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PERIPHERAL RULE WAIVER IS NOT “FUNDAMENTAL ALTERATION” UNDER ADA

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In the case of *PGA Tour, Inc. v. Martin*, No. 00-24 (U.S. 05/29/2001), the Supreme Court of the United States determined that application of a particular “walking rule” to a disabled contestant in a professional golf tournament violated the Americans with Disabilities Act of 1990 (ADA). The specific issue before the Court was “whether a disabled contestant may be denied the use of a golf cart because it would ‘fundamentally alter the nature’ of the tournaments to allow him to ride when all other contestants must walk.” The facts of the case were as follows:

PGA TOUR, Inc., a nonprofit entity formed in 1968, sponsors and cosponsors professional golf tournaments conducted on three annual tours. About 200 golfers participate in the PGA TOUR; about 170 in the NIKE TOUR; and about 100 in the SENIOR PGA TOUR...

There are various ways of gaining entry into particular tours... [Most participants] earn playing privileges in the PGA TOUR or NIKE TOUR by way of a three-stage qualifying tournament known as the "Q-School." Any member of the public may enter the Q-School by paying a \$3,000 entry fee and submitting two letters of reference from, among others, PGA TOUR or NIKE TOUR members. The \$3,000 entry fee covers the players' greens fees and the cost of golf carts, which are permitted during the first two stages, but which have been prohibited during the third stage since 1997...

Three sets of rules govern competition in tour events. First, the "Rules of Golf," jointly written by the United States Golf Association (USGA) and the Royal and Ancient Golf Club of Scotland, apply to the game as it is played, not only by millions of amateurs on public courses and in private country clubs throughout the United States and worldwide, but also by the professionals in the tournaments conducted by PGA, the USGA, the Ladies' Professional Golf Association, and the Senior Women's Golf Association. Those rules do not prohibit the use of golf carts at any time.

Second, the "Conditions of Competition and Local Rules," often described as the "hard card," apply specifically to PGA's professional tours. The hard cards for the PGA TOUR and NIKE TOUR require players to walk the golf course during tournaments, but not during open qualifying rounds. On the SENIOR PGA TOUR, which is limited to golfers age 50 and older, the contestants may use golf carts. Most seniors, however,

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prefer to walk.

Third, "Notices to Competitors" are issued for particular tournaments and cover conditions for that specific event. Such a notice may, for example, explain how the Rules of Golf should be applied to a particular water hazard or man-made obstruction. It might also authorize the use of carts to speed up play when there is an unusual distance between one green and the next tee.

The basic Rules of Golf, the hard cards, and the weekly notices apply equally to all players in tour competitions...

Casey Martin is a talented golfer... As a professional, Martin qualified for the NIKE TOUR in 1998 and 1999, and based on his 1999 performance, qualified for the PGA TOUR in 2000. In the 1999 season, he entered 24 events, made the cut 13 times, and had 6 top-10 finishes, coming in second twice and third once.

Martin is also an individual with a disability as defined in the Americans with Disabilities Act of 1990 (ADA or Act). Since birth he has been afflicted with Klippel-Trenaunay-Weber Syndrome, a degenerative circulatory disorder that obstructs the flow of blood from his right leg back to his heart. The disease is progressive; it causes severe pain and has atrophied his right leg...

When Martin turned pro and entered PGA's Q-School, the hard card permitted him to use a cart during his successful progress through the first two stages. He made a request, supported by detailed medical records, for permission to use a golf cart during the third stage. PGA refused to review those records or to waive its walking rule for the third stage.

At trial, PGA did not contest the conclusion that Martin has a disability covered by the ADA, or the fact "that his disability prevents him from walking the course during a round of golf." Rather, PGA asserted that "the condition of walking is a substantive rule of competition, and that waiving it as to any individual for any reason would fundamentally alter the nature of the competition." In so doing, the PGA presented expert testimony from some of the greatest golfers in history, including Arnold Palmer, Jack Nicklaus, and Ken Venturi, to explain that "fatigue can be a critical factor in a tournament, particularly on the last day when psychological pressure is at a maximum."

While acknowledging that such testimony suggested "permission to use a cart might well give some players a competitive advantage over other players who must walk," the district court noted that such testimony did not address "whether a cart would give Martin such an advantage." In so doing, the district court rejected the PGA's argument that "an individualized inquiry into the necessity of the

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walking rule in Martin's case would be inappropriate.” On the contrary, the district court found the ADA required judicial inquiry “into the purpose of the rule at issue, and to ascertain whether there can be a reasonable modification made to accommodate plaintiff without frustrating the purpose of the rule.”

Moreover, the district court judge found that “the purpose of the rule was to inject fatigue into the skill of shot-making, but that the fatigue injected by walking the course cannot be deemed significant under normal circumstances.” Further, as applied to Casey Martin, the district court judge observed that “the fatigue he suffers from coping with his disability is undeniably greater than the fatigue his able-bodied competitors endure from walking the course,” even with the use of a cart.

As a result, the judge concluded that it would “not fundamentally alter the nature of the PGA Tour's game to accommodate him with a cart.” The judge accordingly entered a permanent injunction requiring PGA to permit Martin to use a cart in tour and qualifying events. PGA appealed.

On appeal, the Ninth Circuit Court of Appeals found Martin’s use of a cart would not fundamentally alter the competition. Applying “an intensively fact-based inquiry,” appeals court agreed with the following words of the trial judge: “[a]ll that the cart does is permit Martin access to a type of competition in which he otherwise could not engage because of his disability.” The Ninth Circuit, therefore, affirmed the decision of the district court in favor of Martin. (See May 2000 NRPA Law Review, *Parks & Recreation*.) PGA then petitioned the U.S. Supreme Court to review this case.

In granting review, the U.S. Supreme Court noted that “[t]he day after the Ninth Circuit ruled in Martin's favor, the Seventh Circuit came to a contrary conclusion in a case brought against the USGA by a disabled golfer who failed to qualify for “America's greatest -- and most democratic -- golf tournament, the United States Open.” In the case of *Olinger v. United States Golf Assn.*, 205 F. 3d 1001 (2000), the Seventh Circuit had determined that “the nature of the competition would be fundamentally altered if the walking rule were eliminated because it would remove stamina (at least a particular type of stamina) from the set of qualities designed to be tested in this competition.” Accordingly, the U.S. Supreme Court had granted the PGA’s petition to review the Casey Martin decision, in part, to resolve the conflict between the federal circuit courts.

INTEGRATION THROUGH MODIFICATIONS

In citing the legislative history of the ADA, the Court noted that “Congress enacted the ADA in 1990 to remedy widespread discrimination against disabled individuals”:

“[D]iscrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation,

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communication, recreation, institutionalization, health services, voting, and access to public services". Congress noted that the many forms such discrimination takes include "outright intentional exclusion" as well as the "failure to make modifications to existing facilities and practices."

After thoroughly investigating the problem, Congress concluded that there was a "compelling need" for a "clear and comprehensive national mandate" to eliminate discrimination against disabled individuals, and to integrate them "into the economic and social mainstream of American life."

To effectuate its sweeping purpose, the ADA forbids discrimination against disabled individuals in major areas of public life, among them employment (Title I of the Act), public services (Title II), and public accommodations (Title III).

Within the context of Title III of the ADA, the Court found that golf courses were expressly included within the statutory definition of "public accommodations." Moreover, the Court acknowledged that a "place of exhibition or entertainment," like a golf course, is as a public accommodation covering not only participants "in some sport or activity", but also "spectators or listeners." As a result, the Court concluded that PGA was also operating "a public accommodation during its tours and qualifying rounds." Accordingly, the Court held that the PGA "may not discriminate against either spectators or competitors on the basis of disability."

FUNDAMENTAL ALTERATION?

Having found that the PGA was a public accommodation under Title III of the ADA, the issue was whether the PGA, in this particular instance, had violated "Title III's general rule prohibiting public accommodations from discriminating against individuals because of their disabilities." As cited by the Court, Title III of the ADA defines "discrimination" to include the following:

a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, *unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.*" §12182(b)(2)(A)(ii) (emphasis added by Court).

In this particular instance, the Court noted that "the PGA did not contest that a golf cart is a reasonable modification that is necessary if Martin is to play in its tournaments." Accordingly, the Court was careful to distinguish Martin's ADA claim from those that "might be asserted by players with less serious

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afflictions that make walking the course uncomfortable or difficult, but not beyond their capacity.” In such instances involving less serious afflictions, the Court found “an accommodation might be reasonable but not necessary” under the ADA.

As characterized by the Court, in this particular instance, the “narrow” issue under consideration was “whether allowing Martin to use a golf cart, despite the walking requirement that applies to the PGA TOUR, the NIKE TOUR, and the third stage of the Q-School, is a modification that would ‘fundamentally alter’ the nature of those events.”

In the opinion of the Court, a modification of PGA's golf tournaments might constitute a fundamental alteration if it gave a disabled player an advantage over others. In this particular case, however, the Court was “not persuaded that a waiver of the walking rule for Martin would work a fundamental alteration” in golf competitions. In reaching this conclusion, the Court observed that “the use of carts is not itself inconsistent with the fundamental character of the game of golf”:

From early on, the essence of the game has been shot-making -- using clubs to cause a ball to progress from the teeing ground to a hole some distance away with as few strokes as possible.

Further, the Court found “nothing in the Rules of Golf that either forbids the use of carts, or penalizes a player for using a cart.” On the contrary, the Court noted that the “walking rule” was “contained in PGA's hard cards, based on an optional condition buried in an appendix to the Rules of Golf.” Accordingly, the Court found that the “walking rule” was “not an essential attribute of the game itself.”

Indeed, the walking rule is not an indispensable feature of tournament golf either. As already mentioned, PGA permits golf carts to be used in the SENIOR PGA TOUR, the open qualifying events for PGA's tournaments, the first two stages of the Q-School, and, until 1997, the third stage of the Q-School as well.

Moreover, PGA allows the use of carts during certain tournament rounds in both the PGA TOUR and the NIKE TOUR. In addition, although the USGA enforces a walking rule in most of the tournaments that it sponsors, it permits carts in the Senior Amateur and the Senior Women's Amateur championships.

As characterized by the Court, the PGA had argued that their tournaments should be distinguished from “the game of golf as it is generally played” because such tournament play is golf at the “highest level.”

According to PGA, “[t]he goal of the highest-level competitive athletics is to assess and compare the performance of different competitors, a task that is meaningful only if the competitors are subject to identical substantive rules.” The waiver of any possibly

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"outcome-affecting" rule for a contestant would violate this principle and therefore, in PGA's view, fundamentally alter the nature of the highest level athletic event. The walking rule is one such rule, PGA submits, because its purpose is "to inject the element of fatigue into the skill of shot-making," and thus its effect may be the critical loss of a stroke.

Accordingly, PGA contended that "the reasonable modification Martin seeks would fundamentally alter the nature of PGA's highest level tournaments." Moreover, the PGA argued that waiving the walking rule for Martin would fundamentally alter PGA tournament play "even if he were the only person in the world who has both the talent to compete in those elite events and a disability sufficiently serious that he cannot do so without using a cart."

In response, the Court took issue with PGA's assertion that "[t]he waiver of any possibly "outcome-affecting" rule for a contestant would ...fundamentally alter the nature of the highest level athletic event." In so doing, the Court characterized golf as "a game in which it is impossible to guarantee that all competitors will play under exactly the same conditions or that an individual's ability will be the sole determinant of the outcome":

[C]hanges in the weather may produce harder greens and more head winds for the tournament leader than for his closest pursuers. A lucky bounce may save a shot or two. Whether such happenstance events are more or less probable than the likelihood that a golfer afflicted with Klippel-Trenaunay-Weber Syndrome would one day qualify for the NIKE TOUR and PGA TOUR, they at least demonstrate 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.

Further, the Court found "the factual basis of PGA's argument" was "undermined by the District Court's finding that the fatigue from walking during one of PGA's 4-day tournaments cannot be deemed significant":

The District Court credited the testimony of a professor in physiology and expert on fatigue, who calculated the calories expended in walking a golf course (about five miles) to be approximately 500 calories -- "nutritionally ... less than a Big Mac." What is more, that energy is expended over a 5-hour period, during which golfers have numerous intervals for rest and refreshment. In fact, the expert concluded, because golf is a low intensity activity, fatigue from the game is primarily a psychological phenomenon in which stress and motivation are the key ingredients... Moreover, when given the option of using a cart, the majority of golfers in PGA's tournaments have chosen to walk, often to relieve stress or for other strategic reasons.

INDIVIDUALIZED INQUIRY?

In the opinion of the Court, PGA's argument that any waiver of the walking rule would fundamentally alter tournament play was "fatally flawed," even if the walking rule was "outcome affecting" (i.e., fatigue may adversely affect performance). Specifically, the Court found that "PGA's refusal to consider Martin's personal circumstances in deciding whether to accommodate his disability runs counter to the clear language and purpose of the ADA."

Title III of the Act requires without exception that any "policies, practices, or procedures" of a public accommodation be reasonably modified for disabled "individuals" as necessary to afford access unless doing so would fundamentally alter what is offered.

To comply with this command, an individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration..

Unlike "the waiver of an essential rule of competition for anyone would fundamentally alter the nature of PGA's tournaments," the Court found that "the walking rule is at best peripheral to the nature of PGA's athletic events, and thus it might be waived in individual cases without working a fundamental alteration."

In so doing, the Court reiterated the ADA's "basic requirement" that "the need of a disabled person be evaluated on an individual basis." In the opinion of the Court, the required individualized inquiry would "no doubt" establish that Martin's use a golf cart "would not fundamentally alter the nature of PGA's tournaments":

As we have discussed, the purpose of the walking rule is to subject players to fatigue, which in turn may influence the outcome of tournaments. Even if the rule does serve that purpose, it is an uncontested finding of the District Court that Martin "easily endures greater fatigue even with a cart than his able-bodied competitors do by walking." The purpose of the walking rule is therefore not compromised in the slightest by allowing Martin to use a cart.

Accordingly, the Court found that [a] modification that provides an exception to a peripheral tournament rule without impairing its purpose cannot be said to 'fundamentally alter' the tournament." On the contrary, the Court found that PGA would satisfy the statutory mandate of the ADA by allowing Martin "the chance to qualify for and compete in the athletic events PGA offers to those members of the public who have the skill and desire to enter." The Court, therefore, determined that "Martin's request for a

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waiver of the walking rule should have been granted.”

[I]n a case of this kind, Congress intended that an entity like the PGA not only give individualized attention to the handful of requests that it might receive from talented but disabled athletes for a modification or waiver of a rule to allow them access to the competition, but also carefully weigh the purpose, as well as the letter, of the rule before determining that no accommodation would be tolerable.

As a result, the U.S. Supreme Court affirmed the judgment of the federal appeals court in favor of Martin.