Martin v. PGA Tour: Applicability of the ADA in Professional Sports

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> The Americans with Disabilities Act presents us all with a historic opportunity. It signals the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life. As the Declaration of Independence has been a beacon for people all over the world seeking freedom, it is my hope that the Americans with Disabilities Act will likewise come to be a model for the choices and opportunities of future generations around the world.[1]
>
> \- Former President George H. W. Bush

I. Introduction

The world of sports was turned on its ear in 1998 when a simple request for an accommodation erupted in controversy. That was what happened when golfer Casey Martin requested a cart so that he

[1] Statement by President George Bush Upon Signing S.993, 26 WEEKLY COMP. PRES. DOC. 1165 (July 30, 1990).

could participate in the Professional Golf Association (PGA) Tour competition. Citing a "no-cart" policy, a mandate that all players shall walk the course without assistance of a cart, the PGA Tour denied his request. In response to the denial, Martin filed suit in the District Court of Oregon under provisions of the Americans with Disabilities Act (ADA). Martin asserted that the PGA's failure to accommodate him constituted discrimination because of his disability. Therefore, according to Martin, the PGA Tour had violated the ADA.

A. Casey Martin

Casey Martin was born with Klippel-Trenaunay-Weber Syndrome, a congenital deformity in his right leg.[2] This is a degenerative disorder that causes Mr. Martin to experience severe pain and atrophy in the lower region of his right leg.[3] As a result of this condition, Martin's ability to walk and play golf has been hindered.[4] In fact, walking from one room to the next would subject him to a substantial risk of fracturing or even the possibility of losing his leg.[5]

B. The PGA Tour

Established in 1968, the Professional Golfers' Association was formed to stimulate high caliber golf competitions and tournaments.[6] Each year, the PGA sponsors three competitive tournaments: The PGA Tour, the Buy.com Tour (formerly known as the Nike Tour), and the Seniors Tour.[7] Of all three of these competitions, the PGA Tour is considered to be the "most superior and challenging level of professional golf."[8] In order to participate, the PGA requires that golfers pay a $3,000 fee, acquire several recommendations, as well as attend the Qualifying School's Tournaments (also known as Q Schools).[9] The Q Schools consist of three stages that competitors play. The players with the best scores qualify to compete in the upper level competitions.[10]

This paper will argue that sport organizations, like the PGA Tour, do not possess an exemption from the ADA. Congress did not state expressly or by implication in either statute or in legislative history that these associations need not comply with the ADA. Additionally, many of these organizations have their own individual rules and regulations dictating how the game is to be played. But are their rules, which are facially neutral, actually meant to discriminate against the disabled? The authority to make decisions regarding waiver of any essential rule should ultimately be left to the judiciary. Similar to the analysis used in administrative law to determine whether a statute is arbitrary or capricious, a judge conducts an individual inquiry into the specifics of a case as well as evaluating the purpose of the rule. The court should give the sports organization some deference regarding the purpose of the rule and the reasons why the organization should not be required to comply with the ADA.

This paper will begin by examining the issues and reasoning behind decisions made by the District Court of Oregon and the Ninth Circuit. Part Two will look at the ADA and its predecessor, the

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[2] *Martin v. PGA Tour,* 204 F.3d 994, 994 (9th Cir. 2000).
[3] *Id*.
[4] Tracy Elizabeth Walsh, *Civil Rights – Americans with Disabilities Act – The PGA is Subject to the ADA Because It is Not a Private Club and Its Tournaments are Places of Public Accommodation*, 9 Seton Hall J. Sports L. 599, 602 (1999) [hereinafter Walsh].
[5] Dina Marie Pascarelli, *Casey Martin v. PGA Tour.: A New Significance to a Golfer's Handicap*, 8 DePaul-LCA J. Art & Ent. L. 303, 304 (1998) [hereinafter Pascarelli].
[6] Brief of Petitioner at 6, *Martin v. PGA Tour*, (S. Ct. filed Nov. 13, 2000) (No. 00-24) [hereinafter Petitioner].
[7] *Id*.
[8] Pascarelli, *supra* note 5, at 305.
[9] Bryon L. Koepke, *The Americans with Disabilities Act and Professional Golf-Breaking Par for the Sake of Equality*, 38 Washburn L.J. 699, 701 (1999) [hereinafter Koepke].
[10] *Martin v. PGA Tour,* 204 F.3d 994, 996 (9th Cir. 2000).

Rehabilitation Act of 1973. Part Three will examine case law that establishes a foundation, however inconsistent, for the ADA in the world of professional sports. Part Four, will explore the legal debate among the PGA and Casey Martin as they square off before the Supreme Court. Part Five, will conclude that the District Court of Oregon and the Ninth Circuit decisions applied the proper rationale when examining this issue.

II. Part One: The Procedural History Surrounding *Martin v. PGA Tour*

A. *Martin v. The PGA Tour* -- District Court of Oregon[11]

Judge Coffin, a United States Magistrate for the District of Oregon, began hearing the parties' arguments over whether the ADA applies to professional sport entities on February 19, 1998.[12] Martin, the plaintiff, asserted that the PGA's refusal to accommodate his request for a golf cart under the "no-cart" rule was a violation of the ADA.[13] The PGA argued that the ADA does not apply to them, and even if it did, changing the "no-cart" rule would change the nature of the sport. Many in the PGA would characterize such rules as "[a]n integral [part of] the past, present, and future existence of their profession."[14]

In spite of the arguments posed by the PGA, the court ruled in favor of Martin. The court held that in fact the ADA does apply to the PGA tournaments.[15] Next, the court had to determine whether Martin's use of a golf cart during the PGA tournaments was a reasonable accommodation. The court took the view that it held an "independent duty to inquiry into the purpose of [a] rule and to ascertain whether there can be a reasonable modification made to accommodate Martin without frustrating the purpose of the rule and without altering the fundamental nature of the PGA Tour competitions."[16]

The court developed a two-part analysis to determine whether an accommodation requested by a disabled athlete was reasonable. First, the court examines whether the accommodation is for all intents and purposes a reasonable accommodation.[17] The court made a point not to include the specifics of this case at first but looked to see whether the request is reasonable in general.[18] The plaintiff, Martin, had the burden of showing that the request for an accommodation was reasonable under general circumstances. If the plaintiff satisfies this burden, the defendant must then prove that such an accommodation would fundamentally alter the nature of the game.[19] Instead of using a generalized standard that the plaintiff used however, the defendant had to prove its case "in the context of the specifics of the plaintiff's . . . circumstances."[20]

The court concluded that Martin's request for the cart was reasonable. Further, Judge Coffin asserted that Martin's use of a golf cart during the PGA Tour competition did not give him a competitive

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[11] *Id.* In addition to the discrimination claim filed by Martin under the ADA, the court also addressed whether the PGA is a place of public accommodation or a private entity. If the court found that the PGA was a place of public accommodation, it would be subject to Title III of the ADA. Martin also asserted that he was an employee of the PGA, which would subject the PGA under Title I of the ADA, if the court agreed.
[12] Pascarelli, *supra* note 5, at 307.
[13] *Id.*
[14] *Id*.
[15] Koepke, *supra* note 9, at 705. The U.S. District Court of Oregon held that golf courses where the PGA holds its yearly tournament constitute a place of public accommodation as defined by Title III of the ADA.
[16] Adam Jay Golden, *A Good Walk Spoiled: The Americans with Disabilities Act and the Casey Martin Case*, 7 Sports Law J. 161, 168 (2000) [hereinafter Golden].
[17] *Id*.
[18] *Id.* at 169.
[19] *Id*.
[20] *Id.*

advantage over other players.[21] Nor did the interjection of a golf cart into the competition fundamentally alter the nature of the sport. Judge Coffin was not convinced by the "fatigue" argument posed by the PGA -- that players fatigue and conditioning plays a role in the sport.[22] In fact, the court concluded that the "fatigue" that players experience has little effect on the way the game is played. The court observed that given Martin's congenital disease, he would experience a greater amount of fatigue than the average healthy golfer. Further, Judge Coffin asserted that Martin was not totally exempt from walking. He had to get in and out of the golf cart, walk over to his ball, and make his shot.[23]

B. Martin v. PGA Tour – The Ninth Circuit

The Ninth Circuit Court of Appeals, under the guidance of Judge Canby, agreed with the District Court's determination that the "no cart" rule is not pertinent to the "generalized" game of golf.[24] The court determined this "required" rule was not uniform in that in some of the tournaments, such as the Seniors Tour, golfers are allowed to use carts.[25] The court concluded that "the Game of Golf consists in playing a ball from the teeing ground into the hole by a stroke or successive strokes . . . these rules do not require players to walk."[26] The court agreed with the District Court's finding that the "fatigue" factor argued by the PGA lacked merit. Judge Canby found that stress and motivation are the central elements distinguishing an average player from a champion, not fatigue.[27]

Therefore, the only issue for consideration is whether allowing Martin to use a golf cart would fundamentally alter the nature of the PGA Tour competitions. The PGA argued that certain rules are subject to the ADA, in that accommodations must be made. Certain rules, however such as the "no-cart" rule, are substantive and cannot be met with an accommodation without fundamentally altering the nature of the game.[28] The court rejected this theory in that it made "all alterations of the [PGA Tour] competitions fundamental."[29] Further, the court concluded that "the mere fact that the PGA has defined walking to be part of the competition cannot preclude inquiry, or the PGA will have been able to define itself out of reach of the ADA."[30]

The PGA contended that if the accommodation was permitted, it would have a damaging impact not only on the game of golf but also on other professional sports and organizations. It argued that District Court's decision could change the nature of the sport, as well as how professional sports organizations create and modify their rules. The PGA predicted that this decision would require a professional sports team "to give a disabled swimmer or runner a head start in a race, or that a growth-impaired basketball player would have to be allowed to shoot 3-point baskets from inside the three-point line."[31] Judge Canby rejected this argument, asserting that such inquiries would be made on a case-by-case basis, therefore, those accommodations that fundamentally alter the nature of the game would be eliminated.[32] The court agreed with the District Court's contention that allowing Martin to use the golf cart would not give a competitive advantage.

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[21] *Id.*
[22] Matthew Kensky, *Casey Martin v. PGA Tour, Inc.: Introducing Handicaps to Professional Golf by Widening the Scope of the ADA*, 9 Geo. Mason U. Civ. Rts. L.J. 151, 175 (1998) [hereinafter Kensky].
[23] Golden, *supra* note 16, at 170.
[24] *Martin v. PGA Tour,* 204 F.3d 994, 999 (9th Cir. 2000).
[25] Pascarelli, *supra* note 5, at 318.
[26] *Martin,* 204 F.3d at 999.
[27] *Id.* at 1000.
[28] *Id.* at 1001.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.* at 1001-02.

III. Part Two: The Americans with Disabilities Act

The origin of the Americans with Disabilities Act of 1990 can be traced to the early 1970s. In 1973, President Richard Nixon signed into law the first piece of legislation that sought to protect the rights of people with disabilities.[33] The Rehabilitation Act of 1973 was designed to "eliminate discrimination against disabled persons."[34] This rule, however, was limited in that it only applied to those entities which receive federal funding.[35] The source of the statute's authority stemmed from Section 504, which states that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, denied the benefit of, or be subject to discrimination under any program or activity receiving Federal financial assistance."[36] Therefore, this statute only provides effective safeguards for a small majority of Americans with disabilities, and only on the federal level. Those citizens who were discriminated against by state and local entities were reduced to relying on state laws to secure equality.

With the passage of the ADA in 1990, Congress laid the foundation for establishing "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[37] Similar to previous civil rights initiatives, Congress sought to "compensate for past mistreatment of people with disabilities in American society and provide disabled persons with more equal opportunities."[38] Congress concluded that people with disabilities are:

> [D]iscrete and insular minorities who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.[39]

A. Title I

The ADA is divided into three sections. Title I provides disabled employees with protection from intentional and passive discrimination by their employers.[40] An employee has a private right of action against those employers who violate this section. Congress however, placed limitations on the usage of this title. To qualify, the claimant must have a "disability" as defined under the ADA, which is "a physical or mental impairment that substantially limits one or more of the major life activities[;] . . . a record of such impairment[;]. . . [or] being regarded as having such an impairment."[41] Then the disabled employee has the burden of proving that the discrimination occurred on the job, such as a failure to make a reasonable accommodation for a disabled worker.[42]

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[33] Walsh, *supra* note 4, at 599.
[34] Julia V. Kasperski, *Disabled High School Athletes and the Right to Participate: Are Age Waivers Reasonable Modifications Under the Rehabilitation Act and the Americans with Disabilities Act?* 49 Baylor L. Rev. 175, 177 (1997).
[35] Adam A. Milani, *Can I Play?: The Dilemma of the Disabled Athlete in Interscholastic Sports*, 49 Ala. L. Rev. 817, 817-18 (1998) [hereinafter Milani].
[36] 29 U.S.C.S. §794 (a) (1994).
[37] 42 U.S.C. § 12101 (b) (1994).
[38] Kenneth F. Neikirk, *Fore! The Americans with Disabilities Act Tees Off at Professional Sports in Martin v. PGA Tour, Inc., But Will it Make the Cut?* 36 Hous. L. Rev. 1867, 1874 (1999) [hereinafter Neikirk].
[39] 42 U.S.C. § 12101 (a) (7) (1994).
[40] Koepke, *supra* note 9, at 706.
[41] 42 U.S.C. § 12102 (1) (A-C) (1994).
[42] Neikirk, *supra* note 39, at 1877.

Congress provided employers some protection against complying with the mandates stressed by Title I.[43] It built into Title I defenses that employers can justify using when denying an accommodation to an individual or group of employees.[44] The intent behind these defenses is grounded in the belief that employers should have the ability to hire, promote, or fire employees based on their own standards. These standards, however, cannot be used to circumvent the law. The employer must demonstrate that hiring a disabled person in certain jobs would pose "a direct threat to the health or safety of other individuals in the workplace."[45] An owner of a private airline, for example, can decide not to hire a blind pilot without running afoul of Title I. The pilot's inability to see would pose a direct threat to the safety of passengers and crew.

Another defense available to avoid compliance with Title I for employers is undue hardship.[46] The statute requires employers to provide reasonable accommodation to their disabled employees. If the employer can prove, however, that the accommodation requested would impose an undue hardship on the business or industry, then the accommodation is not required.[47] The above-mentioned private airline could make an argument that the financial costs of outfitting all of its planes' instruments with Braille would pose an undue hardship on this business, which might result in bankruptcy. In this instance, the court may consider that an accommodation would impose an undue hardship.

B. Title II

Title II of the ADA provides protection for the discriminatory practices of public entities.[48] Congress designed Title II to ensure that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[49] In order for a claimant to establish a violation under Title II, she must prove that a public entity discriminated against her due to her disability; that she is a disabled individual that could perform the requisite tasks; and that she is being prevented from participating in or profiting from the opportunity.[50]

The claimant has the burden of showing to the trier of facts that a public entity harmed her. A public entity, as defined by the ADA, is "any department, agency. . . or other instrumentality of a State or State or local government."[51] If there is an entity that does not fall within the scope defined by the ADA, the court must examine the extent that the state delegates its authority to the entity.[52]

Once it has been determined that the entity in question is public, the claimant proceeds to the second prerequisite--that she is qualified. A qualified individual with a disability is defined in the ADA as a person "who meets the essential eligibility requirement of a service or program with or without reasonable modification to rules, policies or practices."[53] If a person possesses all of the requisite skills to perform a specific task with a reasonable accommodation, the employer must provide it. If this requested accommodation proved to be unreasonable, however, in that it imposes an undue financial hardship or

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[43] *Id*.
[44] *Id*.
[45] 42 U.S.C. § 12113 (b) (1994).
[46] 42 U.S.C. § 12111 (10) (1994).
[47] 42 U.S.C. § 12112 (b) (B) (1994).
[48] *Id*.
[49] 42 U.S.C. § 12132 (1994).
[50] Jonathan R. Cook, *The Americans with Disabilities Act and Its Application to High School, Collegiate and Professional Athletics*, 6 Vill. Sports & Ent. L.J. 243, 246 (1999) [hereinafter Cook].
[51] 42 U.S.C. § 12131 (1) (B) (1994).
[52] Cook, *supra* note 51, at 247.
[53] 42 U.S.C. § 12132 (2) (1994).

other administrative burden, or fundamentally alters the nature of the program, the employer is not compelled to make such an accommodation.[54] Therefore, the individual will be excluded from the activity without violating the ADA.

C. Title III

Title III of the ADA examines discrimination in places of public accommodation or by the owners and operators of these places.[55] The provision in this title prohibits "place[s] of public accommodation [to] impose eligibility criteria that exclude individuals with a disability from enjoying any goods, services, facilities, privileges, advantages, or accommodation."[56] The ADA goes further to define discrimination to "include failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities."[57] Congress concluded that blatant, as well as passive discrimination, "unlawfully excludes persons with disabilities from the full enjoyment of public accommodations."[58]

Similar to the previous titles, Title III contains a defense to the accommodation requirement. Public accommodations covered by this title are required to make an accommodation "unless the entity can demonstrate that making such [a] modification would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden."[59]

Before a claimant can proceed under this title, however he or she must meet the qualifications required by this statute. Similar to the previous titles, a person must be disabled as defined by the ADA.[60] Once this requirement is satisfied, the claimant must demonstrate that the entity is a public accommodation. The statute limits certain entities from the scope of what is deemed to be public. Private clubs and religious organizations are exempted from compliance.[61] Although neither the statute nor case law set out an exact definition of what would qualify as a "public club." In *Wright v. Cork Club*, the District Court for the Southern District of Texas developed some factors by which the court can determine whether an entity is a private club.[62] The court in *Wright* concluded the factors such as "the genuine selectivity of the group in its members, the membership's control over the operations of the establishment, the history of the organization, the use of facilities by non-members, the purpose of the club's existence, whether the club advertises for members, whether the club is non-profit, and the formalities observed by the club," can be considered in making this determination.[63]

An entity must be a place of public accommodation in order to qualify under Title III. The ADA compiled a list of entities that are defined as places of public accommodation, including inns, restaurants,

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[54] Cook, *supra* note 51, at 247.
[55] Neikirk, *supra* note 39, at 1878-79. The ADA prohibits exclusion of individuals because of the lack of auxiliary aids and related services, failure to remove architectural, communication, and transportation barriers, or failure to provide alternative methods. Of course, the public entity can demonstrate that providing an accommodation would fundamentally alter the nature of the activity or impose an undue burden. *See* 42 U.S.C. § 12182 (b) (2) (A) (i-iii) (1994).
[56] 42 U.S.C. § 12182 (b) (2) (A) (i) (1994).
[57] *Id.*
[58] Kensky, *supra* note 22, at 157.
[59] 42 U.S.C. § 12182 (b) (2) (A) (i) (1994).
[60] Neikirk, *supra* note 39, at 1878.
[61] Kensky, *supra* note 22, at 154.
[62] *Wright v. Cork Club*, 315 F. Supp. 1143, 1150-51 (S.D. Tex. 1970).
[63] *Id.*

movie theaters, auditoriums, grocery stores, laundromats, bus stations, museums, zoos, schools, day care centers, gymnasiums, and golf courses.[64] Once the claimant has demonstrated that the entity is a place of public accommodation, she must show that the entity discriminated against her in violation of the ADA.[65]

IV. Part Three: The ADA and Interscholastic Sports

Since *Martin* is a case of first impression regarding the issue of the ADA applicability on professional sports, there is virtually no case law to guide the courts in making its decision. Therefore, a court must analyze prior case law as it has been applied to the ADA and high school athletic programs to determine whether the ADA can be applied in the professional arena.

A. High School Athletic Programs

In many of these cases, the question before the court is not whether the claimant is disabled as defined under the ADA, but rather if the accommodation requested would either impose an undue burden or would fundamentally alter the nature of the program.[66] In dealing with high school athletics, there are two areas in which the ADA often comes into play: age eligibility and what is known as the eight-semester rule.

1. Age Eligibility Rule: *Pottgen v. Missouri State High School Activities Association*

Edward Pottgen was a student at Hancock High School.[67] Due to an undiagnosed learning disability, Mr. Pottgen failed two grade levels while in elementary school.[68] As a result, he was placed in specialized programs and given access to other special services.[69] These services assisted Mr. Pottgen's advancement through school at the same pace as other students.[70]

Throughout junior high and high school, Mr. Pottgen was an active participant in sports.[71] He played baseball for his high school for three years and had every intention to play his senior year.[72] Mr. Pottgen turned nineteen during the summer before his senior year, when he was notified that he was ineligible to play baseball.[73] The Missouri State High School Activities Association (MSHSAA), to which Pottgen's school belonged, established by-laws which stated that "if a student reaches the age of nineteen on or following July 1, the student may [not] be considered eligible for [interscholastic sports] during the ensuing school year."[74] Mr. Pottgen petitioned the MSHSAA for an exemption to the age eligibility rule because his failure of two grade levels was due to his learning disability.[75] In spite of

[64] 28 C.F.R. 36.104. In § 307 (7) of the ADA, Congress established 12 categories of facilities that fit into the statutory definition of public accommodation. The category "physical places" provide: lodging, food and drink to the public, exhibition or entertainment, allow the public to gather, rental establishments, service establishments, public transportation, recreation, education, social services, exercise or recreation.
[65] 42 U.S.C. § 12182 (b) (2) (A) (i) (1994).
[66] Milani*, supra* note 36, at 823.
[67] *Pottgen v. Missouri State High School Act. Ass'n*, 40 F.3d 926, 928 (8th Cir. 1994).
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Pottgen*, 40 F.3d at 928.
[74] *Id.*
[75] *Id*.

Pottgen's request for a waiver, the MSHSAA ruled to deny his request because "waiving the requirement violated the intent of the age eligibility rule."[76]

In response to the denial, Pottgen filed suit against the MSHSAA under the ADA.[77] The District Court of Missouri granted an injunction to Pottgen preventing MSHSAA from obstructing Pottgen from playing baseball during his senior year.[78] He was to play in games held at Hancock and tournaments (both district and state).[79] Further, a penalty would be imposed on any school that failed to comply with the court's order.[80]

The MSHSAA appealed the case to the U.S. Court of Appeals for the Eighth Circuit. This court held that the conclusions drawn by the District Court were erroneous.[81] Under the Rehabilitation Act analysis, the inquiry must include whether an individual meets all the requirements of eligibility, as well as whether a reasonable modification could be made.[82] The court concluded that the MSHSAA's requirements regarding age eligibility had not been met. Pottgen turned nineteen before July 1 thereby failing to qualify to play baseball under the by-laws of the MSHSAA.[83]

The court next examined the purpose behind the rule and whether the rule is essential to the athletic program. MSHSAA argued that the age eligibility rule was essential: "It helps reduce the competitive advantage . . . protects younger players from harm; it discourages student athletes from delaying their education to gain athletic maturity; and prevents over-zealous coaches from gain[ing] a competitive advantage."[84] These goals, MSHSAA contended, were vital in maintaining an athletic program of this caliber.[85] The court concluded that MSHSAA demonstrated the age eligibility requirement is essential to the existence of this athletic program.[86]

Finding that the rule was essential, the court now turned to whether a reasonable accommodation could be given in this instance. The Supreme Court, in *Southeastern Community College v. Davis*, held that a "reasonable accommodation do[es] not require an institution to lower or to effect substantial modifications of standards to accommodate a handicapped person."[87] Applying this standard the Eighth Circuit concluded that Pottgen was nineteen and, therefore, too old to participant in the program. The only reasonable accommodation that the MSHSAA could make was to waive the age requirement.[88] The court saw "no manner, method, or means available which would permit Pottgen to satisfy the age limit."[89] With no alternative except the one suggested by Pottgen, an accommodation, could not be made.[90] Since

[76] *Id.*
[77] *Id.* In addition to suing under the ADA, Mr. Pottgen also used under the Rehabilitation Act of 1973 and under 42 U.S.C.A. § 1983 (1968).
[78] *Pottgen*, 40 F.3d at 928.
[79] *Id.*
[80] *Id*.
[81] The Court of Appeals for the Eighth Circuit dealt with Pottgen's claims under § 504 of the Rehabilitation Act of 1973 and U.S.C.A. § 1983. For the purpose of this paper, the analysis will center around the applicability of the ADA in sports organizations and whether reasonable accommodations can be afforded without fundamentally altering the purpose behind the age eligibility requirement.
[82] *Pottgen*, 40 F.3d at 928.
[83] *Id*.
[84] Milani, *supra* note 36, at 864.
[85] *Pottgen*, 40 F.3d at 929.
[86] *Id*.
[87] *Southeastern Community College v. Davis*, 422 U.S. 397, 406 (1994).
[88] *Pottgen*, 40 F.3d at 930.
[89] *Id*.
[90] *Id*.

no other reasonable accommodation existed, waiver of the age eligibility requirement would constitute a fundamental alternation of the nature of the MSHSAA program.[91]

In his dissenting opinion, Chief Judge Richard Arnold rejected the majority's conclusion. The across-the-board application of a statute is not proper in this instance.[92] Instead, Chief Judge Arnold argued that the court "should look at the plaintiffs as individuals before they decide whether someone can meet the essential requirements of an eligibility rule."[93] Further, he concluded that "the age requirement, as applied to Ed Pottgen, is not essential to the goals of the MSHSAA."[94] Chief Judge Arnold did not believe that allowing Pottgen to play for one more year would fundamentally alter the MSHSAA program.[95] The goals of the MSHSAA were in no danger of being violated by Pottgen. He argued that "there is no contention whatever in the present case that Ed Pottgen deliberately repeated the first and third grades in order to make himself eligible to play baseball another year at age nineteen."[96] He also agreed with the District Court's finding that "any competitive advantage resulting from plaintiff's age is de minimis."[97] Further, Pottgen did not pose a safety concern due to his size, which was not bigger than eligible players on the team.[98]

Chief Judge Arnold concluded that the MSHSAA could have modified the rule to accommodate Pottgen.[99] The majority erred in not evaluating how the rule operates on an individual basis.[100] Instead, they applied the rule in a standardized manner.[101] If a rule could be modified without fundamentally altering the nature of the program, then the rule was not an essential one.[102] If the court had conducted an individualized inquiry into the facts of this case, Chief Judge Arnold asserted, the majority would have found that the age requirement was waivable.[103]

2. Eight-Semester Eligibility Rule: McPherson v. Michigan High School Athletic Association

Dion McPherson was a student at Huron High School in Ann Arbor, Michigan.[104] McPherson struggled through high school, having to repeat eleventh grade twice.[105] The second time he had to repeat the eleventh grade, the two semesters were considered his seventh and eight in high school.[106] During his second year of the eleventh grade, McPherson earned an opportunity to play on the varsity basketball team due to his grade improvement.[107] In his senior year, McPherson was diagnosed with Attention

[91] Cook*, supra* note 51, at 247.
[92] Milani, *supra* note 36, at 865.
[93] *Pottgen*, 40 F.3d at 931 (Arnold, CJ., dissenting).
[94] *Id.*
[95] *Id*.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Pottgen*, 40 F.3d at 931 (Arnold, CJ., dissenting).
[100] *Id.*
[101] *Id.*
[102] *Id.* at 932-33.
[103] *Id.* at 933.
[104] *McPherson v. Michigan High School Athletic Ass'n.,* 119 F.3d 453, 455 (6th Cir. 1997).
[105] *Id.*
[106] *Id.*
[107] *Id.*

Deficit Hyperactivity Disorder (ADHD) and a seizure disorder.[108] Due to the inept conduct of the school, no accommodations were provided for him until the second time he repeated eleventh grade.[109]

McPherson wanted to play basketball his senior year, therefore, he petitioned the Michigan High School Athletic Association (MHSAA) for a waiver of its eight-semester rule.[110] The MHSAA considered the request but decide to reject it.[111] MHSAA asserts that "any student who has completed eight semesters of high school [is] ineligible for interscholastic sports competition."[112] The eight-semester rule, however can be waived "when in its [the Executive Committee of the MHSAA] opinion the rule fails to accomplish the purpose for which it is intended, or when the school works an undue hardship upon the student or school."[113] The primary function of the MHSAA is to "promulgate regulations for its member schools that will promote fair athletic competitions," therefore if applying the eight-semester rule would do harm to its original purpose, the rule would be waived.[114]

McPherson filed a suit in the District Court of Michigan against the MHSAA, asserting that his association had violated his rights under the ADA.[115] MHSAA argued that this rule "creates a fair sense of competition by limiting the level of athletic experience and skill of the players in order to create a more even playing field for the competitors."[116] Further, they asserted that this rule was essential "to preserve the philosophy that students attend school primarily for the classroom education and only secondarily to participate in interscholastic athletics, thus encouraging student-athletes to graduate in four years."[117] In the past, waivers had been given, but MHSAA contended that they occurred in limited circumstances, such as for students not able to attend because of medical reasons, or because the student had applied for the waiver before beginning his eighth semester.[118] The District Court was not swayed by MHSAA's argument that granting the waiver would alter their goals. Therefore, the judge ordered that McPherson be allowed to play basketball during his last year in school.[119]

The MHSAA appealed this decision to the U.S. Court of Appeals for the Sixth Circuit. The court concluded that the injunction granted by the District Court was improper. The plaintiff had to prove that the refusal to grant the request for a waiver was because of his learning disability and that a reasonable accommodation for the disability could have been made, but the MHSAA declined to do so.[120] The court reasoned that eight-semester rule was similar to the rule in *Sandison v. Michigan High School Athletic Association,*

[108] *Id.*
[109] *Id.*
[110] *McPherson,* 119 F.3d at 455.
[111] *Id.* When Mr. McPherson filed his request with the MHSAA, the organization requested additional information to be included within his petition. Specifically, they required information concerning Mr. McPherson's size and athletic ability in comparison to other members on the team. Ms. Jane Bennett, who was the Athletic Director at Huron High School, provided the requested information. Ms. Bennett stated that McPherson was lower than average height and weight as compared with other team members. Ms. Bennett further asserted that McPherson did not pose a safety threat to other team members. Finally, she reiterated that McPherson was not the "star" player on the team but, somewhere in the middle.
[112] *Id.* at 454.
[113] *Id.*
[114] *Id.*
[115] *Id.* at 457. In addition to suing under the ADA, Mr. McPherson filed suit under § 504 of the Rehabilitation Act of 1973, The Michigan Handicappers' Civil Rights Act, Mich. Comp. Law Ann. §§ 37-1101 – 1607 (1985), and 42 U.S.C. § 1983 (1968).
[116] *McPherson,* 119 F.3d at 456
[117] *Id.*
[118] *Id.*
[119] *Id.* at 457.
[120] *Id.* at 460.

> The 19-year age limit. . . regulation is a neutral rule, that is, with respect to disability. . . [T]hroughout the plaintiffs' first three years of high school, [the age limit] did not bar the students from playing interscholastic sports, yet the students were of course learning disabled during those years. It was not until they turned nineteen that [the age limit] operated to disqualify them.[121]

Applying this standard, the court contended that the regulation did not discriminate against the players. But in McPherson's case "the plaintiffs' respective learning disability does not prevent the two students from meeting the age requirement; the passage of time does."[122]

The court then focused on whether the MHSAA could have provided a reasonable accommodation for Mr. McPherson without fundamentally altering the athletic program or imposing undue financial and administrative burdens.[123] In *Sandison*, the court asserted that the age requirement is essential to the athletic program in that it "safeguards against injury to the other players and . . . prevents any unfair competitive advantage that older larger participants might provide."[124] Although the MHSAA or other similar athletic organizations might characterize a certain requirement as essential, the court held that the ultimate determination of what is or is not essential rests with the court and not with the athletic program.[125]

The court held that the goals of the MHSAA's eight-semester rule were just as "essential" a part of the athletic program as the age eligibility rule in *Sandison*.[126] Both programs were "intended to limit the level of athletic experience and range of skill . . . [to] create a more even playing field. . . [and] to limit the size and physical maturity of high school athletes for the safety of all participants."[127] The court was convinced by evidence of abuse that occurred when the eight-semester rule was relaxed, such as when athletes are red-shirted.[128] Therefore, the court held that the eight-semester rule was an essential part of the MHSAA program.

The court then looked at whether waiving such an essential rule would constitute a fundamental alteration of the nature and purpose of the program. As the court concluded in *Sandison*, the removal of such a vital rule would fundamentally alter the nature of the program.[129] The court reasoned that "removing the age restriction injects into the competition students older than the vast majority of other students . . . [thereby] [e]xpanding the sports program to include older students works as a fundamental alteration."[130] Further, the court concluded that to require programs such as the MHSAA to make reasonable accommodations would not only alter the nature of the program, but would also place a substantial undue financial and administrative burden on these organizations.[131] Whether an athlete possesses an unfair competitive advantage would be an unreasonable determination for coaches and physicians to make.[132] The court then compared the waiver that McPherson was requesting and the waivers that had been granted in the past. A part of that question involved the relative burdens between waivers granted in the past and the waiver requested by McPherson. The court pointed out that there was a distinction between a waiver that the MHSAA permits and the request that McPherson made.[133] The

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[121] *Sandison v. Michigan High School Athletic Ass'n..,* 64 F.3d 1026, 1032 (6th Cir. 1995).
[122] *Id.* at 1033.
[123] *McPherson,* 119 F.3d at 461.
[124] *Sandison,* 64 F.3d at 1035.
[125] *McPherson,* 119 F.3d at 461.
[126] *Id.*
[127] *Id.*
[128] *Id.* at 462.
[129] *Id.*
[130] *Sandison,* 64 F.3d at 1034.
[131] *McPherson,* 119 F.3d at 461.
[132] *Sandison,* 64 F.3d at 1035.
[133] *McPherson,* 119 F.3d at 462.

court reasoned that the waiver requested by McPherson would obligate the MHSAA to allow waivers for all students with learning disabilities who had remained in high school for more than eight-semesters.[134] The court, as well as the MHSAA, feared that allowing these students to participate would "open [the] floodgates for waivers, and . . . increasing numbers of such students obviously runs the risk of irrevocably altering the nature of high school sports."[135] Therefore, the court concluded that McPherson's request for a waiver of the eight-semester eligibility rule was not required.

3. Other Federal Court Decisions

The discussion above illustrates the courts' position regarding the ADA's applicability in high school athletics. From the analysis, one could think that the courts are well settled on this issue. One could conclude that if a rule is deemed essential, and if no alternatives exist, then any accommodation request could be considered to fundamentally alter the nature or purpose of the rule. There is a lack of uniformity, however, among the circuits regarding this issue. For example, in the Eleventh Circuit, the court in *Johnson v. Florida High School Activities Association* agreed with Chief Judge Arnold's dissent in *Pottgen*.[136] The court in *Johnson* was not convinced that the Florida High School Activities Association's (FHSAA) age eligibility requirement was an essential rule and removing this rule would fundamentally alter the nature of the program. The court refuted this assertion stating that:

> The age requirement provides a means to an end. It serves as a simple threshold standard by which the FHSAA can achieve the desired goals of safety and fairness. Absent these purposes, the age requirement has no purpose. Thus, to assert that the age requirement is an absolute, unwaivable rule, is to place form over substance. If, as in the instance case, the age requirement can be waived while simultaneously preserving the purposes of the requirement, then the age requirement as applied to that case is not essential.[137]

Regarding the issue of whether any waiver of an essential rule would constitute a fundamental alteration of the nature of an athletic program, the courts are equally unsettled. In *Ganden v. National Collegiate Athletic Association,* the court held that in order to determine whether a waiver of an eligibility rule would fundamentally alter the nature of the program. They must analyze the purpose of these rules and whether or not modifying these rules would allow an organization to circumvent the law.[138] If a court finds that the modified rule would not do damage to the purpose underlying it, a refusal to accommodate would be improper.

V. Part Four: The Legal Debate Between the PGA and Casey Martin

Following an apparent defeat for the PGA Tour in the Ninth Circuit Court of Appeals, the group appealed its case to the United States Supreme Court. On Wednesday, January 17, 2001, Bartow Farr, III, Esq., representing the PGA, and Roy Reardon, Esq., and Barbara Underwood, Esq., representing Casey Martin, argued their cases before the Supreme Court.[139] The arguments presented before the court centered around the question of whether the PGA Tour, a professional sports organization is required

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[134] *Id.*
[135] *Id.* at 462-63.
[136] *Johnson v. Florida High School Activities Ass'n.,* 102 F.3d 1172, 1172 (11th Cir. 1997).
[137] *Id.*
[138] *Ganden v. National Collegiate Athletic Ass'n,* 1996 WL 680000 *at 15 (N.D. Ill. 1996).
[139] The United States Supreme Court Official Transcript at 1, *Martin v. PGA Tour*, (S. Ct. created Jan. 17, 2001) (00-24) [hereinafter Petitioner].

under the ADA to provide a waiver to its "no cart" rule in order to accommodate Casey Martin. And if so, would such a waiver constitute a fundamental alteration of the nature of the PGA competition?[140]

A. Whether the "No-Cart" Rule is Essential to the PGA's Athletic Competition

1. The PGA Tour

The PGA argued that the "no cart" rule is an essential part of the game of golf. They asserted that the "Tour competitions – like every other elite golf competition in the world – require that players walk the golf course during tournaments."[141] Further, the "no cart" rule has always existed in the tournament rules.[142] The purpose of the "no-cart" rule, the PGA contended, "is specifically intended to add the element of physical stress and fatigue to the competition."[143] The PGA argued that a golfer who walks the course may encounter a variety of terrain, intense heat or cold; rain, and wind.[144] It is the fatigue that results from this requirement that may, and frequently does, affect the golfers' concentration, shot-making ability, and overall performance.[145] In order to maintain the tournaments' prestige "and to maintain public confidence, all competitors must observe the substantive rules established for a particular tournament."[146]

In addition, the PGA argued that the District Court and the Ninth Circuit erred in ruling that the rule was not substantive. Instead of allowing the professional sports organization to decide what rules are substantive and what rules are not, the PGA argued these decisions would now be made by the Ninth Circuit.[147] The PGA said that the decision provided no guidance for sports organizations to determine what rules were substantive.[148] The PGA asserted that the "no cart" requirement was a substantive rule and "is reinforced by the fact that it is observed, not just in the highest-level Tour events, but every other comparable golf tournament throughout the world."[149]

2. Casey Martin

Martin argued that the "no cart" rule is not a substantive rule, but a rule that could be waived at the discretion of the PGA.[150] The "Rules of Golf," which are created by the United States Golf Association (USGA) and the Royal and Ancient Golf Club of St. Andrews, Scotland, which the PGA has adopted, contains no rule stating that walking is an essential part of the game of golf.[151] In fact, the rules emphasize that shot-making ability is at the heart of the game.[152] The "Rules of Golf" empower the PGA to create "optional conditions" that may be practiced during the competitions such as modified "eligibility requirements, format, the method of deciding ties, the method of determining the draw for match play and handicap allowances."[153] These "optional conditions" are not considered to alter the nature of the game.[154]

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140 *Id.* In addition to the question posed above, the court was also asked to examine whether the PGA qualified as a place of public accommodation and therefore subject to Title III of the ADA.
141 Petitioner, *supra* note 140, at 7.
142 *Id.*
143 *Id.*
144 *Id.*
145 *Id.*
146 *Id.* at 8.
147 Petitioner, *supra* note 140, at 13.
148 *Id.*
149 *Id.*
150 Brief of the Respondent at 10, *Martin v. PGA Tour*, (S.Ct. filed Dec. 13, 2000) (00-24) [hereinafter Respondent].
151 *Id.* at 10-11.
152 *Id.* at 10.
153 *Id.* at 11.
154 *Id.*

Martin contended that the "no-cart" rule falls within the scope of the "optional conditions" associated with transportation.[155] The "Rules of Golf" prescribe precisely how to address the "no-cart" rule issue, but the PGA did not adopt this language.[156] Instead, the PGA provided an exception to their transportation rule, which prescribed that: "[p]layers shall walk at all times during the stipulated round unless permitted to ride [in a cart] by the PGA Tour Rules Committee."[157] Martin further asserted that "while the PGA sought to portray walking as ingrained in the fundamentals of the game, it has not even adopted the option conditions requirement authorized by the Rules of Golf."[158] Therefore, the "no-cart" rule is not an essential part of the game of golf.

Further, Martin argued that the so-called "no-cart" requirement is not applied universally.[159] Until recently, Martin contended, the PGA did not have a "no-cart" requirement at any stage in the qualifying school (Q Schools).[160] In fact, the PGA Tour Policy Board "approved the proposal as an optional condition of competition without any debate, without an expression by anyone that walking was fundamental to competitive golf and without any suggestion that golfers using carts have an advantage over those who walk the course."[161] The first two Q Schools do not require that a cart not be used, but the third does. Martin questioned whether, "until this very recent change, [one] could become a member of the 'highest-level' tours without ever performing what the PGA terms a fundamental skill."[162] In fact, in the Seniors Tour, golfers are not required to walk the course.[163] Although the PGA would argue that this competition is not as competitive as the PGA and Buy.com Tours, Martin stressed that the "same game [is played] and the same rules govern the Seniors Tour competition."[164] Further, the so-called "old timers day . . . has offered highly competitive golf and lucrative earning to its winner."[165] The applicability of the "no-cart" requirement throughout the PGA's competition is inconsistent. If there is no consistency, then, Martin would argue, the "no-cart" requirement is not a fundamental rule to the game of golf.[166]

B. Whether a Waiver of the "No-Cart" Rule Constitutes a Fundamental Alteration of the Nature of the PGA Competition

1. The PGA Tour

The PGA argued against the Ninth Circuit's ruling that the "no-cart" requirement, although a substantive rule, could be waived and not fundamentally alter the nature of the competition.[167] The PGA contended that changing any substantive rule would "destroy the uniformity of the rules for all

[155] *Id*
[156] Respondent, *supra* note 151, at 11. The Rules of Golf were promulgated by the USGA and the Royal and Ancient Golf Club of St. Andrew, Scotland, created specific language that addressed the "walking requirement" as an optional condition: "If it is desired to require players to walk in a competition, the following condition is suggested: Players shall walk at all times during a stipulated round."
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *Id*.
[161] *Id.* at 12.
[162] Respondent, *supra* note 151, at 12.
[163] *Id.* at 13. The Seniors Tour is a competition for skilled golfers who are fifty-eight years or older. Seventy-eight golfers compete for prizes in excess of $40 million. The leading money winner of the Tour in 1997 earned more than Tiger Woods, who at the time was the leading money winner on the PGA Tour.
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] Petitioner, *supra* note 140, at 9.

competitors – fundamentally altering the nature of a high-level athletic competition."[168] Citing Section 12182(b)(2)(A)(ii) of the ADA, they argued that failure to waive the requirement does not constitute discrimination. A professional sports entity, such as the PGA, is required to comply with the ADA "unless [they] can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, advantages, or accommodation."[169]

The PGA asserted that the Ninth Circuit conducted the wrong inquiry into the waiver. The Ninth Circuit Court of Appeals posed the question of whether a waiver of the "no-cart" rule would give Martin an unfair advantage. The court concluded that due to Martin's congenital condition, he would endure "[a] greater [level of] fatigue [than] the able-bodied by requir[ing] that [he] walk from shot to shot."[170] Therefore, if it was the goal of the PGA to incorporate "[an] added element of physical stress and fatigue [this requirement] was satisfied with respect to respondent by virtue of his disability."[171] The question that the Ninth Circuit Court of Appeals should have asked was not "whether the use of a cart generally would fundamentally alter the competition, but whether the use of a cart by Martin would do so."[172]

The PGA argued that the Ninth Circuit Court of Appeals failed to grasp that the PGA tournaments, similar to other high caliber competitions "must be able to test the physical capability of all competitors according to a uniform set of substantive rules."[173] The premise behind any competition or tournament "is to assess and compare the performance of different competitors, a task that is meaningful only if the competitors are subject to identical substantive rules."[174] The PGA further contended that "the Tour, in its elite events, has never allowed any player to compete without observing the full measure of such rules applicable to all other competitions."[175] There cannot be, the PGA asserted, a waiver of a substantive rule only for selected players.[176] If the purpose of the rule was to ensure the PGA's ability to test the capabilities of its players, allowing only Martin to use the cart would constitute a waiver of an essential rule and give Martin an unfair advantage.

2. Casey Martin

Martin contended that he "is not asking for a wider golf hole, or few strokes in handicap. He is not asking to change the rules of the game; he is asking only to be allowed to get to the game."[177] Martin's attorneys stated that Martin, although having a congenital condition "is a highly talented golfer, able to match skills with the best in the game."[178] The ADA, they argued requires the PGA "to honor his request unless it could prove that allowing him to use a cart would fundamentally alter the nature of its goods, services, facilities privileges, advantages, or accommodations."[179] Therefore, in order to be exempted from this requirement, the PGA must prove that such a request would alter the nature of game and that no other alternatives are available that could provide similar results without altering the competition.

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[168] *Id.* at 10.
[169] *Id.* The preliminary hurdle that must be met is whether the entity qualifies as a place of public accommodation as defined by Title III of the ADA. The petitioner argued that the PGA Tour was not covered under Title III as a place of public accommodation, but they are a private entity who is not subjected to the ADA requirements.
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] Petitioner, *supra* note 140, at 13.
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] Respondent, *supra* note 151, at 18.
[178] *Id.* at 16.
[179] 42 U.S.C. § 12182 (b) (2) (A) (ii) (1994).

The Ninth Circuit Court of Appeals concluded that in order to determine whether Martin's request for an accommodation would fundamentally alter the PGA competition, the inquiry must start with the individualized facts of Martin's disability and the effect his request for an accommodation would have on PGA competitions.[180] The District Court and the Ninth Circuit held that Martin's request to use a golf cart during the tournament would not fundamentally alter the nature of the competition.[181] Based on the findings made during the trial, the District Court reasoned that "all the cart does is to permit Martin access to a type of competition in which he otherwise could not engage because of his disability."[182] The PGA argued that "each and every rule of PGA Tour competition it deems 'substantive' is fundamental and every change in any rule could hypothetically confer a competitive advantage."[183] In essence, the PGA declared its authority, as granted by the Rules of Golf, to refuse to accommodate any request that may change the PGA's vision of their competition. The District Court, however, was not swayed by the PGA's reasoning. The court held that "the mere fact that PGA has defined walking to be a part of the competition cannot preclude inquiry or PGA will have been able to define itself out of the reach of the ADA."[184] Such a determination is for the courts to decide, not the PGA. The court further stated that "ADA requires that all organizations subject to the ADA modify their rules to permit full participation by people with disabilities."[185] The court concluded by saying:

> To argue that in sports the rules themselves are what is fundamental to the enterprise is to try to define sport as exempt from the ADA – and to do so in an insidious way. If no… participation by people with disabilities, then – ironically – sport becomes the only industry in America permitted to construct barriers to access that are unrelated to performance.[186]

C. Whether Imposing Such a Waiver of a Substantive Rule Imposes an Undue Burden on the Sport Organization

1. The PGA Tour

The PGA argued that determining whether the waiver of an essential rule would give a disabled player an unfair advantage over other players would be difficult.[187] They contend that there is "no reliable or consistent way to guide the PGA in ascertaining whether accommodating a disabled player would result in an unfair advantage."[188] The Ninth Circuit Court of Appeals, according to the PGA, perceived that this process would be a relatively easy determination to ascertain. But on the contrary, the PGA asserts that "comparisons among individual athletes must take into account. . . infinite variety of physical attributes ranging from height to strength to eyesight to coordination to stamina."[189] If this determination is difficult for the sport organization itself to conduct, this examination would be "too great for any fact-finder."[190] The PGA embraced the argument in *McPherson* and *Pottgen* that imposing such a burden would be taxing on the staff and other members of the Tour. Finally, the PGA argued that "if such

[180] Respondent, *supra* note 151, at 18.
[181] *Id.*
[182] *Id.*
[183] *Id.* at 17.
[184] *Id.* at 18.
[185] *Id.*
[186] Respondent, *supra* note 151, at 18.
[187] Petitioner, *supra* note 140, at 28.
[188] *Id.*
[189] *Id.*
[190] *Id.* The petitioner contends that in order to determine whether a disabled competitor would have an unfair advantage over other players, the entity must "*conduct an accurate hypothetical contest between one competitor and another, with each performing under different substantive rules*." *Id.*

[an evaluation] was feasible, which it is not, it would still be a poor substitute for what Tour competitions have always been: a test of physical ability under uniform rules."[191]

2. Casey Martin

Martin argued that applying the ADA to the PGA Tour would not impose an undue burden on the organization.[192] The PGA asserted that the individualized inquiry into a player's disability was burdensome.[193] The Ninth Circuit, however, rejected this reasoning stating that "nothing in the record establishes that an individualized determination would impose an intolerable burden on the PGA."[194] In fact, that court speculated that requests for these types of accommodations would not occur often. The court concluded that "given the nature of the sport, it is highly unlikely that many individuals with disabilities will possess both the shot-making skills required for PGA play and the tenacity to overcome the type of disability suffered by Mr. Martin on a daily basis."[195]

The PGA, Martin argues, has some guidance in making individual determinations regarding certain modifications for golfers with disabilities contained in its Rules of Golf.[196] Promulgated and approved by both the USGA and the Royal and Ancient Golf Club of St. Andrews, Scotland, the Rules of Golf establish permitted modifications to the rules in order to accommodate disabled golfers.[197] The purpose of these modifications is to "allow the disabled golfer to play equitably with an able-bodied individual or a golfer with another type of disability."[198] These rules address five types of disabled golfers: blind, amputees, those requiring canes or crutches, requiring wheelchairs, and the mentally disabled.[199] For each of these groups, the Rules of Golf established permissible accommodations, which are not viewed as giving the player an unfair competitive advantage over other players. In fact, Martin argues, a recent ruling 14-3/5 regarding the usage of prosthetic devises by amputee golfers held that "an artificial limb is generally not considered a forbidden artificial devise under the Rules of Golf."[200] Even if the devise has been modified to assist the golfer in playing the game, the Rules of Golf see no unfair competitive advantage given to that disabled player.[201] The committee, however, does reserve the right to declare a devise to have given the competitor an unfair advantage to be diametrically opposed to the type of device discussed in Rule 14-3.[202] Martin argues that the PGA's claim that this type of individualized inquiry would impose an undue burden on the organization is unfounded.

VI. Part Five: The Supreme Court Should Sustain the Lower Courts Decisions

The District Court of Oregon and the Ninth Circuit Court of Appeals proposed the proper analyses when probing this issue. The Courts' analyses take under consideration not only the requests for an accommodation by a disabled athlete, but also the sports organization's purpose and the game in question. These courts wisely chose to examine the reasonableness of an accommodation as applied to the

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191 *Id.* at 29.
192 Respondent, *supra* note 151, at 35.
193 *Id.*
194 *Id.*
195 *Id.* Since Casey Martin filed his suit against the PGA for failure to provide his cart, the PGA has not had any other litigation involving this issue. However, there had been two suits filed recently against the USGA seeking accommodations similar to what Martin requested (*Olinger* and *JaRo Jones*).
196 *Id.*
197 *A Modification of The Rules of Golf for Golfers with Disabilities*, at <http:// www.usga.com> (visited March 12,2001). [hereinafter Modification].
198 *Id.* at 1.
199 *Id.*
200 Respondent, *supra* note 151, at 35.
201 *Modification, supra* note 198, at 2.
202 Respondent, *supra* note 151, at 35.

specific circumstances of an individual's case. The Supreme Court should look at the accommodation as it applies to individual cases.

Arguments against upholding the lower court's decisions state that ADA and its applicability in professional sports and the case itself "threaten[s] to throw Pandora's box wide open."[203] This is certainly not the case. The court carefully structured a two-part analysis, which will eliminate outrageous claims. The burden is on the plaintiff to prove to the court that his or her request for an accommodation is a reasonable accommodation that a sports entity could perform. For example, in his article, Ted Curtis argued correctly that a disabled athlete "who cannot run the full length of a basketball court cannot demand that the court be shortened by 20 feet."[204] In that instance, this would not be a reasonable accommodation for the National Basketball Association to make due to financial and other considerations. If the plaintiff fails to prove the general reasonableness of the request, then he has not met his burden.

If the plaintiff, as in *Martin*, met his burden, then the burden shifts to the sports entity to demonstrate that compliance with the ADA would fundamentally alter the nature of the game. Sport entities should not be excluded from complying with the ADA based on tradition or because an organization said that the rule is substantive. The Supreme Court should conduct an inquiry into the purpose behind the rule. The entity must prove that the rule is a substantive one. The rule must be a part of the very fabric of the sport, such as tackling is to football, whether interscholastic or professional. Even if the rule is substantive, as the Ninth Circuit held in *Martin*, the organization is required to demonstrate that if this substantive rule was taken away, the game itself would be fundamentally changed. For instance, if the Supreme Court removed tackling from the game of football in order to accommodate a disabled player, the game would be fundamentally altered. As in the *Martin* case, however, there are accommodations that a sports organization can make without fundamentally altering the game.

Another argument in favor of non-compliance with the ADA for the PGA is that the law would impose an undue financial and administrative burden. The ADA requires an entity to not only state that the accommodation requested imposes an undue burden, but they must also establish that fact on the record. The Ninth Circuit Court of Appeals correctly found that this type of case involving these types of issues will come up rarely and that it would not impose an undue administrative or financial burden on the organization.

VII. Conclusion

The decision in the Casey Martin case will have a lasting and positive impact on the world of professional sports. For the first time, a disabled player can be protected under the ADA from intentional and passive forms of discrimination. Professional sports organizations are not exempted from complying with the provisions of the ADA. Organizations cannot hide behind facially neutral rules and regulations to prevent competent players from participating in the sport because of their disability categorically. Whether a player should be given a particular accommodation is a question for the courts to decide.

What the PGA fails to recognize is that only the "elite" players advance to the PGA Tour competition, whether disabled or not. In the two previous qualifying competitions to the Tour, both the disabled and the able-bodied player are given the option to use a cart while playing. During this time, use of a cart by a disabled person or non-disabled person is not considered by the PGA to have an unfair

[203] Ted Curtis, *Cart Blanche? A Decision Requiring Accommodation for a Disabled Golfer has Sports Lawyers Wondering What's Next*, 84-ARP A.B.A.J. 34, 34 (1998).
[204] *Id.*

advantage over players not using carts. What makes using carts during the PGA Tour competition an unfair advantage? Both players must have superior skills in order to advance that far. They are the best of the best in the world of golf. Martin's closing remarks in his brief best describes what he is seeking:

> Mr. Martin has not invoked the ADA to "raise" him to the level of the "able-bodied." That cannot happen without divine intervention. Mr. Martin does not ask that he be absolved from having to strike the ball into the hole, nor does he argue that any Rule of Golf must be changed for him. He merely seeks removal of a barrier interposed by the PGA that prevents him from pursuing a career where his talents lie. The ADA requires the removal of such barriers.[205]

Casey Martin should be allowed to pursue his aspirations to be a champion in the world of professional golf.

[205] Respondent, *supra* note 151, at 39.