

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 STATES COURT
OF APPEALS FOR THE FOURTEENTH CIRCUIT**

BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

- I. Did the court of appeals correctly hold 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. Was the court of appeals 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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STATEMENT OF FACTS

Major League Baseball (“the League”) has in place a drug policy (the Major League Baseball Policy on Anabolic Steroids and Related Substances, herein referred to as the “Policy”) which prohibits players from using a number of substances, including performance enhancing drugs and “other anti-estrogens. *Wilson v. Major League Baseball*, No. 09-AC-0213 at 1 (S.D.T.) (hereinafter referred to as “*Tulania District Court opinion*”). A licensed physician, Dr. John Larson, acts as the Policy’s Independent Administrator. *Id.* at 2. His duties include: educating the players regarding the Policy’s implementation, overseeing the drug-testing procedures, and reporting any positive test results to the Commissioner for discipline. *Id.* Further, an “MLB Supplement Hotline” was created by the Policy to provide players with “confidential and accurate information about [supplements], including their ingredients, effects, and adverse reactions.” *Id.*

Clomiphene is one of the anti-estrogens prohibited by the Policy. *Id.* at 1. SpeedShot, an energy-boosting substance, does not list Clomiphene as an ingredient on its label. *Id.* at 3. However, in 2007, the League learned that SpeedShot contained Clomiphene. *Id.*

These results were given to the Vice President of Law and Labor Policy for Major League Baseball, Andrew Birch. *Id.* No one disclosed the findings to the League players. Instead, they only notified the Major League Baseball Players Association (the “MLBPA”) that the company which distributes SpeedShot, “Mega Energy Products,” had become a banned company. *Id.* This meant simply that players could no longer endorse its products. *Id.* The League also vaguely reminded players of the dangers posed by Energy-Boosting Supplements. *Id.*

Kevin Wilson, a player for the Minnesota Twins was unaware that SpeedShot contained Clomiphene. He took the energy-boosting supplement on the morning of a preseason training camp scrimmage. *Id.* at 4. He was subsequently drug tested, and tested positive for Clomiphene. *Id.* Four other players from different teams also tested positive for Clomiphene. *Id.* All five players were suspended for fifteen games pursuant to the Policy which was incorporated into the Collective Bargaining Agreement (the “CBA”) signed by the MLBPA and the League. *Id.*

Unfortunately for Wilson and the other four players, the Policy had adopted a strict liability approach, meaning that their positive results could not be excused despite their ignorance. *Id.* at 1. When Wilson and the four other players appealed their suspension to an independent and neutral arbitrator pursuant to the terms of the Policy, the arbitrator upheld the suspension based on the strict liability rule. *Id.* at 5.

The players had argued that their positive results should be excused Dr. Larson and the League never informed the players that Speedshot contained a banned substance. *Id.* at 4. Indeed, one of the players only commenced using SpeedShot after the MLB Supplement Hotline advised him that it was not on the banned substances list. However, the arbitrator found that the Policy did not articulate or impose such a duty on the League to act; and therefore, the Players, who knew of the strict liability policy, could not be excused based on a claim of unintentional use. *Id.* at 5.

Wilson then filed suit in Minnesota state court against the League, and others, alleging violations of Minnesota’s Drug and Alcohol Testing in the Workplace Act (“DATWA”). *Id.* DATWA creates certain protections for employees who are subject to drug testing by their employers. For instance, it requires employers to provide employees who are subject to drug testing with information regarding their rights dispute or explain positive test results. *See Minn.*

Stat. § 181.952 subdiv. 1(1)-(6). It also prohibits employers from disciplining employees who test positive without verifying with a confirmatory test. *Id.* § 181.953 subdiv. 10(a). Wilson sought both damages and an injunction against enforcement of the arbitration award. *Tulania District Court opinion* at 5. The state court granted Wilson a temporary restraining order barring his suspension. *Id.*

The League removed the case to federal court, where it was consolidated with an action brought by the MLBPA seeking to vacate the arbitration awards (on behalf of all five suspended players) under the Labor Management Relations Act (the “LMRA”). *Id.* The United States District Court for the Southern District of Tulania granted the League’s motion for summary judgment on all claims.

Wilson and the MLBPA appealed to the United States Court of Appeals for the Fourteenth Circuit. The court of appeals reversed the lower court’s decision, holding that DATWA should not be preempted and that the arbitration award should be vacated on public policy grounds. *Wilson v. Major League Baseball*, No. 09-2108 at 14 (14th Cir.) (hereinafter referred to as “*Fourteenth Circuit Court opinion*”).

This Court granted a writ of certiorari to determine two issues: whether the court of appeals correctly held that a Major League Baseball player’s claims under DATWA are preempted by § 301 of the LMRA, and whether the court of appeals was correct in setting aside an arbitrator’s award because it was in violation of public policy. All matters are to be reviewed *de novo*.

SUMMARY OF ARGUMENT

In order to validate Minnesota’s efforts to provide procedural protections to employees, the Fourteenth Circuit’s decision that Wilson’s DATWA claim is not preempted by § 301 of the

LMRA should be upheld. Section 301 only preempts those state law claims which are based on a CBA or are substantially dependent upon interpretation of a CBA. Wilson's DATWA claim, however, arises independent of the CBA.

First, the DATWA claim is not based on the CBA. Instead, it is based entirely on several provisions of DATWA which mandate that employers give employees certain protections during drug and alcohol testing. Because the League did not provide Wilson with such protections, it violated DATWA irrespective of what policy was written into the CBA.

Second, the claim does not substantially depend upon interpretation of the CBA, or even require reference to the CBA. The League violated DATWA due to the manner in which it acted with respect to Wilson. Moreover, the League cannot force preemption merely by referencing the CBA when, as here, the drug policy in the CBA has no bearing on the state law claim.

Furthermore, the League's argument that the DATWA claim is preempted to enable uniform enforcement of its drug testing policy must be rejected because the LMRA does not give employers and unions the authority to displace state regulatory laws just because they are inconvenient. Moreover, § 301 does not grant the parties to a CBA the ability to contract for what is illegal under state law. Therefore, if the League wants to incorporate a drug testing policy into its CBA, it must ensure that the policy rises to the standards required by every state in which it wishes to enforce it.

In addition, the Fourteenth Circuit's decision to vacate the arbitration award should be upheld. When there is a clearly articulated and well-defined public policy, a court may not validate an arbitration award that acts to undermine the public policy. In this case, allowing the suspensions to stand would violate several well-defined public policies.

First, Minnesota has a strong public policy favoring protection of employees in regards to drug policies. This policy is codified in DATWA. The actions taken by the League with respect to Wilson, and subsequently the arbitration award, violate the terms set forth in DATWA, and therefore violate the public policy of Minnesota.

Second, allowing the award to stand would legitimize the league's intentionally harmful behavior. Health and safety are long-standing public policy concerns. The league threatened the health and safety of its players by intentionally withholding information regarding harmful substances when it owed a fiduciary duty to disclose such information. The Court should validate the state's attempts to extend minimum protections to employees and discourage behavior that threatens public health and safety by vacating the arbitration award.

ARGUMENT

I. THE COURT OF APPEALS' DECISION SHOULD BE UPHELD BECAUSE WILSON'S DATWA CLAIM IS NOT PREEMPTED BY THE LMRA.

In order to guard Minnesota's efforts to provide procedural protections to employees, Wilson's DATWA claim should not be preempted by § 301 of the LMRA. The Minnesota Legislature enacted DATWA to create "minimum standards and requirements for employee protection" with regard to an employer's drug and alcohol testing policies. Minn. Stat. § 181.955 subdiv. 1. The League seeks to ignore these protections by arguing that the DATWA claim is preempted by § 301 of the LMRA, which preempts suits between parties to a CBA that require interpretation of the CBA. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 218-19 (1985) ("Congress has mandated that federal law govern the meaning given contract terms."). However, § 301 "says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of [CBAs]." *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 409 (1988). Wilson's DATWA claim can be

established without even referencing the CBA let alone interpreting it; and therefore, it must survive preemption.

Wilson's DATWA claim exists independent of the CBA for pre-emption purposes because it arises wholly from the state law and is not dependent upon interpretation of the CBA. In determining if a state law claim is sufficiently independent of the CBA to survive § 301 preemption, a court should begin with the "claim itself," see *Trustees of the Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing, Inc.*, 450 F.3d 324, 331 (8th. Cir. 2006), and then apply a two-step approach, *Lueck*, 471 U.S. at 213. First, a state law claim is preempted if it derives from rights established by the CBA. *Id.* at 213. Second, the state law claim is preempted if it is "inextricably intertwined with consideration of the terms of the labor contract." *Id.* However, "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301." *Id.* at 211. In fact, a state law claim is "independent" of the CBA for preemption purposes if "resolution of the state-law claim does not require construing the collective-bargaining agreement." *Lingle*, 486 U.S. at 407. Since Wilson's DATWA claim will be established based on the actions the League took against him, resolution of the claim does not require construing or even referencing the CBA.

A. Wilson's DATWA claim does not derive from rights established by the CBA.

Wilson's DATWA claim should not be preempted based on the first step of § 301 preemption analysis because it arises entirely from the state law. When state law "confers nonnegotiable state-law rights on employers or employees independent of any right established by contract," the first route to § 301 preemption is not appropriate. *Lueck*, 471 U.S. at 213. DATWA confers several nonnegotiable state law rights onto employees with regard to drug and alcohol testing policies. For example, it mandates that employers provide employees who are

subject to drug testing with certain information regarding their right to refuse testing and the right to explain positive test results. Minn. Stat. § 181.952 subdiv. 1(3) and (5). DATWA also requires laboratories used by employers for drug testing to meet certain criteria. *Id.* § 181.953 subdiv. 1. Further, DATWA prohibits an employer from “discharge[ing] [or] discipline[ing] ... an employee on the basis of a positive result ... that has not been verified by a confirmatory test.” *Id.* § 181.953 subdiv. 10(a). Wilson will establish these violations through reference to the state law and the actions of the employer without drawing on any provisions of the CBA.

Wilson’s claim under DATWA is nearly identical to the plaintiff’s claim in *Karnes v. Boeing*, 335 F.3d 1189 (10th Cir. 2003), which was not preempted by § 301. The plaintiff in *Karnes* alleged that Boeing had violated several sections of Oklahoma’s Drug Testing Act when it terminated him based on a positive drug test. *Id.* at 1191-92. To establish the violation, Karnes had to prove two elements: that Boeing discharged him based on a drug test, and that it failed to confirm the result through a second test. *Id.* at 1192. Despite the plaintiff being subject to a CBA, the claim did not arise from any rights established by the CBA and required “purely factual inquiry” into the actions of the employers. Therefore, the state law claim survived. *Id.* at 1193.

Likewise, Wilson’s claim arises wholly independent of the CBA and should therefore survive preemption. To establish his claim, he will prove that the League did not provide him with any of the information required under DATWA; that the League did not use proper laboratories for testing; and that the League gave him a fifteen game suspension based on one drug test without confirming the result through a second test. Given that these violations of DATWA can be established by reference to the law itself and the employer’s actions, the claim did not arise from any rights established by the CBA.

Unlike those plaintiffs whose claims arise from their CBA, Wilson’s success will not depend on showing that the CBA established any particular duties. In *Lueck*, the Supreme Court found that the plaintiff’s claim was preempted by § 301 because “the duties imposed and rights established through the state tort ... derive[d] from the rights and obligations established by the contract.” 471 U.S. at 217. This case began after a Wisconsin employee who received disability benefit payments for a back injury claimed that the employer had periodically ordered the insurer to cut off his payments. *Id.* at 205. In evaluating whether the state law tort action for bad faith delay in making disability benefit payments was preempted, the Court explained, “Generally speaking, good faith means being faithful to one’s duty or obligation; bad faith means being recreant thereto.” *Id.* at 216 (citation omitted). To make the claim of bad faith, the plaintiff would have to prove certain duties were established in the CBA and those duties were breached. In other words, the tort claim was “firmly rooted in the expectations of the parties [found in the CBA]” and therefore “must be evaluated by federal contract law.” *Id.* at 217. This is unlike Wilson’s DATWA claim which exists independent of the CBA. The DATWA claim arises out of the Minnesota legislature’s explicit choice to provide employees with protection in the area of drug and alcohol testing. DATWA requires that employers meet a minimum level of protection, despite what exists in the CBA – not because of what exists in the CBA.

The district court would have allowed the League to be immune from DATWA merely because it incorporated its drug policy into the CBA and because DATWA considers CBAs (*Tulania District Court opinion* at 10); but this coincidence does not mean that the DATWA claim arises from the CBA. DATWA mentions CBAs in stating that they must “meet or exceed and ... not otherwise conflict with, the minimum standards and requirements for employee protection provided in [DATWA].” Minn. Stat. § 181.955(1). As the appellate court rightly

recognized in correcting the district court's confusion, this means that where a CBA is less protective of an employee than required by DATWA, the employee could bring two claims: one for breach of contract, and one for a violation of DATWA. (*Fourteenth Circuit Court opinion at 7*). The former may be cause for preemption; whereas, a claim based solely on an employers' violation of DATWA is not. Wilson is not claiming that the League breached the CBA, but only that the League violated DATWA. While the CBA may be relevant to a breach of contract claim, it is not implicated by Wilson's DATWA claim. Therefore, the claim arises out of DATWA alone, irrespective of the CBA.

B. The DATWA claim is also not inextricably intertwined with consideration of the terms of the CBA.

Even if a state law claim does not arise out of the CBA, it must be preempted by § 301 if resolution of the state law claim is "substantially dependent upon" or "inextricably intertwined with consideration of the terms of the labor contract." *Lueck*, 471 U.S. at 213, 220. In other words, if "proof of the state law claim requires interpretation of collective bargaining agreement terms" the claim is preempted by § 301. *Stringer v. National Football League*, 474 F. Supp.2d 894, 900 (S.D. Ohio 2007). However, the League has never pointed to a specific provision of either the CBA or the Policy that would have to be interpreted in order to litigate Wilson's claim. *Tulania District Court opinion at 9*. Indeed, no provision of the CBA or the Policy does need to be interpreted. Instead, the claim will be proven through a purely factual inquiry.

When a state law claim only requires factual inquiries it is not "inextricably intertwined with the CBA" for preemption purposes, even if the plaintiff is subject to a CBA that contemplates comparable issues. *Lingle*, 486 U.S. at 408. The Supreme Court clarified this in *Lingle*, where the plaintiff employee was discharged for filing a worker's compensation claim. *Id.* at 401. The employee had won the claim that she brought based on her CBA's contractual

remedy for discharge without just cause. *Id.* at 402. However, she also brought a state law claim alleging that she was discharged for exercising her rights under the Illinois workers' compensation laws. *Id.* The Illinois Court of Appeals assumed that, because a court would be deciding the same issue as the arbitrator who decided her contracts case, the state tort was inextricably intertwined with the CBA. *Id.* at 408. The Supreme Court rejected this contention. *Id.* The Court recognized that to win on the state law claim the plaintiff would only have to address the "purely factual questions" of whether the employer's motive in discharging her was to deter her from exercising her rights under the workers' compensation law. *Id.* at 406. Despite the contract claim having addressed precisely the same set of facts as the state law claim, the state law claim did not require interpretation of the CBA, and therefore, remained independent for preemption purposes. *Id.*

The district court, in deciding Wilson's case, made a mistake identical to that of the court of appeals in *Lingle*. The district court assumed that because DATWA provides an additional remedy for a plaintiff who is subject to a CBA, any DATWA claim will be inextricably intertwined with interpretation of the CBA. *Tulania District Court opinion* at 10. This is not so. In *Lingle*, a claim was brought based on the CBA that involved attention to the same factual considerations as the claim based on state law. However, the Supreme Court determined that "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." 486 U.S. at 408. Moreover, when the claim only requires "purely factual questions [that] pertain[] to the conduct of the ... employer," this will not "require[] a court to interpret any term of a collective-bargaining agreement." *Id.* at 407.

Like the plaintiff in *Lingle*, Wilson only has to prove purely factual questions that pertain to the conduct of his employer to show that the League violated DATWA. For example, Wilson will show that the League violated DATWA by not using proper laboratories as required by section 181.053 subdiv. 1. Wilson will also show that the League violated DATWA by not giving him the requisite information regarding his right to refuse testing and to explain positive test results under section 181.952 subdiv. 1(3) and (5). Also, Wilson will show that the League violated section 181.953 subdivision 10(a) of DATWA when it disciplined him based on one drug test, without having the result confirmed through a second test. As reiterated by the Tenth Circuit in *Karnes*, this “purely factual inquiry” is not “inextricably intertwined with the terms of the CBA” for § 301 preemption purposes. 335 F.3d at 1193 (citation omitted).

Not only is the necessary inquiry disentangled from the terms of the CBA, but neither party needs to even reference the CBA to establish their arguments. As detailed above, Wilson’s claim will be established by presenting what happened to him, not what existed in the Policy. Meanwhile, the only way the League will be able to defeat the allegations is by showing what it did with respect to Wilson. No policy found in the CBA can save the League when its actions blatantly violated DATWA.

Moreover, if Wilson or the League were to refer to the CBA, the reference still would not mandate § 301 preemption. “[T]he Supreme Court has distinguished those [claims] which require interpretation or construction of the CBA from those which only require reference to it.” *Trustees*, 450 F.3d at 330. The “mere need to look to the collective-bargaining agreement” does not force preemption. *Lividas v. Bradshaw*, 512 U.S. 107, 125 (1994). (citation and internal quotations omitted).

The Ninth Circuit has found that this is especially true where, as here, the reference would have absolutely no bearing on the state law claim. *Cramer v. Consolidated Freightways, Inc.*, 225 F.3d 683, 694-95 (9th Cir. 2001) (en banc). In *Cramer*, an employee initiated an invasion of privacy lawsuit after discovering that the company had installed a two-way mirror in the workplace restroom. *Id.* at 688. The defendant trucking company tried unsuccessfully to force preemption by insisting that the court should reference the CBA because the CBA “contemplate[d] the use of surveillance videotapes.” *Id.* at 694. However, the Ninth Circuit held that the claim was not preempted because the CBA did not have “any bearing” on the privacy claim. *Id.* Rather, the privacy claim was “based ... on the protections afforded ... by California state law, without any reference to expectations or duties created by the CBA.” *Id.* at 693-94.

Wilson’s DATWA claim is likewise based on the protections afforded by state law and can be established without any reference to the expectations or duties created by the CBA. Therefore, it similarly is not preempted. As stated by the Ninth Circuit, “A creative linkage between the subject matter of the claim and the wording of the CBA provision is insufficient” to preempt the claim. *Id.* at 692 (citing *Lividas* 512 U.S. at 124-125).

C. The claim should not be preempted merely for the League’s convenience in uniformly enforcing its drug testing policy.

The League’s argument that the DATWA claim should be preempted to enable uniform enforcement of its drug testing policy must be rejected, because “the LMRA certainly did not give employers and unions the power to displace any state regulatory laws they found inconvenient.” *Cramer*, 225 F.3d at 695 n.9. In *Cramer*, the defendant trucking company made a comparable claim to the League regarding uniformity when it argued that CBAs affecting employees in multiple states should supersede inconsistent state laws. *Id.* at 695. The trucking company argued that, because its CBA expressly contemplated the use of surveillance

videotapes, it should be allowed to install two-way mirrors in its restrooms in violation of the California law. However, the Ninth Circuit rejected this contention, because, “use of the mirrors is a per se violation of the [California] penal code.” *Id.* The trucking company could not avoid state law even though enacting a uniform surveillance policy would have been more convenient for it. Similarly, the League must be held accountable to the minimum standards required under DATWA even if this is less convenient than ignoring such standards.

The League should not be granted immunity from DATWA merely because it placed its illegal policy into a CBA. As stated by the Supreme Court, “there [is not] any suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation.” *Lueck*, 471 U.S. at 211. The district court supported its finding of preemption in Wilson’s case based on its assumption that it would be “impossible” for the League to maintain a nationwide Policy against the use of prohibited substances if state-by-state litigation were allowed. *Tulania District Court opinion* at 12. However, if the League wants to incorporate a drug testing policy into its CBA and also minimize litigation, it simply must ensure that the Policy rises to the standards required by every state in which it wishes to enforce it. This is not too high of a hurdle for such a dominant conglomerate as Major League Baseball.

Another reason that the League must be cognizant of state law protections when it bargains for its CBA is because “§ 301 does not grant the parties to a [CBA] the ability to contract for what is illegal under state law.” *Lueck*, 471 U.S. at 211-12. In *Karnes*, the court reiterated this point in concluding that “the fact that the CBA incorporated [the employer’s] anti-drug policy is irrelevant.” 335 F.3d at 1194. Since Wilson’s claim is nearly identical to the claim of the plaintiff in *Karnes*, the fact that the Wilson’s CBA incorporated the anti-drug policy

is similarly irrelevant. Moreover, the League cannot avoid the prohibition against contracting for illegal policies by blaming the MLBPA for not bargaining aggressively enough. The Ninth Circuit stated in *Cramer* that the “employees had a right to assume their employer would obey the law.” 225 F.3d at 695. When an employer blatantly violates a law by ignoring procedural protections, it should not be granted immunity based on the existence of a CBA; but rather, it should have to face its employee in court.

II. THE ARBITRATION AWARD WAS IN VIOLATION OF A WELL-DEFINED PUBLIC POLICY AND THE COURT MAY NOT ENFORCE SUCH AN AWARD.

The Court should validate Minnesota’s attempt to extend minimum protections to employees. A court may not enforce an arbitration award that is contrary to a “well-defined and dominant” public policy. *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983). This public policy must “be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. *Id.* (citing *Muschany v. United States*, 324 U.S. 49, 66 (1945)). This standard creates a narrow exception that allows vacating arbitration awards based on public policy. The facts of this case precisely meet this exception.

The arbitration award runs directly contrary to a well-defined public policy codified into law. In this case the Minnesota DATWA. DATWA signifies exactly the type of articulated public policy that courts can use to overturn an arbitration award. DATWA expressly imposes employee protections in collective bargaining agreements in the area of drug and alcohol testing. Major League Baseball’s CBA has provisions that directly contradict the well-defined public policy of Minnesota and since all parties agree that the award draws its essence from the CBA, the award violates public policy. *Tulania District Court opinion* at 15.

In addition to violating the well-defined public policy articulated under DATWA, the appellate court found that the award also violated another public policy. Specifically, since

Major League Baseball owed a fiduciary duty to players, it violated this duty by not informing them that Speedshot contained a banned substance. Major League Baseball's failure was both "a violation of the policy and potentially harmful to players' health." *Fourteenth Circuit Court opinion* at 11. So, allowing the award to stand would sanction the wrongful conduct of Major League Baseball and create health and safety risks in violation of public policy.

A. The arbitration award violates DATWA and cannot be enforced.

DATWA is a clear articulation of public policy that both the CBA and arbitration award violate. An arbitration award that violates a "well-defined and dominant" public policy must be vacated. *W.R. Grace*, 461 U.S. at 766.

1. DATWA represents a well-defined and dominant public policy.

The Minnesota Legislature passed DATWA in order to create "minimum standards and requirements for employee protection" with regard to an employer's drug and alcohol testing policies. Minn. Stat. § 181.955 subdiv. 1. There is no more clearly articulated and explicit public policy than one set forth in a statute by a duly elected legislature. The Minnesota Legislature's attempt to codify the public policy of the state in statute form is precisely the type of "law and legal precedent" that the exception calls for. *W.R. Grace*, 461 U.S. at 766. The legislature intended for this law to provide protection to all employees, and when a CBA violates the terms of DATWA, it is directly contradictory to public policy.

Even when a dispute is removed to federal court, to be determined under federal law, a state statute still signifies a dominant public policy. In *Ace Electrical Contractors v. IBEW*, a dispute arose surrounding an arbitration award in a termination dispute. 414 F.3d 896 (8th Cir. 2005). The case was removed to federal court pursuant to the LMRA. *Id.* at 899. The Eighth Circuit found that the terminations, and the contract that allowed them, violated the public policy

codified in the Minnesota Human Rights Act and accordingly vacated the awards. *Id.* at 903. So even if the Court determines that federal law is appropriate, the arbitration award must be vacated.

Though courts have determined that no dominant public policy exists when statutes are merely procedural or are based solely on “general consideration of supposed public interests”, DATWA is not merely procedural or vague. *MidAmerican Energy Co. v. IBEW*, 345 F.3d 616, 621 (8th Cir. 2003); *W.R. Grace*, 461 U.S. at 766; *UPI v. Misco*, 484 U.S. 29, 44 (1987). Instead, it explicitly lays out its mission, to provide protection to employees regarding collectively bargained drug policies, and puts in place specific safeguards that must be met. Because of this specificity, DATWA is a clearly defined public policy and the Court cannot uphold any arbitration award that acts to undermine its effects.

2. The arbitration award is directly contrary to the public policy articulated in DATWA and should be overturned.

DATWA does not attempt to restrict what protections employees can bargain for in collective bargaining agreements. Minn. Stat. § 181.955 subdiv. 1. However, it does set a minimum standard for employee protections that must be met by an employer that drug tests. *Id.* The League failed to meet these standards in several areas while drug testing Wilson; therefore, the methods violated the public policy of Minnesota.

First, DATWA specifically states that an employer may not take any disciplinary action against an employee without a confirmation test. *Id.* § 181.953 subdiv. 10(a). Major League Baseball immediately suspended Wilson based on the results of the screening test, without executing a confirmatory test. Because of this, the League’s actions fell short of the minimum standards set forth in DATWA.

Secondly, DATWA also requires that employees be given an opportunity to explain a positive test result. *Id.* § 181.953 subdiv. 6(a)-(c). Major League Baseball’s blanket strict liability provision violates this safeguard. DATWA requires that the employer allow the employee to “provide any other information relevant to the reliability of, or explanation for, a positive test result.” *Id.* § 181.953 subdiv. 6(b). The strict liability applied to Wilson is directly contrary to this protection because it renders any explanation moot, regardless of its veracity.

The League argues that it must be allowed to enforce its collective bargaining agreement to ensure uniformity throughout the many jurisdictions in which it operates. This is a vague and general assertion of a public policy. *See W.R. Grace* 461 U.S. at 766; *UPI*, 484 U.S. at 44. When choosing which public policy to maintain, the clearly defined and enumerated public policy embodied in DATWA carries far more weight than this general consideration of some supposed public interest. *Id.* If the League values uniformity in its business, it should bargain for a drug policy that doesn’t violate the established public policy of any of the jurisdictions in which it plans to operate.

Since Major League Baseball failed to provide Wilson with the protections enumerated by DATWA, it did not meet the minimum standards required by the public policy of Minnesota. Since the award flows directly from the provisions of the drug policy, it also violates public policy. The Court cannot enforce an arbitration award that violates such a clearly defined public policy and must vacate the award.

B. The arbitration award also sanctions wrongful acts by Major League Baseball that would result in a threat to health and safety.

Courts have ordered arbitration awards vacated when they threaten health and safety. *Fourteenth Circuit opinion* at 10 (citing *Delta Air Lines, Inc. v. Air Line Pilots Ass’n, Int’l*, 861 F.2d 665 (11th Cir. 1988) and *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)). In this case, the appellate court determined that the actions taken by the league were so harmful to public health that they violated this public policy. Specifically, Major League Baseball breached a fiduciary duty by failing to pass along information to players regarding harmful substances. Because the arbitration award validates the unseemly actions taken by Major League Baseball, it must be voided on public policy grounds.

The league intentionally breached a fiduciary duty it owed the players by refusing to inform them of the harmful effects of Speedshot. The league and its laboratory possessed all the knowledge and expertise regarding the drug policy. This is evident in the text of the drug policy which states that “the Independent Administrator will make himself available for consultation with players and club physicians.” *Id.* at 12. Further, Dr. Larson expressly guaranteed in a memorandum sent to all players that he would “continue to provide MLB Players with information on the subject throughout the year.” *Id.*

These acts created a fiduciary duty because a fiduciary relationship “may be found in any case in which... confidence has been reposed and betrayed.” *United Feature Syndicate Inc. v. Miller Features Syndicate, Inc.*, 216 F.Supp.2d 198, 218 (S.D.N.Y. 2002). The players had been assured in the agreement itself, and later in personal promises from the doctor administering the program, that they could rely on the League and its agents to provide current and up to date information regarding what substances are prohibited.

By positioning itself as the authoritative agent regarding banned substances, and agreeing to provide guidance to players about banned substances, the League undertook a duty “to give advice for the benefit of [MLB Players] upon matters within the scope of the relation.”

Lumbermens Mut. Cas. Co. v. Franey Muha Alliant ins. Servs., 388 F.Supp.2d 292, 305 (S.D.N.Y. 2005). This creates a fiduciary relationship. *Id.*

Once a fiduciary duty has been established, the fiduciary must inform the other party when they have superior knowledge not available to the other. *Grandon v. Merrill Lynch & Co., Inc.*, 147 F.3d 184, 189 (2d. Cir. 1998) (“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.”); *Callahan v. Callahan*, 127 A.D.2d 298, 300 (N.Y. App. Div. 1987) (“duty to disclose may arise where a fiduciary or confidential relationship exists or where a party has superior knowledge not available to the other”). It is undisputed that the League had superior knowledge regarding the composition of Speedshot. They knew it contained a banned substance that posed a health risk. *Fourteenth Circuit Court opinion* at 13. The League breached its duty by failing to inform the players that Speedshot contained a banned substance. This refusal to inform occurred even after specific inquiries were made regarding Speedshot. *Id.* at 14. The players justifiably relied on the League to provide accurate information regarding supplements and the League purposely misled the players, even after receiving specific questions regarding Speedshot. By withholding accurate information from players, the league created a potentially dangerous situation.

The Court should not uphold the arbitration award because doing so would sanction a breach of duty resulting in an increased risk to health and safety.

CONCLUSION

The decision of the Fourteenth Circuit must be sustained. Minnesota, in enacting DATWA, has chosen to ensure that its employees are provided with a minimum standard of protection during employment drug and alcohol testing. Because Wilson’s DATWA claim exists

independent of the CBA, the League should not be allowed to ignore Minnesota's attempts and defeat Wilson's claim by merely inserting a drug policy into the CBA. Also, the arbitration award must be vacated because it violates well-defined public policy and further erodes employee rights. For these reasons, this Court should uphold the decision of the Fourteenth Circuit.