

(www.drugtestinganalysis.com) DOI 10.1002/dta.57

Legal issues arising out of blood testing for human growth hormone

Matthew J. Mitten*

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Participation in sport at all levels of competition is a conditional privilege based on a consensual relationship between the parties, rather than an absolute legal right. Athletes generally are required to consent to drug testing for banned performance-enhancing substances as a condition of participating in Olympic and international sports, intercollegiate athletics sponsored by the National Collegiate Athletic Association (NCAA), virtually all professional sports, and some high-school sports. If an athlete declines, he or she is ineligible to participate in the subject sport at that level of competition.

In general, any doping protocol (including one requiring the taking and analysis of blood) unilaterally imposed by a US sport governing body on athletes as an eligibility requirement must be reasonable and further legitimate objectives such as maintaining the integrity of athletic competition and/or protecting athletes' health and safety. In addition, it must provide adequate procedural due-process safeguards for athletes, including a hearing to challenge positive test results, as well as reasonable and proportionate sanctions for usage of banned substances. In unionized professional sports leagues such as Major League Baseball (MLB), the National Football League (NFL), National Basketball League (NBA), National Hockey League (NHL), and Major League Soccer (MLS), a doping protocol is a mandatory subject of collective bargaining under United States labour law. Thus, the union representing the league's athletes must consent to its adoption and implementation.^[1] However, a professional league may unilaterally impose a doping protocol on non-unionized professional athletes as MLB has established for minor league baseball players since 2001.

While several cases have addressed legal issues regarding the taking and testing of urine samples in sports drug testing, blood testing raises both similar and some additional issues. To date, no US or foreign court or arbitral tribunal has directly considered whether mandatory blood testing of athletes for banned performance-enhancing substances, including synthetic human growth hormone (rhGH), violates any internationally or nationally recognized individual rights to privacy or bodily integrity. To determine how this issue is likely to be resolved in litigation or arbitration, it is necessary to review the developing US law and private international law established by arbitration awards regarding the legality of drug testing at the different levels of athletic competition as well as the compelled taking and testing of a person's blood outside the context of athletics. While blood testing has been done in connection with Olympic sports since 2000, the development of a blood test for rhGH has brought this issue to the forefront.

High School and College Sports

In *Vernonia School District v. Acton*^[2] the US Supreme Court upheld a public school district's requirement that minor students must submit to mandatory, suspicionless urine testing for illegal recreational drugs in order to participate in interscholastic athletics. The Court ruled that testing and analysis of student-athletes' urine does not violate the Fourth Amendment of the US Constitution, which prohibits unreasonable search and seizures. It concluded that any infringement of student-athletes' privacy rights is outweighed by school officials' duty to protect their health and safety while participating in sports competition as well as to maintain general discipline and order. However, in *York v. Wahkiakum School Dist. No. 200*,^[3] the Washington Supreme Court recently ruled that a high-school student-athlete drug-testing programme, similar to that of the Vernonia School District upheld by the US Supreme Court, violates the Washington state constitution, which provides more legal protection of individual privacy rights than the US Constitution.

The US Supreme Court, in *Schmerber v. State of California*,^[4] ruled that compelled taking of a person's blood and chemical analysis to measure its blood alcohol level for law enforcement purposes does not violate the Fourth Amendment. The Court found that the '[e]xtraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol.' Observing that the procedure for extracting blood 'involves virtually no risk, trauma, or pain', the Supreme Court determined that this testing method was 'reasonable'. By comparison, in *Winston v. Lee*,^[5] the Supreme Court held that a compelled surgical procedure under general anaesthetic to remove a bullet from a crime suspect is a 'more substantial intrusion' that violates the Fourth Amendment.

Unlike public high schools and universities (and the police), private educational institutions and sports governing bodies such as the NCAA are not government entities subject to the constraints of the US Constitution, including the Fourth Amendment. On the other hand, their drug-testing programs may be subject to state law challenges. The legality of the NCAA's drug-testing program based on the random, suspicion-less collection and

* Correspondence to: Professor Matthew J. Mitten, Marquette University Law School, Milwaukee, WI USA; Member, Court of Arbitration for Sport, Lausanne, Switzerland. E-mail: matt.mitten@marquette.edu

Marquette University Law School, Milwaukee, WI USA; Member, Court of Arbitration for Sport, Lausanne, Switzerland

analysis of student-athletes' urine samples has been upheld by both the California Supreme Court^[6] and a Louisiana appellate court^[7] because the NCAA's legitimate objectives of preserving the integrity of intercollegiate athletic competition and protecting participants' health and safety justifies limited infringement of student-athletes' privacy if appropriate confidentiality safeguards are maintained.

Applying the balancing test established by the foregoing federal and state legal precedents requires consideration of the following factors to determine whether requiring student-athletes, as a condition of competing in intercollegiate or interscholastic athletics, to submit to random, suspicion-less blood testing to determine the presence of rhGH in one's system is lawful. Taking blood from a person is more invasive of one's bodily integrity than collecting a urine sample but in most instances it is not as embarrassing as direct observation of urination. Laboratory analysis of a blood sample could potentially reveal much more about an individual than urine and could be used improperly to obtain extraneous personal medical information such as genetic information and whether a student-athlete is HIV positive. Blood testing for rhGH would be used to achieve the legitimate objectives of maintaining the integrity of intercollegiate and interscholastic athletic competition as well as protecting the health and safety of student-athletes. Currently, there is no alternative to blood testing (for example, urine testing) to determine the presence of rhGH. If appropriate sterile procedures to prevent infection and haematomas are followed, the manner of extracting blood would be reasonable. Balancing these factors and assuming appropriate safeguards to protect confidentiality, the taking and analysis of student-athletes' blood probably would be legal under federal law and in most US states if the blood testing methodology is scientifically valid and a reliable, accurate means of detecting and measuring the presence of rhGH.

Professional Sports

Professional sports clubs and leagues as well as the national governing bodies for individual sports are private organizations whose doping protocols are not subject to the constraints of the US Constitution. These entities, however, must comply with applicable federal labour, employment and civil rights laws that pertain to drug-testing programmes, and also may be required to comply with state laws regulating drug testing of employees^[8]. (The Dormant Commerce Clause of the US Constitution, which precludes individual states from directly regulating interstate commerce may pre-empt otherwise applicable state laws from regulating the drug testing programs of national sports leagues and governing bodies.) The governing body for a non-unionized individual performer professional sport (for example, golf, tennis) has valid authority to require athletes' consent to blood testing for rhGH as a condition of participation, although none has done so thus far.

As a general rule, for unionized professional team sports (for example, MLB, MLS, NFL, NBA, and the NHL), all components of a drug testing program are mandatory subjects of collective bargaining requiring union consent before the league's players are bound to comply with them. Under federal labour law a professional sports league could collectively bargain to impasse with the players' union and then unilaterally implement its last-offered specific terms regarding a blood-testing programme. But it is unlikely that a unionized professional sports league would

unilaterally impose a drug-testing programme because doing so would create the risk that the players would strike in response.

A union's consent to random, suspicionless blood testing protocol, which has not yet occurred in connection with any US professional sports league's drug testing programme, would subject all players to its requirements and be likely to constitute a waiver of the players' individual rights under federal employment or civil rights laws, although a player may be able to challenge particular aspects of the programme under applicable state laws. A player generally must raise any legal challenges arising out of the league's collectively bargained drug testing program in arbitration, the result of which is legally binding on all parties and subject to only very limited judicial review.^[9]

Olympic and International Sports

In an effort to harmonize the international fight against sports doping, on 2 March 2003, the World Anti-Doping Code (WADA Code) was approved by almost 80 governments and all of the major international sports governing bodies at the World Conference on Doping in Sport in Copenhagen, Denmark. The International Olympic Committee (IOC) and international federations (IFs) for each Olympic sport have adopted the WADA Code. Pursuant to contractual obligations, the United States Olympic Committee (USOC) and the US national governing bodies for Olympic sports also have adopted the WADA Code, which is applicable to all US athletes (including professional athletes) participating in national and international Olympic sports competitions. Blood testing for rhGH usage by athletes has been carried out at the past three Olympic Games but there have not been any reported positive results.

In August 2008, the United States ratified the 2005 UNESCO International Convention against Doping in Sport treaty, which incorporates the essential provisions of the WADA Code. This action, however, does not establish a legally enforceable obligation for Congress to enact federal legislation requiring US professional sports leagues and governing bodies to adopt or comply with the WADA Code, which permits (but does not require) blood testing to establish a doping violation.

The World Anti-doping Agency (WADA) International Standard for Testing^[10] states that a blood sample should be collected in a manner that ensures the athlete's health and safety and is of a quality and quantity that satisfies relevant analytical guidelines. The Standard provides that no more than three attempts should be made at one time to collect a sufficient sample of an athlete's blood. Non-compliance with sample collection, transportation, or storage protocol may invalidate blood test results. For example, accidental freezing of the B sample of US cyclist Tyler Hamilton's blood precluded confirmation of his positive A sample. On the other hand, even if an athlete's blood is drawn by someone unauthorized to do so under an applicable state law, this may not adversely affect the validity of test results if other proper procedures are followed. (There is possible tort liability for a negligent blood draw that harms an athlete with potential significant damages liability.)

Swiss law probably governs the validity of blood testing of Olympic sport athletes because WADA, the IOC, and most IFs are based in Lausanne, Switzerland. Thus far, no athlete has asserted that the taking of blood in order to test for rhGH, or any other banned performance-enhancing substance (for example, EPO) violates Swiss law or the laws of any other country, so there is no legal precedent concerning this issue. To date, only the scientific

validity of the blood testing methodology and/or results have been legally challenged. Pursuant to international private agreements among WADA, the IOC, IFs, national Olympic committees (for example, the US Olympic Committee), national governing bodies, and Olympic athletes, all disputes involving doping issues are to be resolved by final and binding arbitration before the Court of Arbitration for Sport (CAS), an international arbitral tribunal, with very limited judicial review by the Swiss Federal Tribunal, Switzerland's highest court.

As a general rule, US courts have no jurisdiction to resolve the merits of any sports doping issues that affect a US athlete's eligibility to participate in Olympic sport athletic competitions within or outside of the United States.^[11] Doping violations involving US athletes are prosecuted by the United States Anti-doping Agency (USADA) and all disputes are initially adjudicated by mandatory arbitration before a panel of American Arbitration Association (AAA)/US CAS arbitrators. Either the athlete or USADA, as well as WADA or the IF for the subject sport, have the right to appeal the AAA panel's decision to an international CAS panel.

Although a CAS award is binding only on the parties to the arbitration proceeding, it provides guidance and may be considered persuasive in resolving similar issues in future arbitration among different parties. Recent CAS awards have established the legal principle that an Olympic sports governing body using a blood test to detect the presence of a banned substance must prove, to the comfortable satisfaction of the arbitration panel, that the testing method is scientifically valid and that test results are accurate and reliable. Court of Arbitration for Sport panels have determined that a combined erythropoietin (EPO) indirect blood test and direct urine test to detect the presence of darbepoetin^[12] and a homologous blood transfusion test to determine the presence of transfused blood by detecting mixed red blood cell population met this standard.^[13]

The WADA Code establishes a rebuttable presumption that a WADA-accredited laboratory has complied with the International Standard for Laboratory (ISL) testing and analysis of an athlete's bodily fluids for banned substances. An athlete's proof that the laboratory failed to comply with a mandatory ISL will invalidate a positive test result unless the anti-doping organization proves that this failure did not affect the validity of the test result. For example, in *Landis v. USADA*,^[14] a CAS panel found that Floyd Landis committed a doping violation based on a test of his urine showing an elevated T/E ratio, although it was not conducted in strict compliance with ISL standards because carbon isotope

ratio analysis confirmed the presence of exogenous testosterone in his system. On the other hand, in *USADA v. Latasha Jenkins*,^[15] an AAA arbitration panel ruled that USADA was unable to rely on urine test results as evidence of an athlete's doping violation because the same laboratory analyst handled both the A and B urine samples in violation of an ISL.

It is probable that one of the first athletes who tests positive for rhGH will question the scientific validity of the testing method and/or the accuracy and reliability of the test results in CAS arbitration, a legal challenge that WADA and the international sports governing bodies must be prepared to defend by proving both requirements are satisfied.

Acknowledgement

I gratefully acknowledge the research assistance of Sean Light, Marquette Law School Class of 2009, in connection with this article.

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