CIVIL RIGHTS – AMERICANS WITH DISABILITIES ACT – THE PGA IS SUBJECT TO THE ADA BECAUSE IT IS NOT A PRIVATE CLUB AND ITS TOURNAMENTS ARE PLACES OF PUBLIC ACCOMMODATION – *Martin v. PGA Tour Inc.*, 994 F. Supp. 1242 (D. Or. 1998).

I. INTRODUCTION

"Golf tests skill, stamina, endurance and perseverance under favorable conditions."[1] With its inception 400 years ago, golf's basic elements were set forth and have remained unchanged.[2] But, are these basic elements only considered an option for able-bodied people? Casey Martin (Martin), challenged that premise and won a preliminary battle. He is a disabled golfer who would like to make a living playing the sport that he loves. Pursuant to the Americans with Disabilities Act, Martin has broken ground for an immeasurable number of disabled athletes by winning a claim of discrimination against the PGA Tour (PGA).

Until 1973, when the Rehabilitation Act[3] was passed by the then President Nixon, there was no legislation to protect people with disabilities.[4] It was soon found that this remedial legislation was only effective for a limited number of disabled Americans on a federal level.[5] However, this acknowledgement of prejudices against the disabled led to the passing of a more comprehensive and even more important decree, the Americans with Disabilities Act of 1990 (ADA).[6] President Bush signed into law what has been

1. Amicus Curiae Brief by the United States Golf Association at 5, Martin v. PGA Tour, Inc., 984 F. Supp. 1320 (D.Or. 1998) (No. 97-6309-TC).

2. *See id.* The United States Golf Association (hereinafter, "USGA") as the governing body of golf, sets out that its chartered purpose is to protect and preserve golf's "ancient and honorable traditions." *Id.*

3. 29 U.S.C. §794 (1973).

4. *See* 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).

5. *See id.*

6. *See id.*

called the most innovative and far-reaching federal civil rights legislation ever on behalf of disabled persons.[7] Congress enacted the ADA to protect all disabled individuals from any type of discrimination.[8] The use of such meaningful and directed language to describe individuals with disabilities as a "discrete and insular minority . . . subjected to a history of purposeful and unequal treatment, and relegated to a position of political powerlessness" forced the courts to use a higher strict scrutiny standard[9] in evaluating alleged discriminatory treatment.[10] Advocates for persons with disabilities praise it as "the most important civil rights act passed since 1964."[11] It is broken down into three major sections, Title I, Title II, and Title III which reach broadly across an extensive range of areas including employment, transportation systems, commercial facilities, courses and examinations, governmental programs, and goods and services offered by a private entity for public accommodation.[12] More specifically, Title III focuses on public accommodations and has a general rule that 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."[13]

The court in *Martin v. PGA*[14] determined that the PGA was

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7. *See* Robert 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, 40 (1991).

8. *See* Keri K. Gould, *And Equal Participation For All . . . The Americans With Disabilities Act In The Courtroom, 8* J.L. & HEALTH 123, 123-24 (1993/1994).

9. Strict Scrutiny standard requires any state action to be narrowly tailored to serve a compelling state interest. *See* International Society For Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1972) (the Court used strict scrutiny in analyzing a religious corporation's challenge to restrictions placed on it in airport terminals).

10. *See id.* at 128. *See also* 42 U.S.C. §12101(a) (1992).

11. Michael L. Perlin, *"Make Promises by the Hour": Sex, Drugs, the ADA, and Psychiatric Hospitalization,* 46 DEPAUL L. REV. 947, 947 (1997) (quoting Kimberly A. Ackourney, *Insuring Americans with Disabilities: How Far Can Congress Go to Protect Traditional Practices?,* 40 Emory L.J. 1183, 1183 n.1 (1991)).

12. *See id.*

13. 42 U.S.C. § 12182(a) (West 1990). Title III took effect 18 months after enactment. *See id.*

14. 984 F. Supp. 1320 (D.Or. 1998); *see also* Martin v. PGA Tour Inc., 994 F. Supp. 1242 (D.Or. 1998).

a place of public accommodation, therefore subject to ADA regulation, and thus required to allow Martin to use a golf cart to accommodate his disability pursuant to Title III. [15] This note will apply an in depth analysis to the claims and defenses raised pursuant to the ADA in *Martin* as well as the prior law that the court relied on in making its decision. In conclusion, the societal implications regarding the impact of the holding will be discussed.

II. *MARTIN V. PGA TOUR INC.*, 994 F. SUPP. 1242 (D. OR. 1998).

A. Statement of Facts

Casey Martin is a victim of a rare congenital vascular malformation, Klippel-Trenaunay-Weber Syndrome that encumbers the blood flow in his right leg.[16] Diagnosed at age

15. Title III of the ADA states, in relevant part, that the following entities are public accommodations if their operations affect commerce, "(L) a gymnasium, health spa, bowling alley, *golf course*, or other place of exercise or recreation." 42 U.S.C.A. § 12181(7) (emphasis added).

16. *See id.* Klippel-Trenaunay-Weber Syndrome (Hereinafter, "KTW"), is

> A congenital malformation syndrome characterized by the triad of asymmetric limb hypertrophy, hemangiomata, and nevi. 'Asymmetric limb hypertrophy' is enlargement of one limb and not the corresponding limb on the other side, the enlarged limb being 3 times more likely to be a leg than an arm in KTW; and the limb enlargement is of bone as well as soft tissue. The hemangiomas, abnormal nests of blood vessels that proliferate inappropriately and excessively, cover a remarkable range from small innocuous capillary hemangiomas ("strawberry marks") to huge cavernous hemangiomas. The nevi are pigmented moles on the skin; in KTW there are often also dark linear streaks on the skin, streaks due to too much pigment. There can be other abnormalities but the triad is the consistent clinical centerpiece of the disease. Most persons with KTW have an enlarged leg and do relatively well without treatment or, for example, with only compression from an elastic stocking. Skin ulcers and other skin problems can occur over the swollen leg. Usually, the treatment is conservative. Surgery is almost never needed. The only possible exceptions are the very rare situations in which the leg reaches gigantic proportions or secondary clotting difficulties arise (due to trapping and destruction of blood platelets in a huge hemangioma). Then, amputation may become necessary. The cause of KTW syndrome is unknown.

MedicineNet, State of the Art Medical Information, (visited Sept. 26, 1998) <http://www.medicinenet.com/Art.asp?li=MNI&ag=Y&ArticleKey=4113>.

3,[17] this condition hinders Martin's ability to walk and to play golf in the "traditional" manner.[18] His limb is severely atrophied and weakened which causes him extreme pain.[19] Double compression stockings, used as medical aids, are needed to permit Martin to stand upright for any length of time and function "normally" during his every day life.[20]

The PGA Tour, Inc., is a non-profit organization that consists of professional golfers.[21] It also acts as a sponsor or cosponsor of golf events by way of three tours, the PGA, the Senior PGA, and the Nike Tour.[22] Eligibility for these tours

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17. *See* Amended Plaintiff's Memorandum in Support of Plaintiff's Motion for Partial Summary Judgement and in Opposition to Defendant's Motion for Summary Judgment at 4, Martin v. PGA Tour, Inc., 984 F. Supp. 1320 (D.Or. 1998) (No. 97-6309-TC).

18. *See Martin*, 994 F. Supp. at 1243. Even the smallest touch to his leg below the knee causes severe pain. *See id.* With every step he is in constant risk of breaking his tibia because the weakened bone cannot sustain his body weight. *See id.*

19. *See id.* Doctors contend that Martin will not have the use of his leg for much longer and amputation may be necessary to treat his condition. *See* ESPN SportsCenter, *Conversation with Casey Martin* (visited July 18, 1998) http://ESPN.Sportzone.com/golf/features/00575808.html>.

20. *See Martin*, 994 F. Supp. at 1244. The court described Martin's condition after removing his support stockings, as seen in a video and described to the court by plaintiff's treating physician, as follows:

> When plaintiff removes his double set of stockings and stands upright, the leg immediately discolors and swells in size because the circulatory condition with which he is afflicted prevents the blood from flowing through his veins back to his heart. Instead, gravity, combined with "incompetent" valves which fail to close properly, pulls blood back down his leg. The leg becomes engorged in blood because the arteries pump blood to his leg but the veins fail to circulate blood back to the heart. To relieve this situation, plaintiff must lie down and elevate the leg.

Id.

21. *See Martin*, 984 F. Supp. at 1321. As defined by the Internal Revenue Code of 1986, § 501(c)(6), a tax exempt organizations include "Business leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues (whether or not administering a pension for football players), not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual." I.R.C. § 501(c)(6) (West 1997). However, it should be noted that the PGA "conducts many of its business endeavors through its wholly owned for-profit subsidiaries." Amended Plaintiff's Memorandum in Support of Plaintiff's Motion for Partial Summary Judgement and in Opposition to Defendant's Motion for Summary Judgment at 2, Martin v. PGA Tour, Inc., 984 F. Supp. 1320 (D.Or. 1998) (No. 97-6309-TC).

22. *See Martin*, 984 F. Supp. at 1321. The first and second stages consist of 72 holes. *See id.* Only the top players, typically 168, go on to the third and final qualifying round which consists of 108 holes. *See id.* The top 35 finishers and ties are placed on the regular PGA Tour and the next 70 are put onto the Nike

can be obtained in a number of different ways, however, the most popular way is to compete in the PGA three-stage qualifying school tournament.[23] Throughout the first two stages of the qualifying school tournament, golf carts are permissible.[24]

In 1997, Casey Martin entered the PGA's Qualifying Tournament.[25] Upon successfully reaching this point in the Tour, Martin filed an action seeking a preliminary injunction[26] that would allow him to use a cart for the remainder of the tournament.[27] Martin's complaint contended that the PGA, by not allowing the use of carts, failed to make its tournaments accessible to disabled individuals in violation of the ADA.[28]

B. Procedural History

Martin's action was brought in the United States District Court, for the district of Oregon, and sought a preliminary and permanent injunction pursuant to 28 U.S.C. §1331,

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Tour. *See id.*

23. *See id.* at 1322. Eligibility to play and membership in the Tour are each separate and one does not guarantee the other. *See id.* For example, a professional may become eligible to compete because he earned a determinable amount of money on the PGA Tour in the previous year, while an amateur may be invited to play by a tournament's sponsor. *See id.*

24. *See id.* The Senior Tour and the first two rounds of the qualifying school tournament are the only exceptions, in all other rounds, a player is required to walk and use caddies. See *id.*

25. *See* Amended Plaintiff's Memorandum in Support of Plaintiff's Motion for Partial Summary Judgement and in Opposition to Defendant's Motion for Summary Judgment at 3, Martin v. PGA Tour, Inc., 984 F. Supp. 1320 (D.Or. 1998) (No. 97-6309-TC). Martin completed the requisite application process that included filling out an application, paying a fee of $3,000 and submitting two letters of recommendation. *See id.* Martin had competed in the first two rounds, using a cart, and successfully advanced to the third round. *See id.*

26. An injunction is defined as, "a court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury." BLACK'S LAW DICTIONARY 784 (6th ed. 1991). A district court must consider four factors in determining whether to issue a preliminary injunction: 1) whether the movant has a "substantial" likelihood of success on the merits; 2) whether the movant would otherwise suffer irreparable injury; 3) whether issuance of a preliminary injunction would cause substantial harm to others; and 4) whether the public interest would be served by issuance of a preliminary injunction. *See* Johnson v. Florida High Sch. Activities Ass'n, Inc., 899 F. Supp. 579, 581 (M.D. Fl. 1995).

27. *See Martin*, 984 F. Supp. at 1322.

28. *See id.*

§1343 and the ADA, and asserted three claims against the PGA.[29] Martin's first claim contended that the PGA is "a private entity which is a public accommodation or which owns, leases or operates a place of public accommodation" as defined by the ADA in § 12181 and §12182.[30] Martin's second claim contended that the PGA, as a private entity, "offers examinations or courses related to applications, licensing, certification, or credentialing for professional or trade purpose as those terms are used" in §12189 of the ADA.[31] The third claim asserted by Martin contended that the PGA, was an employer pursuant to §12111(2) of the ADA, and as such had discriminated against him on the basis of his disability.[32]

The preliminary injunction was granted by the district court, allowing Martin the use of a cart during the final stage of the qualifying tournament.[33] Martin went on to qualify for participation in the 1998 Nike Tour, and as a result he was offered and accepted a position on that Tour.[34] The court, by stipulation of both parties, extended the injunction through the first two tournaments of the Nike Tour.[35]

On January 26, 1998, oral arguments were heard on the PGA's motion for summary judgment and Martin's cross-motion for partial summary judgment.[36] The district court, in considering defendant's motion for summary judgment,[37]

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29. *See* Amended Plaintiff's Memorandum in Support of Plaintiff's Motion for Partial Summary Judgement and in Opposition to Defendant's Motion for Summary Judgment at 1-2, Martin v. PGA Tour, Inc., 984 F. Supp. 1320 (D.Or. 1998) (No. 97-6309-TC).

30. *See id.* at 5.

31. *See id.* at 7.

32. *See id.* at 8.

33. *See Martin*, 984 F. Supp at 1322. The public accommodation claim was the basis for the injunction. *See id.* This injunction led the PGA to lift the no-cart rule for all players in the third round of this tournament. *See id.*

34. *See* Amended Plaintiff's Memorandum in Support of Plaintiff's Motion for Partial Summary Judgement and in Opposition to Defendant's Motion for Summary Judgment at 4, Martin v. PGA Tour, Inc., 984 F. Supp. 1320 (D.Or. 1998) (No. 97-6309-TC). The PGA prohibits the use of carts on the Nike Tour or the PGA Tour. *See id.*

35. *See Martin*, 984 F. Supp. at 1322.

36. *See id.* at 1321.

37. *See id.* Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Id.* (citing FED. R. CIV. P. 56(c)).

addressed the plaintiff's claims in depth.[38]

Martin's second claim was that the PGA is a private entity and by offering examinations or courses[39] it is subject to the ADA's requirement that any person offering such examinations or courses is obligated to make them accessible to individuals with disabilities.[40] Martin argued that golfers earn the right to play on the PGA Tour by finishing in the top 15 money winners on the Nike Tour or by winning three Nike Tour tournaments in a single year, thus making it a "proving ground."[41] In opposition, the PGA argued that the Nike Tour is only a small component of qualifying and that the majority of players in the PGA Tour are the top 125 money winners on the PGA Tour.[42] The PGA's argument concluded that the Nike Tour should not be considered a "course or examination" but that the PGA Tour itself should have that consideration.[43] The Department of Justice (DOJ) regulations became the determining decree in setting forth the interpretations of the meanings of courses and examinations.[44] In defining courses and examinations, the DOJ analogized it to an SAT or Bar exam, where it refers to a specific event not a profession.[45] Because there are no

38. *See Martin*, 984 F. Supp. at 1323.

39. *See* Amended Plaintiff's Memorandum in Support of Plaintiff's Motion for Partial Summary Judgement and in Opposition to Defendant's Motion for Summary Judgment at 4, Martin v. PGA Tour, Inc., 984 F. Supp. 1320 (D.Or. 1998) (No. 97-6309-TC). Section 12189 of Subchapter III of the ADA states:

> Examinations and courses
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> Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary 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 arrangements for such individuals.

42 U.S.C. § 12189 (West 1998).

40. *See* Amended Plaintiff's Memorandum in Support of Plaintiff's Motion for Partial Summary Judgement and in Opposition to Defendant's Motion for Summary Judgment at 7, Martin v. PGA Tour, Inc., 984 F. Supp. 1320 (D.Or. 1998) (No. 97-6309-TC).

41. *See id.* at 35.

42. *See* Defendant's Memorandum of Law in Support of Motion for Summary Judgement at 15, Martin v. PGA Tour, Inc., 984 F. Supp. 1320 (D.Or. 1998) (No. 97-6309-TC).

43. *See id.* Essentially meaning that any performance criteria in any business or profession are a form of "examination or course" under the ADA. *See id.*

44. *See id.*

45. *See id.* at 16. The court also referred to D'Amico v. New York State Board

statutory or ADA definitions for course or examination, the PGA argued that the court should adopt their ordinary meaning.[46] The PGA further asserted that congressional intent would not consider the Nike Tour to be covered by the ADA's "course or examination" provision.[47] The district court, without elaborating, accepted the PGA's position.[48]

To Martin's third claim, the court again adopted the PGA's argument[49] and found that the PGA is not an employer under the ADA.[50] In order for the court to have found that Martin was an employee of the PGA, Martin would have had prove that he was not an independent contractor.[51] The

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of Law Examiners, 813 F. Supp. 217, 218 (W.D.N.Y. 1993) (applying the examination and courses provision of the ADA to the Bar Exam).

46. *See* Defendant's Memorandum of Law in Support of Motion for Summary Judgement at 16, Martin v. PGA Tour, Inc., 984 F. Supp. 1320 (D.Or. 1998) (No. 97-6309-TC). The defendant's memorandum stated that "[t]he dictionary defines a 'course' as a 'number of lectures or other matter dealing with a subject' and an 'examination' is defined as 'an exercise designed to examine progress or test qualifications or knowledge'." *Id.* (citing WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 299, 431 (1983)).

47. *See id.*

48. *See Martin*, 994 F. Supp. at 1247 n.7. The court, without elaboration, stated "[f]or the most part, I agree with, and incorporate by reference, the argument set forth by defendant in its memorandum in support of summary judgment regarding the employee, and course and exam issues." *Id.*

49. *See supra* note 48.

50. *See Martin*, 994 F. Supp. at 1245 n.2. The ADA defines employer under § 12111(5) as:

> (A) In general
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> The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.
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> (B) Exceptions
>
> The term "employer" does not include—
>
> (I) The United States, a corporation wholly owned by the government of the United States, or an Indian Tribe; or
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> (II) A bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501 (c) of Title 26.

42 U.S.C. § 12111(5) (West 1998).

51. *See* Defendant's Memorandum of Law in Support of Motion for Summary Judgement at 17, Martin v. PGA Tour, Inc., 984 F. Supp. 1320 (D.Or. 1998) (No. 97-6309-TC) (citing Birchem v. Knights of Columbus, 116 F. 3d 310, 312 (8th Cir.

United States Court of Appeals for the Ninth Circuit, in *Lutcher v. Musicians Union Local 47*,[52] set out the difference between an employment and an independent contractor agreement as depending on the economic realities of the situation,[53] and held that an independent contractor is not protected against discrimination.[54] Ultimately the *Martin* court agreed with the PGA that Martin was more akin to an independent contractor and not an employee.[55]

However, the court rejected defendant's contention that the PGA is a private non-profit establishment that is exempt from the ADA.[56] The court, in analyzing Martin's first claim, that the PGA is a private entity that is or operates a place of public accommodation, found that the PGA is in fact subject to the boundaries of the ADA.[57]

1997)). In *Birchem*, the Eighth Circuit identified the ADA's protection of an employee but not of an independent contractor. *See Birchem*, 116 F. 3d at 312.

52. 633 F.2d 880 (9th Cir. 1980).

53. *See id.* at 883. Under the eleven-factor test set forth in *Lutcher*, the primary consideration as to an individual's status as an employee or an independent contractor is, "the extent of the employer's right to control the means and manner of the worker's performance." *Id.* Additional factors of the test included:

> 1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist; 2) the skill required in the particular occupation; 3) whether the 'employer' or the individual in question furnishes the equipment used and the place of work; 4) the length of time during which the individual has worked; 5) the method of payment, whether by time or by the job; 6) the manner in which the work relationship is terminated; 7) whether annual leave is afforded; 8) whether the work is an integral part of the business of the 'employer'; 9) whether the work accumulates retirement benefits; 10) whether the 'employer' pays social security taxes; and 11) the intention of the parties.

Lutcher, 633 F.2d at 883 n.5 (citations omitted).

54. *See id.* Specifically, the court held that an independent contractor is not protected by Title VII, which prevents discrimination in employment based on race, color, religion, or national origin . *See id*; s*ee also* 42 U.S.C. 2000e-2 (1998).

55. *See Martin*, 994 F. Supp. at 1247 n.7. *See also supra* note 48.

56. *See Martin*, 984 F. Supp. at 1323. Title III of the ADA § 12187 provides the exemptions from coverage. *See id.* (citing 42 U.S.C. §12187). These exemptions must be construed narrowly and applied sparingly due to the severity and importance of the laws. *See Martin*, 984 F. Supp. at 1323 (citing Nesmith v. YMCA, 397 F.2d 96, 101 (4th Cir. 1968) (comparing Title III of the ADA to Title II of the Civil Rights Act of 1964 and finding them to be essentially parallel)).

57. *See* Martin, 984 F. Supp. at 1323.

C. Prior Law As To Public Accommodation In Athletics

The ADA's application to athletics has been nothing short of limited.[58] However, several high school and college students have made challenges pursuant to the ADA based on eligibility requirements and age restrictions.[59] Although there is a greater skill level and a higher degree of publicity in professional sports than there are in high school or college athletics, the application of the law remains the same.[60]

To establish a claim under Title III of the ADA Martin must prove that (1) he is disabled;[61] (2) the PGA is a "private entity"[62] which operates a "place of public accommodation;" and (3) he was denied the opportunity to "participate in or benefit from services or accommodations on the basis of his disability," and that reasonable accommodations could be made that would not fundamentally alter the nature of the PGA.[63]

Title III was added to the ADA to further reach into the private sector and add more protection for the disabled.[64]

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58. *See* Martin, 994 F. Supp. at 1245.

59. *See,* e.g., McPherson v. Michigan High Sch. Athletic Ass'n, Inc., 119 F. 3d 453 (6th Cir. 1997); Pottgen v. Missouri State High Sch. Activities Ass'n, 40 F. 3d 926 (8th Cir. 1994); Sandison v. Michigan High Sch. Athletic Ass'n, Inc., 64 F. 3d 1026 (6th Cir. 1995); Bowers v. National Collegiate Athletic Ass'n, 974 F. Supp. 459 (D.N.J. 1998); Johnson v. Florida High Sch. Activities Ass'n, 899 F. Supp. 579 (M.D. Fl 1995); Ganden v. National Collegiate Athletic Ass'n, 1996 WL 680000 (N.D. Ill.); and Dennin v. Connecticut Interscholastic Athletic Conference, Inc., 913 F. Supp. 663 (Conn. Super. Ct. 1996).

60. *See Martin,* 994 F. Supp. at 1246.

61. The ADA defines the term disability as:

> (2) Disability
>
> The term 'disability' means, with respect to an individual—
>
> (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.

42 U.S.C. § 12102 (2) (West 1998).

62. A private entity is defined as "(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. §12131 (1) (West 1998).

63. 42 U.S.C. §12182 (West 1998).

64. *See* 42 U.S.C. §12101 (b)(1)-(4) (1994). *See also* Paul Sullivan, *The Americans with Disabilities Act of 1990: An Analysis of Title III and Applicable Case Law,* 29 SUFFOLK U.L. REV. 1117, 1117-20 (1995). Title III serves to prohibit entities that own, lease to, or operate public accommodations from excluding handicapped individuals. *See Sullivan* at 1124.

Exclusion of the handicapped can only be allowed if it is shown that it is necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations provided.[65]

As to requiring an individualized inquiry into the individual's qualifications as well as the reasonableness of the modification, case law has varied.[66] In *Pottgen v. Missouri State High School Activities Ass'n*,[67] a learning disabled student challenged the Missouri State High School Activities Association's (MSHSAA) age restriction pursuant to the ADA, the Rehabilitation Act and §1983.[68] The enforced age regulations allegedly restricted his participation on the school's baseball team because the student turned nineteen before July 1 of his senior year.[69] The district court granted Pottgen a preliminary injunction allowing him to play.[70] The U.S. Court of Appeals for the Eighth Circuit reversed.[71]

The Eighth Circuit, under a Rehabilitation Act analysis, required a determination as to both whether an individual meets all of the essential eligibility requirements and whether

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65. *See id.*

66. *See* Johnson v. Florida High Sch. Activities Ass'n, 899 F. Supp. 579 (M.D. Fl. 1995). Waiving the age requirement in the instant case did not fundamentally alter the nature of the program. *See id.* Allowing Dennis Johnson to participate in interscholastic athletics in no way undermined the purposes of safety and fairness. *See id.*

67. 40 F.3d 926 (8th Cir. 1994).

68. *See id* at 928.

69. *See id.* The Missouri State High School Activities Association's (hereinafter, "MSHSAA") by-law stated, in relevant part, "A student shall not have reached the age of nineteen prior to July 1 preceding the opening of school. If a student reaches the age of nineteen on or following July 1, the student may be considered eligible for [interscholastic sports during] the ensuing school year." *Id.*

70. *See id.* In considering a motion for preliminary injunction, the court weighed the movant's probability of success on the merits, the threat of irreparable harm to the movant absent the injunction, the balance between this harm and the injury that the injunction's issuance would inflict on other interested parties, and the public interest. *See id* at 928-929 (citing Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981) (en banc). The injunction served to enjoin MSHSAA from "(i) preventing Pottgen from competing in any Hancock High School baseball games or district or state tournament games; and (ii) imposing any penalty, discipline or sanction on any school for which or against which Pottgen competed in these games." *Pottgen*, 40 F.3d at 928.

71. *See Pottgen*, 40 F.3d at 928. The court stated that it would reverse only if the issuance "is the product of an abuse of discretion or misplaced reliance on an erroneous legal premise." *Id.* (citing City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554, 556 (8th Cir. 1993), cert. denied, 114 S. Ct. 2741 (1994)).

reasonable accommodations exist.[72] The student could not be precluded from being "otherwise qualified"[73] if reasonable accommodations existed.[74] The court determined that under the ADA, it must "determine whether the age limitation was an essential eligibility requirement by reviewing the importance of the requirement to the interscholastic baseball program."[75] If the requirement is essential there must be a determination of whether or not the athlete meets this requirement without modification.[76] In this case, the court found that the eligibility requirements were essential.[77] Therefore, the student could only be found to be a qualified individual if reasonable accommodations, that did not constitute a fundamental alteration in the nature of the baseball program and "would enable him to meet the age limit," could be made.[78] The court determined that an age limit waiver was not a reasonable accommodation and therefore protection did not extend to Pottgen.[79]

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72. *See Pottgen*, 40 F. 3d at 929. Under the district court's finding, Pottgen was considered an "otherwise qualified individual." *See id.* The question the district court posited was whether or not reasonable accommodations existed considering that he met all of the other eligibility requirements. *See id.*

73. *See id.* at 930. A "qualified individual" is "an individual with a disability, who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for . . . participation in programs or activities provided by a public entity." *Id.* (quoting 42 U.S.C. § 12131 (2) (1998)).

74. *See Pottgen*, 40 F.3d at 930.

75. *Id.* at 930. For ADA purposes the district court made an individualized inquiry into the determination at an earlier stage than the appellate court found inappropriate. *See id.* The age requirement was found to be essential in order to "reduce the competitive advantage flowing to teams using older athletes, protect younger athletes from harm, discourage student athletes from delaying their education to gain athletic maturity and to prevent over-zealous coaches from engaging in repeated red-shirting to gain a competitive advantage." *Id.* at 929.

76. *See id.* at 930-931. At this point, the court, pursuant to their interpretation of the ADA, would conduct an individualized inquiry. *See id* at 931. Chief Judge Richard S. Arnold in his dissent disagreed with the court and believed that the individualized inquiry needs to be completed in the first stage. *See id.* at 931 (Arnold, C.J., dissenting).

77. *See id.* at 929.

78. *Id* at 930. The *Pottgen* court held that "accommodations are not reasonable if they impose 'undue financial and administrative burdens' or if they require a 'fundamental alteration in the nature of the program.'" *Id.* (quoting School Bd. Of Nassau County v. Arline, 480 U.S. 273, 287 (1987)).

79. *See Pottgen*, 40 F.3d at 930. Chief Judge Richard Arnold dissented from this conclusion and argued that the majority was simply reciting the justification for the rule offered by the athletic association and "mechanically appl[ying] it across the board." *Pottgen*, 40 F.3d at 932 (Arnold, C.J. dissenting).

Similarly, in *Sandison v. Michigan High School Athletic Ass'n*[80] (MHSAA), the court followed and refined the reasoning of the *Pottgen* court.[81] The two learning disabled plaintiffs in *Sandison* challenged the MHSAA pursuant to the ADA and the Rehabilitation Act after being denied the opportunity to participate in track and field and cross-country events.[82] The plaintiffs were denied such participation because of their age.[83]

The court held that neither student was "being excluded from participation in . . .any program or activity. . . solely by reason of . . .his disability."[84] The court also found that the purpose of the age restriction was closely fit with the purpose of high school athletics and that allowing them to compete would fundamentally alter the game.[85]

Again the Sixth Circuit, following the reasoning in *Sandison,* ruled in *McPherson v. Michigan High School Athletic Ass'n, Inc.*,[86] that the waiver of an eight semester eligibility rule would impose undue financial and administrative burdens on the association therefore constituting a

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80. 64 F.3d 1026 (6th Cir. 1995).

81. *See* Patricia A. Solfaro, Note, *Civil Rights - Court Should Use an Individualized Analysis When Determining Whether To Grant A Waiver of an Athletic Conference Age Eligibility Rule, Dennin v. Connecticut Interscholastic Athletic Conference, Inc.,* 913 F. Supp. 663 (2d Cir. 1996), 7 SETON HALL J. SPORT L. 185, 200 (1997). The *Sandison* court determined that waiving the age requirement for nineteen-year old disabled students fundamentally altered the nature of the track and cross-country program because more mature and competitive students would be competing. *See id.* It also determined that waiving the age requirement would constitute an undue burden, as a case-by-case analysis would be necessary to determine unfair competitive advantage. *See id.*

82. *See Sandison,* 64 F.3d at 1028. Ronald Sandison and Craig Stanley each sued their respective high schools alleging discrimination under Titles II and III of the ADA, 42 U.S.C. §§ 12132 and 12182 and the Rehabilitation Act of 1973, 29 U.S.C. § 794. *See id.* Due to their disabilities the two students were held back one year before entering school and then again another year before entering high school creating the age gap. *See id.*

83. *See id* at 1032. The students turned nineteen years old before the start of their senior year, in violation of the Michigan High School Athletic Association (hereinafter, "MHSAA") age regulations that prohibit anyone from competing in interscholastic athletics if they are nineteen years of age before September 1 of that year. *See id.* The district court granted the preliminary injunction sought by the students. *See id.*

84. *Id.* at 1032 (citing 29 U.S.C. § 794(a) (1998)).

85. *See Sandison,* 64 F.3d at 1035.

86. 119 F.3d 453 (6th Cir. 1997).

fundamental alteration of the program.[87] Under MHSAA Regulation I § 4 and the MHSAA Constitution there is a stipulation for a waiver of such a rule.[88] This was in contrast to *Sandison* in that the 19-year age limit in that case could not be waived.[89] The court, however, reasoned that there was no distinction between the nature and the purpose of the two regulations, regardless of the waiver option, and found them both necessary.[90]

The same considerations the court used to conclude that a waiver of the 19-year age limit in *Sandison* was not a reasonable accommodation, were applied to McPherson.[91] However, the court found an important distinction between the class of waiver cases contemplated by the MHSAA and the type of relief requested by the plaintiff in *McPherson*.[92]

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87. *See id.* at 462. A waiver of the regulation was the only accommodation available to the student, Dion McPherson, who because of his undiagnosed learning disability was prevented from finishing high school in eight semesters. *See id.* at 461. The MHSAA regulations stated that any student who has finished eight semesters of high school is ineligible for interscholastic sports competition. *See id.* at 456. The court determined that requiring a waiver would force the MHSAA to make "near impossible determinations" about a student's physical and athletic maturity. *Id* at 462.

88. *See id.* at 455. The stipulation reads:

> Except for the eligibility rule in regard to age, the Executive Committee shall have the authority to set aside the effect of any regulation governing eligibility of students or the competition between schools when in its opinion the rule fails to accomplish the purpose for which it is intended, or when the rule works an undue hardship upon the student or school.

Id. (citing MHSAA Constitution, Art. VII, §4(E)).

89. *See McPherson*, 119 F.3d at 461. The plaintiff argued that because there is the potential to obtain a waiver of this rule, the rule cannot be considered necessary and thus cannot be a burden on the MHSAA to waive it. *See id.*

90. *See id.*

91. *See id.* at 462. "Removing the age restriction injects into competition students older than the vast majority of other students, and the record shows that the older students are generally more physically mature than younger students. Expanding the sports program to include older students works a fundamental alteration." *Id.* (quoting *Sandison*, 64 F.3d at 1035). The second explanation went to the determination competitive unfairness and how or who could make it. *See McPherson*, 119 F.3d at 462. Five factors to weigh are "chronological age, physical maturity, athletic experience, athletic skill level, and mental ability to process sports strategy." *Id.*

92. *See id.* The court stated:

> The plaintiff would have us require waivers for all learning-disabled students who remain in school more than eight semesters. That, of course, would have the potential of opening floodgates for waivers, while until now, there have been only a handful of cases deemed appropriate for waivers. Assessing one or two students pales in comparison to the task of

The court initially noted that the simple fact that the MHSAA labeled the rule necessary did not make it so, but concluded that the court had an independent responsibility to determine whether the rule was in fact necessary.[93]

Bowers v. National Collegiate Athletic Ass'n[94] (NCAA), addressed the NCAA "core course" requirement for college athletics and found that the athlete had to be a qualified student to compete.[95] The court found that a waiver of the academic requirements set by the NCAA would alter the fundamental nature of the program because the requirements were essential and necessary to fulfilling the purposes of the program.[96] In certain cases individual assessments and exemptions were permitted.[97]

In contrast, the court in *Johnson v. Florida High School Activities Ass'n, Inc.*[98] (FHSAA) did not accept the reasoning of the above mentioned courts.[99] The majority stated that in *Pottgen* the court "provided no analysis as to the relationship between the age requirement and the purposes behind the

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assessing a large number of students; an increase in number will both increase the cost of making the assessments, as well as increase the importance of doing so correctly. Having one student who is unfairly advantaged may be problematic, but having increasing numbers of such students obviously runs the risk of irrevocably altering the nature of high-school sports.

Id. at 462-463.

93. *See id.* at 461.

94. 974 F. Supp. 459 (D.N.J. 1997). The National Collegiate Athletic Association (hereinafter, "NCAA") is a voluntary, unincorporated association that acts as the primary regulator of intercollegiate athletics in the United States. *See* Robert J. Adelman, *Has time run out for the NCAA? An Analysis of the NCAA as A Place of Public Accommodation*, 8 DEPAUL- LCA J. ART & ENT. L. 79, 95 (1997).

95. *Bowers*, 974 F. Supp. at 461. A learning-disabled college freshman sought a preliminary injunction ordering the NCAA to declare him a qualifier for freshman intercollegiate athletics and athletic scholarships. *See id.* at 460-61. His special education classes in high school did not qualify as "core courses" as required by the NCAA. *See id.* at 463.

96. *See id.* at 466. *See also Sandison*, 64 F.3d at 1034-35; *Pottgen*, 40 F.3d at 929. "The basic purpose of the NCAA is to maintain intercollegiate athletics as an integral part of the educational program and to assure that those individuals representing an institution in intercollegiate athletic competition maintain satisfactory progress in their education." *Bowers*, 974 F. Supp. at 466.

97. *See id.* at 467.

98. 899 F. Supp. 579 (M.D. Fla. 1995) *vacated as moot*, 102 F.3d 1172 (11th Cir. 1997).

99. *See id.*

age requirement."[100] In *Johnson*, a handicapped student athlete, brought an action against a state high school activities association for enforcing age restrictions and ultimately preventing him from competing in high school sports.[101]

The question before the court was whether waiving the age requirement constituted a "fundamental alteration" to the purposes of the rule.[102] The court's opinion adopted the position of the dissent in *Pottgen* and found that allowing Johnson to participate in interscholastic athletics would not undermine the safety and fairness purposes of the age requirement.[103] Therefore, waiver of the age requirement did not fundamentally alter the nature of the program.[104]

The court in *Dennin v. Connecticut Interscholastic Athletic Conference, Inc.*[105] (CIAC), clearly defined and expanded the *Johnson* decision, stating that an individualized analysis would not create an undue administrative burden because the need to do such an analysis only applied to athletes with disabilities, not all athletes failing to meet the age requirement.[106] In *Dennin*, a Down Syndrome afflicted student brought an action against the CIAC when he was

100. Adam A. Milani, *Can I Play?: The Dilemma of the Disabled Athlete in Interscholastic Sports*, 49 ALA. L. REV. 817, 865 (1998) (quoting *Johnson*, 899 F.Supp. at 584- 485).

101. *See Johnson*, 899 F. Supp. at 581. Johnson a nineteen-year old senior in high school, at the time the action commenced, suffered from meningitis at age nine months which caused the loss of all hearing in one ear and a considerable portion in the other. *See id.* Johnson's parents decided to wait a year before enrolling him in kindergarten. *See id.* He was also held back in the first grade due to his disabilities. *See id.* The Florida High School Activities Association's (hereinafter, "FHSAA") regulations stated that anyone who turns nineteen years of age before Sept. 1 of the current school year is prohibited from participating in high school sports. *See id.* at 582.

102. *See id.* at 584. The FHSAA promulgated two purposes for the age requirement: (1) to promote safety, "by liberally regulating the size and strength of players;" and (2) fairness, which prevents teams from building better programs by red-shirting their athletes. *Id.*

103. *See id.* at 585. Judge Arnold's dissent, in *Pottgen*, stated that "if a rule can be modified without doing violence to its essential purposes. . ., it [cannot] be 'essential' to the nature of the program or activity. . ." *Johnson*, 899 F. Supp. at 585 (quoting *Pottgen*, 40 F. 3d at 932) (Arnold, C.J. dissenting).

104. *See Johnson*, 899 F. Supp. at 586. There was no risk of harm found for the FHSAA or the others by the issuance of an injunction. *See id.*

105. 913 F. Supp. 663 (2d Cir. 1996) *vacated as moot*, 94 F.3d 96 (2d Cir. 1996).

106. *See id* at 668.

denied participation on the high school swim team during his senior year.[107] Dennin sought a waiver of the age regulation that restricted his involvement claiming that it violated the Rehabilitation Act and the ADA.[108] In acknowledging that individualized consideration could be complex (considering the factors set forth in *McPherson*), the court stated that although "it may prove difficult in some cases does not substantiate the claim that it would be unduly burdensome or destructive to the purpose of the rule."[109]

According to the *Dennin* court, the Rehabilitation Act and the ADA require an individualized analysis of the purposes behind the age requirement.[110] In finding that the CIAC failed to meaningfully consider whether Dennin's request for a waiver would undercut the purposes of the age eligibility rule, the court also noted that it disregarded the waiver option and failed to produce any reason why an individualized analysis would prohibit Dennin from receiving the waiver.[111]

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107. *See id* at 666. David Dennin participated on his high school swim team throughout his first three years of high school. *See id.* Because of his disability he spent an extra year in middle school, making him nineteen years of age before his senior year at Trumbull High School. *See id.* Thus placing him in violation of the age eligibility requirement set forth by the Connecticut Interscholastic Athletic Conference, Inc., stating that an athlete is not entitled to compete at age nineteen unless his nineteenth birthday falls on or after September 1. *See id.*

108. *See id* at 666.

109. *Dennin*, 913 F. Supp. at 669. The court recognized that other courts have found that similar individual analyses of an age requirement waiver are a reasonable accommodation. *See id.* at 668 (citing Booth v. University Interscholastic League, No. A90CA764, 1990 WL 484414 (W.D. Tex. 1990)). *Booth* dealt with a mentally impaired student who was prevented from playing football his senior year because he was nineteen years old before September 1 of his senior year. *Booth*, 1990 WL 484414 at 1. The court found that to flatly hold that anyone who failed to meet the requirement as a result of a past handicap would necessarily mean the student-athlete would never be otherwise qualified and therefore never deserving of the Rehabilitation Act's protection. *See id* at 3. The court went on to hold that "Not only does such a construction undermine the policies Congress sought to advance on behalf of the handicapped, but it also ignores the obligations of federal entities under the Rehabilitation Act, as interpreted by the U.S. Supreme Court (footnote omitted)." *Id.* (citations omitted).

110. *Dennin*, 913 F. Supp. at 668. The court stated that "[i]t would be an anathema to the goals of the Rehabilitation Act to decline to require an individualized analysis of the purposes behind the age requirement as applied to Dennin." *Id.*

111. *See id.* at 671. The court noted that granting Dennin the waiver would not

D. Opinion Of The Martin Court

Magistrate J. Coffin initially granted Martin a preliminary injunction allowing him to use a golf cart during the third stage of the PGA Qualifying School Tournament.[112] The PGA did not contest Martin's disability as defined under the ADA therefore further analysis into it was unnecessary.[113] As discussed above, in a motion for summary judgement Martin asserted three claims against the PGA.[114] Two of the three claims were dismissed by the district court in favor of the PGA.[115] For that reason, this section will focus only on Martin's first claim, that the PGA is a place of public accommodation.

1. Private Entity

The remaining issue before the district court was that of public accommodation status.[116] Martin maintained that the

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alter the nature of the swimming program because there was no competitive advantage. *See id.* at 669. Dennin was always the slowest swimmer in the pool, there was no safety risk because it is not a contact sport, and he was not a red-shirt threat, his education was delayed because of his disability not to build a competitive advantage. *See id.*

112. *See Martin*, 984 F. Supp. at 1322. This injunction caused the PGA to lift the "no cart" rule for all players and extend it into the first two tournaments on the Nike Tour. *See id.*

113. *Martin*, 994 F. Supp. at 1244. There is an objective three prong test to determine if the plaintiff is impaired: 1) "whether the plaintiff's condition is a physical or mental impairment"; 2) if the disability affects a "major life activity"; 3) if the "major life activity is substantially limited by the" disability. Cerrato v. Durham, 941 F. Supp. 388, 391-92 (S.D.N.Y. 1996).

114. *See Martin*, 994 F. Supp. at 1322-1323. *See also supra* notes 31-55 and accompanying text. The three claims were: "1) defendant [was] a private entity which is or operates a place of public accommodation; 2) defendant is a private entity that offers examinations or courses related to applications, licensing, certifications, or credentialing for professional or trade purposes; 3) defendant is an employer as defined in the ADA." *Martin*, 984 F. Supp. at 1323.

115. *See id.* The court dismissed these two claims finding that the PGA did not offer examinations or courses, nor was it an employer for purposes of the ADA. *See id.* Magistrate Coffin agreed with and incorporated by reference the arguments set forth by the PGA in its summary judgement motion. *See Martin*, 994 F. Supp. at 1247. *See also* Defendant's Memorandum of Law in Support of Motion for Summary Judgment at 15-19, Martin v. PGA Tour, Inc., 984 F. Supp. 1320 (D.Or. 1998) (No. 97-6309-TC).

116. *See Martin*, 994 F. Supp. at 1247. Magistrate Coffin gave his analysis of why the PGA was a public accommodation in his opinion on the motion for

PGA is a public accommodation and therefore subject to the regulations of the ADA and as such, the PGA was in violation of the act.[117] The PGA defended itself by claiming that it is a "private club" and could not be found to be restricted by the ADA.[118]

Before the court could determine whether or not the PGA Tour is in fact entitled to the exemption, it first must look to the nature of the entity.[119] The court stated that the Tour is commercial in nature and its success is determined proportionately to its spectators and viewers.[120] Applying the commonly weighed factors set forth in *United States v. Landsdowne Swim Club*,[121] the court had to decide whether or not the PGA was truly a private club.[122] Applying the first of the seven factors the court used to weigh its decision, genuine selectivity, the court determined that PGA eligibility measures skill and as such the court found that "such natural 'weeding out' selectivity is inherent to athletics, and does nothing to confer 'privacy' to the organizations to which professionals matriculate."[123] The second factor the court assessed, membership control, also weighed against finding

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summary judgment. *See Martin*, 984 F. Supp. 1320 at 1322.

117. *See Martin*, 984 F. Supp at 1322.

118. *See Martin*, 994 F. Supp at 1244.

119. *See Martin*, 984 F. Supp. at 1323. The PGA relied on Welsh v. Boy Scouts of America, 993 F.2d, 1267 (7th Cir. 1993). *See Martin*, 984 F. Supp. at 1324. However, the *Welsh* court used the membership purpose as a controlling factor and set forth the test as to selectivity as the nexus between the organization's purpose and its membership requirements. *See id.* (citing *Welsh*, 993 F.2d at 1277). This was adverse to the PGA's position. *See Martin*, 984 F. Supp. at 1324.

120. *See id.* Specifically the court stated that the:

> Tour is an organization formed to promote and operate tournaments for the economic benefit of its members, a highly skilled group of professional golfers. As with all professional sports organizations, the Tour is part of the entertainment industry, offering competitive athletic events to the public, which in turn generate sponsorship of the events, network fees, advertising revenue, and, ultimately, the tournament prize money awarded the competitors.

Id. at 1323.

121. 713 F. Supp. 785 (E.D. Pa. 1989).

122. *See Martin*, 984 F. Supp. at 1325

123. *Id.* at 1324-25. The Martin court noted this intricate analysis as the most important and that the eligibility requirements are not designed "to screen out members based upon social, moral, spiritual, or philosophical beliefs, or any other criteria used to protect freedom of association values which are at the core of the private club exemption." *Id.* at 1325.

the PGA to be a private entity.[124] According to the court, the fact that PGA Tour players play their way onto the Tour as opposed to being voted in, did little to keep the group private.[125] As to the third factor, history of the organization, the court concluded that the fact that the PGA was formed in 1968 showed only that it was not formed to side step the ADA but did little to prove that it was a private club.[126] In considering the fourth factor, use of facilities by nonmembers, the court found that non-member participants included vendors, reporters, score keepers, volunteers, and members of the gallery, which leaned in favor of the PGA not being exempt.[127] The court also determined that the PGA's purpose, the fifth factor, is to generate revenue for its members, which the court considered strong evidence against the PGA being a private club.[128] The court found the question of whether or not the club advertises for members, the sixth factor, easily answered by the fact that the media extensively covers the PGA.[129] The final factor examined by the court was whether the PGA is nonprofit.[130] The court stated that while the PGA was nonprofit, the fact that it existed "to enhance profits for its members," weighed against exempt status.[131] The court found that PGA was not a private club and therefore, was not exempt from the ADA.[132]

2. Public Accommodation

Having determined that the PGA was not an "exempt private club" the court then turned to the issue of whether or not the tournaments are places of public accommodation.[133]

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124. *See id.*
125. *See id.*
126. *See Martin*, 984 F. Supp. at 1325.
127. *See id.*
128. *See id.*
129. *See id.* "Courts have held that organizations which advertise and solicit new members do not fall within the private club exemption." *Id.* (citing Wright v. Salisbury Club, Ltd., 632 F. 2d 309 (4th Cir. 1980)).
130. *See Martin*, 984 F. Supp. at 1325.
131. *Id.* (citing Quijano v. University Federal Credit Union, 617 F.2d 129 (5th Cir. 1980)).
132. *See Martin*, 984 F. Supp. at 1326.
133. *See id.* at 1326. The ADA requires reasonable accommodations to be provided to the disabled individual in a place of public accommodation. *See id.* The PGA maintained that even if it was found not to be an exempt private entity, it

Under the ADA, golf courses are specifically set forth as places of public accommodation.[134] The PGA asserted that since its courses "are not open to the 'general public' between the boundaries of play during its tournaments the tournament events are not places of public accommodation."[135] The PGA continued its argument by contending that only those places actually accessed by the public at large are considered place of public accommodation and as such the fairways and greens where the public is denied access are not places of public accommodation.[136] The district court broke down the PGA's arguments and rejected them as flawed.[137]

The court first posited that if the defense were correct in its assertions, it would essentially eliminate the private club exemptions under the ADA.[138] Magistrate Coffin criticized the PGA's rational because a private club not exempt from the ADA "could nonetheless refuse to accommodate any handicapped members by pointing out that it only admits . . . members, (and not the public at large) on its grounds."[139] Secondly, the court determined that the statute and regulations that the PGA relied on did not create a right for

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could not be a place of public accommodation because the courses are not open to the public at large. *See id.*

134. *See supra* note 10. Section 12182 of Title III of the ADA as to the prohibition of discrimination by public accommodations, states in relevant part:

> (a)General Rule
>
> No 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.
>
> (b)(2)(A)(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.

42 U.S.C. § 12182 (West 1998).

135. *Martin*, 984 F. Supp. at 1326.

136. *See id.* The PGA refers to the Department of Justice regulations to exemplify places of public/private zoning in places of public accommodation. *See id.* at 1326-27.

137. *See id.* 1326.

138. *See id.*

139. *Id.* This would make the exemption irrelevant. *See id.*

an operator of a public accommodation to create a zone of privacy.[140] To the contrary, the court stated that the regulations actually create a zone for the ADA to apply where it would normally be excluded.[141]

3. Reasonable Accommodation And Fundamental Alteration

Title III of the ADA states in relevant part that

> [d]iscrimination includes 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 the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.[142]

The court recognized and stated that it has an independent duty to inquire into the purpose of the rule at issue to decide whether or not a reasonable accommodation[143] can be made without frustrating the purpose of the rule or fundamentally altering the nature of the game.[144] The plaintiff must first prove that he is disabled and that reasonable modification was requested.[145] Martin

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140. *See id.* Magistrate Coffin addressed the PGA's example of a typical major league baseball stadium as a dual public/private zone. *See id.* at 1327. The PGA argued that while the bleachers are open to the public and thus entitled to ADA protection, the dugout is not protected because public access is restricted. *See id.* The court could not see how a team could not be made to make accommodations for a disabled manager who needs access to the dugout. *See id.*

141. *See id.* The court made reference to supporting analogies discrediting the PGA's argument. *See id.* For example, what if a disabled caddy was hired? *See id.* He would obviously be allowed into the boundaries of the playing course with the protection of the ADA. *See id.*

142. *Martin*, 994 F. Supp. at 1247. (citing 42 U.S.C. §12182(b)2(A)(i)).

143. *See Martin*, 994 F. Supp. at 1247. Reasonable accommodation is "a method of accommodation that is reasonable in the run of cases, whereas the undue hardship inquiry focuses on the hardships imposed by the plaintiff's preferred accommodation in the context of the particular [employer's] operations." Johnson v. Gambrinus Company/Spoetzl Brewery 116 F. Supp. 1052, 1058 (5th Cir. 1997).

144. *See Martin*, 994 F. Supp. at 1248. The court considered it weighty evidence that the PGA does not penalize golfers who do use carts in the Qualifying School Tournament or the Senior Tour. *See id.*

145. *See id.* The PGA stipulated to Martin's disability. *See id.* at 1244.

met these requirements.[146] The court concluded that allowing a cart would not be unreasonable because the Rules of Golf do not require walking.[147]

Whether or not the request fundamentally alters the nature of the public accommodation can be proven by evidence that focuses on the specifics of the plaintiff's or defendant's circumstances and not on the general nature of the accommodation.[148] In prior case law, as noted, this individual inquiry is controversial.[149] Magistrate Coffin followed the reasoning of the *Johnson* court in his analysis on a fact specific basis as to Martin's circumstances.[150]

It should be noted that, with no written policy governing the Rules Committee, no waiver has ever been granted for an individual's disability.[151] In deciding to use the individualized inquiry, the question became whether or not the reasonable accommodation would fundamentally alter the nature of the game.[152] The PGA asserted that the

146. *See Martin*, 994 F. Supp. at 1247. If a plaintiff introduces "evidence that the requested modification is reasonable in general sense, that is reasonable in the general run of the cases," and at the same time defendant introduce evidence indicating that the requested modification is not reasonable in run of cases, plaintiff bears ultimate burden of proof on that issue. *Id.* (citing *Johnson*, 116 F.3d at 1059). The *Martin* court found that under a *Johnson* analysis Martin satisfied this test. *See Martin*, 994 F. Supp. at 1248. It was noted that the NCAA and the PAC 10 athletic conferences allow the use of carts to disabled golfers. *See id.*

147. *See id.* The court cited Rule 1-1 of the "Rules of Golf" set forth and adhered to by the USGA and the Royal and Ancient Golf Club of St. Andrews, Scotland. *See id.* at 1249. "The Game of Golf consists in playing a ball from the teeing ground into the hole by a stroke or successive strokes in accordance with the rules." *Id.*

148. *Id.* at 1249 (citing Johnson v. Gambrinus Co., 116 F.3d 1052, 1059 (5th Cir. 1997)).

149. The PGA relied on the *Pottgen* and *Sandison* courts that stated an individual inquiry is inappropriate because it would create an undue burden. *See Pottgen*, 40 F.3d at 926; *see also Sandison*, 64 F.3d at 1026. *See also supra* notes 75 and 92. The *Johnson* and *Crowder* courts held differently stating that it is necessary to first inquire on a case-by-case basis as to the individual circumstances. *See Johnson* 899 F. Supp. 579; *see also* Crowder v. Kitagawa 81 F.3d 1480, 1486 (9th Cir. 1996).

150. *See Martin*, 994 F. Supp. at 1249. The court stated that it must first conduct an individual inquiry of Martin before it focuses solely on the nature of the PGA and Nike Tours. *See id.*

151. *See id.*

152. *See id.* Martin had made every attempt to accommodate his own disability before asking for a cart. *See id.* Martin's doctor, Doctor Jones, testified as to some of the artificial aids that they tried in order to help Martin walk, they included: a removable brace, shoe orthosis and ankle-foot orthosis. *See id.* at 1249-50.

purpose of the walking rule is to "inject the element of fatigue into the skill of shot-making."[153] Magistrate Coffin elaborated on his decision and stated that the fatigue factor is not significant under normal circumstances.[154] In fact, the court notes, most PGA Tour golfers prefer walking because they can deal better with the psychological elements of fatigue.[155] Martin's fatigue comes from contending with his disability while trying to play, arguably inducing much greater fatigue in him than his able bodied competitors who walk.[156]

Additionally, the court noted that Martin does walk a significant amount on the golf course.[157] The court reasoned that the pain and stress created by his disability gives Martin a higher degree of psychological fatigue.[158] The court concluded that "[a]s plaintiff easily endures greater fatigue even with a cart than his able-bodied competitors do by walking, it does not fundamentally alter the nature of the PGA Tour's game to accommodate him with a cart."[159]

In order to illustrate its point the court presented a hypothetical in accordance with the rules of golf.[160] Magistrate Coffin questioned whether or not certain rules could be modified in order to accommodate a blind golfer.[161]

Nothing helped him. *See id.* at 1250.

153. *See id.* at 1250.

154. *See Martin*, 994 F. Supp. at 1250. A professor and expert of physiology, Dr. Klug describes the energy expenditure of walking 5 miles in 5 hours as "nutritionally less than a Big Mac." *Id.* Doctor Klug also testified that the fatigue of the lower intensity exercise is mainly psychological with stress and motivation as key considerations. *See id.* at 1251.

155. *See id.* When given the option of riding on a cart most golfers choose to walk. *See id.* Eric Johnson, Nike Tour professional, stated that walking is preferred because it gives the full effects of the elements, such as wind direction and rain. *See id.*

156. *See id.* With no time limits enforced, a golfer can take as much time as he desires from shot to shot. *See id.* at 1251 n.14.

157. *See id.* at 1251. Martin walks approximately 25% of the course just in getting in and out of his cart and walking to the shot. *See id.*

158. *See Martin*, 994 F. Supp. at 1251.

159. *Id.* The court considered all relevant factors of Casey Martin's situation and found that the walking rule may be modified to accommodate him with a cart. *See id.*

160. *See id.* at 1252-53.

161. *See id.* at 1252. Rule 6-4 specifies that a player may not have more than one caddie at any one time or he is subject to disqualification. *See id.* Rules 8 states, in relevant part, that advice is any counsel or suggestion that could

The USGA supplies a pamphlet entitled "A Modification of the Rules of Golf for Golfers with Disabilities" that contains permissible modifications to the rules not to be applied to able-bodied players.[162] According to the pamphlet, a golfer is entitled to a coach, that is, one who assists a blind golfer in initially finding the ball and with alignment.[163] The rules, as modified, allow a player to ask advice from his playing partner, either one of the caddies or his coach.[164] The USGA denied that the pamphlet was intended to apply to the PGA Tour and suggested that it is for recreational golfers.[165] The court, in accepting the PGA's assertion, questioned just what would happen if a blind pro golfer wanted a coach and a caddie.[166] The PGA testified that it would need to conduct an individualized assessment before finding the accommodation reasonable in that situation.[167] The court found that this answer directly contradicted the PGA's position in the present case and declared that the rules are not so sacred and reasonable accommodations can be made in light of the circumstances.[168]

III. CONCLUSION

It is understandable that many people often have difficulty with change. And the *Martin* decision will institute just that. But is it possible to ignore the amazing strides that society has taken by accepting disabled Americans into "everyday life"? It has been a slow and positive progression that has enabled millions of handicapped people to enjoy places and take part in many events and jobs that they may not have otherwise. The *Martin* decision should be viewed as

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influence a player during play, i.e. the choice of club or the method of making a stroke. *See id.* Information as to rules or location of flagsticks does not qualify as advice. *See id.* Rule 8-1 states that a player cannot give advice to anyone in competition except his partner and cannot ask advice of anyone except his partner or either of the two caddies. *See id.*

162. *See Martin*, 994 F. Supp. at 1252.

163. *See id.* A coach holds the same status as a caddie. *See id.*

164. *See id.* at 1253. A blind player would be allowed to have both a caddie and a coach. See id.

165. *See id.*

166. *See Martin*, 994 F. Supp. at 1253.

167. *See id.*

168. *See id.*

a milestone for the ever-expanding ADA. An affirmation upon appeal of the district court's decision is unlikely to provoke a flood of litigation against professional sports leagues but it will set the path for many disabled athletes who seek appropriate accommodations.

The idea is that no one should be held back by a disability. The game of golf has its traditions and rules, however, now is the time to modify them. It is not necessary to change golf's rules across the board, but in those particular instances where, after an individualized inquiry, an accommodation can be made without hurting the game, it should be done.

At some point, people will argue that there may be a slippery slope. If the Ninth Circuit agrees with Magistrate Coffin then there will be substantial change. The changes will incorporate several new claims under the ADA. The changes, however, are for the good of the public and the disabled. Of course, some abuse is expected. Fortunately, with good precedent set, most unreasonable cases should fail.

The policy created by this decision will produce more struggle when actual acceptance is an issue. The question, outside of the court, is whether other PGA golfers will accept Martin and his cart. It is sure to be a long and gradual process before all golfers will feel that this decision is "fair." Although the PGA has voiced legitimate concerns, it is unquestionably appropriate to apply the ADA to its competitions. Allowing professional and amateur athletes the opportunity to play is right, regardless of old-fashioned, narrow, viewpoints. The burden of analyzing disabilities on a case-by-case basis is the least a healthy, able-bodied, individual can do for those who do not enjoy such pleasures in life. Good fortune can be shared.

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