

The Americans with Disabilities Act, The United States Anti-Doping Agency, and the Effort Toward an Equal Opportunity: A Case Study of the *United States Anti-Doping Agency v. George Hartman* Matter

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I. INTRODUCTION

George Hartman solidified his reputation as a talented national-level judo athlete during the 2000 calendar year by winning both the U.S. National Collegiate Championships and the Amateur Athletic Union U.S. Open National Championships. However, in the following three years, Hartman plateaued and failed to make an impact at the international level. In the summer of 2003, his coach and physician, Dr. Walter VanHelder, diagnosed him with hypogonadism, erectile dysfunction syndrome, and depression all the alleged result of low testosterone levels. Dr. VanHelder elected to treat these disorders with testosterone injections, and Hartman closed out the year by winning a gold medal at the Pan American Masters competition and by becoming the second ranked U.S. judo athlete in the 100 kg weight class.

After beginning his testosterone regimen, Hartman tested positive for exogenous testosterone, a performance-enhancing substance.¹ While Hartman and Dr. VanHelder eventually claimed the testosterone was for the treatment of Hartman's alleged medical conditions, at no time did Hartman disclose his use of testosterone when tested or submit a Therapeutic Use

¹ See *United States Anti-Doping Agency v. George Hartman*, American Arbitration Association: N. Am. Court of Arbitration for Sport Panel, AAA 30 190 00900 05, 1 (June 19, 2006) [hereinafter *USADA v. Hartman Decision*].

Exemption (“TUE”) to the United States Anti-Doping Agency (“USADA”) requesting pre-competition clearance for his use of a prohibited substance.² Hartman argued he did not violate the applicable sport anti-doping rules because his use of synthetic testosterone was protected by the Americans with Disabilities Act³ (“ADA”) and its precursor, the Rehabilitation Act of 1973 (“Rehabilitation Act”).⁴ The American Arbitration Association’s North American Court of Arbitration for Sport Panel (“AAA Panel”) found that “[Hartman] failed to sustain his burden of proof that he suffers from [a disability]” under the ADA.⁵ Therefore, the AAA Panel was able to ban Hartman from competition for the full two-year period allowed under the World Anti-Doping Code (“WADC”) without a full legal and factual analysis of Hartman’s ADA claim. Nevertheless, the issue posed by Hartman’s claim as to whether USADA’s anti-doping policies are compliant with the ADA is a crucial one for all athletes going forward as USADA seeks to continue its fight against the use of prohibited performance-enhancing substances in sport.

There is little doubt that the ADA can apply to athletics in certain situations.⁶ Professional athletes are typically employees covered by Title I of the ADA.⁷ High School and Collegiate athletics are typically run by public entities covered by Title II of the ADA.⁸ Other athletes are protected by Title III because courts have defined certain fields of play, such as the golf course in *PGA Tour, Inc. v. Martin*,⁹ as public accommodations.¹⁰

The ADA may not apply to USADA since it does not employ the Olympic athletes it tests, is not a public entity, and does not sanction athletic events. Regardless of the ADA’s applicability, however, this article will describe how USADA and the ADA share the common goal of maintaining a level playing field for all athletes. USADA accomplishes this goal by protecting the competition rights of clean athletes. The ADA accomplishes this goal by providing assistance to individuals who, if not for a specific disability, would be fully capable of participating in a given activity. After providing an overview of USADA’s drug testing protocols and the operation of the ADA, this article will conclude that USADA’s drug

² See *id.* at 1.

³ 42 U.S.C. § 12101 (2000).

⁴ 29 U.S.C. § 701 (2000).

⁵ *USADA v. Hartman Decision*, at 1.

⁶ For an in-depth explanation of each Title of the ADA, see *infra* Part III.A.

⁷ See Henry T. Greely, *Disabilities, Enhancements, and the Meanings of Sports*, 15 STAN. L. & POL’Y REV. 99, 103 (2004).

⁸ See *id.*

⁹ 532 U.S. 661 (2001).

¹⁰ See Greely, *supra* note 7, at 103.

testing protocols are able to further this common goal in a manner that is procedurally and substantively compliant with the ADA because USADA offers an individual assessment to athletes who request permission to use an otherwise prohibited substance for the treatment of an acute medical condition.

II. AN OVERVIEW OF USADA'S ORIGIN, ITS MISSION, AND ITS RELEVANT PROTOCOLS.

Before the USADA opened in late 2000, doping control for the Olympic sports in the United States was governed by the National Anti-Doping Program ("NADP"). Under the NADP program, each sport's National Governing Body (NGB)¹¹ was required to prosecute its own athletes for doping violations.¹² In contrast, USADA was set up as an independent non-profit, non-governmental agency and was given contractual authority by the United States Olympic Committee ("USOC") to initiate a national anti-doping program focused on testing, adjudication, education, and research.¹³ By shifting the prosecutorial role from the NGBs to USADA, the NGBs were no longer faced with the inherent conflict of assembling the best teams possible on the one hand, and policing their own athletes on the other.¹⁴

USADA incorporates the mandatory provisions of the World Anti-Doping Code ("WADC") into its Protocol for Olympic and Paralympic Movement Testing.¹⁵ As a result, USADA imposes strict liability sanctions on athletes who test positive for prohibited substances.¹⁶ Athletes may face a two-year period of ineligibility for their first violation of the WADC.¹⁷ If aggravating circumstances are present, the period may be "increased up to a maximum of 4 years."¹⁸ Subsequent offenses may lead to a lifetime ban.¹⁹

¹¹ Examples of NGBs include USA Swimming, USA Hockey, USA Boxing, etc.

¹² See UNITED STATES OLYMPIC COMMITTEE NATIONAL ANTI-DOPING PROGRAM POLICIES AND PROCEDURES (on file with authors).

¹³ See United States Anti-Doping Agency, *USADA History*, <http://www.usantidoping.org/about/history.aspx> (last visited Oct. 27, 2010).

¹⁴ Dionne L. Koller, *Does the Constitution Apply to the Actions of the United States Anti-Doping Agency?*, 50 ST. LOUIS U. L.J. 91, 98 (2005) (citing White House Task Force on Drug Use in Sports, Proceedings: First Meeting of the White House Task Force on Drug Use in Sports 36 (Dec. 7, 2000) (statement of Dr. Johann Olav Koss)).

¹⁵ U.S. Anti-Doping Agency, *FAQs*, <http://www.usantidoping.org/resources/faqs.aspx> (last visited Oct. 27, 2010).

¹⁶ See WORLD ANTI-DOPING CODE § 2.1.1 (2009), <http://www.wada-ama.org>.

¹⁷ *Id.* at §§ 10.2; 10.7.

¹⁸ *Id.* at § 10.6.

¹⁹ *Id.* at §§ 10.2; 10.7.

In certain circumstances, when an athlete can demonstrate he or she bears either “no fault or negligence or no significant fault or negligence,” the period of ineligibility may be reduced or even eliminated.²⁰

The WADC provides for individuals with illnesses or conditions that require otherwise prohibited substances for treatment. Athletes in these situations must request a TUE thirty days before participating in certain events.²¹ Exceptions exist for retroactive approval when athletes take prohibited substances for emergency treatment of an acute medical condition or other exceptional circumstances.²²

When an athlete tests positive for a prohibited substance, an Anti-Doping Review Board composed of medical, technical, and legal experts recommends to USADA whether there is sufficient evidence of doping to proceed.²³ If so, the athlete can request a hearing before a single arbitrator or a panel of three arbitrators selected from the North American Court of Arbitration for Sport (the “AAA Panel”) under the umbrella of the American Arbitration Association.²⁴ Should the athlete choose to challenge the decision of the AAA Panel, he or she can appeal to a final and binding hearing with the Court of Arbitration for Sport (“CAS”).²⁵

III. AN OVERVIEW OF THE AMERICANS WITH DISABILITIES ACT AND THE REHABILITATION ACT.

A. *The Americans with Disabilities Act*

The Americans with Disabilities Act (“ADA”) was passed in 1990 to provide a “clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”²⁶ The ADA seeks to effectuate its mandate by offering “clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.”²⁷ The ADA precludes discrimination against people with disabilities by

²⁰ *Id.* at § 10.5.

²¹ INTERNATIONAL STANDARD FOR THERAPEUTIC USE EXEMPTIONS § 8.3 (2010), available at http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-IS-TUE/WADA_ISTUE_2010_EN.pdf.

²² *See id.* at § 4.3.

²³ UNITED STATES ANTI-DOPING AGENCY PROTOCOL FOR OLYMPIC AND PARALYMPIC MOVEMENT TESTING, § 11 (2009) [hereinafter *USADA PROTOCOL*].

²⁴ AMERICAN ARBITRATION ASSOCIATION SUPPLEMENTARY PROCEDURES FOR THE ARBITRATION OF ANTI-DOPING RULE VIOLATIONS, § 2-12 (2009) [hereinafter *AAA PROCEDURES*].

²⁵ *USADA PROTOCOL*, *supra* note 23, § 15(b).

²⁶ 42 U.S.C. § 12101(b) (2000).

²⁷ *Id.*

employers (Title I),²⁸ public entities (Title II),²⁹ and public accommodations (Title III).³⁰

In response to several Supreme Court decisions at the turn of the century,³¹ Congress passed the ADA Amendments Act of 2008 to clarify the breadth of the term “disability.” Currently, the ADA defines disability as “a physical or mental impairment that substantially limits one or more major life activities of [an] individual.”³² Major life activities “include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”³³ Major life activities also include certain bodily functions, such as the “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”³⁴ The amended ADA states that the definition of disability is to be construed in favor of broad coverage of individuals, and the determination of whether impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of most mitigating measures.³⁵

Under Title I of the ADA, “no [employer] shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment.”³⁶ A qualified individual is someone who, with or without reasonable accommodation, can perform the essential functions of the employment position at issue, where consideration is given to the

²⁸ *Id.* at § 12111.

²⁹ *Id.* at § 12131.

³⁰ *Id.* at § 12181.

³¹ *See, e.g.,* Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) (holding the terms “substantially” and “major” in the definition of disability under the ADA “need to be interpreted strictly to create a demanding standard for qualifying as disabled” and that to be substantially limited in performing a major life activity under the ADA, “an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives”).

³² 42 U.S.C. § 12102(1)(A) (2000).

³³ *Id.* at § 12102(2)(A).

³⁴ *Id.* at § 12102(2)(B).

³⁵ *Id.* at § 12102(4). For example, “mitigating measures such as medication, medical supplies, . . . low-vision devices” not including ordinary eyeglasses or contact lenses, “prosthetics . . . hearing aids . . . mobility devices,” and “reasonable accommodations or auxiliary aids or services” shall not be considered in determining whether a disability substantially limits a major life activity. *Id.*

³⁶ *Id.* at § 12112(a).

employer's judgment as to what those functions are.³⁷ Notably, when an employee uses illegal drugs and the employer brings disciplinary action accordingly, the employee does not fall within the definition of a qualified individual.³⁸ The ADA obligates employers to make a reasonable accommodation to all qualified individuals unless the employer can demonstrate the accommodation would impose an "undue hardship" on the operation of the business.³⁹

Title II of the ADA states: "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."⁴⁰ Title II defines a "qualified individual" as someone who, with the assistance of a reasonable modification, "meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."⁴¹ A "public entity" is defined as any state or local government or any department, agency, or instrumentality of any state or local government.⁴²

Title III of the ADA states "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."⁴³ The term "public accommodation" is defined by a lengthy list of categories including places of lodging, restaurants, bars, auditoriums, grocery stores, laundromats, banks, hospitals, museums, parks, and private schools.⁴⁴ Most relevant for the purposes of this article, the definition of a public accommodation under the statute also includes "gymnasium[s], health spa[s], bowling alley[s], golf course[s], [and] other places of exercise or recreation."⁴⁵

To succeed on a Title III claim, an individual with a disability must demonstrate a requested accommodation is both reasonable and necessary to afford the individual access to the public accommodation.⁴⁶ If the individual is successful, the public accommodation must offer the requested

³⁷ *Id.* at § 12111(8).

³⁸ *Id.* at § 12114(a).

³⁹ *Id.* at § 12112(b)(5)(A).

⁴⁰ *Id.* at § 12132.

⁴¹ *Id.* at § 12131(2).

⁴² *Id.* at § 12131(1).

⁴³ *Id.* at § 12182(a).

⁴⁴ *Id.* at § 12181(7).

⁴⁵ *Id.* at § 12181(7)(L).

⁴⁶ *See id.* at § 12182(b)(2)(A).

accommodation unless the public accommodation can demonstrate the requested accommodation either (1) fundamentally alters the nature of the activity the requested accommodation is sought for⁴⁷ or (2) creates an undue health or safety risk to others.⁴⁸ As applied to sport, the Supreme Court has found that a requested accommodation might fundamentally alter athletic competition in two ways.⁴⁹ First, “[i]t might alter such an essential aspect of the [sport] . . . that it would be unacceptable even if it affected all competitors equally; changing the diameter of [a golf] hole from three to six inches might be such a modification.”⁵⁰ Second, the accommodation might take the form of “a less significant change that has only a peripheral impact on the game itself [but] might nevertheless give a disabled player, in addition to access to the competition as required by Title III, an advantage over others and, for that reason, fundamentally alter the character of the competition.”⁵¹

B. The Rehabilitation Act of 1973

The Rehabilitation Act of 1973 (“Rehabilitation Act”) states that disabled individuals may not be “excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance [solely because of his or her disability],” as long as their requested accommodation is reasonable and necessary.⁵²

The Rehabilitation Act represented progress for Americans living with disabilities, but Congress sought to further expand disability protection when it passed the Americans with Disabilities Act (“ADA”) nearly 20 years later. Because the ADA’s scope encompasses the narrower focus of

⁴⁷ See *id.* at § 12182(b)(2)(A)(ii) (stating that discrimination is “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*”) (emphasis added).

⁴⁸ See *id.* at § 12182(b)(3) (stating that “Nothing in this subchapter shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity *where such individual poses a direct threat to the health or safety of others*. The term ‘direct threat’ means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.”) (emphasis added).

⁴⁹ *Martin*, 532 U.S. at 682.

⁵⁰ *Id.*

⁵¹ *Id.* at 682–83.

⁵² 29 U.S.C. § 794(a) (2002).

the Rehabilitation Act, this article asserts that any demonstration of USADA's compliance with the ADA's policies will implicitly demonstrate USADA's compliance with the Rehabilitation Act's policies as well.

**IV. LEGAL ANALYSIS OF THE UNITED STATES ANTI-DOPING
AGENCY'S ANTI-DOPING POLICIES AND WHETHER THEY ARE
PROCEDURALLY AND SUBSTANTIVELY COMPLIANT WITH THE AMERICANS
WITH DISABILITIES ACT**

Application of the ADA to USADA's anti-doping operation is unnecessary because the analytical standards applicable under the ADA and the WADC standards for obtaining a TUE are in all material respects the same.⁵³ There is "no need to confuse the issues" because, as explained below, the procedural and substantive analysis of a given case will not change regardless of whether the ADA or the TUE standard is applied.⁵⁴

*A. USADA's Anti-Doping Policies Are Procedurally Compliant With
The Requirements Of The ADA*

1. WADA's TUE Standard is an Individualized Assessment, which the
ADA Requires to Evaluate the Reasonableness, Necessity, and Safety of a
Requested Accommodation.

The ADA requires an "individual assessment" to determine whether an individual suffers from a disability and whether the individual's requested accommodation is reasonable, necessary, consistent with the nature of the accommodation sought, and safe.⁵⁵ The TUE standard functions similarly, providing athletes with the same kind of "individual assessment" as is required by the ADA.

A timely submitted TUE will be granted where:

(a)The Athlete will experience a significant impairment to health if the prohibited substance or prohibited method were to be withheld in the course of treating an acute or chronic medical condition.

⁵³ Brief of Claimant at 12, *United States Anti-Doping Agency v. George Hartman*, AAA 30 190 00900 05 (April 7, 2006) [hereinafter *USADA v. Hartman Claimant Brief*].

⁵⁴ *Id.*

⁵⁵ See *Martin*, 532 U.S. at 688 (stating an individualized inquiry under the ADA must determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person); see also *Anderson v. Little League Baseball, Inc.*, 794 F. Supp. 342, 345 (D. Ariz. 1992) (stating the Supreme Court has found an individualized assessment under the ADA must balance the interests of people with disabilities against legitimate concerns for public safety).

(b)The therapeutic use of the prohibited substance or prohibited method would produce no additional enhancement of performance other than that which might be anticipated by a return to a state of normal health following the treatment of a legitimate medical condition. The use of any prohibited substance or prohibited method to increase “low-normal” levels of any endogenous hormone is not considered an acceptable therapeutic intervention.

(c)There is no reasonable therapeutic alternative to the use of the otherwise prohibited substance or prohibited method.

(d)The necessity for the use of the otherwise prohibited substance or prohibited method cannot be a consequence, wholly or in part, without a TUE, or a substance or method which was prohibited at the time of use.⁵⁶

A comparison of the ADA and the TUE standard shows they are procedurally identical in all material respects. First, the TUE standard requires USADA to consider the health of the athlete absent use of the requested substance for the treatment of an acute or chronic condition. This is analogous to an evaluation under the ADA of whether the alleged condition substantially impacts a major life activity so as to qualify as a disability.⁵⁷ Second, the TUE standard requires USADA to consider whether alternative treatments beyond use of the prohibited substance exist. This is analogous to an evaluation under the ADA of the reasonableness and necessity of a requested accommodation.⁵⁸ And third, the TUE standard requires USADA to consider whether use of the prohibited substance would produce enhancement of performance beyond a mere return to a state of normal health. This is analogous to an evaluation under the ADA of whether the requested accommodation would fundamentally alter the sport and/or create an undue health or safety risk.

In many instances, as implied by the Supreme Court in *Martin*, use of performance-enhancing substances might fundamentally alter the sport at issue by providing the disabled athlete with an unfair advantage.⁵⁹ For instance, a baseball player on steroids likely has a distinct advantage over

⁵⁶ INTERNATIONAL STANDARD FOR THERAPEUTIC USE EXEMPTIONS § 4.1 (2010), available at http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-IS-TUE/WADA_ISTUE_2010_EN.pdf.

⁵⁷ See *USADA v. Hartman Claimant Brief*, *supra* note 53, at 14.

⁵⁸ See *id.* at 15.

⁵⁹ See 532 U.S. at 683.

non-steroid abusers in terms of both reaction time and strength.⁶⁰ These changes “unfairly alter the conditions of competition.”⁶¹ Further, in physical contact sports such as football, boxing, or judo, it may never be appropriate for a competitor to take a strength building performance-enhancing substance because it would impose a great danger on other competitors.⁶² Thus, a comparison of the operative language of the ADA and the International Standard for Therapeutic Use Exemptions demonstrates the “individual assessment” offered in each context is the same.⁶³

2. Requiring Athletes to Submit TUEs Prior to the Use of an Otherwise Prohibited Substance is Consistent with the ADA.

An athlete seeking an accommodation for the use of a prohibited substance must formally request a TUE thirty days before participating in certain events.⁶⁴ Retroactive approval will only be granted in situations where a prohibited substance is used for the emergency treatment of an acute medical condition or where certain other exceptional circumstances exist.⁶⁵

In 2006, Olympic track star Justin Gatlin tested positive for a prohibited substance for the second time. Previously, after failing to submit a timely TUE, Gatlin tested positive in 2001 for a prohibited substance intended to treat Attention Deficit Disorder, a medical condition that qualified him as disabled under the ADA. As a result, Gatlin was subject to an extended sanction under the WADC for his 2006 offense because of his prior positive test in 2001. As part of its decision, the AAA Panel in Gatlin's second case held that the extended sanction did not violate the ADA. However, in his dissenting opinion, Arbitrator Christopher Campbell argued Gatlin's request for a TUE should be allowed at any time, even after the 2001 positive test occurred.⁶⁶ Arbitrator Campbell cited *Humphrey v.*

⁶⁰ Baseball Crank: Baseball 2005 Archives, http://baseballcrank.com/archives2/baseball_2005/ (Blog post dated January 4, 2005).

⁶¹ George Mitchell. *Report to the Commissioner of Baseball of an Independent Investigation into the Illegal Use of Steroids and Other Performance Enhancing Substances by Players in Major League Baseball*. Pg. 12. December 13, 2007 (quoting George F. Will, *Barry Bonds' Enhancement*, NEWSWEEK, May 21, 2007, at 82).

⁶² *Cf. USADA v. Hartman Claimant Brief*, *supra* note 53, at 18.

⁶³ *See id.* at 15.

⁶⁴ *See* INTERNATIONAL STANDARD FOR THERAPEUTIC USE EXEMPTIONS § 8.3 (2010), available at http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-IS-TUE/WADA_ISTUE_2010_EN.pdf

⁶⁵ *See id.* at § 4.3.

⁶⁶ *See* United States Anti-Doping Agency v. Justin Gatlin, AAA No. 30 190 00170 07, 1-4

Memorial Hospital Association to support the proposition that the duty to accommodate is a continuing one.⁶⁷

Significantly, *Humphrey* also stands for the proposition that the obligation to accommodate does not start until the entity at issue becomes “*aware of the need for accommodation.*”⁶⁸ When the duty to accommodate arises in the context of Title I, “both the employee and the employer must communicate, exchange essential information and not delay or obstruct the process.”⁶⁹ The duty to accommodate, however, cannot possibly occur before the employee invokes this interactive process.⁷⁰ In *Martin*, the Supreme Court explained that there is a similar obligation to provide affirmative notice of a requested accommodation in the context of Title III.⁷¹ In summary, “[t]he duty to provide a reasonable accommodation is not triggered unless a specific demand for accommodation has been made,”⁷² and an ADA plaintiff has “some burden to be specific about the accommodation [he or] she require[s].”⁷³

What the ADA does not require, however, is for qualified individuals to make their disabilities known if they prefer to keep them private. In other words, qualified individuals are not *required* to seek accommodation. A qualified individual is free to make do with his or her disability and/or try and take private steps to address his or her limitations. The only repercussion for choosing privacy is the forfeiture of the qualified individual’s right to a reasonable and necessary accommodation under the ADA. Of course, the moment the qualified individual formally requests a reasonable and necessary accommodation, his or her right thereto is effectively restored.

In the context of athletics, the TUE standard goes one step further than the ADA by *requiring* athletes to request reasonable accommodation prior to using a prohibited substance in certain events. Unlike situations where the ADA typically applies, an athlete does not have the option of concealing his or her use of a prohibited substance (i.e. an accommodation) for the

(2008) (Campbell, Arb., dissenting).

⁶⁷ See *id.* at 16-17 (Campbell, Arb., dissenting) (citing *Humphrey*, 239 F.3d at 1138).

⁶⁸ See *Humphrey*, 239 F.3d at 1137 (emphasis added); accord *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1179 (10th Cir. 1999).

⁶⁹ *Vawser v. Fred Meyer, Inc.*, 19 Fed. App’x. 722, 723 (9th Cir. 2001) (citing *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1114-1115 (9th Cir. 2000) (en banc), *cert. granted in part sub nom.* *US Airways, Inc. v. Barnett*, 532 U.S. 970 (2001))

⁷⁰ See *Smith*, 180 F.3d at 1179.

⁷¹ *Martin*, 532 U.S. at 691.

⁷² *Gaston v. Bellingrath Gardens & Home, Inc.*, 167 F.3d 1361, 1363 (11th Cir. 1999) (citing *Wood v. President and Trustees of Spring Hill College*, 978 F.2d 1214, 1222 (11th Cir. 1992)).

⁷³ *Freadman v. Metropolitan Property and Cas. Ins. Co.*, 484 F.3d 91, 104 (1st Cir. 2007).

purpose of attempting to keep his or her medical condition (i.e. disability) private. Athletes must *affirmatively* make their requested accommodation known or they risk penalty—even if the TUE would have been granted.⁷⁴ The Supreme Court implicitly approved the TUE approach in *Martin*.⁷⁵ Martin, a talented golfer, suffered from a medical condition that precluded him from walking a golf course. He requested that the PGA Tour accommodate him by altering its rules to allow him to drive a golf cart during tour events. The PGA Tour declined, and Martin brought his ADA claim in Federal Court.

The United States Supreme Court made clear in *Martin* that Congress intended that entities like the PGA give individualized attention to talented disabled athletes by modifying the rules to allow them access *and to weigh the purpose of the modification before determining whether the accommodation is allowed*.⁷⁶ Of course, if the athlete waited to request an accommodation until after he or she was caught, the individualized balancing procedure intended for use by Congress would be rendered ineffective. The point of balancing prior to the competition is to ensure a level playing field. If the athlete were allowed to request a TUE after the fact, it would detract from the spectacle of sport because fans would not know whether live performances were genuine. After all, not all enhancements are as visible as a golf cart.

The rationale behind the notice obligations under the ADA is fairness. For example, in the context of Title I, an employer should not be held accountable through litigation for its failure to accommodate a disabled employee when the employer did not know accommodation was needed. Allowing ADA claims to advance under such circumstances would provide enticement for an employee to lure its employer into a legal trap-door with the hope of securing a substantial damages verdict. Assuming the presence of an actual disability that precludes the employee's case from dismissal, the employee has little incentive to refrain from rolling those dice.

Similar logic is applicable in the context of the TUE standard. USADA requires athletes to request a TUE thirty days prior to using a prohibited substance in certain events. If a TUE did not have to be submitted in advance, it would create an incentive for athletes to cheat until they were caught, and then claim an exemption under the ADA through USADA's prescribed arbitration process after the fact.⁷⁷ While the TUE

⁷⁴ See INTERNATIONAL STANDARD FOR THERAPEUTIC USE EXEMPTIONS § 8.4 (2010), available at http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-IS-TUE/WADA_ISTUE_2010_EN.pdf

⁷⁵ See *Martin*, 532 U.S. at 691.

⁷⁶ *Id.* (emphasis added).

⁷⁷ See *USADA v. Hartman Claimant Brief*, *supra* note 53, at 23.

process may curtail certain privacy rights of athletes, precluding the above scenario is a compelling justification for the limitation. Among the many problems with allowing an athlete to cheat until he or she is caught, and then claim an exemption under the ADA, include: (1) as mentioned above, ex-post assessment detracts from the spectacle of viewing live-action sport; (2) the uncertainty the athlete would ever be caught; (3) the ADA applies exclusively to the United States, thus American athletes would possess a mechanism for cheating not available in other countries; and (4) the use of prohibited substances without providing notice will cause an undue health or safety risk to other athletes due to the physicality of many competitions.⁷⁸ Ultimately, “[c]ontending that [one] has been discriminated against through the application of sport anti-doping rules when, in fact, [one] ignored the TUE processes by which his [or her] disability claim could have been assessed and potentially addressed is truly ‘the pot calling the kettle black.’”⁷⁹

B. USADA’s Anti-Doping Policies are Substantively Compliant with the Requirements of the ADA

1. The Hartman AAA Panel Determined Hartman did not Suffer from a Disability.

The *Hartman* matter is demonstrative of how USADA’s anti-doping policies are substantively compliant with the requirements of the ADA. On March 2, 2005, George Hartman tested positive for a performance-enhancing substance. At no time prior to his positive test did Hartman submit a TUE to USADA requesting accommodation for his use of synthetic testosterone. Hartman had ample time to apply for the TUE. He began receiving testosterone injections on July 21, 2003, and the TUE standard only requires athletes to file requests 30 days prior to a competition.

Nevertheless, Hartman argued he should not be suspended from competition because his use of synthetic testosterone was protected under the ADA and its precursor, the Rehabilitation Act of 1973. Because the AAA Panel found “[Hartman] failed to sustain his burden of proof that he suffers from ‘a physical or mental impairment that substantially limits one or more of [his] major life activities,’” the AAA Panel banned Hartman from competition for the full two-year period allowed under the WADC without analyzing the full ADA issue.⁸⁰

⁷⁸ *See id.* at 24.

⁷⁹ *Id.* at 16.

⁸⁰ *Id.* at 15.

After issuing its decision, the AAA Panel released its formal findings of fact and conclusions of law related to the medical issues at stake in the *Hartman* matter (“AAA Panel Findings of Fact and Conclusions of Law”).⁸¹ The AAA Panel afforded limited credence to the testimony of Dr. VanHelder, Hartman’s physician and coach.⁸² Apparently, beyond those connections to Hartman, Dr. VanHelder also owned a judo training center that prominently featured Hartman as an athlete and instructor.⁸³ The Panel inferred Dr. VanHelder’s judo business could have been “advanced through Mr. Hartman’s success,” and “adversely impacted by a doping positive.”⁸⁴ Compounding the Panel’s skepticism was the fact that certain gaps in Dr. VanHelder’s administration of testosterone to Hartman coincided with major judo competitions.⁸⁵

The AAA Panel found Dr. VanHelder’s assertion the Plaintiff suffered from hypogonadism, erectile dysfunction syndrome (“EDS”), and depression were not supported by independent medical evidence.⁸⁶ With respect to hypogonadism, Dr. VanHelder’s July 2003 test revealed Hartman’s testosterone level was relatively normal.⁸⁷ Testosterone levels can fluctuate by as much as 20% in 20 minutes due to the phenomenon of pulsatility, so multiple tests are needed to accurately confirm one’s testosterone levels.⁸⁸ Not only did Dr. VanHelder fail to conduct a second test of Hartman’s testosterone level, but he also failed to make an assessment of free testosterone.⁸⁹ This test is critical because “[m]ost people who have a low normal level of total testosterone [also] have low levels of [certain binding proteins], so they don’t need as much total testosterone to generate a normal amount of the biologically active free testosterone.”⁹⁰ Finally, the AAA Panel determined that Hartman’s luteinizing hormone (“LH”) value of 0.0 “[was] not indicative of hypogonadism.”⁹¹ The AAA Panel found “about the only thing that can cause the complete absence of LH is . . . [the] administration of [synthetic

⁸¹ Medical Findings of Fact and Conclusions of Law Rendered by The American Arbitration Association North American Court of Arbitration for Sport Panel, *United States Anti-Doping Agency v. George Hartman*, AAA 30 190 00900 05 [hereinafter *USADA v. Hartman Findings*].

⁸² *Id.* at 1–2.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *See id.* at 2.

⁸⁶ *See id.* at 4, 8, 10.

⁸⁷ *See id.* at 5.

⁸⁸ *See id.*

⁸⁹ *See id.* at 6.

⁹⁰ *Id.*

⁹¹ *Id.*

testosterone].”⁹²

With respect to EDS, the AAA Panel found “low testosterone is not a typical cause of erectile dysfunction syndrome.”⁹³ Further, Dr. VanHelder did not (1) conduct the nocturnal penile tumescence test to diagnose Hartman’s alleged EDS or (2) attempt to treat Hartman’s alleged EDS with oral drugs such as Viagra and Levitra before administering testosterone.⁹⁴ Hartman’s wife testified that he continued to have sexual relations with her on a bi-weekly basis throughout this period, and such relations improved further when Hartman finally started taking Levitra four months after he began using testosterone.⁹⁵

Finally, the AAA Panel found Dr. VanHelder never actually diagnosed Hartman with depression.⁹⁶ Dr. VanHelder did not even use the term “depression” in Hartman’s medical records until May 27, 2003, the office visit prior to when Hartman was first administered testosterone.⁹⁷ The evidence shows Hartman maintained a social lifestyle throughout this period as he “continued to work a job as an airport security screener, interact with his wife and undertake the basic tasks of daily living throughout the relevant time period.”⁹⁸

In summary, the AAA Panel found Hartman did not suffer from hypogonadism, erectile dysfunction syndrome, or depression, and thus did not have a mental or physical impairment, much less one that substantially limited one or more of his major life activities. However, an important hypothetical question remains: what if Hartman suffered from one of those three afflictions? It seems clear the broadened definition of disability under the amended ADA encompasses hypogonadism, erectile dysfunction syndrome and depression.⁹⁹ Could Hartman have established testosterone injections were a reasonable and necessary accommodation for those afflictions under the ADA? If so, would USADA have been able to argue testosterone injections fundamentally altered the sport of judo and/or created an undue health or safety risk? And most importantly for the

⁹² *Id.*

⁹³ *Id.* at 8.

⁹⁴ *Id.* at 9.

⁹⁵ *Id.* at 6–7.

⁹⁶ *Id.* at 10.

⁹⁷ *Id.*

⁹⁸ *Id.* at 7.

⁹⁹ Erectile dysfunction syndrome and hypogonadism are covered by 42 U.S.C. § 12102(2)(B), which explicitly indicates that one who suffers from impaired “reproductive functions” is disabled within the meaning of the Act. Likewise, according to § 12102(1)(A), depression would count as a disability within the meaning of the ADA if it substantially limited major life activities including “sleeping,” “thinking,” “working,” and “caring for oneself.”

purposes of this article, would application of the TUE standard result in the same outcome as the one most likely reached under the ADA?

2. Hartman Would Not Have Been Able to Establish Testosterone Injections were Reasonable or Necessary even if he Proved his Disability.

a. Testosterone Injections are not a Reasonable and Necessary Accommodation for Hypogonadism.

The AAA Panel found that there are many causes of hypogonadism that are treatable without testosterone.¹⁰⁰ For example, sleep deprivation, pain, certain medications, depression and overtraining all can lead to hypogonadism, but none of these causes are best treated with testosterone injections.¹⁰¹ Hartman underwent knee surgery a few months before Dr. VanHelder made his diagnosis, resulting in a prescription for narcotics and also significant pain and sleep deprivation.¹⁰² He also apparently suffered from chronic low back pain and insomnia.¹⁰³ The AAA Panel found it was unreasonable for Dr. VanHelder to treat Hartman's alleged hypogonadism with testosterone injections before attempting to address some or all of these issues.¹⁰⁴ Further, because testosterone is actually used as a male contraceptive, the AAA Panel found it could not be considered a medically necessary treatment for Hartman's asserted reproductive limitations.¹⁰⁵

b. Testosterone Injections are not a Reasonable and Necessary Accommodation for Erectile Dysfunction Syndrome.

"Testosterone effects [sic] sex drive but does not do anything to assist in achieving an erection."¹⁰⁶ Therefore, the AAA Panel found "there are many causes of EDS that are treatable without testosterone," including depression and other neurogenic issues, narcotics, and structural vascular problems.¹⁰⁷ The AAA Panel found it was unreasonable for Dr. VanHelder to administer testosterone injections before determining, at the very least, whether Hartman's alleged EDS could be addressed with anti-depressants or by adjusting his post-knee surgery medications.¹⁰⁸ Finally, even Dr.

¹⁰⁰ USADA v. Hartman Findings, *supra* note 81, at 7.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 8.

¹⁰⁵ *Id.* at 6.

¹⁰⁶ *Id.* at 8.

¹⁰⁷ *Id.* at 9.

¹⁰⁸ *Id.*

VanHelder conceded that most people are able to address EDS with oral therapeutic drugs such as Viagra or Levitra.¹⁰⁹ Again, this proved to be the case here, as Hartman's wife testified his EDS improved when he began using Levitra.¹¹⁰ Therefore, the AAA Panel found testosterone injections were not a reasonable and necessary course of treatment for Hartman's alleged EDS.¹¹¹

c. Testosterone Injections are not a Reasonable and Necessary Accommodation for Depression.

The AAA Panel found "there are many causes of depression that are treatable without testosterone," evidenced by more than 25 different effective medications available right now in the United States.¹¹² However, Dr. VanHelder never attempted to prescribe any of these medications and Hartman refused to be evaluated by a psychiatrist.¹¹³ Further, testosterone has never been shown to treat depression effectively in normal men in a controlled trial.¹¹⁴ For these reasons, the AAA Panel found administration of testosterone shots to Hartman for his alleged depression was hardly a reasonable and necessary course of action.¹¹⁵

3. Even if Hartman Was Able to Prove He Suffered From a Disability, and Testosterone Injections Were A Reasonable And Necessary Accommodation, USADA Could Have Demonstrated that the Use of Testosterone Would Fundamentally Alter the Sport of Judo and/or Cause an Undue Risk of Harm to Fellow Competitors.

Hartman asserted in his pre-hearing brief that "competition judo is one of the roughest and most demanding of sports."¹¹⁶ According to language posted on the International Judo Foundation's website in 2006, "[j]udo is a tremendous and dynamic combat sport that demands both physical prowess and great mental discipline."¹¹⁷ "The sport involves techniques that require

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 6–7.

¹¹¹ *Id.* at 9.

¹¹² *Id.* at 10.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *USADA v. Hartman Claimant Brief*, *supra* note 53, at 21 (quoting Respondent's Brief at 2).

¹¹⁷ *Id.* (citing International Judo Federation, *What is Judo?*, available at: <http://www.intjudo.eu/>

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the use of raw physical strength, including moves that allow a competitor to lift and throw an opponent onto the ground.”¹¹⁸ “Once the competitors are on the ground, judo moves include the use of chokeholds and joint locks until one competitor yields in submission.”¹¹⁹ As set forth in *Martin*, increasing the stamina, strength and vitality of some judo athletes would create an advantage that “fundamentally alter[s] the character of the competition.”¹²⁰ The AAA Panel found “testosterone can possibly be strength enhancing ‘even in doses that would be considered physiologic’ for a person with hypogonadism.”¹²¹

Moreover, “the secretive, unannounced use of testosterone by one or more judo competitors presents a potentially grave and unfair risk of injury to other judo competitors.”¹²² “No athlete in a contact sport and particularly no athlete in a ‘fighting’ sport such as judo has a unilateral right (even under the guidance of a physician) to decide whether to use steroids without the permission, or even the pre-competition knowledge, of the appropriate sport officials.”¹²³

4. If Hartman had Filed a Timely TUE Application, the Requested Testosterone Injections Would Have Been Denied for Reasons Consistent with the ADA Analysis Above.

Under the ADA, the initial inquiry goes to whether an individual suffers from a disability. Similarly, the first prong of the TUE standard effectively determines whether an athlete suffers from a limiting medical condition. Here, as discussed, the AAA Panel found Hartman did not suffer from a disability. The AAA Panel found the independent medical evidence did not support a diagnosis of hypogonadism, erectile dysfunction syndrome, or depression. For the same reasons, it is doubtful the TUE Committee would find Hartman was susceptible to a significant impairment to health if the testosterone injections were withheld, let alone find Hartman was suffering from an acute or chronic medical condition.

If a showing of disability is made, the next inquiry under the ADA goes to whether an individual can demonstrate he or she is seeking a reasonable and necessary accommodation. Similarly, the third prong of the TUE standard looks at whether alternative treatments beyond the use of the

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¹¹⁸ *USADA v. Hartman Claimant Brief*, *supra* note 53, at 21.

¹¹⁹ *Id.*

¹²⁰ *Martin*, 532 U.S. at 682; *USADA v. Hartman Claimant Brief*, *supra* note 53, at 21.

¹²¹ *USADA v. Hartman Findings*, *supra* note 81, at 1.

¹²² *USADA v. Hartman Claimant Brief*, *supra* note 53, at 24.

¹²³ *Id.*

prohibited substance exist. The AAA Panel found alternative treatments aside from testosterone injections existed for hypogonadism, erectile dysfunction syndrome, and depression. Further, because Dr. VanHelder failed to properly diagnose Hartman's alleged "disabilities," the AAA Panel found it unclear whether testosterone was among the appropriate treatment possibilities at all. For the same reasons, it is likely the TUE Committee would find that reasonable therapeutic alternatives to testosterone injections existed for Hartman's alleged conditions.

Finally, under the ADA, if an individual is able to demonstrate he or she is disabled and his or her requested accommodation is reasonable and necessary, the opposing entity must offer the accommodation or demonstrate the accommodation would fundamentally alter the sport and/or cause an undue threat to the health and safety of others. Similarly, the second prong of the TUE standard looks at whether the therapeutic use of the prohibited substance would produce an additional enhancement of performance other than that which might be anticipated by a return to a state of normal health following the treatment of a legitimate medical condition. Here, the AAA Panel did not address whether the allowance of testosterone injections to treat a disability would have fundamentally altered the sport of judo and/or caused an undue threat to the health and safety of others. However, it seems likely the USADA could show that the administration of testosterone in a fighting sport like judo would create both an unbalanced playing field and an undue safety risk. Similarly, given the AAA Panel's finding that testosterone can be strength-enhancing even in appropriate doses for a person suffering from hypogonadism,¹²⁴ it is likely the TUE Committee would find Dr. VanHelder's administration of testosterone produced an additional enhancement in Hartman's performance beyond a mere return to a normal state of health.

V. CONCLUSION

In the end, this article substantiates the proposition stated at the outset: USADA and the ADA share the common goal of leveling the playing field. Again, USADA accomplishes this goal by protecting the competition rights of clean athletes. The ADA accomplishes the goal by providing assistance to individuals who, if not for a specific disability, would be fully capable of participation in a given activity.

Most significantly, this article establishes that the TUE standard, the tool employed by USADA to ensure it accomplishes its goal while remaining true to the ADA, is actually procedurally and substantively compliant with the ADA's objectives. Indeed, the *Hartman* matter makes

¹²⁴ *USADA v. Hartman Findings*, *supra* note 81, at 1.

explicit the parallels between each analysis. Further, the *Hartman* matter demonstrates an athlete cannot seriously contend he or she was discriminated against when he or she fails to follow the TUE procedure specifically put in place to offer an individual assessment of his or her alleged disability. As a result, application of the ADA to USADA's anti-doping procedures is unnecessary. Quite simply, there is no need to confuse the issues because the analytical standards applicable under the ADA and the WADA standards for obtaining a TUE are in all material respects the same.¹²⁵

Through the TUE standard, USADA is able to offer an individual assessment of each athlete's request for accommodation through the unique prism of sport. For at least two reasons, public policy dictates it is in USADA's best interest to grant a TUE where appropriate rather than use the TUE standard as a ruse for compliance with the ADA. First, unlike a qualified individual under the ADA, the athlete who seeks a TUE already *has* access to the particular environment. Instead, the athlete is seeking to address certain disabilities so as to level the playing field and compete *within* that environment. USADA, as an entity regulating the participants within a given environment for the purpose of maintaining fair competition, has less incentive to be prejudiced for the sake of convenience or cost than an entity charged with regulating access to the environment itself, such as a traditional employer, public entity or public accommodation under the ADA.

Second, if USADA denies a TUE in a situation where the athlete is entitled to accommodation, USADA will have failed its fundamental objective—to protect the integrity of sport—by depriving the public of the opportunity to cheer on a legitimate competitor.¹²⁶

While *Hartman* was not able to make the necessary showing under the TUE standard—indeed, he never even submitted a TUE application—that does not mean the system is broken. This article confirms the TUE system is alive, well, and functioning appropriately when compared to the ADA's objectives. Therefore, this article ultimately confirms USADA and the ADA are aligned at the balancing point of the level playing field both seek to maintain.

¹²⁵ *USADA v. Hartman Claimant Brief*, *supra* note 53, at 12, 15.

¹²⁶ USADA Mission/Vision, *available at* <http://www.usada.org/about/mission-vision.aspx> (last visited Aug. 24, 2010).