

No. 09-214

In the
**SUPREME COURT OF THE
UNITED STATES OF AMERICA**

MAJOR LEAGUE BASEBALL,
Petitioner,

v.

KEVIN WILSON;
MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,
Respondent.

ON WRIT OF CERTIORARI FROM THE UNITED STATE COURT
OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that Major League Baseball player's claims under Minnesota's Drug and Alcohol Testing In The Workplace Act challenging a suspension under a collectively bargained drug policy are not preempted by section 301 of the Labor Management Relations Act where the Minnesota act requires that the court to decipher whether or not the collectively bargained drug policy fulfils the minimum requirements for drug testing?
2. Whether the Court of Appeals was correct in setting aside and arbitrator's award sanctioning Major League Baseball's refusal to issue warnings regarding the presence of a banned substance in specific products because such an award was in violation of public policy?

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STATEMENT OF FACTS

Respondent Kevin Wilson is employed by the Minnesota Twins, L.L.C. and is a member of the Major League Baseball Players Association (hereinafter “MLBPA”), *Wilson v. Major League Baseball*, No. 09-AC-0213 at 1 (S.D.T. 2009), *rev’d*, No. 09-2108 at 1 (14th Cir. 2009), *appeal filed*, No. 09-214 (2009), who is the other Respondent in this case representing Major League Baseball (hereinafter “MLB”) players Kevin Wilson, Bradley Melton of the Florida Marlins, Al Peterson of the St. Louis Cardinals, Manny Rogers of the Boston Red Sox, and Pat Wilson of the Houston Astros. *Wilson*, No. 09-2108 at 1. A Collective Bargaining Agreement (hereinafter “CBA”) was entered into by the MLBPA and Major League Baseball in 2007 on behalf of the MLB players which included the MLB Policy on Anabolic Steroids and Related Substances (hereinafter “Policy”). *Wilson*, 09-AC-0213 at 1. The Policy dictates that players may not ingest certain substances and states the procedural process for review when a positive test occurs. *Id.* at 1-2.

“Despite multiple warnings against the use of energy-boosting supplements,” Wilson and four other MLB players violated the terms of the CBA by carelessly consuming a clearly banned substance, Clomiphene. *Id.* at 4. Clomiphene is generally used by steroid users to assist with maintaining newly obtained muscle growth during the “crash” that occurs after steroid use. *Id.* at 3. In accordance with the Policy’s preseason provision, all of the players were drug tested. *Id.* at 4. When the five players tested positive for Clomiphene, they were suspended for fifteen games. *Id.* at 4. Section 8 of the Policy that was incorporated into the CBA, *id.* at 8, unmistakably states that certain performance enhancing drugs are prohibited and “[o]ther [a]nti-estrogens, including Clomiphene, Cyclophenil, and Fulvestrant.” *Id.* at 1. Regardless of whether or not the any of the banned substances were taken intentionally or not, the Policy states that a positive test result will

not be excused even for an inadvertent ingestion of the drug. *Id.* This collectively bargained for rule of strict liability was specifically enumerated in the player's contracts. *Id.* at 8.

Furthermore, Appendix C to the Policy further advocates for players not to use supplements at all for the fact that a supplement may possibly contain one of the banned substances. *Id.* at 9.

To assist the players with information regarding supplements, the MLB created the "MLB Supplement Hotline" (hereinafter "Hotline") which offered information about the "ingredients, effects, and adverse reactions" to supplements. *Id.* at 2. However, the players were fully informed through a memorandum announcing the Hotline that "[u]sing the Hotline will not excuse a positive test result." *Id.* at 9. MLB was informed in 2007 that *some* bottles of SpeedShot included Clomiphene. *Id.* at 3. Dr. Larson, a licensed physician who manages the application of the provisions the Policy, informed Dr. Finkle, the consulting toxicologist, that Speedshot may include a banned substance. *Id.* at 2, 3. Mr. David Klein, the Sports Medicine Research Testing Laboratory Director, was asked by Dr. Finkle to test SpeedShot for traces of Clomiphene and confirmed that the banned substance was found in SpeedhShot. *Id.* at 3. The Vice President of Law and Labor Policy for the MLB, Mr. Andrew Birch, was then informed of these findings. While Larson did not release a specific warning regarding SpeedShot, he did send out a general warning to the players not to take energy-boosting supplements. *Id.* at 16. Furthermore, there is no provision in the contract stating that the MLB must inform players that an energy-boosting supplement contains a banned substance. *Id.* at 18.

OPINIONS BELOW

Respondent Kevin Wilson and four other MLB players tested positive during a drug test for having ingested the banned chemical, Clomiphene. *Id.* at 4. The Policy allows for players that have tested positive to appeal to an arbitrator. *Id.* at 2. The players and the MLBPA

appealed the suspensions by submitting to the arbitration. *Id.* at 4. The arbitrator held that Policy created a rule of strict liability and the players were legally responsible for any banned substance that was discovered during the drug test. *Id.* at 5. Therefore, due to the fact that the players did not challenge the positive test and because the arbitrator found that there was no fiduciary duty owed by MLB to issue warnings about products, the players suspensions were upheld. *Id.* Wilson appealed to a Minnesota state court where he claimed that the Policy was in violation of Minnesota's Drug and Alcohol Testing in the Workplace Act (hereinafter "DATWA"). *Id.*

The state court granted a temporary injunction preventing Wilson's suspension. *Id.* The Minnesota case was removed to federal court by MLB. *Wilson*, No. 09-2108 at 2. This case was consolidated with a MLBPA action, that was filed on behalf of the five players, which sought to vacate the arbitration awards upholding the players' suspensions as violating public policy. *Id.* at 2. The MLBPA then amended the complaint to argue that the suspension of Wilson was conflicting with DATWA and therefore in violation of the Act. *Id.* at 2-3. In the consolidated action, the United States District Court for the Southern District of Tulania granted MLB's motion for summary judgment holding that Section 301 of the Labor Management Relations Act (hereinafter "LMRA") preempted Wilson's DATWA claim. The court also upheld the arbitrator's award holding that neither the MLBPA nor Wilson raised an issue of material fact regarding a breach of an alleged fiduciary duty to the players. *Wilson*, 09-AC-0213 at 18, 19. Wilson and the MLBPA appealed to the United States Court of Appeals for the Fourteenth Circuit which reversed the district court's opinion. *Wilson*, No. 09-2108 at 1, 14. The court held that Wilson's DAWTA claim was not preempted by federal law because the CBA or Policy does not need to be interpreted to resolve the DAWTA claim, *id.* at 7, 10, and the uniformity of the

MLB's Policy would not be adversely affected by applying state laws rather than federal laws when applicable. *Wilson*, No. 09-2108 at 9. Furthermore, the court vacated that arbitration award stating that MLB breached their fiduciary duty to the players for not divulging the fact that Clomiphene was an ingredient in SpeedShot. *Id.* at 11. Finally, MLB appealed the court of appeals decision to the United States Supreme Court. *Wilson*, No. 09-214.

SUMMARY OF THE ARGUMENT

Section 301 of the LMRA preempts state laws which would interpret CBAs, in order to create uniform interpretation of such agreements. Section 301 also preempts state law in any claim whose resolution is intertwined with the interpretation of a CBA. Here the CBA is intertwined with the overarching claim, to the point that it is impossible to apply state law to the issue without interpreting the CBA. The Court should reverse the lower court's decision because public policy and legal precedent demand that § 301 of the LMRA preempt state law in this matter.

It is impossible to decipher whether or not the CBA lives up to the DATWA minimum standards without interpreting what certain provisions mean. This cause of action requires an analysis of the entire CBA to determine compliance with the state statute. Furthermore, the CBA restricts drugs that are covered under the DATWA, forcing any argument that the drugs restricted by the CBA go above the statutes reach.

The public policy reasons behind the creation of § 301 of the LMRA require that the lower court's decision be overturned. Section 301 exists as part of a wider federal plan of labor regulation, and is intended to create a uniform system of CBA interpretation. The effects of not applying § 301 to this case would be to create an imbalance where some players are allowed to

play with prohibited substances in their system and others are not, creating an imbalance in both the way that these contracts are interpreted and within the game of professional baseball.

The decision of an Arbitrator in the interpretation of a collective bargaining agreement is rarely capable of being overturned by a court. One of the few reasons that a court is able to overturn the interpretation of an arbitrator, is when the decision of the arbitrator causes a result which runs counter to a well defined public policy. Here the lower court improperly applied the public policy exception to overturn the decision of an arbitrator's interpretation of the collective bargaining agreement. This court should reverse the lower court decision because that decision fails to put forth a public policy that would allow a court to overturn the arbitrator's interpretation of the contract.

The lower court puts forth two public policy arguments to defend their ability to overturn the arbitrator's decision, that the decision sanctions the breach of a fiduciary duty, and that the decision has negative effects on the health of the players. The court fails to lay out well-defined laws against either of these policies.

The court argues that the arbitrator's decision sanctions the breach of a fiduciary duty, whereas there is no fiduciary duty created within the four corners of the contract, the actions of the parties, nor the arbitrator's interpretation of the contract. In a case where the arbitrator has decided that no such duty exists it is up to the court to prove that either public policy requires that a duty be found to be created by the contract or, that a duty exists outside of the contract due to the actions of the parties. The court fails to articulate a policy, and further such a policy is not to be found in the laws of this country. Further the facts surrounding this dispute articulate that no duty was created through any actions by the parties.

The lower court further claims that the arbitrator's award sanctions behavior that is detrimental to the health of the players. This argument is once again not based in any explicit public policy to be found in legal precedent. The cases on which the court bases its decision address the health of a wide population, not the health of an individual as we have here. Further the court would reprimand the MLB officials who failed to warn Mr. Wilson of the existence of the banned substance in SpeedShoot and let Mr. Wilson go without punishment for availing himself to a possibly dangerous substance. The court fails to draw any well founded public policy which would support its overturning the arbitrator's decision in this matter.

ARGUMENT

Point I

THE COURT SHOULD REVERSE THE DECISION OF THE LOWER COURT WHICH HELD THAT SECTION 301 OF THE LMRA DOES NOT PREEMPT THE DATWA BECAUSE THE DATWA REQUIRES THAT THE COURT INTERPRET THE PROVISIONS OF THE CBA AND TO APPLY THE DATWA WOULD CREATE A RESULT WHERE CBA'S ARE NOT INTERPRETED UNIFORMLY.

The DATWA encapsulates the “minimum standards and requirements for employee protection” for the drug policies of Minnesota employers. *Wilson*, No. 09-2108 at 5. However, section 301 of the LMRA states that “[s]uits for violation of contracts between an employers and a labor organization representing employees in an industry affecting commerce ... may be brought in any district court of the United States having jurisdiction of the parties....” *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985) (quoting 29 U.S.C. § 185(a) (2009)). *Textile Workers v. Lincoln Mills* solidified § 301 “as a congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts. *Id.* (citing *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957)). Section 301

preempts claims brought under DATWA “that are ‘substantially dependent upon analysis’ of a CBA.” *Wilson*, No. 09-2108 at 4 (quoting *Allis-Chalmers*, 471 U.S. at 220).

C. The Court Should Reverse the Decision of the Lower Court Because the Application of the DATWA Requires that the Court Interpret the CBA in Order to Determine if the Agreement Meets the Minimum Requirements for Drug Testing Proscribed by the Law.

“There is no preemption [under the LMRA] unless the state-law claim itself is based on, or dependant on an analysis of, the relevant CBA.” *Bogan v. General Motors Corp.*, 500 F.3d 828, 832 (8th Cir. 2007) (quoting *Meyer v. Schnucks Mkts., Inc.*, 163 F.3d 1048, 1050 (8th Cir. 1998)). Further “any claim whose resolution is substantially dependent upon or ‘inextricably intertwined’ with interpretation of the terms of such an agreement.” *Trustees of the Twin City Bricklayers v. Superior Waterproofing, Inc.*, 450 F.3d 324, 330 (8th Cir. 2006) (quoting *Allis-Chalmers Corp.*, 471 U.S. at 213). However, “[a]n otherwise independent claim will not be preempted if the CBA need only be consulted during its adjudication. *Id.* (citing *Livadas v. Bradshaw*, 512 U.S. 107, 124-25 (1994)). “[E]ven if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state-law, on the other, would require addressing the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is “independent” of the agreement for § 301 pre-emption purposes.” *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 409-10 (1988).

The court in *Trustees of Twin City Bricklayers* found that state law tort claims by an employee were preempted by § 301 of the LMRA because the claims could not be resolved without interpreting the CBA. 450 F.3d at 331. The court found that the claims against the company for fraudulent misrepresentation were entwined with the CBA because in order for these claims to be successful the plaintiff must have justifiably relied on the defendant’s statements, the statements in question were made in the CBA. *Id.* In order for the plaintiff’s

reliance to be justifiable under state law, the CBA must have been written in ambiguous legal language, and in order to find the language ambiguous, the court would have to interpret the CBA. *Id.* Further in *Allis-Chalmers Corp.*, this court rejected the Wisconsin Supreme Court's argument that a bad-faith tort claim could be executed independently of contract interpretation. 471 U.S. at 214. This court found that the tort exists for breach of a duty, which is proscribed by the contract. *Id.*

The facts at hand require that § 301 be applied in a manner similar to how it has been applied in *Trustees of Twin City Bricklayers* and *Allis-Chalmers Corp.* In this case, the cause of action is based on the argument that the CBA does not meet the minimum requirements set forth by the DATWA. The "DATWA commands courts to analyze and interpret the twenty-seven pages of the Policy so that it can meaningfully compare them to the numerous requirements in DATWA's twenty-four separate subdivisions". *Wilson*, No. 09-AC-0213 at 11. The likelihood of a court being able to do such a comparison without interpreting a single provision of the CBA is minute. The way the court would have to look at the CBA in this case is analogous to the interpretation that the courts did in *Allis-Chalmers Corp.* and *Twin City Bricklayers*, just like in those cases the court is required to look at the CBA and decipher what certain terms mean and how they apply in order to decipher whether or not it applies with the DATWA.

It is important to note that the aforementioned comparison between the DATWA and the CBA must occur regardless of the fact that the drug directly at issue in the case Clomiphene is not a listed drug in the DATWA. *See id.* at 1; Minn. Stat. 152.01 (2009). The claim does not merely apply to the drug in question; rather, the claim is that the policy generally violates the DATWA. *Wilson*, No. 09-AC-0213 at 5. This distinction requires the court more thoroughly

contrast the terms of the CBA with the DATWA because steroids is a substance banned by the CBA, and is also listed as a controlled substance by the DATWA. *Id.* at 8; Minn. Stat. § 152.02, subdiv. 3(6) (2009). The fact that steroids are listed under the CBA and DATWA requires that the CBA's treatment of the drug comply with the required minimums laid out by the DATWA, which would in turn require a court to interpret the drugs treatment under the CBA to see if it complies with the required minimum treatment expressed in the DATWA.

In contrast, the court in *Bogan* found that § 301 did not preempt the state tort law claim for intentional infliction of emotional distress. 500 F.3d at 833. The court found that although it can be argued that the CBA be addressed in deciphering whether GM should be liable for the tortious conduct of their employee, this does not make the terms of the labor contract so intertwined with the state law claim so as to allow for preemption. *Id.* The court found that “it is not enough that the events in the workplace or that a CBA creates rights and duties similar or identical to those on which the state law claim is based.” *Id.* (quoting *Meyer*, 163 F.3d at 1051). This court found similarly in *Lingle* where it held that the state law tort of retaliatory discharge is independent of the CBA so that §301 preemption would not apply. 486 U.S. at 407. The court in this decision reasoned that none of the elements for this cause of action require that the court interpret any term in the collective bargaining agreement. *Id.* The court cautions against sweeping application of this decision stating that “if a law applied to all state workers but required, at least certain instances, collective-bargaining agreement interpretation, the application of the law in those instances would be preempted.” *Id.*

The facts here distinguish this case from both *Bogan* and *Lingle*. The law in this case requires that the court take a more in depth look at the contract provisions than the law in *Bogan*. Here, the DATWA requires that the court look to the CBA to determine whether the CBA

complies with the statute. *Wilson*, No. 09-AC-0213 at 5. The reasoning behind the *Bogan* decision is further inapplicable here, because even though here the CBA creates rights and duties similar to those on which the state law claim is based, these rights and duties do not create a separate cause of action, they remain the subject of the current cause of action.

The facts of this case also demand that the reasoning behind the court's decision in *Lingle* not apply here. In fact the court in *Lingle* is careful not to apply its decision to the citation here, and expressly state that their decision would not apply in this situation. The DATWA is a law applicable to all workers of the state of Minnesota, however, unlike the law in *Lingle* the DATWA requires that the courts look at the terms of individual CBA's to decipher compliance. *Id.* The difference between the facts of this case and *Lingle*, is that even though the DATWA and the CBA prohibit drug use, a cause of action that has arisen under DATWA cannot be litigated without the terms of the CBA being at issue. *Id.* Under this rationale, the court should not follow the same reasoning as the court in *Lingle*.

D. The Court Should Reverse the Decision of the Lower Court Because In Applying State Law to the Interpretation of the CBA the Court is Creating a System Where Labor Law as Well as Restrictions on Drug use For Players of MLB are not Uniform.

“[T]he ‘dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute [so that] issues raised in suits of a kind covered by § 301 [are] to be decided according to the precepts of federal labor policy.’”

Allis-Chalmers Corp., 471 U.S. at 209 (quoting *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962)). “[I]n enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules.” *Id.* at 209-10. “The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote

industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy.” *Local 174*, 369 U.S. at 104.

Preemption under § 301 exists to support the policy that the federal government should uniformly interpret CBAs. The theory is that if states were given the ability to interpret CBAs there would be as many rules as there are states, and it would be difficult for workers to know what interpretation the state they are working in are going to use, thus disrupting their ability to freely contract. Congress enacted § 301 in order to create a system where any dispute interpreting a CBA would be preempted by federal law, thus allowing each interpretation to occur under uniform federal law. It is public policy requiring a uniform federal labor policy which necessitates the § 301 preemption doctrine.

This case is indicative of this policy in that it exemplifies how the uneven interpretation of a CBA can be destructive to a uniform labor policy. The application of Minnesota law in this situation leaves a disparity between those who happen to be employed by MLB in Minnesota, and those who happen not to be, to the point where the employees in Minnesota may not be subject to the same drug testing laws that those outside the state. In this case four players who live outside Minnesota remain suspended, where state law would allow one player to avoid such a suspension. *Wilson*, No. 09-AC-0213 at 5. This disparity in treatment is even more troubling given the competitive nature of Major League Baseball. The effect that allowing a player who has ingested a banned substance would have on the sport to continue playing because of state law would cause irreparable harm to the sport. States wishing to have more successful Baseball teams would need merely to enact similar laws allowing players to continue playing in their state who had ingested performance enhancing substances. The effect that a better playing team has

on a state's economy is inspiration enough to cause a nationwide race to the bottom, finding the state with the lowest standards for bargaining agreement interpretation with the more chemically enhanced team. For this reason the competitive nature is a great exemplifier as to the reasoning behind the creation of § 301, as well as the need for a uniform system of CBA interpretation. The same public policy concerns which necessitated the creation of § 301 require that it be applied in this case. The effects of allowing states to interpret CBAs in MLB have on the health of the players and the fairness of the sport, require that the CBA be uniformly applied.

Point II

THE COURT SHOULD REVERSE THE DECISION OF THE LOWER COURT WHICH SET ASIDE THE ARBITRATORS AWARD SUSPENDING KEVIN WILSON FOR FIFTEEN GAMES, BECAUSE THE DECISION OF THE ARBITRATOR DOES NOT RUN COUNTER TO A WELL DEFINED PUBLIC POLICY.

“[A] federal court may not overrule an arbitrator's decision simply because the court believes its own interpretation of the contract would be the better one.” *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum and Plastic Workers of Am.*, 461 U.S. 757, 764 (1983) (quoting *Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 596 (1960)). “If the contract . . . violates some explicit public policy [the court] is obligated to refrain from enforcing it.” *Id.* at 766. “Such a public policy, must be well defined and dominant and is to be ascertained ‘by reference to the laws and legal precedents and not from general considerations of supposed public interests.’” *Id.* (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)). “An arbitrator's result may be wrong; it may appear unsupported; it may appear poorly reasoned; it may appear foolish, yet it may not be subject to court interference.” *Delta Air Lines, Inc. v. Air Line Pilots Ass'n Int'l*, 861 F.2d 665, 670 (11th Cir. 1988).

This court should reverse the decision of the lower court because there is no fiduciary duty created by the CBA or the relationship between the parties, and further there is no public policy which would allow the court to overturn the arbitrator's interpretation of the CBA.

A. The CBA does not Create a Fiduciary Relationship Between the Hotline Operators and Kevin Wilson, nor is such a Relationship Created by the Interactions Between the Parties, Because There is no Public Policy Against the Arbitrator's Finding That the CBA does not Create a Fiduciary Relationship, and no Proof is Given that the Parties Acted in a way to Create such a Relationship in the Past.

“Under New York Law, ‘[a] fiduciary relation exists between two persons when one of them is under a duty to act or to give advice for the benefit of the other upon matters within the scope of the relation.’” *Lumbermens Mut. Cas. Co. v. Franey Muha Alliant Ins. Serv.*, 388 F. Supp. 2d 292, 305 (S.D.N.Y. 2005) (quoting *Bank of Am. Corp. v. Lemgruber*, 385 F. Supp. 2d 200, 205 (S.D.N.Y. 2005)). “The ‘ongoing conduct between parties’ must be considered in order to assess, for example ‘whether a party reposed confidence in another and reasonably relied on the other’s superior expertise or knowledge.’” *United Feature Syndicate Inc. v. Miller Features Syndicate*, 216 F. Supp. 2d 198, 218 (S.D.N.Y. 2002) (quoting *Wiener v. Lazard Freres & Co.*, 672 N.Y.S.2d 8, 14 (1st Dep’t 1998)). “[I]t is not mandatory that a fiduciary relationship be formalized in writing [r]ather the ‘ongoing conduct between the parties’ must be considered in order to assess, for example, ‘whether a party reposed confidence in another and reasonably relied on the other’s superior expertise or knowledge.’” *Id.* at 218 (quoting *Wiener*, 672 N.Y.S.2d at 14). “In the case of an omission, the duty to disclose generally ‘arises when one party has information that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.’” *Grandon v. Merrill Lynch & Co. Inc.*, 147 F.3d 184, 189 (2nd. Cir. 1998) (citing *Charella v. U.S.*, 445 U.S. 222, 228 (1980)). “The ongoing conduct between parties may give rise to a fiduciary relationship that will be recognized

by the courts.” *Lumbermens*, 388 F.Supp.2d at 305 (quoting *Sergeants Benevolent Ass’n Annuity Fund v. Renck*, 796 N.Y.S.2d 77, 79 (1st Dep’t 2005)).

The arbitrators decision on whether the contract creates a fiduciary duty is the bargained for interpretation of the contract. “[T]he arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract.” *United Paperworkers Int’l Union, AFL- CIO v. Misco Inc.*, 484 U.S. 29, 38 (1987). “[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed a serious error does not suffice to overturn his decision.” *Id.* at 38. “An arbitrator’s award draws its essence from the [parties’ agreement] as long as it is derived from the agreement, viewed in light of its language, its context and any other indicia of the parties intention.” *Stark v. Sandberg, Phoenix & von Gontard P.C.*, 381 F.3d 793, 799 (8th Cir. 2004).

The arbitrator’s interpretation of the contract cannot be adjusted by the lower court in regards to whether the contract expressly creates a fiduciary relationship between the parties. The only way that the arbitrator’s decision can be overturned is if public policy is shown to require that the contract as written create a fiduciary duty. The district court does not bring forth any law or precedent which would support the assumption that the words of the CBA necessitate the existence of a fiduciary duty, therefore the arbitrator’s finding on this matter must stand.

The District Court in *Lumbermens* found the existence of a fiduciary duty where the parties “had an on-going relationship that may be construed as one of trust and confidence.” 388 F. Supp. 2d at 305. The District Court based its decision on a contractual relationship which crossed five years and had two agreements which specifically laid out the responsibility of each

side of the contract. *Id.* The Lumbermens Agency agreement provided in part that “defendant’s were required to ‘refer to the company’ for express approval (or rejection) by plaintiff for any and all types of bonds prior to writing or issuing a bond on plaintiff’s behalf [the] [a]greement did not authorize defendants to bind plaintiff on such a transaction without plaintiff’s express acceptance and consent. *Id.* at 296. The defendants broke this provision and thus their fiduciary duty with the plaintiff when they wrote a bond against the plaintiff’s direct objections. *Id.* at 298-99.

The facts of the case at hand are distinguishable from the facts in *Lumbermens*, because in this case the relationship between the parties is one that leaves the player responsible for anything that is in their bodies, stating that “[u]sing the Hotline will not excuse a positive test result.” *Wilson*, No. 09-AC-0213 at 9. Unlike the facts of *Lumbermens*, the contract between the parties does not require that Dr. Larson, Dr. Finkle and Andrew Birch to specifically advise the MLB players that a product contains a banned substance, leaving the players the “opportunity to contact the Hotline to obtain ‘confidential and accurate information’ about certain over-the-counter products, including their ingredients, effects, and adverse reactions.” *Id.* This provision of the contract, and thus the contractual obligations of MLB remain unaffected by the actions of the Hotline operators.

The actions of either party do not create a fiduciary duty outside of the contractual obligations of the parties. Unlike *Lumbermens* there is no proof of a relationship where Kevin Wilson would receive information about every commercial product known by MLB to contain banned substances from the Hotline operators. In fact the CBA does not require anything but that the Hotline exist in order to allow players to obtain information about these products. *Id.* at 2. Further, Dr. Larson testified that he took positive steps to prevent the creation of a fiduciary

relationship when he did not specifically disclose the precise of the banned substance in SpeedShot because he feared that the players would come to expect him to openly disclose the existence of other banned substances in the future. *Wilson*, No. 09-2108 at 14. Dr. Larson's unwillingness to create a relationship where he would disclose without prompting any product that he knows to contain a banned substance further indicates that the dealings between the parties do not create a fiduciary relationship.

B. The Court Should Reverse the Decision of the Lower Court Setting Aside the Arbitrator's Decision Because of Concern for the Health of the Players Because the Lower Court Offers no Proof that Public Policy Supports Their Decision, and Because Cases Discussing a Public Policy Regarding Health Only Discuss the Health of the General Public and not an Individual.

In order to overturn an arbitrator's decision for public policy reasons, the policy in question "must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests. *W.R. Grace*, 461 U.S. at 766. A long line of cases address the ability of the court to overturn arbitrator's decisions reinstating employees where the actions of the employee endangered the health of others. *See Delta Airlines*, 861 F.2d at 674 (holding that the arbitrator's decision to reinstate an airline pilot who was discharged for drinking while flying a plane was against public policy); *Iowa Elec. Light & Power Co. v. Local Union 204 of Int'l Bd. of Elec. Workers (AFL-CIO)*, 834 F.2d 1424 (8th Cir. 1987) (holding that the arbitrator's decision to reinstate an employee who disabled the safety features of a nuclear power plant is against public policy). The court in *Iowa Electric Light & Power Co.* stated that their decision was "in keeping with the line of cases vacating arbitrators' awards that direct the reinstatement of employees whose deliberate acts have jeopardized public health or safety." *Iowa Elec. Light & Power Co.*, 834

F.2d at 1428. The court goes on to state that “labor awards directing the reinstatement of employees whose acts posed no danger to public health or safety are usually upheld.” *Id.*

In *Iowa Electric Light & Power Co.*, the court found that reinstatement of a worker who deliberately disengaged the safety features of a nuclear power plant in order to beat the noon lunch crowd was against public policy. *Id.* at 1426. The court found that the arbitrator’s decision to reinstate the employee was against a well established public policy “concerning strict compliance with safety regulations at nuclear facilities.” *Id.* When deactivating the safety features of the nuclear power plant the court found that the employee “broke a safety rule that was put in place pursuant to a strict regulatory scheme devised by Congress for the protection of the public from the hazards of nuclear radiation.” *Id.* at 1428.

The court in *Ace Electrical Contractors, Inc. v. International Brotherhood of Electrical Workers, Local Union No. 292* found that there was no “well defined and dominant” public policy against a CBA requiring a ratio system for age distribution. 414 F.3d 896, 898 (8th Cir. 2005). The court looked to statutes, and congressional intent on the matter in question, and found that the law in this area was more ambiguous than the public policy present in *Iowa Electric Light & Power*. *Id.* at 907.

The facts of this case, like those in *Ace Electrical Contractors, Inc.* are distinguished from *Iowa Electric Light & Power*. In this case the actions of MLB not the suspended employee are the ones that the court claims are causing the health problem. This difference is greatly important because the arbitrator’s decision does not condone the harmful action of the Hotline operators, but instead punishes the wrongdoing of Kevin Wilson, as provided in the contract. It would be difficult to conclude that Wilson’s wrongdoing should be excused under the public policy claim that ingesting SpeedShot is dangerous, when he was the one who decided to take

the product. Further the product in question SpeedShot is available for consumption by the general population; the agreement states that Clomiphene is a prohibited substance in order to prevent players from gaining artificial advantages that “threaten to distort the results of the game and League standings.” *Wilson*, 09-AC-0213 at 8. The Hotline operators are not the last line of defense in preventing consumption of banned substances the CBA repeatedly states that “[p]layers are responsible for what is in their bodies.” *Id.* It is hard to imagine how the ingestion of a product which is sold to the general population by a single individual, is a great danger to society.

The lower court offers no proof of a well defined and dominant policy requiring that the arbitrator’s decision be overturned. This case is distinguishable from *Iowa Electric Light & Power* and comparable to *Ace Electrical Contractors, Inc.* in that the public policy in this area is vague, and does not rise to the level necessary to overturn an arbitrator’s decision. The DATWA, merely outlines the procedure for drug testing in the work place, it does not describe a situation where an employer should be responsible for the ingestion, by an employee of a banned substance, which is not illegal. *See* Minn. Stat. § 181.955 (2009). In fact laws addressing legal drug use by athletes do not exist, to the point that the Court in *Walton Floyd v. The United States Olympic Committee* states “[t]here can be few less suitable bodies than the federal courts for determining the eligibility, or the procedures for determining eligibility, of athletes to participate in the Olympic Games.” 965 S.W.2d 35, 38 (Tex. App. 1998) (quoting *Michels v. U.S. Olympic Comm.*, 741 F.2d 155, 158 (7th Cir. 1984)).

C. Public Policy Demands That The Arbitrator’s Decision Be Affirmed By The Court, Because Of Concerns For Fairness In MLB.

If a policy is to be violated, it would appear to be violated by the lower court's decision, and the arbitrator's. Regardless of the labor issues involved in professional baseball, it is at its core a sports league. What an athlete can ingest and the rules following the choice to ingest these products, is best decided by the contract negotiations of these athletes, including the bargained for interpretations of the arbitrator. Therefore, in these situations the court should give deference to the bargained for agreement, and the arbitrator as required by law. In doing so the court would allow the league to decide what is fair, and what punishment breaking a rule requires. By overturning the decision of the arbitrator in this situation the court not only prevents the application of the bargained for punishment, but also allows a player to continue to play regardless of the Clomiphene in his system, disrupting the over all fairness of the game. The lower court would create a policy where the courts are responsible for deciding what is fair within the game of baseball, and this is not the role of the court.

CONCLUSION

For the aforementioned reasons this court should reverse the decision of the lower court.