

NO. A10-922

State of Minnesota
In Court of Appeals

KEVIN WILLIAMS ET AL.,

Appellants,

v.

THE NATIONAL FOOTBALL LEAGUE,

Respondent.

**BRIEF AND APPENDIX OF RESPONDENT
THE NATIONAL FOOTBALL LEAGUE**

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TABLE OF CONTENTS

| | Page(s) |
|---|----------------|
| TABLE OF AUTHORITIES..... | iv |
| STATEMENT OF THE ISSUES..... | 1 |
| STATEMENT OF THE CASE..... | 4 |
| STATEMENT OF FACTS..... | 7 |
| A. Factual Background | 8 |
| 1. The parties..... | 8 |
| 2. The collectively-bargained Policy on Anabolic Steroids and Related Substances..... | 8 |
| 3. The Policy’s testing procedures and protections for NFL players..... | 9 |
| 4. The Policy’s provision of discipline and appeal rights for players testing positive for banned substances..... | 11 |
| 5. Plaintiffs’ violations of the Policy and resulting suspensions..... | 12 |
| 6. Plaintiffs’ arbitration appeals | 14 |
| B. Procedural History | 15 |
| 1. Plaintiffs’ initial and amended complaints against the NFL..... | 15 |
| 2. The federal courts’ decisions | 16 |
| 3. The state district court’s proceedings on remand..... | 18 |
| a. Summary judgment proceedings | 18 |
| b. Trial proceedings | 18 |
| ARGUMENT..... | 20 |
| I. BECAUSE PLAINTIFFS’ OWN TESTIMONY ESTABLISHED BOTH THAT THEY WERE NOT INJURED BY THE PURPORTED DATWA VIOLATION AND THAT THEY HAD VIOLATED THE COLLECTIVELY-BARGAINED POLICY, THE DISTRICT COURT PROPERLY REFUSED TO GRANT PLAINTIFFS EITHER RELIEF FROM THEIR SUSPENSIONS OR DAMAGES..... | 20 |
| A. Under DATWA’s Plain Language, Only Employees “Injured” By An Employer’s Statutory Violation Can Avoid Discipline Or Obtain Damages..... | 22 |
| B. Under This Court’s Well-Settled Precedents, DATWA Is Unavailable | |

| | | |
|-------------|---|----|
| | To Employees Who Admit To Having Violated A Workplace Drug And Alcohol Policy | 25 |
| II. | THE DISTRICT COURT DID NOT CLEARLY ERR IN FINDING THAT THERE WAS NO VIOLATION OF DATWA’S CONFIDENTIALITY REQUIREMENT | 28 |
| III. | THE DISTRICT COURT CORRECTLY DECIDED NOT TO ENTER AN INJUNCTION BASED ON DISMISSED COMMON-LAW CLAIMS THAT, IN ANY EVENT, WERE IRRELEVANT TO THE DATWA CLAIMS AT ISSUE..... | 29 |
| IV. | THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DECLINING TO CONSIDER MERITLESS CLAIMS RAISED FOR THE FIRST TIME AT, OR ON THE EVE OF, TRIAL. | 32 |
| | A. The District Court Correctly Refused To Address Never-Pled DATWA | |
| | Claims Of Which Plaintiffs Failed To Provide Proper Notice | 32 |
| | B. In Any Event, Plaintiffs’ Belatedly Disclosed DATWA Claims Are Baseless | 36 |
| | 1. The claim that Plaintiffs were denied the “right” to have their samples retested “at a neutral or different laboratory” | 36 |
| | 2. The claim that players do not receive negative test results | 37 |
| | 3. The claim that there was a chain-of-custody violation..... | 37 |
| V. | IN THE ALTERNATIVE, PLAINTIFFS’ DATWA CLAIMS ARE BARRED ON THREE INDEPENDENT LEGAL GROUNDS..... | 38 |
| | A. Plaintiffs Failed To Exhaust Collective-Bargained Procedures For Resolving Disputes Involving The Interpretation Of, Application Of, Or Compliance With, The Collectively-Bargained Policy..... | 39 |
| | B. Plaintiffs Were Tested For Bumetanide - A Drug Not Covered By DATWA | 41 |
| | C. The NFL Cannot Have Violated DATWA Because It Is Not Plaintiffs’ Employer Under The Statute..... | 43 |
| | 1. The NFL does not employ Plaintiffs for purposes of the statute | 43 |
| | 2. Under the district court’s “control” standard, Plaintiffs’ DATWA claims are preempted | 45 |
| VI. | THIS COURT ALSO SHOULD AFFIRM BECAUSE THERE WAS NO VIOLATION OF DATWA’S NOTIFICATION REQUIREMENT. | 47 |

A. The Collectively-Bargained Verification And Notification Procedures
That The NFL Followed Indisputably Exceed DATWA’s Minimum Standards47

B. The Issue Of Whether The Collectively-Bargained Policy Exceeds DATWA’s Minimum Standards Is Preempted By Federal Labor Law51

CONCLUSION54

TABLE OF AUTHORITIES

| | Page(s) |
|---|-----------------------|
| CASES | |
| <i>614 Co. v. Minneapolis Community Dev. Agency</i> , 547 N.W.2d 400 (Minn. Ct. App. 1996) | 2, 30 |
| <i>Allis-Chalmers Corp. v. Lueck</i> , 471 U.S. 202 (1985) | 4, 31, 45, 47, 51, 53 |
| <i>American Family Ins. Group v. Schroedl</i> , 616 N.W.2d 273 (Minn. 2000) | 24 |
| <i>Beardsley v. Garcia</i> , 753 N.W.2d 735 (Minn. 2008) | 3, 42 |
| <i>Belde v. Ferguson Enter., Inc.</i> , 460 F.3d 976 (8th Cir. 2006) | 1, 26, 27 |
| <i>Brown v. NFL</i> , 219 F. Supp. 2d 372 (S.D.N.Y. 2002) | 44 |
| <i>Chuy v. Philadelphia Eagles Football Club</i> , 595 F.2d 1265 (3d Cir. 1979) | 44 |
| <i>City of Minneapolis v. Johnson</i> , 450 N.W.2d 156 (Minn. Ct. App. 1990) | 1, 7, 25, 26, 27 |
| <i>Clarett v. NFL</i> , 369 F.3d 124 (2d Cir. 2004) | 44 |
| <i>Donnelly Bros. Constr. Co., Inc. v. State Auto Prop. & Cas. Ins. Co.</i> , 759 N.W.2d 651 (Minn. Ct. App. 2009) | 35 |
| <i>Fletcher v. St. Paul Pioneer Press</i> , 589 N.W.2d 96 (Minn. 1999) | 2, 28 |
| <i>Graupmann v. Rental Equip. and Sales Co.</i> , 425 N.W.2d 861 (Minn. Ct. App. 1988) | 34 |
| <i>Group Health Plan, Inc. v. Philip Morris Inc.</i> , 621 N.W.2d 2 (Minn. 2001) | 24 |
| <i>Hanson v. City of Hawley</i> , No. A05-1940, 2006 WL 1148125 (Minn. Ct. App., May 2, 2006) | 1, 7, 25, 27 |

| | |
|--|------------------|
| <i>Harms v. Ind. Sch. Dist. No. 300</i> , 450 N.W.2d 571 (Minn. 1990) | 39 |
| <i>Harry N. Ray, Ltd. v. First Nat'l Bank of Pine City</i> , 410 N.W.2d 850 (Minn. Ct. App. 1987) | 3, 35 |
| <i>Havenfield Corp. v. H & R Block, Inc.</i> , 509 F.2d 1263 (8th Cir. 1975) | 3, 34, 35 |
| <i>Heidbreder v. Carton</i> , 645 N.W.2d 355 (Minn. 2002) | 32 |
| <i>In re Copeland</i> , 455 N.W.2d (Minn. Ct. App. 1990) | 1, 7, 25, 26, 27 |
| <i>In re Life Ins. Co. of N. Am.</i> , 857 F.2d 1190 (8th Cir. 1988) | 2, 30 |
| <i>Johnson v. Anheuser-Busch, Inc.</i> , 876 F.2d 620 (8th Cir. 1989) | 45 |
| <i>Law Enforcement Labor Servs., Inc. v. Sherburne County</i> , 695 N.W.2d 630 (Minn. Ct. App. 2005) | 48 |
| <i>LeRoy v. Figure Skating Club of Minneapolis</i> , 162 N.W.2d 248 (Minn. 1969) | 34 |
| <i>Mahoney & Hagberg v. Newgard</i> , 712 N.W.2d 215 (Minn. Ct. App. 2006) | 39 |
| <i>Mattice v. Minn. Prop. Ins. Placement</i> , 655 N.W.2d 336 (Minn. Ct. App. 2002) | 45 |
| <i>Minn. Mining and Mfg. Co. v. Nishika Ltd.</i> , 565 N.W.2d 16 (Minn. 1997) | 3, 41 |
| <i>Munger v. State</i> , 749 N.W.2d 335 (Minn. 2008) | 50-51 |
| <i>Myers by Myers v. Price</i> , 463 N.W.2d 773 (Minn. Ct. App. 1990), review denied (Minn. Feb. 3, 1991)..... | 38, 41 |
| <i>Nat'l Football League Players Ass'n v. Nat'l Football League</i> , 654 F. Supp. 2d 960 (D. Minn. 2009) | 16, 17, 30, 31 |

| | |
|---|--------|
| <i>O'Malley v. Ulland Bros.</i> , 549 N.W.2d 889 (Minn. 1996) | 48 |
| <i>Oberkramer v. IBEW-NECA Serv. Ctr.</i> , 151 F.3d 752 (8th Cir. 1998) | 31 |
| <i>Prow v. Medtronic, Inc.</i> , 770 F.2d 117 (8th Cir. 1985) | 32 |
| <i>Reider v. Anoka-Hennepin Sch. Dist. No. 11</i> , 728 N.W.2d 246 (Minn. 2007) | 41 |
| <i>Robinson v. Fred Meyers Stores, Inc.</i> , 252 F. Supp. 2d 905 (D. Ariz. 2002) | 54 |
| <i>Sauter v. Wasemiller</i> , 389 N.W.2d 200 (Minn. 1986) | 30 |
| <i>Sheeran v. Sheeran</i> , 481 N.W.2d 578 (Minn. Ct. App. 1992) | 21 |
| <i>Slidell, Inc. v. Millennium Inorganic Chemicals, Inc.</i> , 460 F.3d 1047 (8th Cir. 2006) | 32 |
| <i>State v. Loge</i> , 608 N.W.2d 152 (Minn. 2000) | 50 |
| <i>State v. Miller</i> , 659 N.W.2d 275 (Minn. Ct. App. 2003) | 22 |
| <i>Stephens v. Bd. of Regents of the Univ. of Minn.</i> , 614 N.W.2d 764 (Minn. Ct. App. 2000) | 3, 40 |
| <i>Tennessee Valley Authority v. Hill</i> , 437 U.S. 153 (1978) | 23 |
| <i>Thompson v. Thompson</i> , 739 N.W.2d 424 (Minn. Ct. App. 2007) | 44 |
| <i>Trustees of the Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing, Inc.</i> , 450 F.3d 324 (8th Cir. 2006) | 52 |
| <i>United States v. Montoya</i> , 979 F.2d 136 (8th Cir. 1992) | 46, 53 |

| | |
|---|----------------|
| <i>White v. NFL</i> , 41 F.3d 402 (8th Cir. 1994) | 44 |
| <i>Williams v. Nat’l Football League</i> , 582 F.3d 863 (8th Cir. 2009) | 17, 43, 46, 53 |
| <i>Wynn v. Connor</i> , No. 05-2212, 2008 WL 400699 (D. Minn. Feb. 11, 2008) | 40 |
| <i>Zheng v. Liberty Apparel Co., Inc.</i> , 355 F.3d 61 (2d Cir. 2003) | 45 |
| <i>Zupancich v. United States Steel Corp.</i> , No. 08-5847, 2009 WL 1474772 (D. Minn. May 27, 2009) | 5, 53, 59 |

STATUTES

| | |
|-----------------------------------|------------------------------|
| 29 U.S.C. § 185 | 4, 15, 31, 47 |
| Minn. Stat. § 152.01 | 42 |
| Minn. Stat. § 152.01(2) | 42 |
| Minn. Stat. § 152.01(4) | 41-42 |
| Minn. Stat. § 152.02 | 41 |
| Minn. Stat. § 177.35 | 53 |
| Minn. Stat. § 181.938 | 6 |
| Minn. Stat. § 181.950 | 4, 5, 20, 22, 23, 24, 43, 44 |
| Minn. Stat. § 181.950(4) | 3, 41, 42 |
| Minn. Stat. § 181.950(5) | 3, 41 |
| Minn. Stat. § 181.950(6) | 19 |
| Minn. Stat. § 181.951(1)(c) | 31 |
| Minn. Stat. § 181.951(a) | 31 |
| Minn. Stat. § 181.953(3) | 49 |
| Minn. Stat. § 181.953(5) | 2, 37 |

| | |
|--------------------------------|-------------------------|
| Minn. Stat. § 181.953(7) | 2, 37, 49 |
| Minn. Stat. § 181.953(9) | 22, 23, 24 |
| Minn. Stat. § 181.954 | 2, 29 |
| Minn. Stat. § 181.954(2) | 47, 48, 49, 52 |
| Minn. Stat. § 181.955(1) | 47, 48, 49, 52 |
| Minn. Stat. § 181.956(1) | 37, 39 |
| Minn. Stat. § 181.956(2) | 3, 6, 24, 25, 37 |
| Minn. Stat. § 181.956(3) | 22 |
| Minn. Stat. § 181.956(4) | 1, 3, 6, 23, 24, 25, 37 |
| Minn. Stat. § 645.17(1) | 3, 24, 41 |

OTHER AUTHORITIES

| | |
|---------------------------------------|-------|
| Fed. R. Civ. P. 26(e)(1)(A) | 3, 34 |
| Minn. R. Civ. App. P. 103.03(b) | 21 |
| Minn. R. Civ. App. P. 104.01 | 21 |
| Minn. R. Civ. P. 15.02 | 3, 35 |
| Minn. R. Civ. P. 26.05 | 2, 34 |
| Minn. R. Civ. P. 52.01 | 2, 28 |

STATEMENT OF THE ISSUES

1. May Plaintiffs, who admitted that they were not harmed by the National Football League's ("NFL") claimed failure to provide timely notice of their test results and who admitted that they had violated the collectively-bargained Policy on Anabolic Steroids and Related Substances ("Policy"), avoid their suspensions and obtain damages under the Drug and Alcohol Testing in the Workplace Act ("DATWA"), which grants relief only to employees "injured" by a statutory violation, Minn. Stat. § 181.956(2), (4), and not to employees who admitted to having violated a workplace drug and alcohol policy?

The district court held that Plaintiffs could not obtain relief under DATWA because they were not "injured" by any notification delay. ((Add.014.)¹

Apposite Authorities:

Minn. Stat. § 181.956(2), (4)

Hanson v. City of Hawley, No. A05-1940, 2006 WL 1148125 (Minn. Ct. App., May 2, 2006)

In re Copeland, 455 N.W.2d, 503 (Minn. Ct. App. 1990)

City of Minneapolis v. Johnson, 450 N.W.2d 156 (Minn. Ct. App. 1990)

Belde v. Ferguson Enter., Inc., 460 F.3d 976 (8th Cir. 2006)

2. Did the district court clearly err by refusing to find that the NFL disclosed Plaintiffs' test results to the media given that before the media reports, Plaintiffs shared their results with numerous people, any one of whom could have leaked the information to the media?

¹ Citations appearing as Add.xxx are to the Appellants' Addendum; citations appearing as Axxxx are to the Appellants' Appendix; citations appearing as RCAxxxx are to Respondent's Confidential Appendix; citations appearing as RAxxxx are to Respondent's Appendix; citations appearing as Tr.xxx are to the District Court Trial Transcript; citations to "AB" are to Appellants' Brief.

The district court held that the evidence cannot support a finding that the NFL violated DATWA's confidentiality requirement. (Add.011.)

Apposite Authorities:

Minn. Stat. § 181.954(2)

Minn. R. Civ. P. 52.01

Fletcher v. St. Paul Pioneer Press, 589 N.W.2d 96 (Minn. 1999)

3. Did the district court err by not granting Plaintiffs relief based on the NFL's alleged failure to warn players that StarCaps may contain bumetanide and its alleged inconsistent discipline of players testing positive for bumetanide even though identical "failure to warn" and "inconsistent discipline" claims had been rejected by the federal district and appellate courts and were unrelated to Plaintiffs' DATWA claims?

The district court did not rule on the previously-dismissed "failure to warn" and "inconsistent discipline" claims in its Order.

Apposite Authorities:

In re Life Ins. Co. of N. Am., 857 F.2d 1190 (8th Cir. 1988)

614 Co. v. Minneapolis Community Dev. Agency, 547 N.W.2d 400 (Minn. Ct. App. 1996)

Slidell, Inc. v. Millennium Inorganic Chemicals, Inc., 460 F.3d 1047 (8th Cir. 2006)

4. Did the district court abuse its discretion by not considering DATWA claims that Plaintiffs did not disclose in discovery (after being ordered to disclose the factual and legal bases for all their DATWA claims) and raised for the first time at, or on the eve of, trial?

In its Order, the district court did not address Plaintiffs' belatedly disclosed DATWA claims.

Apposite Authorities:

Minn. R. Civ. P. 26.05

Fed. R. Civ. P. 26(e)(1)(A)

Minn. R. Civ. P. 15.02

Minn. Stat. § 181.953(5), (7), (9)

Minn. Stat. § 181.956(1), (2), (4)

Harry N. Ray, Ltd. v. First Nat'l Bank of Pine City, 410 N.W.2d 850 (Minn. Ct. App. 1987)

Havenfield Corp. v. H & R Block, Inc., 509 F.2d 1263 (8th Cir. 1975)

5. Alternatively, should the district court's decision be affirmed because Plaintiffs' DATWA claims are barred on three independent legal grounds:

(1) Plaintiffs failed to exhaust collectively-bargained procedures for resolving their claims. On summary judgment, the district court held that Plaintiffs had exhausted their administrative remedies (A0314-315), but did not address the issue in its Order after trial.

Apposite Authorities:

Minn. Stat. § 181.956(1)

Minn. Stat. § 645.17(1)

Stephens v. Bd. of Regents of the Univ. of Minn., 614 N.W.2d 764 (Minn. Ct. App. 2000)

Minn. Mining and Mfg. Co. v. Nishika Ltd., 565 N.W.2d 16 (Minn. 1997);

(2) Plaintiffs are precluded from invoking DATWA because their claims do not involve tests for a drug governed by the statute. The district court held that Plaintiffs' drug tests are controlled by DATWA. (Add.023.)

Apposite Authorities:

Minn. Stat. § 181.950(4), (5)

Beardsley v. Garcia, 753 N.W.2d 735 (Minn. 2008); and

(3) DATWA is unavailable to Plaintiffs because the NFL is not their employer for purposes of the statute, which asks only for whom Plaintiffs “perform[] services” and by whom they are “compensat[ed],” Minn. Stat. § 181.950. The district court held that the NFL employs Plaintiffs because it “control[s]” their work environment. (Add.017-019.) If a “control” standard applies in determining whether an employment relationship exists, Plaintiffs’ DATWA claims are preempted because any control exercised by the NFL emanates from and is “inextricably intertwined” with collectively-bargained agreements. The district court did not directly address the issue of preemption in its Order.

Apposite Authorities:

Minn. Stat. § 181.950

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985)

29 U.S.C. § 185.

6. Should the district court’s decision also be affirmed on the ground that there was no violation of DATWA’s notification requirement because (a) the collectively-bargained Policy “exceed[s]” and therefore satisfies DATWA’s “minimum” requirements for employee protection, Minn. Stat. § 181.955(1); and (b) any determination as to whether the Policy exceeds DATWA’s minimum standards is “inextricably intertwined” with the Policy’s terms and thus preempted by federal labor law?

The district court held that the Policy does not exceed DATWA’s minimum standards for employee protection and that DATWA’s notification requirement was violated “regardless” of whether the Policy surpasses those standards. (Add.024.) The district court held on summary judgment that a determination of whether the Policy exceeds DATWA’s minimum standards is not preempted by federal labor law (A0317-319), but did not discuss the preemption issue in its Order after trial.

Apposite Authorities:

Minn. Stat. § 181.955(1)

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985)

STATEMENT OF THE CASE

This case is about two professional football players who admittedly violated the Policy on Anabolic Steroids and Related Substances that had been collectively bargained between the NFL and the NFL Players Association (“Union”). Although the NFL had repeatedly warned players that weight-loss supplements often contain substances banned by the Policy – and although Plaintiffs had contractually agreed not to engage in any “last minute weight-reducing tactics” to meet their weight targets – Plaintiffs took a supplement the night before a preseason weigh-in in an effort to achieve rapid weight loss. Their subsequent drug tests were positive for bumetanide, a diuretic prohibited by the collectively-bargained Policy because it masks the use of steroids.

As mandated by the Policy, Plaintiffs were each suspended for four games. Plaintiffs appealed those suspensions at arbitration, but challenged neither the accuracy of their test results nor any of the testing procedures. Instead, they claimed that the NFL had failed to warn them specifically that certain samples of the weight-loss supplement they took had been found to contain bumetanide. That “failure to warn” claim was rejected first by the arbitrator, then – after extensive discovery – by the federal district court, and finally by the Eighth Circuit.

On remand to the state district court, Plaintiffs litigated their second line of defense – claims under DATWA, Minn. Stat. § 181.950 *et seq.*, and the Lawful

Consumable Products Act (“LCPA”), Minn. Stat. § 181.938. The Honorable Gary Larson dismissed Plaintiffs’ LCPA claim and eight of their ten DATWA claims on summary judgment, leaving only claimed violations of DATWA’s notification and confidentiality requirements. After a week-long trial where 13 witnesses (including both Plaintiffs) testified, the district court held that Plaintiffs could not recover because, by their own admissions, they were in no way harmed by any delay in notifying them of their test results. The district court further found that it was “impossible” to infer from the record evidence that the NFL had leaked Plaintiffs’ test results to the media. Concluding that Plaintiffs had “not succeeded on the merits,” the district court refused either to enjoin Plaintiffs’ suspensions or to award money damages, and entered judgment for the NFL.

Plaintiffs have not appealed that final judgment. Nor have they appealed the district court’s summary judgment order dismissing all of their DATWA claims except those pertaining to notification and confidentiality. *All* they have appealed is the district court’s decision not to enjoin their suspensions because they were unharmed by any notification delay and because they failed to prove a violation of DATWA’s confidentiality requirement. Plaintiffs’ narrow challenge is groundless.

As to the purported notification violation, Plaintiffs admitted at trial that they suffered no resulting injury – thereby barring recovery under a statute that provides relief only to employees “injured” by a statutory violation, Minn. Stat. § 181.956(2), (4). As to the alleged breach of confidentiality, Plaintiffs admitted at trial that they shared their test result information with numerous people prior to the

media reports – foreclosing any finding that the NFL *must* have been responsible for the leak. Finally, there is no plausible argument that the district court should have enjoined Plaintiffs’ suspensions based on the “failure to warn” claim that the federal courts dismissed, or based on several other never-pled DATWA claims that Plaintiffs raised for the first time at, or on the eve of, trial.

At bottom, this Court is presented with a drug and alcohol testing law that was enacted to “ensure accurate test results,” Rep. Sandra Pappas, *Workplace Drug Testing – House File 42*, 14 WM. MITCHELL L. REV. 239, 241 (1988), and with Plaintiffs who have never quarreled with the accuracy of their test results. The statute’s purpose thus would not be served by affording Plaintiffs relief from the collectively-bargained consequences of their admitted ingestion of a banned substance. That is confirmed by the statute itself, which authorizes relief from discipline and money damages only for employees “injured” by their employer’s statutory misconduct – not by their own admitted mistakes. It also is confirmed by this Court’s precedents, which consistently reject DATWA claims brought by employees who admit to having violated a workplace drug and alcohol policy. *Hanson v. City of Hawley*, No. A05-1940, 2006 WL 1148125, at *2 (Minn. Ct. App., May 2, 2006); *In re Copeland*, 455 N.W.2d, 503, 506 (Minn. Ct. App. 1990); *City of Minneapolis v. Johnson*, 450 N.W.2d 156, 160 (Minn. Ct. App. 1990). This Court should affirm the district court’s decision denying Plaintiffs relief under DATWA.

STATEMENT OF FACTS

A. Factual Background

1. The parties

The NFL is a professional football league comprised of 32 member clubs. One of those member clubs, Minnesota Vikings Football LLC (“the Vikings”), employs Plaintiffs Kevin Williams and Pat Williams. (RCA0001; RCA0025.) Under their employment contracts, the Vikings agree to pay Plaintiffs a “yearly salary” “[f]or performance of [their] services and all other promises.” (*Id.*)

Plaintiffs are members of the NFL Players Association, the certified collective bargaining representative for all NFL players. In 2006, the Union and the NFL entered into a Collective Bargaining Agreement (“CBA”) governing the terms and conditions of players’ employment and establishing procedures for dispute resolution.

2. The collectively-bargained Policy on Anabolic Steroids and Related Substances

The CBA establishes and incorporates a Policy that bans players from using a variety of “prohibited substances,” including steroids and “blocking” or “masking agents” such as diuretics, which can obstruct the detection of steroids. (A0965.) Bumetanide, a diuretic, is a steroid-masking agent prohibited by the Policy. (A0971.) The Policy makes clear that the use of any banned substance violates players’ contractual duties. (A0957.)

The Policy includes a collectively-bargained rule of strict liability under which “[p]layers are responsible for what is in their bodies, and a positive test

result will not be excused because a player was unaware that he was taking a Prohibited Substance.” (A0961.) The Policy has a section specifically addressing “Masking Agents and Supplements” such as diuretics that are used “by some players to reach an assigned weight,” and that section reiterates the strict liability rule. (A0965.) Players are encouraged “to avoid the use” of unregulated dietary supplements altogether because there is “no way to be sure that they” either “contain the ingredients listed on the packaging” or “have not been tainted with prohibited substances.” (A0978.) The Policy further warns that “several players have been suspended even though their positive test result may have been due to the use of a supplement,” underscoring that “**if you test positive or otherwise violate the Policy, you *will* be suspended.**” (*Id.* (emphasis in original).)

3. The Policy’s testing procedures and protections for NFL players

To protect players throughout the testing process, the Union and the NFL collectively agreed to detailed procedures for collecting specimens, protecting the chain-of-custody, handling materials, and reviewing test results, among other things. The process begins with a specimen collector who observes the player furnish a urine specimen, and then splits the specimen into “A” and “B” sample bottles. (A0974.) The player signs the chain-of-custody form required by the Policy, and the specimen bottles, which are identified only by a “control identification number” and not by the player’s name, are shipped to either the UCLA Olympic Analytical Laboratory (“UCLA Lab”) or the Sports Medicine

Research and Testing Laboratory in Utah (“Utah Lab”) – the only two laboratories in the United States certified and accredited by the World Anti-Doping Agency and capable of testing for all of the substances banned by the Policy. (A0961; A0974; RA0007-9; RA0010-12.)

When a player’s samples arrive at the laboratory, the “A” bottle sample is split into two specimens, and one specimen undergoes an initial test that screens for all substances prohibited by the Policy. (Tr.857-58.) If the initial screening test is positive for a prohibited substance, the second “A” bottle specimen undergoes a confirmatory test designed to detect *only* the substance that was identified during the initial screening test. (*Id.*)

When a player’s “A” sample confirmatory test is positive for a prohibited substance, the laboratory notifies the Policy’s Independent Administrator, Dr. John Lombardo, who requests that the specimen collection company mail him the chain-of-custody forms for all players who provided samples on the same date so that he can match the control identification number with the player’s name. (Tr. 278-81.) Dr. Lombardo alone reviews the chain-of-custody forms and verifies the information contained therein, thus ensuring that no one else – not even the laboratory or the specimen collection company – is privy to the information. (*Id.* at 278-81, 874.)

Following his review, Dr. Lombardo sends the player written notification of the positive “A” sample result, asking him to “call him to discuss” the result so that the player can explain any medical circumstances that could exempt him from

discipline. (Tr. 283-286.) If the player is not medically exempt, the Policy provides for an automatic confirmatory retest of the player's "B" sample – at no expense to the player – and the option to retain an independent toxicologist to observe the "B" bottle test. (*Id.* at 287-88; A0962, A0975.) Like the confirmatory test of the "A" bottle sample, the confirmatory retest of the "B" bottle sample targets only the substance that the initial screening test originally identified. (Tr. 274-76, 278, 858.)

Before reporting the "B" sample result to Dr. Lombardo, the laboratory reviews the data and certifies that the testing was accurately performed. (Tr. 866-67, 870.) If the "B" sample retest confirms the "A" sample result, Dr. Lombardo sends all of the laboratory records to the Policy's Consulting Toxicologist, Dr. Bryan Finkle, who independently reviews the laboratory analysis and chain-of-custody documentation. (Tr. 291-92, 871.) If Dr. Finkle verifies the result, Dr. Lombardo reviews and verifies the data himself. Only after both Drs. Lombardo and Finkle are satisfied to a medical and scientific certainty that the "B" retest is positive and that all testing procedures were properly performed are the "A" and "B" sample results disclosed to the NFL, which then informs the player and the player's employing team. (Tr. 292.)

4. The Policy's provision of discipline and appeal rights for players testing positive for banned substances

The NFL and the Union have agreed that discipline for first-time violators of the Policy is suspension "without pay for a minimum of four regular and/or

postseason games.” (A0963.) The CBA provides that “[a]ny dispute . . . involving the interpretation of, application of, or compliance with, any provision of [the collectively-bargained Policy] will be resolved exclusively in accordance with” the Policy’s procedures. (RA0015.)

Under the Policy, every player who “is subject to discipline for a violation of [the] Policy is entitled to an appeal” before the Commissioner or his designee and the stay of any discipline pending that appeal. (A0965.) Before the appeal hearing, the player has the chance to provide a written statement “setting forth the specific grounds of his appeal.” (A0975.)

5. Plaintiffs’ violations of the Policy and resulting suspensions

Both Plaintiffs received a copy of the Policy annually during training camp. (Tr. 365, 570.) Both Plaintiffs’ contracts provided that they would earn a \$400,000 bonus for meeting their assigned weight targets, and both Plaintiffs contractually agreed not to engage in any “last minute weight-reducing tactics” – including the “use of diuretics” – to meet those targets. (RCA0011; RCA0036.)

Notwithstanding those contractual provisions and the Policy’s multiple warnings against the use of supplements, Plaintiffs both took StarCaps, a dietary supplement that claims to promote rapid, short-term weight loss, the night before a scheduled preseason weigh-in. (Tr. 363, 576-77.)

In accordance with the Policy’s annual preseason testing provision, Plaintiffs were tested for prohibited substances at the start of training camp.

(A0737; A0694.) Both Plaintiffs observed the specimen collectors split their sample into an “A” bottle and a “B” bottle and signed the standard chain-of-custody documentation. (*Id.*) Their samples were then sent to the UCLA Lab, where the initial screening test was positive for bumetanide, a steroid-masking diuretic banned by the Policy. A second test was conducted on the “A” bottle sample to confirm the presence of bumetanide. (RCA0062, RCA0067; RCA0108; RCA0113; Tr. 863-64, 867, 872-73.)

After a laboratory scientist certified that Plaintiffs’ numbered samples had tested positive, Dr. Lombardo requested from the specimen collector the chain-of-custody forms for all players who provided samples the same day as Plaintiffs and reviewed the forms to determine Plaintiffs’ identities. He then sent Plaintiffs written notification of the test results, advising them that they were entitled to have an independent toxicologist observe their “B” bottle tests, and asking them to “call [him] immediately . . . to discuss [the ‘A’ bottle] results.” (A0637; A0638.) In response to Dr. Lombardo’s letter, Kevin Williams, through his agent, called and spoke with Dr. Lombardo (Tr. 300-01, RA0020); Pat Williams did not. Kevin Williams also arranged for an independent toxicologist to observe his “B” bottle test; Pat Williams did not. (Tr. 307, 581-82, 869; A0802.)

Once the laboratory certified the results, Dr. Lombardo sent the records to Dr. Finkle, who reviewed and verified them. After Dr. Lombardo independently verified that both players’ “B” samples confirmed the presence of bumetanide, he informed the NFL, which notified Plaintiffs and their employing team. Plaintiffs

were immediately advised that they would be suspended for four games, as required by the Policy. (A0645; A0649.) Both Plaintiffs appealed their suspensions to arbitration. (RA0021; RA0022; RA0023.)

6. Plaintiffs' arbitration appeals

Represented by counsel, Plaintiffs admitted at the arbitration hearing that they were aware of the Policy and its strict liability rule, but nevertheless took StarCaps so that they could meet their contractual weight targets. (RCA0131-0141.) Plaintiffs did not challenge the testing procedures or results, but instead argued that the suspensions were inappropriate because – notwithstanding the Policy's repeated warnings about the risks of weight-loss supplements – the NFL had not specifically warned players that certain samples of StarCaps had been found to contain bumetanide. (RA0028, RA57-60.) Plaintiffs cited New York fiduciary duty law in support of their "failure to warn" theory and also maintained that they were protected by the Americans with Disabilities Act. (A0797, RA0058-59.) Plaintiffs never mentioned DATWA or the LCPA at the hearing or in any of their written submissions.

On December 2, 2008, the arbitrator upheld Plaintiffs' four-game suspensions. First noting that Plaintiffs had not "challenged the laboratory analysis, the chain-of-custody, or any other aspect of the test," the arbitrator rejected Plaintiffs' fiduciary duty arguments because "[t]he Policy does not articulate or impose an obligation to issue specific warnings about specific products." (RA0023; RA0029.) The arbitrator concluded that, in the end,

Plaintiffs “used StarCaps at their own risk, did so in the face of repeated warnings about the risks inherent in using supplements in general and weight loss products in particular, and did so knowing that a positive test result would result in suspension and would not be excused based on a claim of unintentional or inadvertent use.” (*Id.* at RA0029.)

B. Procedural History

1. Plaintiffs’ initial and amended complaints against the NFL

The day after the arbitration decision, Plaintiffs filed suit in Minnesota state court against the NFL, Dr. Lombardo, Dr. Finkle, and Adolpho Birch, the NFL’s Vice President of Law and Labor Policy.² (A0001-18.) The complaint alleged a variety of state common-law torts based on Defendants’ purported breach of their fiduciary duties to warn Plaintiffs that some samples of StarCaps had been found to contain bumetanide. (A0007-15.)

Defendants removed the action to federal court on December 4, 2008, where it was consolidated with an action brought by the Union on behalf of Plaintiffs and three New Orleans Saints players who also had been suspended after testing positive for bumetanide. (RA0032-46.) The Union sought to vacate the players’ arbitration awards pursuant to section 301 of the Labor Management Relations Act (“LMRA”) on the same “failure to warn” theory that Plaintiffs had raised in their complaint. (*Id.*) The Union also maintained that the awards should

² All of the individual Defendants have been dismissed from the case.

be overturned because the NFL had inconsistently disciplined players testing positive for bumetanide. *Nat'l Football League Players Ass'n v. Nat'l Football League*, 654 F. Supp. 2d 960, 966, 968 (D. Minn. 2009).

Plaintiffs filed an amended complaint on January 2, 2009, which added counts under DATWA and the LCPA. (A0019-38.) Because Plaintiffs did not add to their complaint any factual allegations supporting their DATWA claim or specify which provisions of DATWA were allegedly violated, Defendants served Plaintiffs with a contention interrogatory (A0599-A0601) seeking the bases for their claim. (Add.029.) Although Plaintiffs initially refused to respond to the interrogatory, they ultimately answered in response to a court order (RA0047-48), listing ten specific DATWA provisions that Defendants had allegedly violated.³ Over the next four months, the parties engaged in expedited discovery and an accelerated summary judgment briefing schedule.

2. The federal courts' decisions

On May 22, 2009, the federal district court denied Plaintiffs' motion for summary judgment and granted Defendants' summary judgment motion in part.

³ Plaintiffs alleged that Defendants had 1) failed to consider Plaintiffs' "innocent explanation" for their positive test results; 2) failed to provide two weeks' notice that Plaintiffs would be tested; 3) failed to ensure that the laboratory provided timely notice of Plaintiffs' test results; 4) failed to provide timely notice of Plaintiffs' test results; 5) disciplined Plaintiffs based on unconfirmed test results; 6) failed to notify Plaintiffs of their right to explain their test results; 7) failed to notify Plaintiffs of their right to a "third test"; 8) failed to allow Plaintiffs a "third test"; 9) failed to use certified laboratories; and 10) failed to adhere to DATWA's confidentiality requirements. (Add.030-31.)

Nat'l Football League Players Ass'n v. Nat'l Football League, 654 F. Supp. 2d 960 (D. Minn. 2009). As to Plaintiffs' argument that the NFL had failed to warn players specifically that StarCaps may contain bumetanide, the federal court held that the decision "to send a general warning about weigh[t]-loss supplements rather than about StarCaps in particular" did not amount to a fiduciary duty violation. *Id.* at 970. The court further held that Plaintiffs' "failure to warn" argument was preempted by federal labor law because it "depend[s] on an analysis of the terms of the [collectively-bargained] Policy and is inextricably intertwined with the Policy." *Id.* at 967.

The federal court also rejected the Union's "inconsistent discipline" claim, explaining that any prior "unofficial policy" of not referring "positive bumetanide tests for discipline . . . is not at issue here. What is at issue is the Policy itself," which unequivocally states that "players are responsible for what is in their bodies, and inadvertent ingestion of a banned substance will not excuse a positive test result." *Nat'l Football League Players Ass'n*, 654 F. Supp. 2d at 968.

Having dismissed the "failure to warn" and "inconsistent discipline" theories on their merits, and all of Plaintiffs' common-law claims as preempted, the federal court remanded Plaintiffs' DATWA and LCPA claims to state court. *Nat'l Football League Players Ass'n*, 654 F. Supp. 2d at 973. The parties filed cross-appeals with the United States Court of Appeals for the Eighth Circuit, which affirmed the district court's decision in its entirety. *Williams v. Nat'l Football League*, 582 F.3d 863 (8th Cir. 2009).

3. The state district court's proceedings on remand

On remand, Plaintiffs moved for temporary injunctive relief, which the state district court granted on July 9, 2009. (A.0138-152.)

a. Summary judgment proceedings

The parties filed cross-motions for summary judgment on Plaintiffs' statutory claims on December 7, 2009. On February 18, 2010, the district court issued an order dismissing Plaintiffs' LCPA claim and all but two of Plaintiffs' DATWA claims, holding that there were genuine issues of material fact only as to whether the NFL had disclosed Plaintiffs' test results in violation of DATWA's confidentiality provision, and as to whether the NFL had notified Plaintiffs of their test results within the statutory timeframe. (A0313-314, 326-27.) The district court also held that there was a genuine issue of material fact as to whether the NFL is Plaintiffs' employer for purposes of DATWA and thus subject to its requirements. (A0327.) Finally, the district court held that Plaintiffs had exhausted their administrative remedies, and that a determination of whether the Policy exceeds DATWA's minimum standards is not preempted by federal labor law. (A.0314-315.)

b. Trial proceedings

A bench trial was held from March 8 through 12, 2010. At trial, neither Plaintiff disputed the accuracy of his test results or that bumetanide was in his system at the time of testing. (Tr.369, 583.) Both Plaintiffs testified

unequivocally that they were not harmed by any delay in notifying them of their positive test results. (Tr.369, 582-83.)

On May 6, 2010, the district court issued its Order. The court first held that the NFL employs Plaintiffs because – even though the Vikings “compensat[e]” Plaintiffs for their “services,” Minn. Stat. § 181.950(6) – the NFL “control[s]” Plaintiffs’ working conditions. (Add.016-23.) The court next rejected Plaintiffs’ confidentiality claim, finding that “it is impossible . . . to conclude . . . that any particular individual was the source of the leak” because “so many people outside of the NFL were informed of Plaintiffs’ test results prior to the media reports.” (Add.025.)

Turning to Plaintiffs’ notification claim, the district court recognized that the statute is satisfied if a collectively-bargained policy “meets or exceeds” DATWA’s minimum requirements. (Add.024.) It held that in implementing the steroid Policy, the NFL did not “meet” DATWA’s notification requirement because Dr. Lombardo, the NFL’s purported agent, failed to notify Plaintiffs of their test results within the statute’s three-day limit. (*Id.*) The district court then held – without explanation or analysis – that the Policy also does not “exceed” DATWA’s minimum standards (*id.*), notwithstanding its own findings that the Policy’s procedures for testing samples, maintaining confidentiality, reviewing results, and notifying players offer greater protection than the statute itself.

Finally, the district court concluded that even though the NFL had not complied with DATWA’s notification requirement, Plaintiffs were “not entitled to

relief” due to uncontroverted evidence that they were unharmed by the statutory violation. (Add.024.) Holding that “Plaintiffs failed to establish success on the merits,” the district court denied Plaintiffs’ request for a permanent injunction and dissolved the July 9, 2009 temporary injunction. (Add.027.)

On May 25, 2010, Plaintiffs filed a timely notice of appeal “from an Order of the District Court, County of Hennepin, filed on May 6, 2010, which dissolves a temporary injunction and refuses to grant a permanent injunction based on violations of Minn. Stat. § 181.950.” (A0397.) The following day, the district court stayed its Order pending appeal. (A.369-379). On June 7, 2010, the district court entered final judgment, which Plaintiffs never appealed. (RA.0061.)

ARGUMENT

I. BECAUSE PLAINTIFFS’ OWN TESTIMONY ESTABLISHED BOTH THAT THEY WERE NOT INJURED BY THE PURPORTED DATWA VIOLATION AND THAT THEY HAD VIOLATED THE COLLECTIVELY-BARGAINED POLICY, THE DISTRICT COURT PROPERLY REFUSED TO GRANT PLAINTIFFS EITHER RELIEF FROM THEIR SUSPENSIONS OR DAMAGES.

As a threshold matter, while Plaintiffs in their brief challenge the district court’s decision not to enjoin their suspensions *and* not to award them damages (AB, pp. 41-44), the damages decision is not properly on appeal. In their May 25, 2010 notice of appeal, Plaintiffs made clear that they were appealing only the district court’s dissolution of the temporary injunction and refusal to grant a permanent injunction (A0397) – the only aspects of the May 6, 2010 order that were immediately appealable under this Court’s rules, Minn. R. Civ. App. P.

103.03(b). Indeed, this Court explicitly recognized in its June 23, 2010 order that the instant appeal “is taken only from the May 6, 2010 order denying injunctive relief. *The players have not perfected an appeal from a final judgment on the merits.*” (RA0053-0056 (emphasis added).)

Plaintiffs never perfected an appeal from the final judgment on the merits. In fact, their one and only notice of appeal was filed weeks before the district court’s June 7, 2010 entry of final judgment. Now that the 60-day deadline for appealing the final judgment has passed, *see* Minn. R. Civ. App. P. 104.01, Plaintiffs cannot contest the district court’s refusal to award money damages or attorneys’ fees. *See, e.g., Sheeran v. Sheeran*, 481 N.W.2d 578, 579 (Minn. Ct. App. 1992) (holding that an appeal from “an order for the recovery of money” must be taken from the final judgment, not from the order itself).

In any event, Plaintiffs’ arguments that they should have been awarded damages and an injunction are without merit. Plaintiffs pose no challenge to the district court’s finding that they were “not harmed because of . . . [the] delay” in notifying them of their positive test results (Add.010-011) – nor could they reasonably do so. Both Plaintiffs testified unconditionally at trial that they

“w[er]n’t harmed” by any notification delay. (Tr. 369, 582-83.)⁴ There was no testimony to the contrary. Plaintiffs also admitted to having ingested a substance banned by the collectively-bargained Policy. (Tr. 369, 583.) Under the statute’s plain language and this Court’s longstanding precedents, those uncontested facts bar Plaintiffs from obtaining either relief from their suspensions or money damages and attorneys’ fees.

A. Under DATWA’s Plain Language, Only Employees “Injured” By An Employer’s Statutory Violation Can Avoid Discipline Or Obtain Damages.

In support of their argument that DATWA affords them relief from their suspensions, Plaintiffs rely on subdivision *three* of DATWA’s remedies provision (AB, pp. 15, 40), which provides:

Subd. 3. Injunctive relief. An employee or job applicant, a state, county, or city attorney, or a collective bargaining agent who fairly and adequately represents the interests of the protected class has standing to bring an action for injunctive relief requesting the district court to enjoin an employer or laboratory that commits or proposes to commit an act in violation of sections 181.950 to 181.954.

⁴ While Plaintiffs in their brief refer in passing to the fact that the “positive test results [were] hanging over their heads for four months before they were able to have their appeals heard” (AB, p. 42), that is not evidence of injury resulting from a DATWA violation. The statute governs only the amount of time between when an employer receives an employee’s positive test result and when the employer notifies the employee – not the time between the sample collection and the arbitration appeal. Minn. Stat. § 181.953(7). In any event, the district court properly relied on Plaintiffs’ unequivocal testimony that they were not harmed by any delay. *See, e.g., State v. Miller*, 659 N.W.2d 275, 279 (Minn. Ct. App. 2003) (“Because the weight and believability of witness testimony is an issue for the district court, we defer to that court’s credibility determinations.”).

Minn. Stat. § 181.956(3). Plaintiffs, however, have never sought to enjoin the NFL from “commit[ting] . . . an act in violation of” the statute. Indeed, the only equitable remedy Plaintiffs have sought is relief from their own suspensions – a remedy entirely unrelated to the purported notification violation. The statute makes clear that claims brought by employees seeking reversal of their employer’s decision to terminate, discipline, or not hire fall under subdivision *four*:

Subd. 4. Other equitable relief. Upon finding a violation of sections 181.950 to 181.954, or as part of injunctive relief granted under subdivision 3, *a court may, in its discretion, grant any other equitable relief it considers appropriate, including ordering the injured employee or job applicant reinstated with back pay.*

Minn. Stat. § 181.956(4) (italics added). By its plain language, subdivision four states that only employees “injured” by an employer’s statutory violation are entitled to “[o]ther equitable relief,” including an injunction against resulting discipline or termination. Because Plaintiffs admittedly were *not* injured by the asserted violation of DATWA’s notification requirement, they cannot escape the collectively-bargained consequences of their own misconduct.⁵

Plaintiffs’ argument with respect to damages and attorney fees is equally infirm. DATWA provides in relevant part:

Subd. 2. Damages. In addition to any other remedies provided by law, an employer or laboratory that

⁵ Plaintiffs’ reliance on *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) (“*TVA*”) is misplaced. *TVA* involved a request to enjoin a violation of the statute itself, *id.* at 172, and the requested relief was not statutorily limited to “injured employees,” *id.* at 160.

violates sections 181.950 to 181.954 is liable to an employee or job applicant *injured by the violation* in a civil action for any damages allowable at law. If a violation is found and damages awarded, the court may also award reasonable attorney fees

Minn. Stat. § 181.956(2) (italics added). The statute’s provision of monetary relief only to employees “injured by the [statutory] violation” cannot be reconciled with Plaintiffs’ demand for compensation for lost marketing and career opportunities resulting from their own Policy violations (AB, p. 43).

Plaintiffs’ insistence that “causal injury” need not be established (AB, p. 21) also squarely conflicts with Supreme Court precedent, which confirms that when a statute authorizes damages only for persons “injured by a violation,” plaintiffs *must* prove “a causal relationship between the alleged injury and the wrongful conduct that violates the statute.”⁶ *Group Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 6, 13 (Minn. 2001) (emphasis added). There is indisputably no such “causal relationship” here.

Ultimately, Plaintiffs maintain that the district court’s refusal to grant them relief somehow thwarts “the Legislature’s intent” (AB, pp. 14, 23), but in fact the

⁶ Although subdivision 4 (“[o]ther equitable relief”) refers only to “injured employees,” Minn. Stat. § 181.956(4) – not to employees “injured by the violation,” as stated in subdivision 2 (“[d]amages”), *id.*, § 181.956(2) (emphasis added) – courts must “construe a statute as a whole and must interpret each section in light of the surrounding sections to avoid conflicting interpretations.” *American Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). The Legislature cannot have intended to award injunctive relief to employees injured by anything at all, but damages only to employees injured by the statutory violation. See Minn. Stat. § 645.17(1) (“[T]he legislature does not intend a result that is absurd . . . or unreasonable.”).

opposite is true. The explicit statutory language reveals – contrary to what Plaintiffs contend – that a DATWA violation is *not* “in and of itself sufficient for the issuance” of Plaintiffs’ requested relief (AB, p. 21), and that only employees “injured” by an employer’s statutory violation can obtain damages or the reversal of discipline. Minn. Stat. § 181.956(2), (4). Because the district court properly respected the Legislature’s clear intent, this Court should affirm.

B. Under This Court’s Well-Settled Precedents, DATWA Is Unavailable To Employees Who Admit To Having Violated A Workplace Drug And Alcohol Policy.

This Court has repeatedly held that disciplined or terminated employees who admit to having violated a workplace drug and alcohol policy cannot use DATWA to avoid the consequences of their own misconduct. *Hanson*, 2006 WL 1148125, at *2; *In re Copeland*, 455 N.W.2d at 506; *Johnson*, 450 N.W.2d at 160. This case is no exception to that well-established rule.

Hanson v. City of Hawley is squarely on point. There, a police chief who admitted taking cough medicine before going on duty was terminated for violating the department’s “no-tolerance” policy prohibiting on-call employees from consuming any alcohol or controlled substances. 2006 WL 1148125 at *1. The police chief argued that his test results should be “disregard[ed]” and his termination overturned because the city had violated DATWA “by failing to verify the test with a confirmatory test or to offer him counseling or rehabilitation.” *Id.* at *4. This Court held: “[T]he issue was whether he consumed alcohol in violation of the zero-tolerance policy, and [the police chief] admitted doing so. . . .

Because the policy provided a basis for discharging [the police chief] independent of the test, we affirm the city's decision to terminate [him]." *Id.*

This Court reached the same result in *Johnson*, where a police officer challenged his termination based on the police department's alleged violation of DATWA. 450 N.W.2d at 158. The Court held that while the department "did not comply with the statute," his discharge should be upheld based on the officer's "admitted use of cocaine" as well as other violations of police department rules. *Id.* at 160-61.

Similarly, in *Copeland*, a police officer who was terminated for drug use urged this Court to vacate his discharge because the police department had violated DATWA by failing to offer him counseling. This Court refused, pointing to the fact that the police officer – like Plaintiffs here – admitted to having used drugs after being "advised that his initial urine sample tested positive for cocaine." 455 N.W.2d at 505. This Court explained that "[w]hile the officer in *Johnson* admitted his drug-related conduct *prior* to being tested, the opinion does not bar discharge based on evidence discovered *after* the results of a drug test." *Id.* at 507 (emphasis added). It summarized: DATWA "does not bar the discharge of an employee for reasons independent of the test result." *Id.* at 506.

In *Belde v. Ferguson Enterprises, Inc.*, 460 F.3d 976 (8th Cir. 2006), the Eighth Circuit embraced this Court's rule that a disciplined or discharged employee cannot obtain relief under DATWA where there are grounds for the discipline or discharge independent of the challenged test. *Belde* involved an

employee who brought suit against his employer, a private trucking company, claiming that his termination for refusing to submit to a federally-required drug test violated DATWA. *Id.* at 978. Relying on this Court’s precedent, the Eighth Circuit affirmed the district court’s grant of summary judgment for the employer, explaining that the employee could not invoke DATWA because there were independent grounds for his discharge – he had “refus[ed] to submit to a test mandated by federal law.” *Id.* at 979.

This case is indistinguishable from *Hanson*, *Copeland*, *Johnson*, and *Belde*.⁷ As the district court found, Plaintiffs “acknowledged that Bumetanide was in [their] system[s]” and did “not challenge that [they] tested positive” for a drug that they understood was banned by the Policy. (Add.010-011.) Under this Court’s well-settled precedents, Plaintiffs’ admitted violation of the Policy and the clear terms of their employment contracts justifies their suspensions – regardless of whether the NFL complied with DATWA.

⁷ While *Hanson*, *Johnson*, and *Copeland* were *certiorari* appeals from termination decisions – not damages actions brought directly under DATWA – the difference is immaterial. Plaintiffs here, as in those cases, are seeking relief from the disciplinary action imposed, and the damages they allege stem exclusively from that challenged discipline. (AB, pp. 43, 44.) Moreover, in *Belde*, the Eighth Circuit adopted the rule set forth in *Copeland* and *Johnson* in the context of a DATWA action for damages and injunctive relief. 460 F.3d at 978.

II. THE DISTRICT COURT DID NOT CLEARLY ERR IN FINDING THAT THERE WAS NO VIOLATION OF DATWA'S CONFIDENTIALITY REQUIREMENT.

The district court's finding that the NFL did not disclose Plaintiffs' test results to the media is firmly anchored in the trial record. Ten witnesses testified concerning the purported leak of Plaintiffs' test results to the media. After hearing that evidence, the district court found it "*impossible . . . to conclude*" that the NFL – or "any particular individual" for that matter – "was the source of the leak." (Add.011 (emphasis added).) On appeal, that finding is "given great deference, and shall not be set aside unless clearly erroneous." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (citing Minn. R. Civ. P. 52.01). "Findings of fact are clearly erroneous *only if the reviewing court is left with the definite and firm conviction that a mistake has been made.*" *Id.* (citations and internal quotations omitted) (emphasis added).

Plaintiffs testified that, well before the media reports, they shared the news of their test results with a number of people who did not testify at trial – including their wives, an agent, and two independent toxicologists. (Tr.377, 381-85, 85-586.) Kevin Williams could not even "*remember all the names*" of the people he told about his positive test results. (Tr.391 (emphasis added).) Any one of those people could have leaked the information to the media or to others who did. In view of the uncontroverted evidence that "many people outside the NFL were informed of Plaintiffs' test results prior to the media reports," the district court did not err in refusing to blame the NFL. (Add.025.)

There is no basis for Plaintiffs' contention that the district court "erred by not considering [] the NFL's violation of its duties under DATWA to oversee confidentiality and to investigate leaks." (AB, p. 34.) DATWA imposes no such duties. DATWA prohibits employers only from "disclos[ing]" "test result reports and other information" "to another employer or to a third-party." Minn. Stat. § 181.954(2). There was no evidence of any such disclosure. Accordingly, the district court correctly held that Plaintiffs failed to prove a violation of DATWA's confidentiality requirement.

III. THE DISTRICT COURT CORRECTLY DECIDED NOT TO ENTER AN INJUNCTION BASED ON DISMISSED COMMON-LAW CLAIMS THAT, IN ANY EVENT, WERE IRRELEVANT TO THE DATWA CLAIMS AT ISSUE.

Plaintiffs argue that the district court should have entered the requested injunction because the NFL failed to warn them specifically that StarCaps might contain bumetanide and failed consistently to discipline players who tested positive for bumetanide. (AB, pp. 18-19.) Their argument is foreclosed by binding decisions of the federal district and appellate courts in this case.

Before remand of Plaintiffs' statutory claims to the state district court, the "failure to warn" and "inconsistent discipline" claims were fully litigated by Plaintiffs and their Union and flatly rejected by the federal district court. That court held that the NFL's broad, repeated warnings about the dangers inherent in all weight-loss supplements were sufficient; that the "failure to warn" claim was, in any event, preempted by federal labor law; that the NFL's alleged prior

“unofficial” practice of not suspending players who tested positive for bumetanide did not preclude current enforcement of the “official” Policy; and finally, that there can be “no claim of breach of fiduciary duty arising from the NFL’s conduct.” *Nat’l Football League Players Ass’n*, 654 F. Supp. 2d at 967-72. The federal court’s decision, which was affirmed by the Eighth Circuit, was binding on remand and not open to re-examination.⁸ *See, e.g., In re Life Ins. Co. of N. Am.*, 857 F.2d 1190, 1193 (8th Cir. 1988) (holding that “[petitioner] will not be able to challenge the district court’s preemption ruling on remand in the Missouri courts” because “[t]he district court’s ruling on a question of federal law will be binding on the Missouri courts as res judicata and the law of the case”); *614 Co. v. Minneapolis Community Dev. Agency*, 547 N.W.2d 400, 410 (Minn. Ct. App. 1996) (holding that doctrine of collateral estoppel barred appellant from arguing an issue that had been decided by the federal trial court in a prior adjudication). Accordingly, the district court recognized that the “failure to warn” and “inconsistent discipline” claims were not before it at trial. (Add.014-15.)

⁸ The federal court also held that the information the collectively-bargained Hotline provided players about StarCaps was “undisputedly accurate.” *Nat’l Football League Players Ass’n*, 654 F. Supp. 2d at 971. While Plaintiffs insist in a footnote that Judge Larson “erroneously prevented” evidence about the Hotline “from being entered at trial” (AB, p. 7, n.5), the federal district court’s decision was binding on the lower court and, in any event, Plaintiffs waived any argument that evidence was improperly excluded by failing to file a post-trial motion. *See, e.g., Sauter v. Wasemiller*, 389 N.W.2d 200, 202 (Minn. 1986) (“It has long been the general rule that matters such as trial procedure, evidentiary rulings, and jury instructions are subject to appellate review only if there has been a motion for a new trial in which such matters have been assigned as error.”) (citation omitted).

Plaintiffs nevertheless argue, relying on DATWA, that those arguments are before this Court on appeal. (AB, pp. 18-19).⁹ DATWA says nothing about an employer's duty to warn employees about specific products. Nor does the statute say anything about inconsistent discipline. While DATWA, in a section entitled "authorized drug and alcohol *testing*," prohibits "*testing* on an arbitrary and capricious basis," Minn. Stat. § 181.951(1)(c) (emphasis added), that limitation on an employer's selection of employees for *testing* provides no support for Plaintiffs' "inconsistent *discipline*" claim.¹⁰

Nor is there any basis for Plaintiffs' argument that an injunction should have issued because the NFL "benefit[ed]" from its alleged misconduct. (AB, p. 19.) The only "misconduct" found by the state district court was a failure to provide timely notice of Plaintiffs' test result reports. Plaintiffs have both acknowledged that they were not injured by any delay, and have presented no evidence or argument that the NFL benefited from any such delay. To the contrary, there is uncontroverted evidence that *players* benefited from the Policy's

⁹ Plaintiffs cite only to section 181.951(a), which simply states that "[a]n employer may not request or require an employee or job applicant to undergo drug and alcohol testing except as authorized in this section." Minn. Stat. § 181.951(a).

¹⁰ Moreover, any claim that the Policy was inconsistently administered is essentially a claim for breach of the collectively-bargained Policy and thus "clearly preempted under § 301." *Oberkramer v. IBEW-NECA Serv. Ctr.*, 151 F.3d 752, 756 (8th Cir. 1998); *Allis Chalmers*, 471 U.S. at 210. For that reason, the Union originally brought its "inconsistent discipline" claim under section 301 of the LMRA, which, as explained above, was dismissed by the federal courts. *Nat'l Football League Players Ass'n*, 654 F. Supp. 2d at 965.

lengthier, more elaborate test-result review and verification process. (Tr. 269-70, 276-92, 435-40, 874-77.)

Similarly misplaced is Plaintiffs' contention that "[t]he NFL's hands are unclean" because it "fail[ed] to disclose that StarCaps contained bumetanide." (AB, p. 42.) It is elemental that conduct claimed to amount to "unclean hands" must "bear some relation to the merits of the case," and the dismissed "failure to warn" claim bears no relation to the claims before the state district court. *Slidell, Inc. v. Millennium Inorganic Chemicals, Inc.*, 460 F.3d 1047, 1058 (8th Cir. 2006) (citations omitted); *Prow v. Medtronic, Inc.*, 770 F.2d 117, 121-22 (8th Cir. 1985).¹¹

The district court, in sum, properly refused to entertain Plaintiffs' attempt to resuscitate claims that had already been fully litigated and resolved against them before remand and which, in any case, have no foundation in DATWA.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DECLINING TO CONSIDER MERITLESS CLAIMS RAISED FOR THE FIRST TIME AT, OR ON THE EVE OF, TRIAL.

A. The District Court Correctly Refused To Address Never-Pled DATWA Claims Of Which Plaintiffs Failed To Provide Proper Notice.

After Plaintiffs refused to identify their specific DATWA claims, the federal district court ordered them to answer the NFL's contention interrogatory seeking

¹¹ Even if Plaintiffs could somehow prove the NFL has unclean hands, the doctrine has no application here because it "does not bar a party with 'unclean hands' from *opposing* a request for equitable relief by the other side." *Heidbreder v. Carton*, 645 N.W.2d 355, 371 (Minn. 2002) (emphasis added).

the specific bases for their bare bones complaint. (RA0047-48.) Plaintiffs responded by listing ten ways in which DATWA was purportedly violated. (Add.030-31.) On remand to the state district court, Plaintiffs moved for summary judgment as to all ten alleged violations. At the summary judgment hearing, however, Plaintiffs raised a *new* allegation that appeared nowhere in their response to the NFL's contention interrogatory or in their summary judgment briefs – that the NFL had violated DATWA's chain-of-custody provision. (RA0049-52.) Judge Larson refused to consider that claim, and dismissed all the DATWA claims that Plaintiffs had identified and the parties had briefed except those pertaining to notification and confidentiality. (Add.015; A0327.)

On March 5, 2010, one business day before the start of trial, Plaintiffs notified the district court and the NFL by letter that they intended to present evidence of yet another DATWA claim – that they had been denied the “right” to have their samples tested at a “neutral or different” laboratory. (A0485.) Then at trial, Plaintiffs sought to revive their statutory chain-of-custody argument, and to introduce for the first time yet another DATWA claim – namely, that NFL players

are not provided copies of their negative test result reports.¹² (Tr. 149-52; 221, 328-29; 790-92; 841; 843; 1022.)

The district court did not abuse its discretion by declining in its injunction decision to consider any of Plaintiffs' belatedly disclosed DATWA claims. *See, e.g., Havenfield Corp. v. H & R Block, Inc.*, 509 F.2d 1263, 1272 (8th Cir. 1975) (reviewing the district court's decision not to allow "the untimely raising of new issues" under an abuse of discretion standard). Plaintiffs were ordered by the federal court to disclose the factual and legal bases for their DATWA claim; to the extent that Plaintiffs became aware of additional allegations, they were obligated to supplement their discovery response, *see* Minn. R. Civ. P. 26.05; Fed. R. Civ. P. 26(e)(1)(A) – which they never did.¹³ No new evidence was discovered – and Plaintiffs have presented no argument – to justify their failure to disclose these

¹² In their appellate brief, Plaintiffs mistakenly insist that they also raised for the first time at trial the claim that they "were denied their right to a third test." (AB, p. 28.) The "third test" issue was argued extensively in Plaintiffs' summary judgment briefs and rejected by the district court, which held that "Plaintiffs' samples were tested three times" in strict accordance with the statute. (A0311, Tr. 315-16.) All that Plaintiffs did at trial was request that the district court "reconsider" that prior ruling. (Tr. 526.) Because Plaintiffs have not appealed the district court's summary judgment order, its "third test" decision is not before this Court. *See LeRoy v. Figure Skating Club of Minneapolis*, 162 N.W.2d 248, 249 (Minn. 1969) (appeal from an order granting summary judgment must be taken from final judgment); *Graupmann v. Rental Equip. and Sales Co.*, 425 N.W.2d 861, 862 (Minn. Ct. App. 1988) (same).

¹³ Plaintiffs contend that they alerted the NFL to their claims by mentioning them in discovery requests. (AB, pp. 37-38.) Plaintiffs, however, have cited no authority – and the NFL is aware of none – for the proposition that a discovery *request* (rather than a discovery response) constitutes sufficient notice that a new legal theory is being pursued.

claims in a timely manner. In analogous situations, courts have precluded parties from injecting at the eleventh hour claims that had not previously been raised. *See, e.g., Havenfield Corp.*, 509 F.2d at 1271-72 (holding that the district court did not abuse its discretion by refusing to permit a party to introduce new evidence at trial that was not previously disclosed and that constituted “a basic change in the defendant’s contentions on the issue of liability”).¹⁴

In essence, Plaintiffs are arguing that the district court should have amended the pleadings to conform to the trial evidence as permitted under Rule 15.02 of the Rules of Civil Procedure – even though Plaintiffs never brought the necessary rule 15.02 motion. Regardless, the rule states that amendment is appropriate *only* if (1) the opposing party fails to object to the new evidence and (2) the admission of such evidence would not “prejudice . . . defense upon the merits.” Minn. R. Civ. P. 15.02. Given that the NFL objected to every one of the never-pled claims raised by Plaintiffs at, or just before, trial (A0328-330; Tr. 26, 30, 32-34, 149, 208-10; 214-21; 225-26; 329), the district court did not abuse its discretion in refusing to consider them. *See, e.g., Harry N. Ray, Ltd. v. First Nat’l Bank of Pine City*, 410 N.W.2d 850, 854-56 (Minn. Ct. App. 1987) (holding that

¹⁴ The only authority cited by Plaintiffs, *Donnelly Bros. Constr. Co., Inc. v. State Auto Prop. & Cas. Ins. Co.*, 759 N.W.2d 651 (Minn. Ct. App. 2009) (cited in AB, p. 36), actually supports the NFL’s position. *Donnelly* held that the district court on summary judgment properly denied a party’s requests to consider additional claims not included in the pleadings. *Id.* at 660-61 (“Although the complaint alleges that there may be additional claims, this general reference to future claims does not provide information sufficient to fairly notify respondent of the duty to defend.”).

the district court “did not clearly abuse its discretion in refusing to allow amendment of the pleadings” where a “new theory” was raised for the first time at trial and the opposing party objected to the new evidence “as outside the issues already raised in the pleadings”).

B. In Any Event, Plaintiffs’ Belatedly Disclosed DATWA Claims Are Baseless.

Even if Plaintiffs’ belatedly disclosed claims had been considered by the district court, they would have been found meritless.

1. The claim that Plaintiffs were denied the “right” to have their samples retested “at a neutral or different laboratory”

DATWA provides that “after notice of a positive test result on a confirmatory test,” an employee “may request a confirmatory retest of the original sample” at his “own expense” and at a laboratory other than “the original testing laboratory.” Minn. Stat. § 181.953(9). But as the district court recognized in its summary judgment decision, Plaintiffs “never requested ‘a confirmatory retest of the original sample’” (A0311), and thus had no “right to have their samples retested at a neutral or different laboratory” (AB, p. 30). Even if Plaintiffs *had* requested a “confirmatory retest of the original sample,” their Union already had selected on their behalf the UCLA and Utah Labs as exclusive testing sites, and the district court held on summary judgment – in a decision that Plaintiffs have not appealed – that the use of those laboratories complies with DATWA. (A0312-313.)

2. The claim that players do not receive negative test results

Plaintiffs posit that “players do not receive negative test results,” in violation of DATWA section 181.953(7). (AB, p. 34.) Plaintiffs, however, never alleged that they were harmed by any failure to receive their negative test results – and there is no evidence of such harm in the record. As discussed in section I, *supra*, Plaintiffs’ inability to prove that they were “injured” by the purported statutory misconduct is fatal to their claim for relief from their suspensions and for damages. Minn. Stat. § 181.956(2), (4).

3. The claim that there was a chain-of-custody violation

Plaintiffs vaguely claim that “there was not an appropriate chain of custody” in the handling of their specimens. (AB, p. 35.) The *only* evidence that Plaintiffs cite, however, is Dr. Lombardo’s testimony at trial that he could not remember “the airbill tracking” number for the specimens’ shipment to the UCLA Lab. (AB, p. 35 (citing Tr. 148-49).) That, of course, is evidence of nothing but one witness’s limited power of recall. The record clearly shows that a “reliable” chain-of-custody procedure was “establish[ed],” Minn. Stat. § 181.953(5), and followed at every step of the collection and testing process. (A0944, A0951; Tr. 269, 272-74, 854-74.) In any event, any “chain-of-custody” claim is foreclosed by the fact that Plaintiffs – as the arbitrator explicitly recognized in his decision – never “challenged the chain-of-custody” at arbitration (RA0023; RA0029). *See* Minn. Stat. § 181.956(1) (providing that employees may bring a DATWA action

“*only* after first exhausting all applicable grievance procedures . . . under a collective bargaining agreement”) (emphasis added).

The district court, in sum, got it right. It held, based on the plain language of the statute, that Plaintiffs cannot recover under DATWA because they admittedly were uninjured by the purported statutory violation. It further held, based on uncontroverted evidence that Plaintiffs shared their test results with countless others before the media reports, that the NFL cannot be held liable for any leak. And finally it decided not to base its injunction order on claims that the federal courts squarely rejected or that Plaintiffs raised only at the last minute. Its decision is unassailable.

In the event that this Court finds fault with the district court’s decision, it should affirm on any one of the alternative grounds discussed below.

V. IN THE ALTERNATIVE, PLAINTIFFS’ DATWA CLAIMS ARE BARRED ON THREE INDEPENDENT LEGAL GROUNDS.

Plaintiffs are precluded from obtaining relief under DATWA on three legal grounds – each one of which provides sufficient basis for affirming the district court’s decision. *See Myers by Myers v. Price*, 463 N.W.2d 773, 775 (Minn. Ct. App. 1990), *review denied* (Minn. Feb. 3, 1991) (“We will affirm the judgment if it can be sustained on any grounds.”). First, Plaintiffs cannot avail themselves of DATWA because they indisputably failed to exhaust the CBA’s grievance

procedures.¹⁵ Second, Plaintiffs' DATWA claims are barred because they were tested for a drug – bumetanide – that is not governed by the statute. Finally, the NFL cannot be held liable because it is not Plaintiffs' employer for DATWA purposes.

A. Plaintiffs Failed To Exhaust Collectively-Bargained Procedures For Resolving Disputes Involving The Interpretation Of, Application Of, Or Compliance With, The Collectively-Bargained Policy.

Plaintiffs' DATWA claim must fail because they did not exhaust their administrative remedies. Under DATWA, employees may bring an action “*only* after first exhausting all applicable grievance procedures and arbitration proceeding requirements under a collective bargaining agreement.” Minn. Stat. § 181.956(1) (emphasis added). Plaintiffs' CBA plainly provides that “[*a*]ny dispute . . . involving the interpretation of, application of, or compliance with, any provision” of the collectively-bargained Policy must “be resolved *exclusively* in accordance with the procedure” set forth in the Policy. (RA0015 (emphasis added).)

¹⁵ Although the district court did not decide in its Order whether Plaintiffs failed to exhaust their administrative remedies, this Court still may address that issue because it was raised repeatedly below, is dispositive of the entire controversy, and relies on undisputed facts. *See, e.g., Harms v. Ind. Sch. Dist. No. 300*, 450 N.W.2d 571, 577 (Minn. 1990) (“An appellate court may decide an issue not determined by a trial court where that question is decisive of the entire controversy and . . . when the facts are undisputed.”); *Mahoney & Hagberg v. Newgard*, 712 N.W.2d 215, 218-19 (Minn. Ct. App. 2006) (same).

At arbitration, Plaintiffs never challenged their test results or any of the NFL's testing procedures or protocols; they never argued that they received inadequate notice of their test results. The arbitrator, in fact, explicitly recognized that Plaintiffs did not "challenge[] the laboratory analysis, the chain-of-custody, or *any other aspect of the test.*" (RA0023 (emphasis added).) Plaintiffs thus raised none of the arguments involving "the interpretation of, application of, or compliance with" the collectively-bargained Policy that they eventually brought under DATWA.¹⁶

While DATWA does not explicitly state that an employee must raise a DATWA claim at arbitration in order to satisfy the exhaustion requirement, that interpretation is the only plausible one. The exhaustion requirement, after all, is intended to "promot[e] judicial efficiency." *Stephens v. Bd. of Regents of the Univ. of Minn.*, 614 N.W.2d 764, 774 (Minn. Ct. App. 2000). Were employees not required to raise at arbitration their DATWA claim – or at least the issues underlying their DATWA claim – no efficiency would be achieved and no purpose served by the statute's exhaustion requirement. *Cf. Wynn v. Connor*, No. 05-2212, 2008 WL 400699, at *4-6 (D. Minn. Feb. 11, 2008) (holding that because the exhaustion requirement "promotes judicial economy," plaintiff did not exhaust administrative remedies by filing grievances that did not "pertain[] to any of the

¹⁶ Notably, Plaintiffs *did* allege at arbitration violations of other state and federal laws, including New York fiduciary law and the ADA. (A0797, RA0058-59.)

matters described in [p]laintiff's [complaint]"). The Legislature cannot have intended that "unreasonable" result. Minn. Stat. § 645.17(1); *see also Minn. Mining and Mfg. Co. v. Nishika Ltd.*, 565 N.W.2d 16, 20 (Minn. 1997) ("We must . . . interpret the statute . . . in a sensible manner that avoids unreasonable, unjust, or absurd results.").

Because Plaintiffs never gave the arbitrator an opportunity to consider the grounds for their DATWA claims, as the statute requires, those claims are barred as a matter of law.

B. Plaintiffs Were Tested For Bumetanide – A Drug Not Covered By DATWA.

DATWA is also unavailable to Plaintiffs because they were tested for bumetanide, a drug not governed by the statute. DATWA defines "drug or alcohol testing" as an "*analysis of a body component sample . . . for the purpose of measuring the presence or absence of drugs, alcohol, or their metabolites in the sample tested.*" Minn. Stat. § 181.950(5) (emphasis added). A "drug" is considered "a controlled substance as defined in section 152.01, subdivision 4," *id.*, § 181.950(4), which refers to "Schedules I through V of section 152.02," *id.*, § 152.01(4). Because those schedules do not list bumetanide or any other diuretic, the "analysis" in this case was for "the purpose of measuring the presence or absence" of a drug not covered by DATWA. *Id.*, § 181.950(5).

The district court's decision that DATWA encompasses bumetanide testing is subject to de novo review, *see, e.g., Reider v. Anoka-Hennepin Sch. Dist. No. 11*,

728 N.W.2d 246, 249 (Minn. 2007), and is mistaken for two reasons. First, although DATWA explicitly states that a “[d]rug” for purposes of the statute is a “controlled substance as defined in section 152.01, *subdivision 4*,” Minn. Stat. § 181.950(4), the district court chose instead to rely on section 152.01, *subdivision 2*’s definition of the term “drug,” which includes “all medicines and preparations recognized in the United States Pharmacopoeia of National Formulary” (Add.023 (citing Minn. Stat. § 152.01(2))). The district court’s use of a definition of the term “drug” different from the definition chosen by the Legislature constitutes legal error. *Beardsley v. Garcia*, 753 N.W.2d 735, 740 (Minn. 2008) (holding that a court cannot “effectively rewrite” a statute).

Second, the district court erred in holding that DATWA applies because Plaintiffs were also being tested for steroids, a drug that *is* governed by the statute. (Add.023.) While the initial “A” sample screening test was conducted for the purpose of detecting steroids and their masking agents (Tr.274-276), Plaintiffs did not claim at trial – and are not claiming on appeal – that their initial screening test violated DATWA. Rather, Plaintiffs’ statutory challenge is confined to the confirmatory “A” and “B” sample tests, which were specifically designed to detect *only* bumetanide, not steroids. (Tr.858 (Policy’s Independent Toxicologist testifying at trial that confirmatory tests “target[]” drugs that are present in the initial screening test); *see also* AB, p. 29 (acknowledging that “a confirmatory test targets a drug specifically”).) Because bumetanide testing falls outside of

DATWA's ambit, the district court erred in holding that "DATWA applies to . . . the drug testing at issue in this case." (Add.023.)

C. The NFL Cannot Have Violated DATWA Because It Is Not Plaintiffs' Employer Under The Statute.

A further reason for affirming the district court's denial of injunctive relief is that the NFL is not Plaintiffs' employer and therefore not subject to the statute's requirements. In any event, the issue is inextricably intertwined with several collectively-bargained agreements and, as a result, preempted by federal labor law.

1. The NFL does not employ Plaintiffs for purposes of the statute.

DATWA specifically defines the parameters of the employment relationship for purposes of the statute. It states that an "employee" is a person "who performs services for compensation . . . for an employer." Minn. Stat. § 181.950. The district court itself acknowledged in its Order that "*the teams*" – not the NFL – "*pay Plaintiffs for the performance and services.*" (Add.021 (emphasis added).) It based that decision on unambiguous provisions in Plaintiffs' collectively-bargained contracts stating that the Vikings pay Plaintiffs a "yearly salary" "[f]or performance of Player's services." (RCA0001; RCA0025.) Those contracts make clear that the "*Club employs Player as a skilled football player. Player accepts such employment.*" (*Id.* (emphasis added).) In fact, the CBA's Preamble confirms that players are "employed by a member club of the National Football League," not the NFL itself. (RA0014.)

Without deciding the issue, the Eighth Circuit signaled that Plaintiffs' contracts alone are "*likely dispositive* in determining who their employer is" under DATWA's straightforward definition. *Williams*, 582 F.3d at 877 (emphasis added). The Eighth Circuit held that the collectively-bargained contracts stating that only the Vikings employ Plaintiffs are so transparent they "require [no] interpretation, only mere consultation," and on that basis ruled against the NFL on the issue of preemption. *Id.* The Eighth Circuit also cited several cases recognizing that professional football players are employed by member clubs and not the NFL. *Id.* (citing *Brown v. NFL*, 219 F. Supp. 2d 372, 383 (S.D.N.Y. 2002); *Clarett v. NFL*, 369 F.3d 124, 138 (2d Cir. 2004); *White v. NFL*, 41 F.3d 402, 406 (8th Cir. 1994); *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265, 1269 (3d Cir. 1979)).

The district court, however, chose not to follow the Eighth Circuit's guidance and DATWA's plain language. In place of the statutory standard that asks for whom Plaintiffs "perform[] services" and by whom they are "compensat[ed]," Minn. Stat. § 181.950, the district court imported a common-law standard that asks who has "*control* over the players' employment" (Add.017 (emphasis added)). That standard has no relation to DATWA, and its application was wrong as a matter of law. *Thompson v. Thompson*, 739 N.W.2d 424, 430 (Minn. Ct. App. 2007) ("[W]hether the district court applied the correct legal standard is a question of law, which [this Court] review[s] de novo.").

In enacting DATWA, the Legislature easily could have adopted a test that focused on the extent to which "the alleged employer possessed the power to

control the workers in question.” *Zheng v. Liberty Apparel Co., Inc.*, 355 F.3d 61, 66 (2d Cir. 2003) (cited in Add.016). It did not, and the district court was not permitted to “in effect rewrite [the] statute so as to accomplish a result which might be desirable and at the same time conflict with the expressed will of the legislature.” *Mattice v. Minn. Prop. Ins. Placement*, 655 N.W.2d 336, 341 (Minn. Ct. App. 2002) (citation omitted).

2. Under the district court’s “control” standard, Plaintiffs’ DATWA claims are preempted.

If the “employment” issue does turn on the extent to which the NFL “controls” the players, the resolution of Plaintiffs’ DATWA claims would be “inextricably intertwined with consideration of the terms of” the CBA and thus preempted by the LMRA. *Allis-Chalmers*, 471 U.S. at 213 (state-law claims dependent on “the meaning of the contract relationship” preempted); *Johnson v. Anheuser-Busch, Inc.*, 876 F.2d 620, 624 (8th Cir. 1989) (state-law claim

preempted where it “require[d] an examination of the collective bargaining agreement and the scope of the employment relationship”).¹⁷ To illustrate:

- The district court held that the NFL jointly employs Plaintiffs because the NFL “directly and indirectly controls many aspects of a player’s life both on and off the field.” (Add.017.) But the district court also recognized that the “control” exercised by the NFL “*emanates from a series of formal rules and regulations existing both separate from and in conjunction with the CBA.*” (*Id.* (emphasis added).) Any decision about the NFL’s “control” over players’ lives, as a result, cannot be reached without considering those collectively-bargained “rules and regulations.”
- The district court held that the NFL should be deemed Plaintiffs’ employer because it “controls and supplies many of the funds to the teams” – for example, retirement benefits and pension plans. (Add.021.) But the district court also acknowledged that Plaintiffs’ benefits exist “pursuant to the CBA” and that benefit amounts are “controlled by the [collectively-bargained] plan” (Add.004-005) – making any determination about those benefits dependent on the CBA.
- The district court held that the NFL employs Plaintiffs because “the NFL has the sole right to discipline players under the steroid Program.” (Add.022.) But the district court also found that the collectively-bargained *Policy* – not the NFL – “provides [] the NFL” with “responsibility for imposing discipline.” (Add.007.) Any conclusion about the NFL’s authority to discipline violators of the “steroid

¹⁷ The Eighth Circuit’s preemption decision is not binding because it was based on the premise that the collectively-bargained contracts stating that the Vikings pay Plaintiffs a salary for their services were “likely dispositive” and “require [no] interpretation, only mere consultation.” *Williams*, 582 F.3d at 877. The district court, however, rejected the Eighth Circuit’s approach and held that the contracts are *not* dispositive – that a decision on the employer issue necessitates an analysis of the degree to which the NFL controls the teams and their finances. Because the Eighth Circuit never considered whether the district court’s newly-adopted “control” standard requires an analysis of collectively-bargained agreements, its preemption decision is not law of the case. *See United States v. Montoya*, 979 F.2d 136, 138 (8th Cir. 1992) (holding that law of the case doctrine does not extend to issues not decided in earlier appeal).

Program” thus derives and is inseparable from the collectively-bargained Policy.

In short, because – under the “control” test employed by the district court – a determination of whether the NFL is Plaintiffs’ employer for purposes of DATWA is “inextricably intertwined” with several collectively-bargained agreements, *Allis-Chalmers*, 471 U.S. at 220, Plaintiffs’ DATWA claim is preempted by federal labor law.

VI. THIS COURT ALSO SHOULD AFFIRM BECAUSE THERE WAS NO VIOLATION OF DATWA’S NOTIFICATION REQUIREMENT.

A final alternative ground for affirming the district court’s decision denying injunctive relief is that Plaintiffs never established a violation of DATWA’s notification requirement in the first place. The undisputed evidence shows that the collectively-bargained Policy’s test-result verification and notification procedures “exceed” DATWA’s “minimum standards and requirements” – thereby satisfying the statute. Minn. Stat. § 181.955(1). Moreover, a determination of whether the Policy exceeds DATWA’s minimum requirements is “substantially dependent upon analysis of the terms” of the Policy itself and thus preempted by section 301 of the LMRA. *Allis-Chalmers*, 471 U.S. at 220.

A. The Collectively-Bargained Verification And Notification Procedures That The NFL Followed Indisputably Exceed DATWA’s Minimum Standards.

DATWA specifically allows “parties to a collective bargaining agreement” to agree on “a drug and alcohol testing policy that *meets or exceeds*, and does not otherwise conflict with” the statute’s “*minimum standards and requirements.*”

Minn. Stat. § 181.955(1) (emphasis added); *see also Law Enforcement Labor Servs., Inc. v. Sherburne County*, 695 N.W.2d 630, 637 (Minn. Ct. App. 2005) (recognizing that DATWA’s plain language “permits the parties to bargain concerning a policy that ‘meets or exceeds’ the minimum standards for employee protection”).

The district court’s decision that the Policy’s test-result verification and notification procedures – procedures that indisputably ensure the accuracy and confidentiality of players’ test results – do *not* exceed DATWA’s minimum requirements (Add.024) is reviewed *de novo*, *see O’Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996) (“[A]pplication of a statute to a set of undisputed facts is a question of law, not binding on this court.”), and finds no support in the record. In fact, the district court’s findings compel the conclusion that the Policy’s test-result verification and notification requirements far “exceed” DATWA’s “minimum standards.” Minn. Stat. § 181.955(1). The district court found that under the Policy:

- Plaintiffs’ samples are tested at the UCLA Lab, which is “certified and accredited by the World Anti-Doping Agency [] and the International Organization for Standardization” and “meets or exceeds” the laboratory testing requirements set forth in DATWA (Add.008);
- Dr. Lombardo “review[s] [the] chain-of-custody forms” so that he can match the numbered sample that tested positive with the player’s name, thereby shielding players’ identities from the laboratory during the testing process (*id.*, Add.009-11) – a confidentiality protection found nowhere in DATWA;
- Dr. Lombardo automatically “schedule[s] a testing date” for the confirmatory retest of a player’s “B” sample, at no expense to the player

(Add.009-010) – a benefit above and beyond DATWA’s minimum standards, which require a confirmatory retest only if the employee specifically requests and pays for it, Minn. Stat. § 181.953(9);

- Dr. Lombardo advises a player whose “A” sample has tested positive that he is “entitled to have a qualified toxicologist observe the ‘B’ bottle test” (Add.009-010) – a protective measure that DATWA does not afford;
- Both Dr. Lombardo and Dr. Finkle independently review each player’s test results, laboratory analysis, and chain-of-custody documentation (Add.009-011) – additional levels of review that DATWA does not guarantee employees; and
- The NFL and the employing team learn that a player has tested positive only after both Drs. Lombardo and Finkle are satisfied to a medical and scientific certainty that the confirmatory retest of a player’s “B” sample is positive – whereas under DATWA, the employer is notified of the “A” test result before the employee even has the chance to request a confirmatory retest, Minn. Stat. § 181.953(3), (7). (Add.010-011.)

In light of those findings, the district court’s decision that the Policy’s test-result verification and notification protocols do not exceed the statute’s “minimum standards for employee protection,” *Sherburne*, 695 N.W.2d at 637, cannot survive this Court’s de novo review.

In fact, the district court read the possibility of the collectively-bargained Policy “exceed[ing]” DATWA’s “minimum standards and requirements,” Minn. Stat. § 181.955(1), out of the statute entirely. It held: “*Regardless of whether the NFL desired to give Plaintiffs’ test results an additional level of review, they violated DATWA by not disclosing the confirmatory test results to Plaintiffs within*

three working days.” (Add.024 (emphasis added).)¹⁸ The district court’s opinion that the NFL can satisfy the statute *only* by meeting DATWA’s three-day notice requirement – “regardless” of whether the collectively-bargained Policy exceeds that minimum requirement (Add.024) – cannot be reconciled with DATWA’s plain language, which “formulates two separate and distinct means” by which the statute can be satisfied, *Munger v. State*, 749 N.W.2d 335, 338 (Minn. 2008); *see also State v. Loge*, 608 N.W.2d 152, 155 (Minn. 2000) (holding that “we will read” “the legislature’s use of the word ‘or’ . . . in the disjunctive and require that only one of the possible factual situations be present in order for the statute to be satisfied”) (citations omitted).

The statutory use of the disjunctive term “or” is of particular significance in this context because it is indisputably *impossible* for the collectively-bargained Policy to both meet and exceed DATWA’s minimum standards. Both Dr. Lombardo and Dr. Finkle testified that the additional review and confidentiality measures guaranteed by the Policy – protections that exceed DATWA’s baseline for Minnesota employees – cannot be implemented within the statute’s three-day

¹⁸ In actuality, the “additional level of review” that Plaintiffs’ test results received has nothing to do with what “the NFL desired,” and everything to do with what was negotiated between the NFL and the Union. The uncontradicted testimony at trial established that those added protections were specifically bargained by the Union to ensure both the confidentiality and accuracy of players’ test results. (Tr.435-440.)

timeframe. (Tr. 290, 306, 876-77.)¹⁹ The evidence further demonstrates that the Union and the NFL intentionally bargained for a Policy that ensures accurate, confidential results over one that favors expediency. (Tr. 435-40.) The statute’s explicit provision of “two separate and distinct means . . . by which [a policy] can [satisfy] the statute,” *Munger*, 749 N.W.2d at 338, requires that the bargaining parties’ choice be respected.

In sum, because the Policy’s test-result verification and notification procedures – under the district court’s own findings of fact – provide players even greater protection than DATWA itself, there was no statutory violation and the judgment below should be affirmed. *Myers by Myers*, 463 N.W.2d at 775.

B. The Issue Of Whether The Collectively-Bargained Policy Exceeds DATWA’s Minimum Standards Is Preempted By Federal Labor Law.

The district court’s judgment also should be affirmed because a determination of whether the collectively-bargained Policy exceeds DATWA’s minimum requirements “is inextricably intertwined with consideration of the terms of” the collectively-bargained Policy and thus preempted by the LMRA. *Allis-Chalmers*, 471 U.S. at 220.

¹⁹ While Plaintiffs contend that “the NFL never took any steps to work with the Labs to determine if the DATWA time restrictions could be met” (AB, p. 27), “work[ing] with the Labs” could not possibly accelerate the Policy’s elaborate review and confidentiality measures – and Plaintiffs offer no argument or evidence to the contrary.

“The proper starting point for determining whether interpretation of a CBA is required in order to resolve a particular state law claim is an examination of the claim itself.” *Trustees of the Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing, Inc.*, 450 F.3d 324, 331 (8th Cir. 2006). Here, the “particular state law claim” asks whether the parties “bargain[ed] and agree[d] with respect to a drug and alcohol testing *policy* that meets or exceeds” the statute’s minimum protections. Minn. Stat. § 181.955(1) (emphasis added). It would be impossible for a court to decide whether the parties’ collectively-bargained “[P]olicy” “exceeds” DATWA’s standards without analyzing the terms of the “[P]olicy” itself. *Id.*

Specifically, a court would have to analyze the Policy’s measures to protect the confidentiality of players’ names during the testing process; its provision of an automatic confirmatory retest at no expense to the players and the chance to have an independent toxicologist observe that retest; its guarantee of independent review and confirmation of the test results by the Policy’s Independent Administrator and Consulting Toxicologist (both of whom are jointly appointed by the NFL and the Union); and its protocol of postponing notification to the NFL and the player’s employing team until the test result’s accuracy has been verified to a scientific certainty. The court would then have to compare the Policy’s terms with DATWA’s minimum standards to determine which afford players a greater level of protection. The resolution, in sum, of whether the Policy’s testing, confidentiality, and notification provisions “exceed” DATWA’s minimum

requirements “depends on interpretation” of the Policy itself. *Twin City Bricklayers*, 450 F.3d at 331.²⁰

Zupancich v. United States Steel Corp., No. 08-5847, 2009 WL 1474772 (D. Minn. May 27, 2009) is directly on point. There, a Minnesota federal court considered a putative class action alleging a violation of the Minnesota Fair Labor Standards Act (“Minnesota FLSA”). Similar to DATWA, the Minnesota FLSA contains a provision stating that employees may “bargain collectively with their employers . . . to establish wages and other conditions of work more favorable to the employees than those required by” the statute. Minn. Stat. § 177.35.

Dismissing plaintiff’s state-law claim on preemption grounds, the *Zupancich* court explained:

[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 more favorable to the employees. As such, the claim is inextricably intertwined with the CBA and is not independent.

2009 WL 1474772, at *2-3 (citations omitted) (emphasis added).

²⁰ When the Eighth Circuit issued its preemption decision in this case, it was “unclear” to the court from the existing record “which specific violations of DATWA [Plaintiffs were] alleging . . .” *Williams*, 582 F.3d at 875. Because the federal appellate court never considered Plaintiffs’ notification claim, or whether a decision on that claim is “substantially dependent upon an analysis of the terms” of the Policy itself, *Allis-Chalmers*, 471 U.S. at 220, its decision is not binding as to whether Plaintiffs’ notification claim is preempted by federal labor law. *See Montoya*, 979 F.2d at 138.

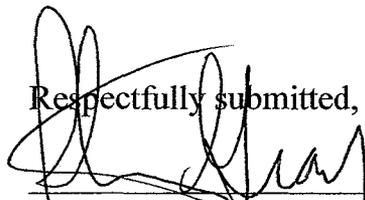
The *Zupancich* court's reasoning applies with equal force to Plaintiffs' DATWA claim. Here, too, the Court is faced with a statute allowing parties to bargain for terms "more favorable to employees" than the minimum statutory requirements, and must "examine" the Policy "to determine whether the agreement negotiated" actually is "more favorable" than the statute itself. *Zupancich*, 2008 WL 5450036, at *2. Because Plaintiffs' DATWA claim is as "inextricably intertwined" with the collectively-bargained Policy as *Zupancich*'s claim was, this Court should hold it preempted. *Id.*; see also *Robinson v. Fred Meyers Stores, Inc.*, 252 F. Supp. 2d 905, 912-13 (D. Ariz. 2002) ("Because the [statute] allow[s] a collective bargaining agreement drug testing policy to control, the claim that Defendants violated the statute in the administration of its drug testing policy requires *interpretation* of the [] CBA.") (emphasis in original).

CONCLUSION

For all the foregoing reasons, this Court should affirm the district court's decision that Plaintiffs cannot recover under DATWA.

DATED: August 16, 2010

Respectfully submitted,



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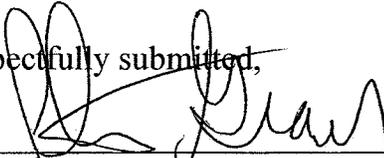
**ATTORNEYS FOR RESPONDENT THE
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with monospace font. The length of this brief is 13,584 words. This brief was prepared using in a proportionally spaced typeface using Microsoft Word Version 2003 in 14-point Times New Roman font.

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