

SUPREME COURT No. 22-1599
POLK COUNTY CASE No. CVCV060174

IN THE
SUPREME COURT OF IOWA

SCOTT HAMPE,

Plaintiff-Appellant

v.

CHARLES GABUS MOTORS, INC. D/B/A TOYOTA OF DES MOINES
AND GADAMINA ENTERPRISES, INC. D/B/A MID-IOWA
OCCUPATIONAL TESTING,

Defendants-Appellees.

*ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE JOSEPH SEIDLIN,
DISTRICT COURT JUDGE*

FINAL BRIEF FOR APPELLANT

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

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VI. CGM AND MID-IOWA FAILED TO SUBSTANTIALLY COMPLY WITH IOWA CODE SECTION 730.5(9)(h) BECAUSE A FEMALE DIRECTLY MONITORED AND OBSERVED THE COLLECTION OF HAMPE'S URINE SPECIMENS

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ROUTING STATEMENT

Because this case involves the application of facts to existing precedent, transfer to the court of appeals would be appropriate. Iowa R. App. P. 6.1101.

STATEMENT OF THE CASE

In 2020, Scott Hampe (“Hampe”) sued his former employer Charles Gabus Motors, Inc. d/b/a Toyota of Des Moines (“CGM”), and a drug specimen collection company named Gadimina Enterprises, Inc. d/b/a Mid-Iowa Occupational Testing (“Mid-Iowa”), following his termination as a sales person and leasing manager at the Toyota car dealership in Des Moines. In his lawsuit, Hampe asserted claims of violation of Iowa’s drug testing laws, fraud, invasion of privacy and conspiracy. The dispute centered around an unannounced drug test conducted by CGM and Mid-Iowa on Hampe that resulted in Hampe’s termination from employment. App. 22. In particular, Hampe claimed that CGM and Mid-Iowa committed at least 8 violations of Iowa Code Section 730.5 by 1) unlawfully used an alternate system to exempt employees from testing and targeted Hampe; 2) failing to make any effort to determine what employees were scheduled to be at work during the test; 4) failing to complete supervisor initial and annual training; 5) destroying evidence of Hampe’s urine specimens before sending them to a laboratory for confirmatory testing or review by a medical review officer; 6) directly monitoring and observing the collection of Hampe’s

sample by a female; 7) having non-uniform disciplinary actions in its written drug testing policy; and 8) failing to carry out the drug test within the written terms of its policy. For similar reasons, Hampe also asserts common law claims for fraud, invasion of privacy, reckless disregard and conspiracy. The basis for these claims centers around CGM's and Mid-Iowa's fraudulent practice of illegally targeting and exempting employees from supposed random selections and the unlawful destruction of urine samples by a third party collector who lacks the requisite qualifications to interpret human urine samples.

The case came before the district court on the parties' cross-motions for summary judgment in July of 2022. The district court granted CGM's and Mid-Iowa's motions in their entirety holding as a matter of law that CGM and Mid-Iowa had either substantially complied with all applicable portions of Iowa Code Section 730.5 or that Hampe was not aggrieved by one of their violations. Likewise, the district court dismissed Hampe's common law claims finding that they were either untimely or preempted by Iowa Code Section 730.5. App. 16-17. The court also denied Hampe's motion for partial summary in its entirety. This appeal ensued.

STATEMENT OF FACTS

Hampe is a former employee of CGM having previously worked as a salesperson and/or leasing manager for fifteen years. App. 277. While Hampe was employed at CGM, CGM conducted monthly unannounced drug testing. App. 198. Mid-Iowa administered the collection of CGM employees' urine specimens on behalf of CGM. App. 198.

SUPERVISOR TRAINING

Kelsey Gabus McBride ("KGM") was the CGM supervisor that managed CGM's drug testing program. App. 156, 373-74. KGM never completed initial drug testing training. App. 377. On July 14, 2016, KGM completed a thirty (30) minute course entitled "Reasonable Suspicion Supervisory Training," which "covered the physical, behavioral, speech and performance indicators of probably alcohol misuse and controlled substance use or abuse." App. 220. On September 26, 2017, KGM completed sixty minutes of "Reasonable Suspicion Supervisor Training," which "covered the physical, behavioral, speech and performance indicators of probable alcohol misuse and controlled substance use or abuse." App. 221. On June 19, 2018, KGM completed sixty minutes of "Reasonable Suspicion Supervisor Training," which

“covered the physical, behavioral, speech and performance indicators of probable alcohol misuse and controlled substance use or abuse.” App.

222. On May 14, 2019, KGM completed sixty minutes of “Annual Refresher Supervisor Training,” which “covered the physical, behavioral, speech and performance indicators of probable alcohol misuse and controlled substance use or abuse.” App. 223.

CGM’S WRITTEN DRUG & ALCOHOL TESTING POLICY

CGM’s written drug policy was provided to Hampe prior to December 5, 2019. App. 196. The policy states that all urine samples are sent to a laboratory for analysis. App. 193, 198. The policy states that all urine samples are reviewed by a medical review officer (“MRO”). App. App. 193, 198. CGM’s policy provides that employee who have samples sent out for further testing are to be sent home until human resources receives a negative test result from the MRO. App. 33.

HAMPE’S NOVEMBER 2019, DRUG TEST

In November of 2019, CGM required Hampe to come into work on his day off and submit to an unannounced drug test. App. 282, 83, 469.

DECEMBER 5, 2019 TESTING POOL

CGM's standard practice was to include all employees in the drug testing pool regardless of whether an employee was scheduled to be at work on the date of a particular drug test. App. ___ (Hampe App. 19). Prior to Mid-Iowa's November 27, 2019, selection KGM did not determine what CGM employees were scheduled to be at the worksite during the December 5, 2019, test. App. ___ (Hampe App. 19). CGM does not know whether the employee list provided to Mid-Iowa was the current employee list at the time of the November 27, 2019, selection for the December 5, 2019, test. App. ___ (Hampe App. 59-60).

DECEMBER 5, 2019, EMPLOYEE SELECTION

On November 27, 2019, fifteen CGM employees were selected to be tested. Additionally, eight alternates were selected. App. 440-41. CGM employees appeared on the list in the order that they were selected. App. 445. Hampe was selected as the final alternate and twenty-third employee on the list. App. 440-41. On the morning of the December 5, 2019, test, KGM called department managers to summon the employees who had been selected for the drug test. If an employee had been selected, but was not present at work, KGM skipped over the employee and moved on to the next employee on the list. App. 388. Nine of the

fifteen employees selected for testing were not at the worksite at the time of the test. One of the eight alternates was also not at the worksite at the time of the test. App. 438, 440-41. Six employees on the initial list of seven alternates submitted to testing. App. App. 438, 440-41.

HAMPE'S FIRST URINE SAMPLE

Hampe submitted a first urine sample to Mid-Iowa's collector named Sarah Ghee ("Ghee"). App. 281-82, 402. Hampe's first sample was of a sufficient quantity. App. 279-82. Ghee used a temperature gun to take the temperature of Hampe's urine sample. App. 281. According to Ghee, Hampe's urine sample was 101 degrees. App. 281. Ghee dumped out the sample after characterizing the sample as looking and smelling like Mountain Dew and as out of temperature range. App. 281, 329.

MID-IOWA'S COLLECTION POLICIES

Mid-Iowa's collection policies require its collector to directly observe urine sample collection. App. 311. They also instruct a collector to smell a specimen to check for signs of adulteration. App. 313. If a second collection occurs due to a sample testing out of temperature range, Mid-Iowa requires a second observed collection. App. 323. The

reason for a second collection is to use direct observation to obtain an acceptable specimen. App. 297. Mid-Iowa is not a laboratory approved by SAMHSA. App. 652.

HAMPE'S SECOND URINE SAMPLE

After waiting for a period of time, Hampe submitted a second urine specimen. App. 282. According to Ghee, Hampe did not produce enough urine, and Ghee discarded the urine sample again. App. 282. Hampe then left the worksite and was terminated the same day for refusing the drug test. App. 367.

HAMPE'S DECEMBER 6, 2019, URINE SAMPLE

On December 6, 2019, Hampe voluntarily presented to Mid-Iowa's facility and took the same drug test that had been administered to him the day prior. App. 501. A male collector collected Hampe's sample. App. 307. Hampe tested negative. App. 501.

ARGUMENT

I. STATUTORY IMMUNITY DOES NOT APPLY BECAUSE HAMPE'S CAUSE OF ACTION IS BROUGHT PURSUANT TO IOWA CODE SECTION 730.5(15)

Preservation of Error

Hampe preserved error by arguing the issue in his motion for summary judgment, resisting the same issue in Defendants motions for summary judgment, and obtaining a ruling in which the court necessarily decided the issues. App. at 941, 952.

Standard of Review

The Court reviews rulings on motions for summary judgment for corrections of errors of law. *Winger Contracting Co. v. Cargill, Inc.*, 926 N.W.2d 526, 535 (Iowa 2019).

Summary judgment is appropriate only if the record “show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Iowa R. Civ. P. 1.981(3); *Banwart v. 50th Street Sports, L.L.C.*, 910 N.W.2d 540, 544 (Iowa 2018). “Even if the facts are undisputed, summary judgment is not proper if reasonable minds could draw different inferences from them and thereby reach different conclusions.” *Id.* at 544-45. In ruling on a motion for summary judgment, the Court does not weigh the evidence. *Bitner v. Ottumwa Cmty. Sch. Dist.*, 549 N.W.2d 295, 300 (Iowa 1996). Instead, the Court inquires whether a reasonable jury, faced with the evidence presented, could return a verdict for the

nonmoving party. *Id.* When the record, taken as a whole, could lead a rational trier of fact to find for the nonmoving party, there is a genuine issue for trial. *Id.* The Court must also indulge on behalf of the nonmoving party every legitimate inference reasonably deduced from the record in an effort to ascertain the existence of a fact question.

Bagelmann v. First Nat'l Bank, 823 N.W.2d 18, 20 (Iowa 2012).

A. Applicable legal principles

In *Dix v. Casey's Gen. Stores, Inc.*, the Iowa Supreme Court clarified that the immunity provisions contained in section (11) do not apply to subsection (15) claims. 671 N.W.2d 671, 684 (Iowa 2021).

B. CGM and Mid-Iowa are both liable for all violations of the statute that aggrieved Hampe because each either violated the statute or aided in the violation of the statute

In portions of its ruling, the district court erroneously held that CGM was immune from wrongful acts committed by Mid Iowa while administering the collection of Hampe's urine specimens. App. 945. This was clear legal error as there is no dispute that the relief Hampe seeks for his Section §730.5 claim is under subsection (15) of the statute. *See id.*

As a result of its flawed analysis, the district court provided two separate analyses regarding whether CGM or Mid-Iowa had failed to comply with the statute for each violation claimed by Hampe. However, a separate analysis was unnecessary because under subsection (15) “[a] person who violates this section or aids in the violation of this section is liable to an aggrieved employee...” Iowa Code §730.5(15)(a)(1).

This is no meaningful dispute that CGM and Mid Iowa acted in concert for the entire scope of the December 5, 2019, test administered on Hampe. CGM’s written policy identifies Mid-Iowa as its sole agent who administers the collection of employee specimens under CGM’s drug testing program. The policy explicitly states that Mid-Iowa is compliant with Iowa Code Section 730.5 and utilizes a medical review officer. App. 473-74. Mid-Iowa performed the selection of CGM employees to be tested, administered the drug test at CGM, discarded Hampe’s sample at CGM and informed CGM of what it purported to be the results of Hampe’s test results without sending them to a laboratory for initial confirmatory testing or to a medical review officer. App. 282. CGM received information from Mid-Iowa in real time and used the information as a basis to terminate Hampe. App. 367. For these

reasons, neither defendant can decouple their actions from each other. For each violation, CGM either directly violated the statute or aided in the violation of it and vice versa. As that is the case, Hampe's remaining brief points address CGM's and Mid-Iowa's liability as one.

II. CGM AND MID IOWA VIOLATED IOWA CODE SECTION 730.5(1)(L)'S RANDOM SELECTION REQUIREMENT BY USING AN ALTERNATE SYSTEM TO EXEMPT NINE EMPLOYEES FROM TESTING AND TO TARGET HAMPE

Preservation of Error

Hampe preserved error by arguing the issue in his motion for summary judgment, resisting the same issue in Defendants motions for summary judgment, and obtaining a ruling in which the court necessarily decided the issues. App. at 952.

Standard of Review

The Court reviews rulings on motions for summary judgment for corrections of errors of law. *Winger Contracting Co.* 926 N.W.2d at 535.

Merits

A. Applicable legal principles

Unannounced drug testing can only be conducted under severely circumscribed circumstances. *Harrison v. Employment Appeal Bd.*, 659 N.W.2d 581, 588 (Iowa 2003). Employers conducting unannounced

tests cannot “ignore the protections afforded by this statute.” *Id.* at 588. An employer that flouts the protections afforded by the statute cannot benefit from the results of the test. *See id.*; *see also Wong Sun v. U.S.*, 371 U.S. 471, 487 (1963) (excluding evidence that is the fruit of the poisonous tree). An employer cannot conduct an illegal drug test and then use information obtained during the illegal test as a basis for firing workers. *Eaton v. Iowa Employment Appeal Bd.*, 602 N.W.2d 553, 558 (Iowa 1999) (employers cannot “benefit from an unauthorized drug test”); *Skipton v. S&J Tube, Inc.*, 2012 WL 3860446 *1 (Iowa Ct. App. Sept. 6, 2012) (rejecting employer’s argument that admission of drug use precluded relief because admission would not have happened “If the company had not improperly requested a drug test”).

The employer carries the burden to *prove* it followed each of the law’s mandates, including administering testing in accordance with the law. *See* Iowa Code § 730.5 (“In an action brought under the subsection . . . the employer has the burden of proving that the requirements of this section were met.”). Section 730.5 claims are “evaluated using a substantial compliance standard.” *Dix*, 961 N.W.2d at 682. “Thus, ‘if the employer’s actions fall short of strict compliance, but nonetheless

accomplish the important objective[s]’ expressed,” by a specific part of the statute an employer’s conduct substantially complies with the statute. *Id.* (citing *Sims*, 759 N.W.2d at 338).

‘[S]ubstantial compliance’ with a statute means actual compliance in respect to the substance essential to every reasonable objective of the statute. It means that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which it was adopted. Substantial compliance with a statute is not shown unless it is made to appear that the purpose of the statute is shown to have been served. What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case.

Id. (citing *Brown v. John Deere Waterloo Tractor Works*, 423 N.W.2d 193, 195 (Iowa 1988) (quoting *Smith v. State*, 364 So. 2d 1, 9 (Ala. Crim. App. 1978)).

Only an aggrieved employee is entitled to relief under the statute. *See* Iowa Code §730.5(15)(a)(1). “[N]ot every violation results in liability. Determining whether an employee is aggrieved necessarily depends on the nature of the violation. *Dix*, 961 N.W.2d at 692 (citing *see Sims v. NCI Holding Corp.*, 759 N.W.2d 333, 340-41 (Iowa 2009). The determining factor is not whether the employee was specifically adversely affected by an erroneous test, but whether the employee was adversely affected by the employer’s alleged violation of section 730.5.”.

Stackhouse v. Casey's General Stores, Inc., Case No. LACL137251

(Iowa Dist. Ct. 2018).

B. In *Dix v. Casey's Gen. Stores, Inc.*, the Iowa Supreme Court expressly reserved the question presented of whether an employer may use alternates in devising its testing pool

This case involves an issue expressly reserved in *Dix v. Casey's Gen. Stores, Inc.* That is, whether an employer's use of an alternate list violates Iowa Code Section 730.5(1)(l)'s requirement to conduct a random selection. *Id.* The test conducted in *Dix* involved a testing pool of "167 employees selected for testing and 17 employees selected as alternates." *Id.* at 679. In examining challenges to Casey's testing pool itself, the Court found that Casey's had substantially complied with Iowa Code Section 730.59(8)(3) despite the fact its testing pool was not perfect. Critical to the Court's finding was the fact that Casey's had made reasonable efforts to decipher what employees were scheduled to be at work at the time of testing. *Id.*

After determining that Casey's had substantially complied with the composition of its employee testing pool, the Court declined to determine whether use of an alternate list violated the statute. This is because the employees that were challenging the use of alternates were

not alternates and therefore could not have been aggrieved. *Id.* at 691-92; Iowa Code §730.5(15)(a)(1)(An employer only liable to an *aggrieved* employee).

C. Iowa Code Section 730.5 does not authorize an employer to create and use an alternate list.

Iowa's drug testing law has thirteen subsections that set forth the conditions required for testing. Iowa Code §730.5. However, no section permits an employer to use alternates. Iowa Code §730.5(7) ("All sample collection and testing for drugs or alcohol under this section *shall* be performed in accordance with certain conditions") *see also Eaton*, 602 N.W.2d at 556 (quoting *Wiebenga v. Iowa Dep't of Transp.*, 530 N.W.2d 732, 735 (Iowa 1995) ("We believe that if the legislature had intended to allow random drug testing of long-term employees who had been given a 'last chance,' then it would have specifically said so in the statute. The fact that it did not indicates that the legislature did not intend to include such an exception"). Of course, this makes sense. If an employer makes reasonable efforts to determine which employees are scheduled to be at work during the time of an unannounced test, there is no need for an alternate list.

D. CGM and Mid-Iowa exempted nine of fifteen employees from testing on the initial list of employees selected for testing on December 5, 2019

“The selection requirements are aimed at preventing employers from targeting or exempting specific employees for drug tests.” *Id.* at 689 (citing Iowa Code Section 730.5(14)(a)(imposing a civil penalty of \$1000 for improperly targeting or exempting employees from drug tests)). Because Hampe was tested as an alternate, this case precisely presents the issue that was reserved in *Dix*. CGM’s initial list consisted of fifteen employees. Its alternate list included eight employees. Hampe was last on the alternate list. App. 218, 440-41. Because employees were listed in the order that they were selected, the only way CGM could test Hampe was to exempt nine employees ahead of Hampe on the initial and alternate list. App. 445.

CGM’s tactic to include all active employees in the testing pool regardless of whether they are scheduled to be at work during testing provided a mechanism for it to surreptitiously exempt and target its employees.

Q. Okay. So it’s my understanding that 297 to 301 is the list – or it’s the drug testing pool of employees from which Mid-Iowa made the random selections for the December 5, 2019, test?

A. Correct.

Q. And this – this list includes all – all active Toyota employees.

A. It includes all Toyota employees.

Q. Before Toyota provided this list of employees to Mid-Iowa, did Toyota determine whether or not any of those employees were not scheduled to be at work on December 5, 2019?

A. No.

384. If an employee was selected for testing but is not at work, KGM chose whether to “exempt” the employee from testing or summon the off-duty employee into work to submit to a test.

A. When I do the list, I call the manager. I say, ‘I need this person, this person, this person.’ ‘So and so is off.’ Okay, so I cross it off. They’re off. Move on. I also call the department heads. Once I know who’s off, I move on to the alternates.

App. 388.

While KGM testified that she always exempts an employee who is not at work at the time of the test, three examples demonstrate that she exempts certain employees while targeting others by requiring them to submit to testing when they are not working. For example, Bob Link

testified that he was instructed to submit to a random drug test in February of 2019 on the day he returned to work from vacation:

I traveled to Jamaica for my daughter's wedding and was excused by Toyota from work during that time. The morning I returned from Jamaica; I was told by my manager that my name had been selected as a part of an unannounced drug test while I was on vacation. The collection of the other employees' urine samples had occurred the week that I was on vacation in Jamaica. I was required to submit my urine sample on a day when no one else was testing and even though I was not scheduled to be at work or at work during the time of the unannounced test.

App. 902-03. Next, Brandon Brown testified that he was notified that he had been selected for an announced test when he was not working in the summer of 2017. App. 900-01. And third, CGM required Hampe take a random drug test in November of 2019 on a day he was not working. App. 283. In other words, KGM engages in targeting.

For Hampe's December 5, 2019, test, KGM exempted nine employees in order to target Hampe. The following table illustrates employees selected for testing and that actually tested versus employees who were selected for testing and exempted by KGM:

Number	Name	Work Status	Test Status
1	Jeff Clark	At work	Tested
2	Ian Davis	At work	Tested
3	Brock Grim	At work	Tested

4	Joseph Iliff	Not at work or skipped	Not tested
5	Lawrence James Sr.	Not at work or skipped	Not tested
6	Alijah Jeffery	Not at work or skipped	Not tested
7	Christopher Klein	At work	Tested
8	Christopher Lane	Not at work or skipped	Not tested
9	David Marchant	Not at work or skipped	Not tested
10	Carlos Mendoza Villegas	Not at work or skipped	Not tested
11	Brian Reed	Not at work or skipped	Not tested
12	Summer Roper	At work	Tested
13	Brian Selby	At work	Tested
14	Robert Unrau	Not at work or skipped	Not tested
15	Joshua Vance	Not at work or skipped	Not tested
ALTERNATES			
16	Randy Indvik	Not at work or skipped	Not tested
17	Ian Egger	At work	Tested
18	Steven Fowler	At work	Tested
19	Marcy Davis	At work	Tested
20	Brad Reece	At work	Tested
21	Ryan McClanahan	At work	Tested
22	Gaidge Lowe	At work	Tested
23	Scott Hampe	At work	Tested

App. 440-42. Unlike in *Dix*, CGM has not provided any legitimate reason (i.e., a change in work schedule, sickness) to justify exempting nine employees from testing on December 5, 2019. If CGM called Link,

Brown and Hampe on their days off work to require them to submit to a random drug test, why didn't they do the same to the 9 exempted employees on December 5, 2019, to submit a sample? The answer is clear. KGM targeted Hampe.

E. CGM targeted Hampe by exempting Joseph Iliff, Christopher Lane and Carlos Mendoza Villegas from testing even though each employee was "punched-in" on CGM's time clock at the time of the December 5, 2019, test.

KGM confirmed that on any given testing date, Mid-Iowa stays at CGM until the testing is completed.

Q. So it wasn't like, "Hey, we're testing from 9:00 to 10:00" and then Mid-Iowa just leaves?

A. Correct. They stay until it's done.

App. 393. The following chart is a summary of CGM's December 5, 2019, time-clock report indicating when certain employees punched-in and punched-out of work:

#	Name	Test Status	Punch-In	Punch-Out
INITIAL LIST				
1	Jeff Clark	Tested	7:57 AM	4:10 PM
2	Ian Davis	Tested	7:00 AM	5:00 PM
3	Brock Grim	Tested	7:54 AM	6:08 PM
	Joseph Iliff	Not tested	6:57 AM	12:11 PM
	Lawrence James Sr.	Not tested		

	Alijah Jeffery	Not tested		
4	Christopher Klein	Tested	7:41 AM	5:17 PM
	Christopher Lane	Not tested	6:52 AM	3:45 PM
	David Marchant	Not tested		
	Carlos Mendoza Villegas	Not tested	11:54 AM	8:00 PM
	Brian Reed	Not tested		
5	Summer Roper	Tested	6:59 AM	6:05 PM
6	Brian Selby	Tested	7:00 AM	5:00 PM
	Robert Unrau	Not tested		
	Joshua Vance	Not tested		
ALTERNATES				
	Randy Indvik	Not tested		
7	Ian Egger	Tested	7:16 AM	6:10 PM
8	Steven Fowler	Tested	9:45 AM	5:45 PM
9	Marcy Davis	Tested	7:51 AM	5:08 PM
10	Brad Reece	Tested	7:08 AM	5:17 PM
11	Ryan McClanahan	Tested	10:59 AM	8:00 PM
12	Gaidge Lowe	Tested	6:52 AM	5:07 PM
13	Scott Hampe	Tested		

App. 440-42. As demonstrated above, Joseph Iliff, Christopher Lane, and Carlos Mendoza Villegas were exempted from testing even though each was actually punched-in at work at the time of the test. Mendoza Villegas even confirmed that he was at work on December 5, 2019, but

never received an instruction to take a drug test. App. 898-99. The below table illustrates how Gaidge Lowe, the seventh alternate, would have been the fifteenth and final CGM employee tested if Iliff, Lane and Mendoza had been tested.

#	Name	Work Status	Test Status	Punch In	Punch Out
1	Jeff Clark	At work	Tested	7:57 AM	4:10 PM
2	Ian Davis	At work	Tested	7:00 AM	5:00 PM
3	Brock Grim	At work	Tested	7:54 AM	6:08 PM
4	Joseph Iliff	Not at work/skip	Not tested	6:57 AM	12:11 PM
	Lawrence James Sr.	Not at work/skip	Not tested		
	Alijah Jeffery	Not at work/skip	Not tested		
5	Christopher Klein	At work	Tested	7:41 AM	5:17 PM
6	Christopher Lane	Not at work/skip	Not tested	6:52 AM	3:45 PM
	David Marchant	Not at work/skip	Not tested		
7	Carlos Mendoza Villegas	Not at work/skip	Not tested	11:54 AM	8:00 PM
	Brian Reed	Not at work/skip	Not tested		
8	Summer Roper	At work	Tested	6:59 AM	6:05 PM
9	Brian Selby	At work	Tested	7:00 AM	5:00 PM
	Robert Unrau	Not at work/skip	Not tested		
	Joshua Vance	Not at work/skip	Not tested		
	Randy Indvik (Alternate)	Not at work/skip	Not tested		

10	Ian Egger (Alternate)	At work	Tested	7:16 AM	6:10 PM
11	Steven Fowler (Alternate)	At work	Tested	9:45 AM	5:45 PM
12	Marcy Davis (Alternate)	At work	Tested	7:51 AM	5:08 PM
13	Brad Reece (Alternate)	At work	Tested	7:08 AM	5:17 PM
14	Ryan McClanahan (Alternate)	At work	Tested	10:59 AM	8:00 PM
15	Gaidge Lowe (Alternate)	At work	Tested	6:52 AM	5:07 PM
STOP					
*16	Scott Hampe (Alternate)	At work	Tested		

App. 440-42.

Finally, after her deposition, KGM admitted that the testing pool impermissibly contained ten other individuals.

Since my deposition, I have reviewed records and believe the 165-person pool included one (1) person that did not formally begin employment and seven (7) employees that had been terminated prior to the December 5, 2019 testing. The 165-person pool excluded two (2) employees at the time of the December 5, 2019 testing.

App. 816. These are additional facts that show CGM's and Mid-Iowa's entire selection process was a fraud.

F. Hampe was aggrieved by CGM's and Mid-Iowa's use of alternates

The district court granted CGM's and Mid Iowa's motions for summary judgment on this basis holding that Hampe had failed to produce any facts showing he was aggrieved. The court stated,

At best, it is purely speculative as to whether Hampe would or would not have been selected for testing had the list included any employees who were not scheduled to work the day of the test or who were otherwise excused. No evidence was shown that indicates any deficiencies in the list were attributable to an effort to single out Hampe for testing. Summary Judgment regarding the issue of whether CGM was in compliance with Iowa Code section 730.5(8)(a) should be granted.

App. 942.

For several reasons, the district court is flat out wrong. First, by definition CGM's drug test was unauthorized because the statute does not permit alternates. Therefore, Hampe was aggrieved because CGM benefited "from an unauthorized drug test." *Eaton*, 602 N.W.2d at 558; *Stackhouse*, Case No. LACL137251 (Iowa Dist. Ct. 2018)("the determining factor is not whether the employee was specifically adversely affected by an erroneous test, but whether the employee was adversely affected by the employer's alleged violation of section 730.5"). Second, Hampe is clearly aggrieved because the outcome would have been different if CGM didn't exempt nine employees from testing,

namely employees Iliff, Lane and Mendoza Villegas. Third, the whole point of a “random” selection is that the process is an objective one, and there is no speculation. *See* Iowa Code §730.5(1)(1) (“The selection of employees to be tested...shall be done based on a neutral and objective selection process” by an independent entity). Here, by exempting employees in the testing pool, CGM unlawfully made the ultimate decision as to whether Hampe was tested. *See id.* For these reasons, Hampe was aggrieved by CGM’s and Mid-Iowa’s violation of the statute.

III. CGM FAILED TO SUBSTANTIALLY COMPLY WITH IOWA CODE SECTION 730.5(8)(3) BY INTENTIONALLY MAKING NO EFFORT TO DETERMINE WHETHER EMPLOYEES INCLUDED IN THE TESTING POOL WERE SCHEDULED TO BE AT WORK AT THE TIME OF THE TEST

Preservation of Error

Hampe preserved error by arguing the issue in his motion for summary judgment, resisting the same issue in Defendants’ motions for summary judgment, and obtaining a ruling in which the court necessarily decided the issues. App. at 953.

Standard of Review

The Court reviews rulings on motions for summary judgment for corrections of errors of law. *Winger Contracting Co.* 926 N.W.2d at 535.

A. Applicable legal principles

a. Employers may conduct unannounced drug or alcohol testing of employees who are selected from any of the following pools of employees:

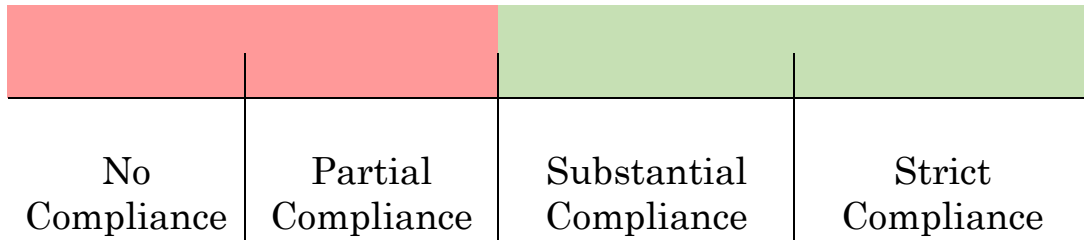
- (1) The entire employee population at a particular work site of the employer ***except*** for employees not subject to testing pursuant to a collective bargaining agreement, or ***employees who are not scheduled to be at work at the time the testing*** is conducted because of the status of the employees or who have been excused from work pursuant to the employer’s work policy prior to the time the testing is announced to employees.

Iowa Code §8(a)(1) (emphasis added).

B. CGM and Mid-Iowa are noncompliant with Section 730.5(8)(1) because neither made any effort to determine if employees included in the testing pool were scheduled to be at work at the time of the test

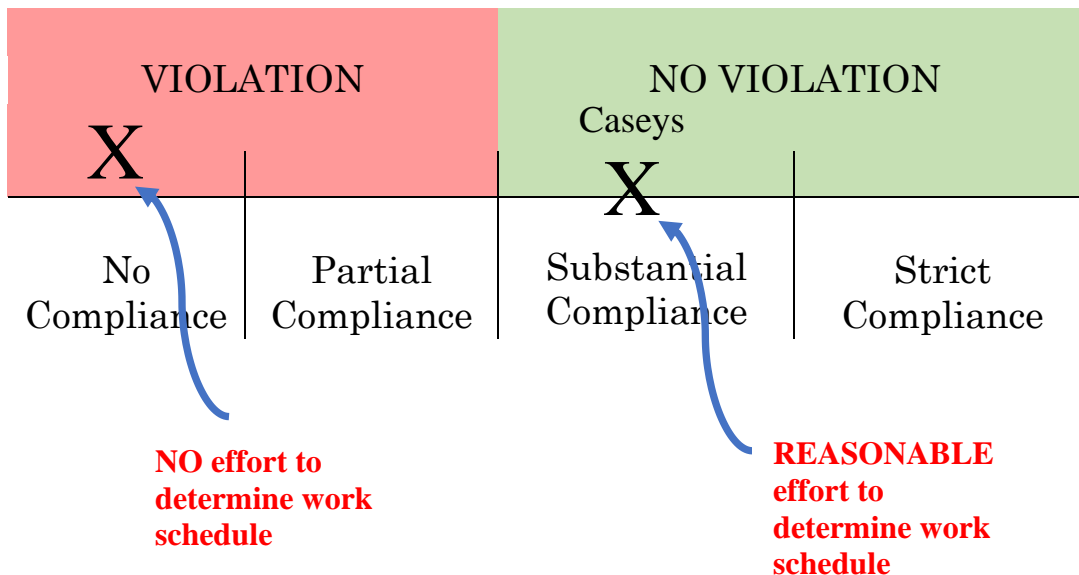
The substantial compliance standard set forth in *Dix* contemplates a spectrum of violations. *Dix*, 961 N.W.2d at 682 (describing the difference between strict compliance and substantial compliance). On one hand, substantial or strict compliance is not a violation of the statute. On the other, partial compliance or “no compliance,” that causes a person to be aggrieved affords the remedies set forth in section 730.5. The below diagram illustrates the spectrum.





In order to be “substantially compliant,” with section 730.5(8)(1) an employer must make reasonable efforts to identify employees scheduled to work on [the testing date]. *Id.* at 689; Iowa Code §730.5(8)(a)(1).

There is no meaningful dispute that CGM made no effort to determine what employees were scheduled to be at work at the time of the December 5, 2019. Quite the opposite, KGM’s standard practice was to include all employees in the drug testing pool regardless of their work schedules. App. 384. Thus, the below diagram depicts where CGM falls on the compliance spectrum as compared to the *Dix* case.



- C. Hampe was aggrieved by CGM’s and Mid-Iowa’s failure to determine which employees were scheduled to be at work at the time of testing.

CGM had no right to conduct this test in the first place because its testing pool was invalid upon selection. *See Eaton*, 602 N.W.2d at 558. Additionally, the outcome would have been different had CGM followed the law and not exempted employees. The only reason Hampe was tested is because of those unlawful exemptions. For these reasons, he was aggrieved.

IV. CGM AND MID-IOWA FAILED TO SUBSTANTIALLY COMPLY WITH IOWA CODE SECTION 730.5(9)(H) BECAUSE THE ONLY SUPERVISOR INVOLVED IN TESTING FAILED TO COMPLETE REQUIRED INITIAL TRAINING AND ANNUAL TRAINING

Preservation of Error

Hampe preserved error by arguing the issue in his motion for summary judgment, resisting the same issue in Defendants motions for summary judgment, and obtaining a ruling in which the court necessarily decided the issues. App. at 952.

Standard of Review

The Court reviews rulings on motions for summary judgment for corrections of errors of law. *Winger Contracting Co.* 926 N.W.2d at 535.

A. Applicable legal principles

Iowa law requires initial and annual supervisor training as a prerequisite for an employer to conduct unannounced drug and alcohol testing. Iowa Code 730.5(9)(h). Subsection (9)(h) states:

In order to conduct drug or alcohol testing under this section, an employer shall require supervisory personnel of the employer involved with drug or alcohol testing under this section to attend a minimum of two hours of initial training and to attend, on an annual basis thereafter, a minimum of one hour of subsequent training. The training shall include, but is not limited to, information concerning the recognition of evidence of employee alcohol and other drug abuse, the documentation and corroboration of employee alcohol and other drug abuse, and the referral of employees who abuse alcohol or other drugs to the employee assistance program or to the resource file maintained by the employer pursuant to paragraph “c”, subparagraph (2).

Id.

B. KGM completed no initial supervisory training

In finding in favor of CGM and Mid Iowa for this alleged violation, the district court held,

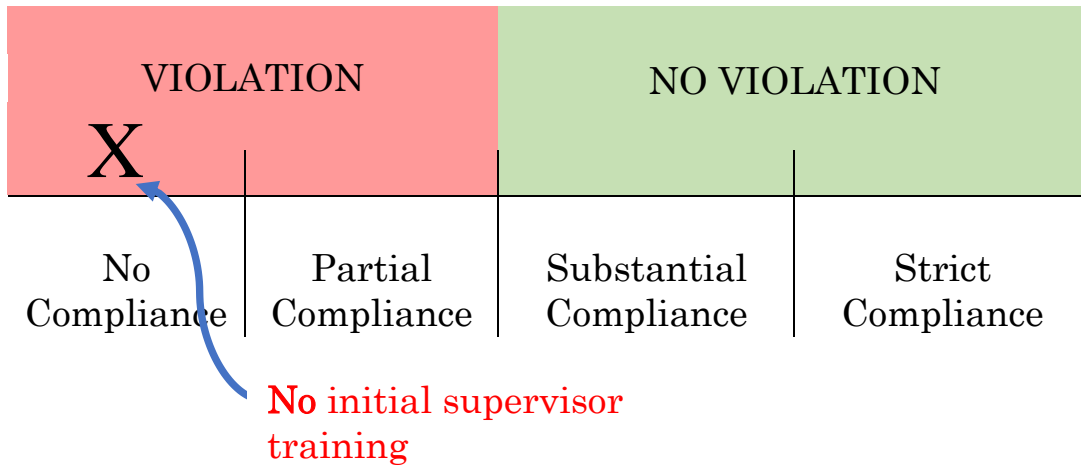
Hampe argues McBride’s training is unsatisfactory, but does not state any specific facts as to how the training is insufficient. Hampe has not met his burden to show there is a genuine issue of material fact regarding CGM’s alleged failure to substantially comply with Iowa Code section 730.5(9)(h).

App. 943. For starters, the district court overlooked the fact that CGM carries the burden of proof for this claim, not Hampe. *See* Iowa Code §730.5(15)(2)(b). Therefore, to prevail, CGM was required to show “the nonexistence of a material fact,” not Hampe. *See Hills Bank & Tr. Co. v. Converse*, 772 N.W.2d 764, 771 (Iowa 2009). Second the district court failed to acknowledge Hampe’s argument and facts supporting it that CGM violated the statute’s mandate for initial training because it is undisputed that KGM never completed initial training. App. 373, 377.

Q. Can you recall any initial training? When you first started overseeing the drug testing program, was there a different type of training that was an initial course?

A. No.

App. 377. The district court should have granted Hampe’s motion because there is no issue of fact regarding KGM’s failure to complete initial training.



- c. **The content of KGM’s training does not comply with Iowa Code Section 730.5(9)(h) because it did not include training on the documentation and corroboration of employee drug abuse or referral of employees who abuse drugs to CGM’s employee assistance program**

The district court also glossed over the fact that the content of KGM’s training did not meet the requirements of the statute. *See* Iowa Code §730.5 (“In an action brought under the subsection...the employer has the burden of proving that the requirements of this section were met”). While her training may have covered “the recognition of evidence of employee alcohol and other drug abuse, her training did not include information about the “the documentation and corroboration of employee alcohol and other drug abuse,” or “the referral of employees

who abuse alcohol or other drugs to the employee assistance program or to the resource file maintained by the employer pursuant to paragraph “c”, subparagraph (2). *See* Iowa Code §730.5(9)(h) (setting forth the required content for initial and annual supervisor training). Therefore, because KGM’s training only covered one of three topics required under the law, and the district court should have granted summary judgment in favor of Hampe. App. 220-23.

D. Hampe was aggrieved by CGM’s failure to substantially comply with supervisory training requirements.

Supervisor training is a prerequisite to conducting unannounced drug testing. Iowa Code §730.5(9)(h) (“In order to conduct drug or alcohol testing under this section, an employer shall require supervisory personnel,” to attend training). Therefore, because KGM failed to complete the required training, the drug test was unauthorized. *See Eaton*, 602 N.W.2d at 558 Accordingly, Hampe was aggrieved by this violation.

It's also important to note the significance of KGM’s failure to complete training on the documentation and corroboration of employee drug abuse. Such training surely would have taught KGM that she was not authorized to terminate Hampe after evidence of his sample was

destroyed without sending it to a laboratory for confirmatory testing and review by a medical review officer. *See* Iowa Code §730.5(7).

Hopefully, if KGM had completed training, the outcome would have been different. The problem is – we don't know if the outcome would have been different because she did not complete the training. For this reason and the other reasons described above, Hampe was aggrieved by this violation. *Woods v. Charles Gabus Ford, Inc.*, 962 N.W.2d 1, 8 (Iowa 2021) (citing *Tow v. Truck Country of Iowa, Inc.*, 695 N.W.2d 36, 38-39 (Iowa 2005) (holding that an employee is aggrieved by a violation of the statute where there is no way to predict the outcome if the employer would have complied with the statute)). Accordingly, the district court should have granted summary judgment in his favor.

V. CGM AND MID-IOWA FAILED TO SUBSTANTIALLY COMPLY WITH IOWA CODE SECTION 730.5(7) BECAUSE THEY DESTROYED EVIDENCE OF HAMPE'S URINE SPECIMENS AT THE TESTING SITE AND DID NOT SEND THE RESULTS TO A CERTIFIED LABORATORY FOR INITIAL CONFIRMATORY TESTING OR FOR REVIEW BY A MEDICAL REVIEW OFFICER

Preservation of Error

Hampe preserved error by arguing the issue in his motion for summary judgment, resisting the same issue in Defendants motions for

summary judgment, and obtaining a ruling in which the court necessarily decided the issues. App. at 952.

Standard of Review

The Court reviews rulings on motions for summary judgment for corrections of errors of law. *Winger Contracting Co.* 926 N.W.2d at 535.

A. Applicable legal principles

After an employee's urine sample is collected, "both portions of the sample *shall* be forwarded to the laboratory conducting the initial confirmatory testing." *Id.* "All confirmatory drug testing *shall* be conducted at a laboratory certified by the United States department of health and human services' substance abuse and mental health services administration or approved under rules adopted by the Iowa department of public health." Iowa Code 730.5(7)(f) (emphasis added).

A medical review officer shall, prior to the results being reported to an employer, review and interpret any confirmed positive test results, including both quantitative and qualitative test results to ensure that the chain of custody is complete and sufficient on its face and that any information provided by the individual pursuant to paragraph "c", subparagraph (2), is considered.

Iowa Code *Id.* An employer is required to notify an employee of his right to a confirmatory test if a positive test result for drugs or

alcohol is reported to the employer by the medical review officer.

Id.

- B. By destroying evidence of Hampe’s urine specimens at the testing site, CGM and Mid-Iowa violated Hampe’s right to ensure accurate testing at a certified laboratory, by a medical review officer and via the confirmatory process set forth in Iowa Code §730.5(7)(j)**

This district court ruled that CGM and Mid-Iowa were authorized to discard Hampe’s urine specimens because Hampe did not produce a valid urine sample. App. 949. The court relied on Dr. Owensby who opined that Hampe’s sample was not a human sample. Specifically, the court concluded,

Hampe has failed to present any material facts showing that he supplied a sample “capable of revealing the presence of drugs to be tested,” or that Mid-Iowa somehow improperly handled his out-of-temperature urine sample. He presented no evidence explaining how the urine he supplied could have been validly tested for the presence of drugs. The only evidence before the court is that it could not. Accordingly, summary judgment is appropriate as to whether Mid-Iowa complied with Iowa Code section 730.5(7).

App. 949. It is far-fetched to hold that there is not at least a fact issue as to whether Hampe produced a human urine sample. Hampe testified that he did!

- Q. Okay. So then what happened ruing that trip back into the restroom with Sarah?**

- A. ...just the fact that they have a young lady in there while you're peeing. And then I produce urine. I hand it to her...

App. 281. The court's function on summary judgment is not as the factfinder. By discarding Hampe's own testimony that the sample he provided was his own urine, the district court usurped the function of the jury and erred in granting summary judgment in favor of CGM and Mid-Iowa.

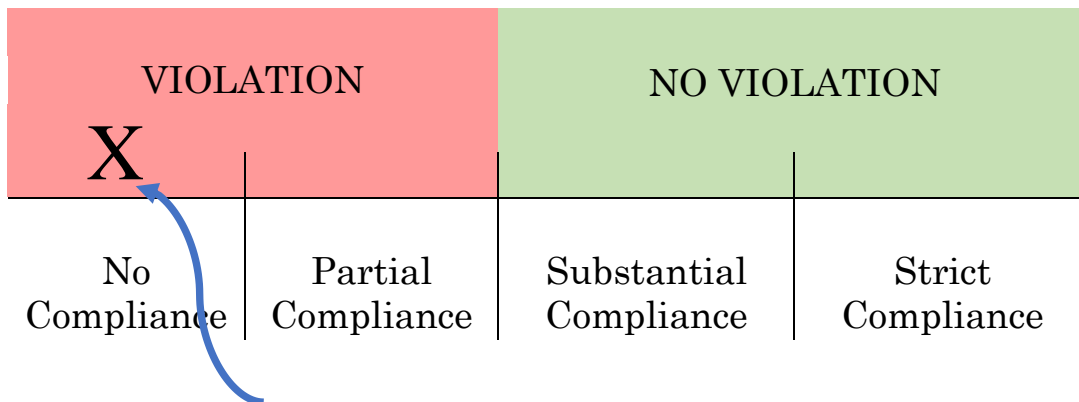
The district court's decision also ignored the purpose of the confirmatory testing requirements contained in the statute. These requirements protect an employee's right to ensure accurate testing. *See Harrison*, 659 N.W.2d at 588 (holding that strict testing requirements are designed to ensure accurate testing and protect employees from unwarranted discipline); *see also Woods v. Charles Gabus Ford, Inc.*, 962 N.W.2d 1, 7 (Iowa 2021). Looking beyond this case, if the district court is correct, there will be nothing to stop an employer from destroying an employee's urine specimen for any bogus reason the employer can think of just to avoid confirmatory testing process.

Hampe submitted two urine samples. App. 281-82. However, instead of sending Hampe's samples to a certified laboratory for initial confirmatory testing, CGM and Mid-Iowa destroyed both samples at the testing site. App. 281-82. By destroying evidence of Hampe's samples, CGM and Mid-Iowa ignored Hampe's right to confirmatory testing, and therefore violated section 730.5(7) in multiple ways. In fact, the destruction of Hampe's specimens had an effect that resulted in at least four violations of the statute that are designed to ensure accurate testing:

- A medical review officer never reviewed Hampe's specimens in violation of Iowa Code Section 730.5(7)h ("A medical review officer shall...review and interpret any confirmed positive test results...");
- Hampe's "test results" were disclosed to CGM before they were reviewed by a medical review officer in violation of Iowa Code Section 730.5(7)h ("A medical review officer shall, *prior* to the results being reported to an employer, review and interpret...") (emphasis added);
- Hampe did not have the opportunity to provide "any information which may be considered relevant to the test," to the medical review officer in violation of Iowa Code Section 730.5(7)(c)(2) and Section 730.5(7)h ("A medical review officer shall...review and interpret...test results, to ensure...that any information provided by the individual pursuant to paragraph "c", subparagraph (2), is considered").

- Hampe was never notified of his right to obtain a confirmatory test in violation of Iowa Code Section 730.5(7)(j) (“[t]he employer shall notify the employee in writing by certified mail, return receipt requested, of the results of the test, the employees’ right to request and obtain a confirmatory test...”).

Once again, CGM’s action constitute “no compliance,” on the compliance spectrum.



- Not tested at a certified laboratory
- Not reviewed by a MRO
- Employer notified before MRO review
- No notice of right to confirmatory test

C. Hampe was aggrieved when CGM and Mid-Iowa destroyed evidence of his urine specimens

The destruction of Hampe’s urine samples before confirmatory testing took place violated his right to ensure an accurate testing process. Here “there is no way to know what the outcome of the [tests] would have been.” *See Woods v. Charles Gabus Ford, Inc.*, 962 N.w.2d 1, 13 (Iowa 2021) (holding that the employee was aggrieved by his employer’s failure to notify him of the cost of a confirmatory test

because by that time his sample had already been discarded).

Therefore, Hampe is aggrieved by the violation.

VI. CGM AND MID-IOWA FAILED TO SUBSTANTIALLY COMPLY WITH IOWA CODE §730.5(9)(H) BECAUSE A FEMALE DIRECTLY MONITORED THE COLLECTION OF HAMPE'S URINE SPECIMENS

Preservation of Error

Hampe preserved error by arguing the issue in his motion for summary judgment, resisting the same issue in Defendants motions for summary judgment, and obtaining a ruling in which the court necessarily decided the issues. App. at 952.

Standard of Review

The Court reviews rulings on motions for summary judgment for corrections of errors of law. *Winger Contracting Co.* 926 N.W.2d at 535.

A. Applicable legal principles

If the collection of a urine sample is “directly monitored or observed by another individual, the individual who is directly monitoring or observing the collection shall be of the same gender as the individual from whom the hair or urine sample is being collected.”

730.5(7)(a).

B. Mid-Iowa’s collector is a female and she directly monitored and observed Hampe submit his specimens

The district court granted CGM’s motion holding that it was immune from liability for Mid-Iowa’s violations. For the reasons articulated previously, the district court was wrong because the immunity provisions contained in section (11) do not apply to subsection (15) claims. *See Dix*, 671 N.W.2d at 684.

The purpose of the testing condition set forth in Iowa Code §730.5(7)(a) is to protect an employee’s right to privacy. *See id.* Therefore, the statute logically requires that a person of the same gender collect a donor’s sample if the donor is being directly monitored or observed. *Id.* The district court should have granted Hampe’s motion for several reasons. First, Ghee should have never been in the restroom in the first place, and her presence alone in the restroom with Hampe is a violation of his right to privacy under Iowa Code §730.5(7)(a). The statute doesn’t authorize a company like Mid-Iowa to be involved in any substantive aspect of an employer’s drug test. This statute only authorizes *employers* to “test employees and prospective employees for the presence of drugs or alcohol...,” not third-party collection companies. Iowa Code §730.5(4) (emphasis added). In collecting a sample, the only

thing an employer is permitted to do at the time of collection is to split the sample into two components at the time of collection, bag it up and send it directly to the laboratory for initial confirmatory testing. *See* Iowa Code §730.5(7)(b), (7)(f) (“All confirmatory drug testing shall be conducted at a laboratory certified by the United States department of health and human services’ substance abuse and mental health services administration...”). The only circumstance that an employer can directly monitor or observe an employee who provides his or her specimen is if there is a reasonable suspicion the sample will be adulterated, or the employee has adulterated a sample previously. *See* Iowa Code §730.5(7)(a). This circumstance is not relevant here, because there are no facts in the record that Hampe adulterated a sample or that would create reasonable suspicion that he was going to adulterate his sample.

Third party collection companies, like Mid-Iowa, who are staffed by lay persons are not authorized to interpret drug testing results under Iowa law. Iowa Code §730.5 doesn’t say anything about taking the temperature of a urine specimen with a temperature gun by a collector who is not at a laboratory and who is not trained as a medical

review officer. *See* Iowa Code §730.5(1)(g) (defining a medical review officer as an individual who has appropriate medical training to interpret and evaluate a test result). It certainly doesn't authorize a lay person, like Ghee to sniff a specimen or examine its appearance in an effort to form an opinion that the sample is mountain dew as opposed to human urine. App. 329.

Reference to a "laboratory" is referenced at least twenty times throughout the statute. *Id.* Likewise, the title "medical review officer" is mentioned eleven times. *Id.* Additionally, Subsection (16) contemplates that a certified "laboratory" should be the agent for an employer like CGM to stating that "A laboratory doing business for any employer who conducts drug or alcohol tests...shall file an annual report..." Iowa Code §730.5(16). This signals the legislature's intent to ensure that urine specimens are analyzed by licensed professionals not third-party collectors. Without question, Ghee's presence in the restroom coupled with her sniffing inspection, visual inspection, temperature inspection, and decision to dump out Hampe's samples constituted direct monitoring and was unlawful. Hampe's testimony and Ghee's statement reflect the same.

Q. Okay. So then what happened during that trip back into the restroom with Sarah?

A. So then she gives me a cup, and then she – I mean, she stays in the restroom with you, and it’s kind of embarrassing or whatever, just kind of – just the fact that they have a young lady in there while you’re peeing.

...

Q. Was there a door on the stall?

A. There was a door on the stall, yea but you can’t really stand and pee and then shut the door.

Q. So did you shut the door or not?

A. No.

App. 281. “Scott went into the restroom to provide his sample and brought out a sample that didn’t resemble human urine, it was neon in color, looked like Mountain Dew, and the sample was 104 degrees.”

App. 309, 329.

Ghee’s direct observation by Hampe is also evidenced by Mid-Iowa’s collection policies and procedures. The procedures have site requirements that state “[t]he preferred type of facility for urine collections is one with a single-toilet room with a full-length door. No one but the donor and direct observer may be present in the room.” App. 311. If a collector takes a second collection due to a sample testing out

of temperature range, the collector is directed to take a second, observed collection. App. 387. Additionally, per Mid-Iowa's expert, the reason for a second collection is to use direct observation to obtain an acceptable specimen. App. 297. These indisputable facts show that Ghee, as a female was directly monitoring a male donor which is a violation of the statute. At the very least, they are facts that preclude summary judgment. For this reason, the district court should have granted Hampe's motion, or in the alternative denied Defendants' motions.

C. Hampe was aggrieved when he was directly observed by a female collector

There is no dispute over Hampe's and Ghee's genders. They are not the same. Ghee, as a female was not authorized under the law to be in the restroom with Hampe while he submitted his sample. Therefore, the test was unauthorized, and Hampe is aggrieved. Additionally, Hampe testified that it was embarrassing to have Ghee monitor him. He also testified that his former co-employee, Paul Van Orsdel, told him that he was "felt really super uncomfortable with a girl" monitoring him as he provided his sample. App. 286. Next, another employee named Steven Fowler also testified that "[i]t was uncomfortable for [him] to have a person of a different gender while [he] was required to provide

urine samples.” App. 495. For all of these reasons, Hampe was aggrieved by the violation and summary judgment should have been granted in his favor.

VII. CGM AND MID-IOWA FAILED TO SUBSTANTIALLY COMPLY WITH IOWA CODE SECTION 730.5(9)(B) BECAUSE CGM’S DRUG TESTING POLICY DID NOT PROVIDE FOR UNIFORM DISCIPLINARY ACTIONS

Preservation of Error

Hampe preserved error by arguing the issue in his motion for summary judgment, resisting the same issue in Defendants motions for summary judgment, and obtaining a ruling in which the court necessarily decided the issues. App. at 952.

Standard of Review

The Court reviews rulings on motions for summary judgment for corrections of errors of law. *Winger Contracting Co.* 926 N.W.2d at 535.

A. Applicable legal principles

Iowa Code section (9)(b) states,

An ‘employer’s written policy shall provide uniform requirements for what disciplinary or rehabilitative actions an employer shall take against an employee or prospective employee upon receipt of a confirmed positive test result for drugs or alcohol or upon refusal of the employee or prospective employee to provide a testing sample. The policy shall provide that any action taken against an employee or

prospective employee shall be based only on the results of the drug or alcohol test.’

Iowa Code 730.5(9)(b).

B. CGM’s written policy did not provide for uniform discipline and CGM didn’t render uniform in practice either

The district court also granted summary judgment in favor of CGM regarding Hampe’s claim that CGM’s written policy does not provide for uniform disciplinary actions. In addressing the claim, the court held,

In support of his contention that CGM does not apply its policy fairly to every employee, Hampe presents two employees whose drug test results proved to be erroneous in some form, and they were not terminated. Those employees, however, submitted samples for their drug tests, and the results of the test were then contested by the employees and found to be mistaken. Hampe was terminated for refusal to take the test. While the other employees were allowed to maintain their positions, CGM was not required to offer Hampe continuous employment.

While the district court examined how discipline was applied during the December 5, 2019, drug test, it failed to examine the written words in CGM’s policy. This is significant because the law requires that the actual written policy set forth the uniform requirements. Iowa Code §730.5(9)(b). Here, CGM’s written policy does not call for uniform disciplinary requirements because CGM has discretion in what level of

discipline, to render on employees who violate the drug testing policy.

(“The company may take the following actions...”). App. 474.

In order to demonstrate how the policy’s disciplinary measures are not uniform, Hampe provided affidavits from two employees accused by Ghee of violating CGM’s drug testing policy during the December 5, 2019, test. First, Steven Fowler was accused by Ghee of providing a diluted sample and having THC in his sample. App. 495, 500. Second, Ghee told Marcy Davis that her sample tested positive for THC. App. 499. While the district court held that these results were mistaken, nothing in the summary judgment record supports the court’s factual finding. Quite the opposite, Ghee told Ms. Davis that “she would normally send it in for further testing, but that she would let it go this time.” App. 499. Davis even told her supervisor of Ghee’s accusation. App. 499-500. However, neither Davis nor Fowler was disciplined. In addition to the words in the policy, these examples support Hampe’s contention that the written policy is not uniform.

C. Hampe was aggrieved by CGM’s and Mid-Iowa’s failure to provide for uniform discipline in the written policy

The requirement for an employer’s policy to contain uniform disciplinary procedures is a prerequisite to conducting drug testing.

Iowa Code §730.5(9)(b). Here again, Hampe was aggrieved because CGM and Mid-Iowa were not authorized to conduct the December 5, 2019, drug test without uniform written discipline in the policy. Hampe was also aggrieved when CGM and Mid-Iowa applied discipline differently to him than they did to Mr. Fowler and Ms. Davis.

VIII. CGM AND MID-IOWA FAILED TO SUBSTANTIALLY COMPLY WITH IOWA CODE SECTION 730.5(9)(A)(1) BECAUSE THEY DID NOT CARRY OUT THE DRUG TEST WITHIN THE TERMS OF CGM'S WRITTEN POLICY

Preservation of Error

Hampe preserved error by arguing the issue in his motion for summary judgment, resisting the same issue in Defendants motions for summary judgment, and obtaining a ruling in which the court necessarily decided the issues. App. at 952.

Standard of Review

The Court reviews rulings on motions for summary judgment for corrections of errors of law. *Winger Contracting Co.* 926 N.W.2d at 535.

A. Applicable legal principles

Iowa law requires an employer to conduct drug testing in accordance with its written drug testing policy that has been provided to employees subject to testing. Iowa Code 730.5(9)(a)(1). An employer's

failure to conduct a drug test in accordance with its own written policy is a violation of Iowa Code section 730.5. *Dix*, 961 N.W.2d at 694.

B. CGM violated the terms of its written policy in at least five ways

The district court again erroneously extended the immunity provided for in subsection (11) to this alleged violation. *See Dix*, 671 N.W.2d at 684. The district court should have granted Hampe's motion since he provided indisputable evidence that CGM failed to follow its own policy in at least five separate ways:

- 1) CGM never sent Scott's sample to a laboratory for analysis. (Pl.'s App. 28, 33, CGM App. 14).
- 2) CGM never had Scott's urine sample reviewed by a MRO. (Pl.'s App.28, 33, CGM App. 14).
- 3) CGM did not send Scott home pending the receipt of a negative drug test from the MRO. (Pl.'s App. 28, 22, CGM App. 14).
- 4) CGM concluded Scott's sample was adulterated based on the collector's conclusion. (Pl.'s App. Unemployment recording, 129:20, 1:32:00).
- 5) After learning the collector concluded Scott's sample was adulterated, CGM initiated a new process and required Scott to provide a second drug sample, which was not provided for in CGM's written policy and had not been provided to Scott.

For these reasons the district court's ruling constitutes legal error and must be reversed.

C. Hampe was aggrieved by CGM's and Mid-Iowa's failure to follow the written policy

If CGM and Mid-Iowa had followed their policies the outcome likely would have been different. However, “there is no way to know what the outcome of the [tests] would have been,” because CGM and Mid-Iowa destroyed the samples instead of sending them for confirmatory testing. For this reason, Hampe was aggrieved by CGM’s and Mid-Iowa’s failure to carry out the test within the term of CGM’s policy. *See Woods*, 962 N.w.2d at 13.

IX. THE DISTRICT COURT ERRED IN GRANTING CGM’S AND MID-IOWA’S MOTIONS FOR SUMMARY JUDGMENT AS TO THE COMMON LAW CLAIMS OF FRAUD, INVASION OF PRIVACY, CONSPIRACY AND RECKLESS DIRECTION

Preservation of Error

Hampe preserved error by arguing the issue in his motion for summary judgment, resisting the same issue in Defendants motions for summary judgment, and obtaining a ruling in which the court necessarily decided the issues. App. at 952.

Standard of Review

The Court reviews rulings on motions for summary judgment for corrections of errors of law. *Winger Contracting Co.* 926 N.W.2d at 535.

Merits

The district court granted summary judgment in favor of CGM and Mid-Iowa as to Hampe's common law claims for three reasons. First, the district court held that Hampe's resistance to both motions was untimely. Second, the court ruled that Hampe had not provided any facts that "the Defendants targeted Hampe and worked together and/or separately to obtain a positive drug test from Hampe under the guise of statutory compliance. Third, the court concluded that Iowa Code Section 730.5 was the exclusive remedy for Hampe's common law claim and that his remedy was limited to the civil action authorized by subsection 15 of the statute. App. 952.

A. After granting Hampe's Motion to Continue the hearing on CGM's and Mid-Iowa's Motions for Summary Judgment, the court did not set a deadline for Hampe to file supplement his resistance

The court's conclusion that Hampe's resistance is untimely is factually inaccurate and overlooks the procedural history of Hampe's cause of action. On May 8, 2020, Hampe filed his Petition against Defendants asserting a Iowa Code Chapter 730.5 claim. App. 11. On July 15, 2020, the court entered an order setting trial for May 31, 2022. The order set a deadline to file summary judgment motions for no later than 90 days prior to trial. After conducting discovery, Hampe filed a

timely motion to amend his petition to add claims against the Defendants for fraud, invasion of privacy, conspiracy and reckless disregard. App. 18. On February 8, 2022, the court granted Hampe's motion to amend the petition. App. 54. On February 28, 2022, Mid-Iowa filed a motion to continue the trial given the added common law claims. App. 62. On February 28, 2022, CGM filed an Answer denying Hampe's common law claims. App. 65. On March 1, 2022, Mid-Iowa answered and also denied Hampe's common law claims. App. 84.

Two days after filing its Answer, CGM filed a motion for summary judgment as to all of Hampe's claims, even Hampe's common law claims. App. 110. The same day, Mid-Iowa also filed a motion for summary judgment attempting to have Hampe's claims, even the common law claims, dismissed. App. 239. On March 4, 2022, the court set a hearing on CGM's and Mid-Iowa's motions for summary judgment for April 15, 2022. App.. Then, on March 11, 2022, the court granted Mid-Iowa's unresisted Motion to Continue Trial. App. 331. Trial was later re-set for June 5, 2023. App. 851.

Having just added the common law claims, Hampe filed a Motion to Continue the April 15, 2022, Summary Judgment Hearing to

Conduct Discovery on the common law claims. App. 333. In addition to the motion, Hampe's counsel filed an Affidavit in Support of the motion specifically stating that additional discovery needed to take place so that Hampe could file a resistance to CGM's and Mid-Iowa's motions for summary judgments as to the common law claims. App. 333.

Thereafter, Hampe filed timely resistances to CGM's and Mid-Iowa's motions for summary judgment as to Iowa Code Section 730.5 and filed his own offensive Motion for Partial Summary Judgment as to his drug testing claim. Hampe's resistances and offensive motion did not contain argument on the common law claims due to the pending Motion to Continue the Summary Judgment Hearing to conduct discovery. App. 348, 502, 664. In the meantime, the parties were still exchanging discovery, and Hampe had a pending motion to compel filed. App. 654.

On April 15, 2022, the court granted Hampe's Motion to Continue the Summary Judgment Hearing *to conduct discovery*. App. 849. Upon granting Hampe's motion, the Court also granted CGM's and Mid-Iowa's motions for additional time to respond to Hampe's Motion for Partial Summary Judgment to April 29, 2022. App. 849. However, no

deadline was set for a supplemental resistance to be filed by Hampe. Of course, this makes sense because at that time it was unknown to anyone how long it would take to complete discovery for Hampe to file his supplemental resistance. The court reset the summary judgment hearing on July 29, 2022, thereby affording Hampe a mere 3.5 months to fully investigate and conduct discovery on his common-law claims. App. 849.

On July 21, 2022, Hampe filed a supplemental resistance that addressed CGM's and Mid-Iowa's motions as to his common law claims. App. 904. Thereafter, CGM and Mid-Iowa filed replies to Hampe's supplemental resistance prior to the summary judgment hearing. App.918, 931.

The district court concluded that Hampe's resistance was due by April 1, 2022. App. 950. However, this conclusion is illogical because the court granted Hampe's Motion to Continue the Summary Judgment on April 15, 2022. App. 849. The decision is also illogical because if April 1, 2022 was Hampe's deadline there would have been no way for Hampe to receive written interrogatories or requests for production back from the CGM or Mid-Iowa before April 1, 2022, unless CGM or Mid-Iowa

answered discovery early. Third, the record reflects that discovery was ongoing and documents were being exchanged after the court granted the continuance. App. 891. Finally, the Court never set a deadline for Hampe to supplement his resistance. And Hampe filed a resistance with time for both CGM and Mid-Iowa to reply prior to the hearing. For all of these reasons, the district court was wrong to conclude that Hampe's resistance was untimely.

B. Iowa Code Section 730.5(11) permits Hampe to bring his common law claims for fraud, invasion of privacy, conspiracy and reckless disregard

Next, the district court also incorrectly held that CGM and Mid-Iowa are immune from liability for their wrongful conduct pursuant to Iowa Code §730.5(11). First, subsection 11 only immunizes employers, not third-party collection company's like Mid-Iowa. *See id.* Second, subsection 11 only immunizes employers who have "established a policy and initiated a testing program in accordance..." with Iowa Code Section 730.5. *Id.* Additionally, immunity is limited to six circumstances, none of which apply to Hampe's test because there was no confirmed positive test result. *Id.* Even if there was a confirmed positive test result, summary judgment still wouldn't be appropriate

because fact issues are present in the record as to 1) whether CGM acted in good faith in terminating Hampe and 2) whether CGM has initiated a testing program in accordance with the safeguards of Iowa Code Section 730.5. *Id.*

C. Fact issues are present in the record that preclude summary judgment on Hampe's claims for fraud, invasion of privacy, conspiracy and reckless disregard

Facts in the summary judgment record support Hampe's contention that CGM's entire drug testing apparatus is reckless at best and fraudulent at worst. There can be no dispute that a relationship of trust exists between CGM and Hampe and Mid-Iowa and Hampe. Hampe was at the mercy of CGM and Mid-Iowa. He was fired for allegedly refusing the test. App. 367. CGM and Mid-Iowa were allegedly trained in how to conduct drug testing in accordance with Iowa Code §730.5. App. 220-23. CGM represented to Hampe 1) that Mid-Iowa is compliant with Iowa Code Section 730.5; 2) that the drug testing procedures comply with Iowa law; and 3) that a laboratory approved by the federal government will review urine specimens; and that a medical review office will review samples if determined adulterated. (Hampe App. 108-09, 115, 117). The eight violations

explained above prove that these representations clearly false. Because a special relationship of trust existed between CGM, Mid-Iowa and Hampe, CGM's and Mid-Iowa's affirmative actions to exempt employees from testing while targeting him for the purpose of terminating him from employment constitute an intent to deceive. *See Grefe v. Ross*, 231 N.W.2d 863, 867 (Iowa 1875); *Mills County State Bank v. Fisher*, 282 N.W.2d 712, 715 (Iowa 1979) (holding that a knowledge of falsity exists where a special relationship of trust exists). For this reason, Hampe's fraud claim should have survived summary judgment.

Fact issues should have prevented summary judgment on Hampe's invasion of privacy claim too. In submitting to drug testing, Hampe had expectation of privacy. *Dix*, 961 N.W.2d at 685. (holding that private employers are subject to the constraints of the fourth amendment). CGM and Mid-Iowa unreasonably invaded Hampe's privacy when they 1) required him to submit to a drug test in violation of the law; 2) when they targeted him; 3) when they reported that his urine sample was adulterated without sending it to a laboratory or MRO and when he was directly observed by a third-party collector who had no right to evaluate his sample under the law. For these reasons,

fact issues in the summary judgment record should have prevented summary judgment.

Finally, the summary judgment record is rife with facts demonstrating that throughout the entirety of the drug testing process, CGM and Mid-Iowa acted in concert for the purpose of targeting Hampe in order to fire him. *Basic Chems., Inc. v. Benson*, 251 N.W.2d 220, 233 (Iowa 1977) (holding that conspiracy is an agreement or understanding between two or more persons to effect a wrong against or injury upon another). Mid-Iowa erroneously trained KGM. App. 220-23. CGM and Mid-Iowa performed an unlawful selection of employees to be tested at CGM's direction. App. 440-42. CGM and Mid-Iowa unlawfully exempted employees to target Hampe. CGM and Mid-Iowa destroyed evidence of Hampe's sample without having the sample tested by a laboratory or MRO. The actions they took together led to his Hampe's termination. As such, fact issues are also present in the record that should have prevented summary judgment on Hampe's claim for conspiracy.

CONCLUSION

For the reasons articulated herein, the district courts order on September 27, 2022, should be reversed and the matter should be

remanded back to district court for 1) trial on Hampe's common law claims and 2) to enter judgment in favor of Hampe as to liability on his Iowa Code Section §730.5 claim and then proceed to trial on damages.

REQUEST FOR ORAL ARGUMENT

Counsel for Appellant requests to be heard in oral argument.

COST CERTIFICATE

I hereby certify that the costs of printing this brief was \$0.00

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