

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.

RESPONDENT'S BRIEF

TEAM #: 43

QUESTIONS PRESENTED

- I. DID THE COURT OF APPEALS CORRECTLY HOLD THAT A MAJOR LEAGUE BASEBALL PLAYER'S STATE-LAW CLAIMS UNDER MINNESOTA'S DRUG AND ALCOHOL TESTING POLICY ARE NOT PREEMPTED BY SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT?

- II. DID THE COURT OF APPEALS CORRECTLY SET ASIDE AN ARBITRATOR'S AWARD BECAUSE IT EFFECTIVELY SANCTIONED A DECISION BY MAJOR LEAGUE BASEBALL THAT VIOLATED PUBLIC POLICY?

I. Statement of the Facts

In 2007, the Major League Baseball Players Association (MLBPA) entered into a collective bargaining agreement (CBA) with Major League Baseball (MLB). The CBA contains a policy on steroid use (the Policy), which provides that first-time violators (players who test positive for a banned substance) face suspension for at least a 15 games, but not more than 25 games; and players subject to disciplinary action may appeal to an arbitrator whose decision constitutes a full, final, and complete disposition of the appeal that is binding on all parties. The Policy also created a Hotline, a confidential telephone service for players to obtain accurate information about dietary products, such as supplements, including ingredients, effects and adverse reactions. The Policy cautions players that they are still responsible for what goes into their bodies—using the Hotline will not excuse a positive result.

Later that year, MLB learned that several samples of SpeedShot contained Clomiphene, a banned substance. Labels on SpeedShot do not disclose Clomiphene as an ingredient. On November 14, 2007, MLB asked David Klein, director of Sports Medicine Research Testing Laboratory to analyze samples of SpeedShot and he confirmed that the product contained Clomiphene. Klein asked the MLB to report his finding to the Food and Drug Administration but MLB refused to do so.

Subsequently, the MLB notified the MLBPA that Mega Energy Products, which distributes SpeedShot, had become a banned company with which teams and players were prohibited from doing business and asked the association to pass that information along to the players. The MLBPA did so and told players they were prohibited from endorsing any of that company's products. Dr. Larson, the Independent Administrator of the MLB Policy, also sent a memo to players urging them not to take products or supplements that claim to provide or boost

energy but Dr. Larson's communication failed to specifically mention that SpeedShot contained a banned substance.

Then, on the morning of a pre-season training camp scrimmage, Kevin Wilson of the Minnesota Twins took SpeedShot. Later, when he was tested pursuant to annual preseason provisions, his results were positive for Clomiphene and Wilson was suspended for 15 games as were four other players on different teams. Wilson and the players appealed to a neutral arbitrator, arguing that despite repeated general warnings about the dangers of energy-boosting supplements and the Policy's strict liability rule, the Policy created a fiduciary duty that required MLB to give a more particularized warning about SpeedShot once it was found to contain Clomiphene.

The arbitrator upheld the suspension and Wilson filed suit against the MLB in state court, alleging the Policy violated Minnesota's Drug and Alcohol Testing in the Workplace Act (DATWA), which provides that an employer may not fire or discipline an employee because of a positive drug test result that has not been verified by a confirmatory test. Furthermore, DATWA prohibits an employer from discharging an employee who is a first-time offender unless the employee is first given an opportunity to participate in treatment and refuses to participate or fails to successfully complete the program. Additionally, a subdivision of DATWA mandates the Act applies to all collective bargaining agreements in effect after passage of the Act in 1987. After the state court granted a temporary restraining order barring Wilson's suspension, the MLB removed the case to federal district court, where the arbitrator's decision was restored. Wilson then successfully appealed the case at the U.S. Court of Appeals for the Fourteenth Circuit.

II. DATWA should not be preempted by Section 301 of the LMRA

The Court of Appeals correctly held that Section 301 of the Labor Management Relations Act (LMRA) does not preempt Wilson's claim under DATWA. Preemption under Section 301 applies where a state-law claim turns on an analysis of a collective bargaining agreement, or any policy or provision contained therein, to determine whether such agreement meets or exceeds the preempted statute. See Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220, 105 S.Ct. 1904, 1916 (1985) (holding that "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim, see Avco Corp. v. Aero Lodge 735, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed. 126 (1968), or dismissed as preempted by federal labor-contract law.")

However, the outcome in this case does not depend substantially on an analysis of the terms of the CBA and whether the agreement meets or exceeds DATWA; therefore, preemption does not apply. See The Trustees of the Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing, Inc., 450 F.3d 324, 330 (8th Cir. 2006) ("An otherwise independent claim will not be preempted if the CBA need only be consulted during its adjudication. See Livadas v. Bradshaw, 512 U.S. 107, 124-25, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994)"). The Superior Waterproofing Court distinguished between cases which require interpretation or construction of the CBA from those which only require reference to it. We fail to see, as Petitioner argues, how the Court in the instant case would have to do anything more than refer to the CBA. Wilson's claim merely asserts the CBA contravenes state law because it omits any of the labor protections afforded employees under DATWA. No analysis or interpretation of the CBA is needed because a plain or cursory reading of the CBA shows the agreement contains none of the protections

stipulated in DATWA; verifying that claim would require nothing more than a reference to the CBA, not an interpretation of the agreement.

A. Preemption would enable employers to skirt state labor laws they disfavor

Another reason for denying pre-emption in this case is that applying it would give employers the power to ignore whatever state labor laws they disfavored, a concern articulated by the Allis-Chalmers Court. See Allis-Chalmers 471 U.S. at 212 (holding that Section 301 does not permit parties to a CBA to contract for rights that violate state law; Congress did not intend to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract). DATWA seeks to protect employees' rights by requiring the employer to give an employee accused of violating a drug policy an adequate opportunity to address the allegations. Moreover, the statute promotes rehabilitation and employee health by giving an offender the chance to submit to counseling and treatment before subjecting the employee to punishment. Such a statute is consistent with a policy such as the one implemented by MLB, the aim of which is to deter drug use, not just punish it. And, had the league just shared the information it possessed about SpeedShot, Wilson and others would not have taken the supplement. The CBA must not be allowed to supersede a law established by elected officials to protect employees in Minnesota; that would give powerful companies and unions the ability to ignore state laws adopted by popularly elected legislators.

B. Preemption does not apply in all cases that relate to CBAs

Preemption also does not apply in this case since the Allis-Chalmers Court said its holding was narrow in focus and did not mean that every state-law suit that relates to a collective-bargaining agreement is pre-empted by Section 301; in other words, preemption must

be examined on a case-by-case basis. Id. at 220. Distinguishing the facts in Allis-Chalmers shows why the holding in that case does not apply in the instant case. In Allis-Chalmers, the respondent was injured in a non-work related accident. In an effort to obtain disability benefits, the respondent sought to circumvent the arbitration process required by a collective bargaining agreement by filing a bad-faith tort claim against his employer and its insurer. The Allis-Chalmers Court said one of its concerns in applying pre-emption was to preserve the effectiveness of arbitration. See Id. at 219 (“A final reason for holding Congress intended § 301 to pre-empt this kind of derivative tort claim is that only that result preserves the central role of arbitration in our ‘system of industrial self-government.’” *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581, 89 S.Ct. 1347, 1352, 4 L.Ed.2d 1409 (1960)).

In the case at bar, Wilson did not circumvent the arbitration process, he submitted to it as provided by the CBA with the league. He is disputing the outcome of the arbitration process. And unlike the issue in Allis-Chalmers, which involved a disability claim triggered by an injury suffered far from the workplace, the instant case involves conduct directly related to Wilson’s performance as an employee and his right to a safe workplace and his ability to meet his employer’s expectations.

Athletes like Wilson are under enormous pressure to succeed in a competitive environment. A player’s ability to succeed and continue his career depends largely on his performing on a par with, or even exceeding the performance of, his peers. In the arena of professional sports, this dynamic unfortunately leads to an arms-race mentality with respect to fitness, strength and performance. Knowing this, the league instituted its Policy aimed at preventing use of energy-boosting supplements by issuing a general warning about such substances. The league also issued a Hotline that players could consult regarding specific

supplements. Despite establishing a support structure that would undoubtedly create a sense of security among players, the league failed to issue specific warnings about the energy-boosting substance known as SpeedShot, even after the league discovered several samples of that product contained the banned substance Clomiphene. With no specific warning, some players were bound to take SpeedShot, prompting other players to take it just to keep their competitors from gaining an edge. The league's decision not to issue a specific warning regarding SpeedShot went against the grain of its overall policy of deterring the use of such substances.

III. Arbitration Award

The MLBPA claims that the arbitration award in favor of the MLB must be vacated on the grounds that it violates public policy. Generally, a court must provide an arbitration award “an extraordinary level of deference” and is required to affirm the decision so long as “the arbitrator was even arguably construing or applying the contract and acting within the scope of his authority.” Stark v. Sandburg, Phoenix & von Gontard, P.C., 381 F.3d 793, 798 (8th Cir. 2004). It is undisputed that the arbitrator's actions met this threshold; however the United States Supreme Court has ruled that a court must not enforce an arbitration award where the policy “as interpreted by the arbitrator violates some explicit public policy.” W.R. Grace & Co. v. Local Union, 461 U.S. 759, 766 (1983). Furthermore the court stated that the explicit public policy must be derived from statutes or legal precedents. Id. The statutes or legal precedents that can be utilized here to establish a public policy must come from federal law or in its absence New York State law. The latter may be applied because the MLB Collective Bargaining Agreement, which the policy is a part of, states that in the absence of applicable federal law New York law controls.

In order to establish that the arbitrator's award violated a public policy the MLB must have breached a fiduciary duty it owed to the MLBP, that breach must have violated an “explicit

public policy” as defined above, and the arbitrator’s interpretation of the drug policy must have condoned the violation of public policy. It is important to note that the court will not vacate the arbitrator’s decision unless the policy itself, not the behavior of the parties to the policy, violates the “explicit public policy.” Mid Am. Energy Co. v. Int’l Bd. Of Elec. Workers Local, 345 F.3d 616, 620 (8th Cir. 2003).

A. Breach of a Fiduciary Duty

A fiduciary relationship exists between the MLBPA and MLB under New York law. “A fiduciary relation exists between two persons when one of them is under a duty to act or give advice for the benefit of the other upon matters within the scope of the relation.” Lumbermens Mut. Cas. Co. v. Franey muha Alliant Ins. Servs., 388 F.Supp.2d 292, 305 (S.D.N.Y. 2005). New York courts employ a fact-specific inquiry into “whether a party reposed confidence in another and reasonably relied on the other’s superior expertise of knowledge.” Id. at 305. The MLB, in the interest of protecting players’ health, created an authoritative source of information on banned substances in all dietary supplements through Dr. Larson, Mr. Birch, and other MLB officials. In addition to this policy statement Dr. Larson sent a memo to every player stating that he would “continue to provide MLB players with information on the subject (energy-boosting supplements) throughout the year.” This clearly shows that the MLB had a duty within the scope of their relationship with the players to disclose dangerous ingredients in energy-boosting supplements. Furthermore, it shows that the Players reasonably relied on the superior expertise and knowledge provided by the MLB. Thus, it is evident that a fiduciary relationship existed between the MLBPA and the MLB.

The fiduciary relationship described above imposes a duty upon the MLB to disclose information concerning banned ingredients in energy-boosting supplements that would endanger

the players' health. "The duty to disclose generally arises when one party has information that the other party is entitled to know because of a fiduciary . . . relation of trust and confidence between them." Grandon v. Merrill Lynch & Co., Inc., 147 F.3d 184, 189 (2d. Cir. 1998). Dr. Larson testified he had a continuing obligation under his duties prescribed by the MLB drug policy to make a "special effort to educate and warn players about the risks involved in the use of supplements." This duty to disclose was breached because Dr. Larson and Mr. Birch knew that Clomiphene, a dangerous banned substance, was an ingredient in SpeedShot. Nonetheless, they intentionally chose to not disclose this knowledge.

It is clear that the MLB breached a fiduciary duty owed to the MLBPA, but this fact alone is not sufficient to warrant vacating an arbitration decision. Under W.R. Grace & Co. v. Local Union, the breach of the fiduciary duty must violate an "explicit public policy" that is obtained through reference to laws and legal precedents. Id. at 766. MLB's breach of the fiduciary duty to disclose information concerning harmful ingredients in energy-boosting supplements threatens health and safety. Federal courts have found that sanctioning behavior which threatens health and safety is a violation of public policy. See, Delta Air Lines, Inc. v. Air Line Pilots Ass'n Int'l, 861 F.2d 665, 674 (11th Cir. 1988) (affirmed vacation of arbitration decision reinstating pilot who was discharged for flying passenger plane while intoxicated); Iowa Elec. Light & Power Co. v. Local Union 204 of Int'l Bd. of Elec. Workers (AFL-CIO), 834 F.2d 1424, 1428 (8th Cir. 1987) (affirmed vacation of arbitration decision reinstating machinist in nuclear power plant that deliberately violated federal safety regulations). Although these cases have different fact patterns, they show that prevention of arbitration awards condoning behavior which threatens health and safety is a violation of an "explicit public policy" under federal law precedents.

B. MLB Drug Policy Violates Public Policy and Should be Vacated

The court should vacate the arbitrator's decision, not on account of Dr. Larson, Mr. Birch or any other MLB official's behavior, but rather because the arbitrator was condoning a violation of an "explicit public policy" through their interpretation of the MLB's drug policy. The former is not sufficient to warrant the vacation of a decision, but if the latter is found then vacating the decision is appropriate. Mid Am. Energy Co. at 620. The facts show that through the language of the drug policy and the proclamations made by officials in charge of it, such as Dr. Larson, the MLB created a fiduciary duty with the Players to disclose when there are dangerous banned substances in an energy-boosting supplement.

This duty was breached when the MLB discovered that Clomiphene was an ingredient in SpeedShot and failed to disclose this fact to the Players. After gaining the above knowledge, Dr. Larson and MLB officials gave only broad warnings about the dangers of energy-boosting supplements in general. Additionally, the MLB Supplement Hotline actually advised a player that SpeedShot was not on the banned substances list and as a result the player began using it. On the surface it may appear that it is only the behavior of the officials that violated an "explicit public policy" as described in the previous section, however when the arbitrator's award condoned their actions this changed. In their decision the arbitrator ruled that under the drug policy the MLB was not required to disclose specific dangerous substances that they discover in energy-boosting supplements. This means that the policy itself, as interpreted by the arbitrator, violates, an "explicit public policy."

IV. Conclusion

For the foregoing reasons, we urge this tribunal to affirm the rulings of the Circuit Court, that (1) Section 301 of the LMRA does not preempt Wilson's claim under state law, and (2) that

the arbitrator's award should be vacated because the MLB's drug policy, as interpreted by the arbitrator, violates public policy.