

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**

**COMPETITION PROBLEM PACKET FOR
THE TULANE MARDI GRAS SPORTS LAW
COMPETITION, 2010**

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.

STANDARD OF REVIEW

For the purposes of this hypothetical, the Supreme Court will review all matters *de novo*.

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TULANIA**

KEVIN WILSON; MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,
Plaintiffs,

Versus

MAJOR LEAGUE BASEBALL,
Defendant.

I. INTRODUCTION

The Plaintiff, Kevin Wilson, is an employee of the Minnesota Twins, L.L.C., which is not a party here, and a member of the Major League Baseball Players Association (the “MLBPA”), the other plaintiff in this suit. In 2007, the MLBPA and Major League Baseball (the “MLB” or the “League”) entered into a Collective Bargaining Agreement (the “CBA”) that incorporates the MLB Policy on Anabolic Steroids and Related Substances (the “Policy”). The Policy prohibits MLB players from using a number of “Prohibited Substances,” including a variety of performance enhancing drugs and “Other Anti-estrogens, including Clomiphene, Cyclophenil, and Fulvestrant.” The Policy provides that “players are responsible for what is in their bodies,” and further explains that “this Policy adopts an approach of strict liability, meaning that a positive test result will not be excused because a player was unaware he was taking a Prohibited Substance.” The Policy further states, “a positive test result will not be excused because it does not result from an intentional use of a Prohibited Substance.”

Players with confirmed positive test results will be subject to discipline by the Commissioner as outlined in the Policy. The first time a player violates the Policy by testing

positive for a banned substance the Policy states he will face at least a 15-game suspension, but not more than a 25-game suspension. Additionally, the Policy provides that “Players subject to disciplinary action may appeal to an arbitrator, who is either the Commissioner or his designee, whose decision constitutes a full, final, and complete disposition of the appeal that is binding on all parties.” The Policy also establishes an arbitration process for the review of any action taken in accordance with the Policy, and provides that the decision will be made by a neutral arbitrator whose decision will be “the full, final, and complete disposition of the appeal and will be binding on all parties.”

The Policy is directed by Dr. John Larson, a licensed physician, as its Independent Administrator. Dr. Larson is in charge of implementing the terms of the Policy, including 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. Dr. Ray Finkle is the “Consulting Toxicologist” to aid in the implementation of the Policy. Larson and Finkle have no affiliation with either the Commissioner’s office or any Major League Baseball club.

The Policy also created the “MLB Supplement Hotline,” (the “Hotline”) a confidential hotline provided to players in order to obtain “confidential and accurate information about these products, including their ingredients, effects, and adverse reactions.” The purpose of the Hotline was to provide MLB players, coaches, and trainers with an opportunity to inquire and obtain information about certain supplements and their relation to the Policy. The memorandum announcing the Policy, however, goes on to caution players “You and you alone are still responsible for what goes into your body. Using the Hotline will not excuse a positive test result.”

In 2007, the MLB learned that some bottles of SpeedShot, an energy-boosting supplement that claims to provide five hours worth of energy, contained Clomiphene,¹ a prohibited substance named in the Policy. The SpeedShot label does not disclose Clomiphene as an ingredient. When Dr. Larson was alerted to a possible connection between the positive results for Clomiphene and SpeedShot he informed Dr. Finkle. Dr. Finkle asked David Klein, Director of the Sports Medicine Research Testing Laboratory, to analyze SpeedShot. On November 14, 2007, Klein emailed Finkle and Larson, informing them that SpeedShot did in fact contain Clomiphene. Andrew Birch, Vice President of Law and Labor Policy for the MLB, was then made aware of this finding. Despite the lab director's request that the MLB report the information about SpeedShot to the Food & Drug Administration, Birch and Larson refused to do so.

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 MLBPA to pass that information on to players. The Union responded by notifying all players, through their agents, that the company that "distributes SpeedShot has been added to the list of prohibited energy-boosting supplement companies" and, as a result, "players are prohibited from endorsing any of their products." In addition, Dr. Larson sent a memorandum to all MLB players reminding them of the dangers posed by Energy-Boosting Supplements and "urging players not to take products or supplements that claim to provide or boost energy." The memoranda also reiterated the strict liability rule of the Policy

¹ Clomiphene is commonly used by male anabolic steroid users to bind the estrogen receptors in their bodies, thereby blocking the effects of estrogen. It also restores the body's natural production of testosterone. It is commonly used as a "recovery drug" by steroid users and is taken toward the end of a steroid cycle. At the end of a steroid cycle, steroid users often experience a post-steroid "crash," which can quickly eat up much of the steroid user's newly acquired muscle. Clomiphene can help prevent this crash and thus help the steroid user maintain the muscle growth caused by the steroid.

that “if you test positive for a banned substance this constitutes a positive test, regardless of intent to do so.” All of these communications, however, failed to specifically mention that SpeedShot in fact contained a banned substance.

Despite multiple warnings against the use of energy-boosting supplements, Kevin Wilson took SpeedShot the morning of a scheduled preseason training camp scrimmage. Pursuant to the Policy’s annual preseason provisions, Wilson was drug tested, and his results came back positive for Clomiphene. As required by the Policy, the plaintiff was suspended for fifteen games for testing positive for a prohibited substance. Additionally, four other players, Pat Wilson of the Houston Astros, Manny Rogers of the Boston Red Sox, Al Peterson of the St. Louis Cardinals, and Bradley Melton of the Florida Marlins, also tested positive for Clomiphene and received the same suspension. Plaintiff, the four additional players, and the MLBPA appealed the suspensions to an independent and neutral arbitrator pursuant to the terms of the Policy.

During the arbitration proceedings, all five players, including Wilson, did not dispute their positive tests or the presence of Clomiphene in their system. The players admitted that they were aware of the warnings regarding energy boosters, the Hotline, and the Policy’s rule that each player is responsible for what is in his body. The players argued, however, that their positive results should be excused because Dr. Larson and the MLB knew, as of September 2007, that at least some SpeedShot shots contained Clomiphene—an undisclosed banned substance—and did not specifically advise MLB players of this fact. The players argued that the sanctions should be lifted because, notwithstanding the explicit and repeated warnings about the dangers of energy-boosting supplements and the Policy’s strict liability rule, the Policy created a fiduciary duty that required the MLB to give a more particularized warning about SpeedShot once it was found to contain Clomiphene.

After a full hearing, the arbitrator upheld the suspensions pursuant to the Policy's strict liability rule. The arbitrator found that "none of the players challenged the laboratory analysis or any other aspect of the test." Thus, there was "no genuine dispute regarding the positive test of each player's urine sample." "There is no question," the arbitrator further ruled, "that the Policy enforces a rule of strict liability—a rule that players alone are responsible for what is in their bodies; that supplements are used at the player's own risk, and each player clearly understood that rule and what it means." Moreover, the arbitrator found, "the Policy does not articulate or impose an obligation to issue specific warnings about specific products, and nothing in the record suggests that the bargaining parties have ever contemplated imposing such a requirement." Thus, the "players used SpeedShot at their own risk, did so in the face of repeated warnings about the risks inherent in using supplements in general and energy-boosting supplements in particular, and did so knowing that a positive test would result in a suspension that would not be excused based on a claim of unintentional or inadvertent use."

Wilson then filed suit against the MLB, Dr. Larson, Dr. Ray Finkle, and Andrew Birch in Minnesota state court. The complaint alleged that the Policy violated Minnesota's Drug and Alcohol Testing in the Workplace Act (DATWA) and sought both damages and an injunction against enforcement of the arbitration award. The state court granted Wilson a temporary restraining order barring his suspension. This temporary injunction, however, applied only to Wilson as the other four suspended players were not employed in the state of Minnesota and thus could not obtain protection from that state's employment laws.

The MLB then removed the case to federal court, where it was consolidated with an action brought by the MLBPA seeking to vacate the arbitration awards under the Labor Management Relations Act (the "LMRA"). MLB now moves for summary judgment on all

claims, arguing that Wilson’s DATWA claims are preempted by Section 301 of the LMRA and that the arbitrator’s award should be upheld. We will discuss each argument in turn.

II. PREEMPTION UNDER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT

Wilson argues that because he is employed in the state of Minnesota, the MLB must comply with the provisions set forth in DATWA, Minnesota’s state law regulating employer drug-testing procedures of employees. Wilson contends that the provisions of the Policy do not comply with the mandates established in DATWA, and thus his suspension cannot be upheld. The MLB asserts that Wilson’s DATWA claim is preempted by Section 301 of the Labor Management Relations Act (LMRA).

A. Statutory Framework

1. 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 Textile 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). Likewise, “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...or dismissed as preempted by federal labor-contract law.” *Id.* at 220.

2. Drug and Alcohol Testing in the Workplace Act (DATWA)

The Drug and Alcohol in the Workplace Act, Minn. Stat. § 181.950, establishes certain procedures for an “employer’s” drug and alcohol testing of “employees” in Minnesota. The statute applies to testing for specified drugs, including cocaine, marijuana, and methamphetamines. *Id.* §§ 152.01(4), 152.02, 181.950(4)-(5), 181.951(1)(a). The substances covered by the statute do not include energy boosters, performance enhancing drugs, or Clomiphene. *Id.*

DATWA lists minimum information requirements for the contents of employers’ drug policies. *Id.* § 181.952 subdiv. 1. Pursuant to DATWA, the drug policies of Minnesota employers must provide:

- (1) the employees or job applicants subject to testing under the policy;
- (2) the circumstances under which drug or 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 verifying a positive test result on an initial screening 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. § 181.952 subdiv. 1(1)-(6). DATWA also sets forth criteria that a testing laboratory must meet in order for an employer to use its services. *Id.* § 181.953 subdiv. 1.

The Act expressly provides that its terms “shall not be construed to limit the parties to a CBA 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 provided in” the Act. *Id.* § 181.955(1). In addition, the Act authorizes random drug and alcohol testing for “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).

B. The CBA and Policy

A comprehensive CBA between the MLB and the MLBPA governs the terms and conditions of plaintiff Kevin Wilson's employment and establishes procedures for the resolution of disputes pertaining to that employment. That Agreement incorporates the Policy, which was jointly negotiated by the MLBPA and the MLB Commissioner, the sole and exclusive collective bargaining representative of the MLB's thirty member clubs. The collectively bargained Policy bans a variety of "Prohibited Substances" including steroids and performance enhancers. Clomiphene is one such prohibited substance.

The Policy establishes that those banned substances "have no legitimate place in professional baseball," and makes clear that the use of any prohibited substance violates the player's contractual duties and "threatens the fairness and integrity of the athletic competition on the playing field" by giving players artificial advantages that "threaten to distort the results of the game and League standings." Furthermore, the CBA prescribes a form player contract, the language of which was incorporated in the plaintiff's contracts, pursuant to which each player agrees not to take performance-related drugs because of "the detriment to the League and professional baseball that would result from impairment of public confidence in the honest and orderly conduct of MLB games or the integrity and good character of MLB players."

The Policy includes a collectively bargained for and explicitly stated rule of strict liability under which "Players are responsible for what is in their bodies. This Policy adopts an approach of strict liability, meaning that a positive test result will not be excused because a player was unaware he was taking a Prohibited Substance." Section 8 of the Policy emphasizes that "a positive test result will not be excused because it does not result from the intentional use of a Prohibited Substance. Players are responsible for what is in their bodies."

Appendix C to the Policy is a letter from the MLBPA and the MLB that addresses the “Use of Supplements” and “strongly encourages players to avoid the use of supplements altogether” warning “if you take these products, you do so AT YOUR OWN RISK!” The letter also advises that “several players have been suspended even though their positive test result may have been due to the use of a supplement,” and underscores that if you test positive or otherwise violate the Policy you will be suspended because “you and you alone are responsible for what goes into your body.”

The MLB also provides players the opportunity to contact the Hotline to obtain “confidential and accurate information” about certain over-the-counter products, including their ingredients, effects, and adverse reactions. The memorandum announcing the Hotline states: “Although we strongly discourage the use of supplements of any kind and for any reason, we understand that an informed decision is the best one.” The memorandum goes on to state “You and you alone are still responsible for what goes into your body. Using the Hotline will not excuse a positive test result.”

C. The DATWA Claims Are Preempted Because the Statute Expressly Requires Analysis of the CBA.

Section 301 of the LMRA “mandate[s] resort to federal rules of law in order to ensure uniform interpretation of collective-bargaining agreements, and thus to promote the peaceable, consistent resolution of labor-management disputes.” *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 404 (1988). Because “uniformity in the interpretation of collective bargaining agreements is considered essential to the federal scheme favoring collective bargaining,” *Anderson v. Ford Motor Co.*, 803 F.2d 953, 955 (8th Cir. 1986), Section 301’s preemptive power covers any state law claim that is “inextricably intertwined with consideration of the terms of the labor contract” or “substantially dependent upon analysis of the terms of an

agreement made between the parties in a labor contract.” *Allis-Chambers*, 471 U.S. at 213, 220; *see also Trustees of the Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing, Inc.*, 450 F.3d 324, 330 (8th Cir. 2006)(finding that a claim is preempted if it requires “interpretation or construction” of a CBA).

The test for preemption is whether state law requirements can be enforced without any reference to an interpretation of the CBA. *Twin City Bricklayers*, 450 F.3d 330. Wilson’s claims cannot. By its plain terms, DATWA predicates relief on interpretation and application of the CBA and its drug-testing Policy. Because interpretation of the CBA would underlie any finding of statutory liability in this case, the claims are preempted regardless of whether a court “chooses to define the [claim] as ‘independent’ of any contractual questions.” *Allis-Chambers*, 471 U.S. at 218. Accordingly, Wilson’s DATWA claim is preempted because it requires interpretation and analysis of the CBA and Policy, and it is inextricably intertwined with the CBA’s enforcement.

DATWA mandates reference to an analysis of the Policy. The statute expressly provides that “parties to a collective bargaining agreement can bargain and agree” to a drug-testing policy as long as that policy “meets or exceeds, and does not otherwise conflict with DATWA’s minimum standards.” Minn. Stat. § 181.955(1). Wilson’s claim thus cannot succeed “without interpreting certain terms of the collective bargaining agreement,” to determine whether the terms of the Policy “meet or exceed” DATWA’s threshold. *Gore v. Trans World Airlines*, 210 F.3d 944, 951 (8th Cir. 2000).

For example, a court would have to determine whether the testing procedures established by the Policy constitute a form of discipline. The court would also have to analyze the rules under the Policy for challenging a positive test result to decide whether Wilson properly exhausted his claim, as mandated by DATWA. *See* Minn. Stat. § 181.956(1). In addition, the

court would have to analyze and define the nature of both the player's rights in arbitration and the Independent Administrator's review following a positive test to see if they meet or exceed DATWA's requirement of an opportunity to "explain the positive test." See Minn. Stat. § 181.953(6). Analysis of the Policy's operation as compared to DATWA's provisions would be complicated even further by the fact that the Policy tests for numerous substances, including the Clomiphene at issue here, that are not even subject to DATWA's protections.

In short, because DATWA commands courts to analyze and interpret the twenty-seven pages of the Policy so that it can meaningfully compare them to the numerous requirements in DATWA's twenty-four separate subdivisions, the DATWA claims are "inextricably intertwined with consideration of the terms of the Policy" and are therefore preempted. *Lueck*, 471 U.S. at 213; *Zupanich v. United States Steel Corp.*, No. 08-5847, 2009 U.S. Dist. LEXIS 44504, at *8-9 (D. Minn. May 27, 2009)("[T]he plain language of the statute requires the Court to examine the CBA to determine whether the agreement negotiated by the parties resulted in conditions that are not more favorable to employees. As such, the claim is inextricably intertwined with the CBA."); *Stringer v. National Football League*, 474 F.Supp.2d 894, 910 (S.D. Ohio 2007) (holding that a wrongful-death suit arising from death of player in hot weather conditions was preempted because the suit intertwined with collective bargaining agreement provisions regarding certification of team trainers and responsibilities of team trainers and physicians); *Holmes v. National Football League*, 939 F.Supp. 517, 527 (N.D. Tex. 1996)(finding that a claim for invasion of privacy arising from mandatory participation in the league's drug-testing program was preempted because an analysis of the CBA was required to determine whether the test was authorized).

Additionally, preemption is warranted because Wilson challenges a nationwide CBA establishing necessarily uniform rules that must be evenhandedly enforced against individuals working in multiple jurisdictions. Allowing state-by-state litigation to revise the CBA piecemeal would make it impossible for the MLB to maintain a single, nationwide Policy against the use of prohibited substances by MLB players. While Wilson is a member of the Minnesota Twins, his career and professional advancement depends upon the operation of a nationwide league that allows him to play games in approximately twenty-five different states. 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 other States in which players play. *See Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989)(“The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.”).

The purpose of the Policy is to enforce a single uniform standard of player conduct that ensures an even playing field for all players and protects the “integrity” of the game. Fair competition could not exist if a patchwork of state laws imposed different rules and policies for the use of prohibited substances every time players crossed into or out of a jurisdiction to play. In this case, for example, while the Minnesota law claims allowed Wilson to keep playing despite an admittedly positive test, four other teams in other jurisdictions played without the help of one of their players who also tested positive after taking SpeedShot. Such disparate enforcement of the Policy threatens the “fairness and integrity” of the athletic competition on the playing field, threatens to distort the results of games and League standings, and is obviously unfair to those players who do not wish to use these substances.

Congress enacted Section 301 precisely because “[t]he possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.” *Teamsters v. Lucas Flour, Co.*, 369 U.S. 95, 103 (1962). By the same token, the already difficult process of bargaining for and enforcing prohibited-substance policies, which are critical to the integrity of professional sports, “would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract.” *Id.* at 103-04.

Furthermore, the Supreme Court has recognized:

[I]f the resolution of a state-law depends upon the meaning of a collective-bargaining agreement, the application of state law...might lead to inconsistent results since there could be as many state-law principles as there are States...[and] is pre-empted and federal labor-law principles—necessarily uniform throughout the Nation—must be employed to resolve the disputes.

Lingle, 486 U.S. at 405-06. Contrary to the principle of uniformity set forth in *Lingle*, any decision against preemption in this instance would authorize players for different teams to find protection under the rules of the state in which they play instead of requiring that the players adhere to the uniform collective bargaining rules set forth in the Policy. In fact, the present case has already engendered inequality, as the other players who tested positive for Clomiphene cannot bring a claim under DATWA as they happen to play for teams outside the state of Minnesota.

The unique and necessarily national character of the rules governing nationwide athletic competition means that federal law—“necessarily uniform throughout the Nation,” *Lingle*, 486 U.S. at 406—can govern the interpretation and enforcement of the Policy and prevent

“[f]ragmentation of the league structure on the basis of state lines.” *Partee v. San Diego Chargers Football Co.*, 668 P.2d 674, 678 (Cal. 1983). Accordingly, in the context of a nationwide drug-testing policy adopted as part of a nationwide CBA governing the interstate play of professional athletes, state law must give way to the need for “interpretive uniformity and predictability” that Section 301 of the LMRA enforces. *Twin City Bricklayers*, 450 F.3d at 334.

Consequently, Section 301 must preempt Wilson’s DATWA claims because the claim is it is “inextricably intertwined” with the enforcement of the Agreement and Policy. Furthermore, the application of Minnesota’s state law would lead to inconsistent results since there could be as many state-law principles as there are States. Therefore, this court is granting the MLB’s motion for summary judgment and dismissing Wilson’s DATWA claims against the league.

III. THE ARBITRATION AWARD

Next, the MLBPA and Wilson contend that this Court should reverse the arbitrator’s award upholding Wilson and the other players’ suspensions. The Policy requires the parties to submit appeals of discipline decisions to arbitration. Thus, this Court’s review of the arbitrator’s decision is circumscribed by the Federal Arbitration Act, which allows a court to set aside an arbitration award only if that award “was procured by fraud, corruption, or undue means,” or when “there was evident partiality in the arbitrators.” 9 U.S.C.A. §§ 10(a)(1)-(2). The MLBPA and Wilson argues that this court should set aside the arbitration award at issue because of the MLB’s alleged bad conduct in not informing the players about the presence of Clomiphene in SpeedShot. They contend that public policy mandates that arbitration awards that condone breaches of fiduciary duties be vacated. The MLB moves for summary judgment, contending that they owed the players no duty to inform them of the presence of banned substances in SpeedShot, and thus that the arbitrator’s award cannot be vacated.

An arbitration award that does not “draw its essence from the collective bargaining agreement” is not entitled to deference from the reviewing Court. *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987). However, a court’s authority to reverse an arbitration award for failure to comply with the Policy is “exceptionally narrow.” *Coca-Cola Bottling Co of St. Louis v. Teamsters Local Union No. 688*, 959 F.2d 1438, 1440 (8th Cir. 1992). This court must afford the arbitrator “an extraordinary level of deference” and must confirm the award as long as “the arbitrator is 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). Further, this court may vacate the decisions of the arbitrator “only for the reasons enumerated in the FAA.” *Crawford Group, Inc. v. Holekamp*, 543 F.3d 971, 976 (8th Cir. 2008).

Both parties concede that the decisions at issue draw their essence from the parties’ CBA. Consequently, the Court must treat the decisions as to whether the Policy requires disclosure as if they represented the agreement between the MLBPA and the MLB, as the players contend was required here. *Eastern Assoc. Coal Cos. v. United Mine Workers of Am.*, 531 U.S. 57, 62 (2000). Put differently, the decisions are “not distinguishable from the contractual agreement.” *Id.* This court must then decide whether the Policy as interpreted by the arbitrator “violates some explicit public policy” that is “well defined and dominant” and can be “ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.” *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983). The question is not whether any behavior by the parties to the Policy violates public policy, but rather whether the Policy itself violates public policy. *MidAm. Energy Co. v. Int’l Bd. Of Elec. Workers Local 499*, 345 F.3d 616, 620 (8th Cir. 2003). If the Policy does violate an explicit public policy, the Court is

obligated to refrain from enforcing it. *W.R. Grace*, 461 U.S. at 766. In order to prevail on this claim, the MLBPA and Wilson must show that a fiduciary duty exists and was breached, that those fiduciary duties are explicit public policy, and that the Policy as interpreted by the arbitrator violated that public policy by condoning a breach of fiduciary duties.

First, the MLBPA contends that the League and Larson breached a fiduciary duty to the players and Larson's duties as a physician because Larson did not issue a specific warning regarding SpeedShot and the fact that it contained Clomiphene. Larson testified, however, that had a player called him to inquire specifically about SpeedShot, Larson would have told that player that SpeedShot contained Clomiphene. Consequently, there can be no claim of a breach of fiduciary duty arising out of Dr. Larson's alleged refusal to divulge that information. In addition, Larson's decision to not issue a specified warning concerning SpeedShot does not violate his duties to players. Larson testified that he decided to send a general warning about energy-boosting supplements rather than about SpeedShot specifically because the whole energy-boosting supplements industry is a problem. Thus, as the arbitrator found, Larson exercised his discretion under the Policy to educate players, and did so in a general way because he believed that all energy-boosting supplements, not just SpeedShot, carried potential risks. The MLBPA and the players may disagree with Larson's conclusion, but under the terms of the Policy, the decision on this issue was Dr. Larson's to make. Absent a showing that the decision was outrageous or without any foundation, the Union and the players cannot establish that the decision constituted a violation of whatever fiduciary duties Larson may have had.

The MLBPA also alleges that the Hotline gave inaccurate information to the players regarding SpeedShot, that Birch knew the Hotline was giving inaccurate information and did nothing to correct the situation, and that this constitutes a breach of the MLB's fiduciary duties

to the players. In 2007, after the discovery that SpeedShot contained Clomiphene, Birch had asked the Hotline about how many calls it had received regarding SpeedShot, yet did not tell the Hotline to dispense any more information about SpeedShot other than the fact that while it was not on the banned substance list, players should avoid taking any energy supplement because the label might not list all its ingredients. While the information that the Hotline gave inquiring players concerning SpeedShot was undisputedly accurate, the MLBPA contends that the Hotline should have informed players inquiring about SpeedShot about the presence of Clomiphene in SpeedShot once the MLB was aware that SpeedShot did in fact contain a banned substance.

While this specific warning might have been preferable to the Union and players, it is not a breach of fiduciary duties to tell players only that energy boosters are risky and that players should not rely on any supplement's list of ingredients because that list might be incomplete. The MLB's decision regarding the general warning to give players is not unreasonable. The administration of the Hotline presents squarely the troubling issues brought forward by this case. There is no doubt that it would have been preferable for the MLB to communicate with players specifically about the presence of Clomiphene in SpeedShot; however, while the MLB's failure to do so is baffling, it is not a breach of the MLB's duties to its players. Through the Hotline, the MLB was attempting to tell players what they already knew: that players should not take energy-boosting supplements. MLB players are adults. They have been warned repeatedly not to take energy-boosting supplements because such energy boosters may cause a positive test for a banned substance. *See Walton-Floyd v. United States Olympic Comm.*, 965 S.W.2d 35 (Tex. Ct. App.—Houston [1st Dist.]) (finding that the USOC did not voluntarily assume a duty under state law through the operation of a hotline service available to athletes to check to status of all medications as to the list of prohibited substances).

It is no doubt true that none of the players here would have taken SpeedShot if the MLB had issued a specific statement saying that SpeedShot contained Clomiphene. It is also likely that those players, having been warned not to take SpeedShot in particular, would have turned to a different energy booster in order to obtain the desired results. There is certainly no guarantee, however, that any other energy booster is less likely to have a banned substance than is SpeedShot. Therefore, despite the MLB's and Larson's repeated warnings about energy boosters, the players would most likely have continued to use them, although not SpeedShot specifically. Most importantly, the MLBPA has offered no authority clearly articulating what public policy was violated under New York law.² Because the Union has failed to demonstrate an explicit, well defined, and dominant public policy requiring such a disclosure, this argument does not provide a basis for vacating the awards. *See W.R. Grace*, 461 U.S. at 766.

The arbitrator determined that the Policy makes players responsible for what is in their bodies. He noted that if the Union disagreed with this apportionment of strict liability, it is free to bargain for a different Policy. The MLBPA is, in fact, free to bargain for a clause that requires the MLB to inform players specifically when an energy-boosting supplement, or any supplement for that matter, is found to contain a banned substance. The Policy as written, however, does not contain such a requirement. More importantly, the absence of such a requirement does not sanction any breach of fiduciary duty.

Having failed to establish that a genuine issue as to a material fact exists about whether the MLB or Larson breached any fiduciary duties, the MLBPA and Wilson cannot succeed on their claim that the arbitrator's decisions must be set aside as contrary to public policy. Thus, the

² New York law governs this issue because the Policy is part of the MLB Collective Bargaining Agreement, which states that to the extent that federal law does not govern, New York State law will govern the CBA.

MLB's motion for summary judgment is granted, the MLBPA's claim must be dismissed, and the arbitrator's award upholding the suspension is upheld.

IV. CONCLUSION

Wilson and the MLPBA's claims must fail on both counts. First, Section 301 of the LMRA preempts Wilson's DATWA claim because the DATWA claims are inextricably intertwined with an interpretation of the CBA. By its plain terms, DATWA predicates relief on interpretation and application of the CBA and the drug-testing Policy. Because interpretation of the CBA would underlie any finding of statutory liability in this case, the claims are thus preempted. Furthermore, Section 301's preemption is required in order to enforce a uniform national drug-testing policy for players of the MLB. Allowing the application of DATWA would lead to more players seeking relief from the MLB's drug-testing program by invoking their specific state laws regarding this subject. This in turn would undermine the uniform drug-testing policy, lead to unfair results and suspensions as already demonstrated in this case, and undermine league's reputation to the public at large. We may even go so far to say that without the application of uniform federal labor law policies, players may be allowed to escape the League's drug-testing program altogether and legally take performance-enhancing substances that would unfairly effect the outcome of the League's games and pose a detrimental threat to the already hurting reputation of the MLB. Accordingly, this court holds that Wilson's DATWA claims preempted by Section 301 of the LMRA and summary judgment is granted.

Secondly, this court holds that the arbitrator's decision must be upheld because the MLB did not owe the players a fiduciary duty to issue product specific warnings concerning the presence of banned substances, and thus the arbitrator's decision did not run contrary to any explicit public policy. The MLB and Larson did issue general warnings regarding all energy

boosters, and did so properly within their discretion. While it may have been more favorable for the League and Larson to issue a specific warning concerning the presence of Clomiphene in SpeedShot, the League and Larson were not under any obligation to do so. Additionally, the Policy's explicit application of strict liability provided enough warning to the players that they are the one's responsible for what goes into their body. Consequently, the presence of a strict liability policy and the general warnings regarding energy-boosting supplements were enough to put the players on notice that their actions could lead to their subsequent suspensions. Accordingly, the arbitrator's suspensions must be upheld and the MLB's motion for summary judgment is granted.

SO ORDERED,

The Honorable Judge Rick Vaughn

**UNITED STATES COURT OF APPEALS FOR
THE FOURTEENTH CIRCUIT**

IN THE MATTER OF:

KEVIN WILSON;
MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,
PLAINTIFF-APPELLANT

versus

MAJOR LEAGUE BASEBALL,
DEFENDANT-APPELLEE.

Appeal from the United States District Court
for the Southern District of Tulania
USDC No. 09-AC-0213

Before SCOTT, SHRUTE, and DORN, Circuit Judges.
SCOTT, Circuit Judge:

I. INTRODUCTION

In this appeal, Kevin Wilson of the Minnesota Twins and the Major League Baseball Players' Association (MLBPA), on behalf of Kevin Wilson, Pat Wilson of the Houston Astros, Manny Rogers of the Boston Red Sox, Al Peterson of the St. Louis Cardinals, and Bradly Melton of the Florida Marlins (collectively "the Players"), appeal the district court's granting of a summary judgment in favor of Major League Baseball (MLB), Dr. John Larson, Independent Administrator of the Policy of the MLB Policy on Anabolic Steroids and Related Substances (the "Policy"), and Andrew Birch, the MLB's Vice President of Law and Labor Policy, holding that claims brought under Minnesota's Drug and Alcohol Testing in the Workplace Act (DATWA) claims were preempted by Section 301 of the Labor Management Relations Act (LMRA) and

that the arbitrator's decision upholding the plaintiffs' suspensions was not in violation of public policy.

II. STATEMENT OF FACTS

This case involves a rather lengthy set of facts concerning the establishment of the Collective Bargaining Agreement between the two parties, the drug testing Policy agreed upon between the two parties, and the subsequent developments that arose concerning the league's response to its discovery that Speedshot, an energy-boosting supplement, contained Clomiphene, a banned substance under the Policy. As there is no dispute to the facts asserted in the District Court's decision, this court adopts that court's statement of the facts as its own.

III. PRIOR HISTORY

In response to the arbitrator's award, Kevin Wilson filed suit against the MLB, Dr. Larson, Dr. Finkle, and Birch in Minnesota District Court, alleging numerous violations of Minnesota common law and breach of contract. That same day, the state court issued a preliminary injunction blocking the suspension of Kevin Wilson because the MLBPA established a likelihood of success on its claim that the Policy is in violation of Minnesota's Drug and Alcohol Testing in the Workplace Act (DATWA). This injunction, however, only blocked the suspension of Kevin Wilson, as he is the only player employed in the state of Minnesota and subject to that court's jurisdiction. The MLB then removed the case to federal district court. Thereafter, the MLBPA, on behalf of the five players, initiated a separate suit in federal court against the MLB and the Commissioner seeking to have the arbitration awards upholding the suspensions vacated as a violation of public policy. The MLBPA then amended

their complaint in federal court, asserting that Wilson's suspension was a violation of Minnesota's Drug and Alcohol Testing in the Workplace Act (DATWA).

The MLB filed a motion for summary judgment claiming that Section 301 of the LMRA preempted Wilson's DATWA claim and that the League had no duty to disclose that SpeedShot contained Clomiphene. The United States District Court for the Southern District of Tullahoma agreed, concluding that Section 301 preempted the Players' DATWA claims. Additionally, the court concluded that the MLBPA's argument—that the MLB and Dr. Larson violated public policy by failing to disclose that SpeedShot contained Clomiphene—failed because Dr. Larson warned players about the energy boosting supplements in general and testified that had a player asked him about SpeedShot he would have disclosed that it contained Clomiphene. The court determined that Dr. Larson's decision not to provide an ingredient-specific warning was within his discretion. The court further decided the MLB had no duty to specifically inform players when an energy booster supplement is found to contain a banned substance. Therefore, the court granted the league's motion for summary judgment and upheld the arbitrator's suspensions.

IV. ANALYSIS

The Players appeal the district court's decision that Section 301 preempts Wilson's Minnesota statutory claim. Additionally, the MLBPA and Wilson appeal the district court's order refusing to set aside the arbitrator's decisions because they claim that the arbitrator's decision sanctions Larson's and the MLB's breaches of fiduciary duty. Whether the district court properly granted the MLB's motion for summary judgment is a question of law that this Court will review *de novo*. *McLean v. Gordon*, 548 F.2d 513, 516 (8th Cir. 2008). The district court's ruling that the DATWA claims are preempted by Section 301 is also subject to *de novo* review. *Bogan v. General Motors Corp.*, 500 F.3d 828, 832 (8th Cir. 2007).

A. Wilson's DATWA Claim is Not Preempted by Section 301 of the LMRA.

We first consider the DATWA claim. The MLB asserted, and the district court agreed, that the DATWA claim is preempted because: (1) the claim turns on analysis of the Policy in order to determine whether it “meet or exceeds” DATWA’s requirements and (2) uniform interpretation of the CBA/Policy is necessary to preserve the integrity of the MLB’s business as a national organization. The MLB concedes that its steroid testing procedures do not comply with the letter of Minnesota law, but argues that the differences are negligible and do not require the Court to invalidate Wilson’s positive test for Clomiphene.

Section 301 applies to “suits for violation of contracts between an employer and a labor organization,” in other words, suits for breaches of CBAs. 29 U.S.C. § 185(a). The Supreme Court of the United States has held that federal law exclusively governs suits for breach of a CBA and that “the pre-emptive force of [Section] 301 extends beyond state-law contract actions.” *United Steelworkers v. Rawson*, 495 U.S. 362, 369 (1990); *see also Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210 (1985). Section 301 preempts state-law claims that are “substantially dependent upon analysis” of a CBA. *Allis-Chalmers*, 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. 399, 406 (1988). Rather, “federal labor-law principles—necessarily uniform throughout the nation—must be employed to resolve the dispute. *Id.* However, the Supreme Court has 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-Chalmers*, 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....”).

In applying the Section 301 preemption doctrine, we 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). The court then applies a two-step approach in order to determine if the claim is sufficiently “independent” to survive Section 301 preemption. *Bogan*, 500 F.3d at 832. 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.* Second, Section 301 preemption applies where a state-law claim “is dependent upon an analysis’ of the relevant CBA,” meaning that that state-law claim requires interpretation of a provision of the CBA. *Id.*

DATWA governs drug and alcohol testing in the Minnesota workplace by imposing “minimum standards and requirements for employee protection” with regard to an employer’s drug and alcohol testing policy. *Minn. Stat.* § 181.955 subdiv. 1. DATWA lists minimum information requirements for the contents of employers’ drug policies. *Id.* § 181.952 subdiv. 1. Pursuant to DATWA, the drug policies of Minnesota employers must provide:

- (1) the employees or job applicants subject to testing under the policy;
- (2) the circumstances under which drug or 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 verifying a positive test result on an initial screening 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. § 181.952 subdiv. 1(1)-(6). DATWA also sets forth criteria that a testing laboratory must meet in order for an employer to use its services. *Id.* § 181.953 subdiv. 1.

Additionally, DATWA requires that an employer provide an employee, who tests positive for drug use, with “written notice of the right to explain the positive test,” an opportunity “to explain that 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). DATWA precludes an employer from “discharg[ing] [or] disciplin[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). Specifically, with respect to first-time offenders, an employer cannot discharge an employee unless the employee is first given the opportunity to participate in treatment and refuses to participate or fails to successfully complete the program. *Id.* § 181.953 subdiv. 10(b)(1)-(2).

DATWA expressly addresses CBAs. Subdivision two of § 181.955 mandates that DATWA applies to all CBAs in effect after passage of the law 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. 1.¹

First, the district court found that because Wilson was tested pursuant to a collectively bargained-for drug policy, DATWA liability hinges on whether the Policy affords protections that are equivalent to or greater than DATWA’s mandatory protections. The court asserted that this would necessarily require it construe the terms of

¹ We note that it is unclear which specific violations of DATWA the Player’s are alleging, other than the failure to use certified laboratories. The amended complaint does not flesh out the claim but generally states that “the defendants have violated the Player’s substantive and procedural rights under the Minnesota Drug and Alcohol Testing in the Workplace Act.”

the Policy in order to determine whether its protections for the players “meets or exceeds” DATWA’s protections such that any DATWA claim alleged by the Players is preempted by section 301. Thus, the court essentially held that an employee has no DATWA claim if he or she is a party to a CBA that is at least as protective of the employee as DATWA. We disagree.

DATWA does not state that an employee who is a party to such a CBA cannot bring a claim under DATWA. Rather, where there is a CBA that is at least as protective of employees as DATWA, the number of possible claims an employee has against his or her employer will be affected. Where the employer complies with DATWA but not with its CBA that provides greater protection, the employee could have only a claim for breach of contract. Where the employer does not comply either with DATWA or its CBA that provides equivalent or greater protection than DATWA, the employee could potentially have two claims, a claim for breach of contract and a DATWA claim.

Here, a court would have no need to consult the Policy in order to resolve Wilson’s DATWA claim. Rather, it would compare the facts and the procedure that the MLB actually followed with respect to its drug testing of Wilson with DATWA’s requirements in order to determine if Wilson is entitled to prevail. Such a claim is not preempted. *See Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 261, 266 (1994) (“[P]urely factual questions’ about an...employer’s conduct...do not ‘requir[e] a court to interpret any term of a [CBA].’”)(quoting *Lingle*, 486 U.S. at 407); *see also Thompson v. Hibbing Taconite Holding Co.*, No. 08-868, 2008 U.S. Dist. LEXIS 87045, 2008 WL 4737442, *1, *4 (D. Minn. Oct. 24, 2008)(holding that a terminated employee’s multiple DATWA claims alleged “violat[ions] [of] such non-negotiable state law rights [which]

d[id] not require an interpretation of the CBA, and would not be preempted under the LMRA.”).

The United States Court of Appeals for the Tenth Circuit considered an analogous fact situation in *Karnes v. Boeing Co.*, 335 F.3d 1189 (10th Cir. 2003). There, a former employee brought an action against Boeing under Oklahoma’s Standards for Workplace Drug and Alcohol Testing Act. *Id.* at 1192. The court observed that “in order to establish a violation of this section, [the plaintiff] must show that Boeing (1) discharged him based on his drug test, and (2) failed to confirm the result through a second test. Neither inquiry requires the court to interpret, or even refer to, the terms of a CBA.” *Id.* Therefore, the court found that the state statutory claim was “clearly independent of the CBA and...not subject to § 301 preemption.” *Id.* at 1194.

Section 301 preempts a state law claim if its “resolution...depends upon the meaning of a collective-bargaining agreement.” *Lingle* 486 U.S. at 405-06. “[T]he Supreme Court has distinguished those which require interpretation or construction of the CBA from those which only require reference to it.” *Superior Waterproofing*, 450 F.3d at 330; *see also Livadas v. Bradshaw*, 512 U.S. 107, 124-25 (1994)(holding there was no section 301 preemption because a wage rate provision of the CBA only had to be referenced to compute the proper damages). “An otherwise independent claim will not be preempted if the CBA need only be consulted during its adjudication.” *Superior Waterproofing*, 450 F.3d at 330. In sum, Section 301 does not preempt every employment dispute, and it does not preempt all other disputes concerning CBA provisions. *Miner v. Local 373*, 513 F.3d 854, 865 (8th Cir. 2008). “Rather, the crucial inquiry is whether ‘resolution of a state-law claim depends upon the meaning of a

[CBA].” *Id.* (quoting *Lingle*, 486 U.S. at 405-06). The MLB does not point to a specific provision of either the CBA or the Policy that must be interpreted.

Finally, the District Court found that denying preemption and subjecting the Policy to divergent state regulations would render the uniform enforcement of the MLB’s drug testing policy, on which it relies as a national organization for the integrity of its business, nearly impossible. The United States Court of Appeals for the Ninth Circuit has rejected a similar argument. *See Cramer v. Consolidated Freightways, Inc.*, 225 F.3d 683, 695 n.9 (9th Cir. 2001)(en banc). In *Cramer*, the employer, a large trucking company, “argue[d] that the terms of the CBAs affecting employees in multiple states should supersede inconsistent state laws.” *Id.* at 688, 695 n. 9. The Ninth Circuit observed, “This contention overreaches, however, because the LMRA certainly did not give employers and unions the power to displace any state regulatory laws they found inconvenient.” *Id.* at 695 n.9.

We think this is the proper result in light of the Supreme Court’s observation that:

[T]here [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. Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored. Clearly § 301 does not grant the parties to a [CBA] the ability to contract for what is illegal under state law. In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.

Allis-Chalmers, 471 U.S. at 211-12; *see also Livadas*, 512 U.S. at 123 (cautioning that section 301 “cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law”). Therefore, the district court’s reasoning fails.

In sum, Wilson’s DATWA claim is predicated on Minnesota law, not the CBA or the Policy, and the claim is not dependent upon an interpretation of the CBA or the Policy. Thus, Wilson’s DATWA claim is not preempted by section 301.

B. The Arbitration Award Must Be Vacated Because It Violates Public Policy.

The MLBPA seeks to vacate the arbitration awards that suspended the players because the suspensions violate public policy. The MLBPA acknowledges that a party seeking to set aside an arbitration award bears a very high burden. This court must afford the arbitrator “an extraordinary level of deference” and must confirm the award as 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). However, “if the [Policy] as interpreted by the arbitrator violates some explicit public policy, [the Court is] obliged to refrain from enforcing it.” *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983). It is not enough for the MLBPA to argue that the award violates a general public policy. Rather, the relevant public policy “is to be ascertained ‘by reference to the laws and legal precedents and not from general considerations of public interests.’” *Id.* (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)).²

An arbitration award must be vacated where it runs counter to public policy. *See Ace Elec. Contractors, Inc. v. Int’l Bd. of Elec. Workers, Local Union No. 292*, 414 F.3d 896, 903 (8th Cir. 2005). Courts have frequently ordered arbitration awards to be vacated on public policy grounds where, as here, an award would sanction behavior that threatens health and safety. *See, e.g., Delta Air Lines, Inc. v. Air Line Pilots Ass’n, Int’l*, 861 F.2d 665, 674 (11th Cir.

² New York law governs this issue because the Policy is part of the MLB Collective Bargaining Agreement, which states that to the extent that federal law does not govern, New York State law will govern the CBA.

1988)(affirming vacation of an award ordering reinstatement of pilot who had been discharged after 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)(affirming vacation of an award ordering reinstatement of nuclear power plant machinist discharged for deliberately violating a federally mandated safety regulation).

The arbitrator's awards at issue here violate public policy because they sanction the MLB's knowing and intentional breach of a fiduciary duty and willful failure to disclose the fact that SpeedShot secretly contained a banned substance. The league's failure to act was both a violation of the Policy and was potentially harmful to the Players' health. Permitting the arbitration award to stand would endorse this wrongful conduct by the MLB and the officials appointed by the League to supervise the Policy.

A fiduciary relationship existed in this case because the Players reasonably relied on Dr. Larson's, Mr. Birch's, and the MLB's superior expertise and knowledge in administering the Policy—which states that it is motivated by concerns of protecting player health—as the authoritative source of information on potentially harmful ingredients in dietary supplements banned by the Policy. “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). 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). In order to determine if a fiduciary duty exists, New York courts conduct a fact-specific inquiry “whether a party reposed confidence in another

and reasonably relied on the other's superior expertise of knowledge." *Lumbermens*, 388 F.Supp.2d at 305.

One of the primary factors underlying the Policy is the concern with the adverse health effects of using prohibited substances. Dr. Larson, as the Independent Administrator of the Policy, had an express duty to educate players about prohibited substances. The Policy specifically provided: "In addition, the Independent Administrator will make himself available for consultation with players and Club physicians; oversee violated protocols; oversee the development of education materials; participate in research on steroids." The MLB Players were expressly directed to Dr. Larson to ask for information about energy-boosting supplements. Furthermore, while discretionary provisions are important parts of the Policy, Dr. Larson expressly promised in a memorandum sent to all players that he would "continue to provide MLB Players with information on the subject throughout the year." Dr. Larson failed to live up to that duty by withholding critical information he learned about SpeedShot that was directly relevant to the health of MLB players.

In addition to Dr. Larson's promise to continually provide MLB players with relevant information on energy-boosting supplements, the MLB held itself and Dr. Larson out to the MLB players as the authoritative sources for information about the ingredients in supplements and energy boosters. The Policy explicitly provides "If you have questions or concerns about a particular supplement or other product, you should contact Dr. Larson. As the Independent Administrator, Dr. Larson is authorized to respond to players' questions regarding specific supplements." By declaring itself and Dr. Larson the authoritative sources of information about all supplements, the MLB undertook a duty "to give advice for the benefit of [MLB Players] upon matters within the scope of the relation," and the players reasonably relied on the MLB and

Dr. Larson's superior expertise and knowledge about the safety of energy-boosting supplements. *Lumbermans*, 388 F.Supp.2d at 305. These facts alone give rise to a fiduciary duty under New York law. Furthermore, the Policy also advises players that the Policy's administrators will make a "special effort to educate and warn players about the risks involved in the use of supplements." Dr. Larson testified that this "special effort to educate and warn players" was a continuing obligation that is included within the scope of his duties under the Policy.

As their fiduciaries with respect to information about dietary information, Dr. Larson and the MLB owed the players the duty to disclose all material facts they knew within the scope of that relationship, especially facts about banned substances, which would endanger a player's health. *See 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"). In this case there is no dispute that Dr. Larson and Mr. Birch knew that Speedshot contained a banned substance years before the players were tested. Further, it is indisputable that they both deliberately withheld this vital health information from the players.

Dr. Finkle, the toxicologist under the Policy, testified that he informed Dr. Larson that Clomiphene had been identified in SpeedShot, although it was not included in the list of ingredients, and that "there should be some concern about the potential adverse effects on the health of players who may be taking this drug without proper medical supervision." Despite this knowledge, Dr. Larson deliberately chose not to inform any MLB player or the MLBPA about these critical facts that threatened the health of MLB players. Shockingly, Dr. Larson testified

that he decided not to disclose to MLB players the presence of this potentially dangerous chemical secretly contained in SpeedShot because he feared that MLB players might then in the future come to expect that he would notify them about other harmful banned substances in energy-boosting supplements. This fear of personal liability caused Dr. Larson to conceal his knowledge about the ingredients in SpeedShot from the MLB players and also from the MLBPA. In addition to Dr. Larson, Mr. Birch, the Vice President of Law and Labor Policy at the MLB, also knew of the banned substance in SpeedShot because Dr. Larson told him about it. Birch, however, did nothing to inform the MLB players or the MLBPA.

Had either Dr. Larson or any MLB official informed the Players that SpeedShot contained a banned substance, the players would not have taken it, would not have risked their health, and would not have been suspended. Indeed one of the players only commenced using SpeedShot after the MLB Supplement Hotline advised him that SpeedShot was not on the banned substances list. Rather than denounce Dr. Larson and Mr. Birch's willful failure to disclose the presence of Clomiphene in SpeedShot, the arbitrator expressly condoned and encouraged this behavior by finding that the Policy does not articulate or impose an obligation on the League to issue product specific warnings. The arbitrator's award, therefore, violates public policy because it sanctions and in fact encourages breaches of fiduciary duty which jeopardized the health of MLB players and upheld suspensions for actions that were the direct result of the League's and Dr. Larson's own misconduct. As a result, the district court's ruling is reversed the arbitration awards must be set aside.

V. CONCLUSION

For the foregoing reasons, we REVERSE the judgment of the district court.