

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
Respondents

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

BRIEF FOR RESPONDENTS

TEAM NUMBER: 23

QUESTIONS PRESENTED

- I. 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.

- II. 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.

Table of Contents

Questions Presentedi

Table of Contents ii

Table of Authorities iii

Standard of Review.....1

Statement of the Case.....2

Summary of Argument4

Argument5

 Labor Management Relations Act5

 Drug And Alcohol Testing In the Workplace Act..... .6

 Major League Baseball’s Anabolic Steroid and Related Substances Policy7

 The Circuit Court’s Decision Should Be Upheld Because Wilson’s DATWA
 Claim Does Not Originate From the CBA nor Does It Require Interpretation
 Of The CBA and Is Therefore Not Preempted By the LMRA8

 The Arbitrator’s Findings are Against Public Policy and, Therefore, the
 Circuit Court Conclusions Must be Upheld13

 Review of Arbitration Awards13

 A Fiduciary Relationship Existed Between Dr. Larson and the
 Players of the MLB14

 The Breach Of The Fiduciary Duty Is Against Public Policy
 Because It Threatens The Health And Safety Of MLB Players
 And The General Public16

Conclusion19

TABLE OF AUTHORITIES

Cases

Allis-Chambers v. Lueck, 471 U.S. 202 (1985)5, 8, 11

Bogan v. General Motors Corp., 500 F.3d 832. (8th Cir. 2007)1, 10

Coca-Cola Bottling Co. of St. Louis v. Teamsters Local Union No. 688,
AFL-CIO, 959 F.2d 1438 (8th Cir. 1992).....13

Cramer v. Consolidated Freightways, Inc., 255 F.3d 683 (9th Cir. 2001)(en
banc).....9, 10

Crawford Group, Inc. v. Holekamp, 543 F.3d 971 (8th Cir. 2008)13

Delta Airlines, Inc. v. Air Line Pilots Ass’n, Int’l, 861 F.2d 665 (11th Cir. 1988)16

Eastern Associated Coal Corp. v. United Mine Workers of Am., Dist. 17,
531 U.S. 57 (2000)14, 16

Grandon v. Merrill Lynch & Co., 147 F.3d 184 (2d Cir. 1998)15

Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246 (1994)9

Healy v. Beer Institute, Inc., 491 U.S. 324, 336 (1989).....11

Hoffman v. Cargill, Inc., 236 F.3d 458 (8th Cir. 2001).....14

*Iowa Elec. Light and Power Co. v. Local Union 204 of the Int’l
Brotherhood of Elec. Workers*, 834 F.2d 1424 (8th Cir. 1987).....16

Leed Architectural Prods., Inc. v. United Steelworkers of Am., Local 6674,
916 F.2d 63 (2d Cir. 1990)).14

Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988)8, 9, 10

Lumbermans Mutual Casualty Co. v. Franey Muha Ins. Servs.,
388 F. Supp. 2d 292 (S.D.N.Y. 2005).....14

McLean v. Gordon, 548 F.3d 613 (8th Cir. 2008) 1

Midamerican Energy Co. v. Int’l Brotherhood of Elec. Workers Local 499,
345 F.3d 616 (8th Cir. 2003).....16

Muschany v. United States, 324 U.S. 49 (1945)17

<i>Stark v. Sandberg, Phoenix & Von Gontard, P.C.</i> , 381 F.3d 793 (8th Cir. 2004).....	14
<i>Textile Workers v. Lincoln Mills</i> , 353 U.S. 448 (1957)	5
<i>Trustees of the Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing, Inc.</i> , 450 F.3d 324 (8th Cir. 2006)	9
<i>United Feature Syndicate Inc. v. Miller Features Syndicate, Inc.</i> , 216 F.Supp.2d 198 (S.D.N.Y. 2002)	14, 15
<i>United Paperworkers Int’l Union v. Misco, Inc.</i> , 484 U.S. 29 (1987)	13, 14, 17
<i>Wiener v. Lazard Freres & Co.</i> , 241 A.D.2d 114 (1st Dep’t 1998)	15
Statutes	
9 U.S.C.A. § 10(a)(1)-(2) (2009)	13
Drug and Alcohol Testing in the Workplace Act, <i>Minn. Stat.</i> § 181.951(4) (2009)	7
Drug and Alcohol Testing in the Workplace Act, <i>Minn. Stat.</i> § 181.953 subdiv. 1 (2009)	6
Drug and Alcohol Testing in the Workplace Act, <i>Minn. Stat.</i> § 181.953 subdiv. 6(a)-(c) (2009)	6
Drug and Alcohol Testing in the Workplace Act, <i>Minn. Stat.</i> § 181.953 subdiv. 10(b)(1)-(2) (2009).....	6
Drug and Alcohol Testing in the Workplace Act, <i>Minn. Stat.</i> § 181.955 subdiv. 1 (2009)	7
Drug and Alcohol Testing in the Workplace Act, <i>Minn. Stat.</i> § 181.955 subdiv. 2 (2009)	7
Labor Management Relations Act, § 1(b), 29 U.S.C. § 141(b) (1947)	6
Labor Management Relations Act, § 201(a), 29 U.S.C. § 171(a) (1947)	6
Labor Management Relations Act, 29 U.S.C. § 185(a) (1947)	5

STANDARD OF REVIEW

The granting of summary judgment by the lower court is reviewed by the court *de novo*. *McLean v. Gordon*, 548 F.3d 613, 616 (8th Cir. 2008). Summary judgment is appropriate where “there is no genuine issue as to any material fact[.]” *Id.* The matter of preemption of the Drug and Alcohol Testing in the Workplace Act by Section 301 of the Labor Management Relations Act is also reviewed *de novo*. *Bogan v. General Motors Corp.*, 500 F.3d 828, 832 (8th Cir. 2007).

STATEMENT OF THE CASE

Kevin Wilson (hereinafter “Respondent”) is employed with the Minnesota Twins, L.L.C., and a member of the Major League Baseball Players Association (hereinafter “MLBPA”). Dist. Ct. Op. at 1-2. The Respondent was suspended for a total of fifteen games after he tested positive for Clomephine, a substance listed in Major League Baseball’s (hereinafter “MLB”) Anabolic Steroids and Related Substances (hereinafter “Policy”) as a banned substance. *Id.* at 4. The Respondent, along with five players not named in this suit who play for other MLB teams, had ingested Clomephine when using an energy-boosting product known as SpeedShot. *Id.* at 4.

In 2007, the MLB and the MLBPA entered into a Collective Bargaining Agreement (hereinafter “CBA”). *Id.* at 1. The CBA included, among other things, the above mentioned Policy. *Id.* at 1. The purpose and intent of the Policy was to stop the use of certain prohibited substances, including a variety of performance enhancing drugs, in order to preserve the fairness and integrity of the game of baseball. *Id.* at 1. Once the Policy was incorporated into the CBA its terms controlled in any dispute between all players who belonged to the MLBPA and played for the MLB. *Id.* at 1.

SpeedShot is an energy-boosting substance that claims to provide five hours worth of energy. *Id.* at. 3. The list of ingredients that Speedshot contains is listed on the packaging but fails to include Clomephine. *Id.* at. 3. Therefore, anyone taking Speedshot would be unaware he or she was ingesting Clomiphene unless informed by someone who had conducted testing on the product and was therefore aware of all of the ingredients it contains. In 2007, the MLB conducted tests such as these on various substances, including Speedshot, during which the MLB discovered Speedshot contained a small amount of Clomephine. *Id.* at. 3. Unaware that Speedshot contained the banned substance, the Respondent ingested the energy booster the morning of a scheduled preseason scrimmage. *Id.* at. 4. Later that day, he was asked to take a random drug test under the strict preseason testing requirements proscribed in the Policy. He subsequently returned a positive drug test and was suspended by the MLB. *Id.* at. 4.

The CBA requires the Respondent's suspension be appealed to a neutral arbitrator. *Id.* at. 2. After hearing both arguments, the arbitrator upheld the MLB's suspension of the Respondent. *Id.* at. 5. In reaching this decision, the arbitrator cited the Policy bargained for between the MLB and the MLBPA. *Id.* at. 5. Specifically, the arbitrator referred to the strict liability rule of the Policy and the lack of an express clause in the Policy which requires the MLB to issue warnings about specific products. *Id.* at. 5. The Policy states the players are held to a standard of strict liability: "players are responsible for what is in their bodies." *Id.* at. 1. Therefore, if a player returns a positive drug test, that player is subject to discipline regardless of whether or not he knew the product or food he ingested contained a banned substance. *Id.* at. 1.

During the arbitration, no weight was given to the omissions of licensed physicians who assist the MLB in the execution of the Policy. *Id.* at. 2. Dr. John Larson is the Independent Administrator of the Policy and is charged with its implementation and application to players

within the MLBPA. Id. at 2. Dr. Ray Finkle is a toxicologist who aids Dr. Larson in the determination of acceptable and non-acceptable substances to be used by the players. Id. at 2. Though not associated with the Major League Baseball Commissioner’s office or the MLB, the duties of Dr. Larson include “overseeing the drug-testing procedures under the policy, reporting any positive test results to the Commissioner for discipline, and *providing education to the players regarding the Policy’s implementation.*” Id. at 2. The MLB Supplement Hotline (hereinafter “Hotline”) was implemented under the Policy to aid Dr. Larson in answering questions concerning the use of certain substances from players, coaches, and trainers. Id. at 2. However, the Policy states that use of the Hotline by a player does not excuse the use of a prohibited substance under the standard of strict liability outlined in the Policy.¹ Id. at 2.

After testing SpeedShot and discovering the presence of Clomiphene, David Klein, the Director of the Sports Medicine Research Testing Laboratory, requested the information be given not only to the Food and Drug Administration but, more importantly, to the MLB players. Id. at 3. For reasons unknown, Dr. Larson and Andrew Birch, Vice President of Law and Labor Policy for the MLB, failed to follow the request of Mr. Klein. Id. at 3. Instead, Dr. Larson and the MLB sent only a broad warning to the MLBPA concerning the line of products produced by Mega Energy Products, the company who makes and sells SpeedShot. Id. at 3. Mega Energy Products was categorized by the MLB as a banned company “with which teams and players were prohibited from doing business.” Id. at 3. In the warning Dr. Larson explained that players should avoid using products which “claim to provide or boost energy” but gave no further explanation as to why this was important or the consequences of avoiding the warning. Id. at 3.

¹ We are unaware whether or not the Respondent attempted to use the Hotline to determine if Speedshot contained a banned substance or if the Respondent contacted Dr. Larson to ask the same question.

The MLBPA relayed this information simply by notifying players that the company which “distributes SpeedShot has been added to the list of prohibited energy-boosting supplement companies” and players should “*refrain from endorsing these products*”. Id. at 3. While players were informed of Mega Energy Product’s status of a banned company in terms of endorsements, the MLB players were never specifically told that SpeedShot contained Clomiphene or any other banned substance and should not be used. Id. at 3. The arbitrator found this fact to be immaterial, stating that “the Policy does not articulate or impose an obligation to issue specific warnings about specific products.” Id. at 5.

The Respondent filed suit in Minnesota state court under Minnesota’s Drug and Alcohol Testing in the Workplace Act (hereinafter “DATWA”) in reaction to the arbitration findings. Cir. Ct. Op. at 3. The MLB, Dr. Larson, Dr. Finkle and Andrew Birch were named as Defendants. Id. at 3. The suit was then moved to federal court by the MLB and was consolidated with the action brought by the MLBPA. Id. at 3. The MLBPA’s suit sought to vacate the arbitration awards under the Labor Management Relations Act (hereinafter “LMRA”). Id. at 3. The MLB moved for summary judgment claiming that the Respondent’s DATWA claims were preempted by § 301 of the LMRA and the arbitrator’s award was not against public policy and should be upheld. Id. at 3. The United States District Court for the Southern District of Tullahoma granted summary judgment in favor of the Defendants. Id. at 3. The United States Court of Appeals for the Fourteenth Circuit subsequently overruled the granting of summary judgment, finding in favor of the Respondent. Id. at 3.

SUMMARY OF ARGUMENT

The Circuit Court’s holding that the Respondent’s DATWA claim is not preempted by Section 301 of the LMRA should be upheld. His state law claim derives from a right he is

afforded under DATWA, not from the CBA he was a party to as a member of the MLBPA. Additionally, the DATWA claim does not rely on the CBA for interpretation but only refers to the CBA for facts and procedures used by the MLB. The Circuit Court's finding that the arbitration award is against public policy should also be upheld in order to preserve or improve the standards that protect the health and safety of MLB players. Although they preached a rule of strict liability, Dr. Larson and the MLB negated this rule when they assumed the responsibility of performing drug tests and established a Hotline the players could call for information relating to banned substances. Due to the hotline and Dr. Larson's attempts to educate the players, they relied on both Dr. Larson and the MLB. This reliance created a fiduciary duty owed by the MLB and Dr. Larson to the players. The breach of this fiduciary duty completely violates public policy and therefore should render the arbitrator's decision void.

ARGUMENT

I. THE LABOR MANAGEMENT RELATIONS ACT

Section 301 of the LMRA provides that "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." 29 U.S.C. § 185(a). Federal law governs the resolution of labor disputes under Section 301. *See Textiles Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957). Accordingly, "a suit in state court alleging a violation of a provision of a labor contract must be brought under § 301 and be resolved by reference to federal law." *Allis-Chambers v. Lueck*, 471 U.S. 202, 210 (1985).

The Act has as its purpose three objectives: 1) to promote sound and stable industrial peace by providing framework of self organization and collective bargaining; 2) to define and

proscribe the rights of management and labor in relation to each other and with labor unions; and 3) to mitigate the inequality of bargaining power between the economic forces of employers and employees by encouraging the practice of collective bargaining, the friendly adjustment of industrial disputes, and full freedom of contract negotiations. LMRA, § 1(b), 29 U.S.C. § 141(b) (1982); LMRA, § 201(a), 29 U.S.C. § 171(a) (1982).

II. DRUG AND ALCOHOL TESTING IN THE WORKPLACE ACT

Minnesota passed DATWA in order to govern drug and alcohol testing in the workplace. It establishes “minimum standards and requirements for employee protection” with “regard to an employer’s drug and alcohol testing policy.” *Minn. Stat.* § 181.955 subdiv. 1. Pursuant to DATWA, the drug and alcohol testing policies of Minnesota employers must provide:

The employees or job applicants who are subject to testing under the policy; 2) the circumstances under which drug and alcohol testing may be requested or required; 3) the right of an employee or job applicant to refuse to undergo drug and alcohol testing and the consequences of refusal; 4) any disciplinary or other adverse personnel action that may be taken based on a confirmatory test; 5) the right of an employee or job applicant to explain a positive test result on a confirmatory test or request and pay for a confirmatory retest; and 6) any other appeal procedures available.

Id. at 181.953 subdiv. 1.

As stated above, DATWA establishes the minimum requirement that if an employee tests positive for drug use, the employer must provide he or she with “written notice of the right to explain the positive test,” “an opportunity “to explain the positive result”, and the ability to “request a confirmatory retest of the original sample at the employee’s job or applicant’s own expense . . .” *Id.* §§ 181.953 subdiv 6(a)-(c). Under DATWA, an employer is not allowed to from “discharge [or] discipline. . . an employee on the basis of a positive result . . .which has not been verified by a confirmatory test.” *Id.* §§ 181.953 subdiv. 10(b)(1)-(2).

DATWA expressly addresses CBAs and directs that DATWA apply to all CBAs in effect after the law passed in 1987. See *Id.* § 181.955 subdiv. 2. Subdivision one, however, provides that DATWA “shall not be construed to limit the parties to a collective bargaining agreement from bargaining and agreeing with respect to a drug and alcohol testing policy that meets or exceeds, and does not otherwise conflict with, the minimum standards and requirements for employee protection . . .” *Id.* § 181.955 subdiv. 1. The Act specifically authorizes the random drug and alcohol testing of professional athletes “. . . if the professional athlete is subject to a CBA permitting random testing but only to the extent consistent with the collective bargaining agreement.” *Id.* § 181.951(4).

III. MAJOR LEAGUE BASEBALL’S ANABOLIC STEROIDS AND RELATED SUBSTANCES POLICY

The Policy which is incorporated into the CBA bargained for between the MLB and the MLBPA lists numerous “Prohibited Substances” which include both steroids and performance enhancers, one of which is Clomephine, the banned substance for which the Respondent tested positive. Dist. Ct. at 8. The Policy clearly states the reasons behind its institution. Banned substances “have no legitimate place in professional baseball . . . and threaten the fairness and integrity of the athletic competition on the playing field” by giving players unfair advantages that “threaten to distort the results of the game and League standings.” *Id.* The policy also includes a contract signed by each player where he agrees not to take performance related drugs. *Id.* The policy also explicitly states the MLB’s standard of strict liability under which “Players are responsible for what it is in their bodies . . . meaning a positive test result will not be excused because a player is unaware he is taking a Prohibited Substance.” *Id.*

IV. THE CIRCUIT COURT’S DECISION SHOULD BE UPHELD BECAUSE WILSON’S DATWA CLAIM DOES NOT ORIGINATE FROM THE CBA NOR DOES IT REQUIRE INTERPRETATION OF THE CBA AND IS THEREFORE NOT PREEMPTED BY THE LMRA

The standard rule of federal preemption is that Section 301 preempts state law claims that are “*substantially dependent upon analysis*” of a CBA. *Allis-Chambers*, 471 U.S. at 220. This is so because “the application of state law . . . might lead to inconsistent results since there could be as many state law principles as there are States . . .” *Lingle v. Norge Div. of Magic Chef, Inc.* 486 U.S. 339, 406 (1988). Rather “federal labor law principles – necessarily uniform throughout the nation – must be employed to resolve the dispute.” *Id.* This Court has repeatedly held that the LMRA preempts state-law claims brought in state court by a party to a CBA from adjudication in state court *only* if the claims require *interpretation* of a CBA terms. *Id.* at 413. Where adjudication of a state-law claim does not *absolutely* require interpretation of the meaning of a CBA term, the claim is “independent” of the CBA and is not subject to LMRA preemption. *Id.* at 409-10. However, mere consultation of a CBA's terms is not sufficient to cause LMRA preemption. *Id.* at 413. Even in instances where state law creates a cause of action that is virtually identical to the nature of a claim available under a CBA, the LMRA does not preempt the state-law claim from adjudication in state court so long as there exists a possibility to reach a judgment on the claim without interpreting the meaning of any term of a CBA. *Id.* at 409-13. Therefore, the Respondent has both a state claim and a federal claim which are parallel to each other. This Court has also established that Section 301 does not preempt state law claims merely because the parties involved are subject to a CBA and the events underlying the claim occurred on the job. *See Allis-Chambers*, 471 U.S. at 211 (“Of course, not every dispute concerning employment, or tangentially involving a provision of a collective bargaining agreement, is preempted by § 301 . . .[.]”).

As noted by the Circuit Court decision, nowhere in DATWA does it dictate that an employee who is a party to a CBA cannot bring a claim under DATWA. Instead, the possibility of adjudicating a claim under DATWA simply increases the number of potential claims a Petitioner can bring. Essentially, this means the CBA is not the “only source” of an employee's rights in the workplace. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994). State law may place additional, separate rights and duties upon those involved in a collective-bargaining relationship. This Court has consistently rejected the idea that an individual may not assert these separate and independent rights in state court where he or she has an alternative remedy available than his or rights that exist under the CBA. *See, e.g., Id.; Lingle*, 486 U.S. at 407. For example, in *Hawaiian Airlines*, Hawaii law placed an additional and separate duty on the employer to not discharge its employees in violation of public policy. 512 U.S. at 258. A claim under state law does not define the meaning of the contractual relationship of the duties arising as a consequence of the bargaining agreement but rather seeks enforcement of the rights which are independent of the agreement itself. If this Court accepts the MLB's position, it is, in effect, allowing employers to exempt themselves from non-negotiable state laws which they view as unfavorable. When Congress passed the LMRA its purpose was not to give employers and unions the power to displace any state regulatory laws they found inconvenient. This would only serve to erase any power or rights an individual possesses under state laws, thereby almost making them moot. *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683, 695 (9th Cir. 2001) (en banc).

In order to determine if a claim is preempted the Court must begin by examining “the claim itself.” *See Trustee of the Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing, Inc.* 450 F.3d 324, 331 (8th Cir. 2006). Only by evaluating the face of the claim is it possible to determine whether adjudication of the claim requires interpretation of the CBA

and should be allowed to continue in state court or be preempted. The court applies a two-step approach in order to determine if the claim is sufficiently “independent” to survive preemption. *Bogan v. General Motors Corp.*, 500 F.3d 832 (8th. Cir. 2007).

First, a “state law is preempted if it is ‘based on’ [a] . . . provision of the CBA[.]” meaning that “[t]he CBA provision at issue” actually sets forth the right upon which the claim is based. *Id.* The CBA provision at issue in the case at hand sets forth no such right. Instead, the CBA merely describes the drug testing policy of the MLB and outlines the procedure by which any dispute between the MLB and a player should be resolved. The Respondent’s state law claim is based entirely on a right that derives from DATWA and is therefore independent of the CBA. The elements of the Respondent’s claim do not turn on the meaning of the CBAs terms. Rather, the elements are products of purely factual inquiries, such as the actions taken by the Petitioners, the motives underlying those actions, and the factual circumstances surrounding these actions.

Second, Section 301 preemption applies where a state law claim “is dependent upon an analysis” of the relevant CBA,” meaning that the state law claim requires interpretation of a provision of the CBA. *Bogan*, 500 F.3d 832 (8th Cir. 2007). As mentioned earlier, mere consultation of a CBA's terms is not sufficient to cause LMRA preemption. *Lingle*, 486 U.S. 399 at 413. Preemption is not proper “because of the mere possibility that the subject matter of the claim was a proper subject of the collective bargaining process, whether or not specifically discussed in the CBA.” *Cramer v. Consolidated Freightways*, 255 F.3d 683 (9th Cir. 2001)(en banc). In order to resolve the Respondent’s DATWA claim it is only necessary for the Court to review the facts of the case to determine which procedures the MLB followed when conducting the Respondent’s drug testing. After comparing these with the procedures required by DATWA,

the Court would be able to determine whether DATWA's minimum requirements were met, and, consequently, if the Respondent should prevail. By reviewing the facts to determine the procedures the Petitioner followed the Court is not engaging in an interpretation of the CBA.

The District Court argued that "preemption is warranted because [the Respondent] challenges a nationwide CBA establishing necessary uniform rules that must be evenhandedly enforced against individuals working in multiple jurisdictions." Dist. Ct. Op. at 12. "Neither Minnesota nor any other State has the right to use its domestic laws in a way that has the practical effect of regulating the physical condition and terms of competition in each of the two dozen States in which players play." (Id. at 12., quoting *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989). Essentially, the court is arguing that through the preemption doctrine federal courts are able to develop uniform meanings for disputed labor-contract terms which can be applied equally to all members of the labor union, regardless of which state they are a citizen. Without this uniformity, individuals who are members of the same union and who agreed to allow the union to bargain for them collectively would be held to different standards. *Allis-Chambers Corp.*, 471 U.S. 202 at 208.

However, although adjudicating the claims solely under one federal law promotes uniformity, the goal of promoting uniformity does not take precedent over the importance of protecting an individual's rights. State and federal law can exist simultaneously in the area of labor law and should be applied equally to all employees regardless of their status as a union member. Just because an employee enters into a contract of employment with an employer he should not be required to waive the protections and rights afforded to him through state laws. Every individual should be able to rely on his or her state protections, regardless of union membership and the outcome of the federal claim.

Additionally, if we follow the line of reasoning of the District Court, federal labor policy mandates that an employee's rights become subordinate to those of the group majority who were parties to the CBA. Essentially, using that reasoning, collective bargaining then extinguishes an individual employee's power to govern his own relationship and rights with his employer. The union and management effectively waived all the rights the employee has been granted and guaranteed under state law because an individual has neither the right nor the power to act on his own. This waiver effectively weakens the overall purpose of the collective bargaining system which is to prevent management from taking advantage of employees through arbitrary enforcement of rules and obligations in the workplace. Individual employees deserve the protection that Congress intended when establishing the system of collective bargaining. An individual's rights are fully protected only by giving him the opportunity to pursue both a state and federal claim, especially when the state right exists outside of the CBA.

Further, the District Court focused heavily in its opinion on the Policy's stated purpose which is to maintain "fairness and integrity" in the MLB. While this is a laudable goal for the MLB, it is the organization's responsibility to ensure the fairness and integrity of the sport is maintained and not the court system's responsibility. The MLB has numerous avenues and resources at its fingertips which it can use to do so. Instead, it is the court's responsibility to guarantee the fairness and integrity of our court system and ensure everyone has the same access and opportunity to protect his or her rights. This Court can preserve the fairness and integrity of our court system by allowing the Respondent to adjudicate his state rights which are derived from a source outside of the CBA to which he is a party and do not rely on the CBA for interpretation.

In summary, the Respondent's DATWA claim does not originate from the CBA nor does it require an interpretation of the CBA to be adjudicated. Therefore, the Circuit Court's decision that the Respondent's state law claim is not preempted should be upheld.

V. THE ARBITRATOR'S FINDINGS ARE AGAINST PUBLIC POLICY AND, THEREFORE, THE CIRCUIT COURT CONCLUSIONS MUST BE UPHELD.

A. Review of Arbitration Awards

A decision reached during arbitration may be overturned by a court if the arbitration award was "procured by corruption, fraud, or undue means" or "where there was evident partiality or corruption in the arbitrators decision [.]" 9 U.S.C.A. § 10(a)(1)-(2) (2009). As apparent from this language, much deference is given to the decisions of the arbitrator. *See Coca-Cola Bottling Co. of St. Louis v. Teamsters Local Union No. 688, AFL-CIO*, 959 F.2d 1438, 1441 ("While we may not agree with the arbitrator's findings on these issues, we 'may not reject those findings simply because [we] disagree [] with them.'") (citing *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987)). As stated in *Crawford Group, Inc. v. Holekamp*: "[T]he court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances." 543 F.3d 971, 976 (8th Cir. 2008). To promote the use of private settlements for labor disputes a court must acknowledge an arbitrator's decision "[a]s long as the arbitrator's award 'draws its essence from the collective bargaining agreement,' and is not merely 'his own brand of industrial justice[.]'" *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 36 (1987). A court may not reject a finding simply because the court disagrees with the arbitrator and a court may not reject an award if the arbitrator misread the contract. *Id.* at 38.

Despite such strong language, this high standard should not be interpreted as “the equivalent of a grant of limitless power.” *Stark v. Sandberg, Phoenix & Von Gontard, P.C.*, 381 F.3d 793, 799 (8th Cir. 2004) (quoting *Leed Architectural Prods., Inc. v. United Steelworkers of Am., Local 6674*, 916 F.2d 63, 65 (2d Cir. 1990)). Limitations are placed on the enforcement of these decisions. *Id.* A decision must be overturned if the arbitrator ignored the plain language of the contract. *See United Paperworkers*, 484 U.S. at 38. In addition, if an “explicit,” “well defined,” and “dominant” public policy is violated, the court must refrain from enforcing the arbitration award. *Eastern Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 63 (2000); *See also Stark*, 381 F.3d at 799 (A “court[] may also vacate arbitration awards which are ‘completely irrational’ or ‘evidence[] a manifest disregard for the law.’”) (quoting *Hoffman v. Cargill, Inc.*, 236 F.3d 458, 461 (8th Cir. 20001)).

The arbitration decision favoring the MLB should be overturned because the language of the CBA creates a fiduciary duty in Dr. Larson and the MLB. Dr. Larson is responsible for educating the players on products containing illegal substances. In failing to notify the players that SpeedShot contains Clomephine, Dr. Larson and the MLB have breached this fiduciary duty. This breach is contrary to the health and safety of MLB players, and therefore, against public policy.

B. A Fiduciary Relationship Existed Between Dr. Larson, the MLB, and the Players who are Members of the MLBPA.

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.” *Lumbermans Mutual Casualty Co. v. Franey Muha Ins. Servs.*, 388 F. Supp. 2d 292, 305 (S.D.N.Y. 2005). Even when the relationship is controlled by a written agreement, such as a collective bargaining agreement, this duty may be implied. *See United Feature Syndicate, Inc. v.*

Miller Features Syndicate, Inc., 216 F. Supp. 2d 198, 218 (S.D.N.Y. 2002) (“[I]t is not mandatory that a fiduciary relationship be formalized in writing.”) (quoting *Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 672 (1st Dep’t 1998)); *See also Grandon v. Merrill Lynch & Co.*, 147 F.3d 184, 193 (2d Cir. 1998) (“[W]hen a broker-dealer breaches this *implied duty* to disclose excessive markups, the broker-dealer violates § 10(b) and Rule 10b-5.”) (emphasis added). In determining the existence of an implied duty, a court must look to prior and continued conduct between the parties involved. *See United Feature Syndicate*, 216 F. Supp. 2d at 218 (“[O]ngoing 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*’”) (quoting *Wiener*, 241 A.D.2d at 672 (emphasis added)).

An implied fiduciary duty existed between the players and Dr. Larson and appointed individuals within the MLB. Players reasonably relied on the advice and answers given by these individuals in determining whether the use of SpeedShot is permitted or restricted by the organization. Dr. Larson’s duty under the Policy includes overseeing the drug-testing procedures, reporting positive test results to the Commissioner and to *provide education to the players regarding implementation and application of the policy*. These explicit duties placed on Dr. Larson makes his lack of affiliation with the Commissioner’s office or the MLB immaterial. He implemented the Policy, and therefore, would possess the best interpretation and understanding of this Policy. In accordance with the CBA and the language therein, players relied on the advice and information concerning any and all questionable substances provided by Dr. Larson as a result of his expertise and knowledge on the subject. Statements and warnings issued by the MLB were a source of this reliance, as well as the Hotline. Dr. Larson was aware of players’, coaches’ and trainers’ reliance on the Hotline since the very purpose of the Hotline

was to provide advice and guidance concerning the use of questioned substances. An implied duty exists based on the requirements of Dr. Larson and the ongoing reliance by players, coaches and trainers within the MLB on the advice given by Dr. Larson.

C. The Breach of the Fiduciary Duty Is Against Public Policy because it Threatens the Health And Safety of MLB Players and the General Public

The decision of the Circuit Court must be upheld because Dr. Larson and the MLB breached the fiduciary duty and this breach is against public policy. A court's review of an arbitrator's decision is not limited "to instances where the arbitration award itself violates positive law." *Id.* at 65. In *Iowa Elec. Light and Power Co. v. Local Union 204 of the Int'l Brotherhood of Elec. Workers*, the court overturned the arbitrator's decision finding that reinstating an employee who neglected to follow safety standards in a nuclear plant, threatened the safety of both employees and the general public. 834 F.2d 1424, 1427 (8th Cir. 1987). ("[T]he safety rules that Schott violated at Iowa Electric-designed to protect not only employees, but also the general public"); *see also Delta Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 861 F.2d 665, 674 (11th Cir. 1988) (affirming vacation of arbitration award which reinstated a pilot who had been discharged after flying a passenger plane while intoxicated). Courts have upheld and overturned arbitration awards that are "cognizant of safety concerns." *See Midamerican Energy Co. v. Int'l Brotherhood of Elec. Workers Local 499*, 345 F.3d 616, 621 (8th Cir. 2003); *see e.g. Iowa Elec.*, 834 F.2d at 1427.

But to overturn an arbitration award based on public policy, the court may not point to general public interests. *See Eastern Ass. Coal Corp. v. United Mine Workers of Am., Dis. 17*, 531 U.S. 57, 62 (2000). The court determination must be "ascertained 'by reference to the laws and legal precedents[.]'" *Id.* A court's refusal to enforce an arbitrator's decision must be based on "some explicit public policy," not a general violation of public policy as typically defined in

the legal field. *United Paperworkers Int'l Union, AFL-CIO v. Misco*, 484 U.S. 29, 43 (1987) (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

As in *Iowa Electric*, the court must overturn the arbitration award to uphold the safety and health concerns inherent in the Policy. The Policy was established by the MLB to protect the players from hazardous performance enhancing drugs. On multiple occasions and with multiple individuals associated with the MLB, the presence of Clomephine in SpeedShot was brought forward and the information was subsequently disregarded. Dr. Larson was aware that SpeedShot contained a prohibited substance and consciously decided to withhold such information. The suggestion of David Klein, Director of the Sports Medicine Research Testing Laboratory, who tested SpeedShot, went ignored as a result of Dr. Larson's discretion. The concerns of Dr. Finkle mirrored those of Mr. Klein. Dr. Finkle was concerned of the adverse effects that could result from player use of this substance without proper medical supervision. Nevertheless, when Dr. Larson informed Andrew Birch of the situation, *both* refused to publicize the specific information to MLB players.

Seeing that the Policy was implemented to protect players within the MLB from use of dangerous performance enhancing substances, it is difficult to understand why those in charge of implementing the Policy would fail to inform players of *all* information made available. As opposed to providing the specific information obtained during the testing of SpeedShot, the League opted to give the players a general warning against the use of energy-boosting substances and informed players that they were banned from endorsing Mega Energy Products. In withholding specifics concerning SpeedShot, Dr. Larson and the MLB has failed to uphold the established duty of protecting the health of players by prohibiting the use of dangerous performance enhancing drugs.

Despite the assistance provided by Dr. Larson and the MLB, the CBA mandates that players are strictly liable concerning drug testing. The Policy states that “players are responsible for what is in their bodies” and “a positive test result will not be excused because it does not result from an intentional use of a Prohibited Substance.” Under this standard, the Petitioner and all other players who return a positive test result would be disciplined regardless of any action or omission on the part of the MLB. If the court upholds the arbitration award, the court would be permitting the MLB to take a win-win stance in the application of the CBA. In applying the CBA as suggested during arbitration, the MLB may offer to aid players, but when their support fails to properly assist these players, fault lies not with the MLB but the players. A more equal footing between the League and its players must be established under the public policy exception. In this suit, the League states that information concerning SpeedShot did not have to be divulged because no player explicitly asked about the SpeedShot test results. All information obtained by the League and Dr. Larson concerning prohibited substances should be provided to the players, regardless if any player has raised specific questions concerning a particular substance. Under the public policy exception, the League must be required to take proactive steps to inform players of prohibited substances, just as players are currently required to take proactive steps in obtaining information about particular products. The court must step in, until further negotiations may occur between the two parties, to protect the health and safety interests of MLB players.

In summary, the court must overturn the arbitration award to uphold standards that protect the health and safety of MLB players. The breach of fiduciary duty by Dr. Larson and the MLB cannot be tolerated under the public policy exception.

CONCLUSION

The Circuit Court's holding that the Respondent's state law claim is not preempted by Section 301 of the LMRA should be upheld because the claim derives from a right he is afforded under DATWA, not from the CBA. Additionally, his DATWA claim does not rely on the CBA for interpretation and is therefore independent and does not require preemption. Parallel state and federal claims can exist simultaneously and afford an individual the full protection of the rights he deserves and Congress intended for him to have when they passed the LMRA. Further, the arbitrator's award is against public policy because the MLB owed a fiduciary duty to its players which it breached by not sharing the results of the drug tests it performed with them. The MLB should not be allowed to write a policy which on its face holds the players strictly liable for their actions but then induces them to rely on the advice and guidance of the MLB and the doctors who work for it. Especially when the MLB and its doctors abstain from full disclosure to the players and the organization which exists not only to look out for the player's best interest but also holds the power to bargain on the players behalf. Therefore, the arbitrator's award is against public policy and should be considered void.

Respectfully Submitted,

Counsel for Respondent