

# CASEY'S CASE: TAKING A SLICE OUT OF THE PGA TOUR'S NO-CART POLICY

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## I. INTRODUCTION

When Casey Martin hobbled<sup>1</sup> into an Oregon federal district court in January of 1998, Americans took notice. Martin, a young golfer who competes on the Nike Tour, a lower level golf circuit run by the Professional Golfers' Association Tour (PGA Tour), possesses a rare circulatory disorder that makes it painful and potentially dangerous for him to walk.<sup>2</sup> Martin sued the PGA Tour over its unwillingness to allow him to use a golf cart in its competitions.<sup>3</sup>

Martin asserted a right to reasonable accommodation for his disability under the Americans with Disabilities Act (ADA).<sup>4</sup> The PGA

\* This Note is dedicated to my son Alex who continues to teach me the trait of patience. I would like to thank Mr. John Bischof for enlightening me about golf, a sport I knew nothing about prior to embarking on this project.

1. This reference is not meant to be derogatory, but rather to describe accurately Mr. Martin's gait, which observers characterize as closer to a hobble than a limp.

2. Martin has a circulatory ailment called Klippel-Trenauney syndrome. His right leg is approximately half the girth of his left and has no primary vein. See *Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242, 1243 (D. Or. 1998); see also Lisa Schnirring, *Casey Martin's Case: The Medical Story*, PHYSICIAN & SPORTS MEDICINE, Apr. 1998, at 15. Martin will probably not be able to play golf past the age of 30. Further, his doctors say if his leg weakens to the point it breaks, it will probably have to be amputated.

3. See generally *Martin v. PGA, Inc.*, 984 F. Supp. 1320 (D. Or. 1998) (denying the PGA Tour's summary judgment motion); *Martin v. PGA, Inc.*, 994 F. Supp. 1242 (D. Or. 1998) (holding that a disabled golfer's request to use a cart during professional golf tournaments was reasonable and would not fundamentally alter the nature of the tournament).

4. *Martin*, 984 F. Supp. at 1322; see also 42 U.S.C. § 12182(a), (b)(2)(A) (1994).

Tour argued that providing carts for players, even those with permanent physical disabilities, would fundamentally alter the nature of the sport and provide an unfair advantage to Martin because walking players and riding players experience different levels of fatigue.<sup>5</sup> The case sparked an intense debate not only in country clubs and sports bars, but also in the worldwide media, legal circles, and even in the United States Congress.

Many viewed Martin as a courageous young golfer who overcame adversity to achieve athletic recognition. Senators Bob Dole of Kansas and Tom Harkin of Iowa spoke on behalf of Martin. Dole stated he did not think that "PGA" should be an abbreviation for "Please Go Away."<sup>6</sup> One newspaper columnist referred to Martin as "noble," and spoke of the PGA Tour as having "beliefs and attitudes as rigid as rigor mortis," as well as possessing a "heartlessness that is unparalleled in sports."<sup>7</sup> Another critic stated that "the [T]our should be putting [Martin] on posters, not in court papers."<sup>8</sup> The lawsuit was referred to as "the PGA Tour's saddest hour."<sup>9</sup>

Golf's greats, including Arnold Palmer and Jack Nicklaus, testified against Martin. Nicklaus stated that carts look bad on television.<sup>10</sup> When Palmer testified that walking is an essential physical component of the game, journalists pointed out that Palmer "chain-smoked his way to tournament victories in the 1960s"<sup>11</sup> and queried whether golfers "tote refrigerators on their backs," ridiculing the PGA Tour's assertion that golf is an athletic sport.<sup>12</sup> Another columnist noted Nicklaus's hypocrisy in proclaiming the sanctity of the PGA Tour's rules while requesting a different (nondisability) exemption for himself.<sup>13</sup> The PGA Tour drew further fire from journalists by

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

6. Thomas Bonk, *Casey Case: Tour Has Cartload of Trouble*, L.A. TIMES, Jan. 30, 1998, at C11.

7. Steve Kelley, *Hypocritical Comments by Golf's Greats Reveal Emptiness of PGA Tour's Case*, SEATTLE TIMES, Feb. 9, 1998, at D1.

8. Editorial, *A Good Walk Spoiled; The PGA Doesn't Get It*, GREENSBORO NEWS & RECORD, Feb. 1, 1998, at F2.

9. Kelley, *supra* note 7, at D1.

10. See *id.*

11. *Id.*

12. Dave Kindred, *Sprewell or Martin: It's Time for a Hero*, PORTLAND OREGONIAN, Feb. 8, 1998, at E2.

13. See Tim Sullivan, *Nicklaus Should Take Fair Way In*, CINCINNATI ENQUIRER, Mar. 18, 1998, at D1. Sullivan noted that Nicklaus received a three-year special exemption in March 1998 from the United States Golf Association (USGA), allowing him to play in the U.S. Open, after Nicklaus supported the no-cart policy at Casey Martin's trial. The timing, at best, is curious. Sullivan also discussed the problem with the Tour's seemingly contradictory stance by stating that "[i]f you don't treat everyone equally, you can't pretend you do." *Id.* Sullivan further noted that Nicklaus's exemption denied another player the chance to compete: "Because the field is limited to 156 players, each special exemption deprives some other player an opportunity to qualify." *Id.* Nicklaus's original request for an

comparing Martin's disability to an ingrown toenail that one of Martin's challengers suffered at the Nike season opener.<sup>14</sup>

Opposition to the Martin suit was also pervasive and passionate. A Midwestern paper's unscientific poll pegged support for Martin at a mere ten percent of its readership.<sup>15</sup> Columnists stressed the importance of protecting the PGA Tour's autonomy in regulating its competitions, fearing a decision for Martin could "open a Pandora's box with far-reaching effects."<sup>16</sup> Some viewed the PGA Tour as the real victim; big brother again undermined a private organization's ability to set its own rules.<sup>17</sup> Others noted the importance of walking in golf: "If you remove walking from golf, you change golf from a sport to a game. You make it the equivalent of billiards, or bowling or tiddlywinks almost."<sup>18</sup> One journalist simply stated, "[I]nfirmities block a lot of us from taking part in the games we love."<sup>19</sup> Another referred to professional sports as "the ultimate Darwinian test of the survival of the fittest" and asserted that "the disabled are not the most fit."<sup>20</sup>

Some criticism went beyond the *Martin* case. One economist stated: "[Martin's case is] based on a rotten law. The ADA [is] merely a 'feel-good law.'"<sup>21</sup> To support this proposition, another ADA critic pointed to a case in which a city was ordered to pay \$1.5 million in back insurance claims for artificial insemination and other treatment because a police officer's infertility was found to be a disability.<sup>22</sup> The

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exemption was denied in January 1998, before the Martin trial. See *Nicklaus Receives Open Exemption*, CINCINNATI ENQUIRER, Mar. 17, 1998, at D1.

Interestingly, Nicklaus has received five U.S. Open exemptions during his career. See Ron Sirak, *Nicklaus, Open Go Hand-in-Hand, Like Golf, Tradition*, ARIZ. REPUBLIC, Feb. 13, 1998, at 13. The exemption allows a player who does not qualify under the regular rules to compete. Exemptions are used for publicity purposes, "to keep in the public's eye the living history of the game." *Id.* Opponents argue that the limited number of spaces in the competition should be given to those who have a realistic chance of winning. See *id.*

14. See Donald Kaul, *If Golfers Are Athletes, So Are People Walking Dogs*, ORLANDO SENT., Feb. 17, 1998, at A11.

15. See Jeffery Flanagan, *Readers Favor PGA Over Martin*, KANSAS CITY STAR, Feb. 8, 1998, at C2.

16. Joe Gordon, *Golf Notes: Authority an Issue-Martin Case Weakens PGA*, BOSTON HERALD, Feb. 8, 1998, at B29.

17. See Robyn Blumner, *Disabled Golfer Swings Wrong Club*, DENVER ROCKY MOUNTAIN NEWS, Jan. 30, 1998, at A52.

18. *Nightline: Casey Martin's Triumph, Golfer Produces a Bold Stroke for the Disabled* (ABC television broadcast, Feb. 12, 1998) (statement of Mike Stachura, Reporter, GOLF DIGEST), available in 1998 WL 5372982 [hereinafter *Nightline*].

19. Jim Murray, *Golf's for Athletes—Sorry*, L.A. TIMES, Feb. 5, 1998, at C1.

20. Blumner, *supra* note 17, at A52.

21. Alexandria Berger, *Acceptance of Disableds' Rights Has Come Slowly*, VIRGINIAN-PILOT & LEDGER-STAR, Feb. 22, 1998, at E10 (quoting James J. Keating, INVESTOR'S BUS. DAILY, Jan. 15, 1998, at A30).

22. See Linda Chavez, *The ADA: A Law Gone Haywire*, CHI. TRIB., Feb. 18, 1998, at 17 (referring to *Bielicki v. City of Chicago*, No. 97-C-1471, 1997 WL 260595, at \*1 (N.D. Ill. May 8, 1997)).

critic also focused on a pre-ADA case in which Northwest Airlines contested the reinstatement of a pilot who was terminated for flying while intoxicated after he successfully completed an alcohol rehabilitation program.<sup>23</sup> Another ADA opponent proclaimed that the ADA is a “haven for everyone from scam artists to disgruntled workers.”<sup>24</sup> Still another spoke of the ADA as “terroriz[ing] institutions with its rigid and uncompromising interpretation.”<sup>25</sup>

Criticism aside, Federal Magistrate Judge Thomas Coffin ruled in Martin’s favor.<sup>26</sup> Legal practitioners are left with a precedential case: the *Martin* decision is the first time that a plaintiff has successfully sued under the ADA for a modification of a professional sport organization’s playing rules.<sup>27</sup> Further, the *Martin* trial marks the first time a federal court has determined that the ADA even applies to professional sports. Although the PGA Tour publicly promised Martin two years without “legal interference,”<sup>28</sup> it has already filed an appeal in the Ninth Circuit.<sup>29</sup> The PGA Tour’s promise is especially curious as it is estimated that the Ninth Circuit decision will be handed down within eighteen months of the lower court decision.<sup>30</sup>

While the *Martin* case gives ADA plaintiffs some solid legal ground for claims, the decision leaves much unanswered. Why did the judge refuse to consider Martin’s claim that the PGA Tour is an employer, which would have invoked Title I coverage? What type of change would amount to an impermissible modification of various professional sports rules? What type of consideration is a professional sports organization required to give to an individual player’s disability?

Part II of this Note examines the history and purposes of the ADA. Part III provides an overview of the *Martin* decision. Part IV presents an alternative theory for determining Martin’s case: organizations governing professional sports are employers and subject to

23. See *id.* (referring to *Northwest Airlines, Inc. v. Airline Pilots Ass’n*, 808 F.2d 76 (D.C. Cir. 1987)). In *Northwest Airlines*, the court ordered the reinstatement specifically because the FAA recertified the pilot to fly after he successfully completed alcohol rehabilitation. See *Northwest Airlines*, 808 F.2d at 83. As the court stated in *Gulf Coast Industrial Workers Union v. Exxon Co.*, 991 F.2d 244 (5th Cir. 1993), “A court would certainly be hardpressed [sic] to oppose reinstatement where the regulatory body charged with ensuring workplace safety agrees to [reinstatement].” *Id.* at 254.

24. Chavez, *supra* note 22, at 17.

25. Bob Ryan, *Sorry, Free Rides Not Right*, BOSTON GLOBE, Jan. 31, 1998, at E1.

26. See *Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242, 1253 (D. Or. 1998).

27. See *id.* at 1251.

28. *Nightline*, *supra* note 18 (statement of Mike Von Freud, ABC News).

29. See *Casey Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242 (D. Or. 1998), *appeal docketed*, Nos. 98-35309, -35509 (9th Cir. July 8, 1998); see also Gaye LeBaron, *Gaye LeBaron’s Notebook*, PRESS DEMOCRAT, Apr. 1, 1998, at A2.

30. See Bob Robinson, *Montgomery Defends ‘Honesty,’* PORTLAND OREGONIAN, Apr. 1, 1998, at C4.

Title I of the ADA. Finally, Part V concludes that the *Martin* decision should be broadened and clarified.

## II. THE ADA: AN OVERVIEW

Congress enacted the ADA in 1990 with only twenty-eight nay votes in the House of Representatives<sup>31</sup> and six nay votes in the Senate.<sup>32</sup> Title I of the ADA covers the employment rights of disabled individuals.<sup>33</sup> Congress intended it "to encourage employers to take on qualified individuals, regardless of their disability."<sup>34</sup> Title II addresses discrimination in services provided by state and local governments.<sup>35</sup> Title III covers discrimination in public accommodations and services offered by private entities.<sup>36</sup> Title IV addresses retaliation, coercion, state immunity, discrimination in telecommunications, and other miscellaneous provisions.<sup>37</sup>

Before the enactment of the ADA, many viewed disabilities, especially mental or developmental disabilities, as a form of deviancy.<sup>38</sup> Congress recognized that legislation was needed because individuals with disabilities had been subjected to purposeful unequal treatment and were politically powerless.<sup>39</sup> Congress concluded that the disabled: (1) are isolated and segregated; (2) are discriminated against in employment, housing, public accommodations, education, transportation, recreation, health, and public services; (3) have no legal recourse; (4) continually encounter discrimination, including outright exclusion, inflexible rules and policies, and lesser services in every facet of living; and (5) are politically powerless and stereotyped.<sup>40</sup>

The ADA is a comprehensive statute. The Act covers the mentally disabled,<sup>41</sup> recovering drug addicts and alcoholics,<sup>42</sup> and individuals

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31. See 136 CONG. REC. H4629 (daily ed. July 12, 1990).

32. See 136 CONG. REC. S9695 (daily ed. July 13, 1990).

33. See 42 U.S.C. §§ 12111-12117 (1994).

34. *Tyndall v. National Educ. Ctrs., Inc.*, 31 F.3d 209, 215 (4th Cir. 1994).

35. See 42 U.S.C. §§ 12131-12165 (1994).

36. See *id.* §§ 12181-12189.

37. See *id.* §§ 12201-12213.

38. See generally HOUSE COMM. ON EDUC. AND LABOR, 101st CONG., LEGISLATIVE HISTORY OF THE AMERICANS WITH DISABILITIES ACT (Comm. Print 1990).

39. See 42 U.S.C. § 12101(a) (1994) (congressional findings).

40. See *id.* § 12101(a)(2)-(5), (7).

41. See *id.* § 12102(2) (defining disability as a physical or mental impairment that substantially limits a major life activity); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 606 (3d Cir. 1998) (holding that an employee, who was no longer able to perform her former duties because of a mental disorder, could bring an action against the employer alleging that disparity in disability benefits violated the ADA).

42. See 42 U.S.C. 12114(a), (b) (1994) (providing coverage for recovering drug addicts but not providing coverage to individuals currently using illegal drugs when the drug use is the reason for the adverse action).

with HIV.<sup>43</sup> In the future, the ADA may assist many who are now healthy because only fifteen percent of disabled Americans are born with their respective disabilities.<sup>44</sup>

The ADA has made a significant impact on society in the context of handicapped access because the disabled now have a right to access offices, supermarkets, town halls, stadiums, theatres, and restaurants they could not physically enter before.<sup>45</sup> In addition, the law protects the disabled from hiring discrimination,<sup>46</sup> although more than two-thirds of the disabled remain unemployed.<sup>47</sup>

The *Martin* case was decided under Title III of the ADA, which prohibits discrimination on the basis of a disability in the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."<sup>48</sup> Discrimination includes the failure to make reasonable modifications to policies when necessary to accommodate the disabled.<sup>49</sup> Discrimination also includes the imposition of eligibility criteria that tend to screen out individuals with disabilities.<sup>50</sup>

To successfully litigate a claim under Title III, the plaintiff has the burden of proving that she requested the public accommodation to modify an existing policy, practice, or procedure to accommodate her disability and that the requested modification is generally reasonable for that type of public accommodation.<sup>51</sup> This burden is met by showing that the modification is reasonable in a general sense.<sup>52</sup> If special equipment is necessary for a reasonable modification, the

43. See generally *Bragdon v. Abbott*, 524 U.S. 624 (1998) (holding that the plaintiff's asymptomatic HIV infection was a "disability" under the ADA).

44. See ENFORCEMENT GUIDANCE ON THE EFFECT OF REPRESENTATIONS MADE IN APPLICATIONS FOR BENEFITS ON THE DETERMINATION OF WHETHER A PERSON IS A "QUALIFIED INDIVIDUAL WITH A DISABILITY" UNDER THE AMERICANS WITH DISABILITIES ACT IN AVOIDING WORKPLACE LITIGATION 141 (PLI Litig. & Admin. Practice Course Handbook Series No. H-562, 1997).

45. See 42 U.S.C. § 12181(7) (1994) (defining public accommodation by a nonexclusive list of places and services); see also Michael Grunwald, *Casey Martin Ruling Should Be a Milestone for All Disabled*, FT. WORTH STAR-TELEGRAM, Feb. 15, 1998, at 3.

46. See 42 U.S.C. § 12112(a) (1994).

47. S. REP. NO. 101-116, at 7 (1989); 133 CONG. REC. H2410 (daily ed. May 17, 1990) (statement of Rep. Hoyer).

48. 42 U.S.C. § 12182(a) (1994).

49. See *id.* § 12182(b)(2)(A)(ii).

50. See *id.* § 12182(b)(2)(A)(i).

51. See *Johnson v. Gambrinus Co./Spoetzel Brewery*, 116 F.3d 1052, 1058-62 (5th Cir. 1997). The Fifth Circuit, for example, articulates the burden allocation as follows: the plaintiff has the burden of proof on whether the proposed modification was requested and reasonable. The burden of production then shifts to the defendant to show that the modification is unreasonable; the defendant must honor the request for modification unless it meets its burden of proving that the requested modification would fundamentally alter the nature of the public accommodation. See *id.*

52. See *id.* But see *Staron v. McDonald's Corp.*, 51 F.3d 353, 356 (2d Cir. 1995) (holding that the reasonableness of a requested modification is a fact-specific inquiry).

public accommodation must provide the equipment unless the modification would impose an undue burden, or would fundamentally alter the nature of the public accommodation.<sup>53</sup>

### III. *MARTIN V. PGA TOUR, INC.*: A REVOLUTIONARY DECISION FOR DISABLED PROFESSIONAL ATHLETES?

The *Martin* case dealt with many issues for the first time: almost all previous ADA cases in the sports context involved disputes over eligibility requirements, especially academic eligibility at the college level.<sup>54</sup>

The arguments in *Martin*, however, first focused on whether the PGA Tour is subject to the ADA.<sup>55</sup> The PGA Tour presented three theories that would exempt it from ADA coverage. The PGA Tour first contended that the ADA was not designed or intended to apply to competitors in professional golf tournaments.<sup>56</sup> Next, the PGA Tour argued that it is not a public accommodation, and that even if it were considered a public accommodation, the PGA Tour is exempt from the ADA's requirements because it falls under the private organization exemption.<sup>57</sup>

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53. See *Johnson*, 116 F.3d at 1058-62. In *Johnson*, the plaintiff, who was blind, challenged the defendant brewery's blanket no-animal policy on its brewery tours and successfully argued that the brewery's failure to allow him to take his guide dog with him on a tour violated the ADA's Title III. The plaintiff met his burden of proving that the requested modification of the brewery's policy to permit access for his guide dog on the tour was reasonable, and the defendant brewery failed to prove that the modification would fundamentally alter the brewery's tour. See *id.* at 1064. The court ordered the defendant to submit a plan permitting broad access for dogs on the brewery tours, which would permit the court to make further findings regarding the fundamental alterations resulting from these proposed modifications. See *id.* at 1065.

54. The National Collegiate Athletic Association (NCAA) dictates certain academic requirements for its athletes. Some athletes have challenged these standards with mixed results. For example, in *Tatum v. National Collegiate Athletic Ass'n*, 992 F. Supp. 1114 (E.D. Miss. 1998), the court ruled that the NCAA operates a place of public accommodation for Title III purposes. See *id.* at 1121. However, the court denied a preliminary injunction to a student who alleged the NCAA violated Title III when it refused to recognize a non-standard, untimed American College Test score for purposes of determining the student's eligibility. See *id.* at 1123. In *Butler v. National Collegiate Athletic Ass'n*, No. C96-1656D, 1996 WL 1058233, at \*6 (W.D. Wash. Nov. 8, 1996), the court preliminarily enjoined the NCAA from declaring a learning disabled student ineligible because he had not fulfilled his core course requirements. Conversely, in *Gander v. National Collegiate Athletic Ass'n*, No. 96-C-6953, 1996 WL 680000, at \*5 (N.D. Ill. Nov. 21, 1996), the court held that the substitution of core courses would require a fundamental alteration to the program. The court also found that the student received the required individual consideration via the school's waiver process, which allows a school (but not a student) to seek waiver of core course requirements in certain circumstances. See *id.* at \*2-3.

55. See *Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242, 1244 (D. Or. 1998); *Martin v. PGA Tour, Inc.*, 984 F. Supp. 1320, 1323 (D. Or. 1998) (denying the Tour's summary judgment motion).

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

57. See *id.* at 1323.

Martin asserted that the PGA Tour is subject to the ADA for three reasons. First, the Tour offers examinations or courses that are covered by the ADA.<sup>58</sup> Second, the PGA Tour is a private entity that operates a place of public accommodation, and third, the PGA Tour is the golfers' employer.<sup>59</sup> Without discussion, the *Martin* court dismissed the characterization of the PGA Tour as a private entity that offers covered examinations or courses as well as the assertion that Martin is an employee of the PGA Tour.<sup>60</sup>

This Note will not discuss Martin's first contention, that the PGA Tour offers courses or examinations covered by the ADA.<sup>61</sup> The issue of whether Martin is one of the Tour's employees is discussed in Part IV of this Note. The following subsection addresses Martin's second assertion that the PGA Tour operates a public accommodation covered by the ADA.

#### A. *The Public Accommodation Determination: The First Step Toward Coverage of a Private Entity Under the ADA*

A private entity is subject to the antidiscrimination provisions of Title III of the ADA if it "owns, leases (or leases to), or operates a place of public accommodation."<sup>62</sup> The owner, lessor, lessee, or operator of a place of public accommodation must not discriminate "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations."<sup>63</sup>

"Golf course" is specifically listed as a public accommodation under the ADA.<sup>64</sup> Despite this fact, the PGA Tour presented a public/private zone argument to distinguish itself from the Act's enumeration. The PGA Tour argued that what occurs "inside the ropes," the fairways and greens of golf courses cordoned off during a tournament, is private and therefore exempt from the ADA because the

58. See *id.* Private entities that offer examinations or courses related to applications, licensing, certifications, or credentialing for professional or trade purposes must offer these services in a manner accessible to persons with disabilities. See 42 U.S.C. § 12189 (1994). Martin argued that the PGA Tour's qualifying tournament is analogous to failing a bar examination because a golfer "failing" the tournament is "effectively refused membership in the profession of golf." Amended Plaintiff's Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment at 38, *Martin v. PGA Tour, Inc.*, 984 F. Supp. 1320 (D. Or. 1998) (No. CIV. 97-6309-TC) [hereinafter Amended Memo].

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

60. See *Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242, 1247 (D. Or. 1998).

61. Essentially Martin argued that qualifying rounds were covered under Title II of the ADA, as an examination of the golfer's skills. The court dismissed this contention without discussion. See *id.* Because the author believes it is more meritorious, she focuses on the Title I coverage issue instead.

62. 28 C.F.R. § 36.104 (1998) (defining "public accommodation").

63. 42 U.S.C. § 12182(a) (1994).

64. See *id.* § 12181(7)(L).

general public is not allowed in this area.<sup>65</sup> The court held the fact that the general public is not allowed “inside the ropes” did not transform a golf course into something other than a public accommodation. The court reasoned that if no nonmembers are permitted on a golf course’s grounds, a country club that did not qualify under the private club exemption could still refuse to accommodate its handicapped members and thereby subvert the requirements of the ADA.<sup>66</sup> In addition, the court reasoned that the inside/outside ropes distinction is unimportant because if this proposition were accepted, the operator of a place of public accommodation could “relegate the ADA to hopscotch areas” of its premises.<sup>67</sup>

The *Martin* court failed to cite an important case that furthers this reasoning.<sup>68</sup> In *Evans v. Laurel Links, Inc.*,<sup>69</sup> a federal district court held that an entire private golf course was subject to Title II of the Civil Rights Act of 1964 because the golf course operated a public lunch counter.<sup>70</sup> The *Laurel Links* case vividly illustrates *Martin*’s argument that entire golf courses are considered public accommodations, even when the PGA Tour is present. In addition, the *Martin* court did not focus on another argument that could be useful in cases similar to *Martin*’s: “the ropes” are not stationary. As the PGA Tour moves from course to course, the area separated by the ropes changes as the particular game progresses. This fact is compelling because the PGA Tour cannot point to a permanent or even specific area that is exempt from ADA coverage.

Although the court ultimately concluded that the PGA Tour is a place of public accommodation, it erred in its elaboration of the public/private zone issue. The court asserted that a disabled manager of a professional baseball team has a right to a reasonable modification even though the public is not allowed in the dugout.<sup>71</sup> The problem with this analogy is that the manager, clearly an employee of the team, would be covered under Title I of the ADA, which mandates greater protections for the disabled.<sup>72</sup> The court, however, refused to apply Title I to the PGA Tour’s professional golfers.<sup>73</sup>

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65. See *Martin v. PGA Tour, Inc.*, 984 F. Supp. 1320, 1326 (D. Or. 1998).

66. See *id.*

67. *Id.* at 1327. For a discussion of the private club exemption, see *infra* Part III.B.

68. The court instead used the case to discuss its finding that nonmembers used the Tour’s “facilities.” See *Martin*, 984 F. Supp. at 1325 (citing *Evans v. Laurel Links, Inc.*, 261 F. Supp. 474 (E.D.Va.1966)).

69. 261 F. Supp. 474 (E.D. Va. 1966).

70. See *id.* at 476.

71. See *Martin*, 984 F. Supp. at 1327.

72. See 42 U.S.C. §§ 12111-12117 (1994).

73. See *Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242, 1247 (D. Or. 1998) (finding that “an employer does not include a bona fide private membership club”). The distinction between Titles I and III will be addressed *infra* Part IV.

Although the sports manager analogy was flawed, the court successfully illustrated its point through analogies to executive suites in sports arenas and to private schools: although executive suites and private schools are open only to specific invitees, they are still classified as places of public accommodation.<sup>74</sup> Thus, the private characteristics of the roped-off area are not determinative.

The court's ruling that the PGA Tour is a place of public accommodation is controversial. One commentator argued that the *Martin* court "does not consider the fairways and greens of golf courses to be off-limits to the public during tournament play."<sup>75</sup> He asserted that the court's holding is in error because Congress never intended that the ADA "require public access to the competitive area of a professional sporting event while the event is in progress."<sup>76</sup> However, the commentator erred in his analysis because the general public does not need access to an area at all times in order for it to be considered a public accommodation.<sup>77</sup>

The crux of the commentator's argument is that the court ignored the well-established legal distinction between an entity's private and public areas.<sup>78</sup> However, the court did no such thing. The question the court addressed was not whether there can be a legal distinction between different areas of a single facility or entity, but whether there was a legal distinction *in this context* given the nature of the so-called private area and the fact that the ADA specifically lists golf courses as places of public accommodation.<sup>79</sup>

The area inside the ropes can be more accurately characterized as quasi-public because it is open to individuals such as reporters, certain volunteers, and vendors. The competitive area cannot be compared to a private apartment as one commentator attempted.<sup>80</sup> Private apartments are not included under ADA regulations, and further, unlike private apartments, golf courses that host the PGA Tour's tournaments are open to the public a majority of the time. In addition, the public is invited to attend and help fund the tourna-

74. See *Martin*, 984 F. Supp. at 1327.

75. Scott Mills, *Off-Course View of ADA Golf-Cart Decision Perverts Law's Intent*, ARIZ. REPUBLIC, Mar. 1, 1998, at H1. Mr. Mills is an employment law attorney in Washington, D.C.

76. *Id.*; see also Mike Rosen, *Martin's Suit Against PGA Was Flawed*, COLORADO SPRINGS GAZETTE TELEGRAPH, Feb. 20, 1998, at 7 (stating that the Tour should not be treated "like a restaurant"). Rosen also mistakenly argued that Magistrate Judge Coffin treated the Tour's golfers as employees. See *id.*

77. See *Martin*, 984 F. Supp. at 1326-27 (explaining that the general public does not have access to reception halls during a wedding or convention centers during a political convention, yet these places are considered places of public accommodation.).

78. See Mills, *supra* note 75, at H1.

79. See *Martin*, 984 F. Supp. at 1326-27 (noting not only that the ADA lists golf courses as public accommodations, but also that golf courses normally are open to the public most of the time).

80. See Mills, *supra* note 75, at H1.

ments. The *Martin* ruling does not place “landlords, tenants, property managers and private employers at risk of lawsuits by unwelcome and uninvited members of the public.”<sup>81</sup> After determining that the PGA Tour is a public accommodation, the court still had to decide whether the PGA Tour is entitled to an exemption from the ADA on the theory that it is a “private” organization.

*B. The Private Club Exemption: Designed to Protect Freedom of Association Values*

The ADA excludes certain private clubs and establishments from coverage.<sup>82</sup> Such exemptions are narrowly construed, and the burden of proving an exemption rests on the organization claiming it.<sup>83</sup> When determining whether an organization qualifies for the private club exemption, courts look at the following: (1) genuine selectivity in membership; (2) membership control of the organization; (3) history of the organization; (4) the extent the organization’s facilities are utilized by nonmembers; (5) the organization’s purpose; (6) whether the organization advertises for members; and (7) whether the organization is nonprofit.<sup>84</sup>

The PGA Tour argued that it was not covered under the ADA due to the “lack” of public participation in its events, its nonprofit status, and the selective process it uses when choosing new members.<sup>85</sup> The PGA Tour argued that because so few golfers can compete at its level, it is genuinely selective.<sup>86</sup> The court, however, held that the PGA Tour’s eligibility requirements did not amount to “genuine selectivity” because the requirements were merely skill tests inherent in all professional sports.<sup>87</sup> In addition, the court did not find the PGA Tour’s requirement that players submit a \$3000 fee and two letters of reference before entering a qualifying school tournament to be evidence of genuine selectivity.<sup>88</sup> The tests and requirements did not qualify for private club exemption status because they were not designed to screen out members based on freedom of association values such as social, moral, philosophical, or religious beliefs, which were the foundation for the private club exemption.<sup>89</sup>

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81. *Id.* (arguing that the *Martin* case exposes these individuals to risk).

82. *See* 42 U.S.C. § 12187 (1994).

83. *See Quijano v. University Fed. Credit Union*, 617 F.2d 129, 131-32 (5th Cir. 1980) (decided under Title VII); *Nesmith v. YMCA*, 397 F.2d 96, 101 (4th Cir. 1968) (same).

84. *See Martin*, 984 F. Supp. at 1324-25.

85. The Tour includes approximately 470 players at any given time. *See id.* at 1321.

86. *See id.* at 1324-25.

87. *See id.* at 1325.

88. *See id.* at 1322.

89. *See id.* at 1325.

The PGA Tour also argued that the lack of public participation in PGA Tour events evidenced its status as a private club.<sup>90</sup> However, the court focused on the pervasive presence of the public (the spectators) at PGA Tour events and the numerous nonplayers who participate in the operation of the event, such as reporters and caddies.<sup>91</sup> The court also noted the importance of the public in generating revenue for the PGA Tour, finding the Tour's success directly dependent on public participation, which militates against a determination of private club status.<sup>92</sup>

Finally, the court found it compelling that the organization's primary purpose is to generate revenue and specifically found that the PGA Tour is a commercial entity.<sup>93</sup> This commercial status weighed against the importance of its nonprofit status.<sup>94</sup> The court stated that an association whose primary purpose is to generate revenue is not the type of organization Congress intended to protect with the private club exemption.<sup>95</sup>

The ruling that the PGA Tour does not qualify for the private club exemption is important because Title II of the Civil Rights Act of 1964 contains a similar exemption.<sup>96</sup> Accordingly, if the court ruled for the PGA Tour on this issue, not only would the PGA Tour be excluded from ADA coverage, it would also be exempted from the Civil Rights Act of 1964. Therefore, a ruling that the PGA Tour is a private club would allow the PGA Tour to discriminate on the grounds of race, color, religion, or national origin, unless the discrimination was prohibited by another statute.

The court failed to accept any of the PGA Tour's three claims of exemption from the ADA's requirements and turned its analysis to whether Martin's requested accommodation was reasonable, would pose an undue burden,<sup>97</sup> or would fundamentally alter the nature of the game of golf.<sup>98</sup>

### C. *The Reasonableness of the Requested Accommodation*

An ADA plaintiff requesting a modification has the burden to prove that the requested modification is generally reasonable for that

90. See *id.* at 1322-24.

91. See *id.* at 1327.

92. See *id.* at 1323.

93. See *id.*

94. See *id.* at 1325.

95. See *id.* The purpose of the private club exemption is to preserve the right of "truly private" organizations, such as those that share "elementary beliefs," to maintain their "unique existence." *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1276-77 (7th Cir. 1993).

96. See 42 U.S.C. § 2000a (1994) (prohibiting the discrimination of individuals on the grounds of their race, color, religion, or national origin in places of public accommodation).

97. See *Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242, 1248 (D. Or. 1998).

98. See *id.* at 1249.

type of public accommodation.<sup>99</sup> The court in *Martin* found that Martin's requested modification to use a golf cart during competition was reasonable.<sup>100</sup>

The court based its reasonableness determination on a number of factors. The PGA has carts available at each event and uses them periodically. Moreover, the PGA Tour allows carts to be used during the first two stages of its qualifying tournaments and all stages of the Senior Tour, yet does not impose a handicap system or stroke penalty on those who opt for carts during these events.<sup>101</sup> In addition, the court found Martin's requested modification reasonable in light of the fact that the NCAA and some college conferences, all of which follow virtually the same rules as the PGA Tour,<sup>102</sup> grant exemptions from the "must walk" regulation.<sup>103</sup> These factors led the court to determine Martin's requested modification was reasonable.

#### *D. The Public Accommodation's Affirmative Defense: Fundamental Alteration*

Title III provides a fundamental alteration defense to an otherwise reasonable modification. A requested modification is not required if the defendant can demonstrate "that making such modifications would fundamentally alter the nature of [the] goods, services, facilities, privileges, advantages, or accommodations."<sup>104</sup> For example, hitting a ball well and running bases is fundamental to major league baseball. Therefore, if a baseball league were forced to modify the game to accommodate players who could not run, the sport would be fundamentally altered.

The place of public accommodation has the burden to prove that the requested modification would fundamentally alter its nature.<sup>105</sup> If the covered entity can prove that the requested modification would provide an unfair advantage to a disabled individual, then proof of fundamental alteration is satisfied.<sup>106</sup> Unlike the reasonableness inquiry, the fundamental alteration inquiry is specific to the individual plaintiff's circumstances.<sup>107</sup>

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99. See *id.* (citing *Johnson v. Gambrinus Co./Spoetzel Brewery*, 116 F.3d 1052, 1059 (5th Cir. 1997)); see also discussion *supra* note 51.

100. See *Martin*, 994 F. Supp. at 1248.

101. See *id.*

102. See Richard Sandomir, *Golf: Witness in Martin Case Calls Golf a Low-Energy Activity*, N.Y. TIMES, Feb. 4, 1998, at C4.

103. See *Martin*, 994 F. Supp. at 1248.

104. 42 U.S.C. § 12182(b)(2)(A)(ii) (1994).

105. See *Martin*, 994 F. Supp. at 1248 (citing *Johnson v. Gambrinus Co./Spoetzel Brewery*, 116 F.3d 1052, 1058-62 (5th Cir. 1997)); see also discussion *supra* note 51.

106. See *Johnson*, 116 F.3d at 1058.

107. See *id.*

Martin argued that walking is only incidental to professional golf.<sup>108</sup> The PGA Tour's no-cart rule is not contained in the industry's rulebook;<sup>109</sup> the PGA Tour invokes Local Rule 33-1<sup>110</sup> to bar carts.<sup>111</sup> Further, cart usage is permitted to shuttle players from the ninth to the tenth green during regular events. When a player hits a tee shot out of bounds, the player can use a cart to return from the fairway to the tee to hit another shot.<sup>112</sup> In addition, the PGA rulebook defines a caddie, like a cart, as an additional piece of equipment, although caddie use is mandatory.<sup>113</sup> The PGA Tour argued that the use of carts in other venues is not relevant to the PGA and Nike Tours.<sup>114</sup> According to the PGA Tour, providing a cart to Martin would give him an unfair advantage, fundamentally altering the sport.<sup>115</sup>

A covered entity can utilize the fundamental alteration defense if the requested accommodation provides an unfair advantage to the disabled individual.<sup>116</sup> Accordingly, the PGA Tour argued that the walking rule is necessary to introduce an element of fatigue into the game.<sup>117</sup> The PGA Tour attempted to stress the correlation between walking and fatigue in golf by pointing out that Ken Venturi won the 1964 U.S. Open despite almost losing consciousness.<sup>118</sup> However, Dr. Gary Klug, a physiologist specializing in fatigue, testified that Venturi's condition was caused by heat exhaustion and fluid loss instead of walking.<sup>119</sup> The court accepted this explanation, noting that the spectators at the tournament were passing out as well.<sup>120</sup>

108. See *Martin*, 994 F. Supp. at 1249 (noting that "[n]o written policy has been cited by either party which governs the Rules Committee in its exercise of discretion regarding a waiver of the walking requirement").

109. See *id.* at 1252.

110. A local rule varies the United States Golf Association Rules of Golf to accommodate certain physical characteristics of individual golf courses and/or environmental conditions during play. Golf committees or course owner-initiated local rules can cover one event or all play for a certain period of time.

111. The PGA Tour promulgates a pamphlet entitled *Conditions of Competition and Local Rules* that governs PGA Tour and Nike Tour tournaments. The preamble to this document states that "[t]he Rules of the United States Golf Association govern play, as modified by the PGA Tour." One of those modifications provides that "[p]layers shall walk at all times during a stipulated round unless permitted to ride by the PGA Tour Rules Committee." *Martin*, 994 F. Supp. at 1249 (quoting PGA Tour, Inc., *Conditions of Competition and Local Rules*, at app.I, ¶ 6 (Transportation)); see also Bob Burns, *Tour in No-Win Situation Issue, Pros Say*, SACRAMENTO BEE, Jan. 29, 1998, at E3.

112. See Kelley, *supra* note 7, at D1.

113. See Eric F. Epler, *Martin Deserves Chance to Compete*, HARRISBURG PATRIOT, Feb. 2, 1998, at C3.

114. See *Martin*, 994 F. Supp. at 1248-49 (noting that the PGA Tour has never granted a waiver of its walking requirement for individualized circumstances).

115. See *id.* at 1249-51.

116. See 42 U.S.C. § 12182(a), (b)(2)(A) (1994).

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

118. See *id.*

119. See *id.*

120. See *id.* at 1250-51. Notably, the United States Golf Association (USGA) prohibits the use of carts with roofs; Martin is exposed to the sun and humidity, even in a cart. See

Dr. Klug also testified that walking casually for eighteen holes is not very tiring and that no other sport is as low in energy consumption as golf.<sup>121</sup> Klug also testified that golfers have numerous intervals of rest when competing.<sup>122</sup> Unlike athletes playing more "physical" sports such as basketball and baseball, golf is a sport that does not require a great deal of aerobic activity.<sup>123</sup> The Pacific Athletic Conference (PAC) 10 and NCAA both deemphasize the importance of walking: both give qualified disabled players a cart<sup>124</sup> even though both organizations govern more physically and mentally demanding tournaments.<sup>125</sup> Martin's position is that the fatigue suffered by golfers is caused by the intense concentration involved in hitting a golf ball around a course for five hours while under pressure.<sup>126</sup>

Regardless of whether carts generally give disabled golfers an unfair advantage, a defendant can only satisfy its burden of proving fundamental alteration by presenting evidence that "focuses on the specifics of the plaintiff's or defendant's circumstances and not on the general nature of the accommodation."<sup>127</sup> General evidence is only relevant to the plaintiff's burden of proving the reasonableness of the requested modification.<sup>128</sup>

The *Martin* court concluded that Martin works at least as hard with a cart during a round as most players walking the full eighteen holes.<sup>129</sup> Many golfers believe that *any* golfer is at a disadvantage using a cart because the golfer does not get a "feel" for the course by walking it.<sup>130</sup> Carts were an option given to the nearly 300 golfers in a PGA Tour qualifying tournament. Martin was one of fewer than a dozen golfers who chose to use the cart.<sup>131</sup> Lastly, Martin has another

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Barker Davis, *Casey at Bat Martin's Guts Merit Him a Chance to Ride*, WASH. TIMES, Feb. 2, 1998, at B1.

121. See Sandomir, *supra* note 102, at C4. Dr. Klug further stated that the average round of golf consumes only 500 calories, which is "nutritionally less than a Big Mac." *Martin*, 994 F. Supp at 1250.

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

123. See Joe Queenan, *Differently-Abled Athletes*, WALL ST. J., Mar. 2, 1998, at A18.

124. See *Martin*, 994 F. Supp. at 1248.

125. See Bob Robinson, *Martin Ready to Step up His Fight*, PORTLAND OREGONIAN, Feb. 2, 1998, at D1 (noting that players in these competitions are required to carry their bags personally and compete in 36-hole days).

126. See *Nightline*, *supra* note 18 (statement of Mike Stachura, Reporter, GOLF DIGEST).

127. *Martin*, 994 F. Supp. at 1248-49 (quoting *Johnson v. Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052, 1059-60 (5th Cir. 1997), and citing *Crowder v. Kitagawa*, 81 F.3d 1480, 1486 (9th Cir. 1996) (noting that that the determination is "highly fact-specific"); *Stillwell v. Kansas City, Mo. Bd. of Police Comm'rs*, 872 F. Supp. 682, 687 (W.D. Mo. 1995) (emphasizing individualized assessment)).

128. See *Johnson*, 116 F.3d at 1060.

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

130. See *id.*

131. See *(Golf) Martin Can Use Cart After Landmark Decision by Judge*, AGENCE FRANCE-PRESSE, Feb. 12, 1998, available in 1998 WL 2220339.

disadvantage: because even practice is painful, Martin cannot waste what little physical energy he has on the practice range.<sup>132</sup>

The court decided that granting Martin an exemption from the no-cart rule would not fundamentally alter the nature of the competitions Martin competes in by giving him an unfair advantage and held that the PGA Tour must permit Martin to use a cart.<sup>133</sup> Although the *Martin* court decided his case under Title III of the ADA, the courts have another option that will better serve the interests of disabled professional athletes—deciding these disputes under Title I of the ADA.

#### IV. TITLE I OF THE ADA: A COMPELLING ALTERNATIVE

So far, courts have found that ADA disputes concerning sports fall under Title III. The *Martin* court refused to consider Martin's case under Title I, which addresses employment.<sup>134</sup> Title I prohibits discrimination of a "qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."<sup>135</sup>

The most significant drawback to Title III suits is the lack of available remedies. Compensatory and punitive damages are available to private plaintiffs only under Title I.<sup>136</sup> Title III only provides successful plaintiffs with injunctive relief and reasonable attorney's fees.<sup>137</sup> Perhaps most importantly, only Title I provides the right to a jury trial,<sup>138</sup> which is generally favored by plaintiffs' attorneys in civil rights cases.

Under Title I, an employee or applicant must be "qualified" in order to seek the Act's protection. The employee or applicant must be

132. See *Davis*, *supra* note 120, at B1.

133. See *Martin*, 994 F. Supp. at 1252-54.

134. See *id.* at 1247.

135. 42 U.S.C. § 12112(a) (1994).

136. See *id.* § 1981a(a)(2). However, compensatory damages and civil penalties may be sought in actions brought by the Attorney General under Title III. See *id.* § 12188(b)(2)(B). Title III civil penalties are not the equivalent of Title I punitive damages. Under Title III, a civil penalty shall not exceed \$50,000 for the first violation and \$100,000 for each subsequent violation. See *id.* § 12188(b)(2)(B). The sum of compensatory and punitive damages under Title I is capped between \$50,000 to \$300,000 depending on the number of individuals the defendant employs. See *id.* § 1981a(b)(3). Punitive damages are available in Title I suits where the defendant discriminated with malice or reckless indifference to certain federally protected rights. See *id.* § 1981a(b)(1).

137. See *id.* § 12188(a)(1) (stating that remedies are set forth in 42 U.S.C. § 2000a-3(a)); see also *Newman v. Piggie Park*, 390 U.S. 400, 401-02 (1968) (holding that plaintiffs bringing suit under Title II of the Civil Rights Act of 1964 to enjoin racial discrimination by public accommodations are not entitled to money damages but may recover attorney's fees).

138. See 42 U.S.C. § 1981a(a)(2) (1994).

capable of performing the essential functions of the job with or without reasonable accommodation before an employer will be in violation of the Act for not providing a requested reasonable accommodation.<sup>139</sup> A reasonable accommodation could include the provision of equipment or devices to enable a disabled individual to perform a job provided that the accommodation does not impose an undue hardship on the employer.<sup>140</sup> The ADA provides four factors for determining whether the provision of an accommodation would impose an undue hardship on the employer: (1) the nature and cost to the employer; (2) the overall financial resources of the employer; (3) the overall resources of the employer; and (4) the employer's type of operation.<sup>141</sup>

In contrast, Title III does not provide an undue hardship defense. The closest thing to Title I's undue hardship defense is the previously discussed fundamental alteration defense.<sup>142</sup> The fundamental alteration defense requires a fact-specific inquiry that is directed to the nature of the public accommodation, not the hardship imposed by the cost of the modification.<sup>143</sup> The difference between these defenses can be important: Title I's undue hardship defense is more narrowly defined than Title III's fundamental alteration defense, even though fundamental alteration is merely a particular type of undue hardship.<sup>144</sup>

### A. Professional Sports Associations as Employers

Some nontraditional employers, such as unions, are covered under the ADA.<sup>145</sup> The determination of whether an entity qualifies as an employer and an individual as an employee depends on the nature of the relationship. The ADA defines an employee as "an individual employed by an employer."<sup>146</sup> The definitions of employer and employee under the ADA are identical to those in Title VII of the Civil Rights Act of 1964;<sup>147</sup> therefore, Title VII cases can be illustrative

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139. See *id.* § 12111(8).

140. See *id.* § 12111(9).

141. See *id.* § 12111(10)(B). The regulations list a fifth factor. See 29 C.F.R. § 1630.2(p) (1998) ("The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.").

142. Title III has an undue burden defense for a covered entity's failure to provide auxiliary aids and services. See 42 U.S.C. § 12182(b)(2)(A)(iii) (1994).

143. See *Johnson v. Gambirinus Co./Spoetzel Brewery*, 116 F.3d 1052, 1064-65 (5th Cir. 1997) (holding that the modification of the brewery's blanket no-animal policy to permit access for guide dogs would not fundamentally alter the nature of the tour).

144. See *id.* at 1059.

145. See 42 U.S.C. § 12111(2) (1994); see also *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041, 1046 n.6 (7th Cir. 1996). The ADA defines "covered entity" as "an employer, employment agency, labor organization, or joint labor-management committee." 42 U.S.C. § 12111(2) (1994).

146. *Id.* § 12111(4).

147. See *id.* § 2000e(b), (f).

when interpreting an employer's or employee's status under the ADA.

### B. Professional Athletes as Employees

The ADA protects an employee who is a "qualified individual with a disability."<sup>148</sup> This is defined as a person with the requisite skill, experience, and other job related requirements of the position and who, with or without reasonable accommodation, can perform the essential functions of the job.<sup>149</sup> Because Martin is clearly qualified to play professional golf with a reasonable accommodation and is disabled, he meets this definition, unless he is considered an independent contractor.

Courts use three similar tests: the common law or *Darden* test,<sup>150</sup> the "economic realities" test,<sup>151</sup> and a hybrid of these tests to determine whether an individual is an independent contractor or an employee. The common law test focuses on the right to control the manner and means by which the work is accomplished. The economic realities test examines the relationship between the worker and employer as well as the economics of the parties. Meanwhile, the hybrid test combines the right to control factor with a consideration of the economic realities between the parties.<sup>152</sup>

148. *Id.* § 12112.

149. *See* 29 C.F.R. § 1630.2(m) (1998).

150. *See* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992). The *Darden* Court stated:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

*Id.* at 323-24 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989) (footnotes omitted)).

151. *See* *EEOC v. Zippo Mfg. Co.*, 713 F.2d 32, 37 (3d Cir. 1983). The economic realities test is more liberal than the common law test. Courts utilizing the economic realities test weigh the following factors: (1) the extent of the employer's control and supervision over the worker, including directions on scheduling and performance of work, (2) the kind of occupation and the nature of skill required, including whether skills are obtained in the workplace, (3) the responsibility for the costs of operation, such as equipment, supplies, fees, licenses, workplace, and the maintenance of operations, (4) the method and form of payment and benefits, and (5) the length of job commitment and/or expectations. *See id.*

152. *See* *Spirides v. Reinhardt*, 613 F.2d 826, 831 (D.C. Cir. 1979). The hybrid tests generally emphasize the right to control and the economic realities of the relationship. *See* *Wolcott v. Nationwide Mut. Ins. Co.*, 884 F.2d 245, 251 (6th Cir. 1989). The prominence of the right to control distinguishes the hybrid tests from the pure economic realities test. *See id.*

In *Nationwide Mutual Insurance Co. v. Darden*,<sup>153</sup> the Court admitted that the statutory definition of “employee” under the Employment Retirement Income Security Act (ERISA)<sup>154</sup> is “circular and explains nothing.”<sup>155</sup> The Court stated that when a statute does not define “employee” usefully, courts should not apply a meaning broader than the common law definition.<sup>156</sup> Prior to *Darden*, some courts thoroughly considered legislative intent when defining the term “employee.”<sup>157</sup> Thus, the *Darden* Court basically refused to apply the traditional statutory construction rules that the definitional scope of “employee” should be construed based on the legislative intent of the statute at issue.<sup>158</sup>

The *Darden* Court narrowed the purview of the term “employee,” at least under ERISA. Although the definition of “employee” is identical in ERISA, Title VII, and the ADA, there is a split in the circuits as to whether the *Darden* test applies to employment cases other than ERISA disputes.<sup>159</sup>

Courts currently consider many different factors when determining whether an individual is an employee. Unless there is no question as to the individual’s status, the determination is for the fact finder because the definition of “employee” turns on the facts of the case.<sup>160</sup> A question of fact exists if some factors weigh in favor of independent contractor status and other factors weigh in favor of employee status.<sup>161</sup> Some of these enumerated factors clearly point to a finding that professional golfers are independent contractors; others point to a finding that professional golfers are employees. The following is an analysis of the *Martin* case, using the common law fac-

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153. 503 U.S. 318 (1992).

154. Employment Retirement Income Security Act, 29 U.S.C. §§ 1001-1371 (1994).

155. *Darden*, 503 U.S. at 323.

156. *See id.*

157. *See id.* at 322-24.

158. *See id.* at 326; *see also* Daniel S. Kleinberger, *Magnificent Circularity and the Churkendoose: LLC Members and Federal Employment Law*, 22 OKLA. CITY U. L. REV. 477, 544 (1997) (arguing that the *Darden* Court’s analysis violates the traditional rules of statutory construction because the Court effectively foreclosed the inquiry into legislative intent).

159. *See, e.g.,* *Lambertsen v. Utah Dep’t of Corrections*, 79 F.3d 1024, 1028 (10th Cir. 1996) (finding that a teaching assistant was not an employee of a prison academy by applying a “hybrid test,” noting that the person was paid and received benefits from the school board rather than the prison); *Wolcott v. Nationwide Mut. Ins. Co.*, 884 F.2d 245, 251 (6th Cir. 1989) (holding that the plaintiff insurance agent was not an employee under the common law test because he hired his own employees, maintained his own office, exercised managerial skill in operation of the business, and was paid on a commission basis).

160. *See* *EEOC v. Pettegrove Truck Serv., Inc.*, 716 F. Supp. 1430, 1433 (S.D. Fla. 1989).

161. *See* *Stouch v. Brothers of the Order of Hermits*, 836 F. Supp. 1134, 1141-42 (E.D. Pa. 1993).

tors originally articulated in *Community for Creative Non-Violence v. Reid*.<sup>162</sup>

First, courts consider the skill required in performing an occupation.<sup>163</sup> Some courts look to whether the skills the employer seeks are commonly found in its workforce; even highly skilled persons can be considered employees where the skill sought by the employer is not unique in its workforce.<sup>164</sup> Although professional golfers are highly skilled professionals, they are the foundation of the PGA Tour's workforce. This factor points to employee status.

Second, courts consider the time and location where work is performed.<sup>165</sup> The PGA Tour owns and operates many of the golf courses used in the tournaments<sup>166</sup> and singly decides where tournaments are to be played. Further, although the players can technically decide which tournaments in which to play, the PGA Tour puts substantial pressure on the players to compete in every event.<sup>167</sup> Benefits such as voting, retirement plans, and future eligibility are tied to the number of tournaments played.<sup>168</sup> This factor weighs in favor of employee status.

Third, courts examine the duration of the employer-employee relationship.<sup>169</sup> In *Martin*, the PGA Tour focused on the fact that Martin was with the Tour for only a few months when he filed suit.<sup>170</sup> Martin pointed out that golfers retain the status of regular members for at least a year once they achieve it<sup>171</sup> and can maintain their regular status through medical extensions,<sup>172</sup> much like an employee being granted a leave of absence, which extends the duration of the relationship. Arguably, this factor also tends to show employee status.

Fourth, courts look to the employer's role in the hiring and the payment of the employee's assistants.<sup>173</sup> Although professional golfers pay and hire their own caddies, the PGA Tour must approve them. The PGA Tour itself hires assistants that provide travel, me-

162. 490 U.S. 730 (1989).

163. See *id.* at 751; see also *Golden v. A.P. Orleans, Inc.*, 681 F. Supp. 1100, 1103 (E.D. Pa. 1988).

164. See *Golden*, 681 F. Supp. at 1103.

165. See *Reid*, 490 U.S. at 751; see also *Walker v. Correctional Med. Sys.*, 886 F. Supp. 515, 521 (W.D. Pa. 1995); *Stouch*, 836 F. Supp. at 1140.

166. See Amended Memo, *supra* note 58, at 44.

167. See *Martin v. PGA Tour, Inc.*, 984 F. Supp. 1320, 1324 (D. Or. 1998).

168. See *id.* at 1325.

169. See *Reid*, 490 U.S. at 751; see also *Dole v. Snell*, 875 F.2d 802, 811 (10th Cir. 1989).

170. See *Martin*, 984 F. Supp. at 1324.

171. See Amended Memo, *supra* note 58, at 44.

172. See *id.* at 45.

173. See *Reid*, 490 U.S. at 751.

dia, accounting, and investment assistance to the players.<sup>174</sup> This factor seems to weigh in favor of employee status.

Fifth, courts examine the employer's right to assign additional duties to the hired party.<sup>175</sup> Although the PGA Tour cannot force players to perform tasks outside of playing golf, PGA Tour players are strongly "encouraged" to play in Pro-Ams and other Tournament Week events after signing up for a tournament.<sup>176</sup> In fact, they can be penalized for noncompliance.<sup>177</sup> Again, an employee status is shown.

Sixth, courts examine the method of payment for the hired party's services.<sup>178</sup> This factor cannot be solely determinative of an individual's status. Individuals paid only by commission, for example, can still be considered employees.<sup>179</sup> PGA Tour players are issued 1099 tax forms,<sup>180</sup> weighing in favor of a finding of independent contractor status. However, nearly half of the average player's earnings are the guaranteed Pro-Am payments that are awarded regardless of performance,<sup>181</sup> again weighing in favor of employee status.

Seventh, courts consider the availability of employee-like benefits.<sup>182</sup> Although the golfers generally pay their own expenses and sign individual contracts with equipment manufacturers,<sup>183</sup> the sponsors provide the golfers with employee-like privileges such as food, beverages, and lockers during tournaments.<sup>184</sup> In addition, regular Tour members qualify for retirement and health plans, as well as deferred income packages.<sup>185</sup> This factor tends toward employee status.

Eighth, courts consider the source of the instrumentalities.<sup>186</sup> Although the PGA Tour does not provide the instrumentalities used by the players, its rules strictly prohibit the use of more than one ball during play<sup>187</sup> and prohibit certain equipment. In *Gilder v. PGA Tour, Inc.*,<sup>188</sup> players using U-shaped grooved golf clubs successfully sued the Tour for banning the clubs after specifically permitting their use

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174. See Amended Memo, *supra* note 58, at 45.

175. See *Reid*, 490 U.S. at 751.

176. See Amended Memo, *supra* note 58, at 45.

177. See *id.* at 46.

178. See *Reid*, 490 U.S. at 751.

179. See *Golden v. A.P. Orleans, Inc.*, 681 F. Supp. 1100, 1104 (E.D. Pa. 1988).

180. See Amended Memo, *supra* note 58, at 47.

181. See *id.* at 46.

182. See *Reid*, 490 U.S. at 751.

183. See Michael Hirsley, *No Gimmies in Disabled Golfer's Suit*, CHI. TRIB., Feb. 8, 1998, at 14.

184. See Bob Robinson, *Tour's Strategy Bothers Martin Camp*, PORTLAND OREGONIAN, Feb. 8, 1998, at E1.

185. See Amended Memo, *supra* note 58, at 46.

186. See *Reid*, 490 U.S. at 751.

187. See *id.*

188. 727 F. Supp. 1333 (D. Ariz. 1989), *aff'd*, 936 F.2d 417 (9th Cir. 1991).

the previous five years.<sup>189</sup> Although the players won this case, the PGA Tour retains the right to ban instrumentalities it does not approve of, even if the instrumentalities comply with USGA rules.<sup>190</sup> This degree of control over the instrumentalities weighs in favor of PGA Tour golfers being employees.

Finally, two other factors weigh in favor of the golfers being considered employees of the PGA Tour: the Tour is a business and the "work" done by the "employees" is part of the regular business of the Tour.<sup>191</sup>

Numerous other factors weigh in favor of the golfers being considered independent contractors. PGA Tour players do not have a supervisor to report to on a regular basis. They are not required to submit routine reports or accountings. They do not receive performance reviews. PGA Tour players generally consider themselves to be independent contractors. They can play on other professional tours (except during Tournament Week), and the PGA Tour does not pay unemployment or worker's compensation premiums for the players.

Weighing these factors side by side, it is possible that professional athletes such as Martin are independent contractors. However, the majority of courts hold an employer's right of control is the most significant indication of whether an individual is designated an employee or an independent contractor.<sup>192</sup> In fact, one court stated that factors other than the employer's right of control are merely "secondary elements" in the determination.<sup>193</sup> Therefore, the actual circumstances of the relationship must be closely examined when evaluating the control factor.

### C. *The Primary Factor: Control*

In professional golf's PGA and Nike Tours, the PGA Tour alone decides who can compete, the time and place of the event, the players' potential earnings (prize money), and the rules governing the

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189. See *Gilder*, 936 F.2d at 418-19. The lower court noted that other equipment innovations, such as the sand wedge, were never banned and that barring the clubs at that point in time would irreparably harm the plaintiff golfers who had become accustomed to their use. See *Gilder*, 727 F. Supp. at 1335. The Ninth Circuit upheld the ruling, noting that the USGA concluded there was not enough information to ban the clubs. See *Gilder*, 936 F.2d at 419.

190. See Amended Memo, *supra* note 58, at 44.

191. See *Reid*, 490 U.S. at 751 (stating that whether the "hiring party is in business" is a factor to be considered in determining whether a hired party is an employee); see also Amended Memo, *supra* note 58, at 47.

192. See, e.g., *Bartels v. Birmingham*, 332 U.S. 126, 129-30 (1947); *EEOC v. North Knox Sch. Corp.*, 154 F.3d 744 (7th Cir. 1998); *Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377, 378 (7th Cir. 1991); *Johnson v. Equitable Life Assurance Soc'y*, No. 96-C-2418, 10 NDLR P 208 (N.D. Ill. 1997).

193. *Brown v. California*, 743 F.2d 664, 667 (1984) (quoting *Tieberg v. Unemployment Ins. App. Bd.*, 471 P.2d 975 (Or. 1970)).

conduct of the game.<sup>194</sup> The terms and conditions of employment and the “hiring” decisions are made by the PGA Tour, just like a traditional employer.<sup>195</sup> In addition, the PGA Tour limits the field of players and subjects them to rules and standards, also similar to an employer.<sup>196</sup> The PGA Tour owns the television rights of every participant in every tournament.<sup>197</sup> The PGA Tour controls what players wear and other aspects of how they appear in tournaments.<sup>198</sup> It tells the players how to conduct themselves, banning playing cards at the tournament site,<sup>199</sup> prohibiting the players from signing autographs during play, and barring them from making negative comments regarding everything from the PGA Tour itself, to sponsors, and even to other players.<sup>200</sup> All of these considerations tend to show an employer-employee relationship between the PGA Tour and its golfers.

Unlike most entities that employ independent contractors, the PGA Tour promulgates rules regarding the work itself by regulating the actual playing of the game. Not only does the PGA Tour give the players a deadline in which to complete their work, it requires the players to maintain a certain pace. In addition, the PGA Tour has rules regarding players' interactions with their caddies and the players' practice sessions.<sup>201</sup>

Notably, the PGA Tour strictly controls certain actions of the players even when they are “off the clock.”<sup>202</sup> The players cannot write bad checks, use profanity, display anger, or even associate with certain people.<sup>203</sup> Because the PGA Tour asserts a significant degree of control over its players, this fact alone could justify a determination that the golfers are employees. Taking the high degree of the PGA Tour's control over its players into account, it is at least arguable that an employer-employee relationship exists under either the economic realities or *Darden* test. The integral question, however, is whether the tests should even be applicable to employment discrimination actions.

#### D. Congressional Intent: Broad Protection Against Employment Discrimination

The Sixth Circuit has argued for complete rejection of the economic realities test, favoring the extension of “coverage to all those

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194. See Amended Memo, *supra* note 58, at 41.

195. See *id.*

196. See Hirsley, *supra* note 183, at 14.

197. See Amended Memo, *supra* note 58, at 41.

198. See *id.* at 41-42.

199. See *id.* at 42.

200. See *id.*

201. See *id.*

202. See *id.* at 42-43.

203. See *id.*

who are in a position to suffer the harm [Title VII was] designed to prevent.”<sup>204</sup> While this premise was merely dicta, its reasoning is sound. The court’s view is that antidiscrimination statutes should be read in the light of “the mischief to be corrected and the end to be attained” urging, “coverage to all those who are in a position to suffer the harm the statute is designed to prevent, unless specifically excluded.”<sup>205</sup> The Supreme Court has commanded courts to take notice, as their “primary consideration,” whether the inclusion of the disputed category of persons would effectuate the “declared policy and purposes” of the statute.<sup>206</sup> This principle is clearly applicable to professional athletes and the ADA because Titles I and III are designed to shield protected classes from interference with employment and the enjoyment of public accommodations respectively, and neither statute specifically excludes professional athletes from coverage. Congress chose to leave it up to the courts to determine who qualifies as an employee. If the courts truly want to further Congress’s intent of prohibiting employers from frustrating the employment rights of individuals with disabilities, they will construe the term “employee” liberally.

Denying an athlete the right to participate in a sport is analogous to denying a person the right to work in a chosen field because a professional athlete’s method of making a living is playing the sport. The important link between the athlete and her livelihood is a sports governing organization, such as the PGA Tour. Although golfers and other athletes can receive great economic rewards from sources other than the professional association itself, many of these benefits flow directly from membership in the association and participation in the events it stages.<sup>207</sup>

Moreover, the PGA Tour has the ability to lock an individual out of his or her profession completely: an individual cannot be considered a first class golfer if she is not a member of the PGA.<sup>208</sup> Membership in the sport’s governing association, such as the PGA, is required in order to participate in premier tournaments.<sup>209</sup> Therefore, in order to compete, the athlete has to accept an adhesion contract.<sup>210</sup> Thus, the denial of accommodations to athletes with a disability, as defined by the ADA, prevents these individuals from having a choice to adhere to these adhesion contracts and forecloses their ability to

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204. *Armbruster v. Quinn*, 711 F.2d 1332, 1341 (6th Cir. 1983).

205. *Id.* (quoting *NLRB v. Hearst Publications*, 322 U.S. 111, 124 (1944)).

206. *United States v. Silk*, 331 U.S. 704, 713 (1947); *Hearst*, 322 U.S. at 131-32.

207. *See* Amended Memo, *supra* note 58, at 38.

208. *See id.*

209. *See Martin v. PGA Tour, Inc.*, 984 F. Supp. 1320, 1324-25 (D. Or. 1998).

210. An adhesion contract is not easily modifiable and is normally presented as “take it or leave it.” No negotiation of the terms is contemplated. *See* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1224 (1983).

work in their chosen profession. Clearly, Congress intended to prevent persons from being excluded from their chosen sporting profession. If a person proves she is an otherwise qualified, disabled individual, that person should be reasonably accommodated, just like in a traditional employment situation.

## V. CONCLUSION

Is the PGA Tour simply exercising its right to make its own rules, or is it using the rules to discriminate against persons with disabilities? Should courts be kicked off the "field?" The controversy will continue to rage, but few fear a flood of lawsuits against professional sports governing associations because of the *Martin* decision. Unlike the *Martin* case, most of the nation's 15,000 annual ADA cases concern whether the plaintiff meets the ADA's definition of a disabled individual.<sup>211</sup>

Golfers who criticize the *Martin* decision do not fear a deluge of professional golfers with permanent debilitating disabilities flooding the offices of the PGA Tour's policy board offices; someone with such a serious disorder that can also play tournament level golf is one in a million.<sup>212</sup> Rather, the critics fear an onslaught of special requests from golfers with bad backs, knees, and the like.<sup>213</sup> They cite the logistical difficulty of trying to accommodate players with these unique needs and the administrative burden of making determinations as to which golfers qualify as disabled.<sup>214</sup>

Other critics cite the importance of tradition; a powerful concept in the game of golf. The PGA and its PGA Tour have never been progressive. As late as 1961, the PGA Tour's bylaws included a Caucasian-only clause.<sup>215</sup> Women have only been allowed in the upper level of the PGA clubhouse for five years.<sup>216</sup> However, rules and traditions that create barriers for people with disabilities are rules and traditions that must be changed.

Outside the golfing community, critics have used the *Martin* decision to attack the ADA itself. Some simply believe the ADA is a

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211. See Grunwald, *supra* note 45, at 3.

212. See Harry Blauvelt, *Martin Testimony Focuses on Fatigue Factor*, USA TODAY, Feb. 4, 1998, at C3.

213. See Robyn Blumner, *supra* note 17, at A52.

214. See Thomas Heath, *Martin's Trial Is Underway; Disabled Golfer, Tour Make Case*, WASH. POST, Feb. 3, 1998, at E1.

215. See Davis, *supra* note 120, at B1.

216. See Eric F. Epler, *Martin Deserves a Chance to Compete*, HARRISBURG PATRIOT & EVENING NEWS, Feb. 2, 1998, at C3. While the PGA's policies may have changed, in 1990 it scheduled a tournament at the Schoal Creek Country Club in Birmingham, Alabama, which excluded minorities. Only after numerous protests did the Club change its policy and the PGA institute site selection criteria requiring open membership policies at host sites. See *PGA Championship: PGA Championships of the '90s*, NEWS TRIB., Aug. 9, 1998, at G4.

safety net, which has been stretched beyond recognition.<sup>217</sup> These critics cite the cases of an anesthesiologist who claimed to have sleep apnea, a 410-pound subway conductor who sued for larger cabs, a GTE employee who said he carried guns illegally because of a nervous condition, and a bank required to install Braille on the driver's side of its drive-through ATMs.<sup>218</sup> However, isolated cases that simply do not seem fair can be found in all areas of the law, not just in ADA litigation. It is a safe assumption that the vast majority of clearly unreasonable cases fail. Further, the ADA is not unreasonable; the ADA does not require changes in the fundamental aspects of a program, service, or sport. Accommodations are provided only to those who otherwise qualify, and accommodations are not required if they impose undue financial or administrative burdens.

The *Martin* case may have a significant impact on other types of disability suits because the case stands for the proposition that the disabled should participate fully in the game of life and should not be held back by their disability. Martin's disability should not hold him back. The talent in golf is hitting a golf ball with precision and distance and keeping your cool as millions watch your performance.<sup>219</sup> The essential aspect of the game is "hitting the ball in the fewest number of strokes it takes to get it in a hole."<sup>220</sup> Martin can complete these tasks very well. He just needs a ride to the starting line. The cart is necessary for Martin to *work*. Sometimes, different treatment is necessary to ensure true equality for individuals with disabilities. Without a liberal interpretation of the ADA, persons with disabilities will continue to be locked out of jobs and careers, clearly contrary to congressional intent.

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217. See Blumner, *supra* note 17, at A52.

218. See Grunwald, *supra* note 45, at 3. Critics cite *Brohm v. JH Properties, Inc.*, 947 F. Supp. 299 (W.D. Ky. 1996), regarding the first example. Yet, the plaintiff in *Brohm* sued under the Kentucky Civil Rights Law, not the ADA. Further, the *Brohm* court dismissed his claim. See *id.* The third example refers to *Hindman v. GTE Data Servs., Inc.*, No. 93-1046-CIV-T-17c, 1994 WL 371396, at \*1 (M.D. Fla. June 24, 1994). In *Hindman*, the court merely denied the defendant's motion for summary judgment, finding a question of fact as to whether the plaintiff's erratic behavior was caused by his disability. See *id.* at \*5. The author finds no record of the other two cases cited by the ADA critics.

219. See *Nightline*, *supra* note 18 (statement of Mike Stachura, Reporter, GOLF DIGEST).

220. *Id.*