

# “Pumped” about HGH Testing? Careful, It May Violate the ADA

BY MICHAEL GREGG

Major League Baseball (MLB), the National Football League (NFL), and the National Basketball Association (NBA) have all agreed, in their new collective bargaining agreements, to test players for human growth hormone (HGH). Calls for professional sports leagues to implement HGH testing increased after the publishing of the Mitchell Report—a 2007 report by former Senator George Mitchell linking a number of high profile baseball players to HGH use. Four years later, the MLB, NFL, and NBA all agreed in principle, within a few months of one another, to test their players for HGH. There is a chance, however, that HGH testing could violate players’ rights under the Americans with Disabilities Act (ADA).

## GENERAL BACKGROUND ON HGH

HGH is a naturally occurring polypeptide hormone secreted by the pituitary gland. HGH is essential for childhood growth.<sup>1</sup> HGH increases during childhood, peaks during adolescence, and steadily declines thereafter.<sup>2</sup> Synthetic HGH was developed in 1985 and approved by the Food and Drug Administration for specific medical purposes. According to the Drug Enforcement Administration (DEA), in blood tests, synthetic HGH is chemically indistinguishable from the naturally occurring hormone. Sleep, exercise, and stress all increase the secretion of HGH.<sup>3</sup>

## BLOOD TESTING FOR HGH IS LIKELY A MEDICAL EXAM UNDER THE ADA

Under the ADA, an employer cannot require a “medical examination” of an employee “unless such examination . . . is shown to be job-related and consistent with business necessity.”<sup>4</sup> In a 2011 decision relating to the suspension of two NFL players for violating the NFL’s drug policy, the Minnesota Court of Appeals held that both the NFL and the Minnesota Vikings were “employers” under a state statute limiting an employer’s ability to require drug testing of employees.<sup>5</sup>

According to the Equal Employment Opportunity Commission (EEOC), the agency charged by Congress to interpret and enforce the ADA, a medical examination is a “procedure or test that seeks information about an individual’s physical or mental impairments or health.”<sup>6</sup> In its Enforcement Guidance, the EEOC lists the following factors to determine whether a test or procedure is a medical examination: (1) whether the test is administered by a health care professional, (2) whether the test is interpreted by a health care professional, (3) whether the test is designed to reveal an impairment or physical or mental health, (4) whether the test is invasive, (5) whether the test measures an employee’s performance of a task or measures his/her physiological responses to performing the task, (6) whether the test normally is given in a medical setting, and (7) whether medical equipment is used.<sup>7</sup> While not binding upon the courts,

the EEOC’s Enforcement Guidance constitutes “a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”<sup>8</sup>

Drug testing is generally not considered a medical examination. The ADA excludes from the definition of medical examination a “test to determine the illegal use of drugs.”<sup>9</sup> The term “drug” is defined to mean “a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act.”<sup>10</sup> “Illegal use of drugs” means “the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act.”<sup>11</sup>

Under federal law, it is generally unlawful to distribute HGH for use in humans. Specifically, the Food, Drug, and Cosmetic Act makes it unlawful to distribute, or possess with an intent to distribute, HGH “for any use in humans other than the treatment of a disease or other recognized medical condition, where such use has been authorized by the Secretary of Health and Human Services . . . and pursuant to the order of a physician.”<sup>12</sup> Violation of the statute is punishable by up to five years in prison and up to 10 years in prison if the offense involves an individual under 18 years of age.<sup>13</sup> A conviction for unlawfully distributing HGH under the Food, Drug, and Cosmetic Act is also considered a felony violation of the Controlled Substances Act “for the purposes of forfeiture under section 413 of such Act.”<sup>14</sup>

Even though the Food, Drug, and Cosmetic Act makes it unlawful to distribute HGH unless such use is authorized by the Secretary of Health and Human Services and pursuant to the order of a physician, HGH, unlike steroids, is not considered to be a controlled substance.<sup>15</sup> In fact, attempts to amend the Controlled Substances Act to include HGH as a “controlled substance” have failed. In 2007, two bills were introduced in Congress, H.R. 4911 and S. 877, to amend the Controlled Substances Act for the purpose of adding HGH as a schedule III drug under the Act. Neither bill made it beyond referral to committees. Consequently, because HGH is not listed as a controlled substance under the Controlled Substances Act, it is not a “drug” under the ADA, and blood testing for HGH likely constitutes a medical examination under the factors set forth in the EEOC’s Enforcement Guidance.

## IS HGH TESTING IN PROFESSIONAL SPORTS JOB-RELATED AND CONSISTENT WITH BUSINESS NECESSITY?

If blood testing for HGH is a medical examination under the ADA, such testing cannot be required of the athletes unless it is job-related and consistent with business necessity. Pursuant to the EEOC’s Enforcement Guidance, a medical examination is job-related and consistent with business necessity “when an employer ‘has a reasonable belief, based on objective evidence, that: (1) an employee’s ability to perform essential job functions will be

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impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition.”<sup>16</sup>

[W]hen determining whether a job requirement is an “essential function,” “consideration shall be given to the employer’s judgment as to what functions of a job are essential . . . .” However, such evidence is not conclusive; “an employer may not turn every condition of employment which it elects to adopt into a job function, let alone an essential job function, merely by including it in a job description.”<sup>17</sup>

“Essential functions” are fundamental duties, not marginal functions of the position.<sup>18</sup> “A highly fact-specific inquiry is necessary to determine what a particular job’s essential functions are.”<sup>19</sup>

Business necessity is closely akin to job relatedness and the terms are often interchanged. Job relatedness is used in analyzing the questions or subject matter contained in a test or criteria used by an employer in making hiring or promotional decisions. Business necessity is larger in scope and analyzes whether there is a business reason that makes necessary the use by an employer of a test or criteria in hiring or promotional decision making.<sup>20</sup>

“The ‘business necessity’ standard is quite high, and ‘is not [to be] confused with mere expediency.’ Such a necessity must ‘substantially promote’ the business’ needs.”<sup>21</sup> In *Cripe v. City of San Jose*, the Ninth Circuit emphasized that the business necessity exception is more stringent than the undue hardship standard within the framework of the ADA—a standard that is generally difficult for employers to meet.<sup>22</sup>

## ARGUMENTS IN FAVOR OF HGH TESTING

In a letter to the NFL and the NFL Players Association (NFLPA) dated December 15, 2011, four former doctors-turned-lawmakers urged the NFL and the NFLPA to implement HGH testing to send a message to the nation’s youth about competing the right way, to protect the health of players and to safeguard the integrity of the game. These three arguments in favor of HGH testing are the same arguments made in the Mitchell Report as reasons for the MLB to implement measures to combat the use of performance enhancing substances.

### Effects on Young Athletes

In a November 2, 2011, letter to the MLB and the MLB Players Association, congressmen Henry Waxman and Frank Pallone said the most important reason to implement HGH testing is to protect “the health of teenagers who aspire to be like pro players.”

Although an important goal, it is not clear that testing professional athletes for HGH based on the assumption that young athletes may imitate them will satisfy the job-related and business necessity standard under the ADA. One can also argue that testing professional athletes for HGH to deter use by young athletes is unnecessary because high schools and colleges can deter HGH use on their own through testing. Courts have held that drug testing of high school and college athletes does not violate privacy rights or the Fourth Amendment.<sup>23</sup> Further, the ADA’s requirement that medical exams be job-related and consistent with business necessity does not apply to students.<sup>24</sup> Consequently, it is unclear whether a fact finder would conclude

that HGH testing is job-related and a business necessity under the ADA simply because professional athletes are role models.

### Health and Safety

Another argument in favor of testing is that HGH poses health risks to those who use it. Pursuant to the EEOC’s Enforcement Guidance, HGH use must pose a “direct threat” to be considered job-related and consistent with business necessity.

“Direct threat” means “a significant risk of substantial harm to the health or safety of the individual or others.”<sup>25</sup> The assessment must be based on “reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.”<sup>26</sup> The employer must also be prepared to show the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm.<sup>27</sup>

The Mitchell Report argues that HGH use by professional athletes poses health risks because illegal drug users “often obtain dubious products (contaminated or otherwise) from black-market sources, self-administer these substances with no medical supervision based on advice gleaned from Internet sites and fellow bodybuilders, and use these substances in amounts that far exceed those that are prescribed by physicians for legitimate uses.”<sup>28</sup>

According to the Mitchell Report, the “most remarked upon” adverse side effect of HGH use is acromegaly, the enlargement of the bones and connective tissues.<sup>29</sup> “Other possible side effects include cancer, impotence in men, menstrual irregularities in women, cardiomyopathy, hypothyroidism, and arthritis.”<sup>30</sup> The report references other risks such as the questionable origin of black-market HGH and infections such as Hepatitis C and HIV from multiple uses of needles.<sup>31</sup> These are all compelling arguments that HGH poses a direct threat to professional athletes who use it.

On the other hand, according to a 2011 publication by the Mayo Clinic, the side effects of HGH may be more prevalent in older adults than younger adults.<sup>32</sup> The publication also notes that because the studies of healthy adults taking HGH have been short term, it is not clear whether the side effects could eventually dissipate or become worse.<sup>33</sup> For an employer to justify testing for HGH, it would be required to show: the duration of the risk, the nature and severity of the potential harm, a high probability that the potential harm will occur, and the imminence of the potential harm. Given the apparent lack of medical studies on the long-term and likely effects of HGH use by healthy young adults, it is not clear whether such a showing can be made.

### Integrity of the Game/Unfair Advantage

Another argument in favor of implementing HGH testing is that it provides those who use it with an unfair advantage, which thereby threatens the integrity of the game. The Mitchell Report notes that the “widespread use of these [performance enhancing] substances raises questions about the validity of records and their comparability across different eras.”<sup>34</sup> The report also notes that:

[I]llegal use of these substances by some players is unfair to the majority of players who do not use them. These players have a right to expect a level playing field where success and advancement to the major leagues is the result of ability and hard work.

They should not be forced to choose between joining the ranks of those who illegally use these substances or falling short of their ambition to succeed at the major league level.<sup>35</sup>

The Mitchell Report also cites to authority that HGH promotes tissue repair and recovery from injury.<sup>36</sup> Furthermore, HGH is listed by the World Anti-Doping Agency as a performance enhancing drug.

The Mitchell Report also notes that because it is unlawful to distribute HGH without a prescription, professional baseball players who use such drugs “place themselves in a position of vulnerability to drug dealers who might use their access and knowledge of violations of law to their own advantage, through threats intended to affect the outcome of baseball games or otherwise.”<sup>37</sup>

[I]llegal drug use inevitably involves contact with criminals. In the sports world, this connection will just as inevitably involve gambling. . . . The knowledge that a player . . . uses drugs is a fact which illegal gamblers clearly want to know. Drug dealers who supply Baseball personnel can dilute a drug or combine it with other substances so as to affect performance and could ultimately place the user in a position of dependence upon both the drug and its source of supply. The results, of course, could be devastating.<sup>38</sup>

These are all compelling arguments that HGH use by professional athletes provides an unfair advantage and adversely affects the integrity of the games.

On the other hand, there appears to be some question about the performance enhancing effects of HGH. According to the DEA, the “ability of HGH to increase athletic performance is debatable.” According to the Mayo Clinic, “the increase in muscle [from HGH use] doesn’t translate into increased strength.”<sup>39</sup> The Mitchell Report also cites to a number of studies that show “human growth hormone does not increase muscle strength in healthy subjects or well-trained athletes.”<sup>40</sup> The report notes further:

Athletes who have tried human growth hormone as a training aid have reached the same conclusion. The author of one book targeted at steroid abusers observed that “[t]he most curious aspect of the whole situation is that I’ve never encountered any athlete using HGH to benefit from it, and all the athletes who admit to having used it will usually agree: it didn’t/doesn’t work for them.”<sup>41</sup>

In addition, the use of HGH by professional athletes may not necessarily involve contact with criminals. For example, athletes could have HGH administered in a controlled medical setting by trained doctors or other medical professionals in other countries that have fewer restrictions on the use of HGH. In fact, under federal law, it is not a crime to use HGH—it is a crime to distribute or possess with the intent to distribute HGH without an authorized use and prescription. Thus, it is not certain that a fact finder would conclude that HGH testing is job-related and a business necessity on the basis that its use by professional athletes provides an unfair advantage and threatens the integrity of the game.

#### PREEMPTION AND WAIVER NOT LIKELY

In addition, rights under the ADA are not preempted by the Labor Management Relations Act (LMRA). In *Lingle v. Norge*

*Division of Magic Chef, Inc.*, the U.S. Supreme Court held that independent statutory rights are not preempted by the LMRA.<sup>42</sup> Courts have also applied the ADA to employees covered by union contracts.<sup>43</sup> Thus, the argument that rights under the ADA are preempted by the existence of a collective bargaining agreement that provides for testing for HGH will likely fail.

Furthermore, it does not appear that substantive rights under the ADA can be waived by a collective bargaining agreement. On the one hand, in *Alexander v. Gardner-Denver Co.*, the U.S. Supreme Court held that while a union may waive certain statutory rights related to collective activity such as the right to strike, an employee’s rights under Title VII cannot be waived through a collective bargaining agreement.<sup>44</sup> On the other hand, in *Lingle*, the Supreme Court left open the possibility that a union may waive its members’ individual statutory rights. “Whether a union may waive its members’ individual, nonpre-empted state-law rights, is, likewise, a question distinct from that of whether a claim is pre-empted under § 301, and is another issue we need not resolve today.”<sup>45</sup> However, at least one federal court has interpreted the *Gardner-Denver* decision to mean that statutory rights unrelated to collective activity cannot be waived through a collective bargaining agreement.<sup>46</sup>

#### CONCLUSION

While many politicians have been clamoring for professional sports leagues to implement HGH testing, it is not certain that HGH testing is permissible under the ADA. Given the uncertainty, Congress or the attorney general may need to amend the Controlled Substances Act to include HGH as a controlled substance. The Controlled Substances Act gives the attorney general the authority to add a drug to the list of controlled substances based on a finding that a drug or substance has a potential for abuse, other findings regarding accepted medical use in treatment, and physical or psychological dependence.<sup>47</sup> Adding HGH as a controlled substance would make it a “drug” under the ADA. As a result, it would be excluded from the definition of medical examination and the resulting requirements that testing be job-related and consistent with business necessity. ♦

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#### ENDNOTES

1. DRUG ENFORCEMENT ADMIN., OFFICE OF DIVERSION CONTROL, DRUG & CHEMICAL EVALUATION SECTION, HUMAN GROWTH HORMONE (2011).
2. *Id.*
3. *Id.*
4. 42 U.S.C. § 12112(d)(4).
5. *Williams v. NFL*, 794 N.W.2d 391, 396 (Minn. Ct. App. 2011).
6. EQUAL EMP’T OPPORTUNITY COMM’N, ADA ENFORCEMENT GUIDANCE: PRE-EMPLOYMENT DISABILITY-RELATED QUESTIONS AND MEDICAL EXAMINATIONS (1995).
7. *Id.*
8. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).
9. 42 U.S.C. § 12114(d)(1).
10. *Id.* § 12111(6)(B).
11. *Id.* § 12111(6)(A).
12. 21 U.S.C. § 333(e).
13. *Id.*
14. *Id.*

15. 21 C.F.R. §§ 1308.11–15; DRUG ENFORCEMENT ADMIN., *supra* note 1.
16. EQUAL EMP’T OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE: DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (2000) (footnotes omitted).
17. *Cripe v. City of San Jose*, 261 F.3d 877, 887 (9th Cir. 2001).
18. *Id.*
19. *Id.* at 888 n.12.
20. *Gaus v. Norfolk S. Ry. Co.*, No. 09-1698, 2011 U.S. Dist. LEXIS 111089, at \*93 (W.D. Pa. Sept. 28, 2011).
21. *Cripe*, 261 F.3d at 890 (alteration in original) (citation omitted).
22. *Id.*
23. *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Hill v. NCAA*, 865 P.2d 633 (Cal. 1994).
24. 42 U.S.C. § 12112(a).
25. *Gaus*, 2011 U.S. Dist. LEXIS 111089, at \*64.
26. *Id.*
27. *Id.*; *Bates v. UPS, Inc.*, 511 F.3d 974 (9th Cir. 2007).
28. GEORGE J. MITCHELL, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL 4 (2007).
29. *Id.* at 10.

30. *Id.*
31. *Id.* at 11.
32. *Human Growth Hormone (HGH): Does It Slow Aging?*, MAYO CLINIC (Feb. 19, 2011), <http://www.mayoclinic.com/health/growth-hormone/HA00030>.
33. *Id.*
34. MITCHELL, *supra* note 28, at 4.
35. *Id.* at 5.
36. *Id.* at 10.
37. *Id.* at 4.
38. *Id.* at 14.
39. *Human Growth Hormone (HGH): Does It Slow Aging?*, *supra* note 32.
40. MITCHELL, *supra* note 28, at 9.
41. *Id.* at 9–10 (alteration in original).
42. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988); *see also Williams v. NFL*, 582 F.3d 863 (8th Cir. 2009).
43. *See, e.g., Cripe v. City of San Jose*, 261 F.3d 877 (9th Cir. 2001).
44. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974).
45. *Lingle*, 486 U.S. at 409 n.9.
46. *See Beckwith v. UPS*, 703 F. Supp. 138, 143–45 (D. Me. 1988); *Wise v. Akal Sec., Inc.*, No. Civ.A. SA04CA1142XR, 2005 U.S. Dist. LEXIS 35241 (W.D. Tex. Dec. 21, 2005).
47. 21 U.S.C. § 811(a).