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What Casey Martin Has to Teach Us about Disability Discrimination in the Workplace

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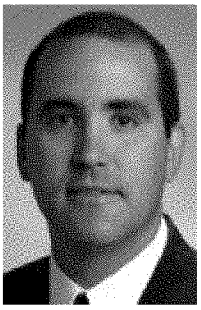
Nicole Buonocore Porter, *Martinizing Title I of the Americans with Disabilities Act*, 47 **Ga. L. Rev.** 527 (2013), available at SSRN.



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For years, plaintiffs claiming discrimination under the Americans with Disabilities Act (ADA) routinely lost because they were unable to establish the existence of a disability. The result was that arguably the most important aspect of the ADA—the requirement that employers make reasonable accommodations to the known disabilities of their employees—went largely ignored in employment decisions and legal scholarship. All of that started to change with the passage of the ADA Amendments Act of 2008 (ADAAA). With the ADAAA, Congress expressly overruled some of the more restrictive interpretations of the definition of disability, thereby increasing the number of individuals who could claim protection from discrimination under the ADA. Congress was clear that this is the result it wanted and that the proper focus in ADA claims should not be on whether an individual has a disability, but whether the individual is qualified for the position in question, i.e., whether the individual can perform the essential functions of a position, with or without a reasonable accommodation.

Thus, the reasonable accommodation concept should increasingly take center stage in ADA cases. The problem, however, is that there has historically been so little focus on the concept in the employment context that there is considerable uncertainty as to what it means to say that an accommodation is or is not "reasonable." Judge Richard Posner famously advanced a cost-benefit approach to the question of reasonableness, but his approach has had limited traction. Some judges have taken a case-specific, "I-know-it-when-I-see-it" approach, which leaves parties and their lawyers with little guidance. Nicole Buonocore Porter (Toledo) aims to address the problem of defining reasonableness in the accommodation context in her latest article, *Martinizing Title I of the Americans with Disabilities Act.*

Porter is not the first author to attempt to provide some clarity to the reasonable accommodation requirement. A couple of years ago, I reviewed Mark Weber's *Unreasonable Accommodation and Due Hardship*, in which Weber made the case that, to some extent, the federal courts (including the Supreme Court in its decision in *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002)) had misconstrued the requirement. Porter does not try to swim upstream as Weber (persuasively) did. Instead, Porter attempts to synthesize the law of reasonable accommodation by drawing up the decisional law involving a different portion of the ADA, Title III.

Title III covers discrimination in public accommodations. The most famous and most detailed Title III decision to date is the Supreme Court's decision in *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001), involving golfer

Casey Martin's successful quest to be permitted to use a golf cart in PGA events. Title III speaks of "reasonable modifications" rather than "reasonable accommodations," and as Porter acknowledges, a golf course is not a workplace (for most people at least). Nonetheless, Porter argues that the Court's decision in *Martin* provides a useful framework for analyzing reasonable accommodation issues in employment discrimination cases.

In deciding whether the PGA was required to depart from its no-carts rule, the Court in *Martin* focused on whether allowing the use of a cart would fundamentally alter the nature of the PGA's tournaments. The Court concluded that departing from any rule in a competitive setting might fundamentally alter the nature of the event in two ways: (1) by altering an essential aspect of the sport, and (2) by providing a competitor with a competitive advantage. Porter argues that a similar approach both explains the outcomes of most employment cases involving reasonable accommodation disputes and provides a useful approach for deciding future cases. Under Porter's approach, an accommodation would be unreasonable (1) if it fundamentally alters the nature of the employer-employee relationship, or (2) if it gives an employee with a disability a competitive advantage over other employees. Without going into great detail, Porter provides examples of accommodations that would fall into the two categories, including some of the accommodations that have proven to be particularly troublesome, such as allowing an employee to work from home.

One may take issue with the burdens her approach would place on employers and other employees. But Porter deserves credit for attempting to articulate a standard that would aid courts and parties in their attempts to deal with the reasonable accommodation requirement. "Reasonableness" is an inherently ambiguous term and the ADA is a fairly complex statute. But given the crucial role that the reasonable accommodation/modification concept plays in the ADA and the increased role it will play following passage of the ADA Amendments Act, a unified approach to the concept might not be such a bad idea. Porter's suggested approach gives courts and scholars something more tangible to deal with when considering accommodation issues. At a minimum, Porter has offered a potentially useful way to consider the issue and one that may aid courts in future cases.

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