

NO. A10-922

State of Minnesota
In Court of Appeals

KEVIN WILLIAMS ET AL.,

Appellants,

v.

THE NATIONAL FOOTBALL LEAGUE, ET AL.,

Respondents.

APPELLANTS' REPLY BRIEF

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ARGUMENT

I. The NFL Violated DATWA

The NFL did not cross-appeal from the trial court's factual and legal finding that it violated DATWA. The only issue before this Court is the appropriate remedy available to the Williamses for that violation. The NFL intentionally ignored DATWA and vows even today to continue to enforce its drug program in violation of DATWA. If this Court declines to reverse the trial court's decision not to grant relief to the Williamses notwithstanding the NFL's violation of DATWA, the Williamses will be left without a remedy and DATWA's effectiveness and significance will have suffered a crippling blow. The only appropriate remedy is an injunction.

The Williamses rely on their opening brief for the substantive issues related to their proofs on damages,¹ the trial court's error in finding that the Williamses did not prove a breach of confidentiality by a preponderance, and the trial court's error in refusing to allow evidence on the whole of the NFL's violations of DATWA.

¹ The NFL claims that it was the Legislature's intent to demand that employees show a causal relationship between injury and an employer's failure to provide timely positive test results. However such a requirement would effectively write out of the statute any form of relief for failure to timely notify. Showing a causal relationship between an employer's discipline and delay in notice would be impossible. An employer could always claim that the delay only deferred discipline which was required. The Legislature deemed the notice requirement to be crucial to the legislative intent, and that determination suffices here.

II. The NFL's Violation of DATWA Warrants the Imposition of an Injunction

Public policy demands that the NFL be prevented from suspending the Williamses. The NFL attempts to gloss over its bad acts throughout its dealing with the Williamses and wrongly states that the only misconduct the trial court found was a failure to provide timely notice to the Williamses of their test result reports.

This argument ignores the whole of the trial court's findings. The trial court found that the NFL knew that: (1) StarCaps contained Bumetanide (Add.012 at 144-145, 150)²; (2) NFL players were taking StarCaps (Add.012 at 141, 150); (3) the NFL never sent an alert about StarCaps despite having sent such alerts for other specific products (Add.007-008 at 81-83); (4) withholding information on StarCaps would likely result in players such as the Williamses violating the Program (Add.012-013 at 146, 153-154); (5) as an employer of the State of Minnesota conducting a drug testing program it should have abided by DATWA (Add.023); and (6) it violated DATWA's three-day provision vis-à-vis the Williamses and others (Add.008-011 at 92, 113, 128; Add.015 at 2; Add.023).

The trial court properly adjudicated the NFL guilty of violating DATWA. The NFL's violative testing directly resulted in the NFL attempting to suspend the Williamses. There is no question that, absent this Court's reversal of the trial court's decision declining to issue an injunction, the Williamses will be suspended by the NFL.

² 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 the Respondent's Confidential Appendix; citations appearing as RAxxxx are to the Respondent's Appendix; citations appearing as "Witness Testimony Date xxx" are to the District Court Trial Transcript.

Therefore, despite the NFL's violation of DATWA, it would be permitted to punish the employees that DATWA was designed to protect. It is redundant and superfluous to permit an employer to violate DATWA and also be permitted to suspend employees based on that violative testing.

The trial court's decision is in effect a warning with no substance and flies in the face of the rights that DATWA seeks to protect. The NFL seeks to convince this Court that the Williamses, who had no idea that they were taking a banned substance because of the NFL's concealment of information, have no right to relief under DATWA. That is incorrect.

The NFL has made it clear that it has no intention of modifying or changing its Program so that it complies with Minnesota law. Indeed, the NFL has stated that, despite the NFL's past, and continuing, violation of DATWA, it intends to administer and enforce its violative drug testing program: "Those decisions make clear that the claims of the players and the NFL Players Association were without substance and that the players suffered no harm by being required to comply with the terms of the collectively-bargained policy on steroids and related substances. We intend to continue to administer a strong, effective program on performance-enhancing drugs that applies on a uniform basis to all players in all states." Public policy dictates that the NFL not be permitted to benefit from its own misconduct in this fashion. *See, e.g., Ganley Bros. v. Butler Bros. Bldg. Co.*, 170 Minn. 373, 377 (Minn. 1927). Allowing the NFL to exact punishment on the Williamses would constitute judicial approval of the NFL's affirmative, and

continuing, violation of DATWA. The only remedy that will prevent this is the imposition of an injunction.

A. The NFL Seeks to Limit DATWA's Protections

The NFL's Respondent's Brief can be broken down into two main arguments, its failed and ill preserved preemption argument (discussed *infra*) and its efforts to limit DATWA's protections. Neither has any basis in the law.

1. DATWA Is Designed to Protect Employees

The NFL's argument that "ensuring accurate test results" is DATWA's goal misses the point. If that were the case DATWA would do nothing more than punish employers if test results were wrong. Employers could otherwise flagrantly ignore DATWA's procedures and safeguards. That is not the case. The NFL's argument is symptomatic of its entire attitude about Minnesota's legislative actions and explains its perspective that it can simply ignore DATWA.

DATWA was established, as explained in *Belsky v. Worldwide Parts and Accessories Corp.*, No. Civ. 04-4702 2006 WL 695531 at * 4 (D. Minn. Mar. 17, 2006), "with the express intent to provide constitutional protections for workers in the workplace." Rep. Sandra Pappas, the author of the legislation, noted "[o]ur rights against self-incrimination, against unreasonable search and seizure, our right to be presumed innocent, as well as our common sense expectation of privacy are non-existent under an aggressive and invasive employer drug testing program." Rep. Sandra Pappas, *Workplace Drug Testing--House File 42*, 14 Wm. Mitchell L.Rev. 239, 239-43 (1988). DATWA provides Minnesota workers with a host of protections that go beyond securing

their right to accurate test results, including the right to privacy and right to due process. *See Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724 (1985) (protecting state's rights to establish mandatory minimum protections for employees). The public policy of DATWA is aimed at protecting employees from, *inter alia*, invasive drug testing and unfair treatment, punishment or retaliation.

DATWA provides employees with safeguards that the Legislature has decided are important in order to respect employees' privacy and fundamental rights and to protect employees from employer abuses and from employers who take it upon themselves to decide what the law should or should not be, like the NFL has. Those safeguards would be diluted, as would be the Legislature's intent, if an employer were permitted to violate DATWA without consequence and if, as here, an employee were punished notwithstanding an employer's violation of DATWA.

An employee who proves a violation of DATWA is entitled to injunctive relief irrespective of whether he has tested positive under the employer's drug policy. Minnesota Statute § 181.956(3) reads: "[A]n employee...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 DATWA. (Emphasis added.) Further, Minn. Stat. § 181.956(4) states that "as part of injunctive relief granted ... a court may, in its discretion, grant any other equitable relief it considers appropriate, including ordering the injured employee" reinstated. *Id.* The express language and intent of DATWA are to provide aggrieved employees with injunctive relief as well as with a

range of equitable remedies in addition to injunctive relief – and not to limit those remedies to persons who can prove their test results were inaccurate.

2. DATWA's Protections Are Available to the Williamses

The NFL contends that DATWA's protections are unavailable to the Williamses because their violation of the NFL's drug policy constitutes independent grounds for their suspension. DATWA does not support that conclusion.

The only conceivable ground for suspending the Williamses is the results of tests administered illegally under DATWA. The NFL cites to no case where the result of an unlawful test provides a valid ground for discipline. *City of Minneapolis v. Johnson*, 450 N.W.2d 156, 160 (Minn. Ct. App. 1990), for example, permitted a police officer to be discharged for drug use when he engaged in misconduct due to his drug abuse. The *Johnson* court refused to allow the employer to use its violative drug testing against the employee as evidence to support the discharge. *Id.* The termination had to be based on *purely* independent grounds. *Id.* The *Johnson* court found that there was sufficient evidence to terminate Johnson because he had admitted to cocaine use and to failing to report cocaine use at a party he attended in a setting apart from the violative drug-testing and related proceedings.

Similarly, in *Hanson v. City of Hawley*, No. A05-1940, 2006 WL 1148125, at *2 (Minn. Ct. App. May 2, 2006), the court permitted discipline of a police officer who consumed alcohol before an accident while on duty based on grounds independent of his drug test. The officer was discharged under a no tolerance alcohol policy based on his admission that he did in fact consume alcohol while on call. Likewise, in *In re Copland*,

455 N.W.2d 503, 506 (Minn. Ct. App. 1990) , the court found that a police officer who had engaged in misconduct due to cocaine abuse could be terminated without first being offered the opportunity for counseling. The *Copland* court found that the officer was not “discharged because he failed a drug test; he was discharged because he failed to perform his duties as a police officer.” *Id.* at 507. And finally, in *Belde v. Ferguson Enterprises, Inc.*, 460 F.3d 976 (8th Cir. 2006), the Court found that the employer’s termination of the employee was exempt from DATWA. It was only after that finding exempting the case from DATWA that the Court discussed, in the alternative, that there existed independent grounds for the dismissal, that is, the employee’s refusal to submit to a federally mandated test. *Belde*, 460 F.3d at 978. Thus the Court distinguished between situations like the case at bar where the results of the testing are the grounds for discipline and cases where there exists a completely independent ground for discipline.

In contrast to the cases cited by the NFL, here there are no grounds to suspend the Williamses except the drug test showing they tested positive for Bumetanide.³ The NFL admitted that it could not suspend the Williamses for taking StarCaps in the absence of Bumetanide because StarCaps is not banned under the Policy. (A0402 at 15; Lombardo Testimony 3/8/2010 at 197:5-14.) The Williamses would have had *no idea* that Bumetanide was in their system were it not for the NFL’s violative testing – this is

³ There is no support for the NFL’s claim that the Williamses’ employment contracts with the Minnesota Vikings constitute independent grounds for dismissal. The Williamses’ contracts do not permit them to be suspended for taking StarCaps, nor has either the NFL or the Minnesota Vikings brought a breach of contract action against the Williamses. (RCA0001-41.)

unsurprising because only the NFL had the knowledge that StarCaps contained Bumetanide. Taking StarCaps did not violate the Policy. Were it not for the presence of Bumetanide in StarCaps, the Williamses would not have been violated under the Policy.

The NFL seeks to enforce a Policy which in and of itself violates DATWA in its application to employees. An employer should not be allowed to enforce a drug policy against employees that violates DATWA. There is nothing independent of the violative drug test that could have resulted in the NFL violating the Williamses, and thus there existed no grounds independent of the NFLs DATWA violations that could have resulted in suspensions.

B. The Dismissed Common Law Claims Do Not Bar Review of the NFL's Testing

The Williamses are not seeking review of dismissed common law claims, contrary to the NFL's arguments. Dismissal of those claims, however, does not bar the Court from considering the NFL's bad acts related to its DATWA testing. Contrary to the NFL's assertions, a party's bad acts are properly considered when a court is considering granting equitable relief. While the NFL is correct that a party may not be prevented from opposing equity even if it has unclean hands, that does not foreclose the court from balancing the equities in granting equitable relief. *See Heidbreder v. Carton*, 645 N.W.2d 355, 371 (Minn. 2002); *Wythe v. Natural Biologics, Inc.*, 395 F.3d 897, 902 (8th Cir. 2005).

C. The NFL Violated DATWA in Numerous Other Ways That Also Warrant Injunctive Relief

The manner in which the NFL has treated the Williamses, in disregard of State law protections and common standards of fairness, as discussed more fully in Appellants' opening brief, evidences the need to impose meaningful equitable and other relief necessary to protect the Williamses and to assure that the NFL understands it cannot simply ignore a law that it does not like. The NFL's disregard of the Williamses' (and other players') rights pre-dates the instant dispute and continues to this day.

The NFL has not informed Players, and continues not to inform Players, of negative test results, in violation of Minn. Stat. § 181.953(7). (A0421-22 at 131; Birch Testimony 3/11/2010 at 790:22-25, 791:1-7; Finkle Testimony 3/11/2010 at 841-42.) The NFL was on notice of this and its other violations of DATWA since the inception of this case, not since the eve of trial, as the NFL contends. As discussed in detail in the Williamses' opening brief, the NFL had notice of this DATWA infraction in the Complaint and throughout discovery. There should have been no notice issue at trial, and it was error for the trial court to consider this claim.

The NFL also has been on notice of its violation of Minn. Stat. § 181.953(9), which includes the right to have an independent laboratory test samples at an employee's expense, since at least the inception of this litigation. Nonetheless, the NFL continues to maintain that its Policy, which allows for only the UCLA or Utah lab to conduct tests, trumps DATWA's requirements in this regard. (A0417 at 110, A0425 at 144; Lombardo Testimony 3/8/10 at 118:6-11; Birch Testimony 3/11/10 at 661:18-23, 662; Robinson

Testimony 3/10/10 at 437-48.) A neutral lab would have potentially uncovered the NFL's failure to alert the proper authorities that StarCaps contained Bumetanide. The use of a neutral laboratory would have added another important layer of protection that the NFL unilaterally stripped from the Williamses and other Players.

The NFL's conduct towards the Williamses, and its continuing conduct, demands relief. Granting injunctive relief prohibiting the NFL from suspending the Williamses will communicate without any ambiguity that the NFL must change its course of conduct.

III. The NFL Seeks to Reargue The Preemption Argument Which Has Been Rejected Time and Time Again

The NFL argues that the issues Appellants contend support reversal are beyond this Court's purview and are jurisdictionally inappropriate. This procedural/jurisdictional argument ignores the explicit language of Minn. R. Civ. App. 103.04, which provides that "on appeal, the appellate courts may reverse, affirm or modify the judgment or order appealed from, or take any other action as the interest of justice may require." This Rule further provides that on appeal from or review of an order any order *affecting* the order from which the appeal is taken can be considered. All of the issues relating to the appropriateness of injunctive relief are properly before this Court and any order affecting the Appellants' right to that relief or Appellants' right to prove entitlement to injunctive relief is properly before this Court pursuant to the explicit language of Minn. R. Civ. App. 104.03.

The NFL's meritless preemption argument continues to fail. The Williamses' claims under DATWA arise under Minnesota state law and address duties and obligations that exist independent of the CBA. The trial court, the federal district court (most recently in summarily remanding this case to the state court after the NFL's second attempt at removal on federal question grounds), and the Eighth Circuit have rejected the NFL's preemption argument. The only proper place for the NFL's failed preemption argument is before the Supreme Court of the United States, where the NFL's Petition for a Writ of Certiorari is pending. The NFL's attempts to have this Court reconsider its preemption argument should be summarily denied.

IV. The NFL's Additional "Independent Legal Grounds" to Prevent the Williamses from Seeking Relief Under DATWA Are Barred by Law of the Case

The NFL has not appealed yet seeks to have this Court reconsider the trial court's ruling by arguing that "independent legal grounds" exist to deny the Williamses' request for relief. This thinly veiled attempt to circumvent appealing is improper and must be rejected. The trial court's ruling stands that the NFL failed to meet or exceed DATWA.

A. The Williamses Exhausted the CBA's Arbitration Procedures

The NFL contends that the Williamses did not exhaust their administrative remedies as required by DATWA. Judge Larson correctly found that the Williamses exhausted their remedies. *See* A0314-15. The Williamses participated in the mandated arbitration process "adjudicated" by Jeff Pash, the NFL chief legal officer. Therefore,

contrary to the NFL's claims, the Williamses exhausted their administrative remedies and are not barred from relief under DATWA.

B. The NFL is the Williamses Employer for DATWA Purposes

Similarly, the trial court adjudicated the NFL to be an employer for DATWA purposes and the NFL has not appealed that decision. (Add.066, Add.027.) (“For purposes of DATWA, the NFL is Plaintiffs’ employer. DATWA governs only “employer drug testing of employees.” *Kise v. Product Design & Eng’g*, 453 N.W.2d 561, 563 (Minn. Ct. App. 1990). Plaintiffs are indisputably employees of the NFL as well as the Vikings, for DATWA purposes.) That issue is not before the Court.

C. The NFL’s Testing Falls Under DATWA

The NFL unambiguously lost its attempts to have its testing fall outside of DATWA’s purview. The NFL argues again that Bumetanide is a drug that is not covered by DATWA. The trial court rejected the NFL’s argument that testing for Bumetanide falls outside of DATWA. (A0307.) (“Defendants claim that because Bumetanide, rather than an illegal drug, was found in Plaintiffs’ systems, that DATWA is inapplicable. This argument is flawed. DATWA is not an outcome determinative test. The NFL was testing Plaintiffs for anabolic steroids and other prohibited substances.”) The NFL did not appeal this ruling and re-argument on this issue must be rejected.

CONCLUSION

The trial court's decision, which fails to structure an appropriate remedy to protect and compensate the Williamses and to send a sufficiently strong message to the NFL that it cannot ignore the law, should be reversed.

Dated: August 30, 2010

Respectfully submitted,



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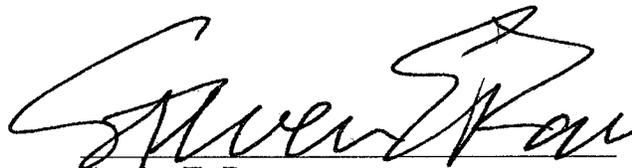
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Steven E. Rau