

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 to the United States
Court of Appeals for the Fourteenth Circuit

BRIEF OF RESPONDENT

Team Number 12

January 10, 2010

Counsel for Respondent

QUESTIONS PRESENTED

Whether the court of appeals correctly held that a Major League Baseball player's claims under Minnesota's Drug and Alcohol Testing in the Workplace Act challenging a suspension under a collectively bargained for drug policy are not preempted by Section 301 of the Labor Management Relations Act.

Whether the court of appeals was correct in setting aside an 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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INTRODUCTION

This case involves a dispute over the preemptive powers of § 301 of the federal Labor Management Relations Act, 29 U.S.C. § 185 (hereinafter “Section 301” or § 301), with respect to the Minnesota Drug and Alcohol in the Workplace Act, Minn. Stat §§ 181.950 et seq. (hereinafter “DATWA”). Section 301 creates federal jurisdiction for disputes arising from collectively bargained for employment agreements. It was enacted by Congress to provide a uniform body of federal common law to regulate the interpretation of collective bargaining agreements. DATWA sets forth minimum standards for workplace drug and alcohol testing policies. DATWA does not limit parties’ ability to collectively bargain for drug policies with employment agreements—so as long as the policies meet the minimum standards.

The interests of Major League Baseball (the “League”), member players of the Major League Baseball Association (the “Union”) and the State of Minnesota converge on the contentious topic of banned substances. The League and the Union share the goal of maintaining an entertainment product where teams, players and fans can take pride in the athletic endeavors of America’s favorite pastime. In order to regulate this pastime and ensure players achieve their athletic goals while maintaining the purity of the sport, the League and the Union collectively bargained to create the MLB Policy on Anabolic Steroids and Related Substances (the “Policy”). Both the League and the Union agree that the regulation of anabolic steroids is necessary.

The State of Minnesota’s strong interest in this dispute arises from its sovereign right to protect the rights, health, and safety of employees residing in the state. The State ensures that health and safety conditions of private employers are fairly administered by granting minimum substantive rights to all employees working in Minnesota.

STATEMENT OF THE CASE

A. The Policy

The Respondent, Kevin Wilson, a player for the Minnesota Twins and member of the Union is bound by a collective bargaining agreement (“CBA”) created between the League and the Union. Wilson v. Major League Baseball, No. 09-AC-0213, slip op. at 1 (S.D. Tul. 2009) (hereinafter “Wilson I”). The CBA incorporated the Policy prohibits use of banned substances such as Clomiphene, by all players. Id. The Policy adopts a strict liability approach: players who test positive for any banned substances will not be excused because a player was unaware he was taking a prohibited substance. Id.

Dr. John Larson, a licensed physician, administers the Policy. Id. at 2. As the Independent Administrator of the Policy, Dr. Larson is also responsible for providing players with continuing education about banned substances. Id. Dr. Ray Finkle is the “Consulting Toxicologist” for the Policy. Id.

The Policy also creates the MLB Supplement Hotline (the “Hotline”). Id. The Hotline is a resource for players to obtain confidential and accurate information about products—including their ingredients, effects, and potential adverse reactions. Id.

B. Banned Substance Clomiphene in SpeedShot.

In 2007, the League, and Dr. Larson conclusively learned that the banned substance Clomiphene was present in the energy supplement SpeedShot. Id. at 3. Dr. Ray Finkle confirmed that Clomiphene was present in SpeedShot, even though it was not listed as an ingredient in the supplement. Id. Against Dr. Finkle’s warnings, Larson decided not to inform players about the presence of Clomiphene in SpeedShot. Id. Instead, the League issued a statement to the Union that players were prohibited from doing business with that Mega Energy Products, the distributor

of SpeedShot. Id. The Union, in turn, communicated to the players that the company that “distributes SpeedShot has been added to the list of prohibited energy-boosting supplement companies,” and therefore “players are prohibited from endorsing any of their products.” Id. Larson also issued a generic memo reiterating the dangers of energy-boosting supplements and the strict liability rule of the Policy. Id. The League or Dr. Larson never informed the players or the Union that the banned substance Clomiphene was in SpeedShot. Id. at 4.

Because Wilson was not accurately informed about the presence of Clomiphene by the League or Dr. Larson, as promised by the Policy, he took SpeedShot and subsequently tested positive for Clomiphene. Id. Pursuant the Policy, Wilson was suspended for fifteen games. Id. Wilson and the Union appealed his suspension to a neutral arbitrator in accordance with the dispute resolution provision of the Policy. Id. In spite of the fact that the League and Dr. Larson owed Wilson and every other member of the Union a fiduciary duty to disclose the presence of Clomiphene in SpeedShot, the arbitrator found the strict liability rule of the Policy to be dispositive. Id. at 5.

C. Course of Proceedings and Disposition Below

Wilson and the Union filed suit against the League in Minnesota state court asserting that the Policy violates DATWA. Id. The Minnesota court granted an injunction against the arbitration award and a restraining order barring Wilson’s fifteen-game suspension. Id. The League removed the case to federal court and argued that § 301 preempts Wilson’s DATWA claim. Id.

The district court granted the League’s Motion for Summary Judgment, finding that § 301 preempted the DATWA claim. Id. at 6. The district court also upheld Wilson’s suspension,

finding that the League did not owe the players a fiduciary duty and therefore the arbitration award did not violate public policy. Id.

Wilson and the Union appealed the district court's decision in the Fourteenth Circuit Court of Appeals. Id. The Court of Appeals found that § 301 did not preempt the DATWA claim, and that the arbitrator's award violated public policy by sanctioning the League's breach of fiduciary duty to the players. Id. For these reasons, the court of appeals reversed the district court's rulings.

SUMMARY OF THE ARGUMENT

Section 301 of the LMRA gives federal courts the power to fashion a body of common labor law. It does not take away individual states' ability to create their own laws regulating employment rights and conditions. Only when the state labor right arises from the CBA, and is thereby "substantially dependent" upon the CBA and requires interpretation of the CBA, does § 301 preempt a state claim.

Minnesota's Drug and Alcohol Testing in the Workplace Act imparts to employees nonnegotiable labor rights. It sets a minimum standard of protection and requires employers to comply with the regulations if they wish to subject employees to drug testing. Wilson's DATWA claim does not require the court to construe the CBA or interpret any term therein. On its face, the CBA does not meet the requirements of DATWA. The League cannot contract around nonnegotiable state rights. The League is attempting to give its CBA a force of law greater than that granted to the states by arguing that § 301 preempts Wilson's DATWA claim. Common sense dictates that the League cannot create contracts that eviscerate a state's sovereign right to create laws, which protect its employees.

Similarly, the League cannot hide behind the strict liability rule of the Policy as a means of defending its breach of fiduciary duty. Dr. Larson's non-disclosure of Clomiphene in SpeedShot violates not only his contractual obligation to the players, but offends centuries of common law. Fiduciary relationships obligate the party with superior knowledge to disclose all pertinent information to the party depending on his expertise. Parties need to be able to depend on fiduciary relationships without fear that an entity, such as the League will be able to induce confidence and then escape its fiduciary obligations. The arbitration award should be vacated because it ignores the League's breach of its fiduciary duty and in doing so undermines established public policy.

ARGUMENT

I. THE COURT SHOULD AFFIRM THE COURT OF APPEALS' RULING THAT CLAIMS UNDER MINNESOTA'S DRUG AND ALCOHOL TESTING IN THE WORKPLACE ACT CHALLENGING A DISCIPLINARY ACTION PURSUANT TO A COLLECTIVELY BARGAINED FOR DRUG POLICY ARE NOT PREEMPTED BY SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT.

Section 301 of the Labor Management Relations Act creates federal jurisdiction for lawsuits arising out of collectively bargained for labor contracts:

Suits for violation of contracts between an employer 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, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (2006). The law is well established that collectively bargained labor agreements must be interpreted under the principles of federal employment law, and incompatible doctrines of state and local laws must give way. Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 102 (1962); see also Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957) (authorizing the federal courts to fashion a body of federal labor law from the policy animating our national labor laws). In order for national employers to effectively contract across the nation, they need the certainty guaranteed by federal law. Local 174, Teamsters, 369 U.S. at 103. It is accepted policy that collectively bargained agreements should be uniformly applied. See id. (reasoning that the subject matter of § 301(a) calls for uniform law). Without the certainty guaranteed by one body of laws, the potential for different meanings under the same contract creates a disruptive influence in interstate commerce. Id. Thus, the Court has interpreted § 301 to hold that the substantive principles of federal labor law are supreme over state labor laws for claims arising from the breach of the collectively bargained agreement. Id. at 102.

It is undisputed that this Court has held that *all contract* claims arising from the breach of CBAs are to be interpreted using federal labor laws. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 209 (1985) (emphasis added). But, this Court has limited that holding: only state-law rights and obligations that exist because of the CBA are preempted by § 301. Id. at 213. Thus, only state-law claims that are “substantially dependent” upon analysis of the collective bargaining agreement must be brought under § 301. Id. at 220. In other words, if the legal character of the state-law claim is independent from the CBA, the state-law claim is not preempted. A state-law claim is independent if the claim does not require the interpretation of a CBA. Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 407 (1988).

Courts should exercise caution which preempting state-law claims because the establishment of labor standards is a traditional police power of the state. Id. at 412; see also Livadas v. Bradshaw, 512 U.S. 107, 123 (1994) (explaining that § 301 cannot be read broadly to preempt nonnegotiable rights conferred on individual employees as state-granted right). Thus, in order for the Court to reverse the court of appeals and grant the League’s Motion for Summary Judgment, the League must show that Wilson’s state-law claim is substantially dependent on the interpretation of the collectively bargained policy. Because the League is unable to show that Wilson’s claim under Minnesota law is substantially dependent on the collective bargaining agreement, the Court should affirm the ruling of the court of appeals.

A. When a state-law claim is independent of, and not substantially dependent on the CBA, the state-law claim is not preempted by § 301

If the state-law claim can be resolved independently of the CBA, the state-law claim *is not* preempted by § 301; if the state-law claim cannot be resolved in such a manner, then the claim *is* preempted by § 301. Lingle, 486 U.S. at 407. Based on the rationale of § 301, it is firmly established that preemption can apply in more circumstances than just breach of contract claims.

Allis-Chalmers, 471 U.S. at 210 (“If the policies that animate § 301 are to be given their proper range . . . the pre-emptive effect of § 301 must extend beyond suits alleging contract violations.”).

To determine if the state-law claim is preempted, the Court must look to the claim itself. See, e.g., id. at 213 (explaining that the analysis must focus on the underlying state tort claim to see if the infringed right was nonnegotiable or was conferred by the collectively bargained agreement). On one hand, if the state-law claim is derived from a relationship created by the CBA, then the state-law claim is preempted because the claim is inextricably intertwined. Id. But, on the other hand, if a resolution of the state-law claim can be reached without construing the CBA, then the state-law claim is independent for the purpose of § 301 preemption analysis. Lingle, 486 U.S. at 407. And, even if the state-law claim and dispute resolution for a claim arising under the CBA would address the exact same set of facts, as long as the resolution of the state-law claim does not require interpreting the CBA the state-law claim is legally independent. Id. at 409-10.

Allis-Chalmers and Lingle highlight the differences between state-law claims that are substantially dependent and those that are independent. In Allis-Chalmers, the employee brought a state-law claim for a breach of good-faith obligation with respect to the payment of an insurance obligation. 471 U.S. at 206. The Court reasoned that the duty to make a payment for the insurance benefits was created by the CBA. Id. at 218 (“Because the right . . . is defined by the contractual obligation of good faith, any attempt to assess liability here inevitably will involve contract interpretation.”). The employer agreed to make insurance benefit payments as part of the CBA. Id. at 204. Without the mutual agreement, the employee would not have a cause of action to seek redress. See id. at 217. In this state-law claim for breach of good faith, the

examining court would have to interpret the CBA to establish the duty that was allegedly breached. See id. at 216-17. Consequently, the Court narrowly held that this specific state-law claim was substantially dependent on the interpretation of the CBA. Id. at 220. Unless brought under § 301, the employee’s claim was preempted. Id.

The Court, however, warned that Congress did not suggest that private collective bargaining agreements were intended to have the force of federal law. Id. at 211-12 (warning that not every dispute which tangentially relates to a collectively bargained labor contract is preempted by § 301). Section 301 does not give private parties the right to bargain around state labor laws that the parties disfavor. Id. at 212. Because labor regulation is a traditional state police power, parties cannot hide behind their collective bargaining agreements to avoid laws that proscribe conduct or establish rights that are independent from the labor contract. Id.; see also id. at 212 n. 7 (“[T]here is nothing in the NLRA . . . which expressly forecloses all state regulatory power with respect to those issues . . . that may be the subject of collective bargaining.”).

In Lingle, however, the employee brought a state-law claim for retaliatory discharge against her employer. 486 U.S. at 401. Unlike Allis-Chalmers, the Lingle Court explained that proving the claimed tort of retaliatory discharge does not depend on interpreting the terms of the CBA. Id. at 407. The Court acknowledged that the collectively bargained agreement may contain a term about retaliatory discharge, but that does not prevent an employee from exercising the substantive state right—even if the two claims would be resolved by analyzing the exact same set of facts. Id. at 409-10. The Court was explicit that the specific state-law claim for retaliatory discharge is a purely fact based inquiry that is not resolved by construing or interpreting the CBA. Id. at 410.

After Lingle, lower courts inconsistently applied meaning of “independent.” See Livadas, 512 U.S. at 124 n. 18. Thus, the Court reemphasized that § 301 “cannot be read broadly to preempt nonnegotiable rights conferred on individual employees as a matter of state law.” Id. at 123. The Court went further, explaining that a claim is independent of the CBA if the meaning of the contract term is not the subject of the dispute. Id. at 124 (“[W]hen the meaning of [the] contract term[] is not the subject of the dispute, the bare fact that the collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be [preempted].”). In a state-law claim, the CBA can be consulted throughout the course of litigation without the state-law claim being preempted, as long as the CBA is not being interpreted. Id. at 125.

B. Wilson’s DATWA Claim is independent of the collective bargaining agreement.

Wilson’s Drug and Alcohol Testing in the Workplace Act (“DATWA”) claim is independent of the collective bargaining agreement and is not preempted by federal labor law for three reasons: (1) DATWA applies to *every* employee in the state of Minnesota; (2) In order to prevail, the court does not have to interpret any provisions of the collective bargaining agreement; and (3) Wilson’s DATWA claim is not a disguised breach of contract claim.

First, DATWA guarantees all Minnesota employees a nonnegotiable right: employers “may not request or require an employee . . . to undergo drug and alcohol testing except as authorized [by DATWA].” Minn. Stat. § 181.951 subdiv. 1(a) (2009). Hence, all employees in Minnesota are guaranteed that they shall not be drug or alcohol tested, unless the employer meets a specific set of requirements. Id. § 181.951 subdiv. 1(b). The employee’s right to a minimum level of protection is not created by a labor contract, but is a state-granted right. At its heart, DATWA protects an employee’s rights.

DATWA on its face forbids the practice of testing employees. But if the employer wishes to drug and alcohol test an employee, the employer's testing practice must meet or exceed a minimum standard of employee protection established by DATWA. Id. § 181.951 subdiv. 1(b) ("An employer may not request or require . . . drug or alcohol testing unless the testing is done pursuant to a written drug and alcohol testing policy that contains the minimum information required [by DATWA]."). DATWA lists six specific requirements that all drug and alcohol testing policies must include:

- (1) Which employees are subject to the policy;
- (2) The circumstances under which an employee may be tested;
- (3) The right of an employee subject to the policy to refuse to take a test and the consequences for refusal;
- (4) Any potential disciplinary actions the employer may take based on a confirmatory test, which verifies the initial positive test result;
- (5) The right of an employee to explain a positive test result on a confirmatory test or to request and pay for a confirmatory retest; and
- (6) Any other appeal procedures that are available to the employee.

Id. § 181.952 subdiv. 1. If the employer does not meet the minimum requirements as required by DATWA, the statute gives employees a cause of action to seek relief. Id. § 181.956.

When DATWA was adopted, Minnesota contemplated the fact that parties may wish to agree to more sophisticated or elevated standards. Id. § 181.955. DATWA does not limit parties from negotiating other programs, so long as the minimum standards are met for employee protection. Id. § 181.955 subdiv. 2. Thus, parties in a CBA may agree to a drug and alcohol testing policy that is more protective of employee rights, but not less protective. An employee's minimum level of substantive protection is nonnegotiable and must be ensured.

Second, in this fact-specific DATWA claim, the Court does not have to interpret or construe any term of the League and the Union's CBA. The Court explained in Livadas that mere reference to the CBA is not the same as actually construing or interpreting a term of the

CBA. 512 U.S. at 124. The meaning of the term must be the subject of the dispute for the claim to be substantially dependent on the CBA, not just the bare fact that it was consulted. Id.

The court of appeals was correct in finding that to prove a DATWA claim the relevant analysis would be of the procedure that the League actually followed. Wilson v. Major League Baseball, No. 09-2108, slip op. at 7 (14th Cir. 2009) (hereinafter “Wilson II”). For an employee to prevail on a DATWA claim, the employee must show that the employer committed or proposed to commit a violation of DATWA. § 181.956. For example, if Wilson can show that when he was tested he was not allowed to take a confirmatory test before he was suspended, this would be an actual violation of DATWA. Another example would be if Wilson can show that he was unable to explain the positive test result on a confirmatory test. These are factual findings for the trier of fact, not an interpretation of the CBA.

The more difficult application of DATWA is when an employer proposes to commit a violation of DATWA. The best method for determining how the parties propose to act is with reference to the collectively bargained drug and alcohol testing policy. This fact patten is almost identical to Livadas.

In Livadas, the employee sought to recover damages for her employer’s willful withholding of composition when she was terminated; her cause of action arose under a state statute. 512 U.S. at 111, 113. There was not a dispute over what her wages were because they were clearly defined by her collectively bargained employment contract. Id. at 124. The Court agreed with a lower court that the most important document to consult to resolve the dispute was not the CBA, but a calendar. Id. The dispute, in fact, arose over when she was paid and whether or not the delay met the state-established standard for being willful. Id. at 125 (reasoning that the standard for “willful failure” was an issue entirely independent of the collectively bargained

agreement). The Court held that the reference to the collective bargaining agreement was not an interpretation because there was not a dispute about the compensation terms. Id.

Like Livadas, where the agreement established damages by reference, the League's Policy is the best evidence of how the League proposes to act. Most importantly, the League admits that its drug testing policy *does not* comply with standards set by DATWA. Wilson II, No. 09-2108, slip op. at 4 (emphasis added). The Policy adopts the standard of strict liability: if a banned substance is in a player's body, then the player is liable. Wilson I, No. 09-AC-0213, slip op. at 1. The Policy does not include the option for a player to provide an explanation for the reason that the substance is in his body because it adopts the standard of strict liability. The absence of this provision in the written policy is a violation of DATWA.

Also, it would be impossible for any court to construe or interpret a provision of the CBA if the provision does not exist in the first place. By not including any one of the provisions in the Policy, the League violated the rights of all its employees in Minnesota.

Third, Wilson's DATWA claim is not a disguised breach of contract claim. The Allis-Chalmers Court warned that most breach of contract claims could be disguised as other types of state-law claims. 471 U.S. at 219-220 (recognizing that the breach-of-good-faith tort claim was a breach of contract claim). Wilson's DATWA claim, however, is more like the retaliatory discharge claim in Lingle. The state in Lingle granted the employee a nonnegotiable right, which gave the employee a cause of action under state law, even though the CBA also gave the employee an avenue to pursue damages through arbitration under the contract. 486 U.S. at 409-10. The employee's suit was not preempted because it did not require interpretation of the CBA. Id.

The same logic applies to DATWA. The statute ensures that the minimum rights of the employee are protected. An employer and employee may agree to the protocol for drug and alcohol testing in the workplace, but if the agreement does not conform to *minimum* standards outlined in DATWA, the employee's nonnegotiable right has been violated. Under DATWA, the employee is the right holder, not the employer. The right of the employee is not created by the CBA—it is created by statute. This Court should reaffirm the Lingle Court: minimum substantive rights that are granted by state statute deserve different considerations; minimum labor standards do not impermissibly intrude into the realm of collective bargaining. 486 U.S. at 412. Preemption of state laws in these areas should not be lightly inferred. Id.

In total, because the state-law DATWA claim is based on the fact that (1) all employees in the state of Minnesota are guaranteed the substantive minimum protections, (2) the court does not need to interpret the CBA in order to resolve the DATWA claim, and (3) the DATWA claim is not a disguised breach of contract claim, the DATWA claim should not be preempted by § 301. This Court should adopt a bright-line rule that ensures the States' right to regulate their workplaces: If a state grants its employees minimum substantive rights by statute, then § 301 cannot be used to preempt a state-law claim—unless the resolution of the claim is absolutely dependent on a disputed interpretation of the collective bargaining agreement.

Applying the rule to Wilson's DATWA claim, this Court would affirm the court of appeals holding. Minnesota labor law guarantees a minimum level of protection to all employees. The right is granted by statute not by the CBA. The employee is the holder of the right, and the substantive right is nonnegotiable. Wilson must only show that the League did not comply with DATWA—a fact that the League has already conceded. Thus, this Court should affirm the court of appeals and allow Wilson's DATWA claim to proceed to trial.

C. Enforcing DATWA is not unduly burdensome on Interstate Commerce

Generally, the Commerce Clause proscribes the application of one state's statute to commerce that takes place wholly outside the borders of the state. Healy v. Beer Inst., 491 U.S. 324, 336-37 (1989). In other terms, the Commerce Clause protects all states from one state projecting its regulatory schemes into the jurisdiction of another. See id. at 337. The Court must analyze the effects of the state statute in terms of how the challenged statute interacts with regulatory regimes of the other states. Id. at 336.

If a state statute regulates even-handedly to effectuate a legitimate state interest and the effect on interstate commerce is merely incidental, the statute should be upheld. See generally Partee v. San Diego Chargers Football Co., 668 P.2d 674, 677 (Cal. 1983) (relying on Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970), and its progeny). A state statute, however, that imposes a burden on commerce that is "clearly excessive" with respect to the local benefits will not be upheld. Id. A burden imposed on interstate commerce is unreasonable where the state regulation substantially impedes the free flow of commerce from state to state or where the area of regulation is one of the "phases of the national commerce which, because of the need of national uniformity, demand their regulation, if any be prescribed by a single authority." Id. (quoting S. Pac. Co. v. Ariz., 325 U.S. 761, 767 (1945)). Accordingly, this Court should affirm the court of appeals on the grounds that DATWA does not substantially impede the free flow of commerce from state to state or govern a phase of commerce, which is traditionally governed by a single authority.

First, Minnesota has a strong interest in protecting Minnesota employees. The California Supreme Court's analysis in Partee provides a clear line of reasoning. In Partee, the court decided whether California antitrust laws were applicable of a National Football League player,

or whether federal antitrust laws preempted the application of California laws. Id. The court held that California did not have a strong interest in regulating monopolistic competition as compared to a state's interest when it relates to health and safety regulation. Id. at 678. The court reasoned that the state had a weak interest in antitrust regulation compared to the high impact on interstate commerce, and the statute could not be enforced because of the Commerce Clause. Id.

Unlike in Partee, DATWA does not attempt to regulate the flow of commerce. DATWA is a safeguard to protect employees. Regulation of the workplace is a traditional area of regulation for the states, and an area in which the states have a strong interest. Id.; cf. Lingle, 486 U.S. at 412 (emphasizing that the establishment of labor standards fall within the traditional police power of the State). Much like health and safety regulations, States have a strong interest in regulating their workplaces to ensure that employers do not prey on their employees. DATWA does not discriminate in favor of Minnesota's employee and place other states at a disadvantage. DATWA merely provides employees a *minimum* standard for drug and alcohol testing in the workplace.

Second, the Partee court also relied upon this Court's ruling in Flood v. Kuhn: that there is a policy for a national uniformity in the regulation of baseball's reserve system and the application of antitrust laws. Partee, 668 P.2d at 678 (citing Flood v. Kuhn, 407 U.S. 258, 284-85 (1972)). In Flood, the Court reluctantly followed prior precedent and explained that although the ruling was logically inconsistent with established antitrust laws, Congress's inaction had sanctioned baseball's antitrust exemption. Id.

The rationale of national regulation of professional baseball should be limited on its face to antitrust cases involving baseball alone. The dissent in Partee explains that professional sports enterprises are legally the same as any other business that is engaged in interstate commerce. 668

P.2d at 681 (Reynoso, J., dissenting). Because (1) states have strong interest in regulating conduct in the workplace, and (2) the fact that a professional sports team is a business—legally no different than the factory or the mom-and-pop bakery—if the team chooses to do business in the state, it must abide by the same rules and laws as any other business. Allowing the League to circumvent state laws that they disfavor not only extends beyond the bounds of the basic tenants of federalism, but also conflicts with the principles of Allis-Chalmers:

Nor is there any suggestion that Congress in adopting § 301, wished to give substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. Such a rule of law would delegate to unions and unionized employees the power to exempt themselves from whatever state labor standards they disfavored.

471 U.S. at 211-12.

Therefore, the court of appeals ruling that Wilson may proceed with his DATWA claim should be affirmed. Section 301 does not preempt the state-law claim because Wilson’s DATWA claim can be resolved without having to interpret the Policy. The Court should reject the League’s argument that public policy suggests that it should get preferential treatment with respect to local labor laws. Baseball is a business and should not be treated any differently than other businesses that are operating in Minnesota. Minnesota is protecting its employees from employers that are doing business in the state, a traditional police power of the states. The League should not be allowed to flout the law because it does not like the law.

II. THE ARBITRATION AWARD SHOULD BE VACATED BECAUSE IT SANCTIONS THE POLICY WHICH VIOLATES ESTABLISHED PUBLIC POLICY OF HOLDING FIDUCIARIES TO GOOD FAITH COMMUNICATION AND DISCLOSURE TO INDIVIDUALS UNDER THEIR CARE AND EXPERTISE

Courts have limited discretion in vacating arbitration awards. However, the court has a duty to vacate those arbitration awards, which egregiously violate established public policy. See, e.g., W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum, & Plastic Workers, 461 U.S. 757, 766 (1983); Delta Air Lines v. Air Line Pilot's Ass'n, 861 F.2d 665, 669 (11th Cir. 1988). The arbitration award sanctioning the League's breach of fiduciary duty is "so offensive" that it "properly results" in this Court "setting it aside." *Id.*

The League and Dr. Larson owe Wilson, and every member of the Union, a fiduciary duty to disclose all relevant information in their possession regarding the presence of banned substances in supplements. A fiduciary duty exists between two persons when one of the persons is under a duty to act for, or to give advice for, the benefit of the other upon matters within the scope of the relationship. United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc., 216 F. Supp. 2d 198, 218 (S.D.N.Y. 2002) (citing Restatement (Second) of Torts § 874 cmt. a). The exact scope of a fiduciary relationship is difficult to define, however one is found where "influence has been acquired and abused, in which confidence has been reposed and betrayed." *Id.* (quoting Penato v. George, 383 N.Y.S.2d 900, 904 (1976)). A factual inquiry is thereby necessary to determine the existence and scope of the fiduciary relationship.

The Policy creates, although not in writing, a fiduciary relationship because it demands the players' trust and confidence in the authority and expertise of the League and Dr. Larson. A fiduciary duty does not need to arise from a formal contract. *Id.* Rather, the Court must consider the circumstances of the ongoing conduct between parties. *Id.* For example, one circumstance to

consider is “whether a party reposed confidence in another and reasonably relied on the other’s superior expertise or knowledge.” Id. (quoting Wiener v. Lazard Freres & Co., 672 N.Y.S.2d 8, 14 (1998).)

The League and Dr. Larson breached their fiduciary duty to the members of the Union by knowingly failing to disclose the presence of Clomiphene in SpeedShot. In a fiduciary relationship, a duty to disclose generally arises when one party has information that the other party is entitled to know because the relationship. Grandon v. Merrill Lynch & Co., 147 F.3d 184, 189 (2d Cir. 1998). A doctor may not withhold information pertaining to the health of those within his care. To allow otherwise directly conflicts with centuries of established public policy. Doctors are held to one of the highest duties of care. Dr. Larson’s non-disclosure illustrates a complete disrespect for the health and safety implications of his actions. Cf. Iowa Elec. Light & Power Co. v. Local Union 204, 834 F.2d 1424, 1429 (8th Cir. 1987) (employee’s disregard of secondary containment regulations at a nuclear power plant so that he could go to lunch early demonstrated a lack of respect for the safety of the public). Because of overwhelming public policy concerns, this Court cannot condone the conduct of the League and Dr. Larson withholding vital information about banned substances.

A. Dr. Larson breached his fiduciary duty to the players by choosing not to disclose the presence of Clomiphene in SpeedShot.

The League, Dr. Larson, and the members of the Union, including Wilson, entered into a fiduciary relationship upon signing of the CBA, which incorporated the Policy. Public policy requires that as administrator of the Policy, Dr. Larson should be required to provide the players with any specific information he has regarding banned substances and supplements.

Specifically, the Policy guides players to adhere to the advice of Dr. Larson. Dr. Larson solicited the confidence of the players through the creation of the Hotline and subsequent

instructional memos. The players reasonably relied on Dr. Larson's expertise. And, even though the players are ultimately responsible for what is in their bodies, the players reasonably relied on the Hotline for guidance. This is evidenced by the fact that the players utilized the Hotline and reasonably believed that both sources provided honest and accurate information. These facts demonstrate a fiduciary relationship.

The Policy is not dispositive in determining the existence or scope of fiduciary duty. The fact-specific relationship between the parties establishes the existence and scope of the fiduciary duty. Lumbermens Mut. Cas. Co. v. Franey Muha Alliant Ins. Servs., 388 F. Supp. 2d 292, 305 (S.D.N.Y. 2005). In Lumbermens, even though the defendant was not a party to the contract by which the plaintiff incurred its losses, the defendant held itself out as an authority, which potentially created a fiduciary relationship. Id. at 306. As in Lumbermens, Dr. Larson created a fiduciary duty to the players when he held himself as their authority on banned substances and supplements. Dr. Larson's memos were issued with the intent that the players would rely on them. Hence, the players reasonably relied that Dr. Larson gave them all his relevant information that was accurate and current. The actions taken by both parties illustrate that both were keenly aware of the relationship, and relied on the mutual performance and trust inherent in the relationship.

The League and Dr. Larson breached their fiduciary duty to the members of the Union when they willingly failed to disclose the presence of Chlomiphene in SpeedShot. A duty to disclose information arises if there is a fiduciary relationship or one party has superior information not available to the other party. Callahan v. Callahan, 127 A.D.2d 298, 300 (N.Y. A.D. 1981) (explaining that an attorney breached his fiduciary duty to a non-client by not disclosing the true value a piece of real property because their past friendship demonstrated the

non-client had right to reasonably rely on the attorney's advice). It is not the existence of the Policy which gives rise to the duty to disclose in this case, it is the fact that the League and Dr. Larson held themselves as experts for the players to rely upon.

Because of the strong interest in public policy, this Court should adopt a "shingle theory" of liability. In Grandon, the Second Circuit Court of Appeals followed the Third and Sixth Circuit and adopted the theory in securities actions. See 147 F.3d at 192. The "shingle theory" says that a securities dealer had an implied duty to disclose merely "by hanging out its professional shingle." Id. Under this theory, the securities dealer breached his duty by not disclosing excessive markups of debt securities to clients. Id.

This Court should adopt the "shingle theory" for medical doctors as well. In this instance, Dr. Larson holds himself out as an expert in the area of banned substances. He has the expertise to know which products are dangerous and which products will get the players suspended under the Policy. Dr. Larson does not have a duty to disclose information that he does not reasonably have; but failing to disclose specific information that he does have not only violates public policy. Consequently, under any of the above theories, Dr. Larson's decision to omit an ingredient specific warning breached his fiduciary duty to the players.

This Court should decline to follow the reasoning in Walton-Floyd v. U.S. Olympic Comm., because the facts presented by each case are qualitatively different. 965 S.W.2d 35 (Tex. App. 1998). Unlike the present case, where there is fiduciary relationship between the parties, in Walton-Floyd a fiduciary relationship does not exist between the United States Olympic Committee ("USOC") and the athlete. Id. at 40. The athletes competing in events sanctioned by the USOC are not employees of the USOC or subject to a CBA where one party holds itself out to be the authority on banned substances.

Additionally, this is not a case of a “good faith” oversight. Here, Dr. Larson concedes to have conclusively known of the presence of Clomiphene in SpeedShot. Yet, he chose not to disclose this information. Because of his fiduciary duty to the members of the Union, the Policy should compel him to disclose the presence of Clomiphene in SpeedShot.

B. The arbitration award violates public policy by sanctioning the League and Dr. Larson conscious breach of fiduciary duty to the members of the Union.

Courts have a limited ability to vacate arbitration awards. A court may not vacate an award when the decision “draws its essence from the [CBA]” or the arbitration body does not exceed the scope of its authority. Ace Elec. Contractors, Inc. v. Int’l Bhd. of Elec. Workers, 414 F.3d 896, 899-900 (8th Cir. 2005). Despite the high level of deference given to arbitration awards courts, must vacate those awards that violate public policy. W.R. Grace & Co., 461 U.S. at 776 (“[A] court may not enforce a collective bargaining agreement that is contrary to public policy.”). The right to overturn an arbitration award is “rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy.” United Paperworkers Int’l Union v. Misco, Inc., 484 U.S. 29, 42 (1987) (hereinafter “United Paperworkers”); see also W.R. Grace & Co., 461 U.S. at 766. In order to overturn an arbitration awards on public policy grounds, the public policy must be to “explicit,” “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.” United Paperworkers, 484 U.S. at 43 (quoting W.R. Grace & Co., 461 U.S.757, 766). An award must “create an explicit conflict with other ‘laws and legal precedents.’” Id. (quoting W.R. Grace & Co., 461 U.S.757, 766).

In United Paperworkers an employee who operated hazardous machinery was discharged when police found him in a marijuana smoke-filled vehicle in the employer’s parking lot. Id., 484 U.S. at 29. The employee was covered by a CBA that provided binding arbitration as the

remedy for any dispute arising from employee discharge and discipline. Id. The arbitration resulted in the reinstatement of the employee. Id. The court of appeals erroneously vacated the arbitration on the grounds that “reinstatement would violate the public policy ‘against the operation of dangerous machinery by persons under the influence of drugs.’” Id. at 35. This court found that although a policy against operating hazardous machinery while under the influence of drugs is “rooted in common sense” it did not rise to the level of a “well-defined and dominant” public policy. Id. at 44.

Utilizing the standards set forth by this court in W.R. Grace, the Eleventh Circuit vacated an arbitration award that reinstated a pilot who had flown a commercial airliner while intoxicated. Delta Air Lines, Inc., 861 F.2d 665, 674. The court highlighted the prevalence of laws against flying while intoxicated to establish an “explicit” and “well defined and dominant” national policy against flying while intoxicated. Id. at 67 (listing roughly forty different state statutes, which prohibit flying while under the influence of alcohol).

Centuries of common law establish an “explicit,” “well-defined, and dominant” policy of holding fiduciaries to a good-faith performance of the duties inherent in their fiduciary relationship. As the administrator of the Policy, Dr. Larson’s position required him to provide players with honest and accurate information. Dr. Larson did not have discretion to withhold pertinent information, which the players relied upon to comply with the Policy.

Above and beyond Dr. Larson’s duties under the Policy, Dr. Larson is a medical doctor. It is the duty of his profession to provide medical advice and care for his patients to the best of his abilities. Any effort that falls short of this duty undermines his profession.

Dr. Larson’s testimony that if a player had asked him specifically about SpeedShot he would have informed the player that Chlomiphene was present in SpeedShot does not create a

defense to his violation of public policy. Conversely, his assertion only strengthens the fact that his actions under the Policy egregiously violate public policy. Upholding the arbitration award under these circumstances creates a proverbial slippery slope precedent whereby fiduciaries can avoid the very duties on which their profession is founded. This Court must affirm the lower court's ruling to vacate the arbitration award because the Policy violates public policy; failing to do so will create a dangerous shield for fiduciaries to hide behind.

CONCLUSION

Wilson's DATWA claim does not require interpretation of the CBA, nor is the claim "substantially dependent" on the CBA. Section 301 therefore does not preempt the state law claim asserted herein. Additionally, the arbitration award sanctioning Wilson's suspension violates public policy by allowing the League to disclaim and breach its fiduciary duty to the players. Accordingly, the decision of the court of appeals should be affirmed.