many of those activities. The "good health" requirement would effectively deter potential contestants with disabilities because they know that casting directors are chasing after the version of "health" propagated by the media. Thus, a disabled person may be disinclined to apply in order to avoid being stereotyped and summarily rejected.

Under Title III, the issue arises as to whether modifying the "good health" requirement constitutes a "fundamental alteration" of a television program's mode of operations, or whether such a change would merely be a reasonable accommodation.[215] In *PGA Tour v. Martin*, the Supreme Court recognized two situations in which a modification constitutes a "fundamental alteration."[216] Unlike the Rules of Golf in *Martin*,[217] no fundamental rules govern how reality shows are supposed to operate. Despite the increasingly scripted nature of reality shows, a fixed format is an anathema to the genre since the appeal of reality TV springs from the "spontaneity" of cast members. However, since each show usually has a specific theme, the *Martin* test may still be used to pinpoint the underlying core values of a reality program by examining what tasks are performed and why.

Altering or even removing the "good health" requirement is a reasonable accommodation under the *Martin* test. The first category

about.html (last visited Dec. 1, 2005).

214. 42 U.S.C. § 12182(b)(1)(D)(i) (2000).

215. *PGA Tour*, 532 U.S. at 681–82.

216. *Id.* at 682–83 (noting that a fundamental change can occur either by altering a universal aspect of the game or by providing an individual player with an advantage over other competitors).

217. *Id.* at 684.

determines whether the proposed modification would so drastically change an essential aspect of a program or service for everyone such that the program or service would become "unacceptable."[218] In *Martin*, walking to a hole was not an essential attribute of golf since the ultimate goal of the game is to hit a ball into a hole.[219] In *The Apprentice*, the essential nature of the game for a contestant is to prove that he or she has the best leadership skills, which are demonstrated through a number of activities.[220] The contestants work in teams headed by a particular member, who is expected to draw up plans to accomplish the mission, delegate the workload, keep teammates from bickering amongst themselves, and ultimately ensure that everyone on the team cooperates to complete the project.[221] While it may be important to travel around quickly or lift heavy objects as part of the project, physical ability is certainly not essential to *The Apprentice* to the same extent as shows such as *Survivor*, *The Amazing Race*, or *Fear Factor*. For example, contestants in *Survivor* find themselves in places with remote and rugged terrains and stay in the game by forming alliances, pooling resources, and cooperating with each other.[222] Despite having the best strategy, a contestant cannot prevail without physical strength and agility; ultimately, a contestant's fate lies in his or her ability to literally out run or out swim the competition during each episode.[223] By contrast, *The Apprentice* is widely recognized as a forum where contestants prove they are capable of surviving in the concrete jungle through the performance of "business oriented tasks," not by how quickly they can dodge alligators.[224]

The second category of fundamental alteration in *Martin* occurs when an accommodation would confer an unfair advantage over everyone else.[225] Removing the "good health" requirement from *The Apprentice* would not give persons with disabilities an unfair advantage, since it would not be accompanied by a preferential provision for persons with disabilities. In

218. *Id.* at 682.

219. *See id.* at 683.

220. The Apprentice: About The Show, *supra* note 213.

221. *See generally* The Apprentice: Episode 2 "Motel Mogul," YAHOO! TV, http://apprentice.tv.yahoo.com/03/theshow/boardroom/episode2.html (last visited Dec. 1, 2005) (illustrating how a failure to delegate and to control infighting led to the downfall of one contestant).

222. *See generally* Miss Alli, *Panicked, Desperate, Thirsty as Hell*, TELEVISION WITHOUT PITY, http://www.televisionwithoutpity.com/story.cgi?show=47&story=6171&page=5 (last visited Dec. 1, 2005) (describing a typical relay race as seen on Survivor).

223. *See id.*

224. The Apprentice: About The Show, *supra* note 213.

225. *PGA Tour*, 532 U.S. at 683.

fact, everyone would be treated equally without regard to health status.

Since the "good health" requirement does not qualify as a fundamental alteration under either category in *Martin*, reasonable accommodations can only be denied if the direct threat and undue burden defenses apply.[226] In the case of *The Apprentice*, they clearly do not. There are no health and safety issues associated with removing the "good health" requirement that fails to address legitimate health conditions that are hazardous for the individual and for others on the program. Since the overbroad criterion is neither very useful nor heavily relied upon by casting directors, removing the "good health" requirement does not constitute an undue burden. Therefore, a modification of the "good health" requirement is a reasonable accommodation under Title III.

B. Title I Litigation Strategies

With respect to discriminatory pre-employment screenings, a person rejected by producers can pursue two avenues. First, a plaintiff can allege that the employer failed to provide reasonable accommodations because the employer chose criteria that screen out, or tend to screen out, applicants with disabilities.[227] Second, the rejected applicant can claim that he or she suffered an adverse employment action due to discriminatory hiring practices.[228] To challenge the policies facially, Schottel used the former strategy in his lawsuit, claiming that producers used standards that discriminated against persons with disabilities and that contestants were classified in a way that those with disabilities suffered adverse actions.[229] In the employment context, the employee/applicant must request accommodations; therefore, a lack of accommodation claim will fail if the plaintiff did not ask for it prior to filing suit.[230] However, if the plaintiff made a request for accommodation but the employer expressly refused to change the pre-employment screening policies, the plaintiff can bypass the third and most difficult *prima facie* prong.

To prove that "good health" functions as a screening mechanism for individuals with disabilities, Schottel must meet the three *prima facie* elements of employment discrimination: (1) he is a disabled person under the ADA, (2) he is otherwise qualified to perform the job, and (3) has

226. *Supra* Part II.A.

227. *Supra* Part II.B

228. *Id.*

229. *See* Complaint, *supra* note 7, at 3.

230. Wallin v. Minn. Dept. of Corr., 153 F.3d 681, 689 (8th Cir. 1998).

suffered adverse employment action on the basis of disability.[231] The first two elements are met with relative ease, but the last one is substantially more difficult.

Applying the "mitigating measures" standard from *Sutton*, Schottel is clearly a person with a disability as defined by the ADA.[232] He uses a wheelchair as a corrective device, and to the extent that the wheelchair helps him travel, Schottel still cannot perform "major life activities" such as walking or climbing stairs. Therefore, no further analysis is necessary to determine whether Schottel's disability substantially limits the "major life activity" of working.

Secondly, Schottel can prove that he is qualified to perform the job by showing that "good health" is a nominal requirement rather than an essential function of the job. In the case of *The Apprentice*, the job description should be that of a corporate executive and not that of an athletic reality show contestant. The job descriptions and physical demands for a "reality TV actor" are different than those for a "corporate executive." Thus, an applicant in Schottel's position should characterize his audition as an application for a corporate position rather than an application to participate in a reality show. Producers of reality TV may claim that because of the "unpredictable" nature of reality shows, "actors" must be able to run, jump, stand for hours, and handle other physically taxing tasks. In contrast, characterizing the audition as an application for an executive position bypasses an inquiry into what tasks contestants have to perform on the program. The focus is on the ultimate prize of the show—a job with the Trump organization—and how a discriminatory screening criterion precludes a disabled applicant from being employed.

Based on common sense notions of corporate requirements for executives, it is not difficult to prove that Schottel is an "otherwise qualified individual." Employers generally require candidates for executive positions to have years of work experience and a certain level of education, usually a Bachelor's Degree.[233] Obvious skills necessary to manage a business include leadership, effective communication, critical

231. *Rizzo*, 84 F.3d at 763.

232. *See Sutton*, 527 U.S. at 480. *See also* Belk v. Southwestern Bell Tel. Co., 194 F.3d 946, 950 (8th Cir. 1999) (applying the *Sutton* "mitigating measures" rule to a situation where a leg brace for a plaintiff who had a pronounced limp as a result of polio allowed the plaintiff to walk, but not in the same way as someone who never had polio, and thus, the plaintiff was disabled for the purpose of the ADA).

233. *See generally* search results for "Executive Officer" on Monster.com, http://jobsearch.monster.com/jobsearch.asp?q=executive+officer&cn=&sort=rv&vw=b&cy=US&re=14&brd=1%2C128%2C1862%2C1863 (last visited Dec. 1, 2005) (providing ever-changing job listings with employment duties, responsibilities, and requirements).

and creative thinking, willingness to endure long working hours, and the ability to travel. "Good health" is certainly not a "skill" or "requirement" for employment. While health and mental sharpness are certainly critical in maintaining peak work performance, courts have established that physical and mental health requirements cannot be overbroad; rather, they must be narrowly tailored to address specific demands of a job position.[234] Similar to the bar examination cases,[235] the "good health" requirement is overly broad because it does not specify the types of physical and mental conditions that would adversely affect an applicant's ability to perform as a corporate executive. If producers are concerned that absenteeism resulting from illness decimates the ability to run a company, or that mental disabilities may render the winner unable to do the job, they are entitled to condition the offer to compete upon the results of reasonable physical and psychological examinations.[236] In fact, the producers of *The Apprentice* did condition the offer on physical and psychological examinations.[237] But, the "good health" requirement runs afoul of the ADA because it resembles the running requirement in *Valle*, which was an insignificant requirement and not related to the job's essential functions.[238] The "good health" criterion required by *The Apprentice* is not an acceptable job qualification under the ADA. It is unnecessary when the producers already have the means (such as the conditional offer to compete) of rejecting applicants whose health issues have a direct effect on the ability to perform the job. Similar to the across-the-board DOT requirement in *Morton*,[239] regardless of its intent, the requirement only functions to discourage people from applying.

Additionally, the use of the "good health" requirement in *The Apprentice* is unjustifiable under the ADA because the affirmative defenses of "business necessity" and "direct threat" do not apply. The business necessity exception applies to jobs where physical exertion is necessary as a normal course of business (such as package delivery services) or in response to emergencies.[240] It is ludicrous to claim that executives must be able to lift fifty pounds, run a mile, or have perfect eyesight in order to perform the job. Even if an executive needs to read documents or sift

234. *See, e.g.*, *Clark*, 880 F. Supp. 430; *see also Judicial Nominating Comm'n*, 906 F. Supp. 1534.

235. *Supra* Part II.B.2.

236. *See Blue Cross Blue Shield of Connecticut*, 30 F. Supp. 2d at 298.

237. Complaint, *supra* note 7, at 4.

238. *Supra* Part II.B.2.

239. *Supra* Part II.B.2.

240. *See, e.g.*, Bauer v. Muscular Dystrophy Assn., Inc., 268 F. Supp. 2d 1281, 1285, 1294 (D. Kan. 2003).

through boxes of files, these are not essential functions of the job. The employer cannot screen out applicants whose disabilities prevent them from performing these tasks, since employers are obligated to provide reasonable accommodations for nonessential job functions or to assist with essential functions.[241] Unlike *Blue Cross*, the producers of *The Apprentice* do not have adequate medical information at a preliminary stage to reasonably conclude that an applicant's disability presents a direct risk.

Furthermore, the direct threat defense is inapplicable in this case because Schottel's mobile disability does not present a risk to himself or others at the workplace, which is a corporate office. As discussed above, the factors to be considered in the "direct threat" analysis are (1) the duration of the risk, (2) the nature and severity of potential harm, (3) the likelihood that the potential harm would occur, and (4) the imminence of the potential harm.[242] These factors are simply inapplicable for office work. In their capacity as executives, persons using a wheelchair do not have to operate heavy machinery or engage in other activities that are risky because of immobility. The only relevant time when a person's disability is really an issue is in the event of an emergency, which is extremely rare.

Finally, it is relatively easy to determine whether an applicant has suffered an adverse employment action. Since Schottel was not selected to participate in the second phase of the job interviewing process, which is the show itself, he suffered an adverse employment action. Nevertheless, it is difficult to establish that the producers' refusal to select Schottel as a contestant is based on his disability, especially because the alleged discrimination occurred very early in the auditioning process. As discussed above, direct or indirect evidence can prove discriminatory intent. Similar to corporate employers who sift through thousands of resumes a year, reality show producers will invariably dispose of disabled persons' applications without documenting the reason for rejection. Also, *The Apprentice* is not a typical job interview; the level of education and work experience may matter far less than personality, physical attractiveness, or other subjective *je ne se quoi* qualities. Under *Sutton*, employers can choose employees based on these physical criteria if they are independent of disability.[243] Even if a disabled applicant advances as far as a face-to-face interview with casting directors, he or she may be rejected for a number of unwritten reasons that will never be known. Unless there are internal documents indicating animus against persons with disabilities or

241. *Nawrot*, 259 F. Supp. 2d at 725.

242. 29 C.F.R. § 1630.2(r) (2004).

243. *Sutton*, 527 U.S. at 490.

detailed casting guidelines that pointedly exclude persons with disabilities, direct evidence almost never exists in these types of situations.

To build a successful case on disparate treatment, a plaintiff will have to rely on the burden-shifting approach using indirect evidence.[244] The first step of the burden-shifting method is satisfied as long as the first two *prima facie* elements are met, along with a showing of adverse employment action.[245] In Schottel's complaint, the *prima facie* elements are met since Schottel is a disabled individual whose background qualifies him to perform essential duties of the job, and he suffered adverse employment action when he was not selected. The producers will then have to rebut the presumption of discrimination by presenting legitimate reasons for not selecting a disabled contestant.[246] Again, because of the subjective nature of casting, the reasons for rejection are indeterminable. The employee will be given an opportunity to prove that the employer's reasons are mere pretexts for discrimination.[247] This objective can be achieved by comparing treatment of disabled applicants with non-disabled applicants who are the same or similarly situated.[248] Even if rigorous statistical evidence is not necessary, a plaintiff will bolster his or her case by demonstrating that non-disabled applicants with the same or similar education, work history, age, and other background factors as their disabled counterparts advanced further in the auditioning process. Also, a plaintiff has a better chance of prevailing if he or she can show that the proffered reasons for rejection, such as unattractiveness, are really rooted in disability, since this type of discrimination is not allowed under *Sutton*.[249] As with the direct evidence method, statistical and pretext evidence is very difficult to obtain for early-stage rejections. If a disabled applicant progressed further in the auditioning process, there would be much more evidence in the form of written evaluations, memoranda, or group discussions to finalize casting.

Overall, it is very difficult to challenge the "good health" requirement absent proof of intentional discrimination. Direct evidence is virtually nonexistent for earlier rounds of audition, and the three-step burden-shifting process is still very hard for plaintiffs to satisfy, even though the process forestalls summary judgment. Success in facial challenges correlates with how far a disabled applicant advances.

---

244. *Supra* Part II.B.

245. *See Bekker*, 229 F.3d at 670.

246. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

247. *Id.* at 804.

248. *See Nighswander*, 172 F. Supp. 2d at 958.

249. *Sutton*, 527 U.S. at 490.

IV. CONCLUSION

Challenging the "good health" requirement from *The Apprentice*, or similar criteria in other reality programs, under Title I of the ADA is inherently difficult because casting is a highly subjective practice. It is often impossible to discover the precise reasons why an applicant is accepted or rejected. Thus, a rejected applicant will rarely succeed in claiming that he or she was not hired due to their disability. A plaintiff has a better chance of prevailing if one of two events occurs. First, an applicant will be able to bypass the adverse employment action prong if a request made to change the "good health" criterion is denied, thereby giving the applicant an opportunity to pursue a lack of reasonable accommodation claim. Second, if the applicant advanced to the final rounds of auditions and was cut from the roster, he or she would have more evidence available to show that the proffered reason for rejection is a pretext for bias. Since these two conditions are so specific, a better litigation strategy is to attack the discriminatory requirement as a Title III claim. *Rendon* and *Martin* are very favorable precedents that fit the reality TV situation. Moreover, because the only important issue is reasonable accommodation, less time and resources are needed to build a successful case.

Carley G. Mak[*]

[*] Many thanks to the Entertainment Law Review Staff and Editors for their tireless work to improve this article. My heartfelt thanks go to Professor Sande Buhai, whose suggestions and support are indispensable. I would like to thank the Disability Rights Legal Center for opening my eyes to disability rights issues. I would also like to thank Note and Comment Editor Grace Nguyen and Production Editor Evan Simons for steering my article onto the right course. Special salute goes to Sophia Tsai and Justin Garten for their daily encouragement. Finally, my deepest gratitude to my family, now and always, for their unconditional love and support.