ELECTRONICALLY FILED MAY 08, 2019 CLERK OF SUPREME COURT

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 REPLY BRIEF

Harley C. Erbe, AT002430
ERBE LAW FIRM
2501 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 281-1460
Facsimile: (515) 281-1474
E-Mail: harleyerbe@erbelaw.com

ATTORNEY FOR
PLAINTIFF/APPELLANT
LUCAS WOODS

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ARGUMENT

I. Defendant's General Drug Testing Policies And Procedures Are Irrelevant To The Issue Of Defendant's Noncompliance With The Three Sections Of Iowa Code § 730.5 That Plaintiff Has Identified.

Defendant's lengthy and mostly irrelevant Statement Of Facts is an exercise in obfuscation intended to distract the Court from the three narrow appeal issues – Defendant's noncompliance with Iowa Code § 730.5(9)(h)'s training requirements, Defendant's noncompliance with Iowa Code § 730.5(7)(j)(1) post-test notice requirements because Defendant's notice to Plaintiff did not specify the cost of retesting, and Defendant's noncompliance with Iowa Code § 730.5(7)(j)(1) post-test notice requirements because its notice to Plaintiff was not sent by certified mail, return receipt requested. Although Defendant is dissatisfied with Plaintiff's Statement Of Facts, Plaintiff, unlike Defendant, correctly limited his Statement Of Facts to the few facts relevant to Defendant's lack of substantial compliance with the above statutory mandates.

Defendant goes to great lengths to keep the focus on its general drug testing policies and procedures and on Plaintiff's allegedly positive drug test, as if those are the only issues and the beginning, middle, and end of the discussion. But when Defendant chose to fire Plaintiff based on those alleged test results, Defendant also committed itself to complying with Iowa

Code § 730.5. Drug testing policies and procedures and a supposedly positive drug test are only part of the analysis. Defendant missed several of the statutorily-mandated requirements and procedures that must follow an allegedly positive drug test if the employer wishes to discharge the employee based on such test.

II. Defendant Must Establish Substantial Compliance With Each Section Of Iowa Code § 730.5 That Plaintiff Has Identified.

The Court should reject Defendant's position that substantial compliance is analyzed with respect to 730.5 as a whole, rather than with respect to each of 730.5's individual, specific requirements. Defendant's assertion that its 730.5 violations can be disregarded as long as it substantially complied with the balance of the statute, and thus supposedly substantially complied when the statute is viewed as whole, rather than as individual sections, is wrong. The issue is whether Defendant substantially complied with each of 730.5's requirements, regardless of its level of compliance with other sections.

The appellate decisions regarding Iowa Code § 730.5 bear this out. Iowa's drug testing decisions always focus on specific statutory requirements and whether such requirements were violated. No appellate

decision has ever taken a global substantial compliance view of 730.5 in the manner that Defendant suggests. For example, in *Harrison v. Employment Appeal Board*, 659 N.W.2d 581 (Iowa 2003), the court held that the employer's noncompliance with 730.5's notice provisions was sufficient to bar the employer's reliance on the drug test results and consequently declined to address other arguments concerning the employer's compliance with the technical requirements for drug testing or the validity of the employer's drug testing policy, *id.* at 586. In *McVey v. National Organization Service, Inc.*, 719 N.W.2d 801 (Iowa 2006), the sole issue on appeal was whether the employer had complied with 730.5's written policy requirement, which is "[a]mong the detailed requirements for employee drug testing that are contained in section 730.5 . . . ," *id.* at 803. The proper method of evaluating Defendant's compliance with Iowa Code § 730.5 is to individually analyze each claimed violation to determine whether substantial compliance exists in each instance.

III. Defendant Did Not Substantially Comply With Iowa Code § 730.5(9)(h)'s Training Requirements.

A. Plaintiff Preserved Error On This Issue.

Plaintiff preserved error on the issue of Defendant's violation of Iowa Code § 730.5(9)(h). Plaintiff raised this argument in Plaintiff's Proposed Findings Of Fact And Conclusions Of Law. (App. Vol. 1 at 16-17.) When the district court did not specifically rule on that contention in its December 15, 2018 posttrial order, Plaintiff brought that omission to the lower court's attention through Plaintiff's Motion To Reconsider, Enlarge, or Amend under Rule 1.904(2) of the Iowa Rules of Civil Procedure and Plaintiff's brief supporting that motion. (App. Vol. 1 at 27, 29-30.)

On December 28, 2018, the district court summarily denied Plaintiff's Motion To Reconsider, Enlarge, or Amend: "Before the court is Plaintiff Lucas Woods' Motion to Reconsider, Enlarge or Amend (the Motion). Upon review of the Motion and the court file, the court finds and concludes that there is no basis for reconsidering, enlarging or amending the court's merits order filed December 15, 2018. **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that the Motion is **DENIED**." (App. Vol. 1 at 55.) Plaintiff could not have done more to bring his Iowa Code § 730.5(9)(h) training argument to the district court's attention and seek a ruling on that issue.

The general rule of error preservation is that an appellate court will not consider an issue that was not presented to the district court. *In re Detention of Anderson*, 895 N.W.2d 131, 138 (Iowa 2017). In order for error to be preserved, the issue must be both raised before and decided by the district court. *Id.* The error preservation rules were not designed to be hypertechnical. *Id.*

If a party raises an issue and the district court does not rule on it, the party must file a motion to request a ruling on that issue. *DuTrac Cmty. Credit Union v. Hefel*, 893 N.W.2d 292, 294 (Iowa 2017). If there are alternative claims, and the district court does not rule on all of them, the losing party must file a posttrial motion to preserve error on the claims not ruled on. *Stammeyer v. Div. of Narcotics Enforcement of Iowa Dept. of Pub. Safety*, 721 N.W.2d 541, 548 (Iowa 2006). The claim or issue raised does not actually need to be used as the basis for the decision to be preserved, but the record must at least reveal the court was aware of the claim or issue and litigated it. *Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002). The failure to obtain a ruling is inexcusable unless the district court refuses or fails to rule after a ruling is requested. *Linge v. Ralston Purina Co.*, 293 N.W.2d 191, 195 (Iowa 1980). A Rule 1.904(2) motion is a proper method

for preserving error in such situations. *Sierra Club Iowa Chapter v. Iowa Dep't of Transp.*, 832 N.W.2d 636, 641 (Iowa 2013).

Plaintiff properly raised the Iowa Code § 730.5(9)(h) issue through his posttrial brief. *Linge*, 293 N.W.2d at 196. Plaintiff correctly filed a Rule 1.904(2) motion when the district court's posttrial order omitted the Iowa Code § 730.5(9)(h) training argument. *Madden v. City of Eldridge*, 661 N.W.2d 134, 138 (Iowa 2003). The district either refused to rule on the Iowa Code § 730.5(9)(h) question or summarily rejected it in its December 15, 2018 order. Under either scenario regarding the December 15, 2018 order, Plaintiff was not required to do more to preserve error. *Id.*; *Metro. Transfer Station, Inc. v. Design Structures, Inc.*, 328 N.W.2d 532, 535 (Iowa Ct. App. 1982).

B. Defendant Did Not Prove That It Substantially Complied With Iowa Code § 730.5(9)(h)'s Training Requirements.

Defendant's position regarding its compliance with Iowa Code § 730.5(9)(h)'s training requirements is baseless. That section is clear that its requirements must be met "[i]n order to conduct drug or alcohol testing under" Iowa Code § 730.5. It does not matter what Plaintiff thinks about the validity of Defendant's drug testing policies or the propriety of the testing

that caused his discharge. Not only are Plaintiff's beliefs irrelevant to the specific question of Defendant's compliance with Iowa Code § 730.5(9)(h)'s training requirements, but Plaintiff's beliefs that Defendant referenced were unrelated to the training of Defendant's employees. Rather, such beliefs concerned the validity of Defendant's written drug testing policy and the precise circumstances of the testing that preceded Plaintiff's termination. The lower court should be reversed on this point.

IV. Defendant Did Not Substantially Comply With Iowa Code § 730.5(7)(j)(1) Because Its Post-Test Notice To Plaintiff Did Not State The Cost To Plaintiff Of Retesting.

Defendant spends much time identifying what the post-test notice to Plaintiff stated. That is the wrong focus. In this situation, it is not the contents of the notice that are important. What matters is what was missing from that notice – The statement of the cost of retesting to Plaintiff that Iowa Code § 730.5(7)(j)(1) mandates. That omission of statutorily required information from Defendant's post-test notice to Plaintiff, regardless of any other language in the notice, precludes a finding of substantial compliance. *Harrison*, 659 N.W.2d at 587-88; *Skipton v. S & J Tube, Inc.*, 2012 WL 3860446, at *4 (Iowa Ct. App. Sept. 6, 2012).

V. The Court Should Reject Defendant's Attempt To Add A Previously Unstated Reason For Terminating Plaintiff.

Defendant includes a discussion of its reasons for discharging Plaintiff even though that is not a disputed issue and is not a matter that Plaintiff raised on appeal. Plaintiff does not dispute that Defendant terminated him because he allegedly failed a drug test. It is unclear why Defendant argued this uncontested aspect of Plaintiff's firing.

One reason why Defendant may have done this is to try to sneak in a new ground for terminating Plaintiff that Defendant never asserted contemporaneously with Plaintiff's discharge or at trial – The allegation that he admitted using methamphetamine to Brandon Carter, the testing employee at Mid-Iowa Occupational Testing. Defendant cites no record evidence, because there is none, that Plaintiff's supposed admission was an alternative termination grounds. That is because there is no record evidence that Mr. Carter shared Plaintiff's alleged statement with Defendant. Thus there was no evidence that Defendant knew of Plaintiff's supposed admission at the time of Plaintiff's termination. Defendant cited no record evidence to the contrary.

From the time of Plaintiff's drug test through trial, the allegedly failed drug test was the sole reason that Defendant provided for firing Plaintiff. The Court should disregard Defendant's attempt to revise history and add a

discharge ground that previously did not exist, particularly in light of the stated discharge reason that Defendant provided in Defendant's Exhibit Q, (App. Vol. 1 at 166), and Defendant's failure to cite to any record evidence that Plaintiff's alleged admission was a factor in Plaintiff's termination. Moreover, the Court should view Defendant's effort in this regard as an indication of the weakness of Defendant's substantial compliance arguments. Defendant is clearly trying to hedge its bets by conjuring a second discharge reason that will stand even in the face of its noncompliance with the three Iowa Code § 730.5 sections that Plaintiff has identified.

CONCLUSION

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

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

Harley C. Erbe, AT002430
ERBE LAW FIRM
2501 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 281-1460
Facsimile: (515) 281-1474
E-Mail: harleyerbe@erbelaw.com

ATTORNEY FOR
PLAINTIFF/APPELLANT
LUCAS WOODS

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 1,779 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

Dated: May 8, 2019

/s/ Harley C. Erbe

Harley C. Erbe, AT002430
ERBE LAW FIRM
2501 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 281-1460
Facsimile: (515) 281-1474
E-Mail: harleyerbe@erbelaw.com

ATTORNEY FOR
PLAINTIFF/APPELLANT
LUCAS WOODS

CERTIFICATE OF SERVICE

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

Steven H. Shindler, Esq.
James R. Hinchliff, Esq.
SHINDLER, ANDERSON, GOPLERUD & WEESE, P.C.
5015 Grand Ridge Dr., Ste. 100
West Des Moines, IA 50265

/s/ Harley C. Erbe

Harley C. Erbe, AT002430
ERBE LAW FIRM
2501 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 281-1460
Facsimile: (515) 281-1474
E-Mail: harleyerbe@erbelaw.com

ATTORNEY FOR
PLAINTIFF/APPELLANT
LUCAS WOODS