Why is the PGA Teed Off at Casey Martin? An Example of How the Americans with Disabilities Act (ADA) Has Changed Sports Law

W. Kent Davis

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ARTICLES

WHY IS THE PGA TEED OFF AT CASEY MARTIN?
AN EXAMPLE OF HOW THE AMERICANS WITH DISABILITIES ACT (ADA) HAS CHANGED SPORTS LAW

W. Kent Davis

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I. INTRODUCTION

*Golf is a good walk spoiled.*

—Mark Twain

When Mark Twain made his humorous observation, he probably had no idea that the link between golf and walking would one day become a topic of national debate. In the early months of 1998, Americans found themselves divided over the issue of whether a disabled professional golfer should be allowed to use a motorized cart during Professional Golfers Association (PGA) tournaments. This time, however, the issue would not be a laughing matter, as the two sides of the debate rallied around such American icons as Arnold Palmer and Jack Nicklaus on the one hand and the sympathetic plaintiff, Casey Martin, on the other.

To Casey Martin, golf is not “a good walk spoiled.” Stricken with a disability ominously labeled Klippel-Trenaunay-Weber Syndrome, he finds walking as daunting as the game of golf itself; just limping around eighteen holes is “a victory of sorts” for him. Given this limitation, it would be difficult not to see Martin as a hero in his simple request to use a golf cart to make his way around tournament courses. Americans have long put athletes on a pedestal and made them the topics of *causes célèbres.* Disabled athletes have been the object of special adoration by the public. For example, Kenny Walker has achieved fame and sympathy as a football player for the University of Nebraska and the Denver Broncos despite being deaf. Jimmy Connors became a popular champion tennis player while afflicted with asthma. Several famous athletes, such as basketball’s Terry Cummings, have become sports heroes.

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2. See Rick Maloney, Nielsen Sides with PGA in Debate About Use of Carts, BUS. FIRST-BUFF., Feb. 9, 1998, at 22 (describing the Casey Martin dilemma as “the topic of discussion in the sports world these days”).
5. Maloney, supra note 2, at 22.
6. Id.
7. See Matthew J. Mitten, Amateur Athletes with Handicaps or Physical Abnormalities: Who Makes the Participation Decision, 71 Neb. L. Rev. 987, 993 (1992) (“Athletes are one of the most revered groups in American society and are among its highest paid members.”)
8. See id. at 989.
9. See id.
10. See id.
while suffering from serious heart conditions.\(^{11}\) And Gail Devers won a gold medal in the women’s 100 meter dash at the Olympics even though she has Graves disease.\(^{12}\) A recent empirical study points to one of the reasons why disabled athletes are held in such high regard for their courage: these disabled sports stars “would rather play with physical pain than suffer the emotional pain of not playing.”\(^{13}\) Americans, it has often been noted, love an underdog, especially one perceived as suffering special hardship.\(^{14}\)

The Casey Martin debate would not remain a discussion confined to the sports pages of newspapers. Unfortunately, like too many American disagreements, the decision over whether to allow Martin to use a golf cart would ultimately be decided in a courtroom.\(^{15}\) However, the judicial decision-making would present some unique questions. Despite the long history of public support for disabled athletes, the law had been silent on the rights of these figures until relatively recently, and judicial wrangling over the rights of the disabled had largely been confined to amateur athletics.\(^{16}\) The passage of the Americans with Disabilities Act (ADA)\(^ {17}\) in 1990, however, gave Martin the legal means of pursuing his desire to use a golf cart. In fact, his case would prove to be the first to apply this antidiscrimination law—requiring reasonable accommodation for people with disabilities—to professional sports.\(^ {18}\)

Using the *Martin* case as a backdrop, this paper will discuss how the passage of the ADA has affected the rights of disabled athletes. Part II will outline a history of disability discrimination laws in the United States, particularly as they affect athletics. Part III will discuss how these statutes had been applied to disabled athletes by courts in the years preceding the *Martin* case. Part IV will discuss the *Martin* case in detail, including a history of the PGA, a biography of Casey Martin himself, and a discussion of the public debate that preceded and followed the trial. After examining all of these issues, the paper will conclude by as-

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11. See id.
12. Mitten, supra note 7, at 989.
13. Id. at 994. Mitten also notes that “[e]conomic pressure such as the loss of a potential scholarship or professional career or the fear of losing a starting position provides strong incentive to any star athlete to play with a handicap or impairment.” Id.
16. See Mitten, supra note 7, at 1003-04.
serting that the Martin case, though not legally earth shattering in its holding, may ultimately prove to be a watershed event by injecting the ADA into professional sports.

II. A HISTORY OF DISABILITY DISCRIMINATION STATUTES IN THE UNITED STATES

A. The Pre-ADA Statutes

Before the ADA was passed, several statutes protected the rights of the disabled in the United States. Congress took tentative steps toward eliminating discrimination against the disabled when it passed the Rehabilitation Act in 1973.19 Section 504 of that Act provides that “[n]o otherwise qualified [disabled] individual with a disability in the United States... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.”20 As part of its legal bite, “the Rehabilitation Act requires federally funded programs to make reasonable accommodations [for] disabled persons.”21 In order for a plaintiff to successfully bring suit against a defendant, he must prove four elements: “1) he is ‘disabled’ under the Rehabilitation Act; 2) he is ‘otherwise qualified’ to participate in the activity or program in question; 3) he was excluded from the activity or program solely on the basis of his disability; and 4) the activity or program receives federal funding.”22 The Rehabilitation Act remains an important piece of legislation to this day for several reasons. First, many sports programs are recipients of federal aid, particularly high school and college activities. Second, the ADA works in conjunction with the Rehabilitation Act in many ways, even though it subsumes the earlier statute in some respects and extends beyond any previous statutory provisions to provide clearer regulations.23 Most important, however, is the analogy that courts often draw between the Rehabilitation Act and the

21. Thomas, supra note 19, at 736.
22. Pahulu v. Univ. of Kan., 897 F. Supp. 1387, 1389 (D. Kan. 1995); see also Mitten, supra note 7, at 1008.
23. See Thomas, supra note 19, at 738.
ADA; courts have repeatedly used decisions on the Rehabilitation Act as precedent to formulate holdings on the ADA.\textsuperscript{24} This is a valuable link for ADA plaintiffs, for the mere fact that the Rehabilitation Act is seventeen years older than the ADA means that there is much more case law on point involving the older statute.\textsuperscript{25}

In the years between passage of the Rehabilitation Act and the ADA, Congress took further steps to eliminate discrimination against the disabled. Perhaps the strongest legislation existed in the area of education.\textsuperscript{26} For example, the Individuals with Disabilities Education Act (IDEA)\textsuperscript{27} is a civil rights statute that requires schools to provide disabled students an "individualized education plan" so that they can receive an "appropriate" education.\textsuperscript{28} Part of an appropriate education is athletics, so the IDEA presumably applies to school sports activities.\textsuperscript{29} Other statutes that Congress passed in the years leading up to the ADA included the Developmental Disabilities Bill of Rights Act of 1975, the Air Carrier Access Act of 1986, the Voting Accessibility for the Elderly

\textsuperscript{24} See Sandison v. Mich. High Sch. Athletic Ass'n, Inc., 64 F.3d 1026, 1035 (6th Cir. 1995) ("Our analysis of the plaintiffs' ADA claim closely tracks our [Rehabilitation Act] section 504 analysis."); Bolton v. Scrivner, 36 F.3d 939, 943 (10th Cir. 1994) ("Congress intended that the relevant caselaw developed under the Rehabilitation Act be generally applicable to the term 'disability' as used in the ADA."); Reaves v. Mills, 904 F. Supp. 120, 123 (W.D.N.Y. 1995) (taking to heart the ADA's language that "[t]he remedies, procedures, and rights set forth in ... [section 504a of the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of [the ADA]"); Eckles v. Consolidated Rail Corp., 890 F. Supp. 1391, 1403 (S.D. Ind. 1995) ("[T]he ADA is to be interpreted consistently with the Rehabilitation Act.").

\textsuperscript{25} This is probably why attorneys often bring suits under both statutes to this day. Though the many Rehabilitation Act decisions would apply to the ADA, lawyers often appear to be more comfortable when precedent directly addresses a statute by name. In addition, it never hurts to bring suit under two statutes when possible rather than under the ADA alone. Of course, this is impossible if the defendant is not a recipient of federal funds, as the Casey Martin case illustrates. The extension of the ADA into activities not funded by the federal government is probably its most dramatic development. See infra Parts II and III for further discussion of the interplay between the Rehabilitation Act and the ADA in case law.


\textsuperscript{28} Colker, supra note 26, at 19. "In order for a school district to be covered by the IDEA, it must accept federal funding and agree to abide by an extensive set of funding criteria." Id.

\textsuperscript{29} Despite this fact, it is doubtful that IDEA goes very far in the area of reasonable accommodations for the disabled. For example, in Board of Education v. Rowley, 458 U.S. 176, 178 (1982), the Supreme Court held that a school did not have to employ an interpreter for a deaf student in order to meet IDEA's requirements. Given this decision, one can only imagine the hesitancy to require accommodations for athletic programs under IDEA. See Colker, supra note 26, at 19. The ADA has helped fill this gap by mandating more exacting accommodations for the disabled in all areas of education, including athletics. See id.

B. The Americans with Disabilities Act (ADA)

In 1990, Congress sought to ensure that the federal government would play an even bigger role in ensuring the rights of the disabled when it passed the ADA.31 Finding a "continuing existence of unfair and unnecessary discrimination and prejudice"32 against the disabled, Congress sweepingly sought "the elimination of discrimination against individuals with disabilities."33 Drafted by Senator Tom Harkin, and backed by Senator Bob Dole,34 "[t]he ADA prohibits discrimination on the basis of disability in employment, programs and services provided by state and local governments, goods and services provided by private companies, and in commercial facilities."35 When "President [Bush] signed the ADA into law on July 26, 1990,"36 he described it as "the world's first comprehensive declaration of equality for people with disabilities."37 The ADA was subsequently codified under five Titles.38 In the parts most relevant to sports law, "Title I covers private employment discrimination; Title II covers the provision of programs and services by state and local governments; and Title III covers the provision of services by public accommodations and commercial facilities such as restaurants,

30. See Colker, supra note 26, at 19.
32. Id. § 12101(a)(9).
33. Id. § 12101(b)(1).
34. See Garrity, supra note 4.
35. Americans with Disabilities (ADA) Homepage of the U.S. Department of Justice (visited March 6, 1998) <http://www.usdoj.gov/crt/ada/adahoml.htm>. Readers should note that this coverage marks a big difference over the Rehabilitation Act, for the federal government now had the power to go after institutions that were not recipients of federal funding.
38. See ADA HANDBOOK, supra note 36, at i.
hotels, and . . .”—most applicable here—golf courses. The arrival of these Titles "has resulted in a booming area of law" for the disabled.

The ADA requires the Equal Employment Opportunity Commission (EEOC) to issue regulations and guidelines implementing Title I; a similar provision requires the Department of Justice (DOJ) to issue federal regulations governing Titles II and III. These regulations are very important, for the Supreme Court has stated that they "are of significant assistance" in fleshing out the basic provisions of federal disability discrimination statutes. When Casey Martin brought his ADA claim against the PGA, he based his claims on Titles I and III. Thus, a closer examination of these two titles is helpful to understanding the rest of this article.

1. Title I of the ADA

Title I states rather bluntly that "[n]o covered entity shall discriminate against 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." Looking at the plain language of this passage, it is clear that one must first prove himself to be "disabled." There are several ways that a person can be qualified as disabled: 1) having "a physical or mental impairment that substantially limits one or more of the 'major life activities of such

39. Id. For the record, Title IV covers telecommunications relay services for hearing and speech impaired individuals (including closed-captioning of public service announcements), and Title V contains miscellaneous provisions such as special rules for insurance providers. See id. Though possibly of indirect importance to matters of sports law, these last two Titles will not be discussed in this paper, with the following brief exception: Section 12212 (in Title V) encourages alternative dispute resolution as a means of resolving disputes under the ADA. See 42 U.S.C. § 12212. However, one federal court has ruled that this section does not require an athlete to arbitrate his discrimination claims against an athletic association because this provision was meant to supplement, not supplant, judicial remedies. See Case Law Development: Mobility/Access, 20 MENTAL & PHYSICAL DISABILITY L. REP. 382, 386 (citing Devlin v. Arizona Youth Soccer Ass'n, No. Civ. 95-745 TUC ACM (D. Ariz. Feb. 8, 1996)).

40. COLKER, supra note 26, at xvii.

41. See id. There is one exception to this provision: the Department of Transportation is charged with issuing regulations to enforce the transportation aspects of Title III. See id. As another important side note, the ADA requires DOJ to issue regulations governing Title II which are consistent with the existing regulations under section 504 of the Rehabilitation Act, yet another link between the two statutes. See id.


44. 42 U.S.C. § 12112(a).
individual';

2) having a record of such impairment; or
3) being regarded as having such an impairment.

According to Congress, qualifying as disabled should be rather common under these three prongs, for the findings which introduce the ADA state that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing . . ." At times, however, proving that one is disabled can be a tough burden, or at least a confusing one. For example, rejection for one job application due to physical impairments, by itself, has been repeatedly held to lack the impact necessary to prove the ADA's prerequisite that a person is substantially limited in the life activity of work under the first prong of the ADA's disability definition, assuming of course that the person is able to work elsewhere. On the other hand, under the third prong of the definition ("being regarded as having such an impairment"), if a prospective employer treats an impairment (either actual or perceived) as substantially limiting one or more of life's major activities, and discriminates based on this treatment, then a person is deemed "disabled" and a violation of the ADA has occurred. This is especially true when the prospective employer treats a perceived disability as a blanket disqualifier for employment. Under this reasoning, even a single refusal to hire based on this perception may adequately make out a case of an employee "being regarded as having such an impairment"; in other words, a pattern of

45. "Major life activities" include functions such as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(l). Sports may qualify by themselves as a "major life activity" under the ADA. As one federal court has put it, "some courts and commentators . . . have concluded athletics comes within the purview of 'learning,' [an] enumerated major life activity, and others have implied athletics in and of itself is a major life activity for certain individuals." Pahulu, 897 F. Supp. at 1391. Interestingly, the EEOC has stated that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." Americans with Disabilities Act Title I Equal Employment Opportunity Commission Interpretive Guidance, 29 C.F.R. § 1630.2(j). The EEOC's guidance seems to conflict with the language of the ADA itself, which requires that a disability "substantially limits one or more of the major life activities" before it is covered. Compare id., with 42 U.S.C. § 12102(2)(A).

46. 42 U.S.C. § 12102(2)
47. 42 U.S.C. § 12101(a)(1).
48. See 29 C.F.R. § 1630.2((j)((3)(l) ("The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."); see also Taylor v. U. S. Postal Serv., 946 F.2d 1214 (6th Cir. 1991); Bolton v. Scrivner, Inc., 36 F.3d 939 (10th Cir. 1994); Byrne v. Bd. of Educ., 979 F.2d 560 (7th Cir. 1992).
49. See Cook v. R.I., 10 F.3d 17, 17 (1st Cir. 1993).
such perceptions may not be necessary. These are subtle distinctions, but ones that could make or break a plaintiff's case.

Returning to the plain language of the ADA's prohibition of discrimination, having proven that he is disabled, a plaintiff must next prove that he is nonetheless "qualified" for the job in question. To be "qualified," the person must be able to "perform the essential functions of the employment position that such individual holds or desires." It is the definition of "essential functions" that often proves a sticky point for litigants under the ADA.

Finally, to succeed under Title I's plain language, a plaintiff must prove that he has been discriminated against in an employment situation. Employment discrimination includes not only excluding one from employment based on a disability, but also "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability."

Courts looking at the plain language of the ADA have begun to encapsulate these elements and the associated burdens of proof. To establish a prima facie disparate employment treatment case under the ADA, the employee has the initial burden of proving that he is a disabled person, "that he or she is qualified to perform the essential functions of the job (either with or without reasonable accommodation), and that he or she has suffered an adverse employment action under circumstances from which an inference of unlawful discrimination arises." In meeting this initial burden, the employee need only show that the discrimination based on disability was "a" cause of the action taken, not necessarily the

50. Id.
52. 42 U.S.C. § 12111(8).
53. See, e.g., Treadwell v. Alexander, 707 F.2d 473, 477 (11th Cir. 1983) (finding that even rarely-performed duties can be essential functions of a job); Davis v. Frank, 711 F. Supp. 447, 454 (N.D. Ill. 1989) (addressing whether answering the phone was an essential function of a postal clerk's position); Ackerman v. Western Elec., 643 F. Supp. 836, 844 (N.D. Cal. 1986) (finding that an employee's actual prior tasks—versus her job description—determine what are the essential functions of a job).
55. 42 U.S.C. § 12112(5)(A). "Reasonable accommodation" requires "making existing facilities used by employees readily accessible to and usable by individuals with disabilities," Id. at § 12111(9)(A), and making "[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position." 29 C.F.R. § 1630.2(o)(ii).
If the employee is successful in this initial step, the employer would then have the burden of proving that the employee was not an otherwise qualified person or that the alleged discrimination was for reasons other than the disability. If the employer is successful with its argument, the burden shifts back to the employee to prove that the employer’s reasons for the alleged actions are based on misconceptions or unfounded conclusions, and that the reasons articulated for the alleged action entail unjustified consideration of the disability.

Another factor that affects Title I is the traditional law of disparate impact. Under the ADA, an employer may not use selection criteria or tests that “tend to screen out” qualified disabled employees unless the criteria “is shown to be job-related for the position in question.” To make out a prima facie case in such disparate impact situations, the plaintiff need only prove that the challenged standard disparately impacts the group of disabled people of which he is a member, and that the plaintiff is otherwise qualified for the position. The burden then shifts back to the employer to prove that the challenged tests are job-related or are required by business necessity.

Before ending the discussion of Title I, it should be noted that defendants have several general defenses against employment discrimination claims. First, an employer does not have to hire a disabled person if that person would constitute a “direct threat to the health or safety of other individuals in the workplace.” The EEOC has extended this defense by regulation to cover situations where the individual may be a direct threat to himself instead of others. However, the direct threat defense is a high hurdle for defendants, for the EEOC has deemed that the threat to personal safety may not involve “slightly increased risk. The risk can only be considered when it poses a significant risk, i.e., high probability, of substantial harm.”

58. See Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1384 (10th Cir. 1981).
59. See id. at 1385.
60. 42 U.S.C. § 12112(b)(6); see also Davis v. Frank, 711 F. Supp. 447 (N.D. Ill. 1989). In contrast, one federal court has stated that “it remains . . . an open question whether [the Rehabilitation Act] forbids recipients of federal financial assistance from engaging in ‘conduct that has an unjustifiable disparate impact’ on the disabled.” Sandison, 64 F.3d at 1032.
62. See id.
63. 42 U.S.C. § 12113(b).
64. See Chiari v. City of League City, 920 F.2d 311, 317 (5th Cir. 1991)(citing 29 C.F.R. § 1613.702(f) (1990)).
65. Americans with Disabilities Act Title I Equal Employment Opportunity Commission Interpretive Guidance, 29 C.F.R. § 1630.2(r). The EEOC further explains that, in weighing
Another defense available to employers is proof that a reasonable accommodation would constitute an “undue hardship” due to “significant difficulty or expense” in achieving it. In determining whether an accommodation would cause undue hardship on a covered entity, courts consider the following factors, among others: “the nature and [net] cost of the accommodation . . . , the overall financial resources” of the employer, and the impact of the accommodation upon the operation of the employer’s facility.

2. Title III of the ADA

Title III broadly states that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” Turning once more to the plain language of the statute, a defendant must first be shown to be a place of public accommodation under Title III. In fleshing out the entities covered by this first element, section 12181(7) of the statute gives a very detailed list of facilities that qualify as a public accommodation, including among many others a “golf course, or other place of exercise or recreation.” One commentator has noted that “[a] type of entity that is not explicitly covered [by section 12181(7)] but would seem to fit many of the criteria of other covered entities is ‘professional or business organizations’,” which could easily include such sports organizations as the NCAA or PGA. It should additionally be noted

the direct threat, the employer must make an individual assessment using factual data, considering potential reasonable accommodations, and taking into account four factors: the duration of the risk, the nature and severity of the potential harm, the likelihood that the harm will occur, and the imminence of the potential harm. See id.; 29 C.F.R. § 1630.3(r).


67. 42 U.S.C. § 12111(10)(B); 29 C.F.R. § 1630.2(p)(2). For a list of other Title I defenses available to an employer, see 42 U.S.C. § 12113, 29 C.F.R. § 1630.15, and Americans with Disabilities Act Title I Equal Employment Opportunity Commission Interpretive Guidance, 29 C.F.R. § 1630.15.

68. 42 U.S.C. § 12182(a).

69. Title III uses the same definition of “disabled” as Title I. See 42 U.S.C. § 12102.

70. 42 U.S.C. § 12181(7)(L). Moreover, the DOJ regulations implementing this provision state that a “facility means all or any portion of . . . sites.” 28 C.F.R. § 36.104.

71. COLKER, supra note 26, at 345. Colker uses the American Bar Association as a specific example, see id., but this definition could presumably apply to such organizations as the NCAA or PGA as well. See Martin v. PGA Tour, Inc., 994 F. Supp. 1242, 1246 (D. Or. 1998) (“It is also worth noting that the ADA does not distinguish between sports organizations and other entities when it comes to applying the ADA to a specific situation. Businesses and schools have rules governing their operations which are of equal importance (in their sphere)
that a separate provision of Title III, section 12189, is equally determinative in deciding whether an entity is covered as a public accommodation, for it states that "[a]ny person that offers examinations or courses related to applications, licensing, certifications, or credentialing for secondary or post-secondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals."72 Any sports organization that falls within this definition would thus qualify as a public accommodation.

Once a defendant is proven to be a public accommodation, the next step is to show that it has discriminated against a disabled person in some manner under the text of Title III. There are several ways that a public accommodation can discriminate under Title III, and each specific offense carries its own particular defense. For example:

—Section 12182(b)(2)(i) deems the imposition of eligibility criteria that tends to screen out disabled individuals discriminatory "unless [the screening] can be shown to be necessary for the provision of the service."73

—Section 12182(b)(2)(A)(ii) deems "a failure to make a 'reasonable modification' in policies" affecting public accommodations discriminatory unless it can be shown that the "modification would fundamentally alter" the services or facilities.74

—Section 12182(b)(2)(A)(iii) states that a public accommodation discriminates when it fails to take steps to ensure that the disabled are not treated differently because of the absence of auxiliary aids and services, unless the provision of these would fundamentally alter the nature of the servicefacility or would result in an undue burden.75

—Section 12182(b)(2)(A)(iv) states that "a failure to remove architectural barriers [or] communication barriers" in places of public accom-

72. 42 U.S.C. § 12189. This provision figured into the Casey Martin case, as the PGA conducts a qualifying school tournament for golfers who wish to join the pro tour. See Martin v. PGA Tour, Inc., 984 F. Supp. 1320, 1321-22 (D. Or. 1998).

73. Colker, supra note 26, at 344.

74. Readers should note that the "reasonable accommodation" language that is used in Title I has a counterpart in the "reasonable modification" language of Title III. Id.

75. Though the DOJ has largely been silent on what constitutes a "fundamental alteration," the applicable regulations define undue burden as "significant difficulty or expense." 28 C.F.R. § 36.303(a).
modation is discriminatory if it affects access for the disabled, but only where such removal is "readily achievable." In further explaining all of these potential violations, the DOJ regulations require a public accommodation to afford facilities "in the most integrated setting appropriate to the needs of the individual."

In addition to the specific defenses available under the individual categories of discrimination, there are some general defenses available under Title III. Perhaps the most important for the Casey Martin case is the simple exception that Title III does “not apply to private clubs or establishments.” Another example is the “direct threat” defense, which is described in terms similar to what we saw under Title I. Once again, the direct threat defense is a high hurdle for defendants, for Title III itself and the DOJ regulations define this defense as “a significant risk to the health or safety of others” by the disabled individuals, require an individualized assessment of such risk, and demand that defendants consider modifications and auxiliary aids/services to eliminate such risks if they are found to exist.

C. The Critics of the ADA

Despite its lofty goals, the ADA has been a source of controversy since its passage, with many arguing that it reaches too far into every aspect of American society. One of the most vocal critics has been attorney Philip K. Howard, who wrote the 1994 best-selling book *The Death of Common Sense.* Though largely sympathetic toward the plight of the disabled, Mr. Howard spends several pages of his book...
pointing out some unfortunate paradoxes of the Rehabilitation Act and the ADA. For example:

— Largely because of the dictates of federal disability laws, “[g]ifted students, in contrast with disabled children, receive virtually no support or attention from America’s school systems . . . . The ratio of funding of special education programs to gifted programs is about eleven dollars to one cent.”

— The ADA fails to acknowledge that “what benefits a person with one disability may harm someone with another disability. Low drinking fountains and telephones are harder to use for the elderly or those with bad backs . . . . Curb cuts are more dangerous for the blind, who have more difficulty knowing when they have reached the end of the block.”

— Though the ADA purports to protect upwards of 43 million Americans,

the overwhelming preponderance of the ADA regulations, . . . and virtually all cost and conflict, relate to wheelchair users . . . . It turns out, in a number that seems to have been actively suppressed [in the Congressional findings], that not 2[sic] percent of the disabled are in wheelchairs, and many of those are confined to nursing homes. Billions are being spent to make every nook and cranny of every facility in America wheelchair accessible . . . ., when children die of malnutrition and finish almost dead last in math.

— “Under ADA regulations, doorknobs are now illegal in the workplace (they are hard to turn for someone without full use of his hands). So is carpet that is more than one quarter-inch thick (it causes too much friction for wheelchairs).”

In summing up his criticisms of the ADA, Mr. Howard notes that “[t]he ADA gave the disabled the right to sue virtually every establishment, public or private, for discrimination,” but argues that the fight for rights under the ADA has become “obsessive” and that handing out these rights “does not resolve conflict. It aggravates it.”

about the misfortunes of those suffering from serious handicaps. Indignities were their daily routine: To someone in a wheelchair, every six-inch curb, every step, is like a high wall.”

83. Id. at 151.
84. Id.
85. Id. at 153.
86. HOWARD, supra note 81, at 130-31.
87. Id. at 130.
88. Id. at 150.
Mr. Howard has found a kindred spirit in the most unlikely of places, for a few African-American leaders have noted that the ADA potentially dilutes the advances of the black civil rights movement. One such leader well-known to Georgians, Julian Bond, has caustically made some observations about the growth of rights symbolized by the ADA:

Today, the protected classes extend to a majority of all Americans, including white men over forty, short people, the chemically addicted, the left-handed, the obese, members of all religions. Surely there is a scholar somewhere who can tell us how we came to this state of affairs and how the road to civil rights became so crowded. . . . In our society, there were only so many fruits to go around. When short, fat, old white men step to the front of the line . . . then our civil rights are as endangered as they were by Bull Connor . . . .

Critics of the ADA have not confined themselves to general discussions of the law, for tough comments have accompanied the statute’s foray into sports law. For example, Professor Matthew Mitten has commented on the dilemma faced by Loyola Marymount University over the disability of star basketball player Hank Gathers. Gathers suffered from a known irregular heartbeat. When he collapsed and died during a basketball game, the university was sued heavily in two suits. Yet Mitten notes that, “[i]ronically, Loyola Marymount’s refusal to permit Gathers to continue playing basketball with his heart condition also could have resulted in litigation” under the ADA. This obviously presents tough choices for some sports programs. Equally biting criticisms have accompanied the Casey Martin case. Syndicated columnist Tony Snow, though largely sympathetic toward Martin himself, takes a dim view of the ADA, arguing that “the feds ought to butt out. The government already has an annoying knack for making everybody’s business its business—with the result that federal ‘help’ costs more and does less good than ever.” Finally, *Sports Illustrated* magazine, in commenting on the Martin case, has quipped that the ADA “has pushed sports enterprises like [the PGA] to the mouth of a very dark cave” and

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89. *See id.* at 132.
90. *Id.* at 132-33.
92. *See id.*
93. *See id.*
94. *Id.*
"has invited a rash of litigation that is testing the best minds in sports and law."96 This alleged rash of litigation is our next topic of discussion.

III. PRIOR COURT CASES INVOLVING DISABILITY DISCRIMINATION IN SPORTS LAW

Bringing lawsuits to support the rights of the disabled is largely a twentieth century phenomenon.97 One commentator has observed that the use of lawsuits to support the rights of the disabled—particularly disabled athletes—is inherently unfortunate. Instead, he argues that "[t]he decision to participate in . . . sports should be the product of mutual agreement between the handicapped or physically impaired athlete and family, school officials, and physicians."98 One should not forget that the ADA itself urges "the use of alternative means of dispute resolution . . . to resolve disputes."99 Despite these earnest appeals, like too many facets of American life, these decisions have often spilled into the courtroom. The complaints by plaintiffs have generally involved two areas: constitutional claims and statutory claims (under the Rehabilitation Act and/or ADA).

A. Constitutional Claims

The use of constitutional claims on behalf of the disabled has seen a rather brief and now largely settled history. One of the earliest suits specifically involving a disabled athlete was Neeld v. American Hockey League,100 in which a hockey player claimed that the league’s policy banning one-eyed players violated the Equal Protection Clause.101 This case is interesting because the court rejected the Equal Protection Clause claim when it found that the action resulted from private conduct, not state action subject to constitutional scrutiny; however, the court also included in dicta the statement that a disabled athlete has an enforceable constitutional right to participate in college sports if such program constitutes state action.102 Despite this promising language for disabled ath-
letes, no other court has recognized a fundamental right to play college or high school sports.\(^{103}\)

Other attempts to lay constitutional claims for the disabled (and disabled athletes in particular) have met similar doom, mainly because of a watershed disability case heard by the Supreme Court in 1985, *City of Cleburne v. Cleburne Living Center*.\(^{104}\) *Cleburne* involved mentally retarded citizens who sued under the Equal Protection Clause of the Fourteenth Amendment, claiming they were members of a protected class (i.e. the disabled) much like members of racial minorities.\(^{105}\) If this argument had been successful, the actions of the defendant in requiring building permits for group homes for the retarded would have been subject to "heightened scrutiny," a very tough hurdle for defendants.\(^{106}\) However, the Court disagreed with the plaintiffs and found that they were not part of a protected class; thus, the Equal Protection Clause only required a much easier rationality test.\(^{107}\) In the wake of *Cleburne*, a "school can justify the exclusion of [certain] handicapped athletes from its athletics program if its decision is rationally related to a legitimate objective."\(^{108}\)

Suits have also attempted to invoke the Due Process Clause as a method of securing rights.\(^{109}\) These attempts have largely been unsuccessful, and one commentator has noted that there is little chance that one could successfully prove there is a liberty or property interest in playing interscholastic or intercollegiate athletics; thus, there is little way to argue a violation of due process in these settings.\(^{110}\) Even if the disabled athlete *could* prove a property or liberty interest, however, a team "could rationally justify such exclusion based on concern for the athlete’s health [or other justifications]."\(^{111}\) This reasoning may doom due process claims in the professional sports world as well.

\(^{103}\) Id. at 1005.
\(^{104}\) 473 U.S. 432 (1985).
\(^{105}\) See id. at 437.
\(^{106}\) See id. at 440-42.

\(^{107}\) See id. at 446. A couple of caveats should be noted, however. First, despite the Court’s rule, it found that the actions of the defendant did not pass the rationality test. See id. at 448-50. Thus, it could be said that the disabled community won the battle but lost the war in this case. Secondly, Justice Marshall argued in dissent that the mentally retarded should be a quasi-suspect class because of the interest in establishing a home and the tragic history of discrimination against the retarded. See id. at 460-78 (Marshall, J., dissenting).

\(^{108}\) Mitten, *supra* note 7, at 1005.
\(^{109}\) See Mitten, *supra* note 91, at 17.
\(^{110}\) See id.
\(^{111}\) Id.
Given this history, the bottom line on constitutional claims appears to be that they are largely ineffective in the context of disabled athletes. The futility of constitutional claims has been offset, however, by the enactment of statutes prohibiting discrimination against the disabled.

B. Statutory Claims

The use of statutory law as a basis for lawsuits has a richer history than constitutional claims. Perhaps the first attempt to seek a judicial remedy for discrimination against the disabled occurred in 1934, when a father unsuccessfully sued a school system under an Ohio statute to have his mentally retarded son admitted to public school.112 The enactments of the Rehabilitation Act and the ADA have resulted in more and more private litigants asserting discrimination claims in the courts.113 Unlike the federal constitution, these statutes require a "substantial justification" rather than a mere rational basis for discriminating against a disabled athlete.114 Before the Casey Martin case, these statutes had never been applied to professional sports.115 However, a wide variety of claims had been brought at the high school and collegiate levels, disabled coaches had sued over discriminatory job requirements under the ADA, and some disabled professional athletes had brought state claims based on laws similar to the ADA. These prior cases, especially the high school and college athletics cases, provide some persuasive precedent for the new link between the ADA and professional sports, as the court in the Martin case noted:

Although the PGA Tour is a professional sports organization and professional sports enjoys certainly, a much higher profile and display of skills than collegiate or other lower levels of competitive sports, the analysis of the issues does not change from one level to the next. High school athletic associations have just as much interest in the equal application of their rules and the integrity of their games as do professionals.116

112. See Board of Educ. v. State ex rel. Goldman, 191 N.E. 914 (1934) ("Apparently this is a case of first impression in Ohio, and counsel have been unable to find a case anywhere in the United States which gives the right to exclude from all educational facilities any child within the prescribed ages upon the basis of an intelligence test. It is, therefore, necessary to look to the provisions of the statutes of Ohio with reference to the right to refuse this child admission to the schools."); see also Colker, supra note 26, at 3.
113. See Thomas, supra note 19, at 741.
114. Mitten, supra note 91, at 19.
115. See Dateline NBC, supra note 14.
1. The High School Cases

State high school athletic associations generally ban students who turn nineteen prior to the start of the school year from participating in sports. The reasons for this widespread ban are threefold: 1) "to prevent a competitive advantage for teams that use older players," 2) "to protect younger [presumably smaller] players from injury," and 3) "to discourage ‘red-shirting,’ the practice of delaying education to gain athletic maturity." At times, these policies have inadvertently affected the eligibility of students who were held back in school purely because of a learning disability. Courts have differed as to whether waiver of these age requirements is a reasonable modification under the federal disability discrimination statutes.

The early trend among courts seemed to be that the federal laws required a waiver of the age requirement when it came to disabled athletes. For example, the Court of Appeals of Texas, in the 1993 case of *University Interscholastic League v. Buchanan*, examined the ban imposed by the defendant League (which regulated high school athletics in Texas), finding that "the underlying purpose of the over-19 rule is to ensure the safety of the participating student athletes and the equality of competitors." Buchanan, who had been held back in school because of a learning disability, requested a waiver of the League rule so that he could play football, a move the League resisted. Because Buchanan had not participated in red-shirting and was average in size for the team, the court found that the concerns that made the rule necessary were not present if he were allowed to play. Thus, as the court reasoned, "[a] waiver mechanism for the over-19 rule would permit the [League] to consider the facts of particular situations in order to make individualized determinations as to the enforcement of the rule. Such determinations are reasonable accommodations."

The reasoning of the Buchanan case found support shortly thereafter in a federal court. In *Johnson v. Florida High School Activities Associa-

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117. See Kasperski, *supra* note 20, at 186.
118. *Id.*
119. *Id.*
120. *Id.*
121. See Kasperski, at 176, 186 & 193.
122. 848 S.W.2d 298 (Tex. Ct. App. 1993) (addressing the IDEA and Rehabilitation Act).
123. *Id.* at 300.
124. *See id.* at 300.
125. *See id.* at 301-02.
126. *Id.* at 302.
tion, Inc., \textsuperscript{127} the U.S. District Court for the Middle District of Florida in 1995 addressed a situation very similar to the Buchanan case. Johnson had been held back in school because of a hearing disability, preventing his participation in high school sports under the Florida over-19 rule.\textsuperscript{128} Much like the Buchanan court, the district court here held that; 
"
[r]esolution of this issue requires an examination of the purposes of the age requirement as applied to the instant case."\textsuperscript{129} It quickly reasoned that:

[T]he relationship between the age requirement and its purposes must be such that waiving the age requirement in the instant case would necessarily undermine the purposes of the requirement . . . . [W]aiving the age requirement in the instant case does not fundamentally alter the nature of the program. . . . Therefore, waiving the age requirement constitutes a 'reasonable accommodation' and must be undertaken.\textsuperscript{130}

Despite these victories for plaintiffs, the tide in the over-19 cases seems to be turning toward the defendants. The first wave of this tide came in 1994 with the Eighth Circuit decision in Pottgen v. Missouri State High School Activities Association.\textsuperscript{131} Pottgen, much like the other litigants discussed above, was held back in school because of a learning disability, which made him ineligible to play high school baseball.\textsuperscript{132} The court here rather bluntly stated that "the age limit is an essential eligibility requirement of the interscholastic baseball program," however.\textsuperscript{133} It then explained that "[w]aiving an essential eligibility standard would constitute a fundamental alteration in the nature of the baseball program. Other than waiving the age limit, no manner, method, or means is available which would permit Pottgen to satisfy the age limit. Consequently, no reasonable accommodation exists."\textsuperscript{134} In stark contrast to the Buchanan and Johnson cases, the court took specific issue with the argument that these situations required an individualized "essential eli-
bility requirement" inquiry, reasoning that if this were required "[a] public entity would never know the outer boundaries of its 'services, programs, or activities.' ... Clearly the ADA imposes no such duty." 135 Given this reasoning, the court held that waiving the rule is not a reasonable modification. 136

Pottgen was quickly followed in 1995 by the Sixth Circuit's decision in Sandison v. Michigan High School Athletic Association, Inc. 137 Under a similar fact pattern, the Sandison court quickly sided with the Pottgen decision:

[W]e agree with the court in Pottgen that waiver of the age restriction fundamentally alters the sports program . . . . Removing the age restriction injects into competition students older than the vast majority of other students, and the record shows that the older students are generally more physically mature than younger students. Expanding the sports program to include older students works a fundamental alteration . . . .

. . . .

[T]he plaintiffs are not subjected to "discrimination on the basis of disability," and waiver is not in this case a "reasonable modification." 138

The Pottgen and Sandison decisions seem to be holding water, as they have already been cited with favor in at least one lower court in another Circuit. 139 However, they have sparked some fierce commentary in law reviews. One author, for instance, chastises the Sandison court for failing "to assess whether an individualized waiver [of the over-19 rule] is a reasonable accommodation" and argues that courts need to be more willing to accommodate the needs of disabled athletes in general, in order "to further the goals of the ADA and Rehabilitation Act to eliminate the neglect and discrimination of disabled individuals." 140 A fellow commentator has been more specific, urging the adoption (by the Fifth

135. Id. at 931.
136. See Pottgen, 40 F.3d at 931. It should be noted that the case was accompanied by a strong dissent. The dissent argued that the court was obligated to look at the reasons behind the over-19 rule and make an individual assessment of the plaintiff to see if "the age requirement could be modified for this individual player without doing violence to the admittedly salutary purposes underlying the age rule." Id. at 932 (Arnold, C.J., dissenting). If so, the dissent reasoned, then it cannot be "‘essential’ to the nature of the program or activity to refuse to modify the rule.” Id. at 932-33 (Arnold, C.J., dissenting). The dissenting opinion was cited with favor in Johnson. See 899 F. Supp. at 585.
137. Sandison, 64 F.3d 1026.
138. Id. at 1035-37.
140. Thomas, supra note 19, at 757, 762.
Circuit) of the “case-by-case” analysis used in Johnson, Buchanan, and Dennin which weighs the individual interest of the disabled student and the purposes of the over-19 rule. This author also urges high school athletic associations to adopt their own waiver procedures that apply to the disabled, dismissing the additional work required as “not an undue burden,” but conversely mandated by the Rehabilitation Act and the ADA.

Despite the voices of these critics, the trend represented by Pottgen and Sandison seems to comport with the views of one eminent sports law scholar. Professor Mitten argues that a sports organization does not have to substantially modify its standards by changing its rules of play or reducing the quality of team play to enable a disabled athlete to participate, given Supreme Court precedent. Furthermore, he states that a disabled “athlete is not ‘otherwise qualified’ if physically unable to perform or function effectively in a particular sport,” and organizations may validly exclude disabled athletes for safety reasons. These arguments, along with the Pottgen and Sandison decisions themselves, seem to raise the bar on the definition of “reasonable accommodations” and “reasonable modifications” for plaintiffs. Thus, it is not clear from the high school cases alone that Casey Martin would have an easy time in his simple request to waive the “no cart” rule of the PGA.

2. The College Cases

Resort to the federal disability discrimination laws has also begun to appear in college sports. Several federal district courts have found themselves deciding what is a reasonable accommodation or modification in this setting. Unfortunately for the sake of clarity, the results are diverse. A landmark case in this area is the 1995 district court decision in Pahulu v. University of Kansas. Pahulu had a scholarship to play football at Kansas. During a scrimmage, he suffered a hit to the head. After-

141. See Kasperski, supra note 20, at 193-94.
142. Id. at 194-96. Kasperski notes with favor that the Colorado High School Activities Association has already “demonstrated such foresight in developing such a process.” Id. at 194.
143. See Mitten, supra note 91, at 18 (citing Southeastern Community College v. Davis, 442 U.S. 397 (1979) and Alexander v. Choate, 469 U.S. 287 (1985)). For example, Mitten states that “it is not necessary to require able-bodied athletes to use wheelchairs to enable paraplegics to play college basketball.” Id.
144. Id. at 18.
146. See id. at 1388.
147. See id.
ward, the team doctors determined that he had a congenitally narrow cervical canal and disqualified him from the team. Pahulu went to several other doctors on his own, all of whom said it was safe for him to play, but the team still barred him. He sued under the Rehabilitation Act, asking that he be allowed to play. The court's ruling on his claim is revealing:

[T]his court finds that for Pahulu, intercollegiate football may be a major life activity, i.e., learning. The defendants' action, however, is not a substantial limitation upon the plaintiff's opportunity to learn . . . . [T]here are a myriad of other educational opportunities available to Pahulu at KU. Consequently, Pahulu is not disabled . . . .

. . . .

Even if the plaintiff is disabled, he is not otherwise qualified . . . . Whether a person is "otherwise qualified" . . . primarily is a factual inquiry . . . . The defendants argue that Pahulu must satisfy the program's requirements, e.g., medical clearance for participation, in order to be otherwise qualified . . . .

. . . .

[T]he conclusion of the KU physicians, although conservative, is reasonable and rational. Thus, the defendants' decision regarding disqualification has a rational and reasonable basis and is supported by substantial competent evidence for which the court is unwilling to substitute its own judgment.

Another federal district court took a similarly dim view of a plaintiff's claim in the 1997 case of Bowers v. National Collegiate Athletic Association. Bowers, a learning disabled student, wished to play football at Temple University. However, the NCAA required students to finish "core course" requirements while in high school before eligibility for college football could be granted. When he applied, the NCAA's Clearinghouse (set up to review academic qualifications of players) ruled that he had only met three of the requisite thirteen core course requirements, which made him ineligible for college football. Bowers, claiming that the failure to meet the core course requirements stemmed from

148. See id.
149. See id. at 1388-89.
150. See Pahulu, 897 F.Supp at 1389
151. Id. at 1393-94.
153. See id. at 462.
154. See id. at 461.
155. See id. at 463.
his disability, sued the NCAA under the ADA, seeking a waiver of the core course requirements. The court was not sympathetic:

Eligibility requirements are "essential" or "necessary" when they are reasonably necessary to accomplish the purposes of a program. The basic purpose of the NCAA is to maintain intercollegiate athletics as an integral part of the educational program and to assure that those individuals representing an institution in intercollegiate athletics competition maintain satisfactory progress in their education.

The NCAA initial eligibility criteria are essentially minimum requirements which assure that freshmen student-athletes are sufficiently able to handle college academic work, along with the demand of participating in intercollegiate athletics during their first year of college.

The NCAA "core course" definition is essential to the NCAA's provision of the privilege of participation in the NCAA's intercollegiate athletic program. Complete abandonment of the "core course" requirement would fundamentally alter the nature of the privilege of participation in the NCAA's intercollegiate athletic program.

These cases may have been the beginning of a consistent trend were it not for the 1996 case of Knapp v. Northwestern University, in which a U.S. district court took the opposite stance of the Pahulu and Bowers courts. Knapp was a basketball player at Northwestern on a scholarship. When the team discovered that he suffered from a heart condition—ventricular fibrillation—it barred him from practicing or competing with the team. Knapp sued the university, claiming that allowing him to play with an internal defibrillator (with bi-weekly interrogation of the device) would be a reasonable modification of team policy. The court here took direct issue with the stance of the other federal courts. For example, it disputed the Pahulu court's logic (though without naming Pahulu directly) that a rationality test applied to cases involving discrimination against disabled college athletes. Moreover,

156. See id.
159. See id. at 1194.
160. See id.
161. See id.
162. See id. ("In deciding a case under the Rehabilitation Act the rational basis test is not applicable.")
the judge issuing the opinion took direct issue against other courts by name (including Pahulu) when he said that:

The district courts, and these are the only courts that have addressed the issue, are split over whether participation in sports is a ‘major life activity . . . .

. . . .

While the issue is not free from doubt, I find that intercollegiate sports competition may constitute a major life activity. I find, without doubt, that it is for Nicholas Knapp.\textsuperscript{163}

Finally, the court noted that “[i]t also undermines the purpose of the Rehabilitation Act not to allow a disabled individual to pursue his chosen field,”\textsuperscript{164} and “the Rehabilitation Act requires that remote or minimal risks not be used to legitimize discrimination.”\textsuperscript{165} With all of these considerations in mind, the court decided that the only reasonable accommodation was to allow Knapp to play with an internal defibrillator interrogated bi-weekly. The bar had been lowered much closer to the ground for plaintiffs like Casey Martin with this case.

3. Tentative Steps into Professional Sports

Though Casey Martin was the first to apply federal disability laws to professional sports, several cases had danced on the perimeter of this area in the past. In combination with the amateur sports case discussed above, these cases may shed a little light on how successful a leap into the professional arena might prove to be. To begin, professional athletes had successfully challenged professional sports league rules prohibiting athletes with certain disabilities from competing on the field of play under state employment discrimination laws.\textsuperscript{166} A prime example is the case of Neeld v. American Hockey League,\textsuperscript{167} in which a U.S. district court forced waiver of a league’s rule that prohibited one-eyed players from competing; the court reasoned that the rule violated New York’s Human Right Law, which prohibited discrimination on the basis of disability unless the disability is a bona fide occupational hazard.\textsuperscript{168} Though obviously not binding precedent, this case might at least be persuasive in the Martin situation.

\textsuperscript{163} Knapp, 942 F.Supp at 1195.

\textsuperscript{164} Id.

\textsuperscript{165} Id. at 1195, 1197.

\textsuperscript{166} See Mitten, supra note 7, at 1003.


\textsuperscript{168} See id.; see also Mitten, supra note 7, at 1003 & n.96.
A perhaps more tenuous—but nonetheless helpful—comparison could be made to the 1992 U.S. district court case of Anderson v. Little League Baseball, Inc.\textsuperscript{169} Anderson, who was confined to a wheelchair, had been acting as a Little League coach for several years.\textsuperscript{170} The national company controlling Little League adopted a new policy forbidding people in wheelchairs from coaching on the field for the safety of children (i.e. concerns that children would collide with the wheelchairs).\textsuperscript{171} Anderson filed suit under Title III of the ADA, seeking an injunction against the new policy.\textsuperscript{172} In deciding against Little League Baseball, the court chastised it for enacting a blanket policy without engaging in an individual assessment over whether Anderson was a safety threat or whether reasonable modifications could be made that would allow him to coach.\textsuperscript{173} As the court put it, “[r]egrettably, such a policy—implemented without public discourse—falls markedly short of the requirements enunciated in the Americans with Disabilities Act and its implementing regulations.”\textsuperscript{174} The link to Casey Martin might not seem obvious, but here was a case where an employee in a sports setting was granted relief by the court, all because a sports league had implemented a blanket policy which banned him from participating.\textsuperscript{175} The bar had apparently been lowered again for Martin.

IV. THE CASEY MARTIN CASE

Given this sometimes confusing and diverse case history, it would be easy to see why the Casey Martin case was not a slam dunk for either party. For one thing, Martin could not bring a constitutional claim against the PGA with any hope of success. In addition, the courts’ definitions of “reasonable modification” and “fundamental alteration” under Title III and similar statutory provisions had been murky at best, for no consensus had been reached across the nation. Furthermore, no court had directly applied Title III to the world of professional sports, and it remained to be seen whether this setting would make a difference.
in defining the relevant terms. Finally, and perhaps most importantly, no case had directly applied Title I to sports leagues. It remained to be seen whether these organizations would indeed be seen by a court as employers subject to the ADA's prohibition of employment discrimination.

On top of the indecisive history of caselaw governing disabled athletes, the Martin case presented two unusual litigants: Martin himself and the PGA. The unique characteristics of these two parties, as with many court cases, would help guide the court’s decision. Thus, a greater understanding of the two litigants is helpful.

A. The Litigants

1. The Professional Golf Association

Evidence of golf in America dates back to 1659, when some historical accounts relate the game being played in upstate New York. Similar accounts discuss the game being played around Savannah, Georgia, and Charleston, South Carolina, by early settlers. After 1811, these accounts disappeared in newspaper stories, and the curiosity seems to have died out. The history of golf in America really begins on February 22, 1888, when six men assembled in a cow pasture in Yonkers, New York with a set of golf clubs and balls brought back from Scotland by Robert Lockhart. By November of 1888 the men had come to enjoy this new pastime so much that they decided to form a club that would provide funds for maintenance of the pastureland course and “cement the comradeship that had evolved among the handful of golf lovers.” Accordingly, they adopted a set of simple resolutions—a sort of “Magna Carta” of American golf according to historians. This simple act would prove to spark an amazing growth of the sport. By the dawn of the twentieth century, the number of organized golf clubs would reach one thousand.

In the first two or three decades after its birth in Yonkers, golf had no pro tour. In 1916, however, the PGA was founded. Though it was not even close to being a labor union that would protect the players, the

177. See id.
178. See George Peper, Golf in America: The First One Hundred Years 8 (1988).
179. See id. at 8-9.
180. Id. at 11-12.
181. See id. at 12.
182. See id.
183. See Peper, supra note 178, at 57.
184. See Barkow, supra note 176, at 56.
PGA gave the pros an organizational entity, with a constitution, bylaws, and its own seal.\textsuperscript{185} The early tour was not very successful, and the professionals who played on it were not very good compared to their counterparts in Europe.\textsuperscript{186} To add to the problem, the PGA almost immediately split into two camps—touring pros and teaching pros.\textsuperscript{187} The war between these two camps raged for thirty years, and gave the game a poor public image.\textsuperscript{188} By the late 1940's, however, players began to understand the value of a good image, and good behavior began to prevail among all members of the PGA.\textsuperscript{189} The arrival of television coverage in 1954, however, was the real unifying force in the PGA, and the game has grown tremendously in power and money since that time.\textsuperscript{190} By 1967, the PGA had grown so powerful that the players owned the television rights to all tournaments in which they participated, were able to control many aspects of production (such as choice of networks, announcers, and advertisers), and oversaw the budget priorities of the PGA itself.\textsuperscript{191}

Despite its sometimes rancorous past, pro golf remains a sport ruled by tradition.\textsuperscript{192} At the heart of this tradition are the rigid rules by which pro golf governs itself.\textsuperscript{193} The PGA “has a powerful interest in the clear [enforcement] of its rules”\textsuperscript{194} and has seldom been swayed to bend its rules in matters of personal safety or comfort.\textsuperscript{195} Many of the PGA's

\begin{itemize}
    \item \textsuperscript{185} See id. at 57.
    \item \textsuperscript{186} See Peper, supra note 178, at 57.
    \item \textsuperscript{187} See id. at 69.
    \item \textsuperscript{188} See Barkow, supra note 176, at 98.
    \item \textsuperscript{189} See id. at 104. For example, by this time players had agreed to a code of conduct which prohibited, among other things, criticizing golf courses in public; however, the players refused to support a prohibition of profanity! See id.
    \item \textsuperscript{190} See id. at 248, 250-51.
    \item \textsuperscript{191} See Barkow, supra note 176, at 254-55.
    \item \textsuperscript{192} See Maloney, supra note 2 (quoting pro golfer Lonnie Nielsen: “It's such a game of tradition. Walking and having a caddie is the way the game has been played for years. I don’t know how important tradition is in a decision like [the Casey Martin case], but when people think of golf on the uppermost levels, that's how we envision the game being played.”); see generally Eberl, supra note 1.
    \item \textsuperscript{193} See Eberl, supra note 1, at 3.
    \item \textsuperscript{194} Id. at 8.
    \item \textsuperscript{195} See id. at 23. Eberl offers this as an (amusing but true) example: [T]wo players on the final nine holes arrived at a teeing area where they discovered some water buffalo placidly grazing. The beasts glanced at the players with bleak and suspicious eyes. The players, properly apprehensive, decided to forego that tee area and headed for the forward tees, from where they played, far removed from the buffalo. Upon their return to the clubhouse when their rounds were completed, the two men turned in their scorecards to the committee and amiably reported the incident with the animals.
\end{itemize}
rule decisions have involved questions of equipment (such as golf carts) and these questions have also supplied the biggest headaches for the PGA over its history.\textsuperscript{196} Despite the rigidity of many of the rules governing PGA play, the general game of golf is also inherently subject to notions of equity, both in deciding on rules questions themselves and in attempting to equalize competition between players.\textsuperscript{197} As one author has put it, "[t]he underlying philosophy of all this is to create equity among players of contrasting abilities, thus, in theory at least, increasing the pleasure for everyone."\textsuperscript{198} This is an interesting notion when one considers the situation that Casey Martin found himself, a dilemma that could go either way under this philosophy.

When looking at the history of the PGA, it is helpful to examine two areas that have often touched it—charges of discrimination and its dealings with the disabled—sometimes with results that are germane here. On the discrimination front, when the PGA was born in 1916, its constitution required members to be of the Caucasian race.\textsuperscript{199} It took until 1961 to get that clause removed from the constitution.\textsuperscript{200} Remnants of that policy lingered, however. As late as 1973, eighteen U.S. congressmen sent a letter to the PGA complaining that a "form of subtle discrimination taints the image of the tournament and brings no credit to the world of professional golf."\textsuperscript{201} Amazingly, "no black man was invited to [one of the premier pro tournaments,] The Masters, until 1975."\textsuperscript{202} These incidents may have contributed to a negative public image for the PGA, one that advertises a willingness to discriminate, whether the subject is race or disability, and may explain some of the public debate that accompanied the Casey Martin case.

\textsuperscript{196} See id. at 112. It is interesting to note that the rigidity of the PGA's rules, especially on the use of golf carts in its tournaments, comes at a time when the use of caddies is dying out on most golf courses and golf carts are becoming the norm. See id. at 55.

\textsuperscript{197} See id. at 39. The handicapping system, though not used in the PGA, is one example of this philosophy. See id. at 127-28.

\textsuperscript{198} EBERL, supra note 1, at 128.

\textsuperscript{199} See BARKOW, supra note 176, at 206. Economics, rather than overt racism, appears to be the driving force behind this clause; the PGA's founders feared that a contrary policy might cause them to "lose control over a lot of cheap caddie and club-cleaning labor." See id. at 207.

\textsuperscript{200} See id. at 206; PEPER, supra note 178, at 69.

\textsuperscript{201} BARKOW, supra note 176, at 216.

\textsuperscript{202} PEPER, supra note 178, at 69.
Despite the seemingly unique nature of the Martin case, the PGA has often had to deal with the plight of disabled golfers, or at least those suffering from temporary infirmities. For example, Ben Hogan limped around the course and won the U.S. Open in 1950, sixteen months after suffering a near-fatal auto accident. In 1954, in the first televised PGA tournament, Ed Furgol won the U.S. Open despite having a withered left arm from a childhood accident. In the 1964 U.S. Open, Ken Venturi literally staggered his way through the last nine holes of play after finishing eighteen holes in sweltering heat, nearly collapsing at the end but pulling off an unlikely victory. The drama of incidents such as these had largely endeared the PGA to the public, but the tide may have begun to change by the 1980's. By then, the cart issue had become a reality for disabled players. In 1987, Charlie Owens, who had been injured in a parachuting incident while in the Army, petitioned for use of a cart during a professional tournament. When permission was denied, Owens walked the first nine holes on crutches before withdrawing. Similarly, in 1987 Lee Elder asked for permission to use a cart after he suffered a mild heart attack. His request was similarly denied. Of course, both of these requests came before the ADA was passed, which put Casey Martin in a whole new ball park (or golf course, perhaps). Conversely, in the 1990's the PGA has seen players such as Paul Asinger, battling cancer and weakened by the effects of chemotherapy but still walking with the rest of the players, apparently without complaint. Thus, the PGA apparently had some public image factors in its favor as well going into the Martin court case.

204. See BARKOW, supra note 176, at 228-29.
205. See Charles & Sider, supra note 203, at 48.
206. In commenting on these earlier incidents, Casey Martin’s father stated: “I love the stories about Venturi and Hogan, but those stories miss the point. Neither Venturi nor Hogan was disabled. They had hope, and they had the opportunity to recover. Casey doesn’t.” Garrity, supra note 4.
208. See id.
209. See id.
210. See id.
211. See Dateline NBC, supra note 14.
Today, the PGA remains a non-profit association of pro golfers. It sponsors three tours for professionals: the PGA Tour, the Senior PGA Tour, and the Nike Tour. The Nike Tour operates as sort of a "minor league" tour for players who are less talented or are developing their skills. There are several ways for a young golfer to enter either the PGA Tour or the Nike Tour. The most important way is the PGA's "three-stage qualifying school tournament." To enter this tournament, the young player must pay a $3,000 entry fee and submit two letters of reference. The first stage of the tournament is 72 holes of golf. Those who do well enough to make the cut in this round move on to a second stage consisting of another 72 holes of golf. The top finishers after this stage, approximately 168 players, move on to stage three, which consists of 108 holes. The 35 players with the lowest scores after stage three are given invitations to play on the PGA Tour, while the next 70 are given invitations to play on the Nike Tour. Of critical importance to this discussion, participants are allowed to use a golf cart in the first two stages of the tournament, but must walk during the stage three rounds. A player on the Nike Tour can later move up to the PGA Tour by winning three Nike Tour tournaments during a single season or by finishing in the top fifteen money-winners for the year. Another route for Nike Tour players to enter the PGA Tour is to obtain a sponsor's exemption for individual tournaments. This entire process is overseen by the current PGA Commissioner, Tim Finchem, a former Democratic activist.

213. See id.
214. See Snow, supra note 95, at 9A.
216. Id.
217. See id. at 1322.
218. See id. at 1321.
219. See id.
220. See Martin, 984 F. Supp. at 1321.
221. See id.
222. See id. at 1322. Carts are also used on the entire Senior Tour. See Charles & Sider, supra note 203, at 48.
224. See Kevin Cook, Golf Plus/News & Notes, Sports Illustrated, Feb. 23, 1998, at G4. This entire process has changed a bit over the years. Most notably, until the late 1950's, the PGA required new professionals to put in a six-month apprenticeship, during which they could not collect any prize money. See Barkow, supra note 176, at 234.
225. See Snow, supra note 95, at 9A.
2. Casey Martin

If ADA advocates had wanted a poster child, they could not have asked for one better than Casey Martin, for his life is clearly one of over-achievement and accomplishment despite adversity. Martin “was born with Klippel-Trenaunay-Weber syndrome, a rare… disorder that causes blood to pool in his lower right leg.”226 Lacking the rich circulatory system in this leg that most people have, his bones below the knee have “become increasingly brittle.”227 Despite this disability, he played sports all throughout secondary school and became an accomplished shooter for his school basketball team in the sixth and seventh grade.228 As his condition worsened as a child, however, he “had to constantly ice his knee, where blood [settled and eroded] the cartilage.”229

After high school, Martin attended Stanford University on an athletic scholarship, where he played golf from 1990 to 1995 and became a two-time Academic All-American.230 While at Stanford, he captained the team to a national championship231 and roomed with no less than Tiger Woods himself.232 To add to the mystique, while at Stanford he studied economics, played piano at fraternity parties (he has long been an accomplished pianist), studied the Bible, and mentored a Hispanic youth.233 Midway through his college career, however, his leg began to worsen, with x-rays showing erosion of both bones and muscles in his afflicted leg.234 As a result, he developed shinsplints and asked the NCAA for permission to use a cart in the 1994 NCAA Championship in Texas.235 The NCAA not only consented for the tournament,236 but also let him use a cart for the remainder of his junior year and his entire senior year as well.237

After leaving Stanford, Martin walked during his two years on the Hooters mini-tour, though he also sometimes played on the Tommy Ar-
mour mini-tour because it allowed carts. After this two year period, Martin entered the PGA’s qualifying school tournament hoping to make the PGA or Nike Tours. He made it through the first two stages, utilizing a cart as allowed by the PGA rules. PGA rules, however, did not allow him to use a cart for stage three, and he filed for an injunction under the ADA in federal district court seeking a waiver of the no-cart rule. The district court granted a preliminary injunction directing the PGA to allow him to use a cart during the third stage of the qualifying school tournament, and the PGA promptly lifted the no cart rule for all players taking part in the third stage rounds. Unfortunately, Martin missed qualifying for the PGA Tour by two strokes, though he did qualify for the Nike Tour. The federal district court quickly extended the preliminary injunction to include Martin’s first two tournaments on the Nike Tour. In his first Nike tournament, in January 1998, Martin won and was soon starring in his own Nike ad. PGA lawyers soon stipulated that he could ride in all Nike Tour tournaments until his court case was heard in full. As the full trial on Martin’s ADA case neared, his doctors warned that his leg was getting worse, describing his right knee as “that of a 70- or 80-year-old,” and telling him that he may face amputation. Meanwhile, Martin himself, when asked why he was so insistent on participating in the pro golf tour despite his disability, cheerfully replied, “[t]his is what I’ve wanted to do since I was a kid.” The stage was now set for a unique, if somewhat melodramatic, showdown that would test the limits of the ADA.

B. The Pretrial Phase

In the months between the federal district court’s granting of a preliminary injunction and the full trial, the Martin case received an incredible airing with the American public, in the press, and among fellow pro golfers. In many respects, like too many cases these days, the trial...
seemed to occur even before the court heard the legal merits of the case, so vocal was the public debate. For its part, the PGA, in the guise of Commissioner Tim Finchem, while expressing sympathy for Martin, basically advanced two arguments in public leading up to the trial: 1) that walking is essential to the game of pro golf; and 2) the PGA Tour has the legal right to make its own rules for competition. (One writer quickly noted that this second argument was precisely the same justification that golf used to exclude blacks for so many years.)

Some of the first people to pick sides in the debate were fellow pro golfers. Lining up behind the PGA were such legends as Arnold Palmer, who gave a deposition arguing that “walking is a traditional and intrinsic part” of pro golf and that Martin would gain an unfair advantage if allowed to walk, and Jack Nicklaus, who offered to do the same. Ken Venturi, who had staggered through the U.S. Open in 1964, argued that “[t]his is not a case of personality. This is a case of an athletic event, which you have to do.” Tour veteran Brad Faxon was even more pointed in his comments, referring to fellow pro Jose Maria Olazabal, a former Masters champion who has suffered a series of foot injuries in recent years: “I don’t see guys in the NFL who have knee injuries getting mopeds. I didn’t see Jose Maria Olazabal getting a cart when he was hurt. Where do you draw the line?” Another pro, David Frost, quipped, “I don’t think it’s right.... If he’s riding and we’re walking, it’s not the way the game was meant to be played.” Even Lonnie Nielsen, who had to abandon the PGA Tour prematurely several years ago due to an arthritic knee, “joined the chorus of pros who sided with the longtime PGA practice of walking: ‘I feel bad for Casey Martin and the condition that he has. It’s a tragedy ... but I really feel like walking is an integral part of the game.’

Lining up behind Casey Martin were some equally impressive pros. Greg Norman personally called Martin in the pretrial days, telling him

249. See Maloney, supra note 2 (quoting Tim Finchem: “This is a very unfortunate system we find ourselves in, having to litigate whether a fellow we think a great deal of can play the game.”).


251. See Snow, supra note 97.

252. See Garrity, supra note 4, at G10; Charles & Sider, supra note 203.


254. Sheeley, supra note 253, at D5.

255. Id.

256. Maloney, supra note 2, at 22.
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the following: "The [PGA] is putting pressure on me to testify on its behalf . . . . But I won't make a very good witness for them because I'm on your side. I hope you get your cart, and I look forward to playing with you someday."257 The Nike Tour's leading money winner, Eric Johnson, even provided some legal evidence for the Martin legal team when he stated that walking actually helped with his rhythm and that it was a part of the game "only as a purpose to get to the next shot."258 Fellow pros Brian Henninger and Peter Jacobsen were also publicly supportive of Martin.259

In the middle of the road were several golfers who apparently could not pick a definite side in the debate. Some could see merits in both sides' arguments. Phil Mickelson was typical, saying, "[I]f we could make an exception in this one case, I might be for it . . . . but you have to ask yourself . . . where does it end?"260 Martin's old buddy Tiger Woods noted at first that if he had to ride in a cart he would be "off rhythm" and argued that walking allowed a player to work off nervous energy.261 Later, however, when asked if riding in a cart would be an advantage, he said that "it could be."262 Even golfers that you would expect to stand solidly behind Martin expressed empathy for both sides. Specifically, Greg Jones, founder and president of the advocacy group Association of Disabled American Golfers, noted that "Casey deserves to have the opportunity to try to make a living. At the same time, if he has a cart and it's 100 degrees and 90 percent humidity, there certainly is the potential to change the competitive nature of the game."263 Some of those with sympathies in both camps eventually came up with novel solutions to the impasse. For example, professional Steve Lamontagne proposed that doctor's put a percentage figure on Martin's disability (say 66 percent) and require him to walk a commensurate number of golf holes to reflect this percentage (six of the nine holes using the 66 percent example).264

257. Garrity, supra note 4, at G10.
258. Golf Pro Supports Martin's Case, Says Walking Keeps Scores Low, FLORIDA TODAY, Feb. 4, 1998, at 2C. Johnson's sentiments were shared by Stanford golf coach Wally Goodwin, who coached Martin to the 1994 NCAA championship and stated that carts hinder more than help a player's game. See id.
259. See Morfit, supra note 207, at G6.
260. Id.
261. Kerasotis, supra note 231, at 1C.
262. Charles & Sider, supra note 203, at 48. Columnist Tony Snow reported Woods' comment more emphatically as "It probably is." Snow, supra note 97 (emphasis added).
264. See Peter Kerasotis, O'Neals Ignore Loss, Manners, FLORIDA TODAY, Feb. 24, 1998, at 1C.
With all of this open discussion among pro golfers, the press seemed to have a field day with the Martin case in the days leading up to trial, sometimes in tasteless fashion as we have regrettably come to expect from the American media. *Hard Copy* even offered a videographer several thousand dollars if he could come up with a clear image of Martin’s withered leg.265 Most comments by the media seemed to favor Martin in his quest. For example, *Sports Illustrated* magazine poked fun at the PGA by noting that “no one has succeeded at tournament golf by virtue of his walking ability.”266 Columnist Tony Snow remarked, “[A]s far as I’m concerned, Martin stands on the side of the angels in his battle against the Lords of the Country Clubs.”267 A newspaper sports writer in Florida accused the PGA of using the same philosophy as first-grade teachers: “If I do it for you, then I’ll have to do it for everyone.”268 Even *Time* Magazine jumped on the bandwagon when it poked fun at the PGA’s argument that walking is integral to golf by derisively asking “how many golfers really look like they’ve done a lot of distance training?”269

The media was not the only outside body to support Martin, as politicians soon jumped on his bandwagon. The California legislature passed a resolution supporting his request to use a cart, and the San Francisco Board of Supervisors praised his “courage and honor in tackling an issue of great interest to all Americans.”270 The original sponsor of the ADA, Senator Tom Harkin, held a press conference with Martin to support his case, and Bob Dole publicly wondered if the letters PGA stood for “Please Go Away.”271

With all of the comments by public figures, it was inevitable that the public would quickly choose sides. Most people aligned with Martin,272 but the choice was not unanimous, as the public found itself split much like the pro golfers themselves.273 Newspapers and other outlets eagerly

265. See Garrity, supra note 4, at G10.
266. Id. This statement appears a bit hypercritical on *Sports Illustrated*’s part, for it had earlier argued that “in a five-hour round, roughly five minutes are spent hitting the ball. The rest of the time you’re chasing it. Stamina counts.” Morfit, supra note 207, at G6.
267. Snow, supra note 97, at 9A.
268. Kerasotis, supra note 231, at 1C.
270. Garrity, supra note 4, at G10.
271. Id.
272. See Sheeley, supra note 253, at D5.
273. Backtalk: Can Casey Get a Lift?, supra note 3 (reporting that readers were split over Martin’s case and listing some of the public’s revealing comments on both sides).
conducted polls of the public to get a pulse on the nation’s sentiments. Against this entire backdrop, Casey Martin began to find hope that he would be the victor no matter what happened, saying, “[I]f this goes to trial and they win, I don’t know if they really win.” With the public relations battle having been waged for several months now, the entire matter was ready to move to trial.

C. The District Court Decision

When Martin filed his request for an injunction in the U.S. District Court for the District of Oregon, Magistrate Judge Thomas Coffin was assigned to the case. Judge Coffin’s holdings are spread over two reported decisions: his rulings on the PGA’s motion for summary judgment issued January 30, 1998, and his final finding of fact and conclusions of law issued February 19, 1998. Judge Coffin’s reasoning on Martin’s claims are spread throughout both opinions, so a combined discussion of the two reported decisions is necessary.

Martin based his claims against the PGA on Titles I and III of the ADA. In his Title I claim, he asserted that the PGA was an employer as described in Section 12111(5) of the ADA and had discriminated against him “because of his disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges

274. See, e.g., Backtalk: Should the PGA Bend?, FLORIDA TODAY, Jan. 18, 1998, at 1C.
275. See Golf Viewpoint (visited March 6, 1998) <http://www.igolf.com/viewpoint/survey/martin/kangaroo.htm>. The site did a remarkable job in summarizing the valid legal and public relations arguments that this paper has highlighted. To be specific, the site listed the PGA’s arguments as: 1) Riding a golf cart is a decided advantage to a player; 2) Walking is integral to the spirit and conduct of the game of golf; 3) The PGA Tour should be able to decide on its own destiny without the interference of the court; 4) Professional sports are not the place for accommodations to be made for disabled people; 5) Allowing Casey Martin to ride diminishes the achievement of players like Ben Hogan and Ken Venturi; and 6) Carts were never a part of the game before the 1960’s and should not be now. Conversely, the site listed Martin’s arguments as: 1) The PGA Tour already uses carts on the Senior Tour and as shuttles between certain holes to speed play; 2) The ADA requires that accommodations for disabled players be made; the PGA is a public place and employer and must adhere; 3) Riding a cart is not an advantage; in many ways it is a disadvantage; 4) Modern courses are designed with golf carts in mind; 5) Walking is no longer part of the game; and 6) Most players would not use a cart even if they could. See id.
277. See Martin, 984 F. Supp. 1320.
278. See Martin, 994 F. Supp. 1242.
279. See 984 F. Supp. at 1323.
of employment.” In ruling on this Title I claim, the court did not have to decide whether Martin was indeed “disabled,” for the PGA chose not to contest this issue. Thus, the only real issue to decide under the Title I claim was whether the PGA is an employer at all, which would determine if it was even capable of employment discrimination. Surprisingly, the judge made very short work of this issue by issuing just one sentence: “As I reject (without detailed elaboration) plaintiff’s claim that he is a PGA Tour employee . . . , I will discuss only his remaining claim . . . under Title III.”

Judge Coffin’s cursory treatment of the Title I claim is surprising because he could have easily cited past cases dealing with the issue of whether a non-profit sports association is an employer or not. A prime example is the case of Graves v. Women’s Professional Rodeo Association, Inc., a Title VII case. (Though falling under a different statute, courts have long analogized ADA claims to Title VII cases when defining “employer.”) Graves put the issue as follows:

"Existence of . . . coverage requires a two-part analysis. The claimant must first demonstrate that the defendant is a covered employer within the meaning of [the statute], thus conferring subject matter jurisdiction on the court. After that is determined, and only if it is determined affirmatively, the claimant must demonstrate the existence of an employment-type relationship which he alleges is being unlawfully interfered with by the defendant."

In the case at hand, the defendant is a voluntary association whose members pay dues. The WPRA does not pay wages, withhold taxes, or provide insurance. The WPRA has a comprehensive set of rules and regulations that are to be followed by members who wish to compete in a particular contest. The WPRA cannot tell its members when and where to participate. Rather the members elect when to compete. This association differs little from numerous other associations, i.e. golfing associations, bowling association, etc. The members of the association who compete agree to abide by the association’s rules. In other words, the competing members agree to “play by the rules.”

280. Id.
281. See 994 F. Supp. at 1244.
282. See 984 F. Supp. at 1323.
283. 994 F. Supp. at 1247 & n.7.
Plaintiff could not have met the second prong of the test. The existence of an employment-type relationship is of crucial significance for those seeking to redress alleged discriminatory actions . . . . Here the only interference alleged is plaintiff's inability to participate in a competition for prize money. As such, plaintiff has not shown the existence of an employment-type relationship.286

Inclusion of this explanation would have done much to explain Judge Coffin's decision on Martin's Title I claims.

Martin's Title III claims consisted of two parts. First, he claimed that the PGA was subject to Section 12189 of the ADA, which requires that "any person [offering] examinations or courses related to applications, licensing, certification, or credentialing for . . . professional or trade purposes shall [do so] in a place and manner accessible to persons with disabilities."287 Again, Judge Coffin made incredibly short work of this claim, rejecting it in one brief sentence without any elaboration.288 Thus, the overwhelming majority of his decision encompassed Martin's final Title III claim, that the PGA was subject to ADA Section 12182's prohibition of discrimination 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.289

The PGA raised three defenses to Martin's remaining Title III claim.290 First, it asserted that it was exempt from Title III as a private club under Section 12187.291 In making this assertion, PGA lawyer William Maledon argued that the PGA was analogous to the Boy Scouts and should be similarly exempt from Title III.292 The court looked at

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286. 708 F. Supp. at 236-38 (emphasis added). On appeal, the Eighth Circuit stated the following: "We find no flaw in the District Court's analysis and may affirm because we, too, find that the relationship between WPRA and its members categorically resists classification as 'employment' according to the ordinary usage of that term." Graves v. Women's Prof'l Rodeo Ass'n, Inc., 907 F.2d 71, 72-73 (8th Cir. 1990).
287. 984 F. Supp. at 1323.
288. See 994 F. Supp. at 1247 & n.7.
289. See 984 F. Supp. at 1323.
290. See id.; 994 F. Supp. at 1244. One defense the PGA did not use was the "direct threat" argument (i.e. that Martin's participation in the PGA tournaments under any circumstances would pose a significant risk to his own health). See infra sections I.B.1 and I.B.2 for a general discussion of this defense. For a discussion of the "direct threat" problem in Casey Martin's specific situation, see Eldon L. Ham, When Athletes Want to Play But Doctors Say No, It's Off to Court, CHI. DAILY L. BULL., Feb. 20, 1998, at 6.
291. See 984 F. Supp. at 1323.
292. See PGA, Martin Head to Court, FLORIDA TODAY, Jan. 27, 1998, at 1C.
seven factors used to determine whether an entity qualifies as a private club: 1) genuine selectivity; 2) membership control; 3) history of the organization; 4) use of facilities by non-members; 5) the club’s purpose; 6) whether the club advertises for members; and 7) whether the club is non-profit. Finding marked differences between the PGA and the Boy Scouts when looking at these factors, the court rejected the PGA’s defense, finding it much more akin to a “commercial enterprise” than a private club.

In its second defense to Martin’s remaining Title III claim, the PGA argued that it was not a place of public accommodation at all because the courses it operates are not open to the general public between the boundaries of play during tournaments. The court rejected this argument as “flawed” for several reasons. First, it noted that Section 12181(7) of the ADA specifically included golf courses on its list of public accommodations. Secondly, the court noted that the PGA’s argument would render the private club exemption virtually irrelevant in many cases. Finally, the court noted that the ADA and its associated regulations “do not support the concept that places of public accommodation have zones of ADA application,” while chauvinizing the PGA for overlooking the fact that “people other than its own Tour members [such as caddies] are allowed within the boundary lines of play during its tournaments.”

The PGA’s final defense to Martin’s Title III public accommodation claim—that allowing Martin to use a cart would not be reasonable because it would mark a fundamental alteration of the game—occupied the greatest portion of the court’s attention. On this issue, the court cited such cases as Sandison and Pottgen, noting that—despite the holdings for the defendant in these cases—“the courts examined the purpose of each of the rules in question to determine if the requested modification was

294. See id. at 1323.
295. See id. at 1326.
296. Id. at 1326-27.
297. See id. at 1326.
298. See 984 F. Supp. at 1326.
299. Id.
300. Id. at 1326-27. In comparison, one federal appeals court has found that the National Football League is not a place of public accommodation. Ted Curtis, “Cart” Blanche? A Decision Requiring Accommodation for a Disabled Golfer Has Sports Lawyers Wondering What’s Next, A.B.A.J., Apr. 1998, at 34 (citing Stoutenborough v. NFL, 59 F.3d 580 (6th Cir. 1995)).
301. See 994 F. Supp. at 1249 (“[T]he ultimate question in this case is whether allowing plaintiff, given his individual circumstances, the requested modification would fundamentally alter PGA and Nike Tour golf competitions.”)
WHY IS THE PGA TEED OFF?

In attempting to find the purpose of the PGA's asserted no-cart rule in Martin's case, the court seemed perplexed, for it could not find any justification for it; as Judge Coffin put it rather succinctly, "nothing in the Rules of Golf requires or defines walking as part of the game." Nonetheless, the court accepted the PGA's proposition that the purpose of the walking rule was to inject the element of fatigue into the skill of shot-making. Despite this acceptance, the court stated that an individual assessment of Casey Martin's situation was necessary to see if the rule could be reasonably modified, citing past circuit court decisions for support of this proposition. In making this individualized assessment, the court relied on the testimony of several doctors (including Martin's) and the statements of fellow pros (such as Eric Johnson) in determining that "the fatigue factor injected into the game of golf by walking the course cannot be deemed significant under normal circumstances." On the other hand, the court, again relying on the testimony of doctors, determined that "walking for Casey Martin is a different story," concluding from an individual assessment of his disability that "it does not fundamentally alter the nature of the PGA Tour's game to accommodate him with a cart." In other words, the court found the requested accommodation of a golf cart "eminently reasonable" under Title III. Casey Martin had won.

D. The Immediate Aftermath of the District Court Decision

The Martin decision seemed immediately to spawn as much commentary as the pre-trial hoopla had. This time, however, many seemed more conciliatory and able to sympathize with both parties. Even Judge Coffin joined in this trend, for when he delivered his verdict he praised both sides for their arguments and singled out PGA Commissioner Finchem's testimony for its professionalism. "I don't see how anyone can fault the PGA Tour for its stand," said Judge Coffin. Even the Martin family was complimentary of Finchem, with Casey's father commenting, "[T]he thing that's awkward for me . . . is that I totally understand the

302. Id. at 1246.
303. Id. at 1249.
304. See id. at 1250.
305. See id. The court specifically rejected, without explanation, Pottgen's reasoning on this question. See id. at 1249 & n.10, 1250.
307. Id. at 1251-52.
308. Id. at 1253.
309. See Garrity, supra note 96, at 63.
310. Id.
other point of view."\(^{311}\) *Sports Illustrated* and other publications suddenly found themselves congratulating Finchem for showing courage and backbone in the whole debate.\(^{312}\) The public, though still apparently divided on the issue, appeared largely sympathetic to Casey Martin while more understanding toward the PGA.\(^{313}\) This was quite a change from the pre-trial stage, when newspaper columnists portrayed Finchem as a callous Chief Executive Officer and politicians denounced the PGA as a club for greedy, self-centered athletes.\(^{314}\)

Despite the amiable comments in these quarters, there were some who were clearly upset by the ruling. Pro golfers were some of the most vocal. Fred Couples called Judge Coffin’s ruling “a farce.”\(^{315}\) Arnold Palmer worried that when the gates of change open like this, “we may not have a Tour at all. It may disappear.”\(^{316}\) Tom Watson said, “[A]s much compassion as I have for Casey, I have contempt for the decision.”\(^{317}\) And Paul Azinger, who had walked tournament courses while suffering through cancer treatments, “insinuat[ed] that Martin [was] trying to get an advantage when he [really did not] need one.”\(^{318}\) The governing bodies of other professional sports seemed equally alarmed at the prospects of the *Martin* decision.\(^{319}\) Even a noted legal scholar chimed in with some concerns, noting that 1) golf has always been a game of overcoming the odds, regardless of one’s individual abilities, and 2) changes in procedures often look minor to outsiders, but can nonetheless be very big to those involved.\(^{320}\)

In the wake of the decision, PGA sponsors seemed eager to have Martin compete in their events, with one sponsor predicting that having Casey in the field “might be bigger mediawise than having Tiger [Woods].”\(^{321}\) For his part, Casey Martin immediately turned down several sponsors’ exemptions to play in PGA Tour events, believing that his

\(^{311}\) *Id.*

\(^{312}\) *See id.; see also* Rance Crain, *PGA Tour Stand on Disabled Golfer Shields the Sport from PR Bonanza*, *ADVERT. AGE*, Feb. 23, 1998, at 22.

\(^{313}\) *See Sportsview Backtalk: Debate Continues After Martin Ruling*, *FLORIDA TODAY*, Feb. 15, 1998, at 3C.

\(^{314}\) *See id.*

\(^{315}\) Cook, *supra* note 224, at G4.

\(^{316}\) Garrity, *supra* note 96, at 63.

\(^{317}\) *Dateline NBC, supra* note 14.

\(^{318}\) Kerasotis, *supra* note 231.

\(^{319}\) *See Garrity, supra* note 96, at 63.

\(^{320}\) Interview with Richard A. Epstein, James Parker Hall Distinguished Service Professor of Law, University of Chicago, in Atlanta, Ga. (March 12, 1998). *See also* Curtis, *supra* note 294.

game had slacked a bit after taking three weeks off for the legal battle\textsuperscript{322} and worrying that other players might be offended "if he took advantage of his situation too early."\textsuperscript{323} Martin returned to the Nike Tour, hoping to debut on the PGA Tour in 1999 (provided he can win two more Nike tournaments), according to his agent.\textsuperscript{324} No matter what his level of participation, commentators galore predicted that Martin would now be a boon to the game of golf, and would attract a healthy following on tour.\textsuperscript{325} Advertisers seemed to salivate over the prospects of endorsements by Martin, with one writer predicting that his golf cart would soon be festooned with corporate decals much like NASCAR automobiles.\textsuperscript{326}

Meanwhile, the PGA quietly planned to appeal Judge Coffin’s ruling to the 9th U.S. Circuit Court of Appeals, though it seemed reluctant to pursue the appeal aggressively.\textsuperscript{327} As Commissioner Finchem put it, "[I]t’s going to take years for the appellate process to resolve this issue. In the meantime, let’s see how well Casey can play."\textsuperscript{328} In other words, we may not see a final resolution to the Casey Martin saga for quite awhile.

V. CONCLUSION

\textit{Golf is the most human of games. In it a man can become the hero of an unbelievable melodrama, the clown in a side-splitting comedy, the dogged victim of inexorable fate, all without having to bury a corpse or repair a tangled personality.}

\textit{—Bobby Jones} \textsuperscript{329}

There are several lessons to be learned from the preceding discussion. First, the ADA, despite its brief history, has already caused significant changes for the lives of disabled people in America. It can be perhaps argued that not all of these changes have been positive for the nation as a whole, as some critics have pointed out. The Casey Martin case points out some of the dilemmas presented by the ADA, and the deep divisions that this statute can foster.

\textsuperscript{322} See Martin Not Ready to Use Exemptions, \textit{Florida Today}, Feb. 15, 1998, at 3C.
\textsuperscript{323} Cook, supra note 224, at G4.
\textsuperscript{324} See Martin Returns to Course Next Week, \textit{Florida Today}, Feb. 25, 1998, at 2C.
\textsuperscript{325} See Kerasotis, supra note 231, at 1C.
\textsuperscript{326} See Crain, supra note 312, at 22.
\textsuperscript{327} See Dateline NBC, supra note 14; Martin Returns to Course Next Week, supra note 318, at 2C. For an assessment of the PGA’s appeal by selected sports lawyers, see Curtis, supra note 300.
\textsuperscript{328} Cook, supra note 224, at G4.
\textsuperscript{329} EBERL, supra note 1, at 97.
Despite its seemingly unique character, the Martin decision is really just one in a line of cases dealing with public accommodations having to make reasonable modifications for disabled athletes. Courts for years have been wrangling over the level of modification that sports organizations are required to make under Title III. It appears, given the Martin decision, that the amateur or professional status of these organizations matters little in deciding Title III claims. Thus, the Martin case, as a district court decision, ultimately seems to be but a small voice in the chorus of Title III claims on behalf of disabled athletes.

The biggest unanswered question after Martin is the scope of Title I claims in the world of professional sports. Because the judge in Martin gave such short attention to this claim, it remains to be fully seen how employment discrimination will be viewed in the world of disabled pro athletes. Perhaps the only thing one can take from the Martin decision in this regard is that sports associations do not meet the Title I definition of "employer." Only time and new litigants will tell how Title I applies to more direct employment relationships such as sports teams.

Despite these shortcomings, the Martin case does stand as a watershed case in one aspect: The ADA has finally made a foray into the world of professional sports. This event is significant, for it may encourage others to wield the ADA as a means of seeking redress in this field and prepare the legal mind set for this eventuality. Thus, the tepid steps taken by the Martin case may just be the beginning of a new area of sports law.