IN THE IOWA SUPREME COURT
Supreme Court No. 19-0002

LUCAS WOODS

Plaintiff/Appellant,

v.

CHARLES GABUS FORD, INC.,

Defendant/Appellee.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
HONORABLE JEANIE K. VAUDT

PLAINTIFF/APPELLANT LUCAS WOODS'S FINAL BRIEF

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Authorities

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Sims v. NCI Holding Corp., 759 N.W.2d 333 (Iowa 2009)

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court. It presents substantial issues of first impression or of enunciating legal principles. One issue of first impression is whether an employer's failure to comply with Iowa Code § 730.5(9)(h)'s training requirements for supervisory employees precludes employee drug testing and gives rise to a claim under Iowa Code § 730.5(15)(a)(1) when an employee is terminated because of a drug test administered in the absence of such mandatory training. Another issue of first impression is whether an employer's noncompliance with Iowa Code § 730.5(7)(j)(1)'s notice requirements can be excused because of an employee's inaction after receipt of a faulty, unlawful post-drug test notice. A final issue of first impression is whether an employer's noncompliance with Iowa Code § 730.5(7)(j)(1)'s mandate that a post-test notice be sent by certified mail, return receipt requested makes it unlawful to discharge an employee based on the test.

STATEMENT OF THE CASE

This is an employee drug testing case brought pursuant to Iowa Code § 730.5. Defendant fired Plaintiff after Plaintiff allegedly failed a drug test. Plaintiff then filed a petition against Defendant under Iowa Code § 730.5(15)(a)(1).

This matter was submitted to the district court for a nonjury trial on October 15 and 16, 2018. The court below issued its order on December 15, 2018. It found no violations of 730.5 and entered judgment against Plaintiff and dismissed Plaintiff's petition.

Three components of the lower court's decision are at issue on appeal. First, the court ruled that the training of Defendant's supervisory employees involved in Plaintiff's drug testing and termination met Iowa Code § 730.5(9)(h)'s requirements and, consequently, that Defendant's drug testing and subsequent termination of Plaintiff was not unlawful for Defendant's failure to comply with Iowa Code § 730.5(9)(h)'s training requirements. Second, the district court found that Defendant substantially complied with 730.5 even though Defendant's post-notice to Plaintiff omitted the cost to Plaintiff of any retesting, as Iowa Code § 730.5(7)(j)(1) requires, and concluded that, regardless, Defendant's noncompliance was excused by Plaintiff's inaction after receiving the defective post-test notice. Finally, the

court below determined that Defendant's method of sending the post-test notice to Plaintiff substantially complied with Iowa Code § 730.5(7)(j)(1) even though the notice was not sent by certified mail, return receipt requested, but rather by just standard certified mail.

Plaintiff filed a motion to reconsider, enlarge, or amend the district court's order on December 18, 2018. The district court denied Plaintiff's motion on December 28, 2018. This appeal followed. Plaintiff raises the foregoing three issues on appeal.

STATEMENT OF THE FACTS

Defendant fired Plaintiff on August 15, 2017 because Plaintiff supposedly failed a random drug test. (Def.'s Ex. Q, App. Vol. 1 at 168.) That drug test occurred on August 9, 2017. (Def.'s Ex. Q, App. Vol. 1 at 167.) Plaintiff's August 9, 2017 urine test was allegedly positive for methamphetamine. (Def.'s Ex. O, App. Vol. 1 at 165.)

Defendant sent Plaintiff a letter on August 16, 2017 concerning the results of his August 9, 2017 drug test. (Def.'s Ex. Q, App. Vol. 1 at 167.) Defendant's August 16, 2017 notice to Plaintiff regarding the drug test results did not specify the cost of retesting. (Def.'s Ex. Q, App. Vol. 1 at 167.) Nor was that notice sent by certified mail, return receipt requested. (Def.'s Ex. Q, App. Vol. 1 at 166; Tr. Vol. I 118:24-119:5, 121:1-13.)

There was no evidence concerning the statutorily-required training of Defendant's supervisory employee involved in Plaintiff's drug testing and termination, Kelsey Gabus McBride, regarding employee drug and alcohol testing. Ms. Gabus McBride was Defendant's human resource director at the time of Plaintiff's drug test. (Tr. Vol. I 99:16-100:5.) She was involved in Plaintiff's August 9, 2017 drug test and August 15, 2017 termination. (Tr. Vol. I 109:11-121:13; Def.'s Ex. Q, App. Vol. 1 at 166-68.)

Plaintiff did not use drugs on August 9, 2017 (the day of the drug test) or in the weeks before the test. (Tr. Vol. I 27:8-13; 94:10-15.) He did not tell anyone that he had used methamphetamine before the August 9, 2017 drug test. (Tr. Vol. I 27:22-25.) Plaintiff thought that the positive drug test was wrong. (Tr. Vol. I 29:22-30:5.)

Plaintiff would have requested a retest if Defendant's August 16, 2017 notice had told him how much the retest would cost. (Tr. Vol. I 34:8-18.) He would have done so because he thought that the first test was wrong. (Tr. Vol. I 34:22-25.) But the unknown cost of the test was also a consideration. (Tr. Vol. I 34:14-18; 93:9-15.) He had not previously had to pay for a drug retest. (Tr. Vol. I 97:2-3.)

Plaintiff's job with Defendant was his only employment at the time of the drug test. (Tr. Vol, I 14:4-11.) Plaintiff has two children who live with him. (Tr. Vol. I 12:24-13:4.) He was the sole provider for his family. (Tr. Vol. I 93:6-7.) He was not eligible for unemployment benefits at the time he received Defendant's notice. (Tr. Vol. I 34:19-21.)

ARGUMENT

Iowa Code § 730.5 Generally

Iowa Code § 730.5(15)(a)(1) provides a private cause of action for violations of its provisions:

> A person who violates this section or who aids in the violation of this section is liable to an aggrieved employee or prospective employee for affirmative relief including reinstatement or hiring, with or without back pay, or any other equitable relief as the court deems appropriate including attorney fees and court costs.

Defendant has the burden of proving that 730.5's requirements were met. Iowa Code § 730.5(15)(b).

Iowa Code § 730.5 is a remedial statute. A remedial statute remedies a wrong to an individual. *City of Waterloo v. Bainbridge*, 749 N.W.2d 245, 249 (Iowa 2008). Remedial statutes must be liberally interpreted in favor of the persons they are intended to protect. *State ex rel. Miller v. Cutty's Des Moines Camping Club, Inc.*, 694 N.W.2d 518, 529 (Iowa 2005).

Defendant must prove substantial compliance with 730.5(7)(j)(1)'s notice requirement. *Sims v. NCI Holding Corp.*, 759 N.W.2d 333, 337 (Iowa 2009). Substantial compliance is compliance in respect to essential matters necessary to assure the reasonable objectives of the statute. *Id.* at 338.

Defendant cannot prove substantial compliance with several aspects of 730.5. Defendant's 730.5 violations are separately discussed below.

I. THE DISTRICT COURT SHOULD HAVE FOUND THAT DEFENDANT DID NOT COMPLY WITH IOWA CODE § 730.5(9)(h)'s TRAINING REQUIREMENTS AND THAT DEFENDANT'S DRUG TESTING AND SUBSEQUENT TERMINATION OF PLAINTIFF WERE CONSEQUENTLY UNLAWFUL.

Preservation Of Error

Plaintiff preserved error on this point. Plaintiff raised this issue in Plaintiff's posttrial brief. Plaintiff again raised this issue in Plaintiff's Motion To Reconsider, Enlarge, Or Amend.

Scope And Standard Of Review

The district court's legal conclusions are reviewed for correction of errors at law. *Sims v. NCI Holding Corp.*, 759 N.W.2d 333, 337 (Iowa 2009). Its findings of fact are affirmed if they are supported by substantial evidence. *Id.* Evidence is substantial if a reasonable mind would accept the evidence as adequate to reach the same findings. *Id.*

Argument

There was no evidence concerning the statutorily-required training of Defendant's supervisory employee involved in Plaintiff's drug testing and termination, Kelsey Gabus McBride, regarding employee drug and alcohol testing. Ms. Gabus McBride was Defendant's human resource director at the time of Plaintiff's drug test. (Tr. Vol. I 99:16-100:5.) She was involved in Plaintiff's August 9, 2017 drug test and August 15, 2017 termination. (Tr. Vol. I 109:11-121:13; Def.'s Ex. Q, App. Vol. 1 at 166-68.) Kelsey Gabus McBride was the only witness who testified for Defendant regarding the circumstances and procedures for Defendant's drug testing policy, Plaintiff's drug test, and Plaintiff's termination under Defendant's testing policy.

Iowa Code § 730.5(9)(h) mandates training for supervisory employees like Ms. Gabus McBride if an employer wishes to conduct drug and alcohol testing:

> 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. . . .

Defendant had the burden of proving that 730.5's requirements were met. Iowa Code § 730.5(15)(b). Defendant did not comply with Iowa Code § 730.5(9)(h). It thus was not permitted to conduct drug and alcohol testing under 730.5. Defendant cannot discharge Plaintiff based on a drug test that Defendant was not allowed to conduct. This was grounds for recovery under Iowa Code § 730.5(15)(a)(1).

II. THE DISTRICT COURT SHOULD HAVE CONCLUDED THAT DEFENDANT DID NOT SUBSTANTIALLY COMPLY WITH IOWA CODE § 730.5(7)(j)(1)'s MANDATE THAT THE POST-TEST NOTICE PROVIDE THE COST PAYABLE BY PLAINTIFF FOR ANY RETESTING AND SHOULD NOT HAVE EXCUSED DEFENDANT'S VIOLATION BECAUSE OF PLAINTIFF'S INACTION AFTER RECEIVING THE DEFECTIVE POST-TEST NOTICE.

Preservation Of Error

Plaintiff preserved error on this point. Plaintiff raised this issue in Plaintiff's posttrial brief. Plaintiff again raised this issue in Plaintiff's Motion To Reconsider, Enlarge, Or Amend.

Scope And Standard Of Review

The district court's legal conclusions are reviewed for correction of errors at law. *Sims*, 759 N.W.2d 333, 337 (Iowa 2009). Its findings of fact

are affirmed if they are supported by substantial evidence. *Id.* Evidence is substantial if a reasonable mind would accept the evidence as adequate to reach the same findings. *Id.*

Argument

It was undisputed that Defendant's post-test notice to Plaintiff, (Def.'s Ex. Q, App. Vol. 1 at 167), did not tell Plaintiff the cost payable to Defendant for retesting. Iowa Code § 730.5 required that information. Plaintiff respectfully submits that the district court erred when it concluded that Defendant substantially complied with 730.5 even though Defendant omitted the cost of retesting from the notice.

Defendant failed 730.5(7)(j)(1)'s notice requirement because its notice to Plaintiff did not specify the cost to Plaintiff of any retesting. The notice is supposed to tell employees "the fee payable by the employee to the employer for reimbursement of expenses concerning the test." Iowa Code § 730.5(7)(j)(1). That means the notice "must tell the employee what the cost of that test will be." *Harrison v. Employment Appeal Bd.*, 659 N.W.2d 581, 587 (Iowa 2003). The requirement that an employee be informed of the cost of the second test is meant to protect the employee from an erroneous test result and ensures that the employee's decision in that regard will be a well-informed one based upon accurate and complete information. *Id.* at 587-88.

Employers must provide the cost of retesting in the post-testing notice in order to substantially comply with 730.5. *Id.* at 587-88.

Iowa Code § 730.5(7)(j)(1)'s notice requirement focuses on the protection of employees who submit to drug testing. *Sims,* 759 N.W.2d at 338. It accomplishes that protective purpose by mandating written notice by certified mail of (1) any positive drug test, (2) the employee's right to obtain a confirmatory test, and (3) the fee payable by the employee to the employer for reimbursement of the expense of the test. *Id.* Such a formal notice conveys to the addressee a message that the contents of the document are important and worthy of the employee's deliberate reflection. *Id.* Iowa Code § 730.5(7)(j)(1)'s important objective is to provide notice to the employee of the positive test result and a meaningful opportunity to consider whether to undertake a confirmatory test. *Id.*

Defendant's August 16, 2017 notice to Plaintiff about his allegedly positive drug test did not specify the cost of retesting. It merely told Plaintiff that any retesting would occur "at your own cost." The notice further stated that if the retest did not confirm the initial test, Defendant would "reimburse the employee for the fee paid by the employee for the second test. . . ."

Plaintiff's situation is similar to that criticized in *Skipton v. S & J Tube, Inc.*, 2012 WL 3860446 (Iowa Ct. App. Sept. 6, 2012). The post-test

notice in *Skipton* merely gave the employee a possible price range, and not "the fee payable," for a confirmatory test. *Id.* at *4. That was not substantial compliance with Iowa Code § 730.5. *Id.*

Defendant's 730.5(7)(j)(1) notice in this matter did not tell Plaintiff the cost of re-testing. It thus did not substantially comply with that section. Defendant violated Iowa Code § 730.5.

An opportunity for a retest would been important to Plaintiff had he known the cost of the test. Plaintiff did not use drugs on August 9, 2017 (the day of the drug test) or in the weeks before the test. (Tr. Vol I 27:8-13; 94:10-15.) He did not tell anyone that he had used methamphetamine before the August 9, 2017 drug test. (Tr. Vol. I 27:22-25.) Plaintiff thought that the positive drug test was wrong. (Tr. Vol. I 29:22-30:5.)

Plaintiff would have requested a retest if Defendant's August 16, 2017 notice had told him how much the retest would cost. (Tr. Vol. I 34:8-18.) He would have done so because he thought that the first test was wrong. (Tr. Vol. I 34:22-25.) But the unknown cost of the test was also a consideration. (Tr. Vol. I 34:14-18; 93:9-15.) He had not previously had to pay for a drug retest, (Tr. Vol. I 97:2-3), so he had no reason to formulate a speculative guess concerning the mandatory cost information that Defendant failed to provide in its post-test notice.

The cost of a retest was important to Plaintiff because his job with Defendant was his only employment at the time of the drug test. (Tr. Vol. I 14:4-11.) Plaintiff has two children who live with him. (Tr. Vol. I 12:24-13:4.) He was the sole provider for his family. (Tr. Vol. I 93:6-7.) He was not eligible for unemployment benefits at the time he received Defendant's notice. (Tr. Vol. I 34:19-21.)

The court below did not specifically discuss whether Defendant's omission of the cost of retesting from the notice constituted a failure to substantially comply with 730.5. The court should have found a lack of substantial compliance based on *Harrison* and *Skipton*. Those cases preclude a substantial compliance finding when the post-test notice omits the cost of retesting. Further, as previously noted, Iowa Code § 730.5 is a remedial statute that should be liberally construed in Plaintiff's favor.

The district court instead focused on what Plaintiff did after he received the defective post-test notice, rather than whether Defendant substantially complied with 730.5's notice requirements, even though it was Defendant's burden to prove substantial compliance with 730.5. None of Plaintiff's post-notice actions should have mattered. No Iowa appellate court has held that an employer's lack of substantial compliance with 730.5 can be excused by an employee's inaction. Such a principle would be perverse –

The point of the post-testing notice provisions is to encourage employees to protect themselves if they wish to contest a positive drug test. When one of those mandatory protective provisions is ignored, thus causing an employee's inaction because of an information vacuum, the inaction caused by the employer should not be reason for excusing the employer's noncompliance that led to the employee's inaction. Plaintiff's post-notice actions should have been irrelevant once it was indisputably established that Defendant did not substantially comply with Iowa Code § 730.5(7)(j)(1).

It is also unfair to blame Plaintiff for not requesting a retest at an unknown cost because he would be reimbursed if the first test was not confirmed to be positive. Section 730.5's notice provisions are intended to allow employees to make informed decisions concerning their response to an allegedly positive drug test. Notice of the cost of retesting is a mandatory, statutorily-required aspect of that information. When that information is omitted, leaving the employee to make an uninformed decision, it contradicts the legislature's policy reasons for including the notice provisions to criticize a discharged employee for not requesting a retest at an unknown charge. Had Defendant followed the notice provisions, there would have been no uncertainty about the cost of retesting.

Regardless, even if Plaintiff's inaction after receiving the post-test notice was somehow relevant and could excuse Defendant's noncompliance, Plaintiff explained his reasons for not requesting a retest at an unknown cost. He had not previously had to pay for a drug retest. He had no way of even estimating what a retest would cost. Plaintiff was unemployed, had no other source of income, and was not receiving unemployment benefits. He had family and housing costs to cover. Plaintiff could not decide whether a retest was affordable under those circumstances without knowing what the cost of retesting would be, information that Defendant was supposed to provide him for that very reason. The court below should have concluded that Defendant did not substantially comply with Iowa Code § 730.5(7)(j)(1)'s notice requirement and that Plaintiff's post-notice inaction was either irrelevant or did not excuse Defendant's statutory violation.

III. THE DISTRICT COURT SHOULD HAVE DETERMINED THAT DEFENDANT VIOLATED IOWA CODE § 730.5(7)(j)(1)'s POST-TEST NOTICE REQUIREMENTS BECAUSE DEFENDANT'S POST-TEST NOTICE TO PLAINTIFF WAS NOT SENT BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED.

Preservation Of Error

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Scope And Standard Of Review

The district court's legal conclusions are reviewed for correction of errors at law. *Sims*, 759 N.W.2d 333, 337 (Iowa 2009). Its findings of fact are affirmed if they are supported by substantial evidence. *Id.* Evidence is substantial if a reasonable mind would accept the evidence as adequate to reach the same findings. *Id.*

Argument

It was likewise undisputed that Defendant did not send its post-test notice to Plaintiff via certified mail, return receipt requested. Iowa Code § 730.5(7)(j)(1) requires that the post-test notice be sent via certified mail, return receipt requested. Plaintiff respectfully asserts that the district court

incorrectly interpreted both the requirements and the purpose of the return receipt requirement when it excused Defendant's failure on this point. The court below should not have found substantial compliance in this regard given Defendant's failure to send the post-test notice to Plaintiff by certified mail, return receipt requested.

"Certified mail, return receipt requested" is a very specific requirement. It describes a special, unique type of mailing. It leaves no room for experimentation by employers in terms of how to address the return receipt requirement.

Moreover, the return receipt requirement is for the employee's benefit, not the employer's, as the district court suggested. It is inaccurate to say that substantial compliance exists as long as the employer has proof that the employee received the post-test notice. This is not an issue of tracking for the employer; it is an issue of alerting the employee to a serious situation. A positive drug test notice received by certified mail, return receipt requested "conveys a message that the contents of the document are important. Thus, an employee receiving notice in this fashion would be more likely to consider his decision with respect to a second test to be an important one. Likewise, he would more deliberately reflect on his options and the ramifications of his decision." *Harrison*, 659 N.W.2d at 587.

Defendant did not send its certified mailing of the post-test notice to Plaintiff return receipt requested. (Def.'s Ex. Q, App. Vol 1 at 166; Tr. Vol I 118:24-119:5, 121:1-13.) The district court did not find that the post-test notice was sent return receipt requested. The court below should have determined that Defendant violated 730.5(7)(j)(1) when it failed to send the notice to Plaintiff via certified mail, return receipt requested. *Harrison*, 659 N.W.2d at 587-88.

CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that this Court reverse the district court and remand this matter for entry of judgment in Plaintiff's favor.

REQUEST FOR ORAL SUBMISSION

Plaintiff respectfully requests that this case be submitted with oral argument.

CERTIFICATE OF COST

I, Harley C. Erbe, certify that the amount actually paid for printing or duplicating copies of this brief in final form as required by the Iowa Rules of Appellate Procedure were $0.

/s/ Harley C. Erbe

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

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 this brief has been prepared in a proportionally spaced typeface using Times New Roman in fourteen-point font and contains 3,355 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

Dated: May 8, 2019

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 8, 2019, one copy of the Appellant's Final Brief was served upon all parties to the above cause through the Court's EDMS system to the parties of record herein as follows:

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