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A Good Walk Spoiled: Casey Martin and the ADA's Reasonable Accommodation Requirement in Competitive Settings

Alex B. Long

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Throughout its brief history, the full scope of the Americans with Disabilities Act (ADA) has remained largely unsettled. Federal courts routinely face the difficult task of attempting to define the contours of a law with little case history and scarce legislative guidance.[1] Questions concerning "What is a disability under the ADA" consume the efforts of both the courts[2] and commentators.[3] The underlying principles of promoting fairness and access for the disabled are, however, almost universally accepted.

When golfer Casey Martin challenged the Professional Golf Association's (PGA) rule preventing golfers from riding in golf carts during tournament play, he touched off a national debate on the fundamental fairness of the PGA's rule.[4] The case, *Martin*

* B.A. 1991, James Madison University; J.D. 1998, Marshall Wythe School of Law, College of William & Mary; Associate, Steptoe & Johnson, Clarksburg, WV.

[1] *See* 136 CONG. REC. S9694 (daily ed. July 13, 1990) (statement of Sen. Armstrong).

[2] *See, e.g.*, Bragdon v. Abbott, 524 U.S. 624 (1998) (holding that asymptomatic HIV infection is a covered disability under the ADA); Zatarin v. WDSU-Television, Inc., 881 F. Supp. 240 (E.D. La. 1995) (holding that infertility is not a disability within the meaning of the ADA); Pacourek v. Inland Steel Co., 858 F. Supp. 1393 (N.D. Ill. 1994) (holding that infertile plaintiff stated a claim within the ADA's definition of disability).

[3] *See, e.g.*, Deborah K. Dallman, *The Lay View of What "Disability" Means Must Give Way to What Congress Says it Means: Infertility as a "Disability" Under the Americans With Disabilities Act*, 38 WM. & MARY L. REV. 371 (1996) (discussing circuit split concerning whether infertility is a disability under the ADA).

[4] *See* Martin v. PGA Tour, Inc., 994 F. Supp. 1242 (D. Or. 1998); John Garrity, *Taking One for the Team*, SPORTS ILLUSTRATED, Feb. 23, 1998, at 63; Jurek Martin, *Taking the Rulebook to Court*, FINANCIAL TIMES, Feb. 14, 1998, at 20; Scott Mills,

v. PGA Tour, Inc.,[5] contained two important issues concerning disability law. The first issue, and arguably the most important[6] aspect of the ruling—that the PGA was not a private club for purposes of the ADA and hence not immune from its coverage[7]—generated relatively little discussion among the public at large. The second aspect—the court's conclusion that the ADA's reasonable accommodation requirement mandated that the PGA permit the disabled Martin to utilize a golf cart during tournament play[8]—caught the attention of non-lawyers and non-golfers alike. The *Martin* court's conclusion, requiring the PGA to accommodate Martin by allowing him to ride in a golf cart because it would not alter the fundamental nature of the competition, drew a sharp response.[9] Golfing traditionalists howled at the federal magistrate judge's decision,[10] while the general public found the requirement to be a fair and sensible solution.[11] What was lacking from the national debate, however, was a focus on what role, if any, the ADA should have in competitive situations.

This Article focuses on the role the ADA should have in competitive situations. Additionally, it makes a simple point, but a

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Ruling Gives Golfer A Free Ride, Not A Level Playing Field, BULLETIN, Feb. 24, 1998, at A7; *Casey Martin's Ride*, ORANGE COUNTY REG., Feb. 15, 1998, at G2.

5 994 F. Supp. 1242.

6 *See Judge: PGA Tour is Place of Public Accommodation Ruling More Important Than Trial's Outcome, Experts Say*, Disability Law Compliance Bulletin, Feb. 12, 1998, *available in* LEXIS, News Library, Curnews File.

7 *See Martin*, 994 F. Supp. at 1246-47.

8 *See id.* at 1247.

9 *Id.* at 1251.

10 In an editorial, the local newspaper in Augusta, Georgia, home of the famous Masters Golf Tournament, argued that "[e]ven the most generous interpretation of the ADA doesn't give judges the power to rewrite the rules of competitive sports." *Appeal Martin Ruling*, AUGUSTA CHRON., Feb. 23, 1998, at A4.

11 *See* Garrity, *supra* note 4, at 63 ("The Tour's obstinacy has cost it dearly in public esteem."); Martin, *supra* note 4, at 20 (implying that public sympathy appears much in Martin's corner); *Casey Martin's Ride*, *supra* note 4, at G2 ("Popular opinion is surely on the side of Casey Martin.").

Golf Digest's accounting of the case is particularly revealing:

> The Hartford Courant called golfers "snobbish Neanderthals." The Seattle Times decried the tour's "insensitivity, arrogance, and stupidity." The Toronto Star declared the "pig-headed" tour "the most elitist pro sports organization in existence." The typical tour player came off as stuffy, petty, exclusionary, greedy and self-righteous. He also wore yellow plaid pants.
>
> "A public-relations nightmare," veteran player Peter Jacobsen said. "Ninety percent of people want to know why the tour is persecuting this poor kid."

Dave Kindred, *A Nightmare That Could Have Been Avoided*, GOLF DIG., May 1998, at 74.

point that judges must address in future ADA cases involving competitive situations: namely, that the ADA's reasonable accommodation standard does not fit as neatly into the public accommodation setting involving competitive behavior as it does into the more traditional employment context. When the law attempts to introduce the abstract notion of "reasonable accommodation" into the laboratory setting of competition in places of public accommodation, it raises serious questions about fundamental fairness and equal opportunity. As the first high profile case to deal with the ADA in a competitive setting, *Martin* had the opportunity to address the shortcomings of the statute in such a setting and to help define the contours of what "reasonable accommodation" means in a situation that produces clear winners and losers based on quantifiable performance. Although the decision in *Martin* may have been correct on its facts, the opinion failed to come to grips with a key principle inherent in any situation where participants are placed in head-to-head competition: A special modification of the rules of the game for one individual, however slight, may necessarily alter the level playing field for all participants.

The *Martin* decision focused primarily on whether a specific waiver of the PGA Tour's rule preventing players from riding in golf carts constituted a "reasonable modification."[12] The court had to determine whether such an accommodation would fundamentally alter the nature of PGA events.[13] The court failed, however, to adequately address the potential consequences of forcing a modification of governing rules in competitive settings. As a result of this failure, the *Martin* decision has potential implications beyond simply the game of golf. It could apply to any situation involving the ADA where one person's gain equals another's loss.

This Article uses the *Martin* decision, and similar decisions involving the ADA in competitive settings, to illustrate several points. First, it illustrates how broad the ADA's reasonable accommodation requirement actually is when it is placed in the context of competitive situations. This is an issue that has ramifications not only for athletes, but students seeking to gain admission to schools based on standardized aptitude tests; law students taking state bar examinations; or even potential employees who

[12] *Martin*, 994 F. Supp. at 1246.
[13] *See id.*

are judged by some type of quantifiable criteria. The *Martin* decision also raises fundamental questions about the fairness of a law that can mandate an alteration of the rules in competitive settings.

Part I of this Article provides a brief overview of the language and purposes of the ADA and attempts to illustrate some of the issues raised by the *Martin* decision. Specifically, Part I analyzes typical employment situations involving the reasonable accommodation requirement in an effort to highlight how the ADA views the concepts of "fairness" and "equality." This analysis draws the rather unremarkable conclusion that, at least in the employment setting, the reasonable accommodation requirement is fair to all employees as it imposes no burden on the nondisabled.

Part II attempts to illustrate how, as one progresses farther away from the employment setting and into more competitive settings, the fundamental fairness of the reasonable accommodation standard is more easily susceptible to challenge. Specifically, in cases of standardized testing used for admission to college, graduate school, law school, and admission to the bar, the competitive nature of the settings demands greater caution when granting special accommodations.

Part III addresses the line of cases most similar to *Martin*: namely, cases involving eligibility rules for participation in athletic programs. These cases clearly illustrate how, if due concern is not paid to the fundamental notion of competition, the reasonable accommodation requirement may go beyond simply placing the disabled on the same footing as the able-bodied and may instead provide the disabled with a competitive advantage, thereby fundamentally altering the nature of competition.

Finally, this Article addresses Casey Martin's situation. *Martin* represents a special class at the furthest end of the spectrum from the typical employer reasonable accommodation case. In professional golf, and in any professional sport, the essence or nature of the activity is competition. When a governing authority is forced to alter an existing rule in order to accommodate a disabled individual, the change may in some cases result in a fundamental alteration of the nature of the event. This mandatory change potentially creates an unfair situation whereby a special allowance for one participant necessarily places other participants at a competitive disadvantage. If applied in this manner, the ADA

ceases to be fair to all parties concerned. Although this Article concludes that the result reached in *Martin* concerning the accommodation at issue was correct, the court's analysis failed to adequately address this concern. Specifically, it failed to recognize that the nature of a professional golf event is distinctively competitive, and that by introducing a new variable into the laboratory setting of competition, the ADA's reasonable accommodation requirement, if applied incorrectly, could destroy the fundamental fairness of competition.

This Article attempts to formulate an approach courts should take in this special circumstance. In addition to conducting an inquiry into the purposes of the governing rule and asking whether a modification would frustrate its purpose, courts should give special consideration to the degree of competition involved in a particular program. By reluctantly expanding the ADA to such operations in close situations courts will be able to prevent the potential unfairness that may arise when modifications are made to existing rules designed to level the playing field for all participants.

I

THE ADA IN THE WORKPLACE

A. Overview of the Reasonable Accommodation Requirement

Prior to the passage of the ADA, there was little to prevent employers from discriminating against the disabled.[14] The Rehabilitation Act of 1973 prohibited discrimination against the disabled by programs receiving federal financial assistance,[15] but the vast majority of private sector employees remained immune from the law's proscription.[16] The ADA requires employers and private entities to make reasonable accommodations to existing practices in order to allow full participation by the disabled.[17] Title I governs the employment setting.[18] Championed by sup-

[14] *See* BUREAU OF NATIONAL AFFAIRS, INC., THE AMERICANS WITH DISABILITIES ACT: A PRACTICAL AND LEGAL GUIDE TO IMPACT, ENFORCEMENT, AND COMPLIANCE 26-28 (1990) [hereinafter A PRACTICAL AND LEGAL GUIDE].

[15] *See* 29 U.S.C. § 794(a) (1994).

[16] *See* A PRACTICAL AND LEGAL GUIDE, *supra* note 14, at 26-28.

[17] *See* 42 U.S.C. §§ 12112(b)(5)(A), 12182(b)(2)(ii) (1994). Instead of "reasonable accommodation," Title III uses the term "reasonable modifications." *See id.* Although not technically accurate, the two terms are used interchangeably for purposes of this Article.

[18] *See* 42 U.S.C. § 12112(b)(5)(A).

porters in Congress as the "most comprehensive civil rights legislation our Nation has ever seen,"[19] the ADA prohibits discrimination against a qualified individual in nearly all facets of the employment relationship because of the disability of such an individual.[20]

It is clear from the legislative history of the ADA that one of Congress' main concerns was how the law would affect the employment setting. Despite strong support for the measure,[21] some members of Congress expressed concern that the law would unduly burden smaller employers,[22] unfairly impose punitive damages on employers,[23] and create an adversarial relationship between employers and employees based upon the law's allegedly vague definition of what constitutes a "disability."[24]

Although Congress was clearly concerned about creating equal opportunity in other settings, it was the employment area that generated the most debate and garnered the most attention. This focus on the ADA in the employment setting continues today with the majority of case law developing in the employment context.[25]

B. Purposes of the Reasonable Accommodation Requirement

Congress enacted the ADA in 1990 to "assure equality of opportunity" for disabled individuals.[26] On its face, the ADA is not unique in the tapestry of employment discrimination law. The ADA's reasonable accommodation requirement, however, helps to separate the ADA from its counterparts, such as Title VII of the Civil Rights Act of 1964 (Title VII)[27] and the Age Discrimi-

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[19] 136 CONG. REC. S9695 (daily ed. July 13, 1990) (statement of Sen. Dole).

[20] *See* 42 U.S.C. § 12112(a). Specifically, Title I prohibits discrimination "in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.*

[21] The Act passed the House of Representatives by a 337-28 vote and the Senate by a 91-6 vote. *See* 136 CONG. REC. H4629 (daily ed. July 2, 1990); 136 CONG. REC. S9695 (daily ed. July 13, 1990).

[22] *See* A PRACTICAL AND LEGAL GUIDE, *supra* note 14, at 32-62.

[23] *See id.*

[24] *See* 136 CONG. REC. S9694 (daily ed. July 13, 1990) (statement of Sen. Armstrong).

[25] *See* McPherson v. Michigan High Sch. Athletic Ass'n, 119 F.3d 453, 460 (6th Cir. 1997).

[26] 136 CONG. REC. S9527-02 (daily ed. July 11, 1990) (statement of Sen. Harkin).

[27] 42 U.S.C. §§ 2000e to e-17 (1994).

nation in Employment Act (ADEA).[28]

As other commentators have noted, the reasonable accommodation concept functions to separate the ADA from traditional anti-discrimination laws.[29] Similar to laws which protect against discrimination based on race, gender, or age, the ADA provides "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[30] Thus, like its counterparts, the ADA prohibits discrimination because of an illegitimate criterion—in this instance, disability.[31] But as Professors Pamela S. Karlan and George Rutherglen have noted, the ADA differs from these other statutes in one crucial respect: Under Title VII and the ADEA, "plaintiffs can complain of discrimination against them, but they cannot insist upon discrimination in their favor; disabled individuals often can."[32] An example given by Professors Karlan and Rutherglen helps to illustrate this point.

> Suppose that one "essential function" of the job of sack handler is to carry fifty-pound sacks from the company loading dock to a store room. If a male worker is physically disabled by a back ailment, and thus unable to carry the sacks the full distance, the company can be required to make the reasonable accommodation of providing the worker with a dolly on which to transport the sacks. By contrast, if a female worker cannot lift the same heavy cartons hoisted by her male counterparts, no accommodation is required and firing her because she cannot do the job as it then stands does not constitute impermissible sex discrimination.[33]

Thus, whereas in most employment discrimination laws, employers are forbidden to take into account a particular trait of an employee, the ADA actually requires such consideration.[34] Failure to do so constitutes discrimination based on an individual's disability.[35] In this sense, the reasonable accommodation functions like affirmative action, mandating that an employer or cov-

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[28] 29 U.S.C. §§ 621-34 (1994).

[29] *See* Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 2 (1996).

[30] 42 U.S.C. § 12101(b)(1) (1994).

[31] 42 U.S.C. § 12112(a) (1994). *Cf.* 42 U.S.C. § 2000e-2(a)(2) (prohibiting discrimination based on "race, color, religion, sex, or national origin"); 29 U.S.C. § 623(a)(2) (prohibiting discrimination "because of [an] individual's age").

[32] Karlan & Rutherglen, *supra* note 29, at 3.

[33] *Id.* at 3-4 (citations omitted).

[34] *See id.* at 9.

[35] *See* 42 U.S.C. §§ 12112(b)(5)(A), 12182(b)(2)(A)(ii) (1994).

ered entity provide special treatment to an individual based on a particular trait.[36]

One need not choose a side in the affirmative action debate to recognize that traditional race- and gender-based affirmative action programs raise issues of fundamental fairness. In contrast, the reasonable accommodation requirement, at least in the employment context, is generally regarded as a rather uncontroversial affirmative action program. Few question the wisdom or fairness of affording preferential treatment to an employee with a disability in the workplace. From a purely practical standpoint, the reasonable accommodation requirement makes sense: it helps enable some of the estimated forty-three million individuals with disabilities seek gainful employment.[37] But given the reality of persistent discrimination in the workplace based on race and gender, this same argument is easily made in support of more traditional affirmative action programs, yet opponents of such programs still remain resolute in their opposition. Thus, there must be another factor which explains why disability-based affirmative action is viewed as non-problematic. That factor, quite obviously, is the perceived fairness of the reasonable accommodation requirement.

Although commentators have debated, and will continue to debate, the meaning of such terms as "fairness" and "equality,"[38] for purposes of this Article "fairness" means nothing more than a situation in which one person is not disadvantaged by the treatment afforded a similarly-situated individual. This working definition excludes some situations which might be considered "unfair" under a stricter definition of the term. For example, the reasonable accommodation requirement could be considered "unfair" in the sack-handling example above because the grantor of the accommodation bestows preferential treatment to the disabled worker; however, as will be explained later, under the working definition of "fairness," the special treatment is "fair."[39] This working definition is employed in order to address those sit-

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[36] *See* Karlan & Rutherglen, *supra* note 29, at 14.

[37] *See* 42 U.S.C. § 12101(a)(1) (1994) (finding that 43 million Americans have one or more physical or mental disabilities).

[38] *See* Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1122, 1143 n.68 (1998) (discussing different commentators' conceptions of the term "equality").

[39] *See infra* notes 41-47 and accompanying text.

uations in which equal treatment is absolutely essential—namely, competitive settings.

There are several explanations for the fundamental fairness of the ADA in the workplace. The below examples illustrate how, in the typical workplace, the reasonable accommodation requirement is fair to the parties involved.[40]

1. Nature of the Workplace

One factor which lessens the perception of any potential unfairness in the ADA is the simple nature of the workplace. Unlike a sporting event, the purpose of the workplace is not to create a playing field on which co-workers compete with each other. Admittedly, in some sense, all workers are in competition with each other. Employers select employees for promotion and salary increases based in part on their performance as compared to other workers. Employers want "the best" employees for the job, and "the best" naturally implies comparison.[41] But the main requirement of any job is simply the ability to perform the job to the satisfaction of the employer. Employees do not come to work each day in order to beat their co-workers in the same sense as professional football players do. Normally, an employee is not required to somehow outperform his or her co-workers.

Thus, the nature or essence of the office and factory setting for workers is one of production, not competition. Unlike a sporting event where the participant's goal is to beat his or her competitors, the typical employee's goal is to produce a satisfactory work product. When an employer makes a reasonable accommodation for a disabled employee so that the disabled employee may perform the essential functions of his or her job, the employer has done nothing to limit the ability of other employees to perform their jobs in a satisfactory fashion.

This is not to suggest that the ADA creates no fairness problems in the workplace. If an employer were to give such special treatment based on race or gender, rather than disability, many would not be so quick to dismiss the benefits that might

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[40] *See infra* notes 41-47.

[41] Obviously, employers look to the skill level and experience of applicants and employees in order to make hiring and layoff decisions. *See* Taxman v. Board of Educ. of Piscataway, 91 F.3d 1547 (3d Cir. 1996) (involving a decision to select one employee for termination over an equally qualified employee on the basis of race). In this sense, employees are in competition with each other.

flow from outperforming one's co-workers.[42] Instead, the perceived fairness problems are lessened in the disability setting, and it is the nature of the workplace which accounts for this perception. As we shall see, the ADA begins to raise greater fairness concerns when the setting switches from the workplace to other settings.

2. *The Reasonable Accommodation Requirement in Action*

A second factor accounting for the overall fairness of the reasonable accommodation requirement in the workplace lies in the purposes and functioning of this requirement. A slight alteration of the facts in the prior example involving the male worker transporting sacks by utilizing a dolly illustrates this point. Imagine that the disabled individual has a female co-worker who is capable of lifting the sacks without the assistance of a dolly.[43] The dolly provided to the disabled worker is clearly a gain; however, the disabled worker's gain in no way disadvantages the female worker. Although she undoubtedly would prefer to have a dolly to help do her work, she is still able to perform the essential function of the job just as her disabled male counterpart now is. The dolly merely serves to place the disabled worker on the same footing as the non-disabled worker, or, in other words, it levels the playing field. The disabled worker's gain is not the non-disabled worker's loss and no issues of unfairness are present.[44]

Assume further that the dolly enables the disabled worker to lift more sacks than his counterpart during the course of a work day. Theoretically, by virtue of being able to transport more sacks per day than his counterpart, the accommodation might place the disabled individual at an advantage when it came time to promote one of the sack handlers. The supervisor will undoubtedly compare the performance of the workers and realize that the disabled individual is performing more efficiently than his counterpart. However, the nature of the workplace helps to limit any potential unfairness in this situation. Promotion decisions are only infrequently based solely on quantifiable factors, such as the number of sacks lifted, the amount of sales commis-

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[42] *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (disallowing the use of preferential protection against layoffs to minority employees).

[43] *See supra* note 33 and accompanying text.

[44] *See* Zacharias, *supra* note 38, at 1143 n.68 and accompanying text (defining fairness).

sion, etc. Supervisors take into account numerous factors in their promotion decisions, including an employee's interpersonal skills, management experience, etc. Thus, the disabled employee's gain as a result of the accommodation does not automatically translate into a loss for his counterpart.

The situation becomes slightly more problematic when the original facts are used, i.e., the female worker cannot lift the sacks. If the disabled worker is allowed to use the dolly and, as a result, is able to perform the job, but the female worker does not receive such special treatment, and is thus unable to perform the essential function of the job, this appears to raise a fairness issue. The female worker will lose her job under this scenario, but the disabled worker will not. The ADA's requirement that a disabled individual be "otherwise qualified" to perform the job helps alleviate such fairness concerns. An "otherwise qualified" individual is one who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual and others.[45] Thus, in making the determination that the disabled worker is otherwise qualified, the ADA assumes that, but for the individual's impairment, he would be able to perform the essential functions of the sack handling position as it stands. The reasonable accommodation requirement in this instance serves to eliminate the barrier that separates the disabled from the nondisabled worker. The requirement attempts to place the disabled worker on the same footing as other workers.[46] If the disabled employee is not able to transport the sacks due to his lack of physical strength, even with the assistance of the dolly or some other accommodation, he would not be entitled to the protection of the ADA because he is not qualified for the position.[47] The female employee is unable to perform the essential function, not because of any impairment, but because of lack of physical strength. The ADA starts with the assumption that what separates a qualified individual with a disability from other employees is the individual's disability. The reasonable accommodation

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[45] *See* 42 U.S.C. § 12112(b)(5)(A) (1994).

[46] *See, e.g.*, D'Amico v. New York State Bd. of Law Exam'rs, 813 F. Supp. 217, 221 (W.D.N.Y. 1993) (describing the function of the reasonable accommodation requirement as to place disabled individuals on "equal footing" with the nondisabled).

[47] *See* 42 U.S.C. § 12112(a) (limiting protection against discrimination to "qualified individual[s]").

requirement seeks only to overcome the individual's disability, not social or genetic forces.[48]

Admittedly, the disabled individual in this scenario is receiving an advantage his counterpart is not. In this sense, the reasonable accommodation requirement does seem to provide an advantage that could be deemed "unfair." The reasonable accommodation requirement, however, simply serves to overcome the barrier which separates the disabled individual from other employees and places the disabled employee on the same level as other employees, regardless of gender or cultural forces. If the disabled worker still cannot do the job due to gender or cultural forces, he will lose his job. The individual's disability, however, in this instance is one additional limitation on his ability which the ADA seeks to eliminate. Thus, the reasonable accommodation requirement tries to eliminate this barrier, yet, from then on, the individual is forced to overcome any other limitations just as his counterparts are. As such, the reasonable accommodation requirement in this scenario is fair under the definition employed. By granting the disabled individual an accommodation, the employer has done nothing to place the able-bodied individual at a disadvantage. The employer has simply removed the barrier that prevents the disabled employee from being on equal footing as able-bodied employees.

C. The ADA's Recognition of Potential Unfairness

Several other provisions of the ADA work in conjunction with the factors discussed above[49] to help alleviate unfairness problems in the employment setting. In order to be entitled to an accommodation, a disabled individual must first be able to perform the "essential functions" of the position with or without a reasonable accommodation.[50] According to the Interpretative Guidance offered by the Equal Employment Opportunity Commission (EEOC), whether a function is essential depends on whether an employer actually requires employees in the position to perform the function.[51] Although the employer may not avoid

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[48] *See* 29 C.F.R. § 1630.2(j) (1998) (Interpretive Guidance).

[49] *See supra* notes 41-47.

[50] *See* 42 U.S.C. § 12111(B)(8) (1994).

[51] *See* 29 C.F.R. § 1630.2(n) (Interpretive Guidance). The EEOC lists several factors to consider in making the determination whether a function is "essential," including: (1) whether the position exists to perform a particular function; (2) the number of other employees available to perform that job function or among whom

having to make an accommodation simply by classifying a function as "essential," the EEOC's guidance makes clear that the inquiry "is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such standards."[52] For example, "if an employer requires its typists to be able to accurately type seventy-five words per minute, it will not be called upon to explain why an inaccurate work product, or a typing speed of sixty-five words per minute, would not be adequate."[53]

Therefore, the "essential function" requirement helps to prevent any unfair advantage over non-disabled workers. An employer is not required to lower the standards with which a qualified individual with a disability must comply if such standards are essential to the job. If a disabled individual cannot rise to the qualitative or quantitative levels required of a position even with an accommodation, the ADA does nothing to assist the individual.[54]

The reasonable accommodation requirement also takes into account the potential impact on other employees in assessing a requested accommodation. The implementing regulations provide that a reasonable accommodation may include reassignment to a vacant position.[55] However, the ADA does not actually require an employer to "bump" an employee from an existing position in order to accommodate the disabled individual.[56]

Finally, the ADA's "undue hardship" standard may also function to alleviate unfairness concerns. Under Title I, an employer is not required to make an accommodation if it can demonstrate that the accommodation would impose an undue hardship to the business.[57] The EEOC defines "undue hardship" as "significant difficulty or expense in, or resulting from, the provision of the accommodation."[58] The undue hardship standard is typically thought of as an affirmative defense preventing unfairness to the

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the performance of the job function can be distributed; and (3) the degree of expertise or skill required to perform the function. *See id.*

[52] *Id.*

[53] *Id.*

[54] *See id.*

[55] 29 C.F.R. § 1630.2(o)(2)(ii).

[56] *See, e.g.*, McCreary v. Libbey-Owens-Ford Co., 132 F.3d 1159 (7th Cir. 1997) (stating the same).

[57] *See* 42 U.S.C. § 12112(b)(5)(A) (1994).

[58] *See* 29 C.F.R. § 1630.2(p) (Interpretive Guidance).

employer;[59] however, it may also function as a means of preventing unfairness among similarly-situated employees. The assessment of whether an accommodation poses an undue hardship necessarily involves the consideration of "the impact on the ability of other employees to perform their duties."[60] If the accommodation would prove unduly disruptive, it may pose an undue burden.[61] Thus, the undue hardship standard, in practice, may sometimes work to prevent unfairness not only to the employer, but also to other employees.

As can be seen, the ADA's "thicket of interlocking definitions and requirements"[62] helps alleviate the potential unfairness of the reasonable accommodation requirement in the workplace. The "otherwise qualified" and "essential function" standards directly limit the reach of the reasonable accommodation requirement and insure that only those who are prevented from performing by reason of their *disability* are entitled to an accommodation. The undue hardship standard, largely targeted toward relieving the burden on employers, also reduces unfairness among employees. Additionally, the very nature of the workplace makes the unfairness problems inherent in the reasonable accommodation requirement appear un-problematic. In this regard, the ADA can be said to be more or less "fair" when it deals with the typical case of a worker seeking to overcome a disability and become a working member of society.

II

FAIRNESS IN STANDARDIZED TESTING: THE ADA IN THE EDUCATION CONTEXT

Most of the law that has been made in ADA cases has developed in the context of employment discrimination claims.[63] As one moves farther away from the traditional employment setting, however, the ADA's reasonable accommodation requirement begins to raise issues of fundamental fairness not present in most employment cases. Accordingly, this part analyzes situations involving accommodation requests in more competitive settings:

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[59] *See, e.g.*, Johnson v. Gambrinus Co., 116 F.3d 1052, 1058 (5th Cir. 1997).

[60] 29 C.F.R. § 1630.2(p)(2)(v).

[61] *See id.* § 1630.2(p) (Interpretive Guidance).

[62] Karlan & Rutherglen, *supra* note 29, at 8.

[63] *See* McPherson v. Michigan High Sch. Athletic Ass'n, Inc., 119 F.3d 453, 460 (6th Cir. 1997).

specifically, the case of accommodation requests made by students taking standardized tests, such as the Scholastic Aptitude Test (SAT) and applicants for the bar examination. This section further considers the fairness ramifications that result from the collision between the reasonable accommodation requirement and the fairness-based justifications for the underlying rules.

A. Titles II and III of the ADA, and the Rehabilitation Act of 1973

Titles II and III of the ADA govern discrimination in public services and places of public accommodations.[64] In addition to outlawing discrimination against a qualified individual with a disability, Title II prohibits the exclusion from participation in or the denial of the benefits, services, programs, or activities of a public entity because of such disability.[65] Public entities typically include state or local governments, their agencies, and public entities providing public transportation.[66] Title III prohibits discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, wages, or accommodations of any place of public accommodation" or by an operator of such a place.[67] In order to be considered a place of public accommodation, an entity must operate a business which falls within one of the twelve categories listed in the statute.[68]

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[64] 42 U.S.C. §§ 12132, 12182(a) (1994).

[65] *See* 42 U.S.C. § 12132.

[66] *See id.* §§ 12132(1)(A)-(B), 12141 (1994).

[67] 42 U.S.C. § 12182(a).

[68] 42 U.S.C. § 12181(7) (1994). The twelve categories are:

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

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

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

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

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

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

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

The reasonable accommodation requirement in public accommodation settings functions much as it does under Title I. Title III, for example, states that it is a discriminatory practice for a place of public accommodation to fail to make:

> *reasonable modifications* in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would *fundamentally alter* the nature of such goods, services, facilities, privileges, advantages, or accommodations.[69]

The requirements under Title II are largely the same.[70] The Rehabilitation Act also imposes a duty of reasonable accommodation upon those receiving federal financial assistance, unless such accommodation would impose an undue hardship.[71] Therefore, entities covered under these statutes are required to modify existing programs and policies in order to accommodate the disabled unless such a modification would "impose[ ] undue financial and administrative burdens . . . or require[ ] a fundamental alteration in the nature of [the] program."[72]

B. Issues of Fairness in Accommodating the Disabled in Standardized Testing

Due to the extreme time pressures of most exams, nearly every

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(H) a museum, library, gallery, or other place of public display or collection;
(I) a park, zoo, amusement park, or other place of recreation;
(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

Id.

[69] 42 U.S.C. § 12182(b)(2)(A)(ii) (emphasis added). Neither the ADA nor the implementing regulations established by the Department of Justice provide any definition for the phrase "fundamentally alter the nature." The first synonym provided by *Webster*'s for "nature" is "essence." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 789 (1986). This Article employs the same definition.

[70] *See, e.g.*, 42 U.S.C. § 35.130(b)(7) (1994) (stating that a public entity shall make reasonable modifications unless the making of such modifications would fundamentally alter the nature of the service, program, or activity).

[71] *See* 29 U.S.C. § 794(a) (1994); 29 C.F.R. § 1613.704 (1998).

[72] Sandison v. Michigan High Sch. Athletic Ass'n, 64 F.3d 1026, 1034 (6th Cir. 1995) (quoting School Bd. of Nassau County v. Arline, 480 U.S. 273, 287 n.17 (1987)).

law student has left a law school exam thinking: "If I only had ten more minutes, I could have said everything I wanted to say." In some instances, disabled students are given extra time to do the work their peers must do in a shorter period. Thus, the reasonable accommodation requirement sometimes may implicate notions of fairness in testing. Further, given the widespread use of standardized college entrance exams, such as the SAT, the reasonable accommodation requirement creates the potential for unfairness to a great many non-disabled students.[73]

1. The Competitive Aspect of Standardized Test Taking

Undergraduate and graduate programs rely on standardized tests, such as the SAT or LSAT, in making admissions decisions.[74] These tests employ methodologies designed to insure that all examinees take the test under the same conditions.[75] Thus, there is a competitive aspect to the tests—applicants take the tests under the same conditions in order to compete for the limited number of available slots for entering students at the learning institution of their choice. The most common form of modification offered by the College Board, the administrators of the SAT, is the allowing of extended time for disabled students.[76] Allowing extended time for disabled students may, in some cases, create the potential for unfairness. All other factors being equal, a student who scores lower on the SAT than her disabled counterpart who was allowed a modification of the testing procedures may find herself at a disadvantage in the admissions process.

Title III of the ADA bans discrimination based upon disability by private entities furnishing examinations. Title III specifically provides that companies offering examinations related to applications for secondary or post-secondary education must offer such examinations in a place and manner accessible to persons

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[73] *See generally* Diana C. Pullin & Kevin J. Heaney, *The Use of Flagged Test Scores in College and University Admissions: Issues and Implications Under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act*, 23 J.C. & U.L. 797, 812 (1997) (referring to the SAT and ACT as "the most widely used" entrance examinations and noting that more than one million students took the SAT in 1995). For an interesting overview of disability law in the education context, see Laura F. Rothstein, *Higher Education and Disabilities: Trends and Developments*, 27 STETSON L. REV. 119 (1997).

[74] Pullin & Heaney, *supra* note 73, at 812.

[75] *Id.* at 813.

[76] *Id.* at 817.

with disabilities, or offer alternative accessible arrangements for such individuals.[77] Courts have interpreted this provision as requiring entities to make reasonable modifications to testing procedures.[78]

Of the more than one million students taking the SAT in 1995, over sixteen thousand students with disabilities took the test under nonstandard conditions.[79] One of the more concerning aspects of the results from such tests is that, although nonstandard tests are generally reliable, tests administered with extended time for completion, the most common form of accommodation, tend to overpredict a student's future college performance.[80] Thus, if a college relies solely on a student's SAT scores to determine admission, students who are permitted to take the test with extended time may have an unfair advantage over other students because their scores do not accurately predict performance to the same extent as their able-bodied counterparts. These conclusions suggest that the allowance of extra time is an inexact science,[81] and unless this unreliability is somehow factored into the admissions equation, non-disabled students may be put at a disadvantage by the ADA's reasonable accommodation requirement.

2. *Factors Mitigating Against Unfairness*

Of course, universities rarely rely solely on an applicant's SAT scores in making admissions decisions. The mere fact that Student A has an SAT score of 1500 and Student B has an SAT score of 1470 does not necessarily mean that Student A will be going to Harvard and Student B will not. Most colleges base their admissions decisions on a variety of factors, including an applicant's Grade Point Average (GPA), extracurricular activities, and maybe even the fact that his or her parents are large contributors to the university's endowment fund. Consideration of other factors, apart from performance on the SAT, helps to

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77 *See* 42 U.S.C. § 12189 (1994).

78 *See, e.g.*, D'Amico v. New York State Bd. of Law Exam'rs, 813 F. Supp. 217 (W.D.N.Y. 1993).

79 Pullin & Heaney, *supra* note 73, at 812-13.

80 *Id.* at 817.

81 *See generally id.* (citing the need for further research to establish comparable tests for students with disabilities and the possibly "insurmountable" technical constraints on developing such a test).

reduce the unfairness inherent under the current system.[82]

Additionally, many universities engage in the practice of "flagging" nonstandard test scores.[83] Under this practice, university personnel review an applicant's file containing such a score and assess the reliability of the score.[84] While at least two commentators have questioned the legality under the ADA and the Rehabilitation Act of flagging nonstandard test scores,[85] the practice does have the effect of at least allowing the university to mitigate any unfairness stemming from the taking of such tests.

Finally, the unfairness of permitting students to take tests with extended time is mitigated by the very nature of the tests themselves. Although the testing procedures are designed to insure a laboratory-like condition for applicants,[86] the taking of the SAT is not truly a zero-sum game. It is not fundamentally competitive in the same manner as, for example, a sporting event. The SAT is designed to predict future academic performance, not to determine winners and losers. Although it may seemingly create such categories, a student who scores higher than her friend on the SAT does not "beat" her friend; she merely showed a higher aptitude for success in college. A deficiency in a student's SAT score may be compensated for by a variety of factors, thus limiting the negative effect of a lower SAT score. Any unfairness that may result from an inflated, quantitative SAT score may be counterbalanced by consideration of other quantitative and qualitative factors.[87]

Of course, none of this should detract from the point that tests given with extended time for completion tend to place the test-taker at an advantage over others. The ADA's reasonable accommodation requirement may even mandate such a result.

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[82] *See id.*

[83] *Id.* at 818-21.

[84] *Id.*

[85] *See id.* at 821-25. The authors' argument is that by flagging such scores, administrators are actually alerting admissions officers that an individual has a learning disability, thus having the effect of being a preadmission inquiry into a person's disability in violation of the ADA. *See id.* at 821-22.

[86] *See generally id.* at 812-13 ("Large-scale, standardized tests . . . us[e] methodologies designed to insure that all examinees take the test under the same conditions. This assures that the resulting scores offer the basis for uniform inferences based upon the scores of the examinees who took the test.").

[87] *See id.* at 817. Some institutions have developed special admissions programs that allow students who do not meet the minimum admissions requirements to demonstrate that they are actually deserving of admission. *See* Rothstein, *supra* note 73, at 122.

What prevents this result from rising to the level of unconscionable unfairness is the nature of the test itself and the purposes for which it is administered. So long as administrators and admissions officers pay careful attention to the issue of fairness in considering the scores from disabled students who have been permitted to take standardized tests under nonstandard conditions, the reasonable accommodation does not, by itself, create an intolerably unfair situation.

C. Bar Exams

Nearly any testing situation involving efforts to accommodate the disabled could potentially raise fairness concerns for other test-takers. For example, if a disabled student is allowed extra time to complete an exam, and steps are not taken to insure that the extra time is not disproportionate to the actual amount of time needed to place the disabled student on the same level as other students, the disabled student may gain an advantage. This concern is particularly pressing when the stakes involved in passing an exam are high, and, unlike in the case of college admissions, no factor other than an individual's raw score may be used to mitigate unfairness.

In the leading case on the ADA in the bar examination context, a New York federal district court was confronted with such a fairness question. At issue in *D'Amico v. New York State Board of Law Examiners*[88] was a disabled applicant's request that the Board permit her to take the bar exam over a four-day period instead of the normal two-day period.[89] The plaintiff in *D'Amico* suffered from a severe myopic condition that worsened as a result of extended reading.[90] After failing the bar examination on her first attempt, D'Amico requested that she be permitted to take the exam over a period of four days instead of the normal two.[91]

In assessing the plaintiff's ADA claim, the court was particularly mindful of the potential advantage D'Amico might gain as a result of the requested modification. The *D'Amico* court stated: "There is a delicate balance that must be made in determining

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[88] 813 F. Supp. 217 (W.D.N.Y. 1993).

[89] *See id.* at 219.

[90] *See id.* at 218.

[91] *See id.* at 218-19. D'Amico's ophthalmologist explained that simply giving her unlimited time over two days would actually worsen her condition. *Id.* at 222.

the reasonableness of a given request especially when it relates to examinations and testing procedures."[92] Thus, the court recognized that, if D'Amico's requested modification were to go beyond what was actually necessary to place her on "equal footing" with other applicants, the modification would provide her with an unfair advantage.[93]

After concluding that "the most important fact that the Court must consider in determining the reasonableness of the Board's examination is the nature and extent of the plaintiff's disability," the court found that D'Amico's request was reasonable.[94] Implicit in the court's reasoning is the assumption that the four-day time period was the appropriate modification to place D'Amico on equal footing with other applicants. Thus, in the court's view, the modification simply placed the plaintiff at the same level as other applicants and did not provide her with an unfair advantage.

1. Factors Mitigating Against Unfairness

Although *D'Amico* and other bar examination cases raise fairness concerns, the concerns do not rise to the same level as those implicated in cases such as *Martin*. Although it is arguably "unfair" to permit any applicant to take a test under different guidelines, the nature of the bar examination helps to distinguish these types of cases from that in *Martin*.

Unlike a professional golf tournament, there is no tangible benefit in passing the bar with a higher score than another applicant. If one applicant passes with the highest score in her state and another passes by the skin of her teeth, neither party stands in a better position than the other. Passage of the bar exam only requires that an applicant correctly answer enough questions to pass. If a court incorrectly concludes that a modification does no more than is necessary to place a disabled applicant at the same level as others, when in fact the modification does give the appli-

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[92] *Id.* at 221.

[93] *Id.* Similar to the above hypothetical, if D'Amico were given twenty hours to complete the exam, when other applicants had only thirteen hours, and D'Amico actually only required eighteen hours to place her on equal footing, she would be receiving a distinct advantage that would exceed the requirements of the ADA. *See generally id.* at 221 ("[T]he ADA was not meant to give the disabled advantages over other applicants. The purpose of the ADA is to place those with disabilities on an equal footing and not to give them an unfair advantage.").

[94] *Id.* at 221, 223.

cant an advantage, the non-disabled are not significantly harmed. The performance of the disabled student is irrelevant to the question of whether the non-disabled student will pass the bar and become an attorney.[95]

Admittedly, there may be a certain psychic harm done in knowing that another applicant had an unfair advantage and the end result of permitting such an advantage might not be "fair" under the normal conception of that term; however, the fundamental nature of the bar examination is not inherently competitive. Consideration of the disabled applicant's time-enhanced score does not effect the correctness of the non-disabled appli-

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[95] A more difficult problem, however, involves providing extra time in exams for learning disabled law students. Generally, law schools have been somewhat reluctant to provide accommodations for learning disabled students. *See* Jane Easter Bahls, *Disability Dilemma*, STUDENT LAW., May 1998, at 20. Part of the reluctance stems from a belief that learning disabilities concern capacities that are essential to the practice of law, such as the ability to concentrate and process information. *Id.*

Another concern is fairness. *Id.* The stakes involved in law school education are high. It is no secret that better academic performance often translates into higher paying jobs. Students compete for interviews and jobs based largely in part on their academic records. Providing a learning disabled student with extra time on exams, which are often the sole factor in determining a student's grade, could potentially place that student at an advantage over other students when employers begin considering the records of competing students.

Consider the following hypothetical:

> A law school professor bases her students' grades solely on their performance on one three-hour exam. The professor uses a curved grading scale, on which there are a fixed number of people who may attain a particular grade. For example, only 5 students will get "A"s, 10 students will get "B"s, etc. Due to a learning disability, one student is allowed an additional hour and a half to complete his exam. With the exception of the disabled student, every other student in the class turns in their exam exactly three hours after the test begins. Unbeknownst to the professor, the disabled student, or the law school administration, the actual amount of additional time the disabled student needed to place him on the same footing as other students was only thirty minutes. The disabled student has gained a sixty minute advantage, and, as a result, is able to give a more complete answer to the final question than his counterparts.
>
> Due to the strength of his final answer, the disabled student gets the last of the five "A"s allocated for the exam, narrowly edging out another student who had to outline his final answer.

The result in this hypothetical clearly seems unfair by any conception of the term. In direct, head-to-head competition with other students, the disabled student received additional un-needed time which enabled him to bump one of his competitors down to a lower level. The disabled student's gain translates into a direct loss for the able-bodied student. Although there are certainly other factors that go into an employer's hiring decision, this gain could potentially play a large factor in determining a student's grade point average, whether the student makes Law Review, or whether an employer grants a student an interview.

cant's answers, nor does it lessen that applicant's chances of passing. One person's gain does not place another in a lesser position.[96] Although, as the *D'Amico* court recognized, there are clearly issues of fairness present in such testing situations,[97] they do not rise to the same level as in some other cases.

III

THE ADA IN ATHLETIC COMPETITIONS

In recent years, courts have faced a growing number of cases involving academic eligibility requirements for student-athletes. Increasingly, learning disabled students seek redress from courts in order to force the governing bodies of schools or athletic associations to modify existing eligibility requirements.[98] In dealing with this issue, courts have attempted to walk the fine line between accommodating the disabled and fundamentally altering the competitive nature of sports.

A. NCAA Cases

The National College Athletic Association (NCAA) establishes minimum academic eligibility standards for new college students to participate in intercollegiate sports.[99] The NCAA bases its eligibility requirements on such factors as a student's completion of high school "core courses," attainment of a minimum GPA in those core courses, and the student's standardized college entrance examination scores.[100] According to the NCAA,

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[96] *See supra* text accompanying note 38 (defining "fairness" for purposes of this Article).

[97] *See supra* notes 90-91 and accompanying text.

[98] *See* Tatum v. NCAA, 992 F. Supp. 1114 (E.D. Mo. 1998); Bowers v. NCAA, 974 F. Supp. 459 (D.N.J. 1997); Ganden v. NCAA, No. 96 C 6953, 1996 WL 680000 (N.D. Ill. Nov. 21, 1996). *See generally* 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 (1997) (discussing the challenges confronting learning disabled students to the eligibility requirements of the NCAA). Another area rife with controversy involves the qualification of disabled athletes who wish to participate in college athletics, but are denied the opportunity for fear that there is a likelihood of substantial harm for the athlete should he participate. *See* Knapp v. Northwestern Univ., 101 F.3d 473 (7th Cir. 1996); *see also* Eldon L. Ham, *When Athletes Want to Play but Doctors Say No, it's Off to Court*, CHI. DAILY L. BULL. Feb. 20, 1998, at 6 (discussing the *Knapp* case and others).

[99] *See Ganden*, 1996 WL 680000, at *1.

[100] *See id.* at *2. According to NCAA rules, "core course[s]" include English, Mathematics, Natural Science, Social Science, and two years of a Foreign Language, Computer, or Religion. *See* Miller, *supra* note 98, at 477 n.90 (citing NCAA Rules).

the purposes of these requirements are: (1) to insure that student-athletes are representative of the college community and not recruited solely for athletics; (2) to insure that a student-athlete is academically prepared to succeed at college; and (3) to preserve amateurism in intercollegiate sports.[101] NCAA bylaws permit a member school to apply for a waiver of the eligibility requirements on behalf of those students who do not qualify under the standards.[102]

In *Ganden v. NCAA*, Chad Ganden, a learning-disabled swimmer, challenged the NCAA's requirements under the ADA, contending *inter alia* that the NCAA failed to make reasonable modifications to its eligibility requirements to accommodate his learning disability under Title III.[103] The NCAA declared Ganden ineligible due to his failure to satisfy the minimum course requirement and his failure to meet the minimum GPA requirements.[104] Due to Ganden's learning disability, he had been unable to take all the required core courses specified by the NCAA and instead took several other courses designed to address his specific weaknesses.[105] The NCAA refused to consider these courses as core courses or modify its GPA requirements, and Ganden sued the NCAA for its alleged failure to modify its criteria.[106]

The District Court for the Northern District of Illinois focused on whether Ganden's requested modifications were reasonable or whether they would fundamentally alter the nature of the NCAA's intercollegiate athletic program.[107] In order to determine whether the requested modifications were reasonable, the court looked to the underlying purposes of the NCAA's requirement to determine if the modifications requested by Ganden would undermine those purposes.[108] The court determined that

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101 *See Ganden*, 1996 WL 680000, at *14.

102 *See id.* at *3.

103 *See id.* at *5. Ganden also contended that the NCAA discriminated against him because its core course requirement tended to screen him out of eligibility on the basis of his disability in violation of Title II, 42 U.S.C. § 12182(b)(2)(A)(1). *See id.*

104 *See id.* at *2.

105 *See id.* at *1, *4. These non-core courses included LRC Typing and LRC Computers. *Id.* For interesting background information on the story of Chad Ganden and the NCAA, see Miller, *supra* note 98.

106 *See Ganden*, 1996 WL 680000, at *4-*5.

107 *See id.* at *14.

108 *See id.* at *15.

the core course requirement served the NCAA's important interests of insuring the integrity of a student's GPA. This requirement also ensures that student-athletes are representative of the college community and are academically prepared to succeed in college.[109] The court noted that the NCAA could still serve these purposes by considering other factors aside from completion of core courses. For example, the NCAA could consider the fact that in the case of disabled students, steady improvement in remedial courses might adequately serve as a substitute for core courses.[110]

The court determined, however, that in Ganden's case, his non-core courses had little similarity to the required core courses and they could not be considered an effective substitute so as to insure the goals of the NCAA.[111] The court stated: "While Title III may require the NCAA to count courses as 'core' even if they are not substantively identical to approved 'core courses,' it does not require the NCAA to count courses with little substantive similarity."[112] As such, consideration of the remedial courses would fundamentally alter the privilege of participating in swimming.[113] Applying this reasoning to the NCAA's GPA requirement, the court concluded that Ganden's requested modification of lowering the GPA requirement would work an even more fundamental alteration of the nature of the NCAA's program and thus rejected Ganden's claim.[114]

B. High School Athletics

1. Sandison v. Michigan High School Athletic Association

Ronald Sandison and Craig Stanley were both high school student-athletes who suffered from learning disabilities.[115] As a result of their disabilities, both students were two school grades behind their age group, and by the beginning of their senior years, both had turned nineteen years of age.[116] Both Sandison

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109 *See id.*

110 *See id.*

111 *See id.* (finding that the grades from such courses did not provide valid indications of Ganden's academic potential).

112 *Id.*

113 *See id.*

114 *See id.* at *16.

115 Sandison v. Michigan High Sch. Athletic Ass'n, 64 F.3d 1026, 1028 (6th Cir. 1995).

116 *See id.*

and Stanley ran cross-country and track for their local high schools, but were prevented from competing their senior years due to a regulation by the Michigan High School Athletic Association (MHSAA) which prohibited competition in interscholastic sports by any student over the age of nineteen.[117] In *Sandison v. Michigan High School Athletic Ass'n*, the two students sued the MHSAA under the Rehabilitation Act and the ADA, seeking an injunction to allow them to run and to prevent the MHSAA from penalizing the school for permitting them to compete.[118] The district court determined that waiver of the nineteen-year age limit constituted a reasonable accommodation and the MHSAA appealed.[119]

On appeal, the Sixth Circuit stated that the MHSAA's age restriction advanced two purposes: (1) safeguarding against injury to other players; and (2) preventing any unfair competitive advantage that older participants might have.[120] Focusing on the effect that a waiver of the age limitation might have upon competition, the Sixth Circuit held that waiver of the rule would work a fundamental alteration of the sports program and hence was not a reasonable accommodation.[121] The court rejected the plaintiffs' contention that, because they were not "star" players, their advanced ages would not provide them with a competitive advantage. Focusing on the unpredictable effect that might occur to the competitive nature of the sport were the plaintiffs permitted to participate, the court stated:

> 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.
>
> Second, although the plaintiffs assert that introducing their average athletic skills into track and cross-country competition would not fundamentally alter the program, the record does not reveal how the MHSAA, or anyone, can make that competitive unfairness determination without an undue burden.[122]

The court noted that in order to conclude that the plaintiffs' age would not provide them with an unfair advantage, coaches and

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117 *See id.* at 1028-29.
118 *See id.* at 1029-30.
119 *See id.* at 1029.
120 *See id.* at 1035.
121 *See id.*
122 *Id.*

physicians would have to consider the skill level of each member of an opposing team, the overall skill level of each opposing team, *and* the skill level of each student whom the older student displaced from the team.[123] Therefore, permitting older students to compete would fundamentally alter the nature of the program and constitute an undue administrative burden.[124]

2. McPherson v. Michigan High School Athletic Association

In *McPherson v. Michigan High School Athletic Ass'n*, a new plaintiff again challenged one of the MHSAA's eligibility requirements.[125] In this instance, the rule at issue made ineligible any student who had completed eight semesters of high school.[126] This rule had the effect of excluding from competition those students who had repeated a grade during high school, the majority of whom as a result would be older than the average competitor.[127] This time, however, the student-athlete in question contended that the MHSAA had in fact made the determination that the Sixth Circuit previously found to be an undue burden; namely, that the MHSAA had, on occasion, waived the eight-semester rule for student athletes.[128] As such, the plaintiff reasoned, the eight-semester rule was not truly necessary, and there was no burden on the MHSAA to waive the rule in his case.[129]

The Sixth Circuit relied heavily on its opinion in *Sandison* in concluding that waiving the eight-semester rule would result in a fundamental alteration of Michigan's high school sports programs.[130] The court determined that the purposes served by the age-limit rule and the eight-semester rule were largely the same:

> [B]oth are intended to limit the level of athletic experience and range of skills . . . *in order to create a more even playing field for the competitors*, to limit the size and physical maturity of high school athletes for the safety of all participants, and to afford the players who observe the [rules], presumably athletes of less maturity, *a fair opportunity to compete* for playing time.[131]

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123 *See id.*
124 *See id.*
125 *See id.* at 455.
126 McPherson v. Michigan High Sch. Athletic Ass'n, 119 F.3d 453 (6th Cir. 1997).
127 *See id.* at 456, 461.
128 *Id.* at 461.
129 *Id.*
130 *See id.* at 462.
131 *Id.* at 461 (emphasis added).

Forced to deal with the fact that the MHSAA had actually waived the eight-semester rule in the past, a fact that seemed to undercut the MHSAA's assertion that waiver would result in an uneven playing field, the court found an additional purpose of the eight-semester rule that made preservation of the rule necessary: the rule helped to eliminate "red-shirting," a practice by which a student repeats a grade in order to gain another year's worth of physical development, and, consequently, an advantage over his competitors.[132] As for the fact that the MSHAA had previously waived the rule for other student-athletes, the court noted that the plaintiff was not merely seeking a waiver for himself. Instead, he was seeking to require the MHSAA to waive the eight-semester requirement for all learning-disabled students who remain in school more than eight-semesters.[133] This could potentially result in an avalanche of waiver requests and the resulting need to make an individual fairness assessment for each request, a prospect that would "irrevocably [alter] the nature of high-school sports."[134]

C. Altering the Level Playing Field

The decisions above highlight two important points. First, all three cases involve rules that, to varying degrees, have the effect and purpose of creating a level playing field for competition. As such, these cases help to illustrate the tension that exists between the reasonable accommodation requirement under Title III and the purposes of rules that promote fairness in competition. Secondly, these cases are instructive for their handling of the reasonable accommodation analysis necessary in these types of cases.

The eligibility rules at issue in *Ganden*, *Sandison*, and *McPherson* were intended to create a level playing field for competitors. For example, two of the purposes behind the core course and GPA requirements in *Ganden* were to insure that student-athletes are representative of the college community and not re-

[132] *See id.* at 461-63. The concern over "red-shirting" was particularly relevant in this case as Dion McPherson, the student in question, had not been diagnosed with a learning disability until *after* his eight-semester eligibility had been exhausted. *See id.* at 456. Thus, the MHSAA argued that allowing a waiver would create a precedent whereby "a school district can have control over a player's eligibility, find that player to be ineligible, and then later, when he was physically and athletically matured, find him eligible." *Id.* at 463. This practice would give the "green light" to rampant red-shirting by school districts and coaches. *Id.*

[133] *See id.* at 462.

[134] *Id.* at 463.

cruited solely for athletics, thus preserving amateurism in intercollegiate sports.[135] Implicitly, the rule sought to establish a playing field on which only athletes of roughly the same skill level could compete and exclude from competition those athletes who were amateur in name only. Similarly, the purposes behind the eligibility rules in *Sandison* and *McPherson* were to prevent older students from gaining a competitive advantage over both their competitors and those whose place on the team they might take as a result of their advanced development.[136]

The purposes of these rules, however, are also distinguishable. Although the NCAA's rules in *Ganden* were related to the preservation of a level playing field, they also were designed to serve goals unrelated to competitive fairness. One of the purposes of the NCAA's eligibility requirements was to "insure that a student-athlete is academically prepared to succeed at college."[137] Indeed, the court in *Ganden* seemed to focus on this purpose almost to the exclusion of the other stated purposes.[138] From the court's discussion, it is clear that the main purpose of the NCAA's eligibility requirements was not to insure fairness in the competitive playing of sports, but to promote the concept of a "student-athlete."[139] The fact that an athlete failed to pass senior English class in no way implies that he is somehow "better" at a sport than his competitors; however, it does say something about whether he is truly a *student-athlete* or simply an *athlete*.

By contrast, the fact that a nineteen-year old athlete is competing against fourteen- and fifteen-year olds suggests that the nineteen-year-old enjoys a competitive advantage over his competitors by virtue of his age and increased physical development.[140] Thus, the age and eight-semester rules in *Sandison* and *McPherson* were designed specifically to insure a level playing

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[135] *See* Ganden v. NCAA, No. 96 C 6953, 1996 WL 680000, at *14 (N.D. Ill. Nov. 21, 1996).

[136] *McPherson*, 119 F.3d at 461; Sandison v. Michigan High Sch. Athletic Ass'n, 64 F.3d 1026, 1035 (6th Cir. 1995).

[137] *Ganden*, 1996 WL 680000, at *14.

[138] *See generally id.* at *15 (discussing the important interest of insuring that student-athletes are prepared to succeed in college).

[139] *See id.* at *16-17.

[140] For example, one of the findings of fact in *Ganden* was that the peak years for a competitive swimmer were between the ages of nineteen and twenty-one. *See id.* at *5. Therefore, a nineteen-year old who was still competing in high school would clearly have a competitive advantage against his competitors, many of whom would be substantially younger.

field, whereas the core course and GPA requirements in *Ganden* had the incidental purpose of achieving this goal. In other words, the rules in *Sandison* and *McPherson* which are designed specifically to insure that no competitor has an advantage over another are "leveling" rules.

Hence, because the rules at issue in *Sandison* and *McPherson* were such leveling rules, the fairness concerns in these cases were more pronounced than in *Ganden*. The age and eight-semester rules were designed to create a laboratory-like setting where no competitor had a distinct advantage by virtue of increased physical development. If a plaintiff could, through the ADA, require a governing body to waive such a rule without insuring that the playing field would not be altered, the plaintiff would be injecting into the laboratory setting of competition an uncontrolled variable. The *Sandison* and *McPherson* decisions properly realized that if assurances could not be made to control for the variable, the effect would be to disadvantage the older student's competitors and those whom he displaced from the team.

The other main difference between the two lines of cases is the issue of the necessity of an individualized inquiry into the nature of the plaintiff's disability and the purpose of the rule that prevents him from participating. For example, the court in *Ganden* methodically looked to both the purposes of the rule and whether a reasonable accommodation was possible for the particular plaintiff.[141] If the remedial courses which Ganden took had been substantially similar to the core courses he did not take, the court hinted that his requested modification might have been reasonable.[142] Indeed, the NCAA itself provides for such individualized consideration of a particular athlete's academic record.[143]

The ADA clearly contemplates this type of individualized inquiry[144] and the *Ganden* court took the *Sandison* court to task for its failure to conduct such an inquiry.[145] The *Ganden* court stated: "[T]he court believes that [*Sandison*] failed to adequately analyze the purposes of the act in light of the specific claims for

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141 *See id.* at *15.

142 *See id.*

143 *See id.*

144 *See* 29 C.F.R. § 1630.2(0) app. (1998) (Interpretive Guidance) (discussing the need to determine the reasonableness of an accommodation in a particular situation).

145 *See Ganden*, 1996 WL 680000, at *14.

modifications; i.e., the circumstances of the plaintiff and learning disabled students."[146]

This criticism has a ring of truth to it. Arguably, however, the *Sandison* court may have concluded that such an individualized inquiry was next to impossible given the fact that the purpose of the rule was so intertwined with protecting against an unfair competitive advantage. Assessing all of the variables involved in making a competitive unfairness determination, including the effect on each player from each opposing team and each player who wished to compete with the older student for playing time and a spot on the team, would be almost impossible.[147] As any alteration of the level playing field could potentially create competitive unfairness, the plaintiff was under a particularly difficult burden to show that the accommodation was reasonable. This conclusion was certainly weakened by the subsequent showing in *McPherson* that the MHSAA had actually waived its eight-semester rule in the past.[148] Yet, the *McPherson* court properly recognized that injecting older, more physically developed students into competition could fundamentally alter the competitive nature of the program if steps were not taken to insure that no such advantage would actually be realized in the case of a particular plaintiff.

Therefore, two important considerations emerge from the above cases. First, in assessing the reasonableness of a requested accommodation in competitive settings, courts need to look not only at the underlying purpose of the rule in question, but also to the individual circumstances of the plaintiff. Second, courts need to be vigilant when dealing with leveling rules specifically designed to create fairness so as not to permit the injection into the laboratory setting of competition unknown variables which may fundamentally alter the competitive nature of a program and frustrate the intent of the rule.

IV

CASEY MARTIN

By now it should be apparent that the inquiry of what consti-

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[146] *Id.*

[147] *See* Sandison v. Michigan High Sch. Athletic Ass'n, 64 F.3d 1026, 1035 (6th Cir. 1995). *See supra* note 123 and accompanying text.

[148] *See* McPherson v. Michigan High Sch. Athletic Ass'n, 119 F.3d 453, 461 (6th Cir. 1997).

tutes a reasonable accommodation becomes more complicated when one leaves the traditional sphere of the workplace and enters a competitive environment. This section attempts to synthesize some of the points previously discussed by an examination of the case of *Martin v. PGA Tour, Inc.*[149] *Martin* helps to illustrate the tensions inherent in moving the reasonable accommodation requirement into a competitive setting and further illustrates the difficult task judges face in making the reasonable accommodation determination.

A. Who is Casey Martin?

If there ever existed a sympathetic plaintiff, Casey Martin fit the bill. Articulate and unfailingly polite, Martin represented the PGA Tour's worst nightmare. Born with the congenital, debilitating diseases known as Klippel-Trenaunay-Weber Syndrome, Martin's right leg is severely atrophied to about half the size of his left leg.[150] Klippel-Trenaunay-Weber Syndrome is a circulatory condition which prevents the blood from flowing through Martin's veins back to his heart and instead causes the blood to flow back down to his leg.[151] As a child, Martin wore leg braces and splints on his leg.[152] As he got older, Martin's condition worsened, resulting in severe pain, restraint, and difficulty walking.[153] Martin's orthopedist testified that Martin is at serious risk of fracturing his tibia "with virtually any activity."[154] Fracture, in Casey Martin's case would probably result in amputation.[155]

Despite his disability, Martin is by all accounts an outstanding golfer.[156] Aside from limiting his everyday activities, Martin's condition also affects his golf game. He has great difficulty walking a golf course and on several occasions Martin withdrew from tournaments due to the severe pain walking caused him.[157] Even when Martin rides from hole to hole in a golf cart, he has exper-

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149 994 F. Supp. 1242 (D. Or. 1998).

150 *See id.* at 1243.

151 *See id.* at 1243-44.

152 *See* Kindred, *supra* note 11, at 73.

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

154 Marcia Chambers, *How the Tour Lost the Case Against Casey Martin*, GOLF DIG., May 1998, at 62, 68 (quoting Martin's orthopedist, Dr. Donald Jones).

155 *See id.*

156 In February 1998, Martin ranked second on the Nike Tour in driving distance. *See* Rick Smith, *Casey at the Bat*, GOLF DIG., May 1998, at 154.

157 *See Martin*, 994 F. Supp. at 1250.

ienced such pain from the simple act of walking the short distance from the cart to the green or the tee box that he has been forced to withdraw from competition.[158] His condition also affects his golf swing. Due to his weakened leg, Martin cannot fully straighten his leg, causing him to address the ball differently than other golfers[159] and preventing him from pushing off with his right leg during his backswing as most golfers do.[160]

A former teammate of golfer Tiger Woods at Stanford University,[161] Martin is currently seeking to become a member of the PGA Tour, the association of professional golfers.[162] One of the ways in which a golfer may join the elite ranks of PGA professionals is by going through the PGA qualifying school tournament and finishing among the top thirty-five contestants.[163] Martin applied for a waiver of the PGA's rule that prevented contestants at the qualifying school from using carts during the final rounds, on the PGA Tour and on the Nike Tour (a lesser version of the PGA Tour sponsored by the PGA).[164] The PGA refused Martin's request.[165] PGA Tour Commissioner Tim Finchem defended the Tour's position, arguing that to permit an exception to the no-cart rule would be to create an "incorrectable imbalance in playing conditions."[166] Finchem stated: "When you change the rules for one player in an athletic sport, you are inherently changing the landscape of that sport."[167] Thus, the battle lines were drawn between a disabled individual's need for a modification of the rules of competition, and an organization's need to set its own standards in order to promote fair play.

B. Martin v. PGA Tour, Inc.

Pursuant to the ADA, Casey Martin sought an injunction directing the PGA to permit him to use a cart while playing on the

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158 *See id.*

159 *See* Dr. Bill Mallon, *Clues to Disability are Hard to Find*, GOLF DIG., May 1998, at 158 (analyzing Martin's swing).

160 *See* Smith, *supra* note 156, at 156.

161 *See* Marcia Chambers, *Judge Says Disabled Golfer May Use Cart on Pro Tour*, N.Y. TIMES, Feb. 12, 1998, at A1.

162 *See* Martin v. PGA Tour, Inc., 984 F. Supp. 1320, 1321-22 (D. Or. 1998).

163 *See id.* at 1321.

164 *See id.* at 1322.

165 *See id.*

166 *See* Chambers, *supra* note 154, at 68.

167 *See* Garrity, *supra* note 4, at 63 (quoting Finchem).

Nike Tour.[168] The PGA's fate may have been sealed when the magistrate judge hearing the dispute rejected the PGA's argument that it was exempt from the ADA's coverage as it was either a private, non-profit establishment, or, alternatively, not a place of public accommodation for purposes of the ADA.[169] This important ruling meant that the PGA, like any other entity, was subject to the ADA's reasonable accommodation requirement.[170]

1. Identifying the Privilege at Issue

Title III of the ADA requires that a place of public accommodation make "reasonable modifications in policies, practices, or procedures . . . unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such . . . privilege . . . or would result in an undue burden."[171] The first step in making this determination must be to identify the policy and the specific privilege that it monitors.[172] The policy at issue in *Martin* was the no-cart rule. The question of identifying the specific privilege at issue, however, is slightly more complex. In order to make this determination, a court must look to the role of the entity in question.[173] For example, in *Ganden v. NCAA*, the plaintiff attempted to characterize the privilege that the NCAA provided as "swimming competitions."[174] The court rejected this overly narrow view of the privilege. Because the NCAA "offers its competitors more than an opportunity to swim, but also to represent the NCAA's member institutions," the privilege at issue was more correctly defined as the NCAA's entire intercollegiate athletic program.[175]

The *Martin* court correctly identified the privilege at issue as playing in PGA and Nike Tour competitions, rather than simply the privilege of playing golf.[176] The distinction is more than se-

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

169 *See id.* at 1325, 1327.

170 *See supra* note 7 and accompanying text (discussing the significance of this aspect of the *Martin* decision).

171 42 U.S.C. § 12182(b)(2)(A)(ii).

172 *See* Ganden v. NCAA, No. 96 C 6953, 1996 WL 680000, *14 (N.D. Ill. Nov. 21, 1996).

173 *See generally id.* (emphasizing the role of the NCAA to promote, not just competition, but the concept of the student-athlete).

174 *See id.*

175 *Id.*

176 *See* Martin v. PGA Tour, Inc., 994 F. Supp. 1242, 1246, 1249 n.10 (D. Or. 1998) ("I agree with the PGA that only the nature of the PGA and Nike Tour golf may be

mantic. The fundamental nature of the game of golf that most Americans play, i.e., the game played by weekend duffers with their friends, is a far cry from the version played by PGA and Nike Tour professionals. The latter version of "golf" involves some of the finest players in the world competing specifically in order to make a living as professionals. Given the proliferation of golf carts on public and private courses throughout the country, it would be difficult for any entity to argue that allowing carts would fundamentally alter the more common form of golf.[177] The inherent nature of competition on the PGA and Nike Tours, however, makes such an argument more believable.

2. *The Need for an Individual Inquiry*

In determining the reasonableness of modification, a court must also look to the underlying purpose of a policy to determine if the requested modification would undermine those purposes in the circumstances of the plaintiff.[178] The *Martin* court conducted this inquiry.[179] According to the PGA Tour, the purpose of the no-cart rule is "to inject the element of fatigue into the skill of shot-making."[180] The primary purpose of the rule, therefore, is not to create a level playing field (although it has that effect), but instead to inject another element into the game. As such, it is not a true leveling rule.

The analysis of whether an accommodation undermines a rule's purpose necessarily requires that a court focus on the particular plaintiff rather than a disabled plaintiff in the abstract. After considering at length the extent of Casey Martin's disability, the court concluded that Martin's disability actually served the same purpose as the no-cart rule. The *Martin* court stated: "The fatigue [Martin] endures just from coping with his disability is undeniably greater than the fatigue injected into tournament play on the able-bodied by the requirement that they walk from shot to shot."[181] In other words, Martin's disability served as a substitute for the artificial no-cart rule for the able-bodied.

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considered in determining whether the requested modification would cause a fundamental alteration.").

[177] *See generally id.* at 1249 ("Nothing in the Rules of Golf requires or defines walking as part of the game.").

[178] *See Ganden*, 1996 WL 680000, at *15.

[179] *See Martin*, 994 F. Supp. at 1246.

[180] *See id.* at 1250.

[181] *Id.* at 1251.

Assuming arguendo the court was correct in its determination that Martin's disability actually causes greater fatigue for Martin than walking does for the average golfer,[182] the purpose of the PGA's rule is accomplished by Martin being Martin. The court's reasoning at this stage of the analysis was sound.[183]

3. *The Question of Fundamental Alteration*

The final step in determining the reasonableness of a requested modification is assessing whether the modification would fundamentally alter the nature of the privilege at issue. Although the analysis is somewhat different, similar considerations are involved in determining the reasonableness of an accommodation in the employment setting. The requirement that a disabled individual be capable of performing the essential function of a position is somewhat analogous to the question of determining whether an accommodation would fundamentally alter the nature of a privilege. Competitive settings, however, require a more precise determination into the nature of the privilege. This is where the *Martin* decision becomes susceptible to criticism.

Recall the case of *Ganden v. NCAA*, involving the swimmer seeking a waiver of the NCAA's GPA and "core course" eligibility requirements.[184] The *Ganden* court concluded that the purpose behind the rules—insuring that student-athletes are prepared to succeed at college—would be frustrated by permitting Ganden to compete.[185] Allowing the swimmer to count remedial courses, which bore little resemblance to core courses, would frustrate the purpose of the rule and fundamentally alter the nature of the privilege;[186] however, the court left open the possibility that remedial courses could, in some circumstances, serve the same purpose as core courses, "even if not qualitatively and quantitatively identical to other 'core courses.'"[187] The fact that there was not an exact match between the substitute and the normal requirement would not be fatal. Thus, although taking

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182 Given the severity of Martin's affliction, this conclusion seems reasonable. *See supra* notes 150-60 and accompanying text.

183 *See generally Ganden*, 1996 WL 680000, at *15 (explaining that remedial courses may adequately substitute for core courses).

184 *See supra* notes 103-14 and accompanying text.

185 *See Ganden*, 1996 WL 680000, at *15.

186 *See id.* at *15-16.

187 *Id.* at *15.

remedial courses might not be the equivalent of taking core courses, if the course substituted was close enough in content, it could be sufficient.

The principal purpose behind the eligibility requirement in *Ganden* was not to create a level playing field.[188] Therefore, if the remedial courses were only a rough approximation of the core courses, no competitive unfairness would necessarily flow from permitting a student to compete. If a swimmer's comprehension of American History was slightly less, but fairly close, to his competitors', this would in no way improve the swimmer's chances of winning.

In contrast, consider the nineteen-year old age limitation in *Sandison v. Michigan High School Athletic Association*. The age requirement was a "leveling" rule, designed to prevent any unfair advantage by older students.[189] If a star nineteen-year old athlete happened to be hitting his athletic peak during high school track season, he would be at a distinct advantage over his younger competitors by virtue of his age. Preventing this competitive advantage would require a precise (and probably impossible) assessment into the abilities of all other similarly-situated athletes.[190] As the nature of athletics is highly competitive and any advantage, no matter how small, may mean the difference between winning and losing, the fundamental competitive nature of a sport could easily be altered by permitting an older student to participate. Thus, the court in *Sandison* was concerned about the potentially unfair effect of allowing older students to compete.

These same concerns were prevalent in *Martin*. Golf is a game which decides who wins and loses based on quantifiable measures—the golfer with the lowest score wins. There are no other considerations. Unlike the SAT where a person with a lower score does not necessarily "lose,"[191] professional golf, and nearly all professional sports, decides winners and losers on solely quantitative grounds. It is extremely difficult (and perhaps impossible) to say for certain how much an unquantifiable factor, such as a competitor's fatigue, translates into quantifiable terms. Does

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188 *See supra* notes 135-40 and accompanying text.

189 *See supra* note 140 and accompanying text.

190 Sandison v. Michigan High Sch. Athletic Ass'n, 64 F.3d 1026, 1035 (6th Cir. 1995).

191 *See supra* notes 86-87 and accompanying text.

the fact that one competitor feels less fatigue than another give him a one shot advantage? Perhaps two? If he has attained this advantage through artificial means, then both the level playing field and the fundamentally competitive nature of the game have been altered.

This argument was advanced publicly by the PGA in its dispute with Casey Martin. PGA Tour Commissioner Tim Finchem testified that even if Martin gained only a slight advantage over other golfers by virtue of being permitted to ride a cart, it would create an incorrectable imbalance in playing conditions.[192] Finchem explained that the difference in skill level among PGA professionals was so slight that even one missed or gained stroke per round could make a dramatic difference in a player's earnings over the course of a year.[193] Indeed, often one stroke may result in the gain or loss of hundreds of thousands of dollars in one tournament alone.[194] Implicitly, if permitting Martin to ride did not place him on exactly the same level as other golfers, Martin would have a competitive advantage that would fundamentally alter the nature of PGA and Nike events. Simply placing Martin "close enough" to other competitors would not be fair.

This reasoning is bolstered by the rules-oriented nature of golf. The 1998 version of the Rules of Golf attempts to cover nearly any contingency that may occur on a golf course. There are rules governing a player's conduct when his ball comes to rest on a water sprinkler;[195] rules concerning what imperfections on the green a golfer may attempt to repair;[196] and rules governing penalty strokes for a violation of the rules.[197] In addition, there is also an abundance of rules governing play before a player ever sets foot on the course. There are rules limiting the number of clubs a player may carry with him;[198] rules covering the size,

192 *See* Chambers, *supra* note 154, at 68.

193 *See id.*

194 As an example, golfer Mark O'Meara won the 1998 Masters Tournament by making a long putt on the final hole to win by one shot. His purse was $576,000. *See* Clifton Brown, *A Major Putt for a Major Title; O'Meara Sinks a 20-Footer on No. 18 to Win in Augusta*, N.Y. TIMES, April 13, 1998, at C1. The second-place finisher pocketed $281,600, a difference of $294,400. *See* George Willis, *Unlucky Thirteen Kills Couples Dream*, N.Y. POST, April 13, 1998, at 66.

195 *See* UNITED STATES GOLF ASSOCIATION, THE RULES OF GOLF 1998-1999, Rule 24-2 (1997).

196 *See id.* Rule 16-1(a).

197 *See, e.g., id.* Rule 2-6 ("The penalty for a breach of a Rule in match play is loss of hole except when otherwise provided.").

198 *See id.* Rule 4-4.

weight, and composition of the balls a golfer may use;[199] and rules governing the type of clubs a player may employ.[200]

These latter kinds of rules are essentially "leveling" rules. They seek to create a laboratory condition for the playing of golf. Permitting a non-disabled golfer to use a non-approved, or "hot," golf ball, for example, would fundamentally alter the competitive nature of a match by providing him with an advantage over other golfers in the type of equipment used. From an early age, the rules of the game are instilled in golfers, and the PGA and golfers alike enforce them with near-religious fervor.[201]

Further insuring the laboratory setting of tournament golf is the fact that golf, perhaps more than any other sport, is a game of inches. A golfer who hits a shot that takes an unlucky bounce two inches to the right may end up in the deep grass known as the "rough." From the rough, the player has less control over her shot and may be forced to select a different club, alter her swing, or change her strategy for her next shot. If, however, the player's ball takes a lucky bounce and ends up two inches to the left, the player may be in the shorter grass known as the "fairway." From the fairway, a professional golfer has greater control over her next shot and may attempt nearly any shot in her arsenal. These are the types of chance occurrences that help separate winners and losers in golf.

In assessing Casey Martin's claim, the court paid little attention to the drastic effects that permitting even a slight advantage might cause. Once the court concluded that the fatigue Martin endures simply from coping with his disability is greater than the fatigue able-bodied golfers face by being forced to walk from shot to shot, the PGA's competitive advantage argument was rendered moot. If Martin was still at a comparative disadvantage even by being allowed to ride, his accommodation could not alter the competitive nature of an event.

In making this determination, the court turned the PGA's own

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[199] *See id.* Rule 5-1.

[200] *See id.* Rule 4-1.

[201] As an example, in 1996 golfer Greg Norman disqualified himself from a tournament for what can only be considered the most trivial of offenses—he used a golf ball that did not conform to United States Golf Association requirements because the marking on the ball was improperly stamped. Instead of the ball reading "XS-90," the ball simply read "XS-9." For want of a zero, the ball was illegal. *See* Jack Cavanaugh, *Missing Zero on Ball Leads to Norman's Disqualification*, N.Y. TIMES, June 30, 1996, at Section 8, p.1.

practices against it. The court noted that the PGA permits cart usage for those who so opt at two of the four types of tournaments it stages.[202] For the court, this fact was "certainly compelling evidence that even the PGA Tour does not consider walking to be a significant contributor to the skill of shot-making."[203] Further undercutting the PGA's argument was the fact that the "vast majority" of competitors opted to walk instead of ride at these tournaments.[204] Thus, the court asked, if permitting competitors to ride truly gives them an advantage in reducing fatigue, why do the majority of them choose to walk?[205]

After conducting an individualized inquiry into the purpose of the no-cart rule and determining that permitting Martin to ride a cart would neither frustrate the purpose nor fundamentally alter the nature of PGA and Nike events, the court ruled in favor of Martin's request.[206] In conclusion, the court opined that not only was Martin's request reasonable under the ADA, it was "*eminently* reasonable in light of Casey Martin's disability."[207]

C. *The Potential Impact of Martin*

As mentioned previously, perhaps the most potentially important aspect of the *Martin* decision was not its determination as to the reasonableness of permitting Martin to ride in a cart, but its conclusion that the PGA Tour is a place of public accommodation.[208] Critics were alarmed at the determination that an organization designed to establish the rules of a game could be required

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[202] *See* Martin v. PGA Tour, Inc., 994 F. Supp. 1242, 1248 (D. Or. 1998). Players on the Senior Tour are permitted to ride if they choose. Carts are also allowed in the two preliminary rounds of the PGA Qualifying School Tournament. *See id.* n.9. Despite the logical appeal of the court's argument, there may in fact be logical explanations for the discrepancy. First, the Senior tour is reserved for golfers over the age of fifty, a category of individuals one might logically expect to suffer more greatly the effects of fatigue. *See id.* Competitors at the PGA Qualifying School undergo a grueling event in which they must play 252 holes of golf, 14 entire rounds, in order to qualify. *See* Martin v. PGA Tour, Inc., 984 F. Supp. 1320, 1321 (D. Or. 1998).

[203] *See Martin*, 994 F. Supp. at 1248.

[204] *See id.* at 1251.

[205] *See id.* One possible explanation may be that, as one pro testified, walking is simply what most pros have done all of their lives. *See* Bill Plaschke, *Verplank Can Read Martin The Ride Act*, L.A. TIMES, Feb. 27, 1998, at C1 (quoting diabetic golfer Scott Verplank).

[206] *See Martin*, 994 F. Supp. at 1253.

[207] *Id.*

[208] *See supra* note 6 and accompanying text.

by the courts to alter those rules.[209] Outraged critics conjured up nightmarish scenarios that might ensue from the decision: "basketball players with spring-loaded shoes; quarterbacks with sign-language interpreters; guide dogs curling up at the feet of big league umpires."[210]

The true challenge courts face in addressing the ADA in competitive situations is not in dealing with these types of outlandish examples, but instead in attempting to balance the fundamental notion of fair play in competition with the ADA's fundamental goal of full participation. It is not a stretch to suggest that despite the ADA's anti-discrimination mandate, many sports still blatantly discriminate against individuals with disabilities.[211] In many instances, the discrimination is easily remedied. For example, modifying starting procedures in swimming competitions to accommodate the hard of hearing can be accomplished with no disadvantage to able-bodied athletes by simply employing a strobe light, in addition to the traditional starting gun, as the device that starts a race.[212] The more difficult problem is in attempting to find the appropriate demarcation point between accommodating the disabled and fundamentally altering the nature of a competitive activity.

In reality, it may turn out that professional golf is one of the few sports where an accommodation of one of the major rules of play might not fundamentally alter the nature of the game. As the *Martin* court noted, the game of golf is fundamentally about putting a ball into a hole;[213] how one gets to the hole is of secon-

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[209] Typical of this criticism are the statements of Sam Kazman, general counsel of the Competitive Enterprise Institute:

> I'm sure if during the debate over this bill (in 1990) if you had brought up the prospect of this occurring, the most avid proponents of the bill would have claimed you were foaming at the mouth. . . . It's a stretch to claim that the golf tournament is somehow a form of public accommodation or that it's really a workplace. Secondly, when you cross from places of employment into the realm of sports, there's a pretty strong dividing line. The general rule of offices and factories is that those who have physical problems ought not have it held against them. But the essence of physical sports is competition.

Casey Martin's Ride, *supra* note 4, at G2 (quoting Kazman).

[210] Garrity, *supra* note 4, at 63.

[211] *See* Julian U. Stein, *Accommodating Individuals with Disabilities in Regular Sport Programs*, in RISK MGMT. IN SPORT 322-23 (Herb Appenzeller ed. 1998). *See also id.* at 324-25 (detailing slow progress of accommodations for the disabled in track and field competitions).

[212] *See generally id.* at 327 (suggesting this as one possible accommodation).

[213] *See Martin*, 994 F. Supp. 1242, 1249 (D. Or. 1998).

dary importance. The same cannot be said of most other sports.

Still, *Martin* does pose some potentially troubling issues for participants in competitive situations. Although measuring the reasonableness of an accommodation in a employment or noncompetitive setting can sometimes be a difficult task, the difficulty is magnified greatly when one moves into a competitive setting. One of the more troublesome aspects of the *Martin* decision was the court's failure to fully address the inherent difference between these types of settings. In one curious passage, the court equates Casey Martin's case with the case of a disabled individual being ordered off a commercial airline by the plane's captain because of the captain's belief that the disabled passenger is unfit to travel safely.[214] The *Martin* court put forth the analogy in an effort to demonstrate the flaw in the PGA's argument that it alone should be allowed to set the rules for its competition—both rules illustrate the "age old rule that the captain is in charge of the ship," a rule which the ADA may sometimes supersede.[215] Although the court's point is well taken, it failed to consider the inherent differences in the two cases. By comparing a noncompetitive situation with a fundamentally competitive one, the court essentially compared apples and oranges. Although permitting a disabled individual to fly might conceivably affect the safety of other passengers, it does not place the other passengers at any type of competitive disadvantage in the same way as waiving a rule of golf might. Analogies to noncompetitive situations are of somewhat limited value when one enters the realm of competition.

As *Martin* illustrates, perhaps the most significant difficulty in dealing with the reasonable accommodation requirement in competitive settings is that the ADA essentially requires a court to measure an unquantifiable factor (the level of Casey Martin's fatigue vs. the fatigue of able-bodied golfers) in a program based on quantification (professional tournament golf). The slightest unfairness could potentially have major quantifiable results for other competitors that are lacking in noncompetitive settings.[216]

In holding that permitting Martin to ride would not provide him with an advantage, the court relied heavily on the testimony

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[214] *Id.* at 1247.

[215] *Id.*

[216] *See generally supra* notes 14-61 and accompanying text (discussing the ADA in the employment context).

of both Martin's physician and an expert on the physiological basis for fatigue.[217] Martin's nutritional expert, in particular, testified that the energy expended in walking a golf course was insignificant: "nutritionally . . . less than a Big Mac."[218]

Relying on the medical opinion of experts as to the nature of the accommodation required for a patient is fairly common in ADA cases;[219] however, it is certainly questionable how much weight should be given to an opinion on a question that is virtually incapable of precise determination.[220] While it may be possible to quantify the amount of energy expended in walking, it would seem scientifically impossible to assess with certainty whether Casey Martin's fatigue level in riding is equal to or greater than an able-bodied golfer's fatigue in walking. Even if Martin's fatigue is only slightly less (admittedly, a doubtful proposition), it may be enough to give him an advantage.

These ramifications could be compounded as more individuals seek waivers of the governing rules of a program. One of the PGA's chief concerns in *Martin* was that allowing a waiver in Martin's case would open the floodgates to future requests, some valid, others concocted, to gain a competitive advantage.[221] As the court in *McPherson v. Michigan High School Athletic Ass'n* recognized, the task of making an individual determination for each requestee as to the potential impact a waiver would have on competition could pose a huge administrative burden.[222]

Given the severity of his disability, it was not overly difficult to conclude that permitting Martin to ride a cart did not alter the level playing field of PGA and Nike Tour events. It may turn out, however, that the truly difficult case is not *Martin*, but a case involving some future golfer with a disability not as severe as Martin's. If the hypothetical court makes the unverifiable con-

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217 *Martin*, 994 F. Supp. at 1249-51.

218 *See id.* at 1250.

219 *See, e.g.*, D'Amico v. New York State Bd. of Law Exam'rs, 813 F. Supp. 217, 223 (W.D.N.Y. 1993) ("[I]n a case where there is no medical evidence to the contrary, and the treating physician's opinion does not appear on its face to be outrageous, it is appropriate for the Court to give great weight to the physician's opinions . . . .").

220 *See generally* Pullin & Heaney, *supra* note 73, at 817 (noting the perhaps insurmountable constraints in establishing comparative tests for the disabled to effectively measure future college performance).

221 *See Casey Martin's Ride*, *supra* note 4.

222 *See* McPherson v. Michigan High Sch. Athletic Ass'n, 119 F.3d 453, 463 (6th Cir. 1997).

clusion that the hypothetical golfer would not be placed at an advantage by a modification, and that decision is actually incorrect (if such a determination is even capable of assessment), then the ADA will have worked a fundamental alteration on the nature of competitive golf.

The difficulty in making this type of determination is compounded when courts must confront a requested waiver of a leveling rule. Courts should be particularly cautious in granting accommodations in such cases. These types of rules are designed specifically to create a level playing field, and nearly any alteration, if not properly accounted for, would alter the level playing field. As mentioned earlier, the no-cart rule in Martin was not such a rule—its leveling effect was only incidental to the rule's purpose.[223] This fact made the court's decision to grant the waiver in Martin's case somewhat easier. If, however, Martin had requested a waiver of one of golf's leveling rules, the court would have faced an extremely difficult task in assessing the effect the accommodation might have on competition. It is for this reason that courts must tread with care when they enter inside the ropes of competitive settings.

CONCLUSION

Perhaps the clearest lesson to be learned from Casey Martin's quest is that courts need to use extra care when dealing with the ADA's reasonable accommodation requirement outside the traditional employment sphere. Within this sphere, questions as to the fundamental fairness of requiring employers to accommodate the special needs of their employees are not as pressing. When one leaves the sphere and enters more competitive settings—settings in which there are clearly defined winners and losers and in which an artificial advantage for one participant necessarily means a disadvantage for others—issues of fundamental fairness become more troubling.

Within a competitive setting, courts need to be particularly vigilant in order to prevent the disabled from gaining an unfair advantage of their able-bodied counterparts. By undertaking a step-by-step analysis which focuses on purposes of the rule at issue, whether permitting an accommodation would thwart that purpose, and never losing sight of the fact that, by its actions, it

[223] *See supra* notes 178-81 and accompanying text.

may be creating an unlevel playing field, courts can attempt to minimize the risks inherent in the reasonable accommodation requirement. If the reasonable accommodation requirement places individual competitors at a disadvantage, the accommodation ceases to be reasonable and the law ceases to be fair. Fair play is, after all, the essence of competition.