ShawPittman LLP
A Limited Liability Partnership Including Professional Corporations

ALERT

NONPROFIT ORGANIZATIONS / ASSOCIATIONS

July 2001 Number 3

Fore: *PGA v. Casey Martin* Sends a Heads–up to Nonprofits

In a highly-publicized opinion, the United States Supreme Court has ruled under the Americans with Disabilities Act (ADA) that the Professional Golf Association (PGA) must afford golf professional Casey Martin the use of a powered golf cart while competing in the PGA Tour. *PGA Tour, Inc. v. Casey Martin,* No. 00-24, 2001 WL 567717 (U.S. May 29, 2001). This decision is potentially troubling for many other kinds of nonprofit organizations because it creates uncertainty about how far courts will go in characterizing activities as "public accommodations" and to what extent courts will encroach upon nonprofit organizations' self-governing rules.

Casey Martin has Klippel-Trenaunay-Weber Syndrome, a circulatory condition affecting blood flow and mobility in his right leg. Martin sued the PGA, a nonprofit organization that sponsors golf tournaments, under the ADA. The PGA Tour consists of three levels of golf competition, with golf carts allowed in the first two levels but not in the third level; that prohibition, according to the PGA, is intended to challenge competitors with elements of fatigue resulting from walking the eighteen-hole course. Martin contended the PGA's refusal to allow him to use a golf cart in the third level of PGA competition violated the reasonable modification mandate of the "public accommodation" portion of the ADA. Martin requested a golf cart because his condition prevents him from walking any distance without extreme pain and threat of hemorrhaging. Justice Stevens, writing for the majority, found that the PGA golf competition is a "public accommodation" under the statute's definition and triggers an obligation by the PGA to make reasonable modifications for the disabled. The Court found that use of a golf cart is such a reasonable modification, rejecting the PGA's contention that it would "fundamentally alter" the nature of the game.

I. "Public Accommodation"

The first issue the Court resolved is the applicability of Title III of the ADA, the section dealing with public accommodations, to the PGA's golf competition. Title III proscribes discrimination on the basis of a disability "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). This discrimination includes unnecessary eligibility criteria, failure to make reasonable modifications which fall short of fundamentally altering the nature of the good or service, failure to take steps to assure individuals with disabilities are not excluded or denied service, failure to remove barriers, architectural or communication, if removal is readily achievable, and failure to provide alternate methods of providing goods or service if removal of barriers is not readily achievable. *See* 42 U.S.C. § 12182(b)(2)(A)(i-iv).

The Martin case focuses on the PGA's failure to make reasonable modifications to its rule in order to allow this disabled professional golfer to use a golf cart in the face of the PGA's claim that use of a cart would fundamentally alter the competition. But many other kinds of nonprofit organizations encounter the same issues of what is a "public accommodation" and what are "reasonable modifications" when entering into hotel or convention center facility contracts, when offering

educational courses, or when providing professional credentialing services. All of these are specifically addressed by the ADA.

Congress named twelve categories of "public accommodations" in Title III. Operators or lessors of public accommodations, including nonprofit organizations, must ensure compliance with the ADA and make certain there is no "discrimination" as Title III defines it. The categories are: places of lodging unless the building contains less than five rooms, establishments serving food and drink, places of exhibition or entertainment, places of public gathering, sales or rental establishments, service establishments, stations used for specified public transportation, places of display or collection, places of recreation, places of education, social service center establishments, and places of exercise and recreation. 42 U.S.C. § 12181(7). In the statute a list of illustrations precedes each category; "golf course" is listed as an example of a place of exercise or recreation.

In deciding whether participation in the golf tournament is a public accommodation, the Court was influenced by the fact that the ADA specifically lists golf courses as places of public accommodation. Additionally, the Court described the PGA as a "lessor" of the golf course and the opportunity to compete in PGA competition as a "privilege." Based upon these characterizations, the Court found that discrimination by the PGA because of Martin's disability is a violation of the ADA. At the Supreme Court level, the PGA did *not* assert that it ran a private club, which would be exempt from ADA coverage, nor did the PGA attempt to distinguish areas restricted to the competitors from those open to the public, *i.e.*, the "behind the ropes" distinction, as it had to the courts below.

The Court was unpersuaded by the PGA's main contention that golf competition is a place of entertainment, with Martin an entertainer and not a "client or customer" of the PGA. If that contention were accepted, Title I of the ADA (the section of the statute dealing with employment) would apply rather than Title III. If the issues were resolved only under Title I, Martin would not have standing to sue under the ADA because Title I is restricted to "employees" and Martin would likely be found to be an independent contractor. The Justices were similarly unpersuaded by the distinction the PGA attempted to make between clients or customers and the participants in the tour. Refusing to decide if the "client or customer" label limited Title III in its entirety, the Court noted that even if it were the case that Title III is meant to apply only to "clients or customers," the fact that golf professionals must pay $3,000 to apply indicates that they are "customers." Looking to the fact that any golfer can qualify and compete so long as the golfer pays the application fee, the Court found that the competition offers the "privilege" of competing in the tournaments to the public and, consequently, qualifies as a public accommodation.

Finally, the Court expressed a desire to make the results of Title III of the ADA consistent with its analog, Title II of the Civil Rights Act. Under Title II, the statute prohibiting discrimination on the basis of race, color, religion or national origin in any public accommodation, Martin would have been protected by the statute as a participant in a sporting event or activity if the discrimination had been based on his race, color, religion, or national origin rather than his disability.

II. "Fundamentally Alter"

The Court decided that the "use of [golf] carts is not itself inconsistent with the fundamental character of the game of golf," and, consequently, that allowing Martin use of a cart would not fundamentally alter the golf competition. Referencing the Rules of Golf promulgated jointly by the United States Golf Association and the Royal and Ancient Golf Club of Scotland, the Court noted that there is no rule forbidding or penalizing the use of carts. The Court also looked to the

PGA Tour's own rules allowing golf cart use in the first two stages of the tournament to support the Court's finding that the walking rule was not indispensable.

Regarding the PGA's ardent assertion that walking served the purpose of fatiguing the participants, the Supreme Court deferred to the District Court's determination that the fatigue factor was not significant and noted that familiarity with the course and keeping a consistent rhythm and body temperature were benefits of walking the course not available to those riding in a cart. The majority opinion concluded by stating that it was Congress's intent to have an "entity like the PGA not only give individualized attention to the handful of requests it might receive [for modification]...but also carefully weigh the purpose, as well as the letter, of the rule before determining that no accommodation would be tolerable."

Applicability to Other Nonprofit Organizations

Notwithstanding its disposition in Martin's favor, the Supreme Court's opinion is a narrow one; it allows only Casey Martin the benefit of the individualized ruling. Still the Court's opinion should serve as a warning to other kinds of nonprofit organizations that sponsor events, services or activities, even those outside of the sporting world. Regardless of one's view of the ruling, one thing is abundantly clear: every nonprofit organization must take a long, hard look at its events, services or activities and fully analyze any situation where an individual with a disability requests a modification. This case acts as a sentinel to lower courts to take a more scrupulous look at what qualifies as a public accommodation, and gives license to courts to conduct more in-depth analyses of the necessity of nonprofit organizations' rules when challenged under the ADA.

The Court's focus on the PGA's open application process, and its characterization of the entry fee as creating a "client or consumer" relationship, evidences an extremely expansive reading of the statutory concept of "public accommodation." Certainly any entity conducting its endeavors on premises specifically listed as an example of a public accommodation in the law should pay special heed to this decision; it is a warning that the endeavor may qualify as a public accommodation. *See* 42 U.S.C. § 12187(7). Any event, service or activity that is offered to the public or a segment of the public, even if participants are selectively chosen from applicants, could now be categorized as a public accommodation.

Does that mean that a trade association, for example, that sponsors an exhibition must provide signing if an exhibitor requests it? Does the answer depend on whether it's a consumer show or an industry show? Does it mean that a professional society must build ramps to a podium if a speaker requests it? Does that answer depend on whether the speaker receives an honorarium or not? These are the kinds of issues that the Supreme Court's decision makes more difficult.

Though possibly unsettling to nonprofit organizations, the breadth of the Court's vision of public accommodations, as well as its foray into an association's own internal rules, does not sound the death knell for nonprofit autonomy. As a threshold, the claimant must satisfy the requirement of the definition of "disability" in the ADA. Then a court must determine that the event, service or activity is actually a public accommodation. Even then the entity need not make modifications if they would fundamentally alter the nature of what is being offered. The latter requirement tends to safeguard against mandatory accommodations that completely change the heart of the event, service or activity. In this case the U.S. Supreme Court undertook the required individualized inquiry. Other cases, even if demonstrating some similarities, may not have an identical outcome. If a nonprofit organization conducts an endeavor that qualifies as a public accommodation and is asked for modifications of policies or premises where the modifications do not fundamen-

tally alter the nature of what is provided, the organization must fulfill its legal duty under the ADA by complying with the request. That has been the law since Congress passed the ADA. What is new is the Supreme Court's rather expansive interpretation of the law in the context of PGA's refusal to let Casey Martin use a golf cart. From now on, where there is uncertainty about the applicability of the ADA, a nonprofit organization would be wise to act as deliberately, carefully and prudently as possible in light of the *Martin* decision.

For further information concerning the issues in this Alert, please contact:

Jerry Jacobs
jerry.jacobs@shawpittman.com - 202.663.8011

Jeff Glassie
jeff.glassie@shawpittman.com - 202.663.8036

Tom Arend
tom.arend@shawpittman.com - 202.663.8070

Karen Cipriani
karen.cipriani@shawpittman.com - 202.663.8069

Lauren Bright
lauren.bright@shawpittman.com - 202.663.8578

Christine Kearns
christine.kearns@shawpittman.com - 202.663.8488

Joyce Oliner
joyce.oliner@shawpittman.com - 202.663.8178