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RANDOM TESTING OF PROFESSIONAL ATHLETES

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Substance abuse among professional athletes is not a new phenomenon. Athletes, not unlike the population at large, have used and abused drugs and alcohol for years. Only within the last eight to ten years, however, has substance abuse by players become the subject of media attention. As a result, sports fans and nonfans alike have leaped to the conclusion that a substance abuse epidemic exists within the ranks of professional athletes. Based on that conclusion, many people believe that if society can cure the epidemic among professional athletes, it will have won the war on drugs. In reality, neither conclusion is true. No substance abuse epidemic is present in professional sports. Furthermore, even if the "epidemic" is cured, it would not solve the problems that create the need for the war on drugs.

First, no source has provided any hard data suggesting that professional athletes either use or abuse drugs or alcohol at a rate different from society at large. Second, there are not enough professional athletes, let alone athletes, involved with substance abuse to impact the war on drugs. The number of athletes employed in the professional sports industry is limited. The combined total of on-field personnel employed by the National Football League, Major League Baseball, the National Basketball Association, and the National Hockey League is less than 3000 individuals. Based on these figures, if every player in each of the above-mentioned sports had a substance abuse problem, and we were able to solve each player's problem, we would not be any closer to a solution to our nation's substance abuse problems. Simply put, whatever role professional athletes who use and/or abuse drugs and alcohol play in our nation's substance abuse problems, these athletes are barely the tip of the iceberg.

Given the high visibility of professional athletes, however, the Task Force asked the question, "Should the Substance Abuse Testing Act of 1991 authorize random drug and alcohol testing for professional athletes?" After a short discussion of whether

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strong policy reasons exist for specifically including professional athletes under the random testing provisions of the Act, the Task Force concluded that authorizing random testing of professional athletes was not warranted. I concur in that decision.

Before drug and alcohol testing of any type (whether "for cause" testing, random testing, after-prior-use testing, postaccident testing, or applicant testing) should be permitted, an employer should have strong policy reasons for conducting such testing. These policy reasons must outweigh the employee's or applicant's privacy interests. The same holds true for legislation authorizing drug and alcohol testing. Generally, the policy reasons given to support random testing of professional athletes are as follows: (1) fair competition; (2) public confidence in the games; (3) high visibility of athletes as role models; and (4) the health and safety of the athletes. Under the circumstances that exist today, these policy reasons are outweighed by the athlete's privacy interests and do not justify random testing. The notion of privacy is fundamental. It is a notion that goes to the very core of each individual's existence.

FAIR COMPETITION¹

The fair competition issue is rooted in the belief that athletes who use drugs to enhance their performance have an unfair advantage over those individuals who do not. In fact, no one has offered empirical evidence that supports the conclusion that those who use drugs for competition actually improve their performance.² As the evidence in *Hill v. National Collegiate Athletic Association*³ suggests, performance enhancement drugs simply do not work. This is the case for all known performance enhancement drugs. At best, the evidence available to support the fair competition argument is anecdotal. Such evidence should not form the basis for governmental authorization of employer intrusion into the privacy of employees. No factual predicate exists to support the notion that drug and alcohol use by professional athletes results in unfair competition. Without that factual pred-

1. For purposes of this discussion, I will assume that some legitimate governmental interest in fair competition among professional athletes exists.

2. See discussion of evidence offered in support of the National Collegiate Athletic Association's drug testing of intercollegiate athletes in *Hill v. National Collegiate Athletic Association*, 273 Cal. Rptr. 402, 418-19 (Ct. App.), *review granted*, 801 P.2d 1070 (Cal. 1990). Although the evidence in *Hill* related to intercollegiate athletes, no data is available to suggest that circumstances are substantially different at the professional level.

3. *Id.*

icate, government cannot justify authorization of random testing based on the need to maintain fair competition.

THE HEALTH AND SAFETY OF THE ATHLETES

Unlike airline pilots, doctors, teachers, and nuclear plant workers, professional athletes are not specifically charged with the responsibility of ensuring health and safety. Indeed, in professional football and hockey, which are inherently violent and dangerous sports, some would suggest that concerns over drug testing for health and safety reasons are misguided. Additionally, misuse of anything from aspirin and beer to properly prescribed medicine can have negative effects upon an individual's health. Moreover, an individual participating in an athletic contest whose physician has prescribed medication to mask the pain of previous injuries is at the same or greater risk for injury than someone on drugs or, alternatively, being hit by someone on drugs.⁴ Yet we do not permit random testing for such misuse in other occupations, nor do we permit random testing of employees generally. Therefore, we should not permit such testing of professional athletes, for no evidence suggests that drug use plays any role in on-field injury to players or their opponents.

Health and safety are issues that might justify a greater intrusion into the individual's privacy interests. However, if evidence is lacking to establish that professional athletes are at a greater risk of illness or injury due to drug use than the population at large, no basis arises for authorizing random testing solely because the individuals involved happen to be professional athletes.

PUBLIC CONFIDENCE

Those individuals who purchase tickets, watch on television, or are merely interested in professional sports have a right to expect that the participants perform at the highest possible level and that they do not engage in any fraud or deception with respect to their performance. By the same token, those indivi-

4. By way of example, in the 1970 NFL championship game between the Cleveland Browns and the Minnesota Vikings, a Browns defensive lineman, who had injured a hand on a previous occasion, had the hand numbed with Novocaine in order to play in the game. The temperature at game time was in the negative teens. The player almost lost the fingers on his previously injured hand because the Novocaine did not allow him to feel that his fingers were becoming frostbitten.

duals who purchase new cars have the same expectations of the workers who put the cars together. The difference between professional athletes and auto workers in this regard is that we do not seek to justify random drug and alcohol testing based on the need for public confidence in the auto workers' performance.

Obviously, the public has a strong interest in the integrity of the individuals participating in a given sport. This is a crucial part of what gives a sport its value. Having a right to the athlete's best performance and an interest in the integrity of that performance does not, however, mean that the public's interest outweighs the individual's privacy rights. When hiring a lawyer, we have a right to expect the lawyer to perform at the highest level of his or her ability and to carry out our legal business with integrity. We have the same expectation when it comes to stockbrokers and school teachers, yet we do not suggest that people engaged in those occupations be subject to random drug and alcohol testing. Public confidence in the people employed in these occupations is as important, if not more so, as the need for public confidence in professional sports.

In the sport of horse racing, at least one court has upheld the random drug testing of jockeys.⁵ The underlying basis given by the court for permitting random testing of jockeys was the need to maintain public confidence in an industry based on gambling.⁶ Unlike most professional sports, horse racing is subject to heavy governmental regulation. In that regard, it is similar to law, medicine, business, and education. Most professional sports, on the other hand, are subject to only minimal governmental regulation. Although the concern in horse racing is legalized gambling, most other professional sports do not involve such conduct. The degree of integrity called for in the area of unregulated professional sports does not justify the intrusion into an individual employee's privacy that would result from random drug and alcohol testing.

ATHLETES AS HIGHLY VISIBLE ROLE MODELS

Some argue that because athletes are role models, they must live up to higher standards than society at large. In fact, as

5. *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986).

6. *Id.* at 1142. The court offered as a second rationale the jockey's awareness of extensive preexisting regulations in the industry serving to maintain the public confidence. *Id.*

people, athletes are no different than others in society. Just because one has the skills of a motor genius to fly through the air like a bird on the way to the basket or to make contact with a ninety-eight-mile-per-hour fastball does not mean that such individuals are immune from or have any greater ability to deal with the causes of substance abuse. We cannot realistically hold athletes to a higher standard with respect to substance abuse than those who are not so athletically gifted.

Many people, particularly young children, certainly look up to athletes. When an athletic hero slips from grace because of substance abuse, the question arises about the role that athletes play in our society. Answering this question by saying that athletes should play an important role and that it is therefore justifiable to reduce or eliminate their individual rights is not the right answer. We would be far better off by telling our children that they can look up to many people, both in and out of sports, who are not substance abusers. We would be better off if we stopped glamorizing those athletes who engage in substance abuse; furthermore, we could do a much better job using those who have succumbed to substance abuse as negative role models in positive ways. An appropriate solution would be to stop making athletes larger-than-life heroes rather than to deny individual athletes the basic and fundamental right to privacy. Having society's unrealistic view of professional athletes override the individual's expectation of privacy solely because they are athletes would be misguided. By deciding that employment in a high-visibility occupation allows us to intrude into the individual's privacy, what group or occupation would be next?

CONCLUSION

As noted in the executive summary of the Task Force's proposed act (the Act),⁷ decisionmakers should narrowly tailor an employer's ability to screen randomly for drug and alcohol use. The Act permits random testing in only three situations: (1) when an employee occupies a job in which impairment could cause catastrophic injury to the public; (2) when an entire plant, facility, or operating unit has demonstrated a prior history of substance abuse and injury resulting from employees coming to work impaired is highly probable; and (3) when the employment position

7. See A SUBSTANCE ABUSE TESTING ACT, executive summary at 9 (Task Force on the Drug-Free Workplace, Institute of Bill of Rights Law, Proposed Official Draft 1991).

involves activities directly connected to the interdiction, detection, punishment, or treatment of illegal drug use.⁸ Professional athletes and professional athletics in general do not fall within any of the above situations. Society's interest in subjecting professional athletes to random drug testing is no higher than its interest in subjecting attorneys, doctors, stockbrokers, or teachers to such testing. We do not propose random testing for those occupations, nor should we authorize it for professional athletes.

The Act, as proposed, provides adequate means, independent of random testing, for professional sports franchises to address concerns relating to employee substance abuse. The Act permits "for cause" testing, after-prior-use testing, postaccident testing, and applicant testing.⁹ In addition, the employer maintains the ability to address employee actions suggestive of substance abuse based on appraisals of employee conduct. These alternatives to random testing are adequate to protect the employer's interests in the professional athletic industry. As noted above, the notion of privacy goes to the very core of the individual. Given the lack of evidence supporting intrusion into the individual athlete's privacy and the availability of less intrusive alternatives, random testing is not justified and should not be permitted.

8. *Id.*

9. *Id.* § 6, at 20-24.