SUPREME COURT OF IOWA

TYLER DIX, JASON CATTELL, JIMMY MCCANN, and **JULIE ELLER,** Plaintiffs-Appellees, v. **CASEY'S GENERAL STORES, INC.** and **CASEY'S MARKETING COMPANY,** Defendants-Appellants.	**No. 18-1464** Polk County District Court No. CVCV052834 Hon. Michael D. Huppert

BRIEF FOR APPELLANTS

CASEY'S GENERAL STORES, INC.

and

CASEY'S MARKETING COMPANY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

ISSUES PRESENTED FOR REVIEW

1. **Whether Casey's is immune under Iowa Code section 730.5(11)(*a*), when it "established a policy and initiated a testing program in accordance with the testing and policy safeguards provided under" section 730.5 and acted "in good faith."**

Iowa Code § 730.5 (2016).

Iowa Code § 88.1 (2016).

2018 Iowa Acts ch. 1046, sec. 1.

Iowa R. App. P. 6.907.

Anderson v. Warren Distrib. Co., 469 N.W.2d 687 (Iowa 1991).

Cubit v. Mahaska Cty., 677 N.W.2d 777 (Iowa 2004).

Dalarna Farms v. Access Energy Coop., 792 N.W.2d 656 (Iowa 2010).

Harrison v. Employment Appeal Bd., 659 N.W.2d 581 (Iowa 2003).

Irving v. Employment Appeal Bd., 883 N.W.2d 179 (Iowa 2016).

Maples v. Siddiqui, 450 N.W.2d 529 (Iowa 1990).

Miller v. Marshall Cty., 641 N.W.2d 742 (Iowa 2002).

Nelson v. Lindaman, 867 N.W.2d 1 (Iowa 2015).

Schaefer v. Putnam, 841 N.W.2d 68 (Iowa 2013).

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

State v. Carpenter, 334 N.W.2d 137 (Iowa 1983).

State v. Kelso-Christy, 911 N.W.2d 663 (Iowa 2018).

State v. McSorley, 549 N.W.2d 807 (Iowa 1996).

Tuxis Ohr's Fuel, Inc. v. Administrator, 72 A.3d 13 (Conn. 2013).

U.S. Bank Nat'l Ass'n v. Lamb, 874 N.W.2d 112 (Iowa 2016).

Zwanziger v. O'Brien, No. 11–1548, 2012 WL 4513836 (Iowa Ct. App. Oct. 3, 2012).

2. If Casey's is not immune, whether Casey's substantially complied with Iowa Code section 730.5.

Iowa Code § 85.3 (2016).

Iowa Code § 730.5 (2016).

Iowa R. App. P. 6.907.

Farmland Foods, Inc. v. Dubuque Human Rights Comm'n, 672 N.W.2d 733 (Iowa 2003).

Iowa Ins. Inst. v. Core Grp. of Iowa Ass'n for Justice, 867 N.W.2d 58 (Iowa 2015).

Koehler Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000).

Munn v. Kraft Foods Glob., Inc., 455 F. Supp. 2d 925 (S.D. Iowa 2006).

Rojas v. Pine Ridge Farms, L.L.C., 779 N.W.2d 223 (Iowa 2010).

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

Smith v. Fresno Irrigation Dist., 84 Cal. Rptr. 2d 775 (Ct. App. 1999).

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Nat'l Safety Council, *Fact Sheet No. 1: Ensuring Pedestrian Safety Around Power Industrial Trucks* (May 2011).

Nat'l Inst. for Occupational Safety & Health, *NIOSH Alert: Preventing Injuries and Deaths of Workers Who Operate or Work Near Forklifts* (June 2001).

OSHA, DOL, *Powered Industrial Trucks (Forklift) E-Tool: Pedestrian Traffic* (last visited Oct. 28, 2018).

OSHA, OSHA 3220-10N 2004, *Worker Safety Series: Warehousing* (2004).

3. If Casey's is not immune and did not substantially comply with section 730.5, whether it is equitable to award Jimmy McCann 22 months of backpay when he admittedly tested positive for illegal drugs, and after being terminated, applied for a single job, from which he withdrew, before deciding to start a food truck business.

Iowa Code § 730.5 (2016).

Iowa R. App. P. 6.907.

Hansard v. Pepsi-Cola Metro. Bottling Co., 865 F.2d 1461 (5th Cir. 1989).

LaFontaine v. Developers & Builders, Inc., 156 N.W.2d 651 (Iowa 1968).

Opperman v. M. & I. Dehy, Inc., 644 N.W.2d 1 (Iowa 2002).

Tubari Ltd., Inc. v. N.L.R.B., 959 F.2d 451 (3d Cir. 1992).

4. If Casey's is not immune and did not substantially comply with section 730.5, whether it is equitable to award Julie Eller 22 months of back pay and two years' frontpay when it is undisputed she failed to look for work after her termination.

Iowa R. App. P. 6.907.

Children's Home of Cedar Rapids v. Cedar Rapids Civil Rights Comm'n, 464 N.W.2d 478 (Iowa Ct. App. 1990).

Denesha v. Farmers Ins. Exch., 161 F.3d 491 (8th Cir. 1998).

Hine v. Mineta, 238 F. Supp. 2d 497 (E.D.N.Y. 2003).

Quint v. A.E. Staley Mfg. Co., 172 F.3d 1 (1st Cir. 1999).

Sangster v. United Air Lines, Inc., 633 F.2d 864 (9th Cir. 1980).

ROUTING STATEMENT

The Supreme Court should retain this case because it presents substantial issues of first impression, as well as substantial questions of enunciating legal principles. *See* Iowa R. App. P. 6.1101(2)(*c*), (*f*). By the time the Court issues an opinion in this case, it will have been ten years since the Court analyzed Iowa Code section 730.5. *See Sims v. NCI Holding Corp.*, 759 N.W.2d 333 (Iowa 2009). In *Sims*, the Court held section 730.5 requires substantial compliance. *Id.* at 338.

Before *Sims*, the only cases in which the Court actually interpreted the text of the statute were two unemployment cases: *Eaton v. Iowa Employment Appeal Bd.*, 602 N.W.2d 553 (Iowa 1999), which involved a version of the statute that predated substantial amendments in 1998, limiting its precedential value, and *Harrison v. Employment Appeal Bd.*, 659 N.W.2d 581 (Iowa 2003), which held an employer could not prove disqualifying misconduct based on the claimant's positive drug test if the employer did not notify him in writing of his right to request confirmatory testing. Yet, section 730.5 occupies over nine pages in the Iowa Code, and is a "linguistic

jungle." *Walsh v. Wahlert*, 913 N.W.2d 517, 521 (Iowa 2018). Comprehensive guidance from the Supreme Court on the meaning and mechanics of this complex statute would benefit employers and employees throughout the state.

STATEMENT OF THE CASE

This case started as four separate civil actions by Tyler Dix, Jason Cattell, Jimmy McCann, and Julie Eller—all former employees of Casey's General Stores, Inc.'s Ankeny Distribution Center (warehouse). Supp. App. pp. 16-39. The plaintiffs all alleged Casey's violated Iowa Code section 730.5 when it drug-tested them on April 6, 2016, and ended their employment based on either confirmed positive results (for Messrs. Dix, Cattell, and McCann), or a refusal to submit to the test (for Ms. Eller). *Id.* Early on, the District Court consolidated the four cases into one (the action docketed for Tyler Dix's action), in response to the plaintiffs' unresisted motion. App. pp. 18-20.

The parties tried the case to Judge Michael D. Huppert on February 5 and 6, 2018. After trial, the Court received post-trial briefs and issued Findings of Fact, Conclusions of Law, and Judgment Entry on March 21, 2018. App. pp. 185-212. The Court ruled that Tyler Dix and Jason Cattell were not entitled to relief under Iowa Code section 730.5 because

"their employment was not adversely impacted" by any statutory violation by Casey's. App. pp. 202; 208.

On the other hand, the Court found Jimmy McCann and Julie Eller's employment *was* adversely impacted by "including persons who were not in safety-sensitive positions [i.e., Mr. McCann and Ms. Eller, in the Court's opinion] in the pool eligible for testing," which the Court found violated section 730.5. App. pp. 191-201. Although the Court noted neither Mr. McCann nor Ms. Eller requested reinstatement, the Court found it equitable—despite Casey's argument that they both failed to mitigate their damages—to award them 22 months of back pay and benefits (totaling $94,889.05 for Mr. McCann and $85,630.75 for Ms. Eller). App. pp. 208-210.

Both parties then filed motions under Iowa Rule of Civil Procedure 1.904. App. pp. 213-218; 309-320. Plaintiffs also filed an application for attorney fees and costs, which Casey's resisted. App. 321-382; Supp. App. pp. 48-62. While the 1.904 motions were pending, Plaintiffs appealed, App. pp. 460-462, and Casey's cross-appealed, App. pp. 463-465. The District Court found Plaintiffs' appeal divested it of jurisdiction, Supp.

App. pp. 63-65, which prompted Plaintiffs to move this Court for an order "confirming jurisdiction" or alternatively for a limited remand, App. pp. 478-483. On July 18, 2018, Justice Waterman issued an order finding "the appeal and cross-appeal [we]re interlocutory in nature," and denied the deemed-applications for interlocutory appeal. App. pp. 484-486.

On remand, the District Court summarily denied Casey's 1.904 motion, App. pp. 443-444, then on July 23, 2018, awarded Mr. McCann and Ms. Eller $67,728.22 in attorney fees and costs, App. pp. 445-453. Additionally, on August 21, 2018, the Court issued a Supplemental Ruling on Issue of Equitable Relief. App. pp. 454-459. The Court found that Ms. Eller was entitled to frontpay in lieu of reinstatement because reinstatement was "not practicable." App. p. 454. The Court, despite finding Ms. Eller "remains unable to re-enter the work force due to her work-related injuries and restrictions," awarded her two years' frontpay (including overtime and benefits, adjusted for inflation), which amounted to $96,871.72. App. pp. 456-457. However, the Court denied Mr. McCann's request for frontpay, noting "there appears to have

been no adverse effects from his termination that would have prevented him from making a timely return to the job market." App. pp. 456-457.

Casey's filed timely notices of appeal from both the Supplemental Ruling and the Court's order granting attorney fees and costs. App. pp. 466-468, 472-474. Plaintiffs likewise filed timely notices of cross-appeal with respect to both judgments. App. pp. 469-471, 475-477. On September 21, 2018, Justice Appel entered an order consolidating the appeal from the fee award and the underlying judgment (as supplemented). Supp. App. pp. 66-68.

STATEMENT OF THE FACTS

Plaintiffs are former employees of Defendant Casey's Marketing Company, which operates Casey's General Stores' Distribution Center (warehouse) in Ankeny. App. p. 108 at ¶ 1.[1] At the pertinent time (April 6, 2016), Tyler Dix and Jason Cattell worked as Heavy-Duty[2] Warehouse workers, and Jimmy McCann and Julie Eller worked as Light-Duty Warehouse workers in the tobacco-returns area, which is a chain-link-fence-enclosed area within the warehouse sometimes referred to as "the cage." App. pp.108 at ¶¶ 2-4, 115 at ¶¶ 57, 61.

On January 26, 2016, Casey's amended its Drug and Alcohol Testing Policy (the "Policy"), which previously only provided for DOT, pre-employment, and reasonable-suspicion testing, to provide for random and post-accident drug and

[1] Although Casey's Marketing Company and Casey's General Stores, Inc. are separate legal entities, and Casey's Marketing Company was the entity that employed all of the appellees, Appellants will refer to the entities together as "Casey's" in this Brief.

[2] Heavy-duty warehouse employees operate forklifts and other mechanical warehouse equipment, and the parties stipulated that Heavy-Duty Warehouse is a job wherein an accident could cause loss of human life, serious bodily injury, or significant property or environmental damage. App. p. 108 at ¶ 5.

alcohol testing. App. pp. 108 at ¶ 7, 487-497. The April 6, 2016 drug test at issue in this case was the first random drug test administered under the revised Policy. App. pp. 505, 542-543.

Casey's Policy defines "random" testing as "[a]n unannounced drug or alcohol test conducted on a periodic basis without advance notice to employees." App. p. 108 at ¶ 8). The Policy states that an employee who receives a confirmed positive drug test will be terminated from employment. App. p. 108 at ¶ 9. The Policy also states that an employee who fails to provide an adequate specimen for testing will be deemed to have refused to submit to a test, and that refusal will be treated as a voluntary resignation of employment. App. p. 109 at ¶ 10. The appellees each signed Policy Verification Forms, acknowledging receipt, review, and understanding of the Policy. App. pp. 109 at ¶ 11, 538-541.

Casey's hired ARCpoint Labs to conduct the April 6, 2016 drug test. App. p. 109 at ¶ 12. On April 5, 2016, Casey's sent ARCpoint a list of 184 employees scheduled to work between

10:00 a.m. and 2:00 p.m. (the testing window) on April 6,[3] App. pp. 514-517, and asked ARCpoint to randomly select 90% of them for testing. App. pp. 109 at ¶ 13, 559. To generate random numbers (to match with the numbers assigned to Casey's employees), ARCpoint used the website randomizer.org.[4] *See* App. pp. 112 at ¶ 22, 518.[5] ARCpoint highlighted in yellow 167 of the 184 employees on Casey's list[6] and highlighted in blue 17 of the employees (blue indicating the employee was selected as an alternate) and sent it to

[3] Casey's HR staff obtained the warehouse schedules from the warehouse supervisors; however, unbeknownst to HR, the schedules changed after they got them from the supervisors. *See* Trial Transcript (hereinafter "Tr.") v.1 p. 15, lines 3-6); Tr. v.1 p. 98, lines 7–23).

[4] This website describes itself as a "'pseudo-random number generator' because the numbers are generated by use of a complex algorithm (seeded by the computer's clock) that gives the appearance of randomness." App. p. 109 at ¶¶ 18–19. *See* https://www.merriam-webster.com/dictionary/pseudorandom (defining "pseudorandom" as "being or involving entities (such as numbers) that are selected by a definite computational process but that satisfy one or more standard tests for statistical randomness").

[5] Apparently, ARCpoint requested a number set between numbers 2 and 184, attempting to correspond with line numbers on the spreadsheet Casey's sent App. pp. 514-517. *See* App. p. 512. ARCpoint's attempt to not count line number 1 (which contained headings for the spreadsheet) resulted in ARCpoint not accounting for line number 185 (employee Jackson Trumper) in the number range it input into randomizer.org. *Compare* App. pp. 514-517, *with* App. p. 512.

[6] Tyler Dix, Jason Cattell, Jimmy McCann, and Julie Eller were all among the list of selected employees highlighted in yellow. App. pp. 560-565.

Casey's. App. pp. 109 at ¶ 14, 560-565. Casey's then organized this list of selections into groups corresponding to employees' scheduled hours for April 6 (so employees who got off earlier would test earlier, and employees who came in later would test later). *See* App. pp. 508-511.[7]

The morning of April 6, 2016, all employees working in the Ankeny Distribution Center were gathered together, and Vice President of Transportation and Distribution Jay Blair announced to them:

> - As you know, we recently changed our Company drug policy to include random testing for safety sensitive positions, such as the warehouse and vehicle maintenance. We have had some issues in the workplace in the recent past relating to finding drugs, drug paraphernalia and used needles, among other concerns. We want to emp[h]asize our concern for our employees by providing you all a safe work environment and make sure the employees around you are not impaired, distracted or unproductive.
> - You were each trained by a supervisor on the new provision more than a month ago.
> - We have engaged a firm that completed the random selection and will administer the testing today.

[7] During this process, two of the selected names (Lindsay Alexander and Jeffrey Loneman) were inadvertently omitted from the list. Tr. v.1 p. 61, lines 18-25.

App. p. 5. Mr. Blair also told employees: "If any of you wish to refuse to test, you are free to leave at any time and it is regarded as a resignation," and: "If any of you are taking a prescription, do not discuss it with us. You should proceed to the test and, if applicable, the Medical Review Officer will contact you at a later date to substantiate the prescription." *Id.*; App. p. 112 at ¶ 24.

Each group of employees was shepherded by a "group leader," a Casey's supervisor or HR team member who accounted for the employees in their group and escorted them to the testing location when it was their turn. App. p. 113 at ¶ 26; App. pp. 512-513 (describing "functional roles"); App. p. 504 (instructions provided to group leaders). The testing locations were the restrooms located within the locker rooms in the warehouse. App. p. 113 at ¶ 29. These are ordinary public-restroom-type restrooms with stalls with locking doors. *See* App. pp. 544-545.

Tyler Dix, Jason Cattell, and Jimmy McCann's Tests and Undisputedly Positive Results

ARCpoint permitted selected employees to urinate into a cup in an individual restroom stall within the Casey's warehouse locker room. App. p. 113 at ¶ 33. Neither Mr. Dix, nor Mr. Cattell, nor Mr. McCann, nor Ms. Eller saw anyone physically or visually intruding into the stall while he or she was in it. App. p. 113 at ¶¶ 35–38. None of them requested additional privacy measures be taken before he or she provided his or her urine sample. App. p. 113 at ¶39. ARCpoint representatives were stationed in the restrooms, outside the restroom stalls. App. p. 113 at ¶ 40.

Messrs. Dix, McCann, and Cattell each had his urine sample in their sight until the collector sealed it. App. p. 114 at ¶ 41. They each signed a Forensic Drug Testing Custody and Control Form stating:

> I certify that I provided my specimen to the collector; that I have not adulterated it in any manner; each specimen bottle was sealed with a tamper-evident seal in my presence; and that the information and numbers provided on this form and on the label affixed to each specimen bottle is correct.

App. pp. 114 at ¶ 42, 546-549, 552-555, Supp. App. pp. 69-72.

ARCpoint personnel performed an instant screen on the urine samples of Messrs. Dix, Cattell, and McCann. Tr. v.2 p. 20, lines 4–17. The result of each of them was "non-negative," meaning the samples had to be sent to a SAMHSA–certified laboratory for confirmatory testing. Tr. v.2 p. 20, lines 4–17. App pp. 546-549, 552-555, Supp. App. pp. 69-72.

The laboratory confirmed, and a medical review officer (MRO) verified, Mr. Dix's urine was positive for marijuana, App. pp. 114 at ¶ 44, 546-549; Mr. Cattell's urine was positive for amphetamines and marijuana, App. pp. 114 at ¶ 49, 552-555; and Mr. McCann's urine was positive for amphetamines and marijuana, App. p. 114 at ¶ 53. None of these men has claimed in this case that his test result was inaccurate (i.e., the wrong specimen, a "false positive," or the result of legally prescribed medication). App. p. 114 at ¶¶ 44, 49, 53); Tr. v.1 p. 157, line 22—p. 158, line 6, (Cattell); Tr. v.1 p. 171, lines 10-19, (Dix); Tr. v.2 p. 46, lines 1-7 (McCann).

Casey's sent certified letters to Mr. Dix, Mr. Cattell, and Mr. McCann informing them of their test results, of their right to have further confirmatory testing done, and of their terminations of employment pursuant to Casey's Policy. App. pp. 114 at ¶¶ 45, 50, 54, 550-551. None of them requested further confirmatory testing. App. pp. 114-115 at ¶¶ 46, 51 55.

Julie Eller's Failure to Submit a Sufficient Specimen and Decision to Leave

ARCpoint personnel first requested a urine sample from Julie Eller at approximately 1:21 p.m. (nine minutes before her shift was scheduled to end). App. pp. 113 at ¶¶ 31-32), 558. Ms. Eller stated she could not urinate the 45 mL required for the drug test. Tr. v.1 p. 185, lines 14–25. Ms. Eller testified she could not urinate enough "Because I had went to the bathroom just before the meeting was called, so I'd already emptied my bladder." Tr. v.1 p. 214, line 24—p. 215, line 7.[8] ARCpoint's collector told Ms. Eller she could either go talk to Casey's HR personnel, or she could wait awhile and try again.

[8] The "meeting was called" hours earlier, at approximately 10:00 a.m. App. pp. 542-543.

Tr. v.1 p. 185, lines 18–20. Ms. Eller chose the latter option, and she notified the collector when she "finally decided to do it again." Tr. v.1 p. 185, lines 21–35. Ms. Eller was provided with two bottles of water during the period when she was waiting to be tested. Tr. v.1 p. 215, lines 12–16.

At 2:13 p.m., Ms. Eller attempted to urinate again, but again did not produce a sufficient specimen (45 mL). App. pp. 113 at ¶ 30, 558. Tr. v. 1 p. 186, lines 1–20. Ms. Eller testified she could not produce a sufficient specimen on her second attempt "[b]ecause [she] emptied my bladder again for the first test." Tr. v.1 p. 215, lines 17-23. Then, Ms. Eller "chose to leave because [she] was pretty upset by that point," even though she was told that by leaving without providing a sufficient specimen, she would be resigning. Tr. v.1 p. 187, lines 6–12; Tr. v.1 p. 209, lines 2-5. Ms. Eller understood she could have stayed and tried to give another sample, but she chose to leave because she "had a meeting with a lawyer." Tr. v.1 p. 209, lines 2-15. Pursuant to the Policy, Casey's Marketing Company deemed Plaintiff Eller to have refused to submit to a test for failure "to provide an adequate specimen

without satisfactory medical explanation," which was considered a voluntary resignation. App. p. 115 at ¶ 60.

Ms. Eller admitted no one came into her stall when she was using it, and she did not request additional privacy measures. App. p. 113 ¶¶35-40. Ms. Eller knows of no medical explanation for why she was unable to produce 45 mL of urine, after drinking two bottles of water, and waiting nearly an hour between attempts. Tr. v.1 p. 210, lines 1-4. Ms. Eller had submitted to urinalysis many times before April 6, 2016, because she was on parole for two years. Tr. v.1 p. 210, lines 9-12. She never had a problem producing an adequate specimen before April 6, 2016. Tr. v.1 p. 210, lines 5-19.

Post-Termination Activities

After being terminated from Casey's, Mr. Dix and Mr. Cattell sought and obtained new jobs. App. pp. 118 at ¶ 87, 119 at ¶¶ 95–96. Mr. McCann and Ms. Eller, on the other hand, did not. App. p. 119 at ¶¶ 107–108.

Mr. McCann initially explored employment with Plumb Supply in May 2016, but by July 2016, he had decided he was going to start a food truck business, a field in which he had no

prior experience. Tr. v.1 p. 229, line 23–p. 231, line 24; Tr. v.2 p. 53, lines 3–8; Tr. v.2 p. 54, line 19—p. 55, line 15. Mr. McCann's food truck, "Good Vibes," did not actually go into operation until June 2017. Tr. v.2 p. 52, line 24—p. 53, line 8.

Mr. McCann understood that Plumb Supply was "very interested" in hiring him. Tr. v.2 p. 55, lines 5–8. Nevertheless, he decided to withdraw from consideration for employment. Tr. v.2 p. 55, lines 9–21. Mr. McCann explained to Plumb Supply: "i enjoy a 'left handed' cigarette at the end of my day so the pre-screening test would be an issue lol sry to laugh but i struggle to take those laws seriously." App. pp. 566-673.[9]

Ms. Eller never did explore other employment after being separated from Casey's. The parties stipulated she "ha[d] not looked for work since April 6, 2016." Tr. v.2 p. 93 line 22—p. 94 line 2. Ms. Eller testified she was not sure what she could do for work. Tr. v.1 p. 219 lines 6–9; *see also* Tr. v.1 p. 210, line 24—p. 211, line 1 ("Q. Ms. Eller, you're currently unable to work; isn't that true? A. Well, yes and no."). Ms. Eller had

[9] Mr. McCann explained at trial that "left-handed cigarette" is a reference to smoking marijuana. Tr. v.2 p. 58, lines 4-11.

restrictions—specifically, a fifteen-pound lifting restriction and she is "not supposed to do repetitive motion over the shoulders." Tr. v.1 p. 182 lines 2–12. Ms. Eller also has severe pulmonary hypertension, which may require her to have a heart and lung transplant. Tr. v.1 p. 212 line 18—p. 213 line 21. Ms. Eller testified that *when* she applies for disability benefits, her pulmonary-hypertension doctor has agreed to support her application. Tr. v.1 p. 213 lines 11–17.

ARGUMENT

I. CASEY'S IS IMMUNE UNDER IOWA CODE SECTION 730.5(11)(*a*) BECAUSE IT "ESTABLISHED A POLICY AND INITIATED A TESTING PROGRAM IN ACCORDANCE WITH THE TESTING AND POLICY SAFEGUARDS UNDER" SECTION 730.5, AND ACTED IN GOOD FAITH.

Casey's preserved error on this issue by raising it in its motion for summary judgment, trial brief, motion for judgment as a matter of law, and renewed judgment as a matter of law. App. pp. 21-41; Tr. v.2 p. 74, line 12—p. 75, line 25. Each time, the District Court ruled against Casey's, expressly or impliedly. App. pp. 103-107; Tr. v.2 p. 92, line 20—p. 95, line 20; App. p. 197 at n.17.

This is an equity case because the statute only provides for equitable relief. *See* Iowa Code § 730.5(15)(*a*)(1) ("A person who violates this section … is liable to an aggrieved employee … for affirmative relief including reinstatement …, with or without back pay, or *any other equitable relief* as the court deems appropriate including attorney fees and court costs." (Emphasis added.)); *Zwanziger v. O'Brien*, No. 11–1548, 2012 WL 4513836, at *3 (Iowa Ct. App. Oct. 3, 2012) (interpreting

identical language of section 70A.29 and holding "[t]he phrase 'any *other* equitable relief' necessarily implies that the 'affirmative relief' authorized is equitable relief.); *id.* at *5 (noting the statute "does not authorize an award of actual damages"; "[r]ather, the statute allows 'affirmative relief including reinstatement, with or without back pay, or any other equitable relief the court deems appropriate, including attorney fees and costs.' These forms of relief have been held to be equitable in nature." (Citation omitted.)). Because this is an equity case, the standard of review is *de novo*. Iowa R. App. P. 6.907.

In one of the Supreme Court's early encounters with Iowa Code section 730.5, entitled "Private sector drug-free workplaces," the Court observed: "The legislature enacted Iowa Code section 730.5 in response to a widespread belief that employers have the right to expect a drug-free work place and should be able to require employees to take steps to insure it." *Anderson v. Warren Distrib. Co.*, 469 N.W.2d 687, 689 (Iowa 1991). Consistent with that intent, section 730.5(11) contains a broad Employer Immunity provision:

> 11. *Employer immunity*. A cause of action shall not arise against an employer who has established a policy and initiated a testing program in accordance with the testing and policy safeguards provided for under this section, for any of the following:
>
> *a*. Testing or taking action based on the results of a positive drug or alcohol test result, indicating the presence of drugs or alcohol, in good faith, or on the refusal of an employee or prospective employee to submit to a drug or alcohol test.

Iowa Code § 730.5(11)(*a*) (2016). This Court's "general approach" is "to construe statutory immunity provisions broadly." *Nelson v. Lindaman*, 867 N.W.2d 1, 9 (Iowa 2015) (citing *Cubit v. Mahaska County,* 677 N.W.2d 777, 784 (Iowa 2004)).[10]

The conditions for employer immunity under section 730.5(12)(*a*) are that the employer: (1) "has established a policy … in accordance with the … policy safeguards provided for under this section," (2) "has … initiated a testing program in accordance with the testing … safeguards provided for under this section," and (3) tested or took action based on a

[10] Interpreting the Employer Immunity provision broadly would also be consistent with this Court's traditional strict construction of the proscriptions of criminal statutes. *State v. Kelso-Christy*, 911 N.W.2d 663, 675 (Iowa 2018). Section 730.5 is a criminal statute, found within the Iowa Code's Title XVI (Criminal Law and Criminal Procedure), Subtitle 1 (Crime Control and Criminal Acts).

positive test result "in good faith." Iowa Code § 730.5(11)(*a*). As detailed below, Casey's satisfied all three immunity conditions, and therefore, it should be immune from liability for testing Mr. Dix, Mr. Cattell, Mr. McCann, and Ms. Eller, and from taking action based on Messrs. Dix, Cattell, and McCann's positive test results, and on Ms. Eller's refusal to submit to the drug test.

A. Casey's Established a Policy in Accordance with the Policy Safeguards.

Casey's Policy substantially complied with each of section 730.5(9)'s policy safeguards. *See Sims v. NCI Holding Corp.*, 759 N.W.2d 333, 338 (Iowa 2009) (defining "substantial compliance" as "'compliance in respect to essential matters necessary to assure the reasonable objectives of the statute.'" (Citation omitted.)). First, it is a written policy that is provided to every employee subject to testing and is available for review by employees and prospective employees. Iowa Code § 730.5(9)(*a*)(1); App. p. 497. *See also* App. p. 487 (cover memo to amended policy); App. pp. 538-541 (all of the appellees received the policy). Though not relevant to this case, the

Policy complies with the statutory requirements applicable to employees who are minors. Iowa Code § 730.5(9)(*a*)(1)–(3); App. p. 497.

The Policy "provide[s] uniform requirements for what disciplinary or rehabilitative actions [Casey's] shall take against an employee … upon receipt of a confirmed positive test result for drugs … or upon the refusal of the employee … to provide a … sample." Iowa Code § 730.5(9)(*b*); App. p. 494. The Policy "provide[s] 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*); App. p. 494. The Policy "provide[s] that if rehabilitation is required pursuant to paragraph '*g*', [Casey's] shall not take adverse employment action against the employee so long as the employee complies with the requirements of rehabilitation and successfully completes rehabilitation." Iowa Code § 730.5(9)(*b*); App. p. 495. Though not relevant to this case, the Policy's prohibited concentration of alcohol is 0.04,

consistent with the 2016 statute. Iowa Code § 730.5(9)(*e*); App. p. 490.[11]

The District Court found Casey's "drug testing policy violated Iowa Code § 730.5 by including persons who were not safety-sensitive positions in the pool eligible for testing." App. p. 201. However, the Policy actually does not specify which positions are safety-sensitive. *See generally* App. pp. 487-497. Rather, the Policy just states that "Casey's may conduct random drug and alcohol testing of employees in safety sensitive positions" and identifies the group subject to testing as (quoting section 730.5(8)(*a*)(3)):

> All 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, other than employees who are not scheduled to be at work at the time testing is to be conducted or who have been excused from work pursuant to the employer's work policy prior to the time the testing is announced to employees.

App. p. 492. The Policy defines "safety-sensitive position" the same as section 730.5(1)(*j*):

[11] Earlier this year, the legislature lowered the threshold to 0.02. 2018 Iowa Acts ch. 1046, sec. 1.

> A job wherein an accident could cause loss of 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 requirements of this paragraph.

App. p. 492. Thus, the Policy is completely consistent with Iowa Code section 730.5.

In sum, Casey's "established a policy and initiated a testing program in accordance with the testing and policy safeguards provided for under" section 730.5. Accordingly, Casey's satisfied the first condition for statutory immunity.

B. Casey's Initiated a Testing Program in Accordance with the Testing Safeguards.

Casey's also "initiated a testing program in accordance with the testing … safeguards provided for under" section 730.5. Although the statute does not define "testing program," there are certain elements of infrastructure that must be in place for an employer to conduct testing. Casey's submits that employer who puts that infrastructure in place has "initiated a testing program" within the meaning of section 730.5(11). *See Schaefer v. Putnam*, 841 N.W.2d 68, 78 (Iowa 2013) ("'[I]nitiate' means to start or commence." (citing *Merriam Webster's*

Collegiate Dictionary 644 (11th ed. 2004) and *Black's Law Dictionary* 784 (6th ed. 1990))); *Tuxis Ohr's Fuel, Inc. v. Administrator*, 72 A.3d 13, 21 (Conn. 2013) ("'Program' means 'a plan or system under which action may be taken towards a goal, or 'a plan of action to accomplish a specified end.'" (quoting *Webster's Third Int'l Dictionary* 1812 (1993) and *Random House Dictionary* 1546 (2d ed. 1993))).

Section 730.5 sets forth thirteen structural elements required of "the employer" to implement a testing program:

1. The employer may only conduct, as a condition of continuing employment, the types of testing allowed by section 730.5(8). Iowa Code § 730.5(4).

2. The employer must normally schedule tests during or immediately before or after work hours. *Id.* § 730.5(6)(*a*).

3. The employer must pay employees for the time required to test. *Id.* § 730.5(6)(*a*).

4. The employer must pay all actual costs for required tests. *Id.* § 730.5(6)(*b*).

5. The employer must provide transportation if the collection is conducted away from the employee's normal worksite. *Id.* § 730.5(6)(*c*).

6. The employer must provide employees with a list of the drugs to be tested. *Id.* § 730.5(7)(*c*)(2).

7. The employer may only take adverse employment action "based on a confirmed positive test result." *Id.* § 730.5(7)(*g*).

8. The employer must "ensure, to the extent feasible, that the testing only measures, and the records concerning the testing only show or make use of information regarding, alcohol or drugs in the body" (as opposed to other medical information). *Id.* § 730.5(7)(*i*).

9. The employer must notify employees of confirmed positive test results, and their right to a confirmatory test of the secondary sample, via certified mail, and otherwise comply with section 730.5(7)(*j*)'s requirements regarding confirmatory testing of the secondary sample (e.g., fee reimbursement if the test is negative). *Id.* § 730.5(7)(*j*).

10. The employer must "establish an awareness program to inform employees of the dangers of drug and alcohol use in the workplace." Iowa Code § 730.5(9)(*c*).

11. The employer must have either an employee assistance program (EAP) or resource file, and make the resource known to employees. *Id.* § 730.5(9)(*c*).

12. The employer may only put a safety-sensitive employee in one pool. *Id.* § 730.5(9)(*f*).

13. The employer must "require supervisory personnel … involved with drug or alcohol testing … to attend" certain training. *Id.* § 730.5(9)(*h*).

As described below, Casey's initiated a program that substantially complied with each of these thirteen testing safeguards. Only two elements require significant discussion: number 6 (list of drugs), and number 13 (training).

1. Casey's program only includes the types of testing allowed by section 730.5(8)—pre-employment, reasonable suspicion, random/unannounced, post-accident, and rehabilitation. Iowa Code § 730.5(4); App. pp. 491-493).

2. Casey's schedules tests during, or immediately before or after, regular work periods. Iowa Code § 730.5(6)(*a*); App. p. 493.

3. Casey's pays employees for all time required to test. Iowa Code § 730.5(6)(*a*); App. p. 493.

4. Casey's pays all of the costs of testing. Iowa Code § 730.5(6)(*b*); App. p. 493.

5. Casey's conducts testing at employees' normal worksite, or provides transportation when tests are conducted elsewhere. Iowa Code § 730.5(6)(*c*); App. pp. 113 at ¶ 29, 492.

6. Casey's provides employees with a list of the drugs for which they will be tested in its Policy. Iowa Code § 730.5(7)(*c*)(2); App. p. 489. In the Policy, Casey's explains that it tests for "drugs," and begins by defining that term exactly the same as the statute does: "Any drug or substance defined as a controlled substance that is included in schedule I, II, III, IV, or V under the Federal Controlled Substances Act." *Compare* Iowa Code § 730.5(1)(*c*), *with* App. p. 489. *Additionally*, however, the Policy elaborates: "Said substances include, but are not necessarily limited to cocaine,

phencyclidine (PCP), opiates, *amphetamines*, *marijuana*, MDMA (ecstasy), and 6-acetylmorphines (6-AM)." App. p. 489 (emphasis added).

The District Court ignored the second sentence—specifically mentioning amphetamines and marijuana (the drugs for which Messrs. Dix, Cattell, and McCann tested positive)—in concluding "[t]he definition of 'drug' within the policy is so broad as to be of no help as contemplated by the statute." App. p. 207. The Court also opined that Casey's needed to provide employees with the list of drugs to be tested *on the day of testing*. *Id.* However, while the legislature could have imposed such a requirement, it did not. *See* Iowa Code § 730.5(7)(*c*). *See also Sims*, 759 N.W.2d at 339 ("We will not read into the statute a mandate which is not present in the plain language."). While it is clear the purpose of the list is "[t]o assist [the] employee … in providing medical information," this purpose was still served when employees received the list (policy specifically naming marijuana and amphetamines) just two months before they were tested. *See* App. pp. 538-541 (acknowledging receipt on January 27 and February 1, 2016).

Further conveying the importance of the document they were receiving, the Policy Verification Forms employees signed required them to affirm: "I understand that it is my obligation to read … the terms and conditions set forth in 'Casey's Drug & Alcohol Testing Policy.'" This formality should have "convey[ed] the message that the [document] was important." App. p. 207. *See Harrison v. Employment Appeal Bd.*, 659 N.W.2d 581, 587 (Iowa 2003) ("A written document … conveys a message that the contents of the document are important.").[12] Accordingly, Casey's maintains, and asks this Court to hold, that providing employees a list of the drugs to be tested (including, but not limited to cocaine, PCP, opiates, amphetamines, marijuana, and ecstasy) in the Policy approximately two months before administering the first drug

[12] Additionally, Messrs. Dix and Cattell signed ARCpoint documents at the time their specimens were screened, indicating the specimens were being sent for confirmatory testing for "THC" (in Mr. Dix' case, App. pp. 546-549) and "AMP, THC" (in Mr. Cattell's case, App. pp. 552-555). Although Mr. McCann's ARCpoint form did not indicate what substances were being confirmed *see* Supp. App. pp. 69-72, he understood he was subject to testing for marijuana and amphetamines, just as well as his coworkers did. Tr. v.2 p. 39, line 5—p. 40, line 5) (McCann understood); Tr. v.1 p. 167 line 4—p. 170, line 23 (Dix understood); Tr. v.1 p. 154, lines 10-15 (Cattell understood); Tr. v.1 p. 203, line 14—p. 206, line 19 (Eller understood).

test substantially complies with section 730.5(7)(*c*)(2). The purpose of the list of drugs is to notify employees what they will be tested for, so if they have a medical explanation for a positive test result, they can provide it. Casey's list of drugs in the Policy, received by each of the appellees only two months before the test, served the purpose of the statute and substantially complied.

7. Casey's only takes adverse employment action based on confirmed positive test results. Iowa Code § 730.5(7)(*g*); App. p. 494).

8. Casey's avoids obtaining any employee medical information other than whether their test result is negative or confirmed positive, by directing employees to provide that information not to Casey's, but to the MRO—the person who, per section 730.5(1)(*g*), is qualified to interpret that information as it relates to an employee's test result. Iowa Code § 730.5(7)(*i*); App. p. 493; Tr. v.1 p. 93, line 15—p. 95, line 4.

9. Casey's notifies employees of confirmed positive test results, and their right to a confirmatory test of the secondary

sample, via certified mail. Iowa Code § 730.5(7)(*j*); App. p. 493; *see also* App. p. 493 at ¶¶ 45, 50, 54.

10. Casey's established an awareness program to inform its employees of the dangers of drug and alcohol abuse in the workplace. Iowa Code § 730.5(9)(*c*); Tr. v.1 p. 77 line 19—p. 78, line 8; *see also* App. pp. 488, 496-497.

11. Casey's has an employee assistance program, publicizes it, and notifies employees how to access its benefits. Iowa Code §730.5(*c*)(1); App. pp. 495-496; Tr. v.1 p. 78, lines 9–22.

12. No employee who Casey's designates as being in a safety-sensitive position is included in more than one pool of safety-sensitive employees. Iowa Code § 730.5(9)(*f*); App. pp. 490.

13. Casey's requires supervisory personnel who are *involved* with *testing* to attend the training specified by section 730.5(9)(*h*). Iowa Code § 730.5(9)(*h*). The District Court correctly ruled that Casey's substantially complied with this requirement because HR Supervisor Marcella Burkheimer (the "lead employee" on the day of testing, App. p. 190, and HR

team member Melinda Karl (designated as a person to whom others should direct questions) had both attended the required training. App. pp. 205-206. The Court aptly reasoned:

> [T]raining is not required for employees engaged in the sort of ministerial tasks delegated to a number of supervisory personnel on the day of testing. These employees were not part of the process of the actual drug testing, but rather dealt with HR paperwork, traffic flow and providing bottles of water to employees as they awaited testing. It would be a strained construction of a statutory directive to require training in recognition, documentation and corroboration of drug abuse, or referral to an employee assistance program, for those individuals engaged in such duties.

Id.[13]

Stated differently, the statutory phrase "involved with drug … testing" must mean involved to the extent that the training would serve a purpose—for example, supervisors who make the decision to test an employee based on reasonable suspicion. *See State v. Carpenter*, 334 N.W.2d 137, 140 (Iowa 1983) ("'Involve' means 'to relate closely.'" (quoting *Webster's Third New International Dictionary* 1191 (1976))); *see also State v. McSorley*, 549 N.W.2d 807, 809 (Iowa 1996) ("We believe the

[13] *See* Tr. v.1 p. 106, line 6—p. 108, line 19 (describing the ministerial tasks other Casey's employees performed on April 6, 2016).

word 'involved' is ambiguous. When the statutory language is ambiguous, the manifest intent of the legislature is sought and will prevail over the literal import of the words used."). The statute should not be interpreted in a way that would require training that would be useless given the employee's role. *See Sims v. NCI Holding Corp.*, 759 N.W.2d 333, 338 (Iowa 2009) ("'Substantial compliance is said to be compliance in respect to essential matters necessary to assure the reasonable objectives of the statute.'" (Citation omitted.)). *See also Dalarna Farms v. Access Energy Coop.*, 792 N.W.2d 656, 660 (Iowa 2010) ("We strive for 'a reasonable interpretation that best achieves the statute's purpose and avoids absurd results.' Legislative intent is ascertained not only from the language used but also from 'the statute's "subject matter, the object sought to be accomplished, the purpose to be served, underlying policies, remedies provided, and the consequences of the various interpretations."'" (Citations omitted.)). Casey's maintains, and asks this Court to hold, that the extensive training outlined in section 730.5(*h*) is only required for supervisory personnel *involved* with actual *testing* in a way

that the training would actually serve a purpose, and this does not include simply keeping track of employees while they are waiting to be tested.

In sum, Casey's implemented all thirteen structural elements required of the employer to initiate a testing program. Accordingly, Casey's "initiated a testing program in accordance with the testing … safeguards" under the statute, and satisfied section 730.5(11)'s second condition for statutory immunity.

Initiating a Compliant Testing Program Does Not Require the Employer to Ensure Perfect Execution of Each Test.

Appellees argue Casey's was responsible for strict compliance with each and every requirement of the statute—whether directed to the collectors,[14] the laboratory,[15] the MRO[16]—even the entity performing the random selection,

[14] *E.g.*, Iowa Code § 730.5(7)(*a*)–(*d*) (collection mechanics).

[15] *Id.* § 730.5(7)(*f*)–(*g*), (*l*) (laboratory requirements).

[16] *Id.* § 730.5(*h*) (MRO duties); *id.* § 730.5(1)(*g*) (mandating that the MRO must have "appropriate medical training to interpret and evaluate an individual's confirmed positive test result together with the individual's medical history and any other relevant biomedical information).

which, by statute, *must* be independent from the employer.[17] However, such a construction of the statute is inconsistent with section 730.5(11)'s grant of immunity to employers who have "*initiated* a testing *program* in accordance with the testing safeguards provided for under" the statute. Iowa Code § 730.5(11) (emphasis added). The statute uses the term "initiated," not "administered," "conducted," "maintained," or words of similar ongoing import. *Id.*; *see Schaefer*, 841 N.W.2d at 78 ("'[I]nitiate' means to start or commence."). Similarly, the statute refers to initiating a *program* not administering a *test*. Iowa Code § 730.5(11); *see Tuxis Ohr's Fuel, Inc.*, 72 A.3d at 21.

As a practical reality, employers *cannot* ensure compliance with every testing safeguard in the statute. For this reason, it makes sense for the legislature to immunize employers who have done everything within their power to implement a system of drug testing that complies with section

[17] *Id.* § 730.5(1)(*l*) (mandating that, for unannounced/random testing, "[t]he selection of employees to be tested from the pool … *shall be done* … by an entity independent from the employer" (emphasis added)).

730.5 (i.e., establish a compliant policy and implement the requisite infrastructural components).

If, after implementing all of the requisite infrastructure (which, as shown above, is significant), something goes awry in the random-selection process, the collection process, the laboratory testing process, or the MRO-verification process, it is fundamentally unfair to hold the employer liable for that third party's error or omission, so long as the employer acted in good faith.[18] Notably, the employer is not the only defendant to which an "aggrieved employee" may turn for relief. Section 730.5(15) provides for civil remedies against "[a] *person*" who violates section 730.5. Iowa Code § 730.5(15)(*a*)(1), (2)

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[18] If employers were held responsible for any and all missteps by selection personnel, collection personnel, laboratory personnel, or the MRO, this would discourage employers from testing at all—it is simply too much risk. However, this result is inconsistent with the public policy expressed by the legislature:

> It is the policy of this state to assure *so far as possible* every working person in the state *safe and healthful* working conditions and to preserve human resources by:
>
> 1. Encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to *stimulate employers* and employees *to institute new and perfect existing programs for providing safe and healthful working conditions*.

Iowa Code § 88.1 (emphasis added).

(emphasis added); *see also id.* § 730.5(14)(*b*) ("A laboratory or medical review officer involved in the conducting of a drug or alcohol test pursuant to this section shall be deemed to have the necessary contact with this state for the purpose of subjecting the laboratory or medical review officer to the jurisdiction of the courts of this state."). Thus, an employee who is aggrieved because of an aspect of the random-selection process, the collection process, or the laboratory or MRO stage of the process, may pursue equitable relief from the person who aggrieved them, but so long as the employer established a compliant policy, initiated a compliant program, and acted in good faith, the employer is immune under section 730.11.

This is the only interpretation that gives meaning to the Employer Immunity provision, because if employers were responsible for not only *initiating* a compliant *program*, but ensuring every test's perfect execution, the Employer Immunity provision would be rendered meaningless. An employer who is the guarantor of perfect execution in every step of the drug-testing process has no *need* for immunity under section 730.5(11) because there will not have been a

violation of section 730.5(4) or (7). *Cf. Maples v. Siddiqui*, 450 N.W.2d 529, 530 (Iowa 1990) ("[W]hen the legislature undertakes to grant immunity from civil liability, we must assume that this is intended to apply to those situations where liability would otherwise exist because of some negligent act or other breach of legal duty."). The statute must be interpreted so as to give effect to every provision, rendering none insignificant or superfluous, *Miller v. Marshall Cty.*, 641 N.W.2d 742, 749 (Iowa 2002)—particularly, an immunity provision, which is to be broadly construed, *Cubit v. Mahaska Cty.*, 677 N.W.2d 777, 784 (Iowa 2004) (collecting cases).

Casey's interpretation of the Immunity Provision also makes sense of the various sections of the statute that say employers may take action based on a confirmed positive test result. *See* Iowa Code § 730.5(7)(*g*) ("An employer may take adverse employment action … based on a confirmed positive test result for drugs or alcohol."); *id.* § 730.5(10)(*a*) ("Upon receipt of a confirmed positive test result for drugs or alcohol which indicates a violation of the employer's written policy, or upon the refusal of an employee or prospective employee to

provide a testing sample, an employer may use that test result or test refusal as a valid basis for disciplinary or rehabilitative actions ...."); *id.* § 730.5(7)(*m*) ("[A]n employer may rely and take action upon the results of any blood test for drugs or alcohol made on any employee involved in an accident at work if the test is administered by or at the direction of the person providing treatment or care to the employee without request or suggestion by the employer that a test be conducted, and the employer has lawfully obtained the results of the test."); *see also Sims v. NCI Holding Corp.*, 759 N.W.2d 333, 340 (Iowa 2009) ("Upon receipt of the positive test result evidencing Sims's violation of the written drug policy, NCI was authorized to terminate Sims's employment." (citing Iowa Code § 730.5(10)(*a*)(3))).

Casey's interpretation also gives effect to the *separate* immunity provision in section 730.5(12) for employers who act in good faith based on "false positive test results." *See* Iowa Code § 730.5(12). The existence of an entirely separate immunity provision for cases involving false positive results means that section 730.5(11)(*a*) must immunize employers in

some *other* type of case alleging violations of section 730.5. *See Irving v. Employment Appeal Bd.*, 883 N.W.2d 179, 194 (Iowa 2016) ("We should recognize the difference in adjacent statutory provisions, not ignore it."). Section 730.5(11)(*a*) fits squarely with this case—a case claiming aspects of a *test* violated the terms of the statute, but nonetheless yielded, as the appellees concede, *true* positive test results.

Overall, Casey's interpretation of the "initiated a program" clause harmonizes the other provisions of the statute that otherwise seem directly contradictory or superfluous. This is the goal. *See U.S. Bank Nat'l Assln v. Lamb*, 874 N.W.2d 112, 120 (Iowa 2016) ("We are tasked with harmonizing the various sections of the statute into a coherent whole."). As detailed above, Casey's "initiated a testing program in accordance with the testing … safeguards" and therefore satisfied the second condition for immunity. Section 730.5(11)(*a*) makes clear that perfection is not the standard employers must meet to avoid civil liability.

C. Casey's Acted in Good Faith.

The final condition for employer immunity under section 730.5(11) is that the employer "test[ed] or [took] action based on the results of a positive drug … test result …, in good faith, or on the refusal of an employee … to submit to a drug … test." *Id.* § 730.5(11)(*a*).[19] "'*Good faith*' means reasonable reliance on facts, or that which is held out to be factual, without the intent to be deceived, and without reckless, malicious, or negligent disregard for the truth." *Id.* § 730.5(1)(*f*).

When Casey's required Messrs. Dix, Cattell, and McCann and Ms. Eller to submit to testing on April 6, 2016, it acted based on facts. First, Casey's designated as safety-sensitive all employees whose worksite was warehouse, based on Casey's good-faith belief that its warehouse is an environment wherein

[19] *See generally* Legis. Serv. Bureau, *Summary of Legislation Enacted in the Year 1998 by the Second Regular Session of the Seventy-Seventh General Assembly and Signed by the Governor* at 142 ("The Act provides that *an employer shall not be liable for actions taken in good faith based on a positive drug or alcohol test*, for failing to test for drugs or alcohol or for failing to detect any specific drug or other controlled substance, for terminating or suspending a drug and alcohol testing program or policy, or for failing to take action relating to a false negative test result." (Emphasis added.)).

an accident could cause serious injury or property damage, based on the facts that numerous forklifts are zipping around the aisles (of racks of products stacked as high as the ceiling) at all times.[20] *See* Tr. v.1 p. 20, line 10—p. 23, line 25; Tr. v.1 p. 85, line 14—p. 87, line 4. Casey's gets to make this designation under the statute. *See* Iowa Code § 730.5(9)(*f*) ("An 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 …." (Emphasis added.)). *See generally Farmland Foods, Inc. v. Dubuque Human Rights Comm'n*, 672 N.W.2d 733, 743 (Iowa 2003) (recognizing "employer's business judgment and expertise").

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[20] *See* Nat'l Safety Council, *Fact Sheet No. 1: Ensuring Pedestrian Safety Around Power Industrial Trucks* (May 2011) ("Safety for pedestrians is often overlooked in lift truck safety programs. According to 2008 data from the U.S. Department of Labor's Bureau of Labor Statistics, the number one cause of lift truck related work fatalities is pedestrians being struck by the vehicle."); OSHA, DOL, *Powered Industrial Trucks (Forklift) E-Tool: Pedestrian Traffic* (last visited Oct. 28, 2018) ("Many pedestrians or bystanders are injured in forklift-related accidents. These injuries can occur when forklifts strike pedestrians or when pedestrians are struck by falling loads."); Nat'l Inst. for Occupational Safety & Health, *NIOSH Alert: Preventing Injuries and Deaths of Workers Who Operate or Work Near Forklifts* (June 2001) ("**WARNING!** Workers who operate or work near forklifts may be struck or crushed by the machine or the load being handled."); OSHA, OSHA 3220-10N 2004, *Worker Safety Series: Warehousing* (2004) (noting "[t]he fatal injury rate for the warehousing industry is higher than the national average for all industries," and the number one hazard is forklifts).

Second, Casey's HR team made the pool list to send to ARCpoint from schedules they obtained from the warehouse supervisors. Tr. v.1 p. 15, lines 3-6; Tr. v.1 p. 98, lines 7–23. While these schedules did not match perfectly with the employees who actually were at work during the testing window on April 6, Casey's acted in good faith based on the written warehouse schedules.

Third, in testing the appellees, Casey's acted based on the fact that ARCpoint was supposed to randomly select 90% of the employees from to pool, in accordance with section 730.5(1)(*l*), and ARCpoint sent back a list of selected employees, and that list included each of the appellees. *See* Tr. v.1, p. 101, lines 19–25; Tr. v.1 p. 99, lines 2–10; App. pp. 542-543, 559, 562-563. While a few names were omitted, due to human error, Casey's reliance on the list that included the appellees was reasonable and in good faith.

Finally, when Casey's took action against Messrs. Dix, Cattell, and McCann based on their confirmed positive test results, it acted on the basis of Casey's receipt of Medical Review Officer Reports indicating positive test results for Mr.

Dix, App. p. 548, Mr. Cattell, App. p. 554, and Mr. McCann, Supp. App. p. 71. Casey's reliance on these MRO Reports, as the basis for termination, was reasonable and "without the intent to be deceived, and without reckless, malicious, or negligent disregard for the truth." Iowa Code § 730.5(1)(*f*).

Under the plain language of the statute, good faith was not required to take action against Ms. Eller for her refusal to submit. *See id.* § 730.5(11) (stating there is no cause of action where the employer "test[ed] or [took] action based on the results of a positive drug … test result …, in good faith, *or on the refusal* of an employee … to submit to a drug … test" (emphasis added)). Nevertheless, it existed, insofar as Casey's reasonably relied on ARCpoint's form stating: "1:21—shy" and "2:13—shy—No test/Walk out," as well as on Ms. Eller's departure from the worksite despite the warning that if she left, she would be resigning. App. p. 558; (Tr v.1 p. 187, lines 6–12); (Tr v.1 p. 209, lines 2-5). Casey's Policy defines "refusal to submit" to include "fail[ure] to provide an adequate specimen without satisfactory medical explanation." App. p. 489.

In summary, Casey's acted in good faith and therefore satisfied the third condition for statutory immunity under section 730.5(11). Casey's established a compliant policy, initiated a compliant program, and acted in good faith in testing the appellees and taking action based on their test results. Casey's is immune from liability, and this Court should reverse the judgment on this basis alone. Iowa Code § 730.5(11)(*a*).

II. CASEY'S SUBSTANTIALLY COMPLIED WITH IOWA CODE SECTION 730.5.

Even if this Court rejects the argument that Casey's was immune under section 730.5(11), the judgment should still be reversed because Casey's substantially complied with section 730.5. The standard of review is *de novo*. Iowa R. App. P. 6.907. Casey's preserved error on this issue by raising it in its motion for summary judgment, motion for judgment as a matter of law, renewed motion or judgment as a matter of law, trial brief, and post-trial brief. App. pp. 21-41; Tr. v.2 p. 74, line 12—p. 75, line 25; App. pp. 152-184.

For the most part, the District Court properly rejected most of Appellees' alleged bases for being "aggrieved employee[s]" under section 730.15(*a*)(1). *See* App. pp. 198-199 ("The defendants have established that they substantially complied with the provisions found in § 730.5 regarding the methodology used to select the employees from the identified pool for testing."); App. p. 199 at n.18) (finding Casey's use of alternates did not violate the statute, because the statute does not prohibit it); App. p. 204 (finding Casey's interpretation of the word "periodic" in section 730.5(1)(*l*) (sporadically/from time to time, as opposed to in regularly scheduled intervals) could not have adversely affected the appellees, whom Casey's tested in the first unannounced test ever); App. pp. 204-205 (finding Casey's use of the warehouse locker-room restrooms as "collection facilities"—despite the fact that the Policy defines that term as "[a] certified collection site such as an occupational health center, a hospital or otherwise identified clinic or facility to which a … current employee may be sent for a drug test"—did not violate section 730.5 because the statute does not require drug tests to occur in a "collection

facility"); App. pp. 205-206 (finding substantial compliance with the training requirement (discussed above)); App. p. 206 (finding the collection site substantially complied with section 730.5(7)(*a*)'s safeguards regarding cleanliness and privacy); App. p. 208 (finding no adverse effect on Messrs. Dix, Cattell, or McCann's employment, resulting from Casey's not providing them a list of the drugs to be tested on test day and admonishing them to not provide Casey's with medical information).

The single alleged error that the District Court found actionable was Casey's designation of Mr. McCann and Ms. Eller as being in "safety-sensitive positions." App. pp. 199-201. As noted above, the District Court incorrectly characterized this designation as a flaw in the *Policy*. App. p. 201. Further, the Court improperly usurped Casey's business judgment to designate which employees are in safety-sensitive positions, when it concluded Mr. McCann and Ms. Eller's positions could not be designated safety-sensitive based on their work environment.

It is *Casey's* who would be liable for a warehouse accident causing loss of human life or serious bodily injury. *See* Iowa Code § 85.3(1) ("Every employer … shall provide, secure, and pay compensation … for any and all personal injuries sustained by an employee arising out of and in the course of the employment …."). Likewise, it is *Casey's* property in the warehouse that stands to be damaged in the event of an accident. Therefore, it should be *Casey's* who gets to decide whether a job in its warehouse is "a job wherein an accident could cause loss of human life, serious bodily injury, or significant property or environmental damage." Iowa Code § 730.5(1)(*j*).

The statute shows that the legislature intended it to be the *employer* who designates an employee as being in a safety-sensitive position. *See id.* § 730.5(9)(*f*) ("An 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 pursuant to subsection 8, paragraph '*a*', subparagraph (3)." (Emphasis added.)). If a position either was or was not,

objectively speaking, safety-sensitive, then section 730.5(9)(*f*) would not have needed to include the words "designated by the employer as being"; rather, it could have saved the six words and simply said "An employee of an employer who is in a safety-sensitive position …." The legislature, of course, did *not* write the statute that way, and these six words must be construed to mean something—to serve some purpose. *See Rojas v. Pine Ridge Farms, L.L.C.*, 779 N.W.2d 223, 231 (Iowa 2010) ("We also presume the legislature included all parts of the statute for a purpose, so we will avoid reading the statute in a way that would make any portion of it redundant or irrelevant.").

Moreover, the District Court's conclusion is not compelled by the text of the statutory definition (the Court read a lot into the word "job"), nor by logic. It very well may be the environment in which duties are performed, rather than the duties themselves, that make a job one in which an accident "could cause loss of human life, serious bodily injury, or significant property or environmental damage." Iowa Code § 730.5(1)(*j*). *See, e.g.*, *Smith v. Fresno Irrigation Dist.*, 84 Cal.

Rptr. 2d 775, 788 (Ct. App. 1999) (noting housekeeping is not a safety-sensitive job if the worksite is a hotel or kitchen, but it is when the worksite is an offshore oil drilling platform because it is a "hazardous environment"; holding worker was in a safety-sensitive position, in part because he worked in and around dirt trenches—"Here, there exist both a hazardous working environment and hazards inherent in the work itself." (citing *Am. Federation of Labor v. Unemployment Ins. Appeals Bd.*, 28 Cal. Rptr. 2d 210 (Ct. App. 1994)). *Cf. Koehler Elec. v. Wills*, 608 N.W.2d 1, 2–3 (Iowa 2000) (holding workers' compensation claimant's *working environment* placed him in a position that exposed him to danger, sufficient to conclude his injury (falling off a five-foot ladder due to alcohol withdrawal) "arose out of" his employment").

Consider, for example, washing windows. There is nothing about the act of cleaning a window that is dangerous. However, if the windows being washed are on a skyscraper, and the employee is working from a suspended platform, the job clearly is one wherein an accident could cause loss of human life or serious bodily injury. Alternatively, consider a

cashier at a fireworks store. There is nothing dangerous about cashiering, but the environment in which it is performed (being surrounded by explosives) makes it one wherein an accident (an errant cigarette butt, perhaps) could cause significant property damage. Similarly, while there is nothing inherently dangerous about Mr. McCann and Ms. Eller's duties (counting packs of cigarettes), the environment in which the duties are performed (a warehouse in which forklifts zip around racks of products stacked to the ceiling) make the job one "wherein an accident could cause loss of human life, serious bodily injury, or significant property or environmental damage." Iowa Code § 730.5(1)(*j*).

While it may be (hopefully) unlikely that a light-duty warehouse worker would be struck by a forklift while walking to or from the "cage," the statute says "*could* cause," not "is likely to cause." *Id.* (emphasis added). Moreover, the employer's judgment on safety-sensitivity is not outcome-determinative, given the fact that section 730.5 (unlike the Fourth Amendment and many other states' statutes) does *not* limit unannounced testing to employees in safety-sensitive

positions. *See* Iowa Code § 730.5(8)(*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 …. (2) The entire full-time active employee population at a particular work site …. (3) All employees at a particular work site who are in a pool of employees in a safety-sensitive position ….").

While Casey's *Policy* limits unannounced testing to safety-sensitive employees, the statute does *not*. Thus, assuming, *arguendo*, that Casey's improperly included Mr. McCann and Ms. Eller in the safety-sensitive pool, this would only violate Casey's *Policy*, not section 730.5. The District Court correctly held: "A cause of action under § 730.5(15) requires a violation of the statute. A violation of an employer's drug testing policy without a corresponding violation of § 730.5 is not actionable." App. p. 205 (citing Iowa Code § 730.5(15)(*a*)(1) ("A person who violates *this section* …." (Emphasis added.)). Although section 730.5(9)(*a*) contains the phrase "testing … shall be carried out within the terms of a

written policy," this phrase cannot be read in isolation. *See Iowa Ins. Inst. v. Core Grp. of Iowa Ass'n for Justice*, 867 N.W.2d 58, 72 (Iowa 2015) ("[W]e read statutes as a whole rather than looking at words and phrases in isolation.").

The phrase appears in the paragraph governing *notice* (not the paragraph that limits the types of testing that can be conducted (section 730.5(8)), and not the paragraph that sets forth the "requirements" for testing as a condition of employment (section 730.5(4))). The *notice* provision states:

> (1) Drug or alcohol testing or retesting by an employer shall be carried out within the terms of a written policy *which has been provided to every employee subject to testing, and is available for review by employees and prospective employees*.

Iowa Code § 730.5(9)(*a*)(1) (emphasis added). Read in context, it is clear that the purpose of this notice provision is not to impose a requirement that policy compliance is necessary to establish statutory compliance. Rather, the purpose was "to ensure that employers would set uniform standards for discipline and rehabilitation and would provide notice to all employees of necessary information regarding their employer's

drug-testing policy." *Munn v. Kraft Foods Glob., Inc.*, 455 F. Supp. 2d 925, 933 (S.D. Iowa 2006).

Casey's detailed written policy, as well the Acknowledgments signed by each of the appellees, establishes substantial compliance with section 730.5(9)(*a*)(1). *See Sims v. NCI Holding Corp.*, 759 N.W.2d 333, 338 (Iowa 2009) ("'Substantial compliance is said to be compliance in respect to essential matters necessary to assure the reasonable objectives of the statute.'"). Casey's Policy served the intended purpose of notifying all warehouse employees, including each of the appellees, that (1) Casey's considered them to be in a safety-sensitive position, (2) they were subject to unannounced drug testing, (3) the could be tested for marijuana and amphetamines, (4) if they had a confirmed positive test, they would be terminated, and (5) in Ms. Eller's case, that the failure to provide a sufficient specimen for testing would be deemed a refusal to submit and would be deemed a resignation. *See* App. p. 487 ("TO: All Safety Sensitive Employees—Service Warehouse, Distribution Center Warehouse and Vehicle Maintenance"); App. pp. 538-541

(Acknowledgments stating at the top: "Policy Covers: All Safety Sensitive Employees"); Tr. v.1 p. 167 line 4—p. 170, line 23 (Dix understood); Tr. v.1 p. 154, lines 10-15 (Cattell understood); Tr. v.1 p. 203, line 14—p. 206, line 19 (Eller understood); Tr. v.2 p. 39, line 5—p. 40, line 5; Tr. v.1 p. 234, lines 16-24) (McCann understood).

In summary, the District Court correctly rejected most of the bases under which Appellees claimed to be "aggrieved." After all, Messrs. Dix, Cattell, and McCann do not challenge the accuracy of their confirmed positive tests for illegal drugs. Ms. Eller does not claim she had a medical excuse for her failure to provide a sufficient sample for testing, and she does not assert her decision to leave at 2:21 was anything but knowing and voluntary. The only way the District Court was able to arrive at the conclusion that any of the appellees was "aggrieved" under section 730.5(15)(*a*)(1) was to conclude, based on out-of-state cases decided under out-of-state statutes, that Mr. McCann and Ms. Eller should not have been classified as safety-sensitive. However, as discussed above, Casey's may designate all warehouse workers as safety-

sensitive based on its business judgment, and even if the Court disagrees with this designation, there is no statutory violation because section 730.5 does not require employees to be designated safety-sensitive in order to be tested. *See* Iowa Code § 730.5(8)(*a*)(1) (allowing employees to comprise a pool of "[t]he entire employee population at a particular work site," which is precisely what Casey's did). The District Court's contrary conclusion is an error of law, and this Court should reverse the judgment entered in favor of Mr. McCann and Ms. Eller.

III. IT IS INEQUITABLE TO AWARD JIMMY MCCANN 22 MONTHS OF BACKPAY UNDER IOWA CODE SECTION 730.5(15)(*a*)(1) WHEN HE APPLIED FOR A SINGLE JOB, THEN WITHDREW, BEFORE DECIDING TO START A FOOD TRUCK BUSINESS.

Even if the Court concludes Casey's is not immune under section 730.5(11), and did not substantially comply with section 730.5, the judgment should still be reversed because the relief awarded to Jimmy McCann was inequitable. Casey's preserved error on this issue by raising it in its trial brief; post-trial brief, App. pp. 152-184; resistance to Plaintiffs' motion to amend, App. pp. 219-308; and motion to reconsider,

App. pp. 309-320. The Court ruled against Casey's when it awarded Mr. McCann $94,889.05 in backpay. App. pp. 211, 454-459. The standard of review is *de novo*. Iowa R. App. P. 6.907.

Section 730.5(15)(*a*)(1) provides for "affirmative relief including reinstatement or hiring, with or without back pay, or any other equitable relief as the court deems appropriate." Iowa Code § 730.5(15)(*a*)(1). Mr. McCann did not seek reinstatement to Casey's. *See* Supp. App. p. 42 ("Jimmy has started his own business, and Julie does not wish to return to a position in which she does not believe she will be treated fairly."). Instead, he only asked for backpay and frontpay. Under this statute, backpay and frontpay are *equitable* remedies. *See* Iowa Code § 730.5(15) (providing 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" (emphasis added)). Thus, Mr. McCann is invoking the Court's *equitable* powers to recover wages and benefits he lost because he

admittedly tested positive for illegal drugs and then *admittedly* did essentially nothing to replace those wages and benefits.

As this Court has explained,

> The equity maxim of clean hands
>
> > expresses the principle that where a party comes into equity for relief he or she must show that his or her conduct has been fair, equitable, and honest as to the particular controversy in issue. A complainant will not be permitted to take advantage of his or her own wrong or claim the benefit of his or her own fraud or that of his or her privies.

27A Am. Jur. 2d *Equity* § 126, at 605 (1996).

The maxim means

> that whenever a party who seeks to set the judicial machinery in motion and obtain some equitable remedy has violated conscience or good faith, or another equitable principle in prior conduct with reference to the subject in issue, the doors of equity will be shut, notwithstanding the defendant's conduct has been such that in the absence of circumstances supporting the application of the maxim, equity might have awarded relief.

Id.

What underlies the maxim is the principle that "equity will not aid an applicant in *securing* or *protecting* gains from wrongdoing or in escaping its consequences." *Id.* at 605–06 (emphasis added). The

> maxim "is ordinarily invoked to protect the integrity of the court where granting affirmative equitable relief would run contrary to public policy or lend the court's aid to fraudulent, illegal or unconscionable conduct." *Myers v. Smith,* 208 N.W.2d 919, 921 (Iowa 1973).
>
> The clean hands maxim need not be pleaded; the district court may apply the maxim on its own motion. *Id.*

Opperman v. M. & I. Dehy, Inc., 644 N.W.2d 1, 6 (Iowa 2002).

Mr. McCann lost his job at Casey's because he used illegal drugs. Awarding him backpay rewards his wrongdoing and absolves him of its consequences, contrary to the clean-hands maxim. *See id.*

Mr. McCann explored only one job after being terminated from Casey's—the job with Plumb Supply. Despite understating Plumb was "very interested" in hiring him, Mr. McCann decided to withdraw from consideration in May 2016 (noting his affinity for left-handed cigarettes), ostensibly because the job was too far away, and he wanted to reserve time to attend his daughter's activities. Instead of looking for other jobs, in July 2016, Mr. McCann decided to go into the food truck business—an endeavor with which he had no

training or experience—and started "Good Vibes." Tr. v.2 p. 52, line 24—p. 53, line 2. Good Vibes did not start serving food until June 2017 (more than a year after Mr. McCann's termination). *Id.* Other than a one-time "cash job" for a "buddy," Mr. McCann *chose* not to be employed because he was devoting his time to starting Good Vibes. Tr. v.2 p. 58, lines 12—p. 59, line 1. At the time of trial, Good Vibes had made no profit. App. p. 519. Despite all this, the District Court found Mr. McCann's "efforts post-termination cannot be described as unreasonable" and awarded him 22 months of backpay (almost $100,000). App. p. 209.

Contrary to the District Court's opinion, Mr. McCann's actions were objectively unreasonable. Had he proceeded with the Plumb Supply opportunity, or sought any employment elsewhere, he *would have* obtained employment. *See LaFontaine v. Developers & Builders, Inc.*, 156 N.W.2d 651, 657 (Iowa 1968) ("Equity courts will not hesitate to indulge in inferences which will avoid unfair or inequitable results."). Instead, he withdrew from the labor market and decided to gamble on a speculative business venture. These actions make

it inequitable to award him backpay. *See generally Tubari Ltd., Inc. v. NLRB*, 959 F.2d 451, 454 (3d Cir. 1992) ("[T]he employer meets its burden on the mitigation issue by showing that the employee has withdrawn from the employment market."); *Hansard v. Pepsi-Cola Metro. Bottling Co.*, 865 F.2d 1461, 1468 (5th Cir. 1989) ("A plaintiff may not simply abandon his job search and continue to recover back pay."). This Court should reverse the judgment entered in favor of Jimmy McCann.

IV. IT IS INEQUITABLE TO AWARD JULIE ELLER 22 MONTHS OF BACKPAY AND TWO YEARS OF FRONTPAY UNDER IOWA CODE SECTION 730.5(15)(*a*)(1) WHEN SHE FAILED TO LOOK FOR WORK *AT ALL* AFTER HER TERMINATION.

Even if the Court finds Casey's was not immune under section 730.5(11) and did not substantially comply with Iowa Code section 730.5, the judgment should still be reversed because the relief awarded to Julie Eller was inequitable. Casey's preserved error on this issue by raising it in its trial brief; post-trial brief, App. pp. 152-184; resistance to Plaintiffs' motion to amend, App. pp. 219-308; and motion to reconsider, App. pp. 309-320. The Court ruled against Casey's when it awarded Ms. Eller $85,630.75 in backpay and $96,871.72 in

frontpay. App. pp. 211, 454-459. The standard of review is *de novo*. Iowa R. App. P. 6.907.

Ms. Eller's efforts to mitigate her damages were even more deficient than Mr. McCann's. In fact, they were *nonexistent*; she did not look for work *at all* between her termination in April 2016 and trial in February 2018. Tr. v.2 p. 93 line 22—p. 94 line 2. Given this complete and total failure to avoid economic loss, it is inequitable to award Ms. Eller backpay or frontpay. *See Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1, 16 (1st Cir. 1999) ("Other courts of appeals … uniformly have relieved the defendant-employer of the burden to prove the availability of substantially equivalent jobs in the relevant geographic area once it has been shown that the former employee made no effort to secure suitable employment." (collecting cases)); *Denesha v. Farmers Ins. Exch.*, 161 F.3d 491, 502 (8th Cir. 1998) ("[A] plaintiff must make some sustained minimal attempt to obtain comparable employment." (Citations omitted.)); *Sangster v. United Air Lines, Inc.*, 633 F.2d 864, 868 (9th Cir. 1980) ("[C]ourts have long held that back pay is not to be awarded when the

evidence shows a willful loss of earnings. Developed from this general concept, the more specific acts which constitute such willful conduct are: failure to remain in the labor market, refusal to accept substantially equivalent employment, failure diligently to search for alternative work, or voluntarily quitting alternative employment without good reason." (Citations omitted.)).

Insofar as the District Court's ruling rested on Ms. Eller's disability, she cannot recover backpay or frontpay during a period when she was unable to work. *See Children's Home of Cedar Rapids v. Cedar Rapids Civil Rights Comm'n*, 464 N.W.2d 478, 482 (Iowa Ct. App. 1990) ("Ann Pizinger, one of the complainants, acknowledged on the record she had been unable to work due to a disability caused by mental illness for some time. The Commission apparently awarded her back wages and benefits for the period she could not work. *The Commission should only have awarded back pay and benefits up to the time when she could no longer work or stopped looking for comparable employment.*" (Emphasis added.)); *see also Hine v. Mineta*, 238 F. Supp. 2d 497, 501 (E.D.N.Y. 2003) (denying

frontpay and finding "a total failure to mitigate in any manner," despite plaintiff's claim that "she was unable to seek other employment because of her alleged emotional injuries sustained"). Although Ms. Eller testified she thought she could work in her former position at Casey's, she did not seek reinstatement to that position, and also testified "yes and no," as to whether she could work, Tr. v.1 p. 210—p. 211, and indicated she might need a heart and lung transplant, and her intent was to file for social security disability benefits. App. p. 119 at ¶ 108; Tr, v.1 p. 213 lines 11–17. Ms. Eller's ability to work at the time of trial was doubtful; her ability to work two years beyond that date (the date up to which the Court awarded her frontpay) was downright unlikely.

For all of these reasons, this Court should reverse the judgment entered in favor of Julie Eller.

CONCLUSION

The District Court erred when it summarily rejected Casey's argument that it is immune under Iowa Code section 730.5. Casey's has satisfied all three statutory conditions for immunity, and therefore, this Court should reverse the District

Court's judgment in favor of Jimmy McCann and Julie Eller, and affirm the District Court's judgment against Tyler Dix and Jason Cattell.

Even if this Court determines Casey's is not entitled to immunity under Iowa Code section 730.5(11), the District Court's judgment in favor of Mr. McCann and Ms. Eller should be reversed because Casey's substantially complied with Iowa Code section 730.5. Casey's did not violate the statute when it designated Mr. McCann and Ms. Eller as being in safety-sensitive positions, because (1) they may be properly designated as safety-sensitive *by their employer*, and (2) even if they were not safety-sensitive, the statute allowed Casey's to put all employees at a particular worksite (the warehouse) in a pool and have ARCpoint select from that pool. Mr. McCann and Ms. Eller cannot be said to be "aggrieved" by any violation by Casey's of the *statute*.

Even if the Court determines Casey's is not immune and did not substantially comply with section 730.5, the judgment in favor of Jimmy McCann and Julie Eller should still be reversed because it is inequitable to award them backpay or

frontpay under the circumstances of this case. Awarding Mr. McCann backpay rewards him for admitted illegal drug use. Awarding Ms. Eller backpay and frontpay when she admittedly did *nothing* to mitigate her damages rewards her for passively incurring avoidable losses.

Finally, Casey's asks this Court to reverse the District Court's award of attorney fees and costs to Jimmy McCann and Julie Eller. For the reasons discussed above, they were not aggrieved by any statutory violation by Casey's. Therefore, attorney fees and costs are not recoverable under section 730.5(15)(*a*)(1).

REQUEST FOR ORAL ARGUMENT

Casey's respectfully requests to submit this case with argument.

Respectfully submitted,

/s/ *Ann H. Kendell*

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on February 25, 2019, I electronically filed this document with the Supreme Court Clerk using the EDMS system, which will serve it on the appropriate parties electronically.

/s/ *Ann H. Kendell*
Ann H. Kendell

CERTIFICATE OF COMPLIANCE

1. The brief complies with the type-volume limitation of Iowa Rules of Appellate Procedure 6.903(1)(*d*) and 6.903(1)(*g*)(1) or (2) because this brief contains 12,680 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(*g*)(1).

2. This brief complies with the typeface requirements of Iowa Rule of Appellate Procedure 6.903(1)(*e*) and the type-style requirements of Iowa Rule of Appellate Procedure 6.903(1)(*f*) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Bookman Old Style.

/s/ *Ann H. Kendell*
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