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Susan K. Menge

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## ARTICLES

# SHOULD PLAYERS HAVE TO PASS TO PLAY?: A LEGAL ANALYSIS OF IMPLEMENTING GENETIC TESTING IN THE NATIONAL BASKETBALL ASSOCIATION

SUSAN K. MENGE\*

### I. INTRODUCTION

Imagine waking up in a hospital and the doctors tell you that your heart had stopped. The last thing you can remember was walking down the street outside your house. The doctors tell you that they are not sure what happened exactly, but in order to determine the cause of your episode, they want to test your Deoxyribonucleic Acid (DNA). You might have some concerns about undergoing a genetic test. With the extensive growth in medical technology, genetic testing is not as obscure as it once was. In fact, it is becoming quite prevalent. However, significant concerns still arise regarding employers having the option of requiring genetic testing of their employees, especially when the employees do not undergo this testing willingly. This Comment will address some of these concerns in the context where genetic testing may very well become an everyday request by employers—professional sports.

Athletes' health is paramount to providing the services expected of professional athletes, and as such, professional sports teams often require certain tests to assure that the players will be able to provide quality services. Genetic testing may become one such requirement as genetic conditions could affect an athlete's performance just as much as a virus or a bad knee.

This Comment will address the circumstances under which the National Basketball Association (NBA) could force an unwilling player to undergo genetic testing to determine the player's genetic predispositions. Section II will provide a hypothetical to demonstrate circumstances that would give rise to a team's request for genetic testing. This hypothetical will be applied

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\* Susan K. Menge is an associate attorney with Cook & Franke, S.C. in Milwaukee, Wisconsin, practicing in the firm's litigation section.

throughout this comment to further illustrate the principles of each section. Section III will explain the process and the information that could be gleaned from genetic testing, as well as one of the diseases, hypertrophic cardiomyopathy (HCM), that would be a potential condition tested for by the NBA. Section IV will compare a genetic testing process to similar drug testing processes while also illuminating some of the liability issues that could arise for teams as a result of an undetected heart condition. Section V will address the Health Information Privacy and Accountability Act and the concerns related to disclosure of medical information. Section VI will explain the unique issues that arise because of the NBA's collective bargaining relationship with its players' union and the potential challenges to genetic testing that could result from this relationship. Section VII will discuss the Americans with Disabilities Act, describing the likelihood that NBA players potentially excluded from play based on genetic testing results would not fall under the protections of the Act. Section VIII will describe the arguments made for and against genetic testing, specifically in the context of professional sports. Finally, Section IX will provide a suggested policy for genetic testing in the NBA, including safeguards and appropriate confidentiality requirements to provide the most protection to players while also protecting the interests of the NBA teams.

## II. HOW THE PROBLEM MIGHT ARISE<sup>1</sup>

As genetic testing is not a current requirement for participating in the NBA, this Comment will focus on a hypothetical set of facts to address the questions and concerns that would arise if such a testing policy was implemented.

Marlon Johnson was a standout in college basketball, entering the NBA at nineteen. He did not start his rookie season for the Milwaukee Bucks, but he continued to improve and earned a starting position his second season. After

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1. This hypothetical is primarily taken from the facts of the Eddy Curry/Chicago Bulls conflict in the fall of 2005. Some of the facts have been changed as the Curry/Bulls situation never escalated into a forced genetic testing situation and it did not directly involve the other NBA teams or the National Basketball Players Association (NBPA). However, a number of the facts have been taken from the following sources: Lacy J. Banks, *Curry's Agent Looks to New York; Deal Offered By Knicks Would Give Bulls Center New Team, No DNA Test*, CHI. SUN-TIMES, Oct. 1, 2005; Mark Bechtel & Stephen Cannella, *Tell-Tale Heart; Is Eddy Curry At Risk for Cardiac Disease? After He Refuses a DNA Test, the Bulls Trade Him*, SPORTS ILLUSTRATED, Oct. 10, 2005, at 21; Michael McCann & Greg Skidmore, *Brave New World? Eddy Curry and Chicago Bulls in Dispute over DNA Test*, SPORTS LAW BLOG, Sept. 26, 2005, <http://sports-law.blogspot.com/2005/09/brave-new-world-eddy-curry-and-chicago.html>; Neil Osterweil, *Full Court Press On Hoop Star Curry To Get DNA Testing*, MEDPAGE TODAY, Sept. 29, 2005, <http://www.medpagetoday.com/Cardiology/Arrhythmias/tb/1843>.

playing for the Bucks for three years, Johnson signed a contract extension to continue with the team for the next five seasons. Early in the 2004–2005 season, Johnson suffered an episode in which he experienced shortness of breath. He took himself out of the game temporarily but returned at the end of the game to lay in the game-winning shot. However, after the incident, Johnson saw a cardiologist to investigate the potential cause of his shortness of breath. The doctor told Johnson that he appeared to have thickening in the walls of his heart but that it did not look too serious and Johnson could continue to play but should return for more tests after the season concluded.

Johnson continued to play through the 2004–2005 season with two more episodes of shortness of breath and one episode including chest pains. After the season ended he saw a group of nationally renowned cardiologists. Two of the doctors told him that he had “athlete’s heart,” which was not serious and that he should just stop activity whenever he experienced symptoms. The other two doctors told him that given his family history, he might have HCM, a genetic heart condition that could result in death. Johnson reported the results of his consultations to his team.

The Bucks asked Johnson to take a DNA test to determine whether he did in fact have the disease, but he refused. The team physician told management that he thought Johnson suffered from a mild form of athlete’s heart and would be fine to play, but management insisted on the DNA test. As a result of the conflict, Johnson asked to be traded. The team denied his request and decided to maintain his contract but told Johnson he would not play. Based on the publicity of this conflict, the NBA implemented a genetic testing policy that required any player to submit to a genetic test at the request of the team physician. The National Basketball Players Association (NBPA), the union representing NBA players, has not commented on the policy.

There are a number of legal ramifications as a result of this type of policy and a number of challenges that could be raised. This comment will address the issues raised by the implementation of a genetic testing policy in the NBA as a precondition for membership on an NBA team.

### III. WHAT IS THE PROCESS AT ISSUE?

In order to properly understand the implications of a genetic testing program, it is necessary to understand what genetic testing involves. This Comment will focus only on testing for HCM because it is a disease that could prove especially fatal to athletes.<sup>2</sup> Many genetic disorders begin affecting the

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2. Cardiomyopathy Ass'n, *Which Cardiomyopathy?*, [http://www.cardiomyopathy.org/html/which\\_card\\_hcm.htm](http://www.cardiomyopathy.org/html/which_card_hcm.htm) (last visited Feb. 12, 2007).

carrier only later in life, but HCM is a disease that could affect an individual early in his or her life.<sup>3</sup> Therefore, testing a professional athlete in his early twenties for HCM could still be helpful in preventing injury, while testing the same athlete for a cancer gene that would not affect him until his late fifties could be unreasonable. The processes used by doctors to test for HCM and similar diseases are discussed below, followed by an explanation of HCM, its symptoms, and its potential effects on an individual.

#### A. *What is Genetic Testing?*

Genetic testing is available to identify a number of different ailments or predispositions. Medical professionals may suggest genetic testing if an individual has a family history of a certain genetic ailment, if an individual has demonstrated symptoms of a genetic disorder, or if an individual wishes to identify whether he or she carries a gene in order to prevent passing it on to his or her children.<sup>4</sup> Laboratories provide a number of methods for testing to an individual seeking to identify a potential genetic condition. Generally, laboratories take a sample of a subject's DNA by swabbing the inside of the individual's mouth.<sup>5</sup> Then, the DNA is used to examine each chromosome to determine whether that individual carries the gene for a particular disease.<sup>6</sup> However, being a carrier is not determinative, as an individual who carries a gene may have a predisposition for a disease, but never actually develop it.<sup>7</sup>

#### B. *What is Hypertrophic Cardiomyopathy?*

One genetic disorder that can be tested for using DNA sampling is HCM.<sup>8</sup> HCM is a disease that results from the thickening of the walls of the heart for an unknown reason.<sup>9</sup> As a result of its thickened walls, the heart cannot process as much blood and the blood pressure required to push blood out of the heart is increased, thereby causing more strain on the heart.<sup>10</sup> Because of the severe strain on the heart caused by physical exertion, professional athletes

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3. *Id.*

4. DANIEL J. SOLOVE & MARC ROTENBERG, INFORMATION PRIVACY LAW 263 (2003).

5. Test Country, *Legal Siblingship DNA Testing Kit*, <http://www.testcountry.com/shop.asp?action=12&product=1226> (last visited Feb. 12, 2007).

6. *Id.*

7. ANGUS CLARKE, GENETIC COUNSELING: PRACTICE AND PRINCIPLES 74 (1995).

8. Harvard Med. Sch., *Hypertrophic Cardiomyopathy Genetic Test*, <http://www.hpcgg.org/LMM/comment/HCM%20Info%20Sheet.jsp?name=LMM&subname=geneticests>.

9. *Cardiomyopathy Ass'n*, *supra* note 2.

10. *Id.*

who have HCM may be particularly at risk for injury or death.<sup>11</sup>

#### IV. COMPARING GENETIC TESTING PROGRAMS TO OTHER PROGRAMS

While genetic testing has never been implemented in professional sports, there are some cases that address comparable testing policies and the subsequent challenges made to such policies. The following cases involving mandatory drug testing of employees are helpful in assessing the reasonableness of implementing a genetic testing policy in the NBA. Additionally, the cases addressing teams' potential liability for heart condition-related injury or death are instructive in evaluating the value a testing policy has to NBA teams and team physicians.

##### A. *A Comparison to Legal Analysis of Employer-Imposed Drug Testing Programs*

Professional sports leagues are private entities.<sup>12</sup> As such, they are not subject to the same types of constitutional claims as public entities, such as governmental employers.<sup>13</sup> While the cases discussed below do not mirror the circumstances of genetic testing in professional sports exactly, they are meant to illustrate the concerns raised by testing policies and some of the appropriate safeguards that can be implemented to address these concerns.

A seminal decision in the area of drug testing policy is *National Treasury Employees Union v. Von Raab*.<sup>14</sup> In this case, immigration officials were required to undergo drug testing.<sup>15</sup> The testing was done randomly and employees who failed the tests were terminated, but were not reported to law enforcement.<sup>16</sup> The U.S. Supreme Court determined that this testing procedure was reasonable because many of the officials were constantly in contact with drug traffickers and could be bribed in breach of national security

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11. N. Suburban Cardiology Group Ltd., Facts About Heart Disease: Cardiomyopathy, <http://www.nscardiology.com/factscardiomyopathy.htm> (last visited Feb. 12, 2007).

12. See generally MATTHEW J. MITTEN ET AL., SPORTS LAW AND REGULATION: CASES, MATERIALS AND PROBLEMS 398–405 (2005).

13. *Id.* A great deal of case law related to athlete drug testing occurred in the context of high school sports. See *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995). While these cases were important to the development of public entity drug testing policies, they are not directly related to drug testing in professional sports because the cases focused mainly on the Fourth Amendment of the U.S. Constitution, which cannot be invoked against a private entity such as a professional sports league.

14. 489 U.S. 656 (1989).

15. *Id.* at 660.

16. *Id.* at 663.

or pose a safety threat to themselves and their fellow officers as they needed to be in full control and alert at all times.<sup>17</sup> However, the Court determined that individuals who were not directly in contact with immigrants, but were working with confidential information, were not subject to the same concerns and a special need had to be shown for them to be subjected to such testing without suspicion.<sup>18</sup> As this case explains, not all drug testing policies are effective in the absence of cause or suspicion. However, certain circumstances involving health and safety can diminish the need to show cause as long as sufficient confidentiality guidelines are followed.

In another situation with an opposite result, the U.S. Supreme Court struck down a Georgia law requiring all candidates for public office to submit to mandatory drug testing.<sup>19</sup> The state expressed a need for the suspicionless testing because politicians need a clear head, free from illegal substances, in order to provide the best possible representation to their constituents.<sup>20</sup> However, the Court expressed an unwillingness to enforce this particular testing program as it was ill-suited to detecting drugs because the candidates could pick their own testing time within a thirty-day period, which guaranteed a clean record only in that particular period.<sup>21</sup> Also, the Court stated that public officials have a lot of exposure so if their abilities were diminished, there would be many instances for the public to detect that disability and remove the individual from office.<sup>22</sup> Therefore, the intrusion upon the privacy of the candidates was unreasonable.<sup>23</sup>

While the cases above indicate that courts will not generally allow unnecessary invasions into individuals' lives, it is important to note that these cases discuss drug testing policies of governmental employers. State actors are held to a different standard than private actors like the NBA. The more germane area of law in scrutinizing the NBA's drug testing policy is labor law.

### *B. Drug Testing in Professional Sports*

The NBA and the NBPA negotiate a collective bargaining agreement (CBA) that outlines the terms and conditions of employment for NBA players.<sup>24</sup> The CBA is binding on all players and includes a Uniform Player

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17. *Id.* at 669–72.

18. *Id.* at 677–78.

19. *Chandler v. Miller*, 520 U.S. 305, 309 (1997).

20. *Id.* at 311.

21. *Id.* at 319–20.

22. *Id.* at 321–22.

23. *Id.* at 323.

24. NAT'L BASKETBALL ASS'N, NBA COLLECTIVE BARGAINING AGREEMENT (2005).

Contract, which outlines the conditions of employment that each player is subject to by agreeing to play for an NBA team.<sup>25</sup> The NBA and the union can agree to any terms they choose, but once those terms are agreed upon, they become binding on all players and the players cannot negotiate on those issues independently.<sup>26</sup>

The NBA currently has a drug testing policy included in its most recent CBA. The policy mandates that a player be subject to up to four random tests per year.<sup>27</sup> The policy differentiates between marijuana use and other performance enhancing or "hard drugs."<sup>28</sup> There are a variety of repercussions for a finding of drug use, and the player can appeal any positive test results.<sup>29</sup> The NBA has not had a problem with performance-enhancing drugs, but the clause serves more as a safeguard. Because the drug testing policy was agreed to in the CBA, it is unlikely that any party would successfully challenge the policy. Further, drug testing is not as controversial a policy as genetic testing might be, especially to individuals who are insured by their teams for astronomical amounts of money. Genetic testing has the potential to provide more extremely personal information that could be considered irrelevant to a player's ability to perform. As a result, a genetic testing policy may be more hotly contested by the NBPA than the drug testing policy.<sup>30</sup>

### C. *How Do Drug Testing Policies Apply to a Genetic Testing Policy?*

Drug testing policies detect the use of illegal substances. As a result, there is a common need for employers to continually assure that their employees are not engaging in illegal, mind-altering activities. This same

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25. *Id.* art. II (2005).

26. *See generally id.*

27. *Id.* art. XXXIII, § 6(a). The NBA's drug policy was altered slightly during the winter of 2005 when the league determined that players would no longer be required to provide samples during games if they failed to take the test prior to tip-off. This change was the result of Seattle's Reggie Evans having to miss a portion of a game when he attempted to take a drug test during half-time of a game. Percy Allen, *One Testy Situation: NBA Rule is Altered; Policy Bans In-Game Sampling for Drugs - Sonics' Evans Missed Part of Tuesday's Contest at KeyArena*, SEATTLE TIMES, Dec. 8, 2005, at D1.

28. NAT'L BASKETBALL ASS'N, *supra* note 24, art. XXXIII, § 4(g).

29. *Id.* § 4.

30. Some players think implementing a heart testing policy would be beneficial to the NBA, but the commissioner's office has not taken a strong stance on the issue. Ian Thomsen, *Change of Heart: Pro Leagues Should Make a Common Cardiac Test Mandatory*, SPORTS ILLUSTRATED, Oct. 31, 2005, at 26. The same disagreement may occur if a genetic testing policy was suggested as the NBPA took a stance against Eddy Curry having to be tested while the commissioner's office again did not take a strong stance. Bob Cohn, *Uncertainty Prevails on Sports DNA Tests; NBA Player Refused Team Request*, WASH. TIMES, Oct. 11, 2005, at A1.



need is not present in the case of genetic testing. As a result, management may need a more pertinent argument for implementing a genetic testing policy. Marlon Johnson's genetic disorder, if he does in fact have one, may not affect his performance at all. He may very well suffer only from athletes' heart. However, the NBA's need to protect the health and safety of its players is an obvious argument in favor of requiring genetic testing.

In a Fourth Amendment analysis, the rights of the individual are balanced against the rights of the entity imposing the testing policy to determine whether the imposition is reasonable under the circumstances.<sup>31</sup> While this analysis will not be applied to a private actor,<sup>32</sup> such as the NBA, similar safeguards may still be appropriate to protect the integrity and autonomy of the players and may prove beneficial in negotiating such a policy with the union. However, because the NBA is a private entity, it could potentially impose more stringent requirements against its players unilaterally without facing constitutional challenges. Additionally, depending on the position taken by the NBPA, more stringent requirements could be included as part of the CBA.

*D. A Comparison to High School Heart Condition Cases—A Team's Potential Liability*

Fatalities caused by heart problems during athletic events unfortunately occur not only in professional sports, but also in amateur sports. As a result, there have been lawsuits brought based on a theory of negligence against those involved in administering or coaching the athletic event. Because similar lawsuits could be brought against team management or team physicians,<sup>33</sup> this aspect of analysis, while not directly on point, is also appropriate to investigate.

In the case of *Tijerina v. Board of Education*,<sup>34</sup> the plaintiff sued a school

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31. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989).

32. *Id.* at 614.

33. There are a number of articles that address the standard of care for team physicians in professional sports. While it is unclear at this time whether such an action would be successful, it is a reality and therefore, should be discussed. For further discussion of the standard of care and liability of team physicians, see Justin P. Caldarone, *Professional Team Doctors: Money, Prestige and Ethical Dilemmas*, 9 SPORTS LAW J. 131 (2002); Matthew J. Mitten, *Emerging Legal Issues in Sports Medicine: A Synthesis, Summary, and Analysis*, 76 ST. JOHN'S L. REV. 5 (2002); Nick DiCello, Note, *No Pain, No Gain, No Compensation: Exploiting Professional Athletes Through Substandard Medical Care Administered by Team Physicians*, 49 CLEV. ST. L. REV. 507 (2001); Twila Keim, Comment, *Physicians for Professionals Sports Teams: Health Care Under the Pressure of Economic and Commercial Interests*, 9 SETON HALL J. SPORTS L. 196 (1999).

34. No. S-98-010, 1998 Ohio App. LEXIS 4569, at \*1 (Ohio Ct. App. Sept. 30, 1998).

district after her son died during gym class. Joey Rocha suffered from HCM and was informally excused from gym classes; however, one day during gym, Joey asked if he could walk while the other students ran.<sup>35</sup> His teacher allowed it, and shortly after class, Joey collapsed and eventually died.<sup>36</sup> The complaint alleged that the school and the gym teacher were negligent in “forcing” Joey to participate in athletic activities while knowing that he suffered from HCM.<sup>37</sup> However, the court determined that it was not reasonably foreseeable to anyone that an activity as simple as walking, which Joey undertook constantly, would lead to his death.<sup>38</sup> Therefore, the complaint was dismissed at the summary judgment stage.<sup>39</sup> As this case demonstrates, even when individuals suffering from HCM undertake the simplest of activities, their lives are still in danger. While the school and teacher were not liable under this set of facts, a different result may occur for a team physician who is more intimately aware of an athlete’s physical history and the potential effects of the stressful activities of professional sports.

A similar case involved a lawsuit by an athlete’s mother against her son’s physician when her son died after playing basketball.<sup>40</sup> Asawa Izidor was suffering from shortness of breath and chest pains and went to a doctor to determine the cause of his symptoms.<sup>41</sup> His doctor alleged that he informed Izidor that he had HCM and that continual athletic activities, such as basketball, could result in sudden death.<sup>42</sup> However, less than a month after receiving his diagnosis, Izidor participated in a basketball game with friends and was found dead the next morning.<sup>43</sup> The court explained that while the doctor had signed an authorization form for Izidor prior to determining that he had HCM, it was not the doctor’s responsibility to revoke the form after Izidor was diagnosed with the disease.<sup>44</sup> Further, the court determined that it was not necessary for the doctor to disclose Izidor’s HCM to his mother because he was over eighteen and emancipated, and as a result, his medical information was private and could not be disclosed.<sup>45</sup> Finally, while the court indicated

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35. *Id.* at \*3.

36. *Id.* at \*3–4.

37. *Id.* at \*4.

38. *Id.* at \*18.

39. *Id.* at \*20.

40. *Izidor v. Knight*, No. 49034-6-I, 2003 Wash. App. LEXIS 1548, at \*1 (Wash. Ct. App. July 21, 2003).

41. *Id.* at \*2.

42. *Id.* at \*4.

43. *Id.* at \*4–5.

44. *Id.* at \*15–16.

45. *Id.* at \*17.

that the doctor should have been more aggressive in protecting Izidor's health after determining that he had HCM, the testimony presented "fell far short of establishing by a preponderance of the evidence that had [the proper advice] been given to . . . Asawa [Izidor], he would not have died when and how he did."<sup>46</sup> As this case demonstrates, doctors may not be directly responsible for the actions of their patients; however, the line dividing negligence and reasonableness is very thin.

The potential for lawsuits that could result from team physicians or management acting without due care in determining whether their players suffer from medical conditions, sufficiently monitoring players' activities, or both, is significant. NBA players have only a limited number of years to play, and if they are not allowed to play based on hypothetical information only, they might forego huge salaries. But if a player is allowed to play when he has a heart condition or other undetected disease, and the player dies, the estate of the player may seek recovery from the physician, the team that allowed him to play and did not require testing to determine whether the player was capable of high-intensity athletic exertion, or both.<sup>47</sup> As a result, a genetic testing policy that could detect fatal genetic conditions might be appropriate and might prevent liability by the NBA if a player with a disease such as Johnson's suffers from its effects during an NBA game or practice.

## V. HEALTH INFORMATION PORTABILITY AND ACCOUNTABILITY ACT ISSUES

While medical testing and the subsequent results often raise questions related to medical information privacy, it appears that professional athletes have agreed to be subject to a different standard of privacy. The Health Information Portability and Accountability Act of 1996 (HIPAA)<sup>48</sup> requires extreme confidentiality of most medical information. Unlike the constitutional privacy issues discussed above, HIPAA applies to both public and private entities.<sup>49</sup> Generally, medical providers cannot disclose medical information

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46. *Id.* at \*19-20.

47. An example of an individual's estate suing his former team is the case of Korey Stringer's wife, Kelci, suing the Minnesota Vikings and the Vikings's athletic trainers after her husband died of heat stroke during summer practices with the Vikings in 2004. *Stringer v. Minn. Vikings Football Club, L.L.C.*, 705 N.W.2d 746 (Minn. 2005). While Mrs. Stringer's case was eventually dismissed against the trainers, it still demonstrates the potential for liability that individual teams and physicians have. Additionally, Stringer's condition was not genetically detectable like HCM and would not have been detected by genetic testing. Therefore, the trainers were likely less at fault in a situation like Stringer's as they could not really determine that he was afflicted until much later on when his symptoms were already present and severe. *See generally id.*

48. Health Insurance Portability & Accountability Act, 42 U.S.C. §§ 201-37 (2005).

49. 45 C.F.R. 160.103 (2005).

to anyone without the express consent of the individual receiving treatment.<sup>50</sup> Additionally, if an individual does agree to disclose medical information, he or she does so on a record-by-record basis.<sup>51</sup>

While this may appear to pose a problem for the NBA in requesting genetic information of its players without their consent, the NBA's CBA appears to contractually require all NBA players to waive their HIPAA rights, at least with regard to their team's management.<sup>52</sup> The CBA allows teams to obtain any information regarding a player's medical history or current health that it desires.<sup>53</sup> The team physician is allowed to "disclose all relevant medical information concerning a player to (i) the General Manager, coaches, and trainers of the Team . . . (ii) any entity from which any such Team seeks to procure, or has procured, an insurance policy covering such player's life or any disability, injury or illness."<sup>54</sup> Not only are teams allowed to disclose such information within the confines of the team, they are also allowed to make such information public "provided that such information relates solely to the reasons why any such player has not been or is not rendering services as a player."<sup>55</sup> Essentially, this allows a team to disclose any medical reason why a player is not playing in a particular game or information related to the termination of a player for medical purposes.

## VI. COLLECTIVE BARGAINING AGREEMENT ISSUES

The NBA is an industry characterized by collective bargaining. Therefore, a number of the policies applied to NBA players are the result of the CBA and are unchallengeable. The following section explains the role of the collective bargaining relationship in implementing a genetic testing policy in the NBA and the labor issues that might arise as a result of the policy.

### A. *The Potential Issues Involved in Unilateral Implementation*

A genetic testing policy would likely be considered a mandatory subject of collective bargaining for purposes of negotiations between the NBA and the NBPA. The National Labor Relations Act (NLRA) requires that employers and unions bargain in good faith over any term that addresses a mandatory

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50. SOLOVE & ROTENBERG, *supra* note 4, at 213.

51. *Id.* at 212-15.

52. NAT'L BASKETBALL ASS'N, *supra* note 24, art. XXII, § 3(a)-(c) (2005).

53. *Id.*

54. *Id.*

55. *Id.* § 3(d).

subject of collective bargaining.<sup>56</sup> Mandatory subjects of collective bargaining are defined as anything related to wages, hours and working conditions.<sup>57</sup> The National Labor Relations Board has declared that drug testing policies are mandatory subjects of collective bargaining.<sup>58</sup> It is likely that a genetic testing policy would also be considered a mandatory subject of collective bargaining. However, if the testing policy was considered a permissive subject of bargaining, management could implement the policy unilaterally without violating the NLRA.<sup>59</sup>

Unilateral implementation occurs if the NBA imposes a rule that was not agreed upon in collective bargaining. The NBA could attempt to impose a new restriction if it developed a new policy before the CBA expired, or if it wished to impose a restriction that was not discussed or not decided on during collective bargaining negotiations. However, if the NBA unilaterally implemented a genetic testing policy into the current CBA, it may result in an unfair labor practice claim by the NBPA as unilaterally implementing a term related to a mandatory subject of collective bargaining is a violation of the NLRA.<sup>60</sup> As a result, the union could compel the NBA to bargain to impasse on the issue.<sup>61</sup> However, once impasse occurred, the NBA would be able to unilaterally implement a testing policy without committing an unfair labor practice.<sup>62</sup> Further, if the parties agreed on the terms of a genetic testing policy and included it in the CBA, it would be immune from attack by the individual players.<sup>63</sup> Finally, as discussed above, the players would not be able to bring constitutional claims against the NBA because it is a private entity.<sup>64</sup> Therefore, it would be most beneficial for the NBA and the NBPA to agree on a genetic testing policy jointly in order to satisfy both parties.

However, unilateral implementation may still be appropriate. According to the hypothetical, the NBPA has not commented on the policy. If it does not

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56. National Labor Relations Act, 29 U.S.C. § 158(d) (2005).

57. *Id.*

58. Johnson-Bateman Co., 295 N.L.R.B. 180 (1989). For a discussion of drug testing as a mandatory subject of collective bargaining in professional sports see Mark M. Rabuano, Comment, *An Examination of Drug-Testing as a Mandatory Subject of Collective Bargaining in Major League Baseball*, 4 U. PA. J. LAB. & EMP. L. 439 (2002).

59. NLRB v. Katz, 369 U.S. 736, 743 (1962).

60. 29 U.S.C. § 158(a)(5) (2005).

61. See *Brown v. Pro Football*, 518 U.S. 231 (1996).

62. *Id.* at 250.

63. See generally *W.R. Grace & Co. v. Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers of Am. Local 759*, 461 U.S. 757 (1983) (expressing United States Supreme Court's policy of upholding decisions agreed upon by the members of the collective bargaining relationship).

64. See *supra* Part IV.C.

make a challenge of an unfair labor practice, an individual player like Johnson would not have recourse against the team or league, but only against the NBPA for breach of the union's duty of fair representation.<sup>65</sup>

*B. The Current CBA Could Already Include Genetic Testing*

The current CBA includes a mandatory physical examination by each player before the player's contract is in full effect.<sup>66</sup> The provision states:

The player must report for such physical examination at the time designated by the Team (which shall be no later than the third business day following the execution of the Contract), and must, upon reporting, supply all information reasonably requested of him, provide complete and truthful answers to all questions posed to him, and submit to all examinations and tests requested of him. The determination of whether the player has passed the physical examination shall be made by the Team in its sole discretion. If the player does not pass the physical examination, the Team shall so notify the player no later than the sixth business day following the execution of the Contract.<sup>67</sup>

As a result of this language, it is possible that a genetic testing requirement may already be included within the physical examination requirement.

The language of the CBA is quite broad and "submit to all examinations and tests requested of him" could be read to encompass genetic testing. As a result, players may not be able to contest such a requirement, as it is already something agreed to during the collective bargaining process. However, this language has never been interpreted to apply to genetic testing. Some critics have suggested that the current CBA language might be ambiguous with regard to genetic testing, and the courts would have to determine the intent of the parties with regard to this sort of testing in light of the current CBA language.<sup>68</sup> While this is a possibility, the language of the CBA specifically requires players to submit to any and all tests requested by the team.<sup>69</sup> This could also be clear and unambiguous, simply meaning that all tests the team may request are required, potentially allowing teams to invalidate a player's

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65. ARCHIBALD COX, ET AL., *LABOR LAW: CASES AND MATERIALS* 1037 (13th ed. 2001).

66. NBA UNIFORM PLAYER CONTRACT ¶ 6 (2005); NAT'L BASKETBALL ASS'N, *supra* note 24, art. II, § 12(h).

67. NAT'L BASKETBALL ASS'N, *supra* note 24, art. II, § 12(h)(i).

68. Michael A. McCann, *The Reckless Pursuit of Dominion: A Situational Analysis of the NBA and Diminishing Player Autonomy*, 8 U. PA. J. LAB. & EMP. L. 819 (2006).

69. NAT'L BASKETBALL ASS'N, *supra* note 24, art. II, § 12(h)(i).

contract for failure to submit to a genetic test.

As a whole, the language of the CBA could already be read to include the testing policy implemented in the hypothetical. Johnson is being required to submit to a medical test. While he is not currently in contract negotiations, there is no indication in the CBA's language that the medical testing provision is applicable only when a player is in the process of signing a new contract. Therefore, Johnson could be in violation of his Uniform Player Contract and could be terminated from the team. If he sought employment with another team, the same result could occur and he might be ostracized from the NBA community based on his failure to undergo such medical tests.

### VII. THE AMERICANS WITH DISABILITIES ACT

Another issue that could be implicated should the NBA enact a genetic testing policy is the Americans with Disabilities Act (ADA).<sup>70</sup> Although there has been little to no litigation related to genetic discrimination that provides direct precedent in this area of law, recent developments in legislation and agency materials indicate that genetic discrimination was intended to fall within the protections of the ADA.<sup>71</sup> An employee, including an athlete, is disabled if he or she "(1) has a physical or mental impairment that substantially limits one or more major life activities of such individual; (2) has a record of such an impairment; or (3) is regarded as having such an impairment."<sup>72</sup>

Title III of the ADA is the provision that generally applies to professional sports teams or leagues.<sup>73</sup> This section provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."<sup>74</sup> Further, the Equal Employment Opportunity Commission has provided guidance in applying the ADA that indicates that genetic disorders are to be included within the

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70. Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2005).

71. Paul Steven Miller, *Is There a Pink Slip in My Genes? Genetic Discrimination in the Workplace*, 3 J. HEALTH CARE L. & POL'Y 225, 237–38 (2000).

72. Paul M. Anderson, Comment, *Cautious Defense: Should I Be Afraid to Guard You? (Mandatory AIDS Testing in Professional Team Sports)*, 5 MARQ. SPORTS L.J. 279, 305 (1995) (citing 42 U.S.C. § 12102(2)).

73. Paul M. Anderson, *A Cart That Accommodates: Using Case Law to Understand the ADA, Sports, and Casey Martin*, 1 VA. SPORTS & ENT. L.J. 211, 214 (2002).

74. 42 U.S.C. § 12182(a).

protections of the ADA.<sup>75</sup>

The courts have recognized heart disease as an impairment for purposes of applying the ADA.<sup>76</sup> In order for the ADA to apply the impairment must preclude the individual from participating in a major life activity.<sup>77</sup> Obtaining employment in a certain career is considered a major life activity for purposes of applying the ADA.<sup>78</sup> The regulations, however, indicate that “[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.”<sup>79</sup> Therefore, participating in professional sports may not be considered a major life activity under the statute.

An athlete who is prevented from employment in professional sports, however, may still not fall within the protections of the ADA if the athlete has HCM. The ADA prohibits discrimination against “qualified individuals with a disability because of the disability.”<sup>80</sup> An individual is a “qualified individual with a disability” only if that individual is one “with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”<sup>81</sup> As the *PGA Tour, Inc. v. Martin*<sup>82</sup> case demonstrates, employers or places of public accommodation, including athletic leagues, can be required to accommodate athletes when it is reasonable.

There are circumstances under which no accommodations can be made that would allow an individual to participate in his or her chosen job. For example, an individual hired by the City of Chicago to serve as a cement mixer sued under the ADA based on a theory that the city did not make reasonable accommodations for his cardiomyopathy after he requested light-duty positions because his condition did not allow him to undertake strenuous physical exertion.<sup>83</sup> The court determined that the employee did not meet the definition of “qualified individual” under the ADA because he could not perform the “essential duties” of the cement mixer position because those

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75. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, COMPLIANCE MANUAL, Notice 915.002, Oct. 10, 1995, available at <http://www.eeoc.gov/policy/docs/preemp.html>.

76. *Knapp v. Northwestern Univ.*, 101 F.3d 473, 478 (7th Cir. 1996).

77. 42 U.S.C. § 12102(2)(a).

78. Mark A. Rothstein, *Genetic Discrimination in Employment and the Americans with Disabilities Act*, 29 HOUS. L. REV. 23, 42 (1992).

79. 29 C.F.R. § 1630.2(j)(3)(i) (2005).

80. 42 U.S.C. § 12112(a).

81. *Id.* § 12111(8).

82. 532 U.S. 661 (2001).

83. *Murphy v. City of Chi.*, No. 02-C-7261, 2004 U.S. Dist. LEXIS 9890, at \*2 (N.D. Ill. June 1, 2004).



duties required physical activity that could jeopardize his heart.<sup>84</sup> Therefore, the city did not violate the ADA by terminating the employee despite his genetic disability.<sup>85</sup>

Athletes who have HCM may not be able to exert themselves at a level that is sufficient to perform as a professional athlete. Therefore, even if Marlon Johnson were formally diagnosed with HCM, he would not qualify as a "qualified individual with a disability" under the statute. There would be no possible manner for the NBA to accommodate him to play professional basketball. He would constantly risk over-exerting his heart. There is currently nothing the NBA could do to assist Johnson. The only way Johnson could improve his situation would be to undergo medical treatment or surgery.

#### VIII. BALANCING THE INTERESTS OF ALLOWING GENETIC TESTING IN PROFESSIONAL SPORTS

There are a number of opposing policy concerns involved in the debate on imposing genetic testing on professional athletes. The discussion below focuses on the major arguments in favor of and in opposition to testing athletes for genetic disorders. While this discussion is not exhaustive, it provides a basis for understanding both the players' and management's concerns.

##### A. *Why Genetic Testing Makes Sense*

Great players have died from undiagnosed heart conditions, and a genetic testing policy could prevent more tragedies. Loyola Marymount player Hank Gathers passed away from HCM in 1990.<sup>86</sup> Reggie Lewis, an outstanding college player and a NBA player with a bright future, died from a heart condition in 1993.<sup>87</sup> While there were some questions as to the actual causes of these players' deaths, it was later determined that both were caused by a heart condition.<sup>88</sup> Gathers was aware of his condition at the time of his death and was being treated, but there was no indication that Lewis was aware that he suffered from a fatal heart condition.<sup>89</sup> Requiring testing of players who demonstrate symptoms such as shortness of breath or irregular heartbeats could save the lives of individuals suffering from HCM or similar genetic

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84. *Id.* at \*6-7.

85. *Id.* at \*7.

86. Osterweil, *supra* note 1.

87. *Id.*

88. Jim Litke, *Eddy Curry at Centre of "A Fight Far Bigger Than Just the Sports World,"* CANADIAN PRESS, Sept. 28, 2005.

89. Osterweil, *supra* note 1.

heart conditions. The costs to the players seem minimal, as all they are required to do is spend ten minutes at the doctor and have a swab taken from their mouths, but there is more to the balance of pro and con.

Requiring genetic testing could benefit third parties who might otherwise be unaware of their potential to pass on or develop a particular disorder.<sup>90</sup> If Marlon Johnson suffers from HCM and is tested, his family members might learn that they are carriers of the HCM mutated gene and could preemptively seek treatment, or at least monitor their health more closely. The carrier of a gene may have a moral duty to the rest of his or her family to determine whether or not he or she has a particular predisposition to a genetic disease. "But the existence of a moral duty does not require that there be a corresponding legal duty."<sup>91</sup> Although an individual may have an ethical obligation to his or her family to be tested, and then a subsequent obligation to the family to disclose the results of the tests, there is no legal force binding the individual to make those decisions.<sup>92</sup> The NBA's testing policy provides an easy way for individuals such as Marlon Johnson to determine whether they carry such a gene, and potentially, to save their own lives and the lives of their family members.

A player who does not have HCM potentially benefits from genetic testing as well. If the player is demonstrating certain symptoms of HCM, such as shortness of breath or chest pains, and it is determined through testing that the symptoms are not caused by HCM, the player could seek treatment for the real cause of the symptoms. Therefore, the testing plan may indicate another, undetected illness. For example, if Johnson truly is suffering from athletes' heart rather than HCM, taking the DNA test would not injure him. Once his doctors determine that he is not suffering from HCM, he can undergo the proper treatment for athletes' heart and potentially return to playing basketball if he wishes to do so. There is no negative effect from undergoing the test and there is a potential outcome that allows him to continue playing.

In addition to the personal concerns involved with implementing the testing procedure, the NBA has legitimate business concerns in implementing such a policy as well. NBA athletes are paid enormous amounts of money to perform at the highest level of athletic competition. While it may seem callous to suggest this, athletes are something of an investment for their teams. Therefore, if the team wants to make sure that it is making a solid investment in a player with an unblemished record of health, that decision should be

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90. Sonia M. Suter, Note, *Whose Genes Are These Anyway?: Familial Conflicts over Access to Genetic Information*, 91 MICH. L. REV. 1854, 1855 (1993).

91. *Id.* at 1885.

92. *See generally id.*

respected as well. Also, if the team could potentially be at risk for injuries caused to players if the injury or condition is not detected,<sup>93</sup> the team should be able to take reasonable preventative measures.

*B. Why Genetic Testing is an Unreasonable Infringement of Personal Rights*

Some players do not want to know that they are suffering from a potentially deadly disease. Individual autonomy suggests that if a person does not want to know his or her personal medical diagnoses, then he or she should not be forced to learn such information. Additionally, medication is only as effective as individuals allow it to be. For example, Hank Gathers was medicated at the time of his death.<sup>94</sup> He requested that his doctors reduce his dosage because of the side-effects and after they agreed, he died on the court.<sup>95</sup> Therefore, even if a player is required to undergo testing and a defect is found, his life is not necessarily guaranteed to be safe. It is up to the individual how he or she wishes to deal with the information that is found by the testing, and some may suggest the same should be true with regard to taking the test.

Forced testing has a number of potentially disturbing consequences if it is allowed to go to an extreme. While the NBA is not likely to implement a genetic testing program to determine everything possible about their players, another employer or an insurance company could implement such a program. The Third Reich tested pregnant women and sterilized individuals who tested positive for the gene that carries Huntington's Disease, another hereditary illness.<sup>96</sup> Also, there are certain genetic conditions that are more prevalent in certain ethnicities or racial groups.<sup>97</sup> If employers were able to test genetically for such disorders, they might violate federal discrimination law. For example:

If managers exclude people who have sickle cell trait, for example, then they may exclude 10 percent of the black workforce and few white workers. Thus, part of the reason 'susceptibility' usually has a racial dimension is that racial and ethnic minorities have more of the targeted genetic traits. Therefore, individuals selected . . . for exclusion from jobs are [] more likely to be from those groups.<sup>98</sup>

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93. See *supra* Part IV.D.

94. Tim Povtak, *Matters of the Heart; It's Difficult to Detect Heart Problems Even in Well-Examined Pro Athletes*, ORLANDO SENTINEL, June 30, 2002, at C1.

95. *Id.*

96. CLARKE, *supra* note 7, at 64-65.

97. ELAINE DRAPER, *RISKY BUSINESS* 83 (1991).

98. *Id.*

If employers are allowed to test for whichever disease they choose, individuals who have not even demonstrated symptoms of the disease, or individuals who happen to carry a gene for that disease because of their ethnic background, could potentially be excluded completely from certain positions.

Specifically in the area of athletics, the concern of genetic engineering or discrimination is an issue. Players currently in the NBA are evaluated based on their performance in practices and games. However, the potential effect of genetic testing is that players could be tested for genes that indicate how well they will perform.<sup>99</sup> Quality players could be excluded based solely on their bodies and not their hard work and dedication, thereby depriving fans of the best athletic competition. Additionally, players may begin what some call “genetic doping” to alter their genetic structures in order to demonstrate a better genetic makeup.<sup>100</sup> Finally, and most disturbingly, parents may begin testing children for potential performance genes or lack thereof and altering their children’s lives based on their genetic makeup. For all of these reasons, the suggested genetic testing program below contains a number of safeguards to prevent abuse or misuse of genetic information.

#### IX. A PROPOSAL FOR CREATING AN ALLOWABLE TESTING PROCESS

The following is a proposal for a genetic testing procedure that takes into account many of the concerns discussed above. The optimal genetic testing policy would be agreed to by the NBA and the NBPA, as well as the individual NBA players who would ultimately be tested. However, such agreement by all the relevant parties may be impossible. While genetic testing may already be allowed under the current CBA, the NBA would still be at an advantage implementing the least controversial testing policy possible. While the NBA is not subject to the restraints on invasion of privacy included in the Constitution, this proposal is an attempt to put forth the least invasive policy possible in order to respect players and their autonomy while also detecting the genetic defects that could potentially cause them great harm.

##### *A. Limits on Testing Procedures and Types of Testing*

Genetic testing could be implemented to detect genes that demonstrate a

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99. Ben Sellenger, *Genetic Testing: The Future of Athlete Selection?*, 2 VA. SPORTS & ENT. L.J. 207, 213–14 (2003). The Human Genome Project determined that there are two genes that can, at times, indicate an individual's likelihood of performing well athletically. *Id.* at 211–13. Additionally, there are genes that can indicate an individual's likelihood of performing poorly in sports. *Id.* For a more in-depth discussion of the Human Genome Project and its findings related to performance genes see generally *id.*

100. *Id.* at 216.

predisposition to a number of diseases; however, not all of these diseases would reasonably have an affect on an NBA player's ability to play professional basketball. A number of genetic conditions do not express themselves until much later in the carrier's life.<sup>101</sup> As a result, the NBA should impose a genetic testing policy that only allows testing for conditions that would reasonably affect the player's ability to function in his athletic career. HCM is a disease that affects a player's heart and his ability to compete athletically.<sup>102</sup> Therefore, the NBA would be acting reasonably in testing for HCM. There are few, if any, other genetic conditions that are prevalent enough in young people that the NBA should impose testing for those conditions at this time. As science continues to make new findings, other conditions may be detectable, but at this point, HCM is the only genetic condition that should be tested for by the NBA.

The NBA should require testing in the least invasive manner. DNA testing can be done in a number of ways, but it is generally considered that swabbing the mouth with a cotton swab is a medically acceptable manner of collecting DNA. It can be reasonably agreed that swabbing the inside of a player's mouth, an action that takes a matter of seconds, is not a very significant imposition on that individual's personal space or privacy. The swabbing or any less-imposing method of obtaining DNA, unless demonstrated to be ineffective, should be utilized to protect the NBA players' dignity.

### *B. Limits on When Testing Occurs*

It is also important that the NBA impose limits on which individuals are tested based on a reasonable expectation that an individual is actually suffering from a genetic disease. Players who have a family history of HCM may have a high likelihood of carrying the HCM trait. However, a family history should not be the only consideration in choosing players to be tested. As an individual can carry the HCM gene but never have effects of the disease, it is important that the player show symptoms before he is required to undergo testing. If a player has a family history of HCM and wishes to take a genetic test as a precaution, the NBA would likely allow him to do so. However, if a player is unwilling or does not know his family history related to HCM, he should not be forced to take a test until he demonstrates some indication that he might be suffering from the disease. At the point where the player shows symptoms, a concern for his health becomes a reasonable

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101. CLARKE, *supra* note 7, at 82.

102. Cardiomyopathy Ass'n, *supra* note 2.

justification to require genetic testing.

### *C. Limits on Dissemination of Information*

Medical information is very personal. As such, it should be treated with respect and confidentiality measures should be taken to protect the privacy of all players. Protections should be in place to assure that only those individuals who need to receive a player's genetic testing results have access to such information. This policy would also more fully comply with HIPAA than the overall waiver of information rights in the current CBA. Some members of team management will likely fall into the category of people who need to know the results of genetic testing. In order to make the best possible decision for the team and the individual players, the coach will need to know which players are physically capable of performing. Additionally, the team physician should be aware of the test results in order to best deal with any complications that could occur during games or practices. If the physician does not know about the potential for HCM symptoms or its effects, he or she cannot effectively treat the player.

There are certain circumstances under which the owner of the team should be aware of a player's genetic testing results. If a team is considering whether to trade for or sign a player, it may be necessary to obtain test results in order to decide whether the player will be an asset to the team. However, the test information should only be provided to a team other than the player's team at the time of the test if there is a serious indication that the player has HCM and a reasonable likelihood that the new team would potentially sign the player. Without these conditions in place, genetic testing information could be passed amongst teams constantly under the auspices of trade discussions.

A concern may exist regarding the player's family members and their access to the medical information obtained through genetic testing. As discussed above, the player may be under a moral obligation to disclose genetic conditions to anyone who might be affected, but allowing disclosure to third parties would be an unnecessary privacy violation despite this moral obligation. With these safeguards in place, the testing procedure required by the NBA would be reasonable and would not be too significant an imposition on players like Marlon Johnson.

## X. CONCLUSION

Professional sports is an industry ripe for the implementation of genetic testing. As this comment has explained, there are a number of issues raised by a testing procedure that requires unwilling athletes to submit to DNA testing as a condition of employment. Under certain circumstances, however, such a

testing procedure could be appropriate. If the limitations suggested in the proposed policy were enacted to prevent unnecessary disclosures and testing, the overall privacy rights of the individual players would be protected. Further, if testing was required only of individuals who demonstrated a likelihood of developing a genetic disease and who also demonstrated symptoms of such a disease, then no unwarranted distress would be caused by implementing such a testing program.

Marlon Johnson might be required to undergo genetic testing under the NBA's CBA. If he does not agree, his team could rightfully release him. If the NBA implemented a policy similar to the one suggested in this comment, Johnson could be assured that the results of his HCM test would only be provided to his team physicians, his coach and him. He would know that he would not be tested for anything other than HCM and that the process would be as easy and painless as possible. While he might not want to submit to such testing, in certain circumstances it could be appropriate, and more importantly, it could save his life.