

1991

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### Repository Citation

David J. Sisson and Brian D. Trexell, *The National Football League's Substance Abuse Policy: Is Further Conflict Between Players and Management Inevitable?*, 2 Marq. Sports L. J. 1 (1991)

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# THE NATIONAL FOOTBALL LEAGUE'S SUBSTANCE ABUSE POLICY: IS FURTHER CONFLICT BETWEEN PLAYERS AND MANAGEMENT INEVITABLE?

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## I. INTRODUCTION

The use of drugs and alcohol by athletes generally, and by professional football players in particular, has long captured the attention of the American public. And, as times have changed, so too has society's perception of the professional football player. Whereas the off-field exploits of players in the past were looked upon with bemusement, today's player engaging in similar behavior can expect not only to be subjected to public scrutiny, but also to be disciplined by the League.

Indeed, drug and alcohol abuse has been a source of contention between the National Football League Players Association ("NFLPA"), the National Football League ("NFL") and the National Football League Management Council ("NFLMC"). As a result, a coherent, effective substance abuse testing and treatment policy has yet to emerge.<sup>1</sup> For nearly a decade before the NFLPA renounced its bargaining status, those parties were unable to agree on a policy which could effectively rehabilitate players with substance abuse problems and, at the same time, retain sensitivity to players' privacy and other civil rights.<sup>2</sup>

The NFLMC is a consortium of the owners of NFL teams—much like a trade association. It acted as the management bargaining agent in labor contract negotiations. Along with the NFL, it has sought to implement as

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The authors wish to thank Ulice Payne, Jr. for his guidance and assistance in preparing this article, as well as Tim English of the National Football League Players Association for his editorial suggestions.

1. See *In the Matter of Arbitration Among the National Football League Players Association and the National Football League Management Council and the National Football League* (October 25, 1986) (Kasher, Arb.) [hereinafter Kasher, Arb.].

2. *Id.* at 13-21.

comprehensive a testing and treatment program as possible, including random testing throughout the year, in pre-season, in the regular season, and in the off-season.<sup>3</sup> In support of its position, the NFL has, in the past, argued that the Commissioner was empowered by the 1982 Collective Bargaining Agreement to take any steps necessary to protect the game's integrity.<sup>4</sup>

The NFLPA used to be the bargaining agent for players. Its chief interest is in protecting the rights of NFL players. In the past, it attempted to curb the Commissioner's efforts to augment and expand his power in disregard of the restrictions placed on him by past collective bargaining agreements.<sup>5</sup>

The NFLMC has argued that the NFLPA's opposition to the NFL's drug testing proposals violated both the terms agreed to in the 1982 Collective Bargaining Agreement and the negotiating history of the 1977 and 1982 Collective Bargaining Agreements, in which the NFLMC rejected the NFLPA's attempts to circumscribe the Commissioner's "integrity of the game" powers.<sup>6</sup> The NFLPA, in turn, argued that it never agreed to what the League later attempted to implement.

A new chapter in the substance abuse policy debate began to unfold on November 6, 1989 when the NFLPA renounced its status as the players' collective bargaining agent.<sup>7</sup> The NFLPA took this extraordinary step in order to combat the NFL's far-reaching restraints on player movement, though it also has the potential for affecting players' rights with regard to drug testing.

If not for the NFLPA's decision to renounce its status, substance abuse testing in general, and the League's program/policy in particular, might have remained at the status quo. However, avenues have now been opened for altering the system on both sides of the dispute. Players are no longer protected by the terms of the 1982 Collective Bargaining Agreement and its narrow drug testing provisions. Thus, the NFL, theoretically, could make good on its threat to impose random drug testing on players absent any restrictions in a collective bargaining agreement. But while the players are

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3. See Greig Neff & Robert Sullivan, *The NFL and Drugs: Fumbling for a Game Plan*, SPORTS ILLUSTRATED, Feb. 10, 1986, at 83; Ron Borges, *NFLPA Opposes Spot-Testing for Drug Use*, BOSTON GLOBE, Jan. 21, 1986, at 55; Gordon Forbes, *Rozelle Ready to Fight Drug Problem on His Own Terms*, USA TODAY, Mar. 11, 1986, at C5; Kasher, Arb., *supra* note 1, at 13-21.

4. See 1982 National Football League Collective Bargaining Agreement, art. VIII. This article empowers the NFL's Commissioner to fine, discipline and/or suspend players for engaging in any type of conduct which is detrimental to the integrity of, or public's confidence in, professional football. That Agreement, however, is no longer in force (*See infra*. Sec. IV).

5. Kasher, Arb., *supra* note 1, at 21-27.

6. *Id.* at 34-42.

7. Manny Topel, *No Union May Mean More Tests*, NEWSDAY, Nov. 10, 1989, at 161.

no longer protected by the collective bargaining agreement, they are no longer constrained by it, either. Individual players may now challenge the procedures and propriety of the current drug testing policy or any other policy that the NFL might try to impose under a variety of legal theories which may not have been available while the collective bargaining agreement was in effect.

This article will examine the history of the labor-management conflict over the substance abuse issue. It will also discuss the status of the current policy. Further, the article will examine the objective propriety of the content and administration of the policy. But principally, it will examine the factors that may ultimately require judicial resolution of the issue.

## II. HISTORICAL OVERVIEW OF CONFLICT REGARDING SUBSTANCE ABUSE

The NFL made inroads into the realm of substance abuse testing in 1971 when Commissioner Rozelle issued the NFL's first loosely designed drug policy.<sup>8</sup> That first policy purported to educate players about the dangers of substance abuse.<sup>9</sup> Examination of that policy reveals two elements which have arisen, time and again, throughout the developmental history of the substance abuse policy. First, the Commissioner issued the written policy just after the NFLPA was certified as the collective bargaining representative for NFL players, "but prior to any negotiated procedures regarding drug testing, treatment and/or education . . . ."<sup>10</sup> The timing of the Commissioner's announcement foreshadowed the adverse relationship which would develop between the NFL and the NFLPA over the implementation of a substance abuse policy.<sup>11</sup>

Second, the provisions of that first policy were, by their very nature, destined to be ineffective in remedying the NFL's substance abuse problems. The posting of notices and education of players did not stem the

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8. In the Matter of Arbitration Among the National Football League Players Association and the National Football League Management Council and the National Football League (Oct. 25, 1986) (Kasher, Arb.).

9. *Id.* The policy also required each NFL team to post notices in its training facility informing players that the "use of drugs not prescribed or approved by the team physician" violates NFL rules. *Id.*

10. *Id.*

11. As will be discussed, there have been two chief disputes regarding the NFL's commitment to a substance abuse policy. The first is that the NFL's commissioner has implemented and/or augmented drug testing procedures in contravention of the collective bargaining process and of existing collective bargaining agreements. The second dispute involves the provisions of the substance abuse policy, itself, its effectiveness, and its impact upon players' privacy and other civil rights.

flow of drugs into the NFL, as would become evident in the late 1970s and the 1980s. Subsequently implemented policies, which will be discussed later in the article, have proved equally ineffective.

Nevertheless, the NFL's substance abuse policy gradually developed into a far-reaching program including testing, education and discipline components. By 1973, the Commissioner had announced new elements of the substance abuse policy, which, for the first time, included a discipline provision.<sup>12</sup> Overall, the 1973 additions changed the program from a purely educational one to a program with practical tools to actually address the drug problem. These tools included further education programs, disciplinary action and team reporting of prescription drug use, as well as the appointment of a medical consultant.<sup>13</sup>

The NFL's efforts to establish a coherent, effective substance abuse policy continued in 1975 with the hiring of Charles Jackson, a drug abuse expert, as a consultant.<sup>14</sup> The NFL retained Mr. Jackson to work with the League's security department in further educating players, and to better develop the security department's ability to investigate alleged substance abuse incidents.<sup>15</sup> Following the NFL's hiring of Mr. Jackson, Commissioner Rozelle reiterated the goals of the 1973 drug policy in a two-page memorandum addressed to NFL players. This letter outlined virtually the same points as those set forth in 1973.<sup>16</sup> Again, however, the NFL's efforts did not curb the NFL's growing drug problem.

In 1982, the NFL's drug problem was thrust into the public eye. Sports Illustrated's cover story on June 14, 1982 was devoted to the NFL's drug problem.<sup>17</sup> The story, written by Don Reese, a former player for the Miami Dolphins and the New Orleans Saints, alleged a widespread substance abuse problem in the NFL.<sup>18</sup> The article served as a catalyst for wholesale efforts toward eliminating the NFL's substance abuse problem. Soon after the article was published, several prominent players, including Chuck Muncie and Rick Upchurch, enrolled in drug dependency programs.<sup>19</sup>

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12. Kasher, Arb., *supra* note 8, at 14.

13. *Id.*

14. *Id.*

15. *Id.* at 14-15.

16. *Id.* at 14.

17. Don Reese & John Underwood, *Special Report: I'm Not Worth a Damn*, SPORTS ILLUSTRATED, June 14, 1982 at cover, 66-82.

18. *Id.* at 69.

19. *Drugs in the NFL*, USA TODAY, Jan. 29, 1986, at C3.

At that time, Commissioner Rozelle told teams to begin testing for drug use.<sup>20</sup> Approximately one month later, on July 19, 1982, the NFLPA alleged that the NFLMC had violated federal labor laws and committed an unfair labor practice by beginning a drug testing program without collectively negotiating the testing procedures.<sup>21</sup>

While the NFLPA's unfair labor practice charge was pending, negotiations were underway for a new collective bargaining agreement. Among other things, the NFLPA sought increased compensation and the NFLMC sought a drug testing policy.<sup>22</sup> The issues were heatedly contested, and the NFLPA ultimately called a players' strike following the third game of the season.<sup>23</sup>

On December 11, 1982, the NFLPA and the NFLMC agreed to a new collective bargaining agreement, and the NFLPA withdrew its unfair labor practice charge.<sup>24</sup> The 1982 Collective Bargaining Agreement ("1982 Agreement") included, for the first time, a collectively bargained substance abuse policy.<sup>25</sup> This policy included provisions for pre-season urinalysis and blood testing, continuing drug dependency education efforts, reasonable cause testing for those players with suspected substance abuse problems, retention of the Hazeldon Foundation to administer the drug program, and strict rules for confidentiality of drug testing results.<sup>26</sup>

The 1982 Agreement was a breakthrough in the development of a substance abuse policy because it established that teams were allowed to test their players for substance abuse, as well as to treat any such problems and to discipline drug abusers.<sup>27</sup> The 1982 Agreement also included a provision empowering the Commissioner to discipline players in the event their conduct threatened the integrity of the game.<sup>28</sup> However, the agreement did not stem the tide of NFL substance abuse. Just one year later, reports surfaced that several NFL players were addicted to cocaine and had been involved in rehabilitation programs.<sup>29</sup> In addition, Coach Sam Rutigliano

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20. Ethan Lock, *The Legality Under the National Labor Relations Act of Attempts by National Football League Owners to Unilaterally Implement Drug Testing Programs*, 39 U. FLA. L. REV. 2, 7 (1987).

21. National Labor Relations Board Office of General Counsel, Case No. 2-CA-18923, 1982 NLRB GCM LEXIS 23, Oct. 26, 1982.

22. Kasher, Arb., *supra* note 8, at 16.

23. *Id.*

24. Lock, *supra* note 20, at 9.

25. Kasher, Arb., *supra* note 8, at 16.

26. 1982 National Football League Collective Bargaining Agreement, art. XXXI; Kasher, Arb., *supra* note 8, at 16.

27. Kasher, Arb., *supra* note 8, at 16-17.

28. 1982 National Football League Collective Bargaining Agreement, art. VIII.

29. *Drugs in the NFL*, *supra* note 19, at C3.

admitted that eight of his Cleveland Browns players were enrolled in the team's drug rehabilitation program.<sup>30</sup>

Soon after the 1982 Agreement was signed, Commissioner Rozelle began to quickly discipline players. He suspended four players, Pete Johnson and Ross Browner of the Cincinnati Bengals, E.J. Junior of the St. Louis Cardinals and Craig Stemrick of the Houston Oilers, for four games without pay during the 1983 season because of cocaine-related problems.<sup>31</sup>

Early in the 1985 season, with no decrease in reports of drug use, Commissioner Rozelle indicated that the NFL favored mandatory drug testing and would seek provisions for such testing in the next collective bargaining agreement.<sup>32</sup> Of course, the NFLPA and its members opposed any such testing scheme.<sup>33</sup> The NFLPA and the Commissioner clashed at the end of the 1985 season when eight teams attempted to impose post-season drug testing requirements upon their players as part of their post-season physical examinations.<sup>34</sup> After several players refused to take the tests and were fined by their teams, the NFLPA filed an unfair labor practice charge, arguing that the post-season drug tests were a unilateral change of working conditions which violated the National Labor Relations Act ("NLRA").<sup>35</sup> Of course, the NFLPA also argued that the fines imposed upon players refusing to take the tests, as was their right, were illegal.<sup>36</sup> The NFLMC countered, claiming the NFLPA's advice to players not to comply with the preseason testing requirements violated Article I, section 3 of the 1982 Agreement, which mandates both the NFLPA and the NFLMC attempt, in good faith, to ensure their respective charges, players and teams, comply with the 1982 Agreement.<sup>37</sup>

The dispute surrounding the implementation of post-season drug tests was highlighted when the Boston Globe reported that the New England Patriots, one of the teams playing in the 1986 Super Bowl, had at least 12 players who used drugs during the season.<sup>38</sup> Following these reports, team

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30. Lock, *supra* note 20, at 9.

31. *Drugs in the NFL*, *supra* note 19, at C3.

32. Gordon Forbes, *Rozelle: NFL May Push Drug Testing in Contract*, USA TODAY, Oct. 16, 1985, at C7.

33. Ron Borges, *NFLPA Opposes Spot Testing For Drug Use*, THE BOSTON GLOBE, Jan. 21, 1986, at 55.

34. *Id.*

35. Charge Against NFLMC, NLRB Case No. 2-CA-21403 (Dec. 18, 1985).

36. *Id.*

37. NFLMC v. NFLPA, Non-Injury Grievance Concerning Post-Season Physical Examinations (Dec. 26, 1985).

38. Ron Borges, *Drug Problem is Disclosed by Patriots: Dozen Involved*, BOSTON GLOBE, Jan. 28, 1986 at 1, 67; Kasher Arb., *supra* note 8, at 17.

members agreed to participate in a voluntary drug testing program.<sup>39</sup> The NFLPA was up in arms over implementation of this new, more rigorous program, and filed yet another unfair labor practice charge.<sup>40</sup> This time the NFLPA charged that the Patriots' drug testing program surpassed the level of testing authorized in the 1982 Agreement, and that the Patriots had also violated the NLRA by dealing directly with employees, rather than the union, in changing terms and conditions of employment.<sup>41</sup>

While the NFLPA protested the Patriots' drug testing plan, Commissioner Rozelle resumed his efforts to implement a mandatory testing program.<sup>42</sup> In March 1986, at the NFL's meetings, the Commissioner stated that he would implement a plan of his own if the NFLPA failed to agree to adopt a firm substance abuse policy.<sup>43</sup>

The NFLPA's opposition to Rozelle's statement was twofold. First, the NFLPA vowed to oppose a unilateral imposition of random drug testing because of its invasive effects on players' privacy.<sup>44</sup> Second, the NFLPA opposed Rozelle's position because of his apparent lack of authority under the 1982 Agreement to impose such a program.<sup>45</sup> Nevertheless, Commissioner Rozelle reiterated his intent to impose a league-wide drug testing program. On July 7, 1986, Commissioner Rozelle acted on his statements, announcing a substance abuse policy which would require two unscheduled urinalyses during the regular season for every NFL player.<sup>46</sup> In addition, the policy included a discipline component under which, in a worst-case scenario, a player could be banned permanently from the NFL.<sup>47</sup> The NFLPA sought an injunction, and the matters were referred to arbitration.<sup>48</sup>

In June, 1986, the Patriots announced that they would not impose a drug testing program on team members.<sup>49</sup> As it turned out, both the post-season drug testing case and the case involving Commissioner Rozelle's au-

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39. Ron Borges, *supra* note 38, at 1, 57.

40. Charge Against the NFL Management Council and the New England Patriots, NLRB Case No. 2-CA-21476 (Jan. 29, 1986).

41. *Id.*

42. Kasher, Arb., *supra* note 8, at 17; Forbes, *supra* note 32, at 35.

43. *Id.*

44. Gene Wojciechowski, *Rozelle Says He's Ready to Impose Drug Testing Plan on NFL Players*, L.A. TIMES, Mar. 11, 1986, at 111-1.

45. *Id.*

46. Kasher, Arb., *supra* note 8, at 19.

47. *Id.* at 19-20.

48. *Id.* at 20.

49. Lock, *supra* note 20, at 13.



thority were submitted to arbitration and decided in favor of the NFLPA.<sup>50</sup> During the arbitration hearings to determine whether the NFL could impose post-season drug tests, the NFLPA argued that the only tests authorized under the 1982 Agreement were the mandatory pre-season test and those tests mandated by a reasonable cause determination.<sup>51</sup> Further, the NFLPA argued that management was specifically barred from imposing post-season drug tests by article XXXI and the negotiations leading to the adoption of that article.<sup>52</sup>

In response, the NFLMC argued that drug testing was not barred as a component of the post-season physical examination under the terms of the 1982 Agreement, and that the management rights provision of the agreement reserved all management rights not expressly limited in its terms.<sup>53</sup>

The arbitrator found in favor of the NFLPA, ruling that implementation of a post-season drug testing policy would violate the 1982 Agreement because the parties, during collective bargaining concerning drug testing, agreed only to pre-season and reasonable cause testing.<sup>54</sup> Because the NFLMC never sought permission to conduct post-season drug tests during the negotiations which produced the drug testing agreement, the arbitrator held that the NFLMC was barred by the 1982 Agreement from imposing such tests.<sup>55</sup>

In making these determinations, the arbitrator dismissed the NFLMC's "management rights" argument because the terms of the 1982 Agreement indeed limited management's right to impose drug testing programs.<sup>56</sup> Indeed, the "management rights" clause only applied to those items not discussed elsewhere in the Agreement.

A few days later, in a decision of equal significance, an arbitrator held that Commissioner Rozelle could not implement a league-wide drug testing program involving random drug tests for the same reasons which led the arbitrator to reject the post-season drug testing plan.<sup>57</sup> Reviewing the bargaining history, the arbitrator noted that the NFLPA had been opposed to drug testing in any form.<sup>58</sup> After collective bargaining, the NFLPA agreed

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50. Opinion and Decision In re Arbitration between NFLMC and NFLPA Re: Post-Season Physical Examinations (Oct.20, 1985) (Kagel, Arb.) [hereinafter Kagel, Arb.].

51. *Id.* at 11.

52. *Id.* at 11-13.

53. *Id.* at 10-11, 13; 1982 National Football League Collective Bargaining Agreement, art. I, sec. 4.

54. Kagel, Arb., *supra* note 50, at 32.

55. *Id.*

56. *Id.* at 33.

57. Kasher, Arb., *supra* note 8, at 72.

58. *Id.* at 70.

only to pre-season and reasonable cause testing, and specifically provided that no random drug testing would occur.<sup>59</sup> The arbitrator rejected the NFLMC's argument that the Rozelle proposal would not violate the ban on spot-checking because under Rozelle's plan, all players would be randomly drug tested.<sup>60</sup>

The arbitrator found that random drug tests were never addressed in the negotiations which led to the 1982 Agreement, and Article XXXI precluded all random drug testing.<sup>61</sup> However, the arbitrator did order that Commissioner Rozelle could, under the auspices of Article VIII, augment the provisions of any pre-existing drug program provided the augmentation did not specifically contradict any of the terms of the 1982 Agreement.<sup>62</sup> The arbitrator found that where Commissioner Rozelle retained "integrity of the game" authority, he could exercise that authority as long as he did not violate the terms of the 1982 Agreement.<sup>63</sup> Since certain terms of Rozelle's augmented drug program had not been addressed in the 1982 Agreement, the arbitrator allowed imposition of those terms pursuant to a drug policy augmentation.<sup>64</sup> For example, the 1982 Agreement did not define "prohibited substances," the status of players who were hospitalized for drug treatment, a player's entitlement to pay for time spent in the hospital for drug treatment, and the extent of discipline imposed upon players for improper drug involvement.<sup>65</sup> All of these were areas the Commissioner was free to address by implementing an augmented program.

### III. DEVELOPMENT, STATUS AND ADMINISTRATION OF THE CURRENT NFL SUBSTANCE ABUSE POLICY

Despite the NFL's arbitration losses, the League was still interested in maintaining a more comprehensive drug policy than what was provided for in the 1982 Agreement. Commissioner Rozelle introduced such a policy to the NFL in 1987, and it has been updated annually. In the last few years, the competence and fairness of League testing procedures has been so heavily criticized by the NFLPA and the media that the credibility of the policy has been seriously compromised. This section will discuss the apparent philosophy behind the policy, what it entails, and how it has been implemented. It will also discuss prospects for the policy's future. Ultimately,

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59. *Id.* at 70-71.

60. *Id.* at 71-72.

61. *Id.* at p. 72.

62. *Id.* at 72-76.

63. *Id.* at 68.

64. *Id.* at 67-68.

65. *Id.* at 67.

the single most important theme of the policy is control—evidenced by the fact that, from its inception, the League alone has dictated and administered its terms.

### A. *NFL Philosophy Toward Drug Abuse*

The NFL has a number of legitimate reasons for maintaining a tough stance toward drugs. Commissioner Rozelle has noted the acute health risks for players who abuse drugs.<sup>66</sup> In addition, the NFL is arguably no different than any other large employer. While substance abuse policies and drug testing are not yet universally conducted by all employers, they are a central operating feature of many Fortune 500 companies.<sup>67</sup> Certainly NFL teams, as employers, have an interest in maximizing productivity which might be compromised by employees who are intoxicated.<sup>68</sup> The league also has an interest in protecting the safety of all players. Players abusing certain substances might constitute a danger to themselves and to other players, considering the inherently physical nature of professional football and the high susceptibility to injury under even the most favorable conditions.

Nevertheless, some questions arise which require closer scrutiny. First, is drug use in the NFL so wide-spread as to warrant testing and strong disciplinary measures? According to one source, 6.5% of NFL players tested positive for cocaine, marijuana, alcohol and other drugs (excluding steroids) in 1986 preseason testing. That number rose to 9.6% in 1987. However, most of those positive test results were from prescription medication or alcohol. In 1986 only 0.7% of players tested positive for cocaine and only 1.8% for marijuana. In 1987, only 0.8% tested positive for cocaine and 1.6% for marijuana.<sup>69</sup> One commentator suggests that the NFL has carefully concealed these statistics, because "to justify its brass knuckles drug policy, the NFL needs to give the impression drug use by players is

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66. See Drug Policy of the National Football League, Commissioner Rozelle's Introductory Message, July 1989.

67. See *Drug Abuse: The Workplace Issues*, AMA Research Study 68 (1982) [hereinafter *Workplace Issues*].

68. The owner of the Tampa Bay Buccaneers, Hugh Culverhouse, has publicly stated that he believes drug use among players in the 1980s contributed to the decline of the franchise. Among Buccaneer players, linebacker David Lewis was placed in a rehabilitation center in 1981, offensive guard Greg Roberts was arrested in 1987 on drug possession charges, and linebacker Cecil Johnson pleaded guilty in 1988 to charges of cocaine trafficking. "It was Partytime USA," Culverhouse explained. See ASSOCIATED PRESS, *AM Cycle*, Aug. 5, 1989.

69. See Richard Demak & Jerry Kirshenbaum, *The NFL Fails its Drug Test*, *SPORTS ILLUSTRATED*, July 10, 1989, at 39.

wide-spread.”<sup>70</sup> In any event, because players are high profile public figures, substance abuse among their ranks captures a disproportionate share of media attention, perhaps obscuring the actual extent of the problem.

Second, why have players and the NFL been unable to reach a mutually acceptable substance abuse policy? Other major professional sports leagues have developed such policies through joint labor-management efforts.<sup>71</sup> The National Basketball Association (“NBA”) policy, for example, has been held up as perhaps the model for the sports industry.<sup>72</sup> That policy is administered solely by an outside agency which is accountable to neither the players association nor the league. Both labor and management negotiated the substance as well as the administration of the policy, including procedural safeguards and appeal mechanisms.<sup>73</sup> The NBA Players Association agreed to a program which imposes some of the strictest discipline for violations of its provisions. In turn, the League agreed to forgo any testing other than on a “reasonable cause” basis.<sup>74</sup> Presumably, the drug problem in the NFL is not any greater or more inherently capable of solution only by management. And the NBA has battled at least as much as the NFL with high profile drug abuse.<sup>75</sup>

Third, do players themselves really object to attempts to create a drug free work place? In fact, the goals of both players and the League appear to be similar. NFLPA Executive Director Gene Upshaw has stated that if afforded a role in developing a drug policy, “my players would have a policy that I guarantee would be far tougher than the league’s would ever be. [Other players] want [drug users] out of the game.”<sup>76</sup> Surprisingly, in a Sports Illustrated poll of six hundred players, 59% stated they were in favor of random drug testing.<sup>77</sup> By all indications, most players do not fear testing because they believe the incidence of drug use among players is relatively low.<sup>78</sup>

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70. *Id.*

71. For a summary on the drug testing programs in the National Basketball Association, Major League Baseball and NASCAR, See Laurence M. Rose & Timothy H. Girard, *Drug Testing in Professional and College Sports*, 36 KAN. L. REV. 787, 797-802.

72. See Bob Ryan, *NFL Should Adopt the NBA’s Drug Testing Policies*, BOSTON GLOBE, Jan. 26, 1990, at 28.

73. See Drug Agreement Between NBAPA and NBA, Oct. 1983, at 5-7.

74. See Judicial Conference on Sports, 2d. Circuit, 125 F.R.D. 197, 314-15 (1990).

75. The banning of Michael Ray Richardsen and John Lucas and especially the cocaine overdose of Len Bias are examples.

76. Ryan, *supra* note 72, at 28.

77. See Manny Topel, *No Union May Mean More Tests*, NEWSDAY, Nov. 10, 1989, at 161.

78. Players do, however, concede that steroid use is highly prevalent. Atlanta Falcons offensive lineman, Bill Fralic, a former steroid user and a member of the NFLPA steroid committee

The answers to these questions may in fact beg the ultimate question—what is unique about sports which requires drug testing? Indeed, no other entertainment medium routinely tests its performers. Perhaps the answer lies in the NFL's belief that drug use among players projects a negative image to fans who might, as a result, stop consuming their product.<sup>79</sup> Indeed, it is difficult to argue with such logic. Fans might certainly become disenchanted with the idea of highly compensated athletes indulging in illegal activities which, for average employees, might be a cause for discharge. Still, players also have a financial stake in maintaining the image of the product. In not sharing control, the NFL seems to have allowed the policy itself to become the focus rather than any drug problem.

### *B. Elements of the Policy*

One observer has described the paradigm drug policy as “a four legged stool,” consisting of first, deterrence; second, medical screening; third, education and referrals; and fourth, treatment.<sup>80</sup> While the NFL's policy contains all of these elements, critics have argued that, in practice, the policy consists of little more than testing.<sup>81</sup>

#### 1. Rules of Conduct<sup>82</sup>

Players are forbidden from using, possessing or selling illegal drugs or anabolic steroids, and are counseled to avoid abusing alcoholic beverages and prescription drugs.<sup>83</sup> This prohibition applies to players both during the season and in the off-season.<sup>84</sup> Perhaps most significantly, players are told that substance abuse constitutes “conduct detrimental to the integrity” of football and alienates fans.<sup>85</sup> In addition, they are referred to a provision of the NFL Standard Player Contract which requires players to avoid en-

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suggested to Congress that up to 75% of players on offensive and defensive lines use steroids. Fralic, in fact, has supported year-round random steroid testing in opposition to the NFLPA's position on the subject. *Id.*

79. See 1990 National Football League Substance Abuse Policies, Part II, July 1990.

80. *Workplace Issues*, *supra* note 67, at 20.

81. See Demak & Kirshenbaum, *supra* note 69, at 38.

82. The following elements of the policy have remained essentially unchanged since its inception in 1987. For convenience sake, various sections from specific policies will be cited, though they each contain an analog in other policies.

83. See Drug Policy of the National Football League, July 1989, at 1-2.

84. This off-season application was implied prior to 1990, at which time it was made official. See 1990 National Football League Substance Abuse Policies, *supra* note 79, at 1.

85. See National Football League Policy and Procedures Re: Drug Abuse and Alcohol, July 1991, at 1 [hereinafter 1991 Substance Abuse Policies].

gaging in conduct detrimental to the club or League and told a violation of the policy violates the contract.<sup>86</sup>

## 2. Drug Testing

Draft choices are tested at scouting combines.<sup>87</sup> Current players are tested as part of their preseason physicals and on a reasonable cause basis.<sup>88</sup> Reasonable cause includes any player who: (a) has previously tested positive, (b) has previously received treatment for drug or alcohol problems, (c) has been convicted of a drug-related or alcohol-related offense (e.g., drunk driving), or (d) in the reasonable medical judgment of the league advisor or team physician, exhibits physical, behavioral or psychological symptoms of substance abuse.<sup>89</sup>

The advisor and the team physician must agree on reasonable cause testing and determine a schedule for frequency of tests, which may be scheduled or unscheduled and can be conducted even in the off-season.<sup>90</sup> The definition of reasonable cause may be a bit broad given the fact that most employers only employ it on the fourth basis (i.e., observation).<sup>91</sup> Failure to submit to testing is considered the equivalent of a positive test.<sup>92</sup> Further, players who would deliberately attempt to adulterate a specimen are advised they will be subject to discipline, perhaps more severe than for a positive test result.<sup>93</sup> The NFL fears that players will "doctor" urine samples.<sup>94</sup>

## 3. Discipline

The NFL employs a three-step, progressive discipline policy. Under step one, any player who tests positive for the first time is not subject to discipline, but rather is required to undergo substance abuse evaluation by a

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86. *Id.* See also, NFL Standard Player Contract, art. 1, § 3. But it is important to note the extent to which the policy actually dovetails with the contract. In practice, each team is given a fair amount of discretion as to how it wishes to apply the policy as a private employer and independent member of the NFL. Thus, what might be "detrimental conduct" to one team might not be to another. Moreover, some teams place a greater emphasis on rehabilitation and less on testing.

87. See Drug Policy of the National Football League, July 1989, at 4.

88. *Id.*

89. *Id.*

90. *Id.* at 5.

91. See generally Jeffrey J. Olson, *Legal and Practical Considerations in Developing a Substance Abuse Programs*, 6 THE LABOR LAWYER 859 (1990).

92. See Drug Policy of the National Football League, July 1989, at 5.

93. *Id.*

94. For example, New York Giants linebacker Lawrence Taylor who tested positive twice for cocaine, admitted in his biography *LIVING ON THE EDGE* that he often smuggled "clean" urine from players who did not use drugs into the testing booths and passed it off as his own.

team physician.<sup>95</sup> The player is then to be offered medical treatment including counseling, physiological outpatient or inpatient treatment, and an after-care program.<sup>96</sup> At step two, after a player tests positive for a second time, he is to be suspended. Up until 1991, the player at step two was suspended for four games; whereas now he is suspended for six games.<sup>97</sup> A third positive test results in step three, at which a player is permanently banned from the NFL.<sup>98</sup> Players may also be disciplined for committing illegal acts relating to the possession or distribution of prohibited substances.<sup>99</sup>

#### 4. Testing Procedures

Certain administrative controls on the policy purport to protect the integrity of the testing processes. The testing program is administered by an NFL-appointed drug advisor who is available for consultation with players and team physicians and for clinical monitoring.<sup>100</sup> The testing procedures include designated sites for collection and bottles with tamper resistant seals.<sup>101</sup> All bottles are identified by a control identification number, rather than the player's name. The player is required to sign a chain of custody form. The collected urine is tested for presence of cocaine, marijuana, amphetamines, opium and morphine. Testing is performed at a National Institute of Drug Advocacy ("NIDA") certified laboratory.<sup>102</sup> Players are required to furnish the specimen under direct observation.<sup>103</sup> After receiving an initial positive test, a confirmation test is performed and the advisor notifies the team physician and league office of the result.<sup>104</sup> Finally, the policy calls for all test results to be kept confidential by the advisor and the League.<sup>105</sup>

#### C. Administrative Problems

The NFL drug testing policy gained some unwanted publicity in the late 1980s, largely because of its administration. Most of the criticism came from two sources. First, in mid-1989, Sports Illustrated published an arti-

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95. See Drug Policy of the National Football League, July 1989, at 5.

96. *Id.*

97. See 1991 Substance Abuse Policies, *supra* note 85, at 6.

98. *Id.*

99. *Id.* at 5.

100. *Id.* at 3.

101. *Id.* at 4.

102. *Id.* at 4-5.

103. *Id.* at 4.

104. *Id.* at 5.

105. *Id.* at 9-10.

cle detailing improprieties in the testing program and suggesting that the league's true motivation for firmness was an attempt to make the players look bad in order to gain bargaining leverage with the NFLPA.<sup>106</sup> Second, a news reporter at WJLA in Washington aired a three-part expose on the program on the eve of the 1990 Super Bowl, alleging, in addition to sloppy administration, outright coverups and discrimination.<sup>107</sup>

At the center of the controversy was the NFL's drug testing advisor, Dr. Forest Tenant. Dr. Tenant's credentials were impressive. He holds a medical degree from the University of Kansas and a doctorate from the UCLA school of public health.<sup>108</sup> He also supervised a methadone clinic in Los Angeles.<sup>109</sup> However, questions about Dr. Tenant's philosophy and his capacity for administration became the focus of his tenure.

Perhaps most disturbing was Dr. Tenant's belief that as far as "addicted users are concerned you can forget about counseling."<sup>110</sup> Comments like this immediately called into question the NFL's commitment to rehabilitation. Instead, like the NFL, Dr. Tenant's efforts were directed toward testing. He developed and marketed a rapid eye movement home kit to help parents determine whether their children use drugs.<sup>111</sup> He also distributed instructional video tapes on how to detect drug users by observation (e.g. clothing and hair style).<sup>112</sup>

Another target was the League's handling of urine samples which may have been improper. Samples were allegedly mishandled, mislabeled, and at times even spilled into each other.<sup>113</sup> Further, unqualified individuals were apparently drafted as lab technicians.<sup>114</sup> Though Dr. Tenant may have known of these problems with chain of custody, he routinely reported test results to Commissioner Rozelle without mentioning the improprieties.<sup>115</sup>

The *Baskin Report* also alleged that Tenant's program had protected white players while incriminating blacks. It stated that certain white quarterbacks had tested positive for cocaine but the players were never dis-

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106. See Demak & Kirshenbaum, *supra* note 69, at 38.

107. *Baskin Report on NFL Drug Testing* (WJLA, Jan. 22-24, 1990) [hereinafter *Baskin Report*].

108. *Id.* at 9.

109. Elliot Almond, *Controversy Continues to Dog Tenant*, L.A. TIMES, Jan. 27, 1990.

110. Ryan, *supra* note 72.

111. Almond, *supra* note 109.

112. See *Baskin Report*, *supra* note 107.

113. *Id.*

114. *Id.*

115. *Id.*



ciplined according to the three-step policy.<sup>116</sup> While the NFL categorically denied the charges, the report was still damaging. Commissioner Tagliabue called it a "journalistic molotov cocktail."<sup>117</sup>

These allegations appear to be borne out by at least two individual cases. Denver Broncos tight end Clarence Kay allegedly tested positive for cocaine for a third time in 1988.<sup>118</sup> However, the urine sample in question apparently sat for twelve days before it was analyzed.<sup>119</sup> In addition, some normal chain of custody procedures were not observed.<sup>120</sup> Reportedly, Commissioner Rozelle agreed to refrain from banning Kay in exchange for Kay's remaining quiet about the improprieties in the test.<sup>121</sup> Rozelle sent him a letter stating "only my dissatisfaction with the administrative handling of certain matters relating to your recent positive testing has led me to refrain from removing you, based on that testing, for a minimum of 30 days from the Broncos roster—a consequence normally called for in step 2 under league policy at this time of year."<sup>122</sup> Rozelle then admonished Kay to remain "clean" since he had been given his last chance.<sup>123</sup>

Seattle Seahawks defensive back Terry Taylor failed a 1987 preseason drug test and after rehabilitation was tested up to 25 times for reasonable cause.<sup>124</sup> In 1988 Commissioner Rozelle suspended Taylor for 30 days, stating that he had tested positive for cocaine.<sup>125</sup> Taylor appealed the suspension in United States District Court in Seattle, seeking a temporary restraining order. The court granted the order, stating "I do say that there are serious questions raised about the manner of the testing, whether or not its flawed. The question raised in my mind because he passed 24 out of 25 [drug tests], roughly, and there is a definite conflict and whether or not it was his sample that he signed . . ."<sup>126</sup> The court granted the temporary injunction pending arbitration.

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116. *Id.*

117. Leonard Shapiro, *In Week of Hype and Glitz, The Real Story is Miles Away*, WASH. POST, Jan. 22, 1991.

118. ASSOCIATED PRESS, PM cycle, Sept. 6, 1990.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. Demak & Kirshenbaum, *supra* note 69, at 38.

125. *Id.*

126. Taylor v. National Football League, Case No. C88-1182D (W.D. Wash. 1988).

#### D. Recent Changes

In 1990, Commissioner Tagliabue changed the name of the Policy to "Substance Abuse Policies" in a more than symbolic move. He dismissed Dr. Tenant, replacing him with Dr. Lloyd S. Brown.<sup>127</sup> In addition, he created a separate set of rules for steroid abuse.<sup>128</sup> In fact, he stated "I regard [steroids] as the most severe drug problem we have in the National Football League."<sup>129</sup> Further, executive and front office personnel are also now required to undergo testing in accord with the policy.<sup>130</sup> In addition, the 1991 policy provides for a "safe harbor," wherein a player can turn himself in for drug use and seek rehabilitation without discipline.<sup>131</sup> Such players are placed on a reserve/nonfootball illness list under which they continue to draw their full salaries.<sup>132</sup>

But the policy has also become more stringent in several respects. Players are now forbidden from consuming alcoholic beverages in locker rooms or on team flights.<sup>133</sup> Perhaps as a result of well-publicized drunk driving arrests, players are now disciplined for any alcohol-related conviction.<sup>134</sup> A first offender is suspended for a minimum of four games; and, if aggravating circumstances exist (including serious injury or death of third parties) a longer suspension may be imposed.<sup>135</sup> Second or subsequent alcohol-related offenses carry a six game suspension.<sup>136</sup> Further, players merely consuming an excessive amount of alcohol may be required to undergo medical counselling with a team physician and establish a procedure for clinical monitoring including appropriate treatment and testing for cause.<sup>137</sup>

While many of Commissioner Tagliabue's changes have been directed toward improving administrative procedures, the League did not meet all of the NFLPA's requests. For example, the NFLPA had asked that unit samples be split with the union retaining half the sample to confirm or deny the test results.<sup>138</sup> The league refused and the NFLPA has been relegated to

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127. 1991 Substance Abuse Policies, *supra* note 85, at 2.

128. 1990 National Football League Substance Abuse Policies, Part I, July 1990.

129. *Tagliabue is Quick to Tackle Some Tough Questions*, WASH. POST, Jan. 28, 1990.

130. 1991 Substance Abuse Policies, *supra* note 85, at 1.

131. *Id.* at 6-7.

132. *Id.* at 7.

133. *Id.* at 10.

134. Reggie Rogers, a former Detroit Lion defensive end, was convicted of manslaughter in 1987 when he was involved in an accident and was legally intoxicated. *Detroit News* (Sept. 3, 1987).

135. 1991 Substance Abuse Policies, *supra* note 85, at 8-9.

136. *Id.* at 9.

137. *Id.* at 8.

138. David Ginsburg, ASSOCIATED PRESS, PM Cycle, Aug. 3, 1989.

conducting its own testing in addition to that of the League. The NFLPA has set up a portable facility outside of team headquarters and players on a voluntary basis may store urine samples.<sup>139</sup>

It is clear that players are still not satisfied with their degree of involvement in formulating drug testing policy. And, Commissioner Tagliabue has made no secret of the fact that he still favors random testing. NFLPA Executive Director Gene Upshaw summed up the Association's relationship with the League stating, "[W]e don't trust anything they do—the techniques, the procedure, the standard, their labs."<sup>140</sup> Thus, at best, the current status seems to be an uneasy detente which may not last, due in large part to the fact that the players no longer have a bargaining agent.

#### IV. LEAGUE OPPORTUNITIES FOR EXPANSION OF SUBSTANCE ABUSE PROGRAM

At a recent judicial conference on sports issues, former Major League Baseball Commissioner Bowie Kuhn noted "a private employer, who is not restricted by a state statute and is not restricted by a collective bargaining agreement, or by the implications of the labor law, is pretty well free to do what he wants in the area of drug testing."<sup>141</sup> Kuhn then acknowledged "in professional sports that thing is settled pretty much in a mold. We do have unions in professional sports; we do have collective bargaining; we do have agreements . . . ."<sup>142</sup> The NFLPA's recent renunciation of bargaining status has shattered that mold and, for the first time in recent memory, opened the way for a league to exercise discretion in regard to substance abuse testing—up to and including the random testing so coveted by Commissioner Rozelle. Collectively, players are virtually powerless to stop a new regime of testing, let alone to change the existing system. Unfortunately for players, they cannot substitute the safety net of traditional labor law with a lawsuit based on constitutional violations. Thus, no mechanism exists which would force the NFL to justify the reasonableness of its procedures on a global basis.

##### A. *Immediate Effect of Renounced Bargaining Status*

For the greater part of the century, the labor movement had passed professional athletes by and left them at the whim of management. Until

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139. Elliot Almond & Randy Harvey, *Union Offers Plan To Check Drug-Testing*, L.A. TIMES, July 14, 1989.

140. Ginsburg, *supra* note 138.

141. Second Annual Judicial Conference on Sports - 2nd Circuit, 125 FRD 197, 313 (1990).

142. *Id.*

the 1960's, no real unions existed in professional sports.<sup>143</sup> The NFLPA itself was not an acknowledged representative until the 1970's.<sup>144</sup> The NFL's 1982 Agreement expired in 1987. After no progress was made on a new agreement, the NFLPA finally voted on November 6, 1989 to renounce itself as the bargaining representative for players. While the NLRB did not immediately approve the action, the NFLPA immediately ceased bargaining with the NFLMC.<sup>145</sup> In a highly calculated gamble, the NFLPA seemingly turned the clock backwards.

The NFLPA (probably correctly) surmised that it would be unable to effectively challenge issues such as free agency while constrained by federal labor laws.<sup>146</sup> The NFLPA probably also knew that even without a collective bargaining agreement the League might not impose restrictions any more onerous than before, since it could not run the risk of providing additional ammunition for pending anti-trust suits.<sup>147</sup> However, following the NFLPA's renunciation, players no longer have protections in the area of work rules and discipline—areas that without an agreement (and subject to some qualification) courts generally leave to the discretion of employers.<sup>148</sup>

#### 1. No continuing duty to follow the bargaining agreement

Most significantly, players lost the precedential value of the *Kagel* and *Kasher* arbitration decisions. Perhaps because comprehensive drug programs were not the norm in 1982, the 1982 Agreement addressed only pre-employment and reasonable cause testing. But the agreement included an integration clause which stated "[T]his agreement represents the complete understanding of the parties on all subjects covered herein and there will be

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143. Ubertine *PROFESSIONAL AND AMATEUR SPORTS*, at 4-3 (1990).

144. *Id.* at 4-4. The NFLPA did exist in name, however, prior to that date. It was mentioned during Congressional hearings as early as 1958. See *Organized Professional Team Sports: Hearings on H.R. 5307, before House Subcommittee on Antitrust of the Commissioner on the Judiciary*, 85th Congress, 1st Session (1957-58).

145. See *Associated Press*, AM Cycle, Sept. 30, 1991. The NFLPA's action was taken five days after the Court of Appeal for the Eighth Circuit ruled that an antitrust and labor exemption applied so long as the NFLPA was a union.

146. See Ed Garvey, *Forward to the Scope of the Labor Exemption in Professional Sports: A Perspective on Collective Bargaining in the NFL*, 1989 DUKE L.J. 328, 337. Garvey argues that: [c]ollective bargaining is being strangled to death because the NFL monster got too big and too strong. They control the networks; they control the announcers, they have most of the sports press on their side; and more important than anything, because they operate as a monopoly sharing everything, they have money and time on their side. *Id.*

147. *Id.* See also Ethan Locke, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339; Robert McCormick, *Labor Relations in Professional Sports - Lessons in Collective Bargaining*, 14 EMPL. REL. L.J. 501 (1989).

148. *Id.*

no change in the terms and conditions of this agreement without mutual consent."<sup>149</sup> The arbitrator's holdings effectively limited testing to those enumerated areas until a new agreement could be reached. But without an agreement, the old restrictions and decisions are irrelevant.

The players also generally lost the benefit of individual noninjury grievances—i.e., arbitration. In practice, players did not go to arbitration when receiving drug supervision. In the past, when the NFL violated any provision of the agreement, an arbitrator was given the authority to "enter an appropriate order, including to cease and desist from implementing or continuing the practice or proposal in question . . . ."<sup>150</sup> Arbitration is generally a simpler, more expedient and less expensive remedy than traditional civil litigation.<sup>151</sup>

Moreover, had the NFL actually attempted to introduce an especially intrusive component of a new substance abuse policy, the NFLPA might have succeeded in having it enjoined pending arbitration. In *Graphic Communications Union v. Stone Container*,<sup>152</sup> the court that held an irreparable harm might be effected on employees notwithstanding an arbitrator's ability to prohibit future testing. The court reasoned that arbitration "could not undo the humiliation and disclosure of personal information which will already have occurred from those tests while awaiting the arbitrator's decision."<sup>153</sup> Still, the Court of Appeals for the Second Circuit recently refused to enjoin unilateral testing, citing the very narrow exception to the Norris La Guardia Act's proscription against injunctive relief when a bargaining agreement exists.<sup>154</sup>

## 2. No duty to bargain

The NFL also may now disregard with impunity what it has been avoiding for years—bargaining over the terms of the policy. Section 8(d) of the

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149. 1982 National Football League Collective Bargaining Agreement, at 7.

150. *Id.* In fact, federal courts generally do not decide issues touched on in collective bargaining. However, they do have jurisdiction in order to protect the integrity of an arbitrator's decision. Thus, in *Taylor v. National Football League*, Case No. C88-11820 (W.D. Wash. 1988), Judge Dimmick ordered a temporary restraining order preventing the suspension of Terry Taylor only until an arbitrator could ultimately decide the case. *Id.*

151. See generally Bernard Cushman, *Arbitration and the Duty to Bargain* 1967, 67 WIS. L. REV. 612 (1967).

152. 3 I.E.R. Cases 261 (S.D. Ind. 1988).

153. *Id.* at 262.

154. See *Niagara Hooker Employees Union v. Occidental Chemical Corp.*, Daily Lab. R. 133 (July 11, 1991) (backpay and reimbursement remedies exist even if arbitration does not prevent the temporary effect of discharge). For a discussion of the general prohibition on injunctions in this area see Charles J. Morris, *THE DEVELOPING LABOR LAW* 888-908 (1983).

National Labor Relations Act ("NLRA") makes the duty to bargain with the union mandatory in certain circumstances. These include issues of "wages, hours, and other terms and conditions of employment . . . ."<sup>155</sup> Moreover, employers are required to bargain in good faith and to impasse.<sup>156</sup> Employers who disregard this duty and unilaterally impose mandatory terms risk violating the NLRA. But, if a term is non-mandatory, an employer can impose it on employees regardless of whether it was not addressed in collective bargaining.<sup>157</sup>

Commentators have argued that Commissioner Rozelle's attempts to approve post-season testing and to impose random testing constitute violations of traditional labor law.<sup>158</sup> Still, the arbitrators in the two major NFL decisions skirted this issue, expressly declining to decide whether drug testing was a mandatory subject of collective bargaining.

But in two 1989 decisions, *Johnson-Bateman*<sup>159</sup> and *Minneapolis Star Tribune*,<sup>160</sup> the NLRB finally pronounced that employers are required to bargain fully over testing. Significantly, the NLRB also determined that a union does not waive its right to approve the details of testing merely because it approves a broad "management rights" provision.<sup>161</sup> The NFLPA agreed that "the NFL clubs maintain and reserve the right to manage and direct their operations in any manner whatsoever, except as specifically limited by the provisions of the agreement."<sup>162</sup> Further, the board determined that the right to bargain is not waived merely because an agreement is silent on drug testing or an aspect thereof.<sup>163</sup> Rights are only waived if the union specifically relinquishes an issue.

If the NFLPA again became the bargaining agent, the League would have no legal basis for ever unilaterally imposing random drug testing without at least bargaining to impasse. And, even if the League were to abandon attempts to randomly test, it would likely be unable to convince the NFLPA to adopt even the same drug testing provisions as existed in the 1982 Agreement in connection with its current substance abuse policy. For instance, the Agreement allows for "reasonable cause" testing but does not

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155. See 29 U.S.C. § 169 (1981).

156. *Id.*

157. Charles J. Morris, *THE DEVELOPING LABOR LAW* 772-84 (1983).

158. See generally, Locke, *The Legality Under the National Labor Relations Act of Attempts by National Football League Owners to Unilaterally Implement Drug Testing Programs*, 39 U. FLA. L. REV. 1 (1987).

159. *Johnson-Bateman*, 295 N.L.R.B. 26 (1989).

160. *Minneapolis Star Tribune*, 295 N.L.R.B. 63 (1989).

161. *Johnson-Bateman*, 295 N.L.R.B. 63 (1989).

162. 1982 *National Football League Collective Bargaining Agreement*, art. I, § 4 (1982).

163. *Johnson-Bateman*, 295 N.L.R.B. 25 (1989).

define reasonable cause. The substance abuse policy, on the other hand, finds reasonable cause to test even when a player does not exhibit signs of substance abuse. Thus, any player who ever tested positive in the past can be tested essentially at the whim of the NFL or any club, without notice and even in the off season. This resembles random testing much more closely than reasonable cause testing. The NFLPA might be reluctant to agree to such terms, despite its general disapproval of drug use.

In fact, the NFL could be required to bargain over every aspect of the Policy—not just testing. Such aspects include: (1) where the testing program is administered and who administers it, (2) defining what constitutes a positive test result, and (3) establishing appropriate discipline. In short, the NFLPA could through reasserting its bargaining status take virtually all of the elements of the substance abuse policy out of the sole discretion of the league.

### *B. Present Absence of Constitutional Restraint*

Substance abuse testing can potentially be intrusive, invasive and embarrassing. It can also subject employees' livelihoods to the results of tests whose accuracy and proper administration they may not be able to control. For those reasons, federal and state courts have frequently struck down employers testing programs as unreasonable on constitutional grounds. However, constitutional restrictions apply only to governmental actors—not to private employers acting without color of law.<sup>164</sup> Because earlier battles between the NFLPA and NFLMC centered around traditional labor law issues, constitutional issues were largely ignored.<sup>165</sup> Since players no longer have collective bargaining protection, their inability to utilize the strongest weapon against unwanted drug testing makes their position all the weaker. It is useful to examine how much stronger players' claims would be if the NFL were a state actor, as well as to explore the possibility that the NFL might someday be required to justify its program on constitutional grounds.

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164. See *Blum v. Yaretsky*, 457 U.S. 991 (1982) (private acts are not "state action" unless a state specifically exercises coercive power enforcing a private employer's actions). See also *Skinner v. Railway Labor Executive's Ass'n*, 489 U.S. 602 (1989) ("the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative . . ."). *Id.* at 614.

165. The NFLPA did, however, prepare a statement to Congress arguing that random testing based on anything less than reasonable suspicion is a Fourth Amendment violation, citing several cases involving municipalities. Of course, those cases are probably inappropriate because they clearly involve government actors. See SELECT COMMITTEE ON NARCOTICS ABUSE AND CONTROL, U.S. HOUSE OF REPRESENTATIVES, Sep. 10, 1987.

## 1. Privacy rights

While the right to privacy, as such, does not appear in the United States Constitution,<sup>166</sup> the Fourth Amendment does ensure that "the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."<sup>167</sup> This right has been found to extend to compulsory production by employees of blood and urine samples.<sup>168</sup> Thus, subject employers must be able to prove the reasonableness of the taking and handling of bodily fluids. In determining reasonableness, the United States Supreme Court has held that the proper analysis "requires the balancing of the need for the particular search against the invasion of personal rights that the search entails."<sup>169</sup> Arguably, the NFL's Policy does not meet that test.

Some courts have assessed the reasonableness of a test based on the type of bodily fluid involved. In general, courts tend to find the taking of blood more intrusive because it requires physical extraction.<sup>170</sup> In contrast, urine is a waste product which is excreted.<sup>171</sup> Nonetheless, it has been held that "urine excreted for a drug test is not a waste product to be flushed down the toilet."<sup>172</sup> The NFL only expressly authorizes urine tests.

Once the blood or urine has been collected, the ensuing analysis is also considered a Fourth Amendment search.<sup>173</sup> The rationale is that an em-

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166. The right, however, has been extrapolated from other Constitutional guarantees. The Supreme Court has identified a core group of "fundamental rights" which generally relate to family relations. See *Roe v. Wade*, 410 U.S. 113 (1973) (right to privacy implicated when determining whether to allow a pregnancy termination); *Loving v. Virginia*, 388 U.S. 1 (1967) (the miscegenation law and the right to privacy); *Griswald v. Connecticut*, 381 U.S. 479 (1965) (marital contraceptive use subject to privacy right). But cf. *Bowers v. Hardwick*, 478 U.S. 186 (1986) (privacy protection does not extend to private consensual homosexual activity).

167. U.S. CONST. amend. IV. The Fourteenth Amendment extends Fourth Amendment protections against unreasonable searches and seizures to states. See *Mapp v. Ohio*, 367 U.S. 643, (1961); *Wolf v. Colorado*, 38 U.S. 25, (1949).

168. See *Skinner v. Railway Labor Executive Ass'n*, 489 U.S. 602 (1989); *Everitt v. Napper*, 833 F.2d 1507 (11th Cir. 1987); *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987).

169. *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

170. *Skinner v. Railway Labor Executive Ass'n*, 489 U.S. 602 (1989). "[I]t is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable." *Id.* at 616.

171. See *Mack v. U.S., F.B.I.*, 653 F. Supp. 70, 75 (S.D.N.Y. 1986):

The collection of a urine sample has little in common with stomach pumping or body cavities' searches (or even with the taking of a blood sample, which requires the infliction of an injury, albeit a small one). It is even less intrusive than a fingerprint which requires that one's fingers be smeared with grease and pressed against a paper. *Id.* at 75.

172. *Rushton v. Nebraska Public Power Dist.*, 2 I.E.R. Cases 25, 35 (D. Neb. 1987).

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



ployer can learn very private facts about an employee in a test, apart from whether he is using drugs (e.g. sexually transmitted diseases, diet).<sup>174</sup>

Employees are also generally recognized to have the right to urinate in private. Indeed, the act of urination is one of the most highly private functions recognized by our society.<sup>175</sup> Thus, in balancing interests, courts will generally subordinate an employer's right to obtain an unadulterated sample with an employee's right to discretion. Nonetheless, at least one court has noted there is no constitutional right to "modesty."<sup>176</sup> The NFL's program of "frontal observation," with an examiner personally monitoring each player in the act of urination, compromises the players interests.<sup>177</sup>

The recent judicial trend is also to find unreasonable drug tests which assess off-duty use.<sup>178</sup> In *NTEU v. Yeutter*,<sup>179</sup> the Court of Appeals for the Second Circuit reversed a district court which upheld an employer's decision to discipline for off-premises drug use. Discipline under the NFL policy is based almost entirely on "system presence"—as few players have ever been found to have been under the influence of drugs (with the exception of steroids) while performing.<sup>180</sup>

Ultimately, the most vulnerable practice in the Fourth Amendment realm is random drug testing. While warrantless searches are generally prohibited, an exception exists for certain administrative searches. But that exception is found only to exist with respect to safety-sensitive positions or

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174. *Lovvorn v. City of Chattanooga, Tennessee*, 846 F.2d 1539 (6th Cir. 1988). See also *Jevic v. Coca Cola Bottling Co. of New York*, 1990 U.S. Dist. LEXIS 8821.

175. *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (1987) explained:

There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observations; indeed, its performance in public is generally prohibited by law as well as by social custom. *Id.* at 175.

176. *Fowler v. N.Y.C. Dept. of Sanitation*, 4 I.E.R. Cases 81, 85 (S.D.N.Y. 1989).

177. San Francisco 49er tight end Brent Jones explained that the process "looked like a home-plate umpire, leaning over the catcher to see if he held onto the ball." Ian Miller, *The 49ers Encounter First Testing of Season, NFL Begins Stepping Up Steroid Monitoring*, SAN FRANCISCO CHRONICLE, July 31, 1990. And there is an even more practical problem. Some players have trouble urinating under observation. One Phoenix Cardinal player missed an hour of practice when he could not produce a sample despite drinking 19 glasses of water. "His cup not runneth over," explained Cardinals general manager, Larry Wilsen. *Time In a Bottle*, SPORTING NEWS, Aug. 7, 1989, at 71.

178. See 6 Individual Employment Rights, BNA, No. 15, at 4 (July 30, 1991) (suggesting that off-duty use will be the most active area of litigation within the next 18 months).

179. 5 I.E.R. Cases 1605 (D.C. Cir. 1990).

180. While testing for off-duty drug use might be more tenuous, courts have categorically rejected the argument that an employee has the fundamental constitutional right to use illegal drugs off-duty. See *Local 1277 v. Sunline Transit Agency*, 2 I.E.R. Cases 579, 588 (C.D. Calif. 1987).

positions of national security such as nuclear plant operators<sup>181</sup> and air traffic controllers.<sup>182</sup> Courts have cooled to the notion of approving random testing even for firefighters<sup>183</sup> and police officers.<sup>184</sup>

The NFL would be extremely hard-pressed to justify a random program on a constitutional basis, as the balance would probably tip in favor of player interests.<sup>185</sup> Indeed, even the well established pre-season testing of players is done regardless of suspicions, and thus might be vulnerable to attack.

## 2. Due Process

Drug programs have also been challenged on general due process grounds. Employers must comply with substantive due process by demonstrating the inherent reasonableness and reliability of the actual test, apart from the search or seizure itself.<sup>186</sup> For instance, many employers utilize the Enzyme Multiplied Immunoassay Technique (EMIT) because it is portable and relatively inexpensive.<sup>187</sup> The EMIT has been found to have a specificity of 90%; in other words, of 100 nonusers, the test would identify 90.<sup>188</sup> Some courts have taken judicial notice of the reliability of such tests and determined that reliance on them without confirmation may be arbitrary and capricious.<sup>189</sup>

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181. *See* *Rushton v. Nebraska Public Power District*, 2 I.E.R. Cases 25 (D. Neb. 1987) (given the highly regulated nature of the nuclear power industry, and the fact that constant surveillance is an accepted measure of the business, employees have a diminished expectation of privacy).

182. *See* *National Ass'n of Air Traffic Specialists v. Dole*, 2 I.E.R. Cases 69, (D. Alaska 1987) ("the national interest in air safety and the public's perception of safety justifies the intrusion into the legitimate expectation of privacy of flight service specialists . . ."). *Id.* at 86.

183. *Lovvorn v. City of Chattanooga, Tennessee*, 845 F.2d 1539 (6th Cir. 1988) (for a mandatory drug test of firefighters is to be reasonable, there must be some evidence of a significant department-wide drug problem or individualized suspicion).

184. *See* *Taylor v. O'Grady*, 4 I.E.R. Cases 1569 (7th Cir. 1989) (generalized interest in fostering public perception of integrity of work force is not sufficient to overcome privacy interest).

185. *But see* *Shoemaker v. Handel*, 1 I.E.R. Cases 815 (3rd Cir. 1986), in which New Jersey Racing Commission regulation was upheld which required random testing of all jockeys. The court considered, in addition to safety factors, that the "integrity of the sport" would be compromised if such testing was not allowed. The NFL would likely make a similar argument.

186. *See* *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306, 313 (1950).

187. Edward J. Imwinkelreid, *Some Preliminary Thoughts on the Wisdom of Governmental Prohibition or Regulation of Employee Urine-analysis Testing*, 11 NOVA L. REV. 563 (1987).

188. Rodstein, *Drug Testing in the Workplace: The Challenge to Employment Relations and Employment Law*, 17 KY. L.J. 683, 695-97 (1988); Fenton, ET AL., *Comparison of Enzyme Immunoassay and Gas Chromatography/mass spectrometry in Forensic Toxicology*, 25 GEN. FORENSIC SCI. 314 (1980).

189. *Jones v. McKenzie*, 1 I.E.R. Cases, 1077, 1081 (D.C. 1986); *Higgs vs. Wilson*, 616 F. Supp. 226 (W.D. Ky. 1985). *But see* *Jenson v. Lick*, 589 F. Supp. 35 (D. N.D. 1984); *Wykoff v.*

While the NFL also conducts confirmatory tests, the level at which a player can test positive might be unfairly low. The National Institute on Drug Abuse has determined positive tests must contain at least 150 nanograms of cocaine and 15 nanograms of marijuana.<sup>190</sup> The NFL finds positive results for players with amounts far lower.<sup>191</sup>

Courts also examine the manner in which a search (i.e., chain of custody) is conducted in order to determine its fairness. Indeed, courts have determined that the propriety of drug screenings depends on such factors as the certainty of specimen identification; specimen storage, handling and preparation; preparation and storage of testing instruments and hardware; and qualification and training of laboratory personnel performing the test and interpreting the results."<sup>192</sup> For instance, in *Egloff v. New Jersey Air National Guard*,<sup>193</sup> the plaintiff was merely given an unopened, unlabeled bottle and told to "fill it." No provisions were apparently made to insure nonalteration of the specimen. The court found a Fourth Amendment violation, given the fact that "the testing was marked by a conspicuous absence of the most rudimentary non-procedural safeguards and guidelines."<sup>194</sup> By this analysis, many of the drug tests conducted by the NFL (at least during the Dr. Tenant tenure) might be challenged.

Finally, employees are recognized as having procedural due process rights, including the right to a formal hearing. This includes the right to confrontation as well as to adequate notice.<sup>195</sup> Courts have found a violation of the right when an employee was suspended without pay, pending a hearing.<sup>196</sup> While players are now allowed to appeal a decision to the Commissioner, one might argue that this is a hollow right since he acts as prosecutor, judge, and jury.<sup>197</sup> The NFL can and does suspend players without

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Rasig, 613 F. Supp. 504 (N.D. Ind. 1985); *Peranzo v. Coughlin*, 608 F. Supp. 1504 (S.D.N.Y. 1985).

190. National Institute on Drug Abuse, *Developing an Occupational Drug Program* (1978).

191. See 1990 National Football League Substance Abuse Policies, Part II, July 1990.

192. *Jones v. McKenzie*, 1 I.E.R. Cases 1121, 1124 (D.C. Cir. 1987).

193. 3 I.E.R. Cases 509 (D. N.J. 1988).

194. *Id.* at 513.

195. *Local 1277 v. Sunline Transit Agency*, 2 I.E.R. Cases 579 (Central Dist. Cal. 1987); *Jones v. McKenzie*, 1 I.E.R. Cases, 1076 (D.C. 1986).

196. *Id.*

197. Players must appeal within five days in writing to the Commissioner and while the appeal is pending, discipline or other suspension will not take effect. National Football League Policy and Procedure Re: Drug Abuse and Alcohol, July 1991, at 7. But prior to 1980 no appeal at all was written into the policy. When Terry Taylor was suspended, his agent, Jack Mills, was told by the NFL that there was no right to an appeal, though during his TRO hearing, the NFL took the position that he could appeal to Commissioner Rozelle. See Richard Demak & Jerry Kirshenbaum, *The NFL Fails Its Drug Test*, SPORTS ILLUSTRATED, July 10, 1989. In fact, Judge Demick asked "you're telling me that Pete Rozelle has the ultimate and the total authority to

pay following a second positive drug test, even if a hearing has not taken place.

### 3. Federal and State Legislation

Some mention should be made about the possible effect of drug testing laws on the substance abuse policy. Those current and proposed laws might temper the League's unfettered discretion in two ways. First, such laws regulate the manner in which an employer can test. Several states have passed such laws.<sup>198</sup>

Second, complying with these laws might constitute state action. The Supreme Court in *Skinner v. Railway Labor Executive Assoc.*<sup>199</sup> recently applied a constitutional analysis to a private railroad which imposed mandatory suspicionless post-accident testing. The Court determined that because the employer was following federal laws by implementing a drug program, the testing was a state action.<sup>200</sup> Ultimately, the employer in *Skinner* was found to have acted reasonably, but only because urination was done without observation, testing was only employed after major accidents and the employees were in a extremely safety-sensitive occupation.<sup>201</sup>

The Department of Transportation has issued guidelines which regulate testing among interstate motor carriers, railroad and pipeline workers, and the airline industry.<sup>202</sup> Employers are to be tested prior to hire, bi-annually, upon reasonable cause, after accidents, and randomly.<sup>203</sup> The Department of Defense also requires private defense contractors to randomly test employees in safety-sensitive positions.<sup>204</sup> And, the Drug-Free Workplace Act, while it does not mandate drug testing, does require federal contractors to maintain substance-free employment sites.<sup>205</sup> All of these laws are potentially dangerous for employers because they outline basic standards but leave the implementation to the discretion of the individual employer.

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suspend, and that he can lift the suspension for any reason he sees fit?" *Taylor v. National Football League*, Case No. C88-11821, 18 (W.D. Wash. 1988).

198. In regard to states with NFL franchises, see ARIZ. REV. STAT. ANN. § 15-513 (1990); CONN. GEN. STAT. ANN. § 31-51, (1990); FLA. STAT. ANN. § 112.0455 (1990); GA. CODE ANN. §§ 21-2-140, 45-20-90; ILL. ANN. STAT. Ch. 111 2/3, 730-5 (West 1990); KAN. STAT. ANN. § 75-4362 (1989); LA. REV. STAT. ANN. § 44:111-1113; MINN. STAT. ANN. § 181.950 (1990); MO. ANN. STAT. § 707.

199. 489 U.S. 602, (1989).

200. *Id.* at 615. "The fact that the Government has not compelled a search does not, by itself, establish that a search is a private one."). *Id.*

201. *Id.*

202. See e.g. 49 C.F.R. § 391.87 (1989) (interstate driver).

203. *Id.*

204. 48 C.F.R. § 252.223-7500(4)(i) (1988).

205. 41 U.S.C. § 702(a)(1) (1988).

Finally, the Hatch-Boren Bill, which was introduced in Congress in 1989, has proposed mandatory random drug testing for specific industries including professional sports franchises.<sup>206</sup> If the pending bill passes, the NFL could claim the imprimatur of federal approval for such testing. However, it also might be required to justify the reasonableness of its substance abuse policy.

#### V. PLAYER REMEDIES FOR INJURIES CAUSED BY THE POLICY

As discussed above, the NFLPA's renunciation of bargaining status effectively divested players of some theoretical protections afforded by traditional labor law. However, while subject to collective bargaining, the union's remedies were limited to enforcement of the agreement and participation in the bargaining process. Most other conceivable causes of action (including tort claims) were preempted by section 301 of the Labor Management Relations Act<sup>207</sup> which gives federal courts jurisdiction of claims affecting the terms of a labor contract.<sup>208</sup> "Thus, if an employee attempts to escape application of section 301 by alleging only state law violations—when in fact the claims implicate the CBA—the employee will be subject to the artful pleading doctrine . . ."<sup>209</sup> and the case will be removed to federal court.

After assuming jurisdiction, federal courts will generally follow the NLRB's policy of deferring any particular grievance to arbitration.<sup>210</sup> The Supreme Court has explained that if an individual were allowed to sidestep available grievance procedures, arbitration would be hollow and the effect would be to "eviscerate a central tenet of federal labor contract law under section 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance."<sup>211</sup>

Since renunciation, however, players are free, individually or collectively, to challenge the substance abuse policy in the courts irrespective of the collective bargaining agreement. But with regard to this issue (as opposed to an antitrust claim), players are highly unlikely to litigate as part of a class, merely because of the abstract intrusiveness of testing or the per-

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206. See S. 1903; H.R. 3940 (1989).

207. 29 U.S.C. § 185 (1964).

208. See *Strachan v. Union Oil Company*, 1 I.E.R. Cases 1844 (5th Cir. 1985); *Utility Workers Local 246 v. Southern California Edison Company*, 3 I.E.R. Cases 1068 (9th Cir. 1988); Charles J. Morris, *THE DEVELOPING LABOR LAW* 873-913 (BNA 1983).

209. *Laws v. Calmat*, 3 I.E.R. Cases 785, 787 (9th Cir. 1988).

210. See Edwin R. Teple, *The NLRB Policy of Deferral to Arbitration*, 5 *UNIV. OF TOLEDO L. REV.* 563 (1977).

211. *Allis-Chalmers Corporation v. Leuck*, 471 U.S. 202, 220 (1985).

ceived abuse of civil rights. The reality of modern professional football is high average salaries, short playing careers, and agents carefully guiding players—in short, decentralized interests. Thus, only players suspended or banned because of a positive drug test or arguably harassed through repeated spot tests are likely to have an important enough personal interest to litigate. Still, we may well see a number of suits filed in the near future under a wide variety of possible theories. While the strength of the relative theories vary widely, it is certain that any claim challenging the substance abuse policy would bring it again into the national spotlight.

### A. *State Constitutional Claims*

As discussed above, one of the strongest bases for attacking a drug test is on federal constitutional grounds. Though courts have uniformly limited such claims to cases of governmental action, employees have recently begun to assert claims based on privacy rights afforded by state constitutions which contain different language and different legislative histories. California, a traditionally progressive legal state, has broken ground in this area and may influence courts in other jurisdictions.

The California Constitution provides “all people are by nature free and independent and have inalienable rights. Among these are life, liberty and . . . privacy . . . .”<sup>212</sup> In contrast, the United States Constitution does not specifically enumerate the right to privacy. Thus, California has expressly made the right fundamental and on par with other rights such as the possession of property.

With this backdrop, the court in *Taylor v. O’Grady*,<sup>213</sup> considered the efficacy of an employer’s refusal to hire a job applicant who would not submit to drug testing. The court held that urinalysis testing implicates the right to privacy.<sup>214</sup> It also held because the state constitution does not specifically state whether its provisions are limited to state actors, it must also apply to private employers.<sup>215</sup> Ultimately, the court conducted the traditional balancing test and determined because the plaintiff was not a current employee, she had a lesser expectation of privacy. Thus, the court upheld the employer’s testing program.<sup>216</sup>

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212. CAL. CONST. art. I, § 1.

213. 4 I.E.R. Cases 1569, 1574 (7th Cir. 1989).

214. *Id.*

215. *Id.*

216. *Id.*

But in *Luck v. Southern Pacific Trans. Co.*,<sup>217</sup> a California court considered the effect of suspicionless drug testing on a current employee. The plaintiff was a six year employee who the company had no reason to believe was impaired on the job. The court found that on balance the interest of the employee was more compelling and the employer had violated her right to privacy. Accordingly, it upheld a jury award of economic damages.<sup>218</sup>

To date, only one other state has imposed constitutional requirements on private employers.<sup>219</sup> Indeed, some plaintiffs have tried and failed to persuade other courts that such an extension is warranted.<sup>220</sup> Nonetheless, at least for the NFL's four California teams, the *Wilkinson* and *Luck* decisions are highly significant. The affect on other jurisdictions remains to be seen.<sup>221</sup>

### B. Tort Claims

#### 1. Invasion of Privacy

Even if no federal or state constitutional privacy claims are available, players may still proceed with similar common law causes of action. In order to maintain such claims, plaintiffs must show an intentional and unreasonable intrusion. The tort includes the following four categories: an intrusion upon seclusion, publicity given to private life, appropriation of likeness and placing a person in a false light.<sup>222</sup> An aggrieved player would likely proceed under the first category.

Plaintiffs have attempted to argue that off-duty illegal drug use is, by right, a private matter until it can be affirmatively shown that such use interferes with work performance. According to this theory, an employer would violate the right to privacy if he or she attempted to discover any off-duty private facts. But courts have noted the right to be free from intrusions is not absolute.<sup>223</sup> Indeed, the "right does not extend so far as to subvert those rights which spring from social conditions including business

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217. 5 I.E.R. Cases 421 (Cal. App. 1990).

218. *Id.*

219. The Montana Constitution, likewise, provides a right to privacy extending to private employers. See *State v. Helfrich*, 600 P.2d 816 (Mon. 1979).

220. See *Luedtke v. Nabors Alaskan Drilling, Inc.*, 4 I.E.R. Cases 129 (Ala. 1989).

221. Six other states with NFL teams have constitutions which explicitly recognize privacy rights—though more have expressly applied their terms to private employers. See ARIZ. CONST. art. II, § 8; FLA. art. I, § 3; ILL. CONST. art. I, § 6; LA. CONST. art. I, § 5; WASH. CONST. art. I, § 7; MASS. ANN. LAWS ch. 214, § I (1989).

222. RESTATEMENT (SECOND) OF TORTS §§ 652(b), 652(d), 652(c), 652(e), respectively. See also Decker, EMPLOYEE PRIVACY LAW AND PRACTICE (1987).

223. See Henry H. Peritt, WORKPLACE TORTS: RIGHTS AND LIABILITIES, 207-213 (1991).

relations.”<sup>224</sup> Therefore, legitimate business reasons for testing are likely to make the testing or intrusion reasonable.

It is important to note that players may proceed not just against their team or the League but against the testing laboratory. In *Neal v. Corning Glass Works Corp.*,<sup>225</sup> an employee sued an emergency room physician for invasion of privacy when he shared treatment information with the employees regular physician regarding drug use at work. The court refused to dismiss the case on summary judgment grounds, finding a colorable claim existed.<sup>226</sup>

Ultimately, drug testing is likely to be upheld so long as the procedure for testing is not outrageous. In general, employees are afforded less consideration in balancing rights in regard to a tort claim than in regard to a constitutional claim.

## 2. Defamation

A more powerful claim for a pro football player would probably be for defamation. In fact, defamation is the most frequently alleged claim in lawsuits involving drug-testing.<sup>227</sup> In order to establish liability, a plaintiff must show: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting to at least negligence in the part of the publisher; and (d) absence of special harm.<sup>228</sup>

The leading case in the employee drug testing context is *Houston Belt & Terminal Railway Co. v. Wherry*,<sup>229</sup> in which an employer tested a worker who fainted on the job. The employer found traces of what it thought was methadone in the employee's urine, though the employee's personal physician explained the substance was not methadone. The employee was terminated, but not for drug use. When he later sought assistance from the Veteran's Administration, the Department of Labor contacted the employer, who said that the individual had been discharged for misconduct associated with drug use.<sup>230</sup> The court upheld a compensatory award of \$150,000 and \$50,000 in punitive damages.<sup>231</sup>

The element of publication would probably be satisfied in any player claim, given the tendency of the League to articulate its reasons for disci-

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224. *DiTomaso v. Electronic Data Systems*, 3 I.E.R. Cases 1700, 1703 (E.D. Mich. 1988).

225. 5 I.E.R. Cases 1636, 1637 (S.D. Ohio 1989).

226. *Id.* at 1637.

227. See Robert DeCresce & Mark Lifshitz, DRUG TESTING IN THE WORKPLACE 28 (1989).

228. See Perritt, *supra* note 223, at 251-255.

229. 548 S.W.2d 743 (Tex. Civ. App. 1976).

230. *Id.* at 746-748.

231. *Id.* at 753-755.



pline. A Sports Illustrated article also maintains that under Dr. Tenant, the NFL regularly violated even its own standard of confidentiality.<sup>232</sup> Moreover, even if the League did not disclose, it could be subject to the document of compelled self-publication. The doctrine applies when an employer issues a communication to an employee, knowing that the employee will need to publish it in order to get another job.<sup>233</sup> In an example, a player banned from the league might effectively be forced to protect his reputation by announcing to the media that "the League said I flunked a drug test, but I know they are wrong."

Finally, the League might not always be able to use truth as a defense. In the past, perhaps fearing its testing procedures could be impeached, the NFL has backed off discipline after announcing the player had tested positive—essentially destroying for itself an affirmative defense.<sup>234</sup> Given the damage that the disclosure of a false positive test could inflict, the League or any team could face a major liability.

### 3. Intentional/Negligent Infliction of Emotional Distress

In order to prove intentional infliction of emotional distress, a plaintiff must establish that a defendant's conduct was "extreme and outrageous" and damages flowed proximately from such conduct.<sup>235</sup> If a plaintiff cannot establish intent, he may proceed under a negligence theory if the requisite elements of duty, breach, foreseeability and damages can be identified.<sup>236</sup> But courts tend to subject plaintiffs to a rather heavy burden.

In *Blankenship v. South Carolina Electric & Gas Co.*,<sup>237</sup> an employer unilaterally modified its employee handbook to provide for random drug testing. When the employee refused to submit to testing, she was discharged, required to surrender her badge, and was escorted from the workplace. The court dismissed her claim for emotional distress while

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232. See Richard Demak & Jerry Kirschenbaum, *NFL Fails its Drug Test*, SPORTS ILLUSTRATED, July 10, 1989.

233. See *Churchey v. Adolph Coors Company*, 759 P.2d 1336 (Colo. 1988) (defendant liable when he should have foreseen that plaintiff would be under a "strong compulsion" to disclose defamatory statements. But cf. *Quinn v. Limited Express, Inc.*, 715 F. Supp. 127 (W.D. Pa. 1989).

234. The NFL had decided to discipline Chicago Bears defensive end Richard Dent in 1988 when he refused to take a drug test after having tested positive in the past for cocaine use. When the NFL suspended him, he threatened to sue and the league agreed to dismiss the discipline. Jeff Hardie, *Dent Helped Straighten Out Bears*, WASH. TIMES (Dec. 6, 1990).

235. See e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (magazine depicted plaintiff's mother in sexually degrading manner).

236. RESTATEMENT (SECOND) OF TORTS §§ 46, 47.

237. 5 I.E.R. Cases 930 (S.C. 1990).

acknowledging "if she did not want to work under the new drug guidelines, her only recourse was to quit."<sup>238</sup> The court also noted that "most plaintiffs in civil actions think that a defendant's conduct is outrageous, yet few factual situations are outrageous as a matter of law . . . [the] mere discharge from employment is [not] outrageous."<sup>239</sup>

However, when the method of testing itself is more personally offensive in nature, plaintiffs have recovered. In *Kelley v. Schlumberger Technology Corp.*,<sup>240</sup> an employer's drug test revealed that an employee used marijuana. Plaintiff argued negligent infliction of emotional distress based in large part on the fact that the test included "direct observation", causing him disgust at the "idea of someone being paid to look at [his] penis while [he] urinated." The court upheld a jury award of \$125,000 in compensatory damages.<sup>241</sup> Given the NFL's policy of "frontal observation", the League might be similarly vulnerable.

### C. *Wrongful Discharge*

A plaintiff may sue for the wrongfulness of his discharge, rather than any injuries suffered as a result. In this cause of action, an individual also need not show impropriety or outrageousness associated with the procedures of testing. A preliminary, but not inconsiderable, aspect of this claim is proving drug use was not a proper basis for dismissal. In the absence of a collective bargaining agreement or a special statute, courts generally consider workers to be at-will employees who can be terminated without cause.

#### 1. Public Policy

In order to state a public policy claim, a plaintiff must show the existence of a clear public policy (generally evidenced by statute) that would be jeopardized if a defendant were allowed to escape liability for terminating him in the absence of an overriding justification on the part of the employer.<sup>242</sup> Plaintiffs are often unable to articulate a clear public policy and resort to alleging privacy rights loosely and extrapolated from many statutes.<sup>243</sup> In such circumstances, courts will often state that they are "reluc-

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238. *Id.* at 933.

239. *Id.*

240. 3 I.E.R. Cases 696 (1st. Cir. 1988).

241. *Id.* at 697.

242. See RESTATEMENT (SECOND) OF TORTS § 870.

243. See *Greco v. Halliburton Company*, 2 I.E.R. Cases 1281 (D. Wyo. 1987); *Hershberger v. Jersey Shore Steel Company*, 5 I.E.R. Cases 710 (Pa. Super. 1990).

tant to find that efforts to assure a drug-free workplace contravene the public policy of the state . . .”<sup>244</sup>

An employee is on much stronger footing when his state has a private drug testing law which is violated by the employer and which is used as the basis for the termination. In *Henessey v. Coastal Eagle Point Oil Co.*,<sup>245</sup> although a New Jersey law required that all drug testing be done on a reasonable suspicion basis, plaintiff was terminated for refusing to take a random test. The court found the discharge improper based on the public policy pronounced, especially since the employer could articulate no reasonable basis for its actions.<sup>246</sup> If the league institutes random testing, players in states with drug testing laws may be able to use the decision as precedent.

## 2. Breach of Contract

All players are bound by a standard contract.<sup>247</sup> That contract does not include any mention of drug testing or discipline, except to state that individual clubs may impose appropriate discipline.<sup>248</sup> The substance abuse policy, however, might be considered an employee handbook, since it articulates separate work rules. Courts in most states have recognized that, under appropriate circumstances, an employee handbook can act as a contract, abrogating the general at-will nature of employment.<sup>249</sup>

*Johnson v. Carpenter Technology*,<sup>250</sup> is illustrative. In *Johnson*, an employee was terminated after he refused to submit to a drug and alcohol urinalysis screening. The employee claimed he was orally promised that he would have permanent employment. He also alleged that because the employer unilaterally changed the employee handbook to include drug testing, he only needed to follow the old handbook—which did not provide for drug testing. The court noted that since the employee was not subject to a collective bargaining agreement, his continued employment amounted to an acquiescence to the terms of the new contract.<sup>251</sup> Therefore, at best, a player would be relegated to arguing that the NFL was not following its

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244. See *Monroe v. Consolidated Freightway*, 3 I.E.R. Cases, 1185, 1187 (E.D. Mo. 1988).

245. 1989 N.J. Super. LEXIS 474.

246. *Id.*

247. See National Football League Standard Player Contract.

248. *Id.* at 3.

249. See e.g., *Ferraro v. Koelsch*, 124 Wis. 2d 154, 368 N.W.2d 666 (1985); *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 590, 292 N.W.2d 880 (1980); *Duldulao v. St. Mary of Nazareth Hosp.*, 15 Ill. 2d 482, 505 N.E.2d 314 (1987); *Cleary v. American Airlines*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

250. 5 I.E.R. Cases 964, 967 (D.C. Conn. 1989).

251. *Id.*

current policy. The contract argument would probably have no effect on a challenge to a new procedure, such as random testing, so long as notice was given in an updated policy.

#### D. Discrimination

Finally, a player might challenge the administration or discipline of the substance abuse policy based on a discrimination theory. Nearly every state in the country has a fair employment law which prohibits employment decisions whose purpose (disparate treatment) or effect (disparate impact) is to treat differently employees who are part of a protected class.<sup>252</sup> Moreover, various federal laws provide similar protections. In general, an employee's statutory remedies are limited to backpay. While such a claim would probably fail, it might inflict a great deal of damage on the league from a public relations standpoint.

##### 1. Based on Status as Addict

Many states treat drug and alcohol addiction as a handicap which an employer must reasonably accommodate if an employee is qualified to do a job.<sup>253</sup> Of course, inability to do a job because of the particular addiction is good cause for discharge.<sup>254</sup> The Rehabilitation Act of 1973 provides similar federal protection, but it only applies to federal contractors.<sup>255</sup>

A statute of particular interest in this area is the Americans with Disabilities Act ("ADA") which will apply to many employers, including professional sports franchises, by July 26, 1992.<sup>256</sup> The ADA protects from discrimination "qualified individuals with a disability."<sup>257</sup> Individuals are considered disabled if: (a) they have a physical or mental impairment that substantially limits one or more of their major life activities; (b) they have a record of such impairment and; (c) they are regarded as having such an impairment.<sup>258</sup> However, current illegal users of drugs are not protected

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252. See, e.g., WIS. STAT. §§ 111.31-111.395.

253. See, e.g., WIS. STAT. § 111.34; Jane M. Nold, Note, *Hidden Handicaps: Protection of Alcoholics, Drug Addicts, and the Mentally Ill Against Employment Discrimination Under the Rehabilitation Act of 1973 and the Wisconsin Fair Employment Act*, 1983 WIS. L. REV. 725. It is beyond the scope of this article to exhaustively discuss the doctrine of reasonable accommodation.

254. *Squires v. Labor & Industry Review Commission*, 97 Wis. 2d 648, 294 N.W.2d 48 (Ct. App. 1980).

255. 29 U.S.C. § 701-796 (1982).

256. Pub. L. No. 101-336. By that date, all employers with more than 15 individuals will be subject to its terms.

257. *Id.* at § 102(a).

258. *Id.* at § 3.

under the ADA.<sup>259</sup> The ADA neither authorizes nor prohibits drug testing, though it requires proper procedural protections.<sup>260</sup>

Thus, a player might argue that it is discriminatory to test without suspicion of current use (i.e. pre-season). Moreover, a player who has tested positive in the past may not be currently using, but is still subject to reasonable cause testing which is essentially done at random. While one might argue this is discrimination based on past use, the ADA does not prohibit employers from testing to ensure rehabilitation. In addition, the legislative history of the ADA indicates Congress specifically approved of the NFL substance abuse policy stating,

The committee believes that the leagues' policies are in compliance with the requirements of this act. The National Football League permits its players who test positive on drug tests to enter a treatment program and not be disciplined on the first occasion. Players who test positive on a second occasion are permitted to receive treatment but are suspended for a 30-day period or until deemed fit to return. After a third positive drug test a player is banned from play and is ineligible for reinstatement for at least one year. This policy is consistent with the act.<sup>261</sup>

In general, discrimination is not found where an offending employee is offered rehabilitation following the first offense.<sup>262</sup> Still, a suspended or banned player might attempt to argue he was not afforded a "reasonable opportunity" for rehabilitation, pointing perhaps to statements from Dr. Tenant dismissing the viability of the rehabilitation process. Thus, if the NFL truly wishes to insulate itself from liability for discrimination, it will put greater emphasis on rehabilitation rather than punishment.

## 2. Based on Race

Enough circumstantial evidence may also exist for a minority player to posit a charge of race discrimination in regard to the administration of the policy. As discussed above, the *Baskin Report* revealed alleged evidence of coverups of positive drug tests from white quarterbacks. If true, this would be evidence of disparate treatment, prohibited by Title VII of the Civil Rights Act of 1964.<sup>263</sup> In any event, it is unlikely the NFL would like to

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259. *Id.* at § 104(a).

260. *Id.* at § 104(d). In fact, according to the ADA drug testing is not considered to be a medical examination.

261. Public L. No. 101-335, 1990 U.S. Code Cong. & Admin. News (101 Stat.) 363.

262. Indeed, some states such as Minnesota actually require an opportunity for rehabilitation before an employee may be terminated. MINN. STAT. § 181.952.

263. 42 U.S.C. § 2000(e) (1982).

open up all of its documentation on the program in the course of litigation discovery. While no claim has yet been filed on this basis, the mere threat could cause the League to settle with (and perhaps reinstate) a banned player.

Even if direct discrimination could not be proven, as a last resort a player could make out a prima facie disparate impact claim under Title VII. In *New York City Transit Authority v. Beazer*,<sup>264</sup> a plaintiff challenged an employer policy that tested for methadone use on the basis that 62 to 65% of the methadone users in New York were black or Hispanic. The United States Supreme Court, however, found no discrimination because the rule was job related and not motivated by race.<sup>265</sup> A player bringing such a claim would have to show that blacks (or black athletes in particular) are more prone to drug use—a very difficult standard.

Any of the above-described causes of action are theoretically viable. However, what might dissuade a player from bringing such a claim is the fact he would almost certainly make himself a symbol of substance abuse—not an enviable place in the history of the game.

## VI. CONCLUSION

The development of the NFL's drug policy has been slow and unsteady, marked not by cooperation but by conflict. Although everyone seems to agree some type of drug testing program should be implemented, the distrustful relationship between the NFLPA and the NFL has made the implementation of an effective substance abuse policy in the NFL virtually impossible. Since the NFLPA renounced its bargaining status, the NFL probably has the ability to force random testing upon its players, thereby further chilling the relationship between management and employees. However, such a move might expose the NFL to a plethora of individual lawsuits regarding privacy rights, employment rights, and the accuracy of the NFL's drug testing program. Given the scandal that surrounded the Dr. Tenant regime, the NFL substance abuse policy needs no more negative attention. Moreover, the NFL is already waging war against its players in several pending antitrust lawsuits; just as Commissioners Rozelle and Tagliabue have been concerned about the impact substance abuse has on the "integrity of the game", so too must the NFL be concerned with the negative impact further adverse legal decisions might have on the League.

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264. 440 U.S. 568, (1979).

265. *Id.* See also *Drayton v. City of St. Petersburg*, 477 F. Supp. 846 (M.D. Fla. 1979).

Players have become more aggressive in defending their rights. No longer do players consider it a privilege merely to play in the National Football League. Today's star players become multi-million dollar businesses through increasing salaries, endorsements and investments. They cannot afford to allow the NFL to have sole discretion in an area that could conceivably destroy their livelihoods.

At the same time, the possibility does exist for a mutually acceptable resolution of this issue. Commissioner Tagliabue has suggested in this regard "[T]here's probably a lot we can do, if we had a union which was willing to sit down and negotiate at the collective bargaining table . . . we could work out a system that was satisfactory on many of these scores."<sup>266</sup> It is clear is that the cooperative approach has enabled the NBA to adopt the strongest drug policy in professional sports, and to achieve success that was not envisioned just ten years ago. Whether the NFL can achieve similar success remains to be seen.

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266. Ken Denlinger, *Tagliabue Is Quick to Tackle Some Tough Questions*, THE WASH. POST, Jan. 28, 1990, at 28.