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IN THE IOWA SUPREME COURT
No. 18-1464

TYLER DIX, JASON CATTELL, and JIMMY MCCANN,

Plaintiffs-Appellees / Cross-Appellants,

And

JULIE ELLER,

Plaintiff-Appellee,

v.

CASEY'S GENERAL STORES, INC., and CASEY'S MARKETING COMPANY,

Defendants-Appellants / Cross-Appellees.

Appeal from the Iowa District Court for Polk County
The Honorable Michael D. Huppert

Brief of Amicus Curiae the Iowa Association of Business and Industry

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Identity and Interest of Amicus Curiae

The Iowa Association of Business and Industry ("ABI") is the largest business network in the State of Iowa, representing over 1,500 business members that employ over 330,000 Iowans. Among other things, ABI represents the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the business community. ABI submits this amicus brief because this Court's interpretation of the Iowa Drug Testing Statute, Iowa Code section 730.5, will have a significant impact on businesses across the State of Iowa and their ability to ensure a safe, drug-free workplace for their employees and business patrons.

Rule 6.906(4)(d) Statement of Authorship

ABI is represented by the undersigned counsel of the Nyemaster Goode, P.C., law firm, who authored this brief in whole. No party, party's counsel, or other person contributed money to fund the preparation or submission of this brief.

Argument

The trial court in this case correctly recognized that substantial compliance, not strict compliance, is all that is

required of employers who have instituted a drug-testing program under Iowa Code section 730.5. The trial court, however, failed to recognize the statutory and common law deference given to employers who have made the determination that individuals to be drug-tested work in "safety-sensitive" positions. Further, section 730.5's statutory framework and public policy considerations necessitate differentiation between the roles and responsibilities of the employer as compared to third-party independent contractors that are hired to conduct the employer's testing program.

I. SUBSTANTIAL COMPLIANCE, NOT STRICT COMPLIANCE, IS ALL THAT IS REQUIRED UNDER IOWA CODE SECTION 730.5.

The Iowa Supreme Court has held that substantial compliance, not strict compliance, is the applicable standard to apply when interpreting whether an employer has complied with the requirements of Iowa Code section 730.5. "Substantial compliance is said to be compliance with respect to essential matters necessary to assure the reasonable objectives of the statute." *Sims v. NCI Holding Corp.*, 759 N.W.2d 333, 338 (Iowa

2009) (quoting *Superior/Ideal, Inc. v. Bd. of Review*, 419 N.W.2d 405, 407 (Iowa 1988)). Broadly speaking, section 730.5 is intended to protect an employer's right to ensure a drug-free workplace; viewed more narrowly, the Legislature's intent was to "ensure the accuracy of any drug test serving as the basis for adverse employment action." *Id.* (citations and internal quotation marks omitted). Strict compliance with the statute is not required to ensure those objectives are met. The trial court correctly held that only substantial compliance with section 730.5 is required, and this determination should be affirmed. *See* Trial Court Order, p. 12.

II. AN EMPLOYER'S DESIGNATION THAT AN EMPLOYEE IS SERVING IN A "SAFETY-SENSITIVE POSITION" SHOULD BE GIVEN DEFERENCE.

A. Iowa Code Sections 730.5(1)(j), (8)(a)(3), and (9)(f) Empower and Require Employers to Classify Which Employees Serve in "Safety-Sensitive Positions."

Iowa Code Section 730.5(1)(j) defines "Safety-sensitive position" to include a "job wherein an accident could cause loss of human life, serious bodily injury, or significant property or environmental damage, including a job with duties that include

immediate supervision of a person in a job that meets the requirement of this paragraph."

This is distinct from the determination by an employer of which employees are in a "pool" of employees for purposes of "unannounced drug or alcohol testing." *See* Iowa Code § 730.5(8)(a). For purposes of unannounced testing, one of the pools of employees from which the test group may be selected includes "[a]ll employees at a particular work site who are in a pool of employees in a safety-sensitive position and who are scheduled to be at work at the time testing is conducted . . . ." Iowa Code § 730.5(8)(a)(3).

The statute further states that "[a]n employee of an employer who is designated by the employer as being in a safety-sensitive position shall be placed in only one pool of safety-sensitive employees subject to drug or alcohol testing . . . ." Iowa Code § 730.5(9)(f).

These statutory provisions provide the following framework: (1) *employers* must determine whether an employee is in a "safety-sensitive position," and (2) *employers* must determine which

employees are in a particular "work site." Employers, after all, have the ultimate burden of determining which employees are in the pool of employees from which the testing group may be selected through a randomized process. *See* Iowa Code § 730.5(8)(a)(3).

Where an employer has classified an employee as working in a "safety-sensitive position," as that term is defined in section 730.5(1)(j), that decision should be upheld. The statutory framework set forth in section 730.5 empowers and, in fact, requires employers to determine whether a particular employee serves in a "safety-sensitive position." In this case, the trial court usurped the employer's role as set forth in section 730.5(9)(f). The trial court's ruling on this issue should be reversed.

B. Employer Classification of Employees Should be Given Deference as a "Business Judgment."

As set forth above, it is ultimately the employer that must decide how to classify its employees. The definition of "safety-sensitive" positions in section 730.5(1)(j), however, must be applied in numerous and varied work environments and businesses. Employers, therefore, cannot turn solely to the

statutory framework in Iowa Code Section 730.5 to make the determination of which employees are serving in "safety-sensitive" positions prior to submitting the list of employees for randomized selection. The countless variety of employee job duties, workplaces, and safety concerns employers must take into consideration necessitate some level of discretion by employers to make these categorization decisions.

Employers cannot be expected to defer to employees to come up with their preferred classification, as no employee would plausibly seek to be classified as serving in a "safety-sensitive position," if that were the standard. Additionally, employers cannot come to the courts for definitional assistance in advance of classifying employees to be tested. Rather, the employer is responsible for making this determination, just as employers are responsible for making other safety-related determinations to satisfy state and federal workplace mandates. Employers are in the best position to make this categorization decision, as the employer knows what the safety risks are in a particular workplace, the job functions for a particular employee, and the

corresponding safety concerns if the employee at issue was under the influence of drugs or alcohol while at work. These decisions made by employers should be given deference by courts reviewing the categorizations after-the-fact.

In the employment discrimination context, it has repeatedly been said that courts "do not 'sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent those judgments involve intentional discrimination.'" *Elam v. Regions Fin. Corp.*, 601 F.3d 873, 880-81 (8th Cir. 2010) (quoting *Rodgers v. U.S. Bank, N.A.*, 417 F.3d 845, 854 (8th Cir. 2005)); *see also Cerro Gordo Cnty. Care Facility v. Iowa Civil Rights Comm'n*, 401 N.W.2d 192, 197 (Iowa 1987). This Court has recognized the importance of an employer's business judgment as it pertains to personnel issues, so long as there is no concern with the employer's motivation in making that judgment. *See Woodbury Cnty. v. Iowa Civil Rights Comm'n*, 335 N.W.2d 161, 166 (Iowa 1983) (quoting *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1012 n. 6 (1st Cir. 1979)); *see also Farmland Foods, Inc. v. Dubuque Human Rights Comm'n*, 672 N.W.2d 733, 743

(Iowa 2003) (recognizing the importance of an employer's business judgment); *Cerro Gordo Cnty. Care Facility*, 401 N.W.2d at 197 (making a distinction between an employer's motive to engage in discrimination versus an employer's exercise of their "business judgment"); *Valline v. Murken*, No. 02-0843, 2003 WL 21361344, *5 (Iowa Ct. App. June 13, 2003) ("Employers have wide latitude to make business decisions.") (citing *McLaughlin v. Esselte Pendaflex Corp.*, 50 F.3d 507, 511 (8th Cir. 1995) and *Day v. Johnson*, 119 F.3d 650, 657 (8th Cir. 1997)).

Similarly, this Court should not sit as a super-personnel department of an employer that has categorized its employees as safety-sensitive or as working at a particular work site where there is no concern in the record about the employer's motivation behind making the classification decisions at issue.

III. IOWA CODE SECTION 730.5 DOES NOT REQUIRE AN EMPLOYER TO PROVIDE A LIST OF DRUGS TO BE TESTED *AT THE TIME OF TESTING*, DOES NOT MANDATE THE MANNER IN WHICH SUCH A LIST MUST BE PROVIDED, AND DOES NOT REQUIRE *EMPLOYERS* TO PROVIDE EMPLOYEES WITH OPPORTUNITY TO DISCLOSE MEDICAL INFORMATION WHERE EMPLOYER HAS CONTRACTED WITH A THIRD-PARTY INDEPENDENT CONTRACTOR TO HANDLE SAMPLE COLLECTION PROCESS AND TESTING.

Iowa Code section 730.5(7)(c)(2) provides as follows:

> 7. *Testing procedures*. All sample collection and testing for drugs or alcohol under this section shall be performed in accordance with the following conditions:
> . . .
>
> > (c) Sample collections shall be documented, and the procedure for documentation shall include the following:
> > . . .
> >
> > > (2) An employee or prospective employee shall be provided an opportunity to provide any information which may be considered relevant to the test, including identification of prescription or nonprescription drugs currently or recently used, or other relevant medical information. To assist an employee or prospective employee in providing the information described in this subparagraph, the employer shall provide an employee or prospective employee with a list of the drugs to be tested.

A. Iowa Code Section 730.5(7)(c)(2)'s Requirement that Employees Be Furnished With a List of Drugs to Be Tested Does Not Require an Employer to Provide Such a List *At The Time of Testing*.

There is no requirement in Iowa Code section 730.5(7)(c)(2) that the employer provide the list of drugs to be tested *at the time of testing*. The statute simply requires that the employer "provide an employee or prospective employee with a list of the drugs to be tested." Iowa Code § 730.5(7)(c)(2). Where an employer has provided such a list in advance of testing, this statutory requirement has been satisfied. The purpose of providing such a list is to give notice to employees of the types of drugs that may result in a positive drug test. *See id.* (stating the list is required "[t]o assist an employee . . . in providing the information described . . . ."). There is no statutory requirement that such notice be provided on the day of testing. It only requires that it be provided at some point prior to that date.

Section 730.5(7)(c)(2) should not be judicially broadened to require employers to provide a list of drugs to be tested *at the time of testing*. Many employers may choose to utilize a third-party

independent contractor—as Casey's did in this case—to handle the sample collection process. Additionally, the sample collection process may take place at the third-party's business location, at a healthcare facility, or at another facility that is *not* the employer's business location. *See* Iowa Code § 730.5(6)(c) (providing for sample collection "at a location other than the employee's normal work site"). In such instances, it would be unreasonable to require the employer to provide a list of drugs to be tested *at the time of testing*, so long as the employee has been provided with the list of drugs to be tested with sufficient notice such that the employee is "assist[ed]" in providing "any information which may be considered relevant to the test . . . ." *See* Iowa Code § 730.5(7)(c)(2).

Because there is currently no express statutory requirement that an employer provide a list of drugs to be tested *at the time of testing*, the Court should not judicially expand the obligations of employers under the Iowa Drug Testing Statute to include such a requirement.

B. Iowa Code Section 730.5(7)(c)(2)'s Requirement that Employees Be Furnished With a "List of the Drugs to be Tested" Is Non-Specific With Regard to the Manner in Which Such List is Provided.

In this case, Casey's provided the "list" of drugs to be tested through a January 26, 2016 memorandum to "All Safety Sensitive Employees" in particular facilities, with the revised Drug and Alcohol Policy attached. *See* Def. Ex. K, p. 3. Casey's chose to provide the list of drugs to be tested to its employees by providing definitions of "controlled substance" and "drug" in its Drug and Alcohol Policy, thereby directing employees to multiple federal and state controlled substances statutes for a comprehensive list of drugs to be tested and setting forth a limited category of controlled substances in further detail. *Id.*

The Iowa Drug Testing Statute does not provide guidance with regard to what type of "list" an employer must provide, so some level of deference must be given to employers to determine the manner in which they want to provide such a list. The statute does not set forth whether the list must be provided the day of the testing, immediately prior to the testing, or in electronic or paper format. *See* Iowa Code § 730.5(7)(c)(2). It also does not specify

how the drugs are to be listed. For example, the statute does not specify whether "amphetamine" is sufficiently specific so as to include "pseudoephedrine," which is the generic name for the brand name "Sudafed," or whether the list provided by an employer must include all three of the above—amphetamine, pseudoephedrine, and Sudafed.

The purpose of providing the list of drugs to be tested is to ensure employees have adequate notice to be able "to provide any information which may be considered relevant to the test." *See* Iowa Code § 730.5(7)(c)(2). To the extent an employer has provided an over-inclusive list of the drugs to be tested, this should be viewed as substantial compliance with the statute because the *purpose* of the statute has been satisfied, and sufficient notice to employees has been provided.

This Court should hold that where an employer has provided notice to employees of the list of drugs to be tested on or before the date of testing, as Casey's has done in this case, an employer has substantially complied with both the letter and the spirit of Iowa Code section 730.5(7)(c)(2).

C. Iowa Code Section 730.5(7)(c)(2)'s Requirement that Employees "Be Provided an Opportunity to Provide Any Information Which May be Considered Relevant to the Test" is Not a Requirement for *Employers* Where A Third-Party Independent Contractor is Conducting the Sample Collection Testing.

Although employers are expressly required, under Iowa Code section 730.5(7)(c)(2), to provide a list of drugs to be tested, the statute is silent with regard to whether *employers* are required to provide employees to be tested with "an opportunity to provide any information which may be considered relevant to the test." Iowa Code § 730.5(7)(c)(2). Rather, the statute requires that this obligation be fulfilled by the individual or entity handling the actual testing process—which may or may not be the employer.

First, it should be noted that there is no requirement in the statute that anyone affirmatively inquire: "Are you taking any medications?" Rather, the statute is drafted in terms of providing the employee to be tested with "an *opportunity* to provide any such information." *Id.* (emphasis added). Any argument that the employees being tested in this case lacked the opportunity to provide this information at the time their sample was collected by

ARCpoint personnel, or through the medical review officer during the testing phase of the process, should be asserted against ARCpoint or the medical review officer, not the employer.

Second, due to conflicting legal obligations, employers cannot ask employees to disclose their medications. The Americans With Disabilities Act and regulations promulgated thereunder prohibit this very sort of inquiry. *See* 42 U.S.C. § 12112(d)(4)(A) ("A covered entity shall not . . . make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity."); 29 C.F.R. § 1630.13(b) ("[I]t is unlawful for a covered entity to . . . make inquiries as to whether an employee is an individual with a disability or as to the nature or severity of such disability."); *see, e.g., Bates v. Dura Automotive Sys., Inc.*, 767 F.3d 566, 578 (6th Cir. 2014) (analyzing the EEOC guidance related to employers asking employees about their prescription drug or medication use and whether such questions violate various federal laws); *Lewis v. Government of the District of Columbia*, 161 F.

Supp. 3d 15, 22 (D.D.C. 2015) (same); *see also Conroy v. New York State Dep't of Correctional Servs.*, 333 F.3d 88, 95-96 (2d Cir. 2003) (citing favorably EEOC guidance that an ADA disability-related prohibited inquiry includes questions to an employee about prescription medications they are taking); *Roe v. Cheyenne Mountain Conf. Resort, Inc.*, 124 F.3d 1221, 1230 (10th Cir. 1997) (holding an employer's requirement that employees report prescription or other drug use violated the ADA). Such an inquiry also creates the risk that an employer would learn about an employee's prescription drug medication and thereafter perceive an employee as being disabled, again implicating civil rights laws and regulations.

Presumably, the Iowa Legislature did not intend to mandate employers violate the law in order to avoid liability under Iowa Code section 730.5. Employers' desire to avoid learning about their employees' protected health information to satisfy state and federal legal and regulatory obligations is likely the reason employers, like Casey's, contract with third-party independent contractors to handle the actual sample collection and testing of

their employees.

The structure of section 730.5 itself illustrates that the requirements associated with the sample collection and testing process are the province of the individual or entity handling the collection and/or testing process, at least when, as here, the employer is not undertaking those tasks.[1] *Compare* Iowa Code § 730.5(7)(c)(2) (referring to collection and testing procedures without specifying who is conducting the collection and testing) *with* Iowa Code § 730.5(6)(b) (referring specifically to an employer requirement). The Iowa Legislature, in drafting section 730.5, recognized that most employers will not be in control of, or have the expertise to, collect samples, perform testing, and interpret results. To that end, an employer may not be held liable if, in

[1] The employees here sought a remedy solely from their employer, but the Iowa Drug Testing Statute does not expressly limit liability to employers; rather, it states that "[a] person who violates this section or who aids in the violation of this section, is liable to the aggrieved employee . . . ." Iowa Code § 730.5(15)(a)(1). The statute defines the terms "employer" and "employee," but uses the term "person" in its remedy provision, thereby evidencing a clear intent to distinguish liability. *See, e.g.*, *Vivian v. Madison*, 601 N.W.2d 872, 876 (Iowa 1999) (analyzing the use of the words "person" and "employer" for purposes of the Iowa Civil Rights Act).

good faith, it establishes a testing program designed to meet these requirements. Iowa Code § 730.5(11).

Where an employer has contracted with an independent contractor to conduct the sample collection and testing process for its employees, the employer should not be held liable for any violations of the Iowa Drug Testing Statute committed by the independent contractor. *See* Iowa Code § 730.5(15)(a)(1) (allowing for recourse against non-employers); *see also* Iowa Code § 730.5(14)(b) (providing for jurisdiction over a laboratory or medical review officer who is involved in the drug testing conducted pursuant to this section). This conclusion is consistent with Iowa law in other respects: one who normally retains an independent contractor is liable to those harmed by the contractor only if the work performed by the contractor involves an abnormally dangerous activity creating a non-delegable duty or a peculiar unreasonable risk of harm. *See Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 693-95 (Iowa 2009).

Conclusion

The Iowa Association of Business and Industry respectfully requests that the Court apply the express statutory language set forth in the Iowa Drug Testing Statute, Iowa Code section 730.5, and refrain from broadening employer obligations under the statute as was requested by the plaintiffs before the trial court. ABI further requests that the Court provide deference to the business decisions of employers in designating employees as working in "safety-sensitive positions" and in providing the "list of drugs to be tested" where the statute fails to provide thorough guidance on these issues.

Respectfully submitted,

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Certificate of Compliance with Typeface Requirements and Type-Volume Limitation

1. This brief complies with the typeface requirements and type-volume limitation of Iowa Rules of Appellate Procedure 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

   [X] This brief has been prepared in a proportionally spaced typeface using Century Schoolbook in 14 point font and contains 3,478 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

/s/ Leslie C. Behaunek November 6, 2018

Certificate of Filing and Service

I hereby certify that on November 6, 2018, I presented the foregoing document to the Clerk of Court for the Iowa Supreme Court for filing and uploading into the Appellate ECF system, which will send notification of such filing to the appropriate parties electronically.

/s/ Leslie C. Behaunek November 6, 2018