Walking with Tradition v. Riding into Tomorrow: Olinger v. United States Golf Association

Julie L. Livergood

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Available at: https://via.library.depaul.edu/law-review/vol51/iss1/5

This Notes & Comments is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.
INTRODUCTION

“The handicapped live among us . . . . They have the same hopes, the same fears, and the same ambitions as the rest of us . . . . In their quest to achieve the benefits of our society they ask no more than equality of opportunity . . . .”1 That equal opportunity must be extended to competitive sports and, more specifically, to the world of competitive professional golf. The game of golf, even at the professional level, is about getting the ball from the tee to the green and into the hole in the least amount of strokes. Accordingly, professional golf competition can also be, quite literally, a game of inches. Even the slightest advantage given to one golfer can translate into one less inch or one less stroke and ultimately change the outcome of the competitive event.2 Yet, equal opportunity need not translate into competitive advantage because the disabled competitive athlete enters the arena at a disadvantage. To level the playing field, adjustments or modifications should be required to afford the disabled athlete an equal opportunity to compete with able-bodied competitors. Such a modification should have been provided to professional golfer, Ford Olinger.

Ford Olinger, a disabled professional golfer, sought an equal opportunity to compete in the men’s national championship of golf, the United States Open (U.S. Open), sponsored by the United States Golf Association (USGA).3 He sought to compete because he had mastered the “fundamental” skills of golf: striking and putting the ball into the hole in a minimum number of strokes. However, because of his disability, Mr. Olinger lacked the capacity to comply with the

---

2. For example, Payne Stewart, shooting a four-round score of 279, won the 1999 U.S. Open by one stroke over Phil Mickelson, with the tournament outcome decided on the final putt of the final hole of the competition. Putt Falls; Stewart Wins Second Open, ESPN Golf Online.com at http://espn.go.com/golfonline/USOpen1999 (last visited February 18, 2001).
USGA rule requiring golfers to walk eighteen holes of a competitive round.⁴ Mr. Olinger requested a waiver of that rule, which would have allowed him to use a golf cart during the competitive rounds of the U.S. Open.⁵ The USGA denied his request.⁶ By denying Mr. Olinger the use of golf cart, the USGA effectively denied Mr. Olinger equal access to compete in the U.S. Open.

Mr. Olinger sued the USGA under Title III of the Americans with Disabilities Act (ADA), which protects disabled individuals against discrimination and ensures equal access to "the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations" provided through public accommodations.⁷ The protection afforded to disabled individuals by the ADA requires public accommodations to provide reasonable modifications for disabled individuals unless the entity can establish that the requested modifications would fundamentally alter the nature of the program at issue or impose an undue hardship on the entity.⁸ The District Court for the Northern District of Indiana and the United States Court of Appeals for the Seventh Circuit rejected Mr. Olinger's claim because they found that a waiver of the USGA walking rule would fundamentally alter or potentially change the outcome of the U.S. Open.⁹

A strikingly similar claim was raised in the United States District Court of Oregon and the United States Court of Appeals for the Ninth Circuit in Martin v. PGA Tour, Inc.¹⁰ The Martin decision directly conflicted with the Olinger decision. The Martin courts held that because walking was only an incidental, as opposed to an essential, part of competitive professional golf, the provision of a golf cart to Mr. Martin would not fundamentally alter the nature of the competitive rounds.¹¹ The United States Supreme Court resolved this conflict, holding in Martin that Congress intended the ADA to reach into professional sports and guide organizations such as the USGA

---

⁴ Id.
⁵ Id. at 1001-03.
⁶ Id. at 1004.
⁹ See Olinger, 205 F.3d at 1006-07, aff'g Olinger, 55 F. Supp. 2d at 933.
and the PGA as to how much modification of their rules is necessary to comply with the ADA standards.12

Competitive golf and competitive sports present an additional dimension to analysis of Title III of the ADA. Because of the nature of competitive sports, even a slight advantage given to a disabled individual over the able-bodied competitor by the ADA regulations could potentially alter the outcome of a sporting event or fundamentally alter the nature of the event. This presents a difficulty for courts analyzing Title III provisions as they apply to disabled athletes, especially those at the professional level. Courts must begin the analysis by determining whether the desired modification is substantive to the nature of the sport and whether alteration of the rule may change the ultimate outcome of the event. This requires courts to determine where reasonable modification of a rule ends and fundamental alteration begins. The ADA regulations require public and most private entities to make reasonable modifications. However, does this infringe upon the rights of the sporting organizations to set their own standards for the games?

This Note will analyze the decisions of the District Court for the Northern District of Indiana and the Seventh Circuit Court of Appeals in Olinger v. United States Golf Association.13 Part II will discuss the background and requirements of the ADA that support Mr. Olinger’s claim.14 Part II will also describe several cases involving athletes raising claims under the ADA and those courts’ reasonings behind their decisions.15 Part III will introduce the parties to this action and outline the rulings of the district court and the court of appeals.16 Part IV will analyze the Olinger decisions in terms of the privilege at issue. Specifically, Part IV will discuss whether the USGA, as a private organization, must be subject to ADA regulation and whether individual inquiry into Mr. Olinger’s situation would have revealed that provision of a golf cart, while breaking with tradition, would have neither undermined the purpose of the walking rule nor fundamentally altered the outcome of the U.S. Open.17 Part V

14. See infra notes 19-110 and accompanying text.
15. See infra notes 111-257 and accompanying text.
16. See infra notes 258-338 and accompanying text.
17. See infra notes 339-425 and accompanying text.
will examine the potential impact that the United States Supreme Court ruling in *Martin* will have on the world of competitive sports.\(^\text{18}\)

II. **BACKGROUND**

The Rehabilitation Act of 1973 and the Americans with Disabilities Act provide powerful tools for the disabled to fight discrimination in the workplace and public accommodations. This section will discuss the purposes and requirements of these legislative enactments.

**A. The Rehabilitation Act of 1973**

The Rehabilitation Act of 1973, precursor to the Americans with Disabilities Act of 1990 (ADA), prohibited discrimination against the disabled by programs receiving federal financial assistance.\(^\text{19}\) Originating in 1972\(^\text{20}\) as an attempt to expand the Vocational Rehabilitation Act,\(^\text{21}\) the Rehabilitation Act of 1973\(^\text{22}\) was enacted with the ambitious goal of providing equal rights to the nation’s twenty-eight to fifty million physically and mentally handicapped individuals.\(^\text{23}\)

Section 504 of the Rehabilitation Act is perhaps the most significant and far reaching section in terms of protecting the disabled against discrimination. It provides, “No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, 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. . . .”\(^\text{24}\) The Rehabilitation Act, as amended in 1974, clarified the purpose of the original Act by enlarging the definition of “handicapped individual” to include any person who: “(i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.”\(^\text{25}\)

---

18. *See infra* notes 426-28 and accompanying text.
23. *S. REP. No. 1297*, 93d Cong., 2d Sess., 50, *reprinted in* 1974 U.S.C.C.A.N. 6373, 6400 (stating that the inability to accurately determine the number of disabled individuals in the country was a sad commentary on the nation’s public policy towards the disabled).
25. The Rehabilitation Act, 29 U.S.C. § 705(20)(B) (1994). Section 705(20)(B), applying to employment situations, defines “handicapped individual” as “any individual who (i) has a physical or mental disability which for such individual constitutes or results in a substantial handicap
lative history of the 1974 amendment indicates a congressional intent for section 504 to require federally funded programs and entities to take affirmative actions to accommodate the handicapped.\textsuperscript{26} Congressional reports reflect the intent to prohibit institutions receiving federal funds from discriminating against handicapped individuals in any manner.\textsuperscript{27} The congressional intent was supported by the implementation of regulations imposing specific affirmative obligations on recipients of federal funds, unless they could show that such accommodations would impose undue hardship.\textsuperscript{28} For those meeting the definition of "disabled," the Rehabilitation Act required federally funded programs to affirmatively provide "reasonable accommodations" to provide access to those programs.\textsuperscript{29}

However, the reach of the Rehabilitation Act's coverage was limited to federal agencies, federally funded programs, or contracts with the federal government; therefore, the majority of private sector employees and users of private sector facilities could not benefit from the law's proscriptions.\textsuperscript{30} Moreover, courts inconsistently applied section 504 while attempting to provide greater clarity to the Act.\textsuperscript{31} Modeled after Title VI of the Civil Rights Act of 1964, an implied private right of action allowed enforcement of the Rehabilitation Act by allowing individuals to file claims to require compliance with the Act.\textsuperscript{32} However, contrary to legislative intent, courts restricted enforcement of

\textsuperscript{26} S. REP. NO. 1297, 93d Cong., 2d Sess., 39, \textit{reprinted in} 1974 U.S.C.C.A.N. 6373, 6405-07. The report to the Senate Labor and Public Welfare Committee stated that section 504 was intended to prohibit discrimination against disabled individuals as well as to require, when applicable, affirmative acts to integrate disabled individuals.

\textsuperscript{27} H.R. REP. NO. 1149, 95th Cong., 2d Sess., 41 (1978): \textit{see also} 120 CONG. REC. 30,551 (1974) (statement of Sen. Robert Stafford). "[A] test of discrimination against a handicapped individual under Section 504 should not be couched either in terms of whether such individual's disability is a handicap to employment or whether such individual can reasonably be expected to benefit, in terms of employment, from vocational rehabilitation services. Such a test is irrelevant to the many forms of potential discrimination covered by Section 504." \textit{Id.}

\textsuperscript{28} 45 C.F.R. § 84.12(b) (2000) (listing some reasonable accommodations that may be required to make facilities handicapped accessible, such as restructuring jobs, modifying work schedules, acquiring or modifying equipment and providing readers or interpreters).

\textsuperscript{29} The Rehabilitation Act, 29 U.S.C. § 794(a) (1994).


\textsuperscript{31} \textit{See} Camenisch v. Univ. of Texas, 616 F.2d 127, 133 (5th Cir. 1980) (granting preliminary injunction to require sign language interpreter for deaf student because the student's handicap did not prevent him from realizing the benefits of his training). \textit{But see} Tatro v. Texas, 625 F.2d 557, 565 n.19 (5th Cir. 1980) (holding that not all types of modifications are required even if the disabled individual would realize the principal benefits of the program with the modification).

section 504 to intended beneficiaries of federal funding.\textsuperscript{33} Courts also rejected a “unified entity approach,” which provided that once an entity became involved in a program or activity receiving federal funding, the entire entity was not necessarily subject to the requirements of section 504.\textsuperscript{34}

Courts have also inconsistently interpreted the obligation to take affirmative actions to modify accommodations to make programs handicap accessible.\textsuperscript{35} The United States Supreme Court held that section 504 did not require entities to disregard disabilities, make substantial modifications, or lower standards to accommodate disabled persons.\textsuperscript{36} It distinguished between evenhanded treatment of qualified disabled individuals and affirmative efforts to overcome the handicap.\textsuperscript{37} Defining a “qualified handicapped person” as a “person who is able to meet the program’s requirements in spite of rather than except for the handicap,”\textsuperscript{38} the Court conceded that a “situation may arise where a refusal to modify an existing program might become unreasonable and discriminatory.”\textsuperscript{39} However, the Court’s holding was limited to the facts of the particular case and left open the possibility that in certain circumstances, failure to modify a program may violate sec-

\textsuperscript{33} See Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87, 89 (4th Cir. 1978) (holding that a handicapped person could not bring an employment claim under section 504 unless the primary objective of the federal funding was a provision of employment; here, the federal funds provided to the nursing home that fired the plaintiff were directed toward patient treatment).

\textsuperscript{34} See Simpson v. Reynolds Metals Co. Inc., 629 F.2d 1226, 1232 (7th Cir. 1980) (holding section 504 does not forbid all forms of discrimination against handicapped persons); see also Brown v. Sibley, 650 F.2d 760, 764 (5th Cir. 1981) (holding disabled plaintiff did not have standing to bring a claim under section 504 because plaintiff was not involved in the specific federally funded program); but see Flanagan v. President and Dir. of Georgetown College, 417 F. Supp. 377, 384 (D.D.C. 1976) (holding that because Georgetown College accepted federal assistance to construct its law school, it could not discriminate in providing services and benefits throughout its institution to handicapped students).

\textsuperscript{35} See Southeastern Cmty. College v. Davis, 442 U.S. 397, 411 (1979) (suggesting that public entities did not have a general obligation to take affirmative actions to tailor programs to accommodate the disabled: “[N]either the language, purpose, nor history of Section 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds.”); but see Georgia Assoc. of Retarded Children v. McDaniel, 511 F. Supp 1263, 1280 (N.D. Ga. 1981) (holding that school’s policy of not providing public education beyond the required 180 days per year for retarded children did not consider individual needs of handicapped children, and therefore violated section 504).

\textsuperscript{36} Davis, 442 U.S. at 411.

\textsuperscript{37} Id.

\textsuperscript{38} Id. at 406.

\textsuperscript{39} Id. at 412-13.
tion 504, leaving the district courts with the discretion to determine what circumstances constituted a violation.40

Inconsistent interpretation and lack of clarity of the Rehabilitation Act led Congress to enact the ADA, affording greater protection from discrimination for disabled individuals.

B. The Americans with Disabilities Act (ADA)

Introduced in 198841 and signed into law in 1990 by President George H. W. Bush,42 Congress enacted the ADA to ensure individuals with physical and mental disabilities the “right to move freely within our society without confronting discrimination,” which is a right guaranteed to other citizens through the Civil Rights Act of 1964.43 As a “policy statement to the world,”44 “[t]he ADA [was] a pronouncement that our society w[ould] no longer tolerate lost potential – that we w[ould] no longer judge people by their disabilities but by their abilities – that we w[ould] no longer design a society which excludes, but one that includes.”45 The ADA broadened the reach of protection for disabled individuals by proscribing discrimination based on disability without regard to whether the entity was federally funded.46

The purpose of the ADA was to provide a “clear and comprehensive national mandate for the elimination of discrimination,” with “strong [and] consistent enforceable standards,”47 to ensure “equality of opportunity, full participation [in society], independent living, and economic self-sufficiency for [the disabled].”48 Congress determined that forty-three million Americans had one or more physical or

40. Id. See also Board of Education v. F.C. ex rel. R.C., 2 F. Supp. 2d 637, 642 (D. N.J. 1998) (upholding an ALJ decision that Section 504 required the local Board of Education to provide free education to a disabled student).
mental disabilities.\textsuperscript{49} Further, it was expected that the number of disabled individuals would increase as the population aged.\textsuperscript{50} Despite protection under the Rehabilitation Act, many disabled individuals continued to suffer discrimination in the areas of employment, housing, public accommodations, education, recreation, transportation, communications, health services, and access to public services.\textsuperscript{51} Such discrimination continued to result in exclusion from many areas of life, as well as inflexible rules and policies with no legal recourse.\textsuperscript{52} Congress believed that without the ADA, pervasive discrimination would continue to "deny people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society [was] justifiably famous."\textsuperscript{53} The ADA made a significant impact on the lives of the disabled by opening access to places not previously accessible.\textsuperscript{54} Legislation was necessary to protect individuals with disabilities, who were members of a politically powerless, discrete and insular minority that had been subjected to purposeful and unequal treatment.\textsuperscript{55}

Divided into three main titles regulating employment, public entities, and public accommodations, the scope of the ADA broadened the reach of the Rehabilitation Act to extend into many facets of a disabled individual’s life.\textsuperscript{56}

\textsuperscript{49} The Americans with Disabilities Act, 42 U.S.C. § 12101(a)(1) (1994). The ADA used the term “disabled” instead of the term “handicapped” used in the Rehabilitation Act. These terms are used interchangeably in common usage and are regarded to have the same meaning. \textit{Id.} Congress, in the ADA, defined “disabled” according to the definition used in the Rehabilitation Act, as "an individual [who has] a physical or mental impairment that substantially limits one or more of the major life activities, a record of such impairment, or is regarded as having such impairment.” See The Rehabilitation Act, 29 U.S.C. § 706(7)(c)(1) (1994); The Americans with Disabilities Act, 42 U.S.C. §§ 12101(a)-(c) (1994). A physical impairment is “[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine . . . ." 28 C.F.R. § 41-31(b)(1)(i) (2000).

\textsuperscript{50} The Americans with Disabilities Act, 42 U.S.C. § 12101(a)(1) (1994). The ADA will likely protect many now healthy individuals, as only fifteen percent of the disabled are born with their disabilities. \textit{See} \textsc{Practicing Law Institute}, \textsc{PLI Litigation and Administration Practice} \textsc{Course Handbook}, \textsc{Series} #H-562 (1997).


\textsuperscript{54} Examples include employment, grocery stores, movie theaters, etc. It was no longer necessary to prove receipt of federal funds to enforce the standards of the ADA.


1. Title I of the ADA – Employment

Title I of the ADA prohibits discrimination in the workplace based on disability, stating that “no [employer] shall discriminate against a qualified individual with a disability” with respect to any terms, conditions, or privileges of employment. The broad definition of employer as “covered entity” applies to private employers with fifteen or more employees, as well as employment agencies, labor organizations, and joint labor-management committees. Title I requires that reasonable accommodations be made to facilities, making them “readily accessible” to otherwise qualified disabled employees. Title I of the ADA incorporates many of the standards set forth in section 504 of the Rehabilitation Act. An otherwise qualified individual is “one with a disability who with or without the reasonable accommodation is qualified to perform the essential function of the occupation.”

58. Id. (stating that this section includes job applications, hiring, advancement, discharge, compensation, and job training).
61. Compare The Americans with Disabilities Act, 42 U.S.C. § 12111(9) (2000) with The Rehabilitation Act, 29 U.S.C. § 794 (2000). See supra note 25 and accompanying text. Under the ADA, suggested “reasonable accommodations” include (but are not limited to): a) making existing facilities readily accessible to and usable by disabled individuals; b) job restructuring; c) developing modified work schedules; d) reassignment to a vacant position; e) acquiring or modifying existing equipment or devices; f) modifying examination, training materials or policies; and g) providing qualified readers or interpreters for blind or deaf employees. See S. REP. NO. 933, § 101(8), 101st Cong., 1st Sess., 135 CONG. REC. 10,954, 10,955 (daily ed. Sept. 12, 1989). For similar suggestions under section 504 of the Rehabilitation Act, see 29 C.F.R. § 32.3 (Department of Labor regulation); 45 C.F.R. § 84.12(b) (Department of Health and Human Services regulation).


Determined on a case-by-case basis, Title I may require employers to modify or renovate existing policies, equipment, or work areas. However, the ADA provides an exception to its standards if the employer can demonstrate that compliance would present an “undue hardship” or that the disabled individual poses a direct threat to the health or safety of another person in the workplace.

2. Title II – Regulating Public Entities

Title II of the ADA significantly broadened the protection of disabled individuals provided by the Rehabilitation Act as a comprehensive mandate to public entities requiring that services, programs, or activities be made accessible to all disabled individuals. It also prohibits all public entities, such as local and state governments, from discriminating against individuals with disabilities regardless of whether the entity received federal funds. It prohibits public entities from excluding any qualified individual on the basis of disability from participating in or benefiting from services, programs, or activities of the public entity. Moreover, Title II requires public entities to provide equal and integrated access to all such programs, services, or activities. Title II also imposes additional requirements, beyond those stipulated in section 504 of the Rehabilitation Act, regarding equally accessible communications. Title II also clarified the requirements of section 504 regarding public transportation by extending the scope


64. The Americans with Disabilities Act, 42 U.S.C. § 12113(b) (1994) (including “not posing a direct threat to others” as part of the job qualification standard).

65. The Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (1994). See also 42 U.S.C. § 12132 (2000) (making prohibition against discrimination on the basis of a disability set forth in section 504 of the Rehabilitation Act applicable to all programs, activities, and services provided, or made available, by state and local governments). Compare to 29 U.S.C. § 794 (Rehabilitation Act only applicable to federally funded programs activities); see supra note 22 and accompanying text.

to cover all public entities providing public transportation, regardless of whether such entities received federal funds.\textsuperscript{69} Because one objective of the ADA was to provide mobility to all disabled Americans,\textsuperscript{70} Title II applies to the operation of vehicles, as well as the design of those vehicles.\textsuperscript{71}

Title II of the ADA applies to all activities of public entities and requires that all employment practices be made accessible to disabled individuals through reasonable accommodations to workers and applicants with disabilities.\textsuperscript{72} Moreover, the scope of Title II extends to activities of state and local governments, such as colleges, universities, publicly operated parks, or police operations.\textsuperscript{73} A public entity may be exempt from the requirements of Title II with a sufficient showing that making reasonable accommodations would constitute an undue hardship, which is defined as an action requiring significant difficulty or expense.\textsuperscript{74}

3. \textit{Title III – Regulating Public Accommodations}

Title III of the ADA prohibits discrimination against disabled individuals in all places of public accommodations, including those that are privately operated,\textsuperscript{75} "covering almost every facet of American

\begin{footnotesize}
\begin{enumerate}
\item The Americans with Disabilities Act, 42 U.S.C. § 12132 (1994). Factors considered in determining whether undue hardship would be present include: a) the nature and the cost of the accommodation; b) the overall financial resources of the facility involved and the impact of the accommodation on the expenses and the resources of the facility; c) the overall financial resources of the covered entity; d) the type and location of the facility and the operation; and e) the impact of the accommodation on the operation of the facility, including the impact on the ability of other employees to perform their duties and the ability to conduct business. \textit{Id. See, e.g.,} Arneson v. Heckler, 879 F.2d 393, 397 (8th Cir. 1989) (applying a similar cost analysis under the Rehabilitation Act). Undue hardship may also include requiring a substantial alteration in the nature of the program or service, or a situation in which the disabled individual poses a direct threat to the health or safety of other individuals in the workplace.
\item The Americans with Disabilities Act, 42 U.S.C. § 12181(7) (1994) (defining public accommodation as a private entity that falls into any of the enumerated categories including: 1) places of lodging; 2) establishments serving food or drink; 3) places of exhibition or entertainment, including motion picture houses, theaters, concert halls, and stadiums; 4) places of public gather-
\end{enumerate}
\end{footnotesize}
life in which a business establishment or other entity serves or comes into contact with the general public.”76  “The purpose behind Title III and its attendant regulations is to facilitate the removal of physical, organizational, and attitudinal barriers from places of public accommodation and commercial facilities.”77 Similar to Title I of the ADA, Title III imposes the same obligations on covered entities, requiring “reasonable accommodation” and prohibiting eligibility criteria intended to screen out disabled individuals.78 Generally, Title III requires operators and owners of public accommodations to allow disabled individuals to equally participate in or benefit from the goods, services, and accommodations provided by the entity. They must do this by making “reasonable modifications” in their practices or policies, unless such modifications are shown to “fundamentally alter” the nature of the goods or services offered or would result in an “undue burden” on the entity.79 Title III does not, however, require that disabled persons “achieve the identical result or level of achievement of non-disabled persons, but does mean that persons with disabilities must be afforded equal opportunity to obtain the same result.”80

Congress identified widespread discrimination based on disability, including relegating disabled persons to “inferior status in our society,” in which the disabled were “severely disadvantaged socially, vocationally, economically, and educationally,” and “denied the opportunity to compete on an equal basis . . . .”81 Congress concluded that discrimination existed in “critical areas” of life, including places of “public accommodation.”82 By captioning the ADA as an Act in-

77. HENRY H. PERRITT JR., AMERICANS WITH DISABILITIES ACT HANDBOOK 246 (1997).
82. This is supported by voluminous documentation, including seven reports referenced in congressional committee reports. See S. REP. NO. 101-116 at 6 (1989); H.R. REP. NO. 101-485, pt. 2 at 28 (1990). The seven reports include NATIONAL COUNCIL ON DISABILITY, TOWARD INDEPENDENCE (1986); NATIONAL COUNCIL ON DISABILITY, ON THE THRESHOLD OF INDEPENDENCE (1988); U.S. COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES (1983); LOUIS HARRIS AND ASSOCIATES, THE ICD SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM (1986); LOUIS HARRIS AND
tended to establish a "clear and comprehensive" prohibition of discrimination on the basis of disability.\textsuperscript{83} Congress clearly indicated that it was not seeking to address discrimination based on disability in a "partial or piecemeal fashion."\textsuperscript{84} Title III was drafted in extremely broad terms, expanding the scope of coverage of public accommodations to support the comprehensive nature of the ADA.\textsuperscript{85}

It [was] critical to define places of public accommodation to include all places open to the public, not simply restaurants, hotels, and places of entertainment (which [were] the types of establishments covered by Title II of the Civil Rights Act of 1964) because discrimination against people with disabilities [was] not limited to specific categories of public accommodations.\textsuperscript{86}

Congress consciously based Title III of the ADA on the framework of the Civil Rights Act of 1964.\textsuperscript{87} Case law concerning Title II of the Civil Rights Act guides courts to broadly interpret regulation of public accommodations consistent with "the overriding purpose" of Title III of the ADA, which is the elimination of discrimination reaching entities "because of a service it provides to direct participants in some sport or activity, as well as, because it entertains spectators."\textsuperscript{88} Because the scope of Title III of the ADA is broader than the Civil Rights Act of 1964, which covers participants in athletic contests, it may be assumed that Congress intended to cover such participants...
under Title III of the ADA. Two Civil Rights Act cases involved alleged discrimination against golfers, with those courts holding that Title II of the Civil Rights Act applied to the participants and not only to the spectators of events held at the public accommodation, the golf course.

Congress expressly created a few exceptions to the expansive coverage imposed by Title III of the ADA, such as religious organizations, private clubs, or establishments. However, Title III did not create exceptions by implication.

Congress derived the “reasonable modification” of Title III and “reasonable accommodation” of Title I requirements from prior dis-

---

89. See Miller v. Amusement Enterprises, Inc., 394 F.2d 342, 349 (5th Cir. 1968) (holding that Title II of the Civil Rights Act is not to be read “with narrowed eye but with open minds attuned to the clear and strong purpose of the Act, namely, to secure for all citizens the full enjoyment of facilities described in the Act which are open to the general public”); United States v. Slidell Youth Football Ass'n, 387 F. Supp. 474, 480-82 (E.D. La. 1974) (holding that both the intentional exclusion of black football players, and the subsequent denial to their parents of the opportunity to watch their children play football, violated Title II of the Civil Rights Act); United States v. Johnson Lake, Inc., 312 F. Supp. 1376, 1380 (S.D. Ala. 1970) (holding racial discrimination at swimming and dancing facilities was subject to Title II of the Civil Rights Act because of the effects on the participants and on those who came to watch the participants).

90. See Evans v. Laurel Links, Inc., 261 F. Supp. 474 (E.D. Va. 1966). This case was brought as a class action seeking to require the operators of a public golf course to permit black golfers to play on their course. The court ruled that the golf course was a place of exhibition or entertainment under Title II. Id. at 477. The court held that while “the Act prohibits discrimination among spectators who patronize a place of exhibition or entertainment, its application is not limited to spectators if the place of exhibition or entertainment provides facilities for the public to participate . . . .” Id. The Civil Rights Act of 1964 protected both golf spectators and participants from discrimination. See also Wesley v. City of Savannah, 294 F. Supp. 698, 700-03 (S.D. Ga. 1969) (holding that Title II of the Civil Rights Act prevented a private golf association from engaging in racial discrimination in a city golf tournament). Construing the language of Title II liberally, the Wesley court enjoined the golf association from holding the tournament until it discontinued its discriminatory practices. Id. See also PGA Tour, Inc. v. Martin, 2001 U.S. LEXIS 4115, *35 (2001). PGA tournaments offer at least two “privileges” to the public – “that of watching the golf competition and that of competing in it.” Id.


92. Amicus Brief of Senators Dole and Harkin at 16, PGA Tour Inc. v. Martin, 204 F.3d 994 (9th Cir. 2000) (on file with author).


ability anti-discrimination statutes,\textsuperscript{95} regulations,\textsuperscript{96} and case law.\textsuperscript{97} Reasonable modification is required because "discrimination against [people with disabilities] cannot be eliminated if programs, activities, and tasks are always structured in the ways people with 'normal' physical and mental abilities customarily undertake them. Adjustment or modifications of opportunities to permit [people with disabilities] to participate fully have been broadly termed 'reasonable accommodation.'"

Reasonable accommodation is defined as "providing or modifying devices, services, or facilities or changing practices or procedures in order to match a particular person with a particular program or activity. Individualizing opportunities is this definition's essence." Therefore, analysis of a request for reasonable modification of a rule or practice must focus on the "purpose" of the rule or practice, rather than its context.\textsuperscript{100} The central objective of the ADA is to allow disabled persons to participate and compete on an equal basis, thereby necessitating that reasonable modifications be made to the way activities and programs are structured to include the disabled in the participation and competition.\textsuperscript{101}

\textsuperscript{95} See The Fair Housing Amendments Act of 1988, 42 U.S.C. § 3604(f)(3)(B) (1994) (requiring entities "to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person [persons with disabilities] equal opportunity to use and enjoy a dwelling").

\textsuperscript{96} See, e.g., 41 C.F.R. § 60-741.6(d) (1990) (Department of Labor regulation to implement section 503 of the Rehabilitation Act); 45 C.F.R. § 84.12 (1990)(D.H.H.S. regulation to implement section 504 of the Rehabilitation Act).


\textsuperscript{98} U.S. COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 102 (1983) [hereinafter "THE SPECTRUM"]. See also Alexander, 469 U.S. at 295-96 nn.12 & 16 (citing Commission on Civil Rights report as authority).

\textsuperscript{99} THE SPECTRUM, supra note 98, at 102. See also Crowder v. Kitigawa, 81 F.3d 1480 (9th Cir. 1996); Johnson v. Gambrinus Co./Spoetzl Brewery, 116 F.3d 1052 (5th Cir. 1997).

\textsuperscript{100} See Southeastern Cmty. College v. Davis, 442 U.S. 397, 406-07 (1979) (requiring the entity to demonstrate that the requirement was essential to the scope and purpose of the program). See also Letter of Patricia Roberts Harris to College Presidents, Equal Employment Opportunity Commission (Oct. 5, 1979).

In identifying an essential function to determine if an individual with a disability is qualified, the employer should focus on the purpose of the function and result to be accomplished, rather than the manner in which the function presently is performed . . . . Although it may be essential that the function be performed, frequently it is not essential that it be performed in a particular way.

\textit{Id.} at 400 (referring to Title I requirement of reasonable accommodation, comparable to Title III reasonable modification requirement).

\textsuperscript{101} See, e.g., the remarks of James Brady, President Reagan’s former press secretary, 135 CONG. REC. S 10791 (daily ed. Sept. 7, 1989) (remarks of James Brady, President Reagan’s former press secretary). Mr. Brady commented:

Passage of the ADA will increase the acceptance, dignity, and full participation of citizens with disabilities. We do not want pity or sympathy. All we want is the same civil
Title III of the ADA requires public accommodations to make reasonable modifications to policies, practices, or procedures, allowing an individual with a disability the opportunity to obtain the goods, services, facilities, privileges, or accommodations being offered. However, a public accommodation is not required to make such modifications if it “can demonstrate . . . [that it] would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.” The concept of fundamental alteration implies that “some program functions and program requirements are essential, while others may be only incidental. The incidental-essential distinction is also consistent with the premise that there are frequently equally effective ways in which tasks and activities may be restructured to achieve similar objectives.” The Department of Justice defines fundamental alteration as a “modification that is so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages, or accommodations offered.” In applying the concept of fundamental alteration, courts have outlined some implications: alterations are not required if they would endanger a program’s viability; modifications are not required if they would “jeopardize the effectiveness” of a program or involve a “major restructuring;” and modifications that would alter an entity so as to create a new program are not required. The analysis of whether a requested modification constitutes a fundamental alteration must be done on a case-by-case basis, requiring a public accommodation to demonstrate that the particular modification for the disabled individual fundamentally alters the relevant good, service, facility, privilege, advantage, or accommodation. The burden of proof lies with the public accommodation to establish that the modification requested

rights and opportunities that all citizens have. We want fairness, acceptance, and the chance to contribute fully to our nation – just like everyone else.

103. Id.
104. THE SPECTRUM, supra note 98, at 124.
106. New Mexico Ass’n for Retarded Citizens v. New Mexico, 678 F.2d 847, 855 (10th Cir. 1982).
109. See THE SPECTRUM, supra note 98, at 102 (stating that “individualizing opportunities” is the “essence” of the reasonable modification requirement). See also H.R. REP. No. 10-485, pt. 3, at 39 (1990) (applying to Title I and stating that “[a] reasonable accommodation should be tailored to the needs of the individual and the requirements of the job”).
constitutes a fundamental alteration in the nature of the program at issue.110

Disability claims by athletes under the ADA present courts with unique circumstances, requiring analyses of not only the nature of the alterations requested, but also the impact on the competitive arenas sought to be modified.

C. Athletes Raising Claims under the ADA

Disabled athletes, at all levels of competition, may bring claims of discrimination based on their disability under the ADA. This section outlines select cases at the high school, collegiate, and professional levels, illustrating that ADA claims involving competitive sports present unique situations requiring courts to adduce the purpose of the rule or policy at issue and possibly adding another dimension, competitive advantage, to the ADA analysis.

1. Sandison v. Michigan High School Athletic Association111

The plaintiffs, Ronald Sandison and Craig Stanley, were both nineteen-year-old high school seniors that were two years behind their peers in school because of learning disabilities.112 The plaintiffs sought waivers of age eligibility requirements imposed by the Michigan High School Athletic Association (MHSAA) that barred them from participating in interscholastic track and cross-country competition.113 The MHSAA eligibility regulations prohibited participation in interscholastic competition if a student reached his or her nineteenth birthday before September first of the current school year.114 According to the MHSAA, the purpose of the age requirement was to safeguard against injury “in case of over-age and correspondingly over-sized participants,” and to prevent “any unfair competitive ad-

112. Id. at 488-89.
113. Id. at 485, 489.
114. Id. at 489.
vantage that older and larger participants might provide.\textsuperscript{115} The two students sued the MHSAA and their respective school systems under the Rehabilitation Act and the ADA for unlawfully excluding them from interscholastic athletic competition.\textsuperscript{116}

a. The District Court

The United States District Court for the Eastern District of Michigan granted preliminary injunctive relief, holding that the MHSAA had “downgrade[d] the importance of interscholastic sports in the plaintiffs’ learning programs.”\textsuperscript{117} The MHSAA managed interscholastic sports and competition at almost every public and private secondary school in the state of Michigan.\textsuperscript{118} The district court found that because of the MHSAA’s involvement in the schools, it was not only a public entity, but also operated a place of entertainment, thereby subjecting it to the regulations set forth in Titles II and III of the ADA.\textsuperscript{119} The MHSAA argued that the plaintiffs did not meet the “otherwise qualified” requirement because they failed to meet the age requirement of the eligibility regulations.\textsuperscript{120} However, the district court held that the appropriate inquiry in this case was whether the disabled individuals met the program’s requirements for participation, in spite of their disabilities.\textsuperscript{121} Overprotective rules and policies may subject disabled individuals to not only outright intentional exclusion, but also discriminatory effects. The failure to make reasonable modifications to existing practices may actually perpetuate the discriminatory effects of facially neutral rules.\textsuperscript{122} While admitting that the age rule was necessary, the district court held that it conflicted with the ADA and the

\textsuperscript{115} Id. at 490.
\textsuperscript{116} Id. at 485.
\textsuperscript{117} Sandison, 863 F. Supp. at 488-89.
\textsuperscript{118} Id. at 487.
\textsuperscript{119} Id.
\textsuperscript{120} Id. at 489.
\textsuperscript{121} Id. See also Alexander v. Choate, 469 U.S. 287, 301 (1985) (citing Southeastern College v. Davis, 442 U.S. 397 (1979), as requiring a balance between providing meaningful access to an otherwise qualified disabled individual by making reasonable accommodations in the program or benefit and the interests of the program). See also School Bd. of Nassau County v. Arline, 480 U.S. 273, 287-88, n.17 (1987) (stating that “[w]hen a [disabled] person is not able to perform the essential functions of the job, the court must also consider whether any reasonable accommodation by the employer would enable the [disabled] person to perform those functions.”); Brennan v. Stewart, 834 F.2d 1248, 1261-66 (5th Cir. 1988) (rejecting the assertion of Davis that an “otherwise qualified” person must be able to meet all of a program’s requirements in spite of the disability, following the inquiry set forth in Alexander v. Choate of whether some “reasonable accommodation” is available to satisfy the legitimate interests of both the program and the disabled person).
\textsuperscript{122} Sandison, 863 F. Supp. at 491. The MHSAA had procedures in place for waivers of most eligibility requirements, but not for the age requirement. Id.
Rehabilitation Act, and therefore required a resolution of these competing interests. Finding that waiver decisions on a case-by-case basis would not destroy the age rule or its purposes, the district court held that reasonable accommodation of the plaintiffs' disabilities should be made by waiving the age requirements in this case. Further, the district court rejected the MHSAA argument that individual consideration of such waiver requests would impose an undue burden on the association and the schools. It held that its decision was not "universal" and must be analyzed on a case-by-case basis, allowing denial of a waiver if the plaintiff posed a safety risk or the waiver would give the plaintiff a competitive advantage.

After individual inquiry into the requested accommodation, the district court held that participation in interscholastic sports was an "integral part of the education of the plaintiffs." It noted that Sandison received better grades due to his participation and interaction with teammates who "encouraged him to study and be disciplined," while Stanley developed better social skills as a result of his participation on the sports teams.

b. The Court of Appeals

On appeal, however, the United States Court of Appeals for the Sixth Circuit rejected the reasoning of the district court, focusing instead on the effect that a waiver of the age requirement might have upon competition by possibly providing a competitive advantage to the disabled athletes. Because a waiver of the age requirement would constitute a fundamental alteration of the sports programs, the Sixth Circuit held that this waiver could not be considered a reasonable accommodation. Further, the Sixth Circuit rejected the Title III of the ADA claim, holding that the MHSAA was not a public accommodation. Utilizing Title II of the ADA, the Sixth Circuit reasoned that the age requirement was a "neutral rule" with respect to disability and, therefore, did not implicate the "solely by reason of disability"
element of the ADA because even absent their disabilities, the plaintiffs still would not have satisfied the age requirement, making them not "otherwise qualified." Finding that the age requirement rule was "necessary" and a waiver of this rule would "fundamentally change the bright-line age restriction," the Sixth Circuit held that waiver of such a rule could not be considered a "reasonable accommodation."

The Sixth Circuit also found persuasive the MHSAA argument that individual consideration of such waiver requests would pose an undue burden, holding that such considerations would

require high school coaches and hired physicians to determine whether these factors render a student's age an unfair competitive advantage. The determination would have to be made relative to the skill level of each participating member of opposing teams and the team as a unit. And of course, each team member and the team as a unit would present a different skill level.

However, the individual inquiry considered burdensome by the court would only be applied to those disabled students requesting a waiver because of their disabilities.

In contrast to the Sandison decision, the United States District Court for the Northern District of Indiana and the United States Court of Appeals for the Seventh Circuit held that a similar waiver request did not fundamentally alter the nature of the program, concluding that waiver of the rule in question was a reasonable modification for the disabled athlete.

132. Sandison, 64 F.3d at 1033. However, the court failed to address that it was only because of their disability that the plaintiffs found it necessary to obtain a waiver as a reasonable modification of the rule.
133. Id. at 1037. The court applied its analysis in a general sense as opposed to an individual inquiry, in direct conflict with the mandate of the ADA; it did not consider (as the district court did) how an "individual" waiver in this case would affect the purpose of the age requirement rule.
134. Id. at 1035. See also McPherson v. Michigan High Sch. Athletic Ass'n, 119 F.3d 453, 462 (6th Cir. 1997) (holding that individual inquiry would essentially require the high school athletic association to determine a particular student's physical and athletic maturity).
135. See Johnson v. Florida High Sch. Activities Ass'n, 899 F. Supp. 579, 585 (M.D. Fla. 1995), vacated as moot 102 F.3d 1172 (11th Cir. 1997); Dennin v. Connecticut Interscholastic Athletic Conference, 913 F. Supp. 663, 668 (D. Conn. 1996), vacated as moot 94 F.3d 96 (2d Cir. 1996) (stating "[t]hat it may prove difficult in some cases does not substantiate the claim that it would be unduly burdensome or destructive of the purpose of the rule."). See also Julie Kasperski, Comment, Disabled High School Athletes and the Right to Participate: Are Age Waivers Reasonable Modifications under the Rehabilitation Act and the Americans with Disabilities Act, 49 BAYLOR L. REV. 175, 193-94 (1997).
Eric Washington was a learning disabled high school student who dropped out of school during the 1996-97 school year. He re-enrolled at Central Catholic High School the following year and sought to participate in the school's basketball program. To gain eligibility, Mr. Washington and Central Catholic High School sought a waiver of the Indiana High School Athletic Association's (IHSAA) rule prohibiting participation in interscholastic sports after eight semesters (regardless of whether the student is enrolled in school) following the commencement of the ninth grade. The IHSAA advanced that the purpose of this rule was to "discourage redshirting," "promote competitive equality, protect students' safety, create opportunities for younger students and promote the idea that academics are more important than athletics." Central Catholic High School and Mr. Washington requested a waiver under the IHSAA "hardship rule" that allowed the Association to refuse enforcement of a rule if strict enforcement in the particular case would not "serve to accomplish the purpose of the rule, the spirit of the rule would not be violated and there was no showing of undue hardship in the particular case." The IHSAA denied the waiver request and Mr. Washington filed a claim under Title II of the ADA and section 504 of the Rehabilitation Act.

a. The District Court

The United States District Court for the Northern District of Indiana focused on two lines of inquiry: first, "whether the rule itself, without reference to the particular individual [was] generally fundamental and essential," and second, "whether the individual waiver requested would do damage to the purposes behind the rule." The district court subsequently granted preliminary injunctive relief against enforcement of the eight semester rule, holding that the re-

136. 181 F.3d 840 (7th Cir. 1999).
137. Washington v. Indiana High Sch. Athletic Ass'n, 181 F.3d 840, 842 (7th Cir. 1999).
138. Id.
139. Id.
140. Id. "Redshirting is the practice of slowing a student's academic pace and postponing his initial participation in competitive athletics in order to permit him to gain physical and athletic maturity before beginning his period of eligibility for competitive athletics." Id. n.2.
141. Id.
142. Washington, 181 F.3d at 843. The IHSAA already had a procedure in place to waive such requirements, yet chose not to follow that procedure. Id.
143. Id.
144. Id. at 843-44.
145. Id. at 844.
quested waiver was a "reasonable modification of the IHSAA's rule" because the waiver would not constitute a conflict with the purposes of the rule. The district court concluded that Mr. Washington had demonstrated a substantial likelihood of success on the merits with respect to his claims under Title II of the ADA and section 504 of the Rehabilitation Act by establishing: a) he suffered from a disability; b) he was "otherwise qualified" to participate in the activity; and c) he was excluded from playing basketball because of his disability. The district court also rejected the IHSAA undue hardship argument, finding that Mr. Washington was the first student in over fourteen years to request such a waiver.

b. The Court of Appeals

The United States Court of Appeals for the Seventh Circuit upheld the district court ruling, holding that Mr. Washington had established the discrimination "by reason of his disability" element and that he was a "qualified individual" under Title II of the ADA. Mr. Washington did not have to establish that the discrimination he faced was intentional, because even facially neutral "rules" may have a disparate impact and failure to modify these neutral rules may be proof of discrimination under Title II of the ADA. The analysis turned on whether "waiver of the rule, in the particular case at hand would be so at odds with the purposes behind the rule that it would be a fundamental and unreasonable change," or whether modification of the

---

146. Id. at 843.
147. Id. at 844. The record indicated that there had been no redshirting, and that Mr. Washington's participation in athletics had increased his self-esteem and his academic achievement, thereby resolving the conflict between the waiver request and the purpose of the rule. Washington, 181 F.3d at 844.
148. Id. at 843. Subsequently, the court rejected the claim under the Rehabilitation Act because Mr. Washington failed to establish that the IHSAA was the recipient of federal funds. Id.
149. Id.
150. Id. at 848-49 (holding that but for his learning disability, Mr. Washington would not have dropped out of school his junior year and would have been eligible to play).
151. Id. at 849-52. See also The Americans with Disabilities Act, 42 U.S.C. § 12131(2) (1994) [Q]ualified individual with a disability' means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.
152. Washington, 181 F.3d at 848. See also Crowder v. Kitagawa, 81 F.3d 1480, 1483 (9th Cir. 1996).
153. Washington, 181 F.3d at 848.
154. Id. at 850. See also Pottgen v. Missouri State High Sch. Activities Ass'n, 40 F.3d 926, 931 (8th Cir. 1994) (Arnold, C.J. dissenting); Dennin v. Connecticut Interscholastic Athletic Confer-
rule would create an undue financial or administrative hardship.\textsuperscript{155} Concluding that individual inquiry was most consistent with the congressional intent underlying the ADA, the Seventh Circuit found support in cases involving employment discrimination claims under section 504 of the Rehabilitation Act, which required individual analysis on a case-by-case basis.\textsuperscript{156} Therefore, the Seventh Circuit held that ADA regulations similarly require individualized analysis.\textsuperscript{157} Moreover, the Seventh Circuit found that focusing on the general purposes behind a rule, without considering the effect a waiver for a disabled person would have on the rule’s purposes, “would negate the reason for requiring reasonable exception.”\textsuperscript{158} As applied to Mr. Washington, the grant of a waiver to allow participation would not frustrate the purposes of the eight semester rule because the evidence did not establish that “redshirting” would provide Mr. Washington with a competitive advantage over other athletes or that athletics were valued over academics.\textsuperscript{159} Furthermore, the record did not support the argument that individual inquiry into waiver requests would place an undue financial or administrative burden on the IHSAA; the few case-by-case analyses potentially required could not be described as an excessive burden.\textsuperscript{160}

\begin{flushright}
\textsuperscript{156} Washington, 181 F.3d at 851 (citing Arline, 480 U.S. at 287, holding that determining whether a plaintiff is otherwise qualified for a job requires an individualized inquiry if section 504 is to “achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks”).
\textsuperscript{157} Id. at 851 n.14 (citing the appendix to Title II of the ADA regulations which relies on the Supreme Court recognition in School Board of Nassau County v. Arline that there is a need to balance the interests of people with disabilities against the legitimate concerns for public safety, and that a person who poses a significant risk will not be considered “qualified” if reasonable modifications would not eliminate that risk). However, the determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability. It must be based on an individualized assessment . . . Such an inquiry is essential if the law is to achieve its goal . . .
\textsuperscript{159} Id. at 852.
\textsuperscript{160} Id. at 851. The IHSAA already conducted individual analyses regarding whether physically impaired student athletes should receive waivers. Id. at 852.
\end{flushright}

Michael Bowers, a highly talented high school football player, diagnosed as learning disabled in the second grade, attended special education classes throughout high school. Because of his talent on the football field, Mr. Bowers was heavily recruited by several colleges and universities to play scholarship intercollegiate football.

Although Mr. Bowers applied one year earlier for National Collegiate Athletic Association (NCAA) certification granting him "qualifier status" by the NCAA Clearinghouse, he did not receive notification of his "non-qualifier status" until July 30, 1996, less than one month before he was to begin classes on full scholarship at Temple University. The NCAA eligibility criteria for competition in intercollegiate sports programs required a student to apply for and receive "qualifier status," based in part on the academic "core" classes successfully completed in high school. As a result of the denial of "qualifier status," Mr. Bowers lost his full athletic scholarship and opportunity to participate in the Temple University football program.

a. The District Court

In May, 1997, Mr. Bowers sought preliminary injunctive relief under the ADA, seeking revision of his ineligible status. The United States District Court of New Jersey requested that the NCAA consider whether Mr. Bowers was entitled to a waiver of the freshman eligibility rules. The NCAA Subcommittee considered "whether [Bowers] would be able to succeed academically during his first year of college while also confronting the demands of participating in an intercollegiate sports program" within the context of the purpose of

---

163. Id. (noting that the recruiting institutions included University of Iowa, Temple University, and American International College).
164. Id. at 468. The NCAA delegates authority to the NCAA Clearinghouse, a division of the American College Testing Service, to determine the eligibility of students for participation in collegiate sports and receipt of athletic scholarships during their freshman year. Bowers, 974 F. Supp. at 461 n.2.
165. Bowers, 9 F. Supp. 2d at 469.
166. Id. at 468.
167. Id. at 468-69.
168. Id. at 466.
169. Id.
170. The NCAA Subcommittee was comprised of four experts in special education. Id. at 463.
the eligibility rule and determined that Mr. Bowers would not be able to succeed academically.

Subsequently, the district court denied Mr. Bowers' request for injunctive relief, holding that he did not establish a reasonable likelihood of success on the merits. The district court held that the NCAA eligibility requirements did not unfairly exclude disabled student athletes, and the waiver process and provisions provided adequate accommodation and alternatives for those athletes. The NCAA eligibility requirements were essential to "maintain intercollegiate athletes as an integral part of the educational program and to assure that those individuals representing an institution in intercollegiate athletic competition maintain satisfactory progress in their education."

The district court concluded that Mr. Bowers' request to consider his special education classes as "core" classes did not simply seek to modify the rule; it sought to virtually eliminate the "core" course requirement. To grant this request would have exceeded the scope of the ADA, which requires "even-handed treatment of individuals with disabilities" but "does not require the NCAA to simply abandon its eligibility requirements." Therefore, the district court held that "a complete abandonment of the 'core course' requirement would fundamentally alter the nature of the privilege of participation in the NCAA's intercollegiate athletic program."

The NCAA successfully

---

172. Id. at 466. The Clearinghouse determined that, even with the principal's certification, "[s]tudents in [special education] courses are expected to acquire the same knowledge, both quantitatively and qualitatively, as students in comparable course(s)." Bowers, 9 F. Supp. 2d at 469. Bowers "lacked two years of social studies, three years of English, and the requisite additional core courses." Id. Bowers was given core course credit for only three of his high school courses. Id. at 467.
173. Id. at 466.
174. Bowers, 118 F. Supp. 2d at 521-23. The Bowers court held that even though the NCAA rules expressly excluded special education classes from consideration as "core" classes, the bylaws considered as a whole provided two alternative routes by which a learning disabled student could obtain "qualifier status." Bowers, 9 F. Supp. 2d at 468. This "status" could be obtained either by 1) the student's high school principal certifying that the student obtained equivalent knowledge as students completing core courses; or 2) the student presenting evidence that the student's overall academic record merits the waiver of the core classes requirement. Id. Bowers availed himself of both alternatives, without success. Id. at 469.
177. Id. (citing Sandison v. Michigan High Sch. Athletic Ass'n, 64 F.3d 1026, 1031 (6th Cir. 1995)).
178. Id. (citing Garden v. NCAA, 1996 U.S. Dist. LEXIS 17368, No. 96-6953, *16 (N.D. Ill. Nov. 21, 1996)).
179. Id. at 467.
defended its position against the ADA claim by performing the essential function of individual inquiry of the particular circumstances of the disabled individual. As such, the NCAA proved that Mr. Bowers’ request, as applied to him, would fundamentally alter the purpose of the freshman eligibility requirement.

In addition to high school and collegiate sports, the ADA has application in the world of professional athletics.


Casey Martin is a highly skilled professional golfer who suffers from Klippel-Trenaunay Syndrome,\footnote{Klippel-Trenaunay Syndrome is a rare congenital disease marked by excessive growth of soft tissue and/or bones with venous malformations and lymphatic abnormalities usually affecting one limb. No cure exists, but treatment may include wearing an elastic garment on the affected limb to protect the limb from trauma and decrease the chance of bleeding from the vascular abnormalities. \textit{Description of Klippel-Trenaunay Syndrome}, at \url{http://www.k-t.org/description.html} (last visited Aug. 6, 2001).} a congenital circulatory disorder that renders him unable to walk an eighteen-hole golf course without significant pain and risk of injury.\footnote{Martin, 994 F. Supp. at 1243-44.} Despite the pain, Mr. Martin can perform all the essential functions required during a round of golf, with the exception of walking to the golf ball while it is in play.\footnote{Martin, 994 F. Supp. at 1243.} In 1997, Mr. Martin entered the PGA’s three-round qualifying school in an attempt to gain playing privileges on the PGA Tour.\footnote{Martin, 994 F. Supp. at 1322. Qualifying school is a three-stage tournament to qualify for playing privileges on the PGA Tour or the Nike Tour. \textit{Id.} To enter qualifying school, a player must present a $3000 entrance fee and two letters of recommendation. \textit{Id.} Golf carts are permitted in the first two rounds of qualifying school. \textit{Id.}} He advanced through the first and second stages of the qualifying school using a golf cart.\footnote{Id. at 1243.} Pursuant to the PGA’s “no-cart” rule, the third round of the qualifying school required golfers to walk the entire eighteen-hole round.\footnote{Id. at 1322.} Mr. Martin requested that the PGA waive the “no-cart” rule as a reasonable modification in light of his disability, but was denied the waiver.\footnote{Martin, 984 F. Supp. at 1322.} Mr. Martin then sought permanent injunctive relief under Title III of the ADA to enjoin the PGA from enforcing the “no-cart” rule, making tournaments, such as the qualify-

\footnote{Martin, 984 F. Supp. at 1322.}
ing school and the PGA Tour events, accessible to individuals with disabilities.\textsuperscript{189}

\textbf{a. The District Court}

The United States District Court of Oregon considered Mr. Martin’s claims under Title III of the ADA, holding that the PGA Tour was a public entity operating a place of public accommodation, thereby subjecting it to ADA regulation.\textsuperscript{190} The district court held that Mr. Martin’s request for the use of a golf cart was a reasonable accommodation that would not fundamentally alter the nature of the PGA’s golf tournaments.\textsuperscript{191}

The district court first considered whether the PGA operated a place of public accommodation at the golf courses where it held its tournaments.\textsuperscript{192} Although reasoning that the general public was not allowed “inside the ropes” of the players’ competition area, the district court found that the greens and fairways of the golf courses were nonetheless public accommodations under the ADA.\textsuperscript{193} The district court also determined that the PGA was not a private club for ADA purposes, and therefore was required to comply with ADA standards for public accommodations when it operated its tournaments.\textsuperscript{194} Finding the PGA to be a private commercial enterprise, the district court analyzed the PGA’s status under an abbreviated seven factor analysis used in Civil Rights Act jurisprudence\textsuperscript{195} to determine if it was also exempt from the scope of the ADA.\textsuperscript{196} The district court found that eligibility requirements were based on skill and were not designed to screen members based on freedom of association values.\textsuperscript{197} Players and members were not voted in by current members; instead, they “played their way in.”\textsuperscript{198} The PGA was found to be a bona fide or-

\textsuperscript{189} Id. Temporary injunctive relief was granted to allow Martin to compete in the third round of qualifying school with a golf cart. \textit{Id.} His score qualified him for a position on the PGA sponsored Nike Tour. \textit{Id.}
\textsuperscript{190} Martin, 984 F. Supp. at 1326-27.
\textsuperscript{191} Martin, 994 F. Supp. at 1253.
\textsuperscript{192} Martin, 984 F. Supp. at 1326.
\textsuperscript{193} Id.
\textsuperscript{194} Id. \textit{See} The Americans with Disabilities Act, 42 U.S.C. §§ 12181, 12187 (1994).
\textsuperscript{195} Martin, 984 F. Supp. at 1325 (analyzing the PGA status by evaluating 1) genuine selectivity; 2) membership control; 3) the history of the PGA; 4) the use of PGA facilities by non-members; 5) the PGA’s purpose; 6) advertising for members; and 7) whether the PGA is non-profit). \textit{See} United States v. Landsdowne Swim Club, 713 F. Supp. 785, 796-97 (E.D. Pa. 1989) (setting forth factors to determine if an establishment maintains public or private status for the purposes of determining its exemption from the Civil Rights Act).
\textsuperscript{197} Martin, 984 F. Supp. at 1325.
\textsuperscript{198} Id.
ganization that was not formed to evade ADA requirements because it was in existence prior to the enactment of the ADA. The PGA’s reliance on revenues generated by non-members, such as vendors, reporters, scorekeepers, volunteers, and the public, established that PGA facilities were used by non-members. The PGA was formed for the commercial purpose of promoting and operating golf tournaments to the economic benefit of its members. Because the PGA was extensively covered by the media through its tournament events, it did not actively advertise for members. Finally, the district court found that the PGA existed for purely “mercantile” purposes, even with its non-profit status. The factors established that the PGA was a public entity operating a public accommodation; therefore, the PGA “no-cart” rule was subject to Title III scrutiny. Thus, the PGA was required to make reasonable accommodations providing access to disabled individuals, unless it could establish that such accommodation would fundamentally alter the nature of its program.

Casey Martin’s disability was undisputed. Therefore, the district court analyzed the reasonableness of the request for use of a golf cart, holding that reasonableness was determined in the “general sense, that is, in the general run of cases.” The burden of proof was then on the PGA to establish that modification of the “no-cart” rule would constitute a fundamental alteration to the nature of its program.

The district court analyzed the walking requirement in terms of whether walking was an essential requirement of professional golf. Because the ADA required individual assessment of the accommodation in terms of the disabled individual, the district court considered

199. Id. at 1323-24.
200. Id. at 1325.
201. Id. at 1323.
202. Id. at 1325.
204. Id. at 1326-27.
205. Id. at 1327.
207. Id. at 1248 (citing Johnson v. Gambrinus Co., 116 F.3d 1052, 1061 (5th Cir. 1997), where the Fifth Circuit required a brewery owner to allow a blind individual’s guide dog to accompany the individual on a public brewery tour as a reasonable modification of the brewery’s policies to permit access by disabled persons with guide dogs). The court noted that the PGA allows golf carts in other tournaments, such as the Senior Tour and the first two rounds of qualifying school. Id. Moreover, the NCAA and Pac 10 Athletic Conference allowed use of golf carts to accommodate disabled collegiate athletes. Id.
208. Id. at 1249.
209. Id. at 1249-53.
whether walking was necessary in professional golf competition, and whether modification of the “no-cart” rule for Casey Martin would fundamentally alter the nature of the game played at PGA Tour tournaments. The purpose of the “no-cart” walking rule advanced by the PGA was to inject a fatigue factor into competitive golf. Relying on the testimony of Dr. Gary Klug, a physiologist specializing in the study of fatigue, the district court held that the PGA’s asserted “fatigue factor due to walking” was insignificant. The district court rejected the argument that the fatigue factor was caused by walking in the tournament under normal circumstances, holding that stress and motivation to win are the key ingredients contributing to fatigue during the course of play. The district court also found that even with the use of a golf cart, Mr. Martin must walk twenty-five percent of the golf course, enduring significant pain, because the golf cart often could not be driven to the ball. Therefore, the district court concluded that Casey Martin’s use of a golf cart during tournament play would neither frustrate the purpose of the “no-cart” rule nor fundamentally alter the nature of professional golf competition.

b. The Court of Appeals

On appeal, the United States Court of Appeals for the Ninth Circuit upheld the ruling of the lower court, affirming that the PGA operated a place of public accommodation, which subjected it to ADA regulation. The Ninth Circuit rejected the PGA’s argument that the competitive playing area “inside the ropes” was exempt from

210. Martin, 984 F. Supp. at 1249 (finding that the Rules of Golf did not require walking and that the PGA had previously waived the “no cart” rule in other tournaments; therefore, the court concluded that walking was not an essential part of the competition).

211. Id. at 1250.

212. Id.

213. Id. Dr. Klug testified that the calories expended walking an eighteen-hole round of golf was less than was found in a Big Mac sandwich. Id. But see, infra note 315 (discussing the exclusion of Dr. Klug’s testimony from the Olinger v. United States Golf Ass’n proceedings).

214. Id. at 1250-51 (relying on testimony by Dr. Gary Klug, professor of physiology at the University of Oregon, who testified that walking in competitive golf is not physiologically taxing and does not create an appreciable measure of fatigue). PGA witness and 1964 U.S. Open winner, Ken Venturi testified that the principal cause of fatigue in PGA golf is mental stress caused by the pressure of competition. Respondent Brief to the Supreme Court at 39, PGA Tour, Inc. v. Martin, 121 S. Ct. 1879 (2001). Mr. Venturi and other PGA witnesses who testified that riding in a golf cart reduces a perceived fatigue factor admitted that “they were speaking generally about able-bodied hypothetical golfers and not about Mr. Martin.” Martin, 994 F. Supp. at 1250.


216. Id. at 1251-53.

217. Id. at 1253.

218. Martin v. PGA Tour, Inc., 204 F.3d 994, 996 (9th Cir. 2000).
ADA regulation and held that the “underlying premise of the cases dealing with disabled student athletes is that Title III applies to the playing field, not just the stands.” The Ninth Circuit found that provision of a golf cart to Mr. Martin was reasonable because it provided him access to the competition, access that was provided in other competitions and, as a practical matter, was not difficult to administer.

The Ninth Circuit also affirmed the district court ruling that walking was not an essential part of the game of golf. After individual inquiry, the Ninth Circuit held that use of a golf cart by Mr. Martin would not fundamentally alter the nature of the golf tournament. The inquiry focused on the individual exception and, in light of the plaintiff’s individual characteristics, whether the purpose of the rule or program would be fundamentally altered. Also rejecting fatigue as a significant factor in the competition, the Ninth Circuit held that walking was not fundamental or essential to the competition; therefore, the use of a cart by Mr. Martin could not fundamentally alter the nature of the golf competition. Because walking was not essential to the competitive game, a golf cart could not serve to provide Mr. Martin with a competitive advantage over able-bodied, walking golfers. As applied to Mr. Martin, who “endures greater fatigue even with a cart than his able-bodied competitors do by walking, [provision of a golf cart] did not fundamentally alter the nature of the PGA Tour’s [competition].” The Ninth Circuit further rejected the un-


220. Id. at 999.

221. Id. (citing Rule 1-1 of the Rules of Golf, “[the game of golf] consists in playing a ball from the teeing ground into the hole by a stroke or successive strokes in accordance with the Rules.”).

222. Id. at 1001. See also School Bd. of Nassau County v. Arline, 480 U.S. 273, 287 (1987) (holding individual inquiry is required under the Rehabilitation Act); Bragdon v. Abbott, 524 U.S. 624, 632 (1998) (holding that the court is required “to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act”).

223. Martin, 204 F.3d at 1002 (citing Pottgen v. Missouri State High School Activities Assoc., 40 F.3d 926, 932 (8th Cir. 1994) (Arnold, Judge dissenting)). See also H.R. REP. No. 101-485, pt. 2 at 102 (1990) (requiring public accommodations “to make decisions based on facts applicable to individuals and not on the basis of presumptions as to what a class of individuals with disabilities can or cannot do”).

224. Martin, 204 F.3d at 1001.

225. Id.

due hardship argument, finding that the fact-based inquiry requirement would actually eliminate the flood of waiver requests and potential litigation by disabled athletes that was feared by the PGA.

c. The Supreme Court

The United States Supreme Court affirmed the Ninth Circuit ruling, holding that “Title III of the ADA by its plain terms, prohibits [the PGA] from denying Martin equal access to its tours on the basis of his disability.” The Court ruled that the ADA required the PGA to consider Mr. Martin’s individual circumstances and make reasonable accommodations to allow Mr. Martin the equal opportunity to compete in PGA Tour events, unless such accommodations would serve to fundamentally alter the nature of the events. PGA Tour events, and presumably other professional sporting events, are encompassed by the ADA because Title III of the ADA did not carve out exceptions for “elite” athletic events. Upholding the lower courts’ finding that the fatigue factor was less than persuasive in Mr. Martin’s individual circumstance, the Court found “walking at best peripheral to the nature of the [PGA’s] athletic events.” “A modification that provides an exception to a peripheral tournament rule without impairing its purpose cannot be said to ‘fundamentally alter’ the tournament.” Therefore, Mr. Martin should have been granted the waiver that would have allowed him to compete in the PGA Tour events.

5. JaRo Jones v. United States Golf Association

JaRo Jones is a skilled senior golfer who was substantially limited in his ability to walk due to Post Polio Syndrome with Progressive Neuromuscular Atrophy. He was otherwise qualified to participate in the qualifying rounds of the United States Senior Open Championship

227. Martin, 204 F.3d at 1002 (holding that nothing in the record established that an individualized determination of Martin’s condition would impose an undue hardship on the PGA).

228. Id. (noting that the “PGA has steadfastly declined to consider Martin’s condition in adhering to its position that permitting him to use a cart would fundamentally change its competition”).


230. Id. at 1893.

231. Id. at 1896-97. See also supra note 92 and accompanying text (ADA did not create exceptions by implication).

232. Id. at 1896.

233. Id. at 1897.


235. JaRo Jones v. United States Golf Ass’n, Civil No. A-00-CA-278 JN at 1.
The USGA is a nonprofit association that publishes and promulgates the Rules of Golf. Pursuant to upholding the “ancient and honorable tradition,” the USGA did not allow the use of golf carts by competitors in the U.S. Senior Open. However, nothing in the Rules of Golf required a golfer to walk. The walking requirement was imposed by the USGA Championship Committee and designed to inject a fatigue factor into the tournament.

Because of his disability, Mr. Jones requested a waiver of the walking rule from the USGA in 1998, 1999, and 2000, to allow him to compete in the qualifying rounds for the U.S. Senior Open. The USGA denied all three of his requests. In May, 2000, Mr. Jones sought injunctive relief under Title III of the ADA, requiring the USGA to allow him to use a golf cart in the U.S. Senior Open and its qualifying rounds.

a. The District Court

The United States District Court for the Western District of Texas first determined that Mr. Jones was disabled within the meaning of the ADA. As an operator of a public accommodation while conducting its golf tournaments, the USGA was subject to the regulations of Title III of the ADA. The district court rejected the USGA argument that public accommodation did not extend “inside the ropes,” holding that Title III applied to the playing field, as well as “outside the ropes.” Moreover, the area “inside the ropes” was open to any member of the public over the age of fifty who met the qualifications. Even though the field was eventually winnowed to 156 positions for the U.S. Senior Open, the nature of the facility remained accessible to the public.

---

236. Id.
237. Id.
238. Id. at 2.
239. Id.
240. Id. at 9.
242. Id. at 2.
243. Id. at 2-3.
244. Id. at 3.
245. Id. at 5-6.
246. JaRo Jones, Civil No. A-00-CA-278 JN at 6 (citing Martin v. PGA Tour, Inc., 204 F.3d 994, 998 (9th Cir. 1998); Olinger v. United States Golf Assoc., 55 F. Supp. 926, 931 (N.D. Ind. 1999)). See also The Americans with Disabilities Act, 42 U.S.C. § 12181(7)(L) (1994) (stating that “golf courses” are one of the enumerated public accommodations).
247. JaRo Jones, Civil No. A-00-CA-278 JN at 5.
unchanged. The USGA also contended that the tournaments it conducted were "mixed use" facilities. The district court rejected this argument, holding that the ADA does not provide for "exempt zones" in places of public accommodation. Therefore, failure to make reasonable modifications discriminated against Jones because nothing in the rules required walking, and Jones established that a cart was a reasonable modification to accommodate his disability by allowing him access to the U.S. Senior Open and its qualifying rounds.

To defend against the Title III claim, the USGA needed to prove that accommodating Mr. Jones with a golf cart would constitute a fundamental alteration in the nature of the U.S. Senior Open. "The evidence must focus[ ] on the specifics of [Jones'] circumstances and not on the general nature of the accommodation." Based on the evidence presented and individual analysis of Jones' circumstances, the district court held that "Jones' use of a cart would not give him an advantage over other players that would fundamentally alter the competition." Moreover, the district court rejected the USGA argument that such individualized inquiry would become an administrative burden. The USGA received 3,050 applications to compete in the U.S. Senior Open in 2000. However, between 1986 and 1998, the USGA received only twelve waiver requests for all of the tournaments it sponsored. In order to be consistent with the Supreme Court decision in and to comply with the requirements of the ADA, the USGA must allow Mr. Jones the use of a golf cart as he seeks equal access to the U.S. Senior Open.

The decisions in the cases involving athletes raising claims under the ADA provide a basis for future courts to determine whether a requested modification is reasonable in terms of the circumstances of the disabled athlete. However, some of the analyses used in the afore-

248. Id. (citing Martin, 204 F.3d at 999).
249. Id. at 6.
250. Id.
251. Id. at 11.
252. JaRo Jones, Civil No. A-00-CA-278 JN at 8-9 (citing Martin, 204 F.3d at 1001). See also Johnson v. Gambrinus Co., 116 F.3d 1052, 1064-65 (5th Cir. 1997) (holding individual inquiry essential to determination of fundamental alteration).
253. JaRo Jones, Civil No. A-00-CA-278 JN at 9. Moreover, this court was critical of the Seventh Circuit's decision in Olinger v. United States Golf Association, finding that the Olinger court did not conduct the individual inquiry required by the mandate of the ADA. Id. at 10.
254. Id. at 11.
255. Id.
256. Id.
257. See supra notes 229–33 and accompanying text.
mentioned cases were applied inconsistently in Olinger v. United States Golf Association.

III. The Parties

A. Ford Olinger

Ford Olinger is a highly skilled thirty-three year-old professional golfer who achieved professional status in 1988 and attempted to qualify for the 1998 and 1999 United States Open Golf Championships (U.S. Open).258 Mr. Olinger suffers from bilateral avascular necrosis in both hip joints, a disability that significantly impairs his ability to walk259 and causes him "excruciating pain in the knee and lower back."260 Mr. Olinger is also at significant risk of fracture when he uses his legs to walk.261 Mr. Olinger underwent surgery to graft his fibula in an attempt to repair his left hip but achieved limited success.262

Despite the progressive nature of this disease, Mr. Olinger remains eligible or "otherwise qualified" to compete for a berth in the U.S. Open sponsored by the USGA.263 To compete in this event, the golfers are required to walk eighteen holes of the competition.264 However, because of the severity of the degenerative disease affecting both of his hips, Mr. Olinger was unable to walk the full eighteen holes required to compete.265 Upon denial of the waiver, Mr. Olinger

259. Id. Avascular necrosis results from the temporary or permanent loss of blood supply to the bone tissue, resulting in collapse of the bone. Questions and Answers about Avascular Necrosis, National Institute of Arthritis and Musculoskeletal and Skin Diseases, at http://www.nih.gov/niams/healthinfo/avnecqa.htm (last visited June 7, 2001). When this process involves a bone near a joint, it leads to collapse of the joint surface, resulting in pain and arthritis in that joint. Id.
261. Id.
262. Id. Ongoing treatments vary for this disease based on the severity of the process, however treatment includes protection of the joint by limiting movement, prevention of further bone destruction, and reduction of pain. Questions and Answers about Avascular Necrosis, supra note 259, at http://www.nih.gov/niams/healthinfo/avnecqa.htm. Mr. Olinger is required to take Oxycontin, a medication used to treat cancer patients to alleviate moderate to severe orthopedic pain. Oxycontin causes drowsiness and decreased functioning of the lungs. Brief for the Appellant at 8, Olinger v. United States Golf Assoc., 55 F. Supp. 2d 926 (N.D. Ind. 1999).
265. Id.
sought injunctive relief to enjoin the USGA from enforcing its “no-cart” rule.266

**B. The United States Golf Association (USGA)**

The USGA is a private, not-for-profit organization consisting of nearly 800,000 individual members and more than 9,000 public and private golf courses.267 The organization is “run by golfers for the benefit of golfers.”268 A professional staff oversees the association’s day-to-day functions from its headquarters, The Golf House, in Far Hills, New Jersey.269 The USGA depends on over 1,200 volunteers from all over the country to coordinate the responsibilities of the organization.270 Founded in 1894 by five United States golf clubs,271 the USGA continues to pursue its primary purpose: “to act in the best interest of the game for the continued enjoyment of those who love and play it.”272 Two functions served by the USGA are the sponsorship of thirteen national championships and the development and maintenance of the Rules of Golf.273 By the general consent of the golf community, the USGA is regarded as the governing body of golf in the United States.274 In cooperation with the Royal and Ancient Golf Club of St. Andrews in Scotland, the USGA writes and interprets the Rules of Golf “to guard the tradition and integrity of the game.”275 Any changes in the governing rules must be jointly agreed upon by the USGA and the Royal and Ancient Golf Club.276 In addition, the USGA publishes *A Modification of the Rules of Golf for Golfers with Disabilities* to “allow the disabled golfer to play equitably

---

266. Id.
269. Id.
270. See supra note 267, at 3.
272. See supra note 267, at 3.
273. See supra note 267, at 4–6. The USGA also promotes amateur golf, maintains equipment standards through research and technology, provides handicap and course rating systems, funds turfgrass and environmental research, preserves golf’s history, and ensures golf’s future through its foundation. Id. at 4-9.
276. USGA Members Program, supra note 267, at 6.
with an able-bodied individual or golfer with another type of disability.277

C. The United States Open Golf Championship

One of the tournaments sponsored by the USGA is the United States Open Golf Championship (U.S. Open).278 Use of the word “Open” emphasizes the competition’s democratic qualifying process.279 The process of narrowing the competitors to the ultimate field of 156 players involves two qualifying rounds for non-exempt players.280 To be considered for participation in the local qualifying rounds, participants must either have professional status or carry a certified handicap index of 1.4 or lower as an amateur.281 Local eighteen-hole qualifying rounds are conducted at ninety sites nationwide, producing 750 competitors to advance to the sectional rounds.282 Sectional qualifying rounds, played at twelve sites around the country, consist of thirty-six holes of golf played on a single day.283


278. Stephen Goodwin, The Evolution of the Open, 2000 U.S. Open Championship 128 (2000). For the first half of the U.S. Open’s one hundred year history, it was called the “National Championship.” Id.

279. Id.

280. Olinger, 55 F. Supp. 2d at 928 (stating that exempt status can be obtained by card-carrying professional players). In fact, 7,117 golfers vied for the 156 playing positions in 1998. Id.

Categories for exemption for the 2001 U.S. Open include:

Winners of the U.S. Open Championship for the last 10 years; Winner of the 2000 U.S. Amateur Championship; Winners of The Masters for the last five years; Winners of the British Open Championship for the last five years; Winners of the PGA of America Championship for the last five years; Winner of the 2001 Players Championship; Winner of the 2000 U.S. Senior Open Championship; From the 2000 U.S. Open Championship, the 15 lowest scorers and anyone tying for 15th place; From the 2000 final official PGA Tour money list, the top 30 money leaders; From the 2000 final official PGA European Tour money list, the top 15 money leaders; From the 2001 official PGA Tour money list, the top 10 leaders through May 27; Any multiple winner of PGA Tour co-sponsored events whose victories are considered official from April 26, 2000 through the close of entries on April 3, 2001; Special exemptions selected by the USGA Executive Committee; From the 2001 official PGA European Tour money list, the top two money leaders through May 28; From the 2000 final official Japan Golf Tour money list, the top two money leaders, provided they are in the top 75 in the World Ranking at that time; From the 2000-2001 final official PGA Tour of Australia money list, the top two money leaders, provided they are in the top 75 in the World Ranking at that time; From the current World Ranking, the top 50 point leaders as of May 28.


281. Olinger, 55 F. Supp. 2d at 928. The handicap index is designed to provide golfers of differing abilities the chance to compete against one another on relatively equal terms; it takes into account the difficulty of the courses played and the average score of the golfer to compute the golfer’s handicap. USGA Members Program, supra note 267, at 7.


283. Id.
local and sectional levels, as well as at the national championship, the USGA sponsors the rounds at various golf courses and "occupies each site for a limited time before, during and after the subject events." In 1998, private clubs were used for over ninety-five percent of the 103 sites for local and sectional qualifiers. The 1998 U.S. Open was sponsored by the USGA, which leased the Olympic Club in San Francisco for the event.

D. The District Court Ruling

The district court in Olinger looked to cases decided under the Rehabilitation Act of 1973 to determine whether the modification request to use a golf cart was reasonable and whether it would serve to fundamentally alter the nature of the activity. This analysis "[wa]s easily transferable [sic] to the Title III [of the ADA] reasonable modifications context," because both provisions contained very similar language. Under the ADA, the plaintiff bears the burden of showing the general reasonableness of the requested modification. Because the use of a golf cart had become so widespread throughout the game of golf and the Rules of Golf did not specifically prohibit the use of a golf cart, the USGA did not challenge the reasonableness of Mr. Olinger's request. The burden then shifted to the USGA to establish that the "modification would fundamentally alter the nature of the public accommodation." Prior cases held that the inquiry must necessarily focus on specific circumstances of the parties as opposed to reasonableness in general. The public accommodation program or activity requested to be modified in Olinger was not the game of golf in general, but the competitive rounds of the U.S. Open. Therefore, the district court's inquiry centered around whether Mr. Olinger's use of a golf cart in the qualifying rounds and the U.S. Open would fundamentally alter the nature of U.S. Open competition.

284. Id. at 928.
285. Id. at 928-29.
286. Id. at 929.
287. Id. at 933.
288. Olinger, 55 F. Supp. 2d at 933 (citing Johnson v. Gambrinus Co., 116 F.3d 1052, 1059 (5th Cir. 1997)).
289. Id. at 934. See also Johnson, 116 F.3d at 1059.
290. Olinger, 55 F. Supp. 2d at 934.
291. Id.
292. Id.
293. Id.
294. See Johnson, 116 F.3d at 1059-60.
296. Id.
The district court analyzed Mr. Olinger's claim under Title III of the ADA by addressing whether the USGA and its events were places of public accommodation within the scope of the ADA.297 Because Congress chose to list places rather than events or activities as public accommodations, the district court found that the USGA and the U.S. Open were not places of public accommodation.298 However, it also found that the golf courses on which the USGA sponsored the U.S. Open tournaments were within the scope of the ADA as places of public accommodation.299 Recognizing that Mr. Olinger did not seek equal access to the USGA, but rather to the golf courses on which the USGA conducts its tournaments, the district court held that for one day in May each year, the USGA operates "[ninety] golf courses for the local qualifying rounds and [twelve] golf courses for the sectional rounds,"300 thereby restricting normal operations of those golf courses during those days.301 The USGA "exercise[d] substantial control over the operations of the golf courses used in the local and sectional qualifying rounds and the championship rounds."302 The district court rejected the USGA's argument that the golf courses it operated were "mixed use" facilities with a Title III exempt area "inside the ropes."303 Analogizing this case to a series of cases addressing the National Collegiate Athletic Association eligibility rules, the district court held that the ADA regulations did not provide for a "private enclave in a public accommodation."304

The district court then focused on the reasonableness of Mr. Olinger's request for the accommodation of a golf cart during competition, holding that it constituted a reasonable request for modification in a

297. Id. at 931 (citing The Americans with Disabilities Act 42 U.S.C. §§ 12181(7), 12182 (2000)).
298. Id. (citing Welsh v. Boy Scouts of America, 993 F.2d 1267, 1273 (7th Cir. 1993); Ford v. Schering-Plough Corp., 145 F.3d 601, 612-13 (3d Cir. 1998); Stoutenborough v. Nat'l Football League, 59 F.3d 580, 583 (6th Cir. 1995) (proposing that the USGA, like the Boy Scouts of America, the youth hockey league, and the professional football league, is a membership organization and not a place of public accommodation)).
299. Id. (stating that "[t]he inquiry must focus on the place, not the event").
300. Id. at 931.
301. Olinger, 55 F. Supp. 2d at 931.
302. Id. at 932.
303. Id.
304. Id. (comparing the golfers in the events to athletes in the NCAA cases, the court did not find that Title III was limited by the roped off competitive area, and nothing supported such a finding). See also Bowers v. Nat'l College Athletic Assoc., 9 F. Supp. 2d 460, 483-90 (D.N.J. 1998); Tatum v. Nat'l College Athletic Assoc., 992 F. Supp. 1114, 1122-23 (E.D. Mo. 1998); Ganden v. Nat'l College Athletic Assoc., No. 96 C 6953, 1996 WL 680000 (N.D. Ill. Nov. 21, 1996) (holding that the NCAA exercised enough control over the athletic facilities, as places of exercise and recreation and places of exhibition or entertainment, to make the NCAA an operator of the facilities and the competitors were the performers).
“general sense” because the use of golf carts had become so “ubiquitous,” and the Rules of Golf did not forbid the use of carts.\textsuperscript{305} However, it also held that the USGA, as an operator of a public accommodation, avoided provision of the “generally” reasonable modification by establishing that use of a golf cart by Mr. Olinger would fundamentally alter the nature of U.S. Open competition.\textsuperscript{306}

The final step of the district court’s inquiry was to determine whether the request was reasonable in Mr. Olinger’s circumstances or whether provision of a golf cart would fundamentally alter the nature of competition in the U.S. Open.\textsuperscript{307} The fundamental alteration question was analyzed from two perspectives: the purpose of the rule and the administrative burden of modifying the rule.

First, the district court looked to the purpose of the walking rule and whether provision of a golf cart would provide any competitive advantage.\textsuperscript{308} The USGA contended that the purpose of the walking rule was to inject a “fatigue factor” into the competitive equation because the U.S. Open was not only a test of golf skill, but also a test of stamina.\textsuperscript{309} The Rules of Golf empower the Committee in charge of the competition to set forth the conditions for each event.\textsuperscript{310} Yet, the Rules of Golf provide no specific prohibition on the use of golf carts during competitive play; on the other hand, the Rules specifically address other facets of the game, such as the maximum number of clubs available to a golfer during a round, the design of golf balls used, and the use of outside assistance.\textsuperscript{311} The Rules of Golf relied upon by the Committee ensure fairness in the competition by providing the “unique aspect of golf that underscores the extent rules ensure the

\begin{footnotesize}
\begin{itemize}
\item 305. \textit{Olinger}, 55 F. Supp. 2d at 934 (citing \textit{Johnson}, 116 F.3d at 1059 (proposing that the ADA plaintiff bears the burden of proving that the requested modification is reasonable in a general sense)).
\item 306. \textit{Id.} (citing \textit{Johnson}, 116 F. 3d at 1059 (proposing that the defendant must prove that the modification would fundamentally alter the nature of the public accommodation, focusing on the specific circumstances rather than reasonableness in general)).
\item 307. \textit{Id.} at 936.
\item 308. \textit{Id.} at 934-36.
\item 309. \textit{Id.} 935-36.
\item 310. \textit{UNITED STATES GOLF ASSOCIATION, RULES OF GOLF} 33-1 (2000) [hereinafter \textit{RULES OF GOLF}]. See also \textit{RULES OF GOLF} at Appendix I 104 (defining use of transportation as “if it is desired to require players to walk in a competition, the following condition is recommended: ‘Players shall walk at all times during a stipulated round’”).
\item 311. \textit{RULES OF GOLF, supra} note 310, at 4-4(a) (requiring no more than 14 clubs), 5-1 App. III (describing design of golf balls), 14-2 (disallowing assistance to golfer by prohibiting caddie from holding an umbrella to shield golfer from inclement weather or heating a golf ball, or positioning a caddie in the line of play or the line of a putt).
\end{itemize}
\end{footnotesize}
exact same conditions." Moreover, the *Rules of Golf* dictate that scores for rounds of golf are determined by the number of strokes taken, and the "competitor who plays the stipulated round in the fewest strokes is the winner." The USGA contended that the walking rule had been a condition of competition for the U.S. Open and qualifying rounds since the Open's inception in 1895, because "physical endurance and stamina of the competitors were very important parts of the test to which the competitors were subjected in championship-level golf competitions."

The district court relied heavily on the testimony of Dr. James M. Rippe, founder and director of the Center for Clinical and Lifestyle Research. Dr. Rippe testified to his study of medical literature and specific effects of fatigue, such as decreased hand-eye coordination and decreased dexterity, and concluded that because walking golfers expend significantly more calories, they experience more physiological and heat-induced stress, leading to decreased cognitive and psychomotor functions. However, Dr. Rippe's research involved only able-bodied golfers, finding that the able-bodied golfer who rides in a cart has a significant and unfair advantage over the able-bodied golfer who walks. Dr. Rippe conceded that the competitive edge in any given situation would be unmeasurable, varying with the extent of the golfer's disability, temperature, humidity, terrain, and the number and type of strokes. However, the district court was persuaded that a competitive edge, however slight, might exist. Coupled with the

---

315. *Olinger*, 55 F. Supp. 2d at 935. *See also* Brief for Appellee at 11, *Olinger v. United States Golf Assoc.*, 55 F. Supp. 2d 926 (N.D. Ind. 1999) (stating Dr. Rippe was associate professor of medicine in cardiology and the Center was regarded as the leading walking research lab in the United States for fifteen years). Dr. Klug, who testified at the Martin proceeding was excluded as unreliable under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *Olinger*, 55 F. Supp. 2d at 950.
317. *Olinger*, 55 F. Supp. 2d at 936 (stating that a person who walks a golf course on an average summer day expends the same amount of energy as one who runs eleven minute miles for two and one-half hours; calculating the amount of time spent walking during a round of golf at 1.1 minutes walking per stroke). *But see* Martin v. PGA Tour, Inc., 994 F. Supp. 1242, 1252 (D. Or. 1998) (stating that, even with a cart, Casey Martin still would walk twenty-five percent of the course).
319. *Id.*
finding that only a small amount of competitive edge was necessary to materially affect the outcome of the competition, this led the district court to hold that use of the golf cart, while a “generally” reasonable request, would fundamentally alter the nature of competition in the U.S. Open.  

Further, the district court heard testimony from Ken Venturi, winner of the 1964 U.S. Open. Mr. Venturi experienced significant fatigue during the 1964 competition due to extreme heat and humidity. He contended that “physical and mental fatigue are integral parts of the game of golf, which affect the performance of golfers in championship-level golf competitions.” However, Mr. Venturi’s fatigued victory came after playing thirty-six holes in the final day. Beginning in 1965, the U.S. Open was conducted over four days, instead of three, thereby eliminating the need for playing thirty-six holes on the final day and ending the severe endurance test of the final round. Based on Mr. Venturi’s testimony, the district court concluded that if Mr. Olinger were allowed to compete while riding in a golf cart, he could eliminate stamina from the set of qualities tested in the U.S. Open championship, thereby circumventing the purpose of the walking rule. The district court concluded by stating:

[T]he point of an athletic competition . . . is to decide who, under conditions that are about the same for everyone, can perform an assigned set of tasks better than (not as well as) any other competitor. The set of tasks assigned to the competitor in the U.S. Open includes not merely striking a golf ball with precision, but doing so under greater than usual mental and physical stress. The accommodation Mr. Olinger seeks, while reasonable in a general sense, would alter the fundamental nature of that competition.

The district court also analyzed the administrative burden that would be imposed on the USGA by requiring the organization to develop a system of individual inquiry to determine whether an applicant truly would need a golf cart to compete, holding that such a development was unnecessary. In addition to holding that the

---

320. Id.
321. Id.
325. Olinger, 55 F. Supp. 2d at 937.
326. Id. at 937-38.
327. Id. at 937.
ADA required the court to make an individual decision concerning a plaintiff, the district court acknowledged that it must also balance the potential impact of the inquiry against the overall nature of the program or activity.328 Because the USGA had never used its rules or discretionary decisions to give one player an advantage over another and in fact had developed rules to “level” the playing field, the district court held that all players must be bound by the same rules.329

E. The Seventh Circuit Court of Appeals Ruling330

The United States Court of Appeals for the Seventh Circuit upheld the district court ruling that provision of a golf cart to Mr. Olinger during competitive golf rounds would serve to fundamentally alter the nature of U.S. Open competition. Analyzing the evidence under a clearly erroneous standard of review and finding “ample” support in the record for the district court ruling, the Seventh Circuit rejected Mr. Olinger’s contention that the USGA did not present proof that, under Mr. Olinger’s personal circumstances, the use of a golf cart would fundamentally alter the nature of the U.S. Open competition.331 The Seventh Circuit held that the ADA did not require entities to change the basic nature, character, or purpose of the activity, and that the walking rule served such a basic purpose.332 Particularly persuasive was the testimony of Ken Venturi, discussing his 1964 victory at the U.S. Open under stifling conditions: “[I]f another competitor would have been riding in a cart, there would have been a ‘tremendous advantage to the other player,’ Venturi said.”333 Venturi also related the story of Ben Hogan, who won the U.S. Open walking one year after a serious automobile accident that left him unsure if he would ever again walk.334 The Seventh Circuit found this testimony very persuasive because “it emphasize[d] the importance and tradition of walking in championship-level tournament golf competition.”335

The Seventh Circuit briefly addressed the administrative burden that would be imposed on the USGA by requiring individual inquiry into such requests, holding that it was unnecessary to require the USGA to develop an entirely new system to evaluate such requests.336

328. Id.
329. Id.
330. Olinger v. United States Golf Ass’n, 205 F.3d 1001 (7th Cir. 2000).
331. Id. at 1006.
332. Id.
333. Id at 1005-06
334. Id. at 1007.
335. Olinger, 205 F.3d at 1007.
336. Id.
"The decision on whether the rules of the game should be adjusted to accommodate [Olinger] is best left to those who hold the future of golf in trust."\textsuperscript{337}

The United States Supreme Court recently granted certiorari to Mr. Olinger, vacating the Seventh Circuit Court of Appeals' decision and remanding the case to be considered in light of the Supreme Court decision in \textit{PGA Tour, Inc. v. Martin}.\textsuperscript{338}

IV. \textsc{Analysis}

Under Title III of the ADA, Ford Olinger sought an injunction to direct the USGA to allow him the use of a golf cart during the competitive rounds of the U.S. Open.\textsuperscript{339} While rejecting the USGA's argument that the playing area "inside the ropes" was exempt from coverage by the ADA, the district court denied the injunction on the grounds that use of a golf cart created a fundamental alteration in the nature of the competition.\textsuperscript{340} Title III of the ADA requires that operators of public accommodations make "reasonable modifications in policies, practices or procedures... unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such... privilege..."\textsuperscript{341} For Ford Olinger, the denial of injunctive relief also denied him the equal opportunity to play in the U.S. Open. Provision of a golf cart would have been a reasonable modification, affording Mr. Olinger an equal opportunity to compete.

\textbf{A. Does Title III of the ADA Apply to the USGA and What is the Privilege at Issue?}

The first step in the inquiry is whether the ADA applies to a given entity. Title III of the ADA exempts private clubs or organizations from coverage by the ADA.\textsuperscript{342} The \textit{Olinger} court found that the USGA, as a private organization, was nonetheless subject to the regulations of the ADA.\textsuperscript{343} Based upon the seven factors relied upon by the \textit{Martin} courts, the USGA and the U.S. Open did not qualify for private club status.\textsuperscript{344}

\textsuperscript{337. Id.}
\textsuperscript{338. Olinger v. United States Golf Ass'n. 2001 U.S. LEXIS 4150 (2001), see supra notes 229-233 and accompanying text.}
\textsuperscript{339. Olinger v. United States Golf Assoc., 55 F. Supp. 2d 927, 929-30 (N.D. Ind. 1999).}
\textsuperscript{340. Id. at 932-38.}
\textsuperscript{343. Olinger, 55 F. Supp. 2d at 930-33.}
\textsuperscript{344. See supra notes 195-204 and accompanying text (discussing the \textit{Landsdowne} factors as applied to the PGA). The eight factors include general selectivity, membership control, the his-
The first two factors were not supported because the USGA, even as a strictly private organization, is open for a membership fee to all adults and children who wish to support the game of golf.\textsuperscript{345} Moreover, the USGA-sponsored U.S. Open competition is open to all golfers who qualify based on their level of skill.\textsuperscript{346} The winnowing process of the competition does not change the nature of the facility. The golf course where the tournament is conducted becomes no less a public accommodation simply because most of the competitors are eliminated through the qualifying rounds.\textsuperscript{347} Moreover, USGA members exert no control over future memberships or voting power, thereby negating the freedom of association or selectivity element of private status.\textsuperscript{348} Factor three looks to the history of the USGA and precludes a finding that the organization was formed to sidestep the scope of the ADA. Further, the USGA does not qualify for private status under factors five and six because it advertises for membership in its publications and allows use of its facilities by non-members.\textsuperscript{349} Attendance at USGA-sponsored events includes the competitors, spectators, vendors, scorekeepers, and newsmedia personnel.\textsuperscript{350} Even the non-profit status of the USGA cannot qualify it as a private entity exempt from ADA regulation.\textsuperscript{351} The district court, however, focused not on the organization but on the place where the USGA sponsored the event to determine the applicability of the ADA.\textsuperscript{352} Therefore, by conducting the sponsored event at an enumerated public accommodation, the USGA and the U.S. Open, as private entities, were subject to ADA regulations and required to make reasonable modifications to allow access to disabled individuals, unless they could establish that such modifications would create a fundamental alteration in the nature of the competition or present an undue burden on the USGA.

Moreover, the district court correctly rejected the USGA contention that “inside the ropes” was exempt from ADA regulation, while the golf course in general was subject to the regulations.\textsuperscript{353} As the

\textsuperscript{345} USGA Members Program, supra note 267, at 12.
\textsuperscript{346} See supra notes 281–82 and accompanying text.
\textsuperscript{347} Martin v. PGA Tour, Inc., 204 F.3d 994, 999 (9th Cir. 2000).
\textsuperscript{348} USGA Members Program, supra note 267, at 3.
\textsuperscript{349} Id.
\textsuperscript{350} Id.
\textsuperscript{351} Id.
\textsuperscript{353} Olinger, 55 F. Supp. 2d at 931. See supra note 297 and accompanying text.
district court found in Martin, "such a distinction would render the private club exemption virtually irrelevant" by "relegat[ing] the ADA to hop-scotch areas" and requiring the courts to demarcate zones based on restricted access to the public.\footnote{354} By narrowly construing exceptions to the ADA, courts prevent organizations that are deemed public entities or private entities with public aspects from defeating the congressional intent of the ADA through simple designation of certain areas as "members only."\footnote{355} Further, Title III of the ADA does not restrict the definition of public accommodation to only those portions of a public exhibition that are open to the general public. This argument presumes that there is nothing public about the competition itself.\footnote{356} However, the golf courses used for competitions remain golf courses throughout the competitions.\footnote{357} Limited entry to a part of a public accommodation does not deprive the entity of its status as a public accommodation. Moreover, the Ninth Circuit found that many other places of public accommodation exist that are open only to specific invitees.\footnote{358} For example, elite private universities restrict admissions to a select few who qualify.\footnote{359} However, such competitive selectivity does not shield those universities from the scope of the ADA.\footnote{360}

Once the district court determined that the USGA was subject to ADA regulation, the next step in the inquiry was to identify the privilege at issue.\footnote{361} The district court correctly held that Ford Olinger did not seek equal access to the USGA, but rather to the golf course on which the USGA conducted the U.S. Open rounds.\footnote{362} However, the USGA did not simply sponsor golf in general. It sponsored the highly competitive men's national golf championship, the U.S. Open. This very important distinction entered into the analysis because the district court looked at the privilege sought to be exercised, not in terms of the nature of and impact on the game of golf in general, but rather

\footnote{355} Id. at 1327.
\footnote{356} Martin v. PGA Tour, Inc., 204 F.3d 994, 998 (9th Cir. 2000).
\footnote{358} Martin, 204 F.3d at 998-99.
\footnote{359} Id.
\footnote{360} Id. However, section 12181(a) does not grant equal access to a place where a person is not entitled to be, therefore a disabled spectator is not entitled to access "inside the ropes" during a tournament. 42 U.S.C. § 12181(a) (2000).
\footnote{361} Olinger, 55 F. Supp. 2d at 930.
\footnote{362} See The Americans with Disabilities Act, 42 U.S.C. § 12181 (1994). See also supra note 80 and accompanying text (discussing the ADA requirement that disabled persons be allowed equal access).
in terms of the nature of and impact on the game as played by the finest players in the world, competing with the sole intent of winning the coveted title and prize money.

After determining that an entity is subject to ADA regulation and identifying the privilege sought to be accessed, courts must analyze the requested modification in the context of the individual circumstances of the disabled person.

B. Individual Inquiry – Modification in this Case Does Not Undermine the Purpose of the Rule

To determine the reasonableness of a requested modification, the court must look to the underlying purpose of the policy or rule and decide whether that purpose would be undermined by granting the requested modification given the circumstances of the disabled plaintiff. This requires the court to focus on the particular disabled individual rather than a hypothetical disabled person. Individualized opportunity involves examination on a case-by-case basis that focuses on the specific factual situation. 363 “[C]ourts must examine the proposed alternative, [requested modification] in light of the purposes underlying the rule.” 364 Specifically, when looking to an alteration in the rules of athletics, the inquiry must consider whether the rule is substantive in defining who is eligible to compete or governing how the game is to be played. 365 A substantive rule intends to, and potentially does, influence the outcome of the event governed by the rule, as distinguished from rules not intended to affect the outcome, such as dress or decorum. 366 The Olinger court analyzed the requested waiver of the “walking” rule in light of the purpose advanced by the USGA. 367 The purpose advanced for the rule was to inject a “fatigue factor,” thereby testing the stamina of competitors in the overall skill of shot-making. 368 While finding that the use of a golf cart, “in a general sense,” was reasonable with respect to the competitive arena of the U.S. Open, the court held that a golf cart might affect the outcome of the event. 369

The Sixth Circuit Court of Appeals in Sandison v. Michigan High School Athletic Association applied a similar analysis to the purpose of

363. The spectrum, supra note 98, and accompanying text.
366. Milani, supra note 364, at 882.
368. See supra notes 308-14 and accompanying text.
369. See supra notes 308-14 and accompanying text.
the age requirements for high school competition, holding that the age rule was essential to the sports program to provide a safe and level playing field. Therefore, a waiver of this essential or substantive rule could potentially affect the outcome of the competitive event or fundamentally alter the nature of the competition in high school athletics. However, the Sixth Circuit did not consider the plaintiffs' disabilities in the context of the purpose of that rule and, given these plaintiffs' individual circumstances, the purpose of the age rule would not be undermined.

The Seventh Circuit Court of Appeals in Washington v. Indiana High School Athletic Association also applied this analysis, with a different result. The Seventh Circuit evaluated the eight semester eligibility rule in terms of whether a waiver of the rule, in that particular case, would be so at odds with its purpose that it would constitute a fundamental and unreasonable change. Based on this plaintiff's factual situation, and not simply similarly situated plaintiffs, the Seventh Circuit held that a waiver allowed Mr. Washington to participate in the athletic program, yet did not frustrate the purpose of the rule.

Mr. Washington was allowed to compete while maintaining a level playing field for all of the athletes involved. At the collegiate level, the district court in Bowers v. National Collegiate Athletic Association considered the purpose of the "core course" requirement for "qualifier status" or eligibility for the privilege of participating in intercollegiate athletic programs. This requirement was not considered a leveling rule for eligibility, but rather a non-discriminatory rule designed to ensure academic success at the collegiate level. The district court required the NCAA to look at Mr. Bowers' individual circumstances, such as the courses he attended in high school to determine if those courses could possibly meet the requirements set forth by the NCAA to help ensure collegiate academic success by the athletes. Further, the NCAA provided alternatives to the "core course" requirement that would still uphold the purpose of the rule. This individual inquiry, required by the ADA,

370. See supra notes 128-135 and accompanying text.
372. Id. at 853.
373. Id. at 853-54.
375. Id. at 468.
376. Id. at 468-69. See generally, supra notes 173-180 and accompanying text.
377. See supra note 175 (describing the alternatives available); supra note 100 (discussing the ADA standard that even essential rules or policies may be served by alternate means). Bowers v. National Collegiate Athletic Ass'n, 974 F. Supp. 459, 466 (D.N.J. 1997).
took into account Mr. Bowers' circumstances and determined that he was unlikely to succeed academically because he was unprepared to meet the challenge of college-level classes.\textsuperscript{378} The district court held that granting a waiver to Mr. Bowers in this circumstance would not only provide a disservice to the purpose of the rule, but would likely obliterate the rule.\textsuperscript{379}

One question for \textit{Olinger} remained: was walking a fundamental or substantive rule for professional competitive golf, such that allowing a disabled golfer to ride in a cart, as opposed to walking, could undermine the purpose of that rule?\textsuperscript{380} More specifically, after individual inquiry, would provision of a golf cart to Mr. Olinger undermine the purpose of the “walking” rule? The USGA contended that the “walking” rule was substantive, designed to inject a fatigue factor into the competitive equation. Therefore, it governed how the game was played and potentially influenced the outcome of the U.S. Open.\textsuperscript{381} However, the district court rejected Mr. Olinger’s contention that if walking were as essential to the game as purported, scores would actually go up as the round progressed due to the fatigue involved.\textsuperscript{382}

To support its contention, the USGA presented testimony from Dr. James Rippe revealing that the able-bodied golfer riding in a cart endured less fatigue than the able-bodied walking golfer.\textsuperscript{383} However, Dr. Rippe also established that the amount of fatigue a particular golfer would endure on any given day was variable and difficult, if not impossible, to quantify.\textsuperscript{384} Variables such as heat, humidity, and terrain could affect even able-bodied golfers in very different ways. Without the ability to specify the amount of fatigue endured, it is nearly impossible to establish with any degree of certainty that fatigue quantifiably affects the final score or plays any substantive role in the outcome of the competition.\textsuperscript{385}

\begin{itemize}
\item \textsuperscript{378} Bowers, 9 F. Supp. 2d at 468-69. \textit{See supra} notes 173-180 and accompanying text.
\item \textsuperscript{379} Id.
\item \textsuperscript{380} \textit{See supra} note 100 and accompanying text (discussing the essential/incidental distinction in terms of fundamental alteration).
\item \textsuperscript{381} \textit{See supra} note 309 and accompanying text.
\item \textsuperscript{382} Olinger v. United States Golf Assoc., 55 F. Supp. 2d 926, 935-36 (N.D. Ind. 1998). Professional golfers’ scores generally remain consistent throughout the eighteen holes, begging the question, how can fatigue really affect the scores and the outcome.
\item \textsuperscript{383} Olinger, 55 F. Supp. 2d at 935-36.
\item \textsuperscript{384} Id. at 936.
\end{itemize}
The Olinger court did not consider that Ford Olinger had an extra variable to contend with on any given day, his disability. Based on the evidence presented, the Olinger court assumed that providing Mr. Olinger with a golf cart would “remove stamina (at least a particular type of stamina) from the set of qualities designed to be tested in this competition.” However, individual inquiry into Mr. Olinger’s circumstances would have revealed that he likely endures greater fatigue because of his pain simply walking to and from the golf cart than a healthy, walking Tiger Woods would endure even on a particularly grueling day. This conclusion was reflected in the district court’s Martin decision, which stated that “the fatigue [Martin] endures just from coping with his disability is undeniably greater than the fatigue injected into tournament play on the able-bodied golfer by the requirement that they walk from shot to shot.” However, even if the district court in Olinger was correct in its conclusion that fatigue played a role in the competitive equation of the U.S. Open, the purpose of the USGA’s “walking” rule would have been served throughout the tournament by providing Mr. Olinger with the use of a golf cart. The injection of the fatigue factor into Mr. Olinger’s game was accomplished before he ever stepped onto the golf course.

Moreover, the golf cart would not remove the mental stress involved in a competitive round. Is it possible that the primary source of fatigue endured by golfers at the professional level has less to do with physical factors, such as heat and humidity, and everything to do with mental stress? As Ken Venturi testified in Martin, the principal causes of the fatigue endured in competition were an overpowering motivation to win and the pressure of the competition. Mental fatigue may require greater concentration or focus as the round progresses. However, use of a golf cart would be unlikely to impact a professional golfer’s ability to focus. With or without a cart, the mental fatigue would be the same, as the finest golfers in the world are all vying for that coveted first place finish.

386. Olinger, 55 F. Supp. 2d at 937.
387. The Martin court assumed that a disabled golfer was required to walk twenty-five percent of course, even with a cart. Martin, 994 F. Supp. at 1251. See also supra note 216 and accompanying text.
389. Brief for Claimant, Martin, 994 F. Supp. at 1251. See also supra note 214 and accompanying text.
C. Fundamental Alteration – Provision of a Golf Cart Would Not Fundamentally Alter the Outcome of the U.S. Open.

The final step in determining the reasonableness of a requested modification requires analysis of whether the modification would fundamentally alter the nature of the privilege or the outcome of the event.\textsuperscript{390} When dealing with competitive sports, even the slightest advantage could fundamentally alter the outcome of an athletic contest. The court in \textit{Sandison} considered the nature of competitive sports in light of the age requirement and determined that the advantage given to older students by waiving the age requirement could be enough to make the difference between winning and losing.\textsuperscript{391} To prevent this advantage would require a precise (and sometimes impossible) assessment of the abilities of all other similarly situated athletes. The Supreme Court in \textit{Martin} held that modification theoretically could fundamentally alter a golf tournament in two ways: by altering an "essential aspect of the game of golf that it would be unacceptable, even if it affected all competitors equally"\textsuperscript{392} (i.e. changing the diameter of the hole) or by a more peripheral change that would nonetheless give the disabled golfer an advantage over able-bodied golfers.\textsuperscript{393} The Court held that a golf cart, in this individual circumstance, would not fundamentally alter the PGA tournament in either way.\textsuperscript{394}

Competitive advantage was central to the \textit{Olinger} court’s inconsistent analysis of the fundamental nature of the modification requested. Wins and losses in professional golf are decided in a quantifiable measure: the golfer with the lowest score wins. However, it is nearly impossible to determine how much the unquantifiable factor of fatigue would translate into a golfer’s final score. Does this advantage translate into a one stroke advantage? Possibly two strokes? The court was persuaded that even a one stroke advantage could be crucial because of the small margin necessary to make a difference between winning and losing and the fact that fatigue could play a central role in the outcome of the U.S. Open.\textsuperscript{395}

At this level of competition, the difference in the level of skill is so slight that one missed or gained stroke per round could amount to a win or loss and a difference in prize money of thousands of dollars. To

\textsuperscript{390} See supra notes 128-134 and accompanying text.
\textsuperscript{392} PGA Tour, Inc. v. Martin, 121 S. Ct. 1879, 1893 (2001).
\textsuperscript{393} Id.
\textsuperscript{394} Id.
\textsuperscript{395} Supra notes 2, 320 and accompanying text.
maintain a fair standard, there must be a level playing field that is absolutely equal in all circumstances of the competition. The USGA and competitive golf are governed by a multitude of rules, attempting to provide for virtually any contingency that may arise during competitive play to assure that all competitors play under like circumstances. Rules governing players' conduct include: what to do when the ball comes to rest on a water sprinkler; how to correct imperfections on the green; and how to assess penalty strokes for violation of the rules. In addition, the Rules of Golf governs allowable equipment, including the number of clubs that may be carried during a round, the size, weight, and composition of the balls used, and the type of clubs used during a competitive round. These latter rules create a level "laboratory" condition for the play of competitive golf, a sport that can be decided by a matter of inches. For example, a slight miss-hit could result in an inadvertent slice into the rough, failure to make the green in regulation, or an extra putt, all of which could add strokes to a competitor's final score. However, if the ball should take a lucky bounce, it may settle a few inches to the right or the left in the "fairway," allowing the player better control of the next shot. This small advantage, or lucky bounce, of a few inches could be the difference between winning and losing. However, all professional golfers must play their ball where it lies, creating a "level" playing field even when conditions are out of the golfers' control.

The "level" playing field that the USGA sought to create with the Rules of Golf included the injection of fatigue into the competitive

396. RULES OF GOLF, supra note 310, at 24-2.
397. Id. at 16-1(a).
398. Id. at 2-6.
399. Id. at 4-4.
400. Id. at 5-1.
401. Id. at 4-1.
402. Rough is the deep grass on either side of the fairway, allowing the golfer less control of the next shot and possibly requiring different club selection, different strategy or a different swing. Joseph C. Dey, Golf, II. The Golf Course, at http://encarta.msn.com (last visited July 25, 2001).
404. Professional golfers learn and practice shot-making from all sorts of conditions, this skill is one of the factors that allows them professional status.
405. The fairway is the main part of the golf course, a carefully manicured strip of land where the grass has been cut to provide the golfer with a good playing surface for the ball. Joseph C. Dey, Golf, III. The Golf Course, at http://encarta.msn.com (last visited July 25, 2001).
406. RULES OF GOLF, supra note 310, at 13-1.
equation. However, the *Martin* and *Jones* courts were not persuaded that injection of a fatigue factor, by requiring walking during competitive rounds, was necessary to “level” the playing field or was actually part of any competitive equation in the individual circumstances of the cases heard.407 Those disabled golfers entered the arena of competition at a disadvantage. The provision of golf carts to the disabled golfers simply attempted to “level” the playing field. The *Martin* courts applied an empathetic focus and perspective to the analysis of the case, placing themselves “in the shoes” of the disabled golfer.408 They considered that the nature and language of the ADA’s prohibition of discrimination suggested that interpretation must also take into account the “compassionate purpose” behind the ADA.409

In contrast, the *Olinger* courts, persuaded by Ken Venturi’s compelling testimony, found that waiving the “leveling” “walking” rule would decrease the importance of conditions that affect a golfer’s performance, “but which lie beyond the golfer’s ability to control – fatigue born of hills, of heat, [and] of humidity.”410 The *Olinger* courts did not consider that Ford Olinger endures more fatigue from shot to shot, even with a cart, than his able-bodied competition forced to walk on any given day, thereby rendering the fatigue factor moot in his individual circumstance. Instead of using an empathetic understanding of the context of Mr. Olinger’s individual situation, the court applied an “apathetic disregard for the real world impact.”411 The analysis used by the Seventh Circuit in *Olinger* was also in direct conflict with its analysis in *Washington*.412 Similar to the waiver of the age requirement in *Washington*, the fatigue factor should have been evaluated in the context of Mr. Olinger’s individual circumstances, and it should have been determined whether provision of a golf cart would undermine the purpose of the rule, and therefore possibly fundamentally alter the outcome of the event. However, as in *Washington*, if the purpose of the rule can be maintained despite waiver of the rule, the requested modification must be granted.413 Moreover, the laboratory

---

407. See supra notes 209-17, 253 and accompanying text.
409. O’Grady, supra note 408, at 18.
410. *But see* Brief to the Supreme Court for the Respondent, PGA Tour, Inc. v. Martin, 121 S. Ct. 1879 (2001) (noting that Ken Venturi testified in Martin v. PGA Tour, Inc. that stress and motivation to win were “key ingredients in the “psychological phenomenon” of fatigue; walking was an insignificant part of the fatigue equation). See also *supra* note 214 and accompanying text.
412. *See generally* supra notes 150-160 and accompanying text.
413. See *supra* note 159 and accompanying text.
conditions in virtually every other part of the competition would be maintained. The golf cart simply would have "leveled" the playing field for Ford Olinger. The Olinger courts should have "walked" in the shoes of the "disenfranchised outsider."\textsuperscript{414} The Supreme Court in \textit{Martin} "walked" in the shoes of Mr. Martin, finding that "pure chance may have a greater impact on the outcome of elite golf tournaments than the fatigue resulting from the enforcement of the walking rule."\textsuperscript{415}

Mr. Olinger and Mr. Martin are similarly situated; both professional golfers have debilitating disabilities precluding them from walking an eighteen-hole golf course for competitive events.\textsuperscript{416} Both players also sought equal access to the competitive events by the use of a golf cart, which was held by the United States Supreme Court in \textit{Martin} to be a reasonable accommodation that would not fundamentally alter the nature of these events.\textsuperscript{417} In order to be consistent with the Supreme Court holding in \textit{Martin}, the Seventh Circuit must now reverse its ruling and find that the USGA walking requirement, as it related to Mr. Olinger, violated Title III of the ADA, and thereby require the USGA to allow Mr. Olinger the opportunity to compete using a golf cart.\textsuperscript{418}

Is it possible that the fundamental alteration that the Olinger courts were actually concerned about was the alteration of the time-honored tradition of golf? The Seventh Circuit Court of Appeals was very concerned with the testimony of the legendary Ken Venturi about his heat-exhausted victory in 1964 and about the legendary golfer, Ben Hogan’s "walking" victory at the U.S. Open just one year after a debilitating automobile accident. Moreover, the Seventh Circuit discussed the tradition of the late, great Payne Stewart,\textsuperscript{419} who used his full name on his U.S. Open application because it "was the U.S. Open." The Seventh Circuit seemed much more concerned with the time-honored tradition of golf than the nature of the sport in the year 2000. While tradition most certainly holds a very important place in

\textsuperscript{414} O'Grady, \textit{supra} note 408, at 25.
\textsuperscript{415} \textit{Martin}, 121 S. Ct. at 1895.
\textsuperscript{416} See \textit{supra} notes 182-189, 258-266 and accompanying text.
\textsuperscript{417} \textit{Martin}, 121 S. Ct. at 1897-98. \textit{But see} \textit{supra} notes 331-335 and accompanying text (citing the Seventh Circuit holding in Olinger that the provision of a golf cart would fundamentally alter the nature of the U.S. Open).
\textsuperscript{418} See generally PGA Tour, Inc. v. Martin, 121 S. Ct. 1879 (2001).
our society, the ADA attempts to bridge the gap between the discrimination that tradition may invoke and equal opportunity for all individuals. Tradition cannot be allowed to provide a cover for making changes that will actually improve the game.\textsuperscript{420} The USGA could have maintained the tradition of golf, while still giving Ford Olinger the opportunity to compete. In accord with their misplaced concern for tradition, the \textit{Olinger} courts recognized that while the USGA may not have unfettered discretion in the making of the rules governing the sport, it is acknowledged as the governing body of golf in the United States and must be afforded great deference to preserve that tradition.

The \textit{Olinger} courts also considered the difficulty in assessing requests to permit the use of a cart and held that such a requirement would present an undue burden on the USGA.\textsuperscript{421} However, given the small number of requests for waivers, the administrative burden would be minimal at best.\textsuperscript{422} The \textit{Martin} court asked the same question and held that nothing in the record established that such inquiry would be an intolerable burden.\textsuperscript{423} On the other hand, testimony persuaded the \textit{Olinger} courts that virtually any player could get a note from his doctor stating that the player was unable to walk due to a specified condition,\textsuperscript{424} which would require the USGA to establish methods to conduct individualized inquiry into such requests. However, this is what is required of other entities under ADA standards.\textsuperscript{425} The USGA should not be exempt from establishing criteria to evaluate disabled persons on an individual basis. The USGA waiver process could be amended to require an independent examination by a physician of their choosing, verifying that the individual actually qualifies for the waiver requested. Coupled with establishing specific standards and criteria for the grant of a waiver, this process would satisfy the individual inquiry mandate of the ADA without upsetting the competitive balance.

\textsuperscript{420} Brain Pollock, \textit{Case Note and Comment: The Supreme Court Appeal of the Casey Martin Case: The Court’s Two Options – Martin’s Hole-in-One or Olinger’s Slice into the Bunker}, 10 \textit{Depaul J. Art & Ent. Law} 391, 440-41 (2001).

\textsuperscript{421} See \textit{supra} notes 327-329 and accompanying text.

\textsuperscript{422} See \textit{supra} notes 254-256 and accompanying text. Between 1986 and 1998, the USGA received only 12 waiver requests for all the tournaments they sponsored. Olinger v. United States Golf Ass’n, 205 F.3d 1001, 1003 (7th Cir. 2000).

\textsuperscript{423} See \textit{supra} notes 227-228 and accompanying text.

\textsuperscript{424} Olinger v. United States Golf Ass’n, 55 F. Supp. 2d 926, 937 (N.D. Ind. 1999).

\textsuperscript{425} See \textit{supra} note 75 and accompanying text.
V. Impact

Potentially, the aspect of the Olinger decision that could have the greatest impact on competitive sports is the determination that the competitive event, the U.S. Open, was operated at a place of public accommodation, thereby subjecting the Rules of Golf to scrutiny under ADA standards. Accordingly, any organization charged with establishing and maintaining rules for a particular game or sport that is conducted or operated in a place of public accommodation could be required by a court to alter those rules to comply with ADA regulations. This potentially takes the rule-making capabilities out of the hands of the sport and places them in the hands of the courts. The courts must then determine what rules are substantive, how much deference should be afforded to those organizations that know their sports the best, and how much deference should be afforded to tradition. The Olinger courts afforded great deference to the established rules of competitive golf.

Critics of the Martin decision concocted outlandish applications of the decision, such as requiring “spring loaded shoes for [disabled] basketball players or quarterbacks with sign language interpreters,” to illustrate the possibility of opening the flood gates to requests for modifications of the rules and ADA litigation. Courts must tread with care so as not to open those floodgates. Given the severity of Mr. Olinger’s and Mr. Martin’s disabilities, it should not be overly difficult to conclude that permitting them to ride in golf carts in competition would not fundamentally alter the level playing field established by the Rules of Golf. However, the truly difficult cases for courts would be more marginal cases or those involving different requests for modifications. For example, provision of a golf cart to the hypothetical disabled professional golfer with a less severe disability than Mr. Olinger (one that does not limit the ability to walk) could lead to that golfer gaining a slight advantage over able-bodied golfers, thereby allowing the ADA to fundamentally alter the nature of competitive professional golf. The difference herein lies with the fact that the provision of golf carts to Mr. Olinger and Mr. Martin is necessary to provide equal access to tournament play; it is not simply a means to make the play more comfortable or less difficult. Consider also requests for modifications of the rules governing the use of specific golf balls or requests to play on shorter courses because a specific disability would

not allow play by the current rules. The court would then need to
determine whether the rule requested to be modified was indeed sub-
stantive and whether modification would fundamentally alter or affect
the outcome of that competition. However, if the request is not quan-
tifiable, it may be nearly impossible to determine with any accuracy
whether any advantage would be given to that golfer in those circum-
stances. Professional sports add another dimension and are especially
difficult to analyze because of the high level of skill or mastery of the
competitors, making many of the players virtually equal on any given
day. The mere possibility of a slight advantage may be enough to al-
low the modification to fundamentally alter or change the outcome of
the event. In professional sports, not only is winning or losing at
stake, but there is generally substantial prize money at stake as well.

The challenge for courts analyzing the ADA in competitive situa-
tions is not dealing with the outlandish examples, but instead is bal-
ancing the notion of fairness of competition with the ADA’s
fundamental goal of providing full participation to the disabled. De-
spite the ADA’s anti-discrimination mandate, many sports still dis-
criminate against disabled individuals. Some situations are easily
remedied, such as modifying the starting procedure in swimming com-
petitions to use a strobe light instead of the traditional starting gun to
accommodate the hearing-impaired competitive swimmer.

The more difficult problem arises when courts attempt to demarcate
the point between accommodating the disabled athlete and funda-
mentally altering the nature of the competitive activity, which could
potentially change the outcome of the event. When the individual in-
quiry requires courts to measure unquantifiable factors, competitive
settings add an extra aspect to the analysis because accommodations
that give even the slightest advantage to the disabled competitor alter
the level playing field and upset the balance that courts must attempt
to attain. This precedent must be construed narrowly by future courts
because every case and factual situation will be different.

VI. Conclusion

The central objective of the ADA is to allow disabled persons to
participate and compete on an equal basis. The Supreme Court in
Martin has reiterated the “policy statement to the world,” no longer
tolerating lost potential and requiring judgment of people by their
abilities, not their disabilities.429 The Supreme Court has granted the
“privilege” of equal access not only to Casey Martin, but to other

429. See supra notes 45-46 and accompanying text.
qualified professional golfers, such as Ford Olinger and JaRo Jones, and to other qualified professional athletes who seek equal access to pursue their dreams of competing at an elite level in a sport in which they have mastered the skills essential to the game. This is precisely what the ADA seeks to ensure for all disabled individuals, and what entities such as the USGA and PGA should be required to provide.

Julie L. Livergood
R.N., M.S.N.