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

REPLY BRIEF FOR APPELLANTS

CASEY'S GENERAL STORES, INC.

and

CASEY'S MARKETING COMPANY

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ARGUMENT

I. THE COURT SHOULD REVIEW THE DISTRICT COURT'S FINDINGS *DE NOVO*.

Appellees invoked the equitable jurisdiction of the district court when they sought reinstatement with backpay and frontpay. *See Lee v. State*, 844 N.W.2d 668, 680–82 (Iowa 2014) (characterizing reinstatement with backpay as prospective equitable relief under *Ex Parte Young*). "[O]nce equity has obtained jurisdiction of a controversy, it will determine all questions material or necessary to accomplish full and complete justice between the parties …." *Grandon v. Ellingson*, 144 N.W.2d 898, 901 (Iowa 1966). Therefore, "the case stands in equity." *Rector v. Alcorn*, 241 N.W.2d 196, 199 (Iowa 1976).

The fact that the district court ruled on objections during the trial does not change the nature of the case from equitable to law. *See Passehl Estate v. Passehl*, 712 N.W.2d 408, 414 (Iowa 2006) ("Although the district court ruled on some evidentiary objections in the course of trial, the objections were minor and did not have a significant effect on the

proceedings. The district court ultimately used its equitable powers to order specific performance and to issue an injunction. The nature of the pleadings and the court's decision leads to the conclusion that this case was fully tried in equity."); *id.* at n.6 ("During trial, the judge ruled on objections. Normally, this is the 'hallmark of a law trial,' but the fact that the trial judge did so does not automatically make this an at-law proceeding. Where, as here, no one claims the trial court improperly excluded evidence, the trial court's ruling on objections does not prevent a de novo review." (quoting *Sille v. Shaffer*, 297 N.W.2d 379, 381 (Iowa 1980))); *see also Moser v. Thorp Sales Corp.*, 312 N.W.2d 881, 899 (Iowa 1981) ("Equity courts, as well as courts of law, give effect to the general rules of evidence."). Because this case is cognizable in equity, the standard of review is *de novo*. Iowa Code § 624.4; Iowa R. App. P. 6.907.

II. THE EMPLOYER IMMUNITY PROVISION APPLIES.

A. The Court May Apply Rules of Statutory Interpretation and Construction.

Appellees argue the Court may not apply rules of statutory interpretation in this case because section 730.5(11)(*a*) is unambiguous. Casey's disagrees. Section 730.5(11) is ambiguous because it contains undefined terms that determine whether an employer is immune—namely, "initiated" and "testing program." *See Naumann v. Iowa Prop. Assessment Appeal Bd.*, 791 N.W.2d 258, 261–62 (Iowa 2010) ("A statute is ambiguous when reasonable persons could disagree as to its meaning. 'Ambiguity may arise from specific language used in a statute or when the provision at issue is considered in the context of the entire statute or related statutes.' 'Ambiguity arises in two ways—either from the meaning of specific words or "from the general scope and meaning of the statute when all of its provisions are examined."' 'Even when a statute appears unambiguous on its face it can be rendered ambiguous by its interaction with and its relation to other statutes.'" (Citations omitted.)).

Additionally, section 730.5(11)(*a*) cannot be read in isolation; it must be read in the context of the entire statute in which it appears. *See Simon Seeding & Sod, Inc. v. Dubuque Human Rights Comm'n*, 895 N.W.2d 446, 461 (Iowa 2017) ("'[W]e read statutes as a whole rather than looking at words and phrases in isolation'; context is important." (quoting *Iowa Ins. Inst. v. Core Grp. of Iowa Ass'n for Justice*, 867 N.W.2d 58, 72 (Iowa 2015))). When one reads section 730.5 as a whole, an ambiguity appears. There is a conflict between subsection 15(*a*)'s imposition of liability for a "violat[ing] this section" and section 11(*a*)'s grant of immunity for "[t]esting or taking action based on the results of a positive drug or alcohol test result, …, in good faith, or on the refusal of an employee … to submit to a drug or alcohol test," when the employer "has established a policy and initiated a testing program in accordance with the testing and policy safeguards provided for under this section." The conflict exists because it is possible for an employer to (1) establish a compliant policy, (2) initiate a compliant testing program, (3) act in good faith, (4) terminate an employee for positive results, but yet (5) *still violate this section*. This result

is possible because so many requirements of section 730.5 depend on actions of third parties (e.g., sample-collectors, laboratory personnel, and medical review officers). Without the immunity provisions in subsections (11) and (12), employers would be liable for violations committed by third parties.

It is, at a minimum, a reasonable interpretation of the statute that the legislature wanted to immunize employers acting in good faith from liability arising from third parties' statutory violations. As such, it is entirely appropriate to resort to rules of statutory interpretation and construction to harmonize all parts of the statute. *See Naumann*, 791 N.W.2d at 261–62 ("A statute is ambiguous when reasonable persons could disagree as to its meaning. 'Ambiguity may arise from specific language used in a statute or when the provision at issue is considered in the context of the entire statute or related statutes.'" (Citations omitted.)); 2A Norman J. Singer & Shambie Singer, *Sutherland Statutory Construction* § 45:2 (7th ed. 2014) (hereinafter "Sutherland") (noting "ambiguous statutes are subject to the process of statutory interpretation"). After all, "[e]very occasion to determine

whether, and how, a statute applies in a particular situation is by definition an occasion to interpret it, even absent any dispute." Sutherland § 45:3.

B. Appellees' Claimed Violations Fall Squarely Within the Employer Immunity Provision.

Appellees argue "Plaintiffs' claims … are premised on violations of sections of 730.5 other than those listed in subsection 11(a)," which lists three violations: (1) "[t]esting … in good faith," (2) "taking action based on the results of a positive drug or alcohol test result …, in good faith," and (3) "taking action based on … the refusal of an employee … to submit to a drug or alcohol test." Iowa Code § 730.5(11)(*a*).

Appellees claim relief under section 730.5(15)(*a*) because of Casey's "testing" them and "taking action based on the results of a positive drug … test result" (in Ms. Eller's case, based on her refusal to submit). *See* Dix Amend. Pet. ¶ 32 ("The drug test was not conducted in accordance with Iowa Code §730.5."); Cattell Amend. Pet. ¶ 33 (same); McCann Amend. Pet. ¶ 43 (same); Eller Amend. Pet. ¶ 46 (same). While Appellees attack specific *aspects* of the testing, ultimately,

their claim for *relief* stems from Casey's terminating their employment because of their positive test results (and in Ms. Eller's case, because of her refusal to submit to the test). *See* Dix Amend. Pet. ¶ 41 ("As a result of Defendants' violation of Iowa Code §730.5, Plaintiff Dix has suffered damages in the form of lost past wages and future wages, attorney fees and costs."); Cattell ¶ 42 (same for Cattell); McCann Amend. Pet. ¶ 52 (same for McCann); Eller ¶ 47 (same for Eller). As such, Appellees' claims are premised entirely on alleged violations listed in section 730.5(11)(*a*)—specifically, "testing," "taking action based on the results of a positive drug … test result," and "taking action based on … the refusal of [Ms. Eller] … to submit to a drug or alcohol test."

C. Harmonizing the Employer Immunity Provision with the Civil Remedies Provision Serves the Purpose of the Statute.

Appellees next argue immunity under subsection 11(*a*)—the Employer Immunity Provision—"endangers the employee protections provided for in the statute," undermines the statute's purpose, and incentivizes employers "to violate the statute." First, this is an argument for the legislature, not this

Court. If the legislature wanted to make section 730.5 a strict-liability statute, it could have. Instead, the legislature included *two* employer immunity provisions—one (subsection 12) for "false positive results," and one (subsection 11) for the acts and omissions listed in subparagraphs *a* through *f*, which include "[t]esting … in good faith," "taking action based on the results of a positive drug … test result, … in good faith," and "taking action based on … the refusal of an employee … to submit."

Second, Appellees' argument ignores the fact that statute's purpose was *not* solely to "protect" employees from drug testing. Rather, as this Court recognized, "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); *see also Sims v. NCI Holding Corp.*, 759 N.W.2d 333, 338 (Iowa 2009) ("In the broadest sense, section 730.5 is intended to protect an employer's right to ensure a drug-free workplace. Viewed more narrowly, the legislature's

intent was to 'ensure the accuracy of any drug test serving as the basis for adverse employment action.' Accurate drug testing inures, of course, to the benefit of both employers and their employees." (Citations omitted.)).[1] While this Court has noted another purpose of the statute was "to protect employees from unfair and unwarranted discipline," *Harrison v. Employment Appeal Bd.*, 659 N.W.2d 581, 588 (Iowa 2003), the Court has also found that it is not unfair or unwarranted to terminate an employee for being under the influence while on the job, *see Pinkerton v. Jeld-Wen, Inc.*, 588 N.W.2d 679, 682 (Iowa 1998) (rejecting employee's argument that the employer violated section 730.5 by not offering him

[1] Accurate workplace drug-testing is properly viewed as an effort to keep employees safer—i.e., something that *protects them*, not something from which they need protection. *See generally* OSHA, U.S. Dep't of Labor, *Clarification of OSHA's Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing Under 29 C.F.R. § 1904.35(b)(1)(iv)* (Oct. 11, 2018), https://www.osha.gov/laws-regs/standardinterpretations/2018-10-11 ("The Department believes that many employers who … conduct post-incident drug testing do so to promote workplace safety and health. In addition, evidence that the employer consistently enforces legitimate work rules (whether or not an injury or illness is reported) would demonstrate that the employer is serious about creating a culture of safety, not just the appearance of reducing rates.").

rehabilitation (as then required by the statute) after he tested positive for prescription painkillers; explaining: "To subscribe to this view would effectively ignore [the employer's] statutory right … to fire him for being under the influence of alcohol or controlled substances while on the job.").

Although section 730.5 has changed significantly since 1995 (when the *Pinkerton* case arose), it still contains the employer's statutory right to terminate employees "[u]pon 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 … to provide a testing sample." Iowa Code § 730.5(10)(*a*)(3). The legislature and this Court have always recognized an employer's right to terminate employees who are under the influence of alcohol or drugs at work. *See Sims*, 759 N.W.2d at 340 ("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))); *Pinkerton*, 588 N.W.2d at 682 (rejecting employee's argument that the employer violated section 730.5 by not offering him

rehabilitation (as then required by the statute) after he tested positive for prescription painkillers; explaining: "To subscribe to this view would effectively ignore [the employer's] statutory right … to fire him for being under the influence of alcohol or controlled substances while on the job.").

In this case, Messrs. Dix, Cattell, and McCann have never disputed the accuracy of their positive drug test results. They admit their urine was positive for drugs, which constitutes being "under the influence" under Casey's Policy. *See* App. 490. ("An employee … shall be conclusively deemed for the purposes of this policy, to be 'under the influence' … if an individual has any drug or its metabolite(s) for which testing is conducted under this policy in an amount such that a positive test result is confirmed by the laboratory [and] the Medical Review Officer ….). Being "under the influence" of drugs—i.e., having a confirmed positive test result—results in termination under Casey's Policy. *See* App. 494. The statute expressly allows this. *See* Iowa Code § 730.5(10)(*a*)(3) ("Upon receipt of a confirmed positive test result for drugs … which indicates a violation of the employer's written policy, … an

employer may use that test result … as a valid basis for disciplinary … actions pursuant to the requirements of the employer's written policy and the requirements of this section, which may include, among other actions, the following: … (3) Termination of employment.").

Similarly, the statute allows an employer to terminate an employee who, like Ms. Eller, "refus[es] to provide a testing sample." *Id.*; *see also* App. 489. ("An individual will be deemed to have refused to submit to a test if the individual … fails to provide an adequate specimen without satisfactory medical explanation ….."). In short, allowing immunity is consistent with, not contrary to, the purpose of the statute.

Equally misguided is Appellees' claim that "If a positive test result negated an employer's violations of the law, employers would have an incentive to violate the statute." Just because an employer is immune from liability under section 730.5 does not mean an employer faces no consequences if it acts on a drug test that violated section 730.5. This Court's unemployment appeal decisions established that an employer cannot rely on a noncompliant drug test to establish

misconduct to disqualify employees from receiving unemployment benefits. *See Harrison*, 659 N.W.2d at 588 ("Although an employer is entitled to have a drug free workplace, it would be contrary to the spirit of Iowa's drug testing law if we were to allow employers to ignore the protections afforded by this statute, yet gain the advantage of using a test that did not comport with the law to support a denial of unemployment compensation."); *Eaton v. Iowa Employment Appeal Bd.*, 602 N.W.2d 553, 558 (Iowa 1999) ("It would be contrary to the spirit of chapter 730 to allow an employer to benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits."). No employer wants to terminate an employee for a positive drug test result only to pay that employee unemployment benefits.

Third, it hardly incentivizes employers to violate section 730.5 if they have to bear the cost of litigation and prove their entitlement to immunity. Such an argument is analogous to saying the *Burlington–Faragher* affirmative defense incentivizes employers to sexually harass employees. To prove immunity

under section 730.5, an employer will almost certainly have to incur the expense of a trial (because summary judgment for the party bearing the burden of proof on an issue is exceedingly rare). Thus, prevailing in a section 730.5 claim based on the Employer Immunity Provision is a Pyrrhic victory. There is no incentive to violate section 730.5.

III. CASEY'S IS IMMUNE.

A. Appellees' Arguments Against Immunity Fail.

Appellees argue that to "initiate[] a testing program in accordance with the testing and policy safeguards provided for under this section," an employer must prove "it followed each of the law's mandates, including administering testing in according with the law." This argument is flawed for two reasons.

First, if a precondition for immunity was non-violation of the statute, immunity would never be needed because there would be no liability from which to be immune. Appellees' interpretation of the Employer Immunity Provision cannot be correct, because it renders the Provision surplusage. *See 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.").

Second, the legislature used the verb "initiated" in the Employer Immunity Provision, not "administered." This is significant because *elsewhere* in the statute, the legislature *did* use the verb "administer" in reference to an employer's testing program. *See* Iowa Code § 730.5(1)(*l*) ("'*Unannounced drug or alcohol testing*' means testing for the purposes of detecting drugs or alcohol which is conducted on a periodic basis, without advance notice of the test to employees, other than employees whose duties include responsibility for *administration of the employer's drug or alcohol testing program*, subject to testing prior to the day of testing, and without individualized suspicion." (Emphasis added.)). Similarly, in subsection 12, the legislature provided immunity from liability for acting on "false positive" results, to "an employer who has *established* a program of drug or alcohol testing in accordance with this section." *Id.* § 730.5(12).

"Establish," like "initiate," connotes the act of starting, beginning, or setting up a program. *See* https://www.merriam-webster.com/dictionary/establish (defining "establish" to include "to institute," "to bring into existence," etc.); https://www.merriam-webster.com/dictionary/initiate (defining "initiate" to include "to cause or facilitate the beginning of," to "set going," etc.). The legislature recognized that any "false positive" test result will have occurred as a result of actions by third parties, not the employer. Likewise, where, as here, the employer acted on positive test results that are not "false positives," so long as the employer established a compliant policy, initiated a compliant testing program, and acted in good faith, the legislature determined the employer should be immune from civil liability.

As thoroughly discussed in Casey's opening brief, and as affirmed below, Casey's proved it established a compliant policy, initiated a compliant testing program, and acted in good faith. Casey's is therefore entitled to immunity under section 730.5(*a*)(1).

B. Casey's Acted in Good Faith.

Appellees argue Casey's cannot have acted in good faith if there was a statutory violation. Yet, non-violation cannot be the standard required to establish good faith. The concept of "good faith" is *only* mentioned in the context of employer immunity under subsections 11(*a*) and 12(*c*). *See generally* Iowa Code § 730.5. As noted above, if there is no statutory violation, the employer is in no need of immunity. Therefore, the statute cannot be interpreted so as to require non-violation to establish good faith; this would render the immunity provisions meaningless. Instead, the legislature recognized that despite an employer's best efforts and good faith, statutory violations may occur during the testing process. The legislature chose to immunize such employers from civil liability. *Id.* § 730.5(11)(*a*).

Appellees rely on *Skipton* for the proposition that a statutory violation *ipso facto* constitutes bad faith and precludes immunity. However, *Skipton* does not so hold. In *Skipton*, the employer's testing program required employees to test whenever they had an injury requiring medical

treatment—*regardless* of whether the injury arose from an accident. *Skipton v. S&J Tube, Inc.*, No. 11–1902, 2012 WL 3860446, at *6 (Iowa Ct. App. Sept. 6, 2012). Thus, the employer did not initiate a compliant testing program, and was not entitled to immunity. *Id.*[2] The decision did not turn on the good-faith issue at all. *Id.*

Casey's acted in "good faith," as defined in the statute—i.e., in "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." Iowa Code § 730.5(1)(*f*). In designating as safety-sensitive all employees whose worksite is the warehouse, Casey's reasonably relied on the fact that all such employees work in an environment where numerous forklifts are zipping around aisles with racks of products stacked all around them.[3] With

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[2] While the *Skipton* panel did use the term "administer" as opposed to "initiate," ultimately, this is an unpublished Court of Appeals opinion that this Court is not bound to follow. *See* Iowa R. App. P. 6.904(2)(*c*) ("Unpublished opinions or decisions shall not constitute controlling legal authority.).

[3] Appellees' complaint about Casey's not testing HR employees, Jay Blair, and Ed Vaske ignores the statute's use of the term "work site." *See* Iowa Code § 730.5(8)(*a*)(3)

respect to the list Casey's provided to ARCpoint (of employees scheduled to be at work at the time of testing), Casey's reasonably relied on the accuracy of the bid schedules HR staff received from the warehouse supervisors. For the random selections, Casey's reasonably relied on ARCpoint's representation that it would randomly select 90% of the employees on the list and randomly select alternates.

In summary, the evidence established Casey's acted in good faith within the meaning of subsection 11(*a*). Immunity is available. *See id.* § 730.5(11)(*a*).

C. Substantial Compliance Is All That Is Required.

("Employers may conduct unannounced drug or alcohol testing of employees who are selected from any of the following pools of employees: … (3) All employees *at a particular work site* who are in a pool of employees in a safety-sensitive position …." (Emphasis added.)). The work site of HR, Mr. Blair, and Mr. Vaske is in the corporate office next to the warehouse. Even though they may enter the warehouse work site from time to time (or even frequently, as in Mr. Blair's case), their assigned work site is the corporate office, not the warehouse. The statute specifically allows employers to pick and choose among work sites in deciding where to conduct testing. *See id.* § 730.5(3) ("In addition, an employer may implement and require drug or alcohol testing at some but not all of the work sites of the employer and the requirements of this section shall only apply to the employer and employees who are at the work sites where drug or alcohol testing pursuant to this section has been implemented.").

This Court has never required a statute to state "substantial compliance" in order for the standard to be substantial, rather than strict, compliance. *See, e.g.*, *Residential & Agric. Advisory Comm., LLC v. Dyersville City Council*, 888 N.W.2d 24, 48 (Iowa 2016) ("Failing to comply with every word of a statute is not fatal in every situation. What we require is substantial compliance, which we have defined as 'compliance in respect to essential matters necessary to assure the reasonable objectives of the statute.'" (Citations omitted.)); *City of Postville v. Upper Explorerland Reg'l Planning Comm'n*, 834 N.W.2d 1, 9 (Iowa 2013) ("Chapter 21 is a critical mechanism for ensuring government transparency. ... Substantial compliance with the statute is all that is required." (Citations omitted.)); *Robinson v. State*, 687 N.W.2d 591, 595 (Iowa 2004) (stating "substantial compliance [with Iowa Code section 669.13] would be sufficient"); *Nedved v. Welch*, 585 N.W.2d 238, 240 (Iowa 1998) ("Section 668.11 requires substantial compliance, which is compliance in respect to essential matters necessary to assure the reasonable objectives of the statute.").

It is undeniable that section 730.5 uses the word "shall" many times, which is sometimes said to indicate the statute is "mandatory." *See, e.g.*, *Pearson v. Robinson*, 318 N.W.2d 188, 191 (Iowa 1982) (recognizing "shall" "imposes a duty," but that "does not mean the obligation is mandatory"); *Wisdom v. Bd. of Sup'rs of Polk Cty.*, 19 N.W.2d 602, 607–08 (Iowa 1945) ("[T]he word 'shall' appearing in statutes is generally construed as mandatory but when the word is not addressed to public officials and no right is destroyed by giving it a directory meaning, it will be so construed."). However, even if section 730.5 were to be deemed mandatory, the standard is still substantial compliance. *See Hedrick Cmty. Sch. Dist. v. S. Prairie Area Educ. Agency 15*, 433 N.W.2d 746, 751 (Iowa 1988) ("Substantial compliance is … still the standard by which we measure whether the mandatory duties were performed." (citing *Boyle v. Burt*, 179 N.W.2d 513, 515 (Iowa 1970) (statute defining mandatory duty can require only substantial compliance))); 1A Sutherland § 25:2 ("Characterizing a statute as mandatory, directory, prohibitory or permissive is in reality *the result of a determination as to*

what effect should be given to its provisions; and there is no essential, inherent, intrinsic, or constitutional difference in statutes whereby their character can be determined initially to understand their effect." (Emphasis added.)).

D. Casey's Established a Policy That Substantially Complied with Section 730.5's Policy Safeguards.

Casey's established a policy that substantially complied with the policy safeguards. *See Sims*, 759 N.W.2d at 338 ("We conclude NCI substantially complied with the written policy provision ...."). In *Sims*, this Court found the policy substantially complied with section 730.5 when it "provided ample information regarding the company's random testing policy and the procedures of its implementation," even though it did not explain employees' right to request confirmatory testing. *Id.* at 339. Casey's Drug & Alcohol Policy was also amply informative.

It appears Appellees' only complaint about the policy itself is the frequency of the anticipated testing. Appellees argue: "the policy provides that '[s]elections are made at various, unannounced times throughout the year.' The law

does not allow for testing at 'various' times; it allows for 'periodic' testing." Thus, the issue for the Court is whether it is "necessary to assure the reasonable objectives of the statute" for employers' policies to specify the "regular intervals" at which unannounced testing will occur (e.g., monthly, quarterly, semi-annually, annually, etc.).

Such a requirement is wholly unnecessary to assure the statutory objectives to "protect an employer's right to ensure a drug-free workplace" and "to ensure the accuracy of any drug test serving as the basis for adverse employment action." *Sims*, 759 N.W.2d at 338. Requiring testing to occur at regular intervals, as opposed to "from time to time" (both of which are definitions of the word "periodic") cannot possibly lead to more accurate test results, and it definitely does not help employers ensure a drug-free workplace.

There is no statutory objective that a "regular intervals" requirement would serve. The statute contains no substantive requirement that unannounced testing be conducted "periodically"; rather, the only time the word "periodic" appears in the statute is in the definition of "unannounced

testing." *See* Iowa Code § 730.5(1)(*l*) ("'*Unannounced drug or alcohol testing*' means testing for the purposes of detecting drugs or alcohol which is *conducted on a periodic basis*, without advance notice of the test to employees …." (Emphasis added.)). Had the legislature wanted to limit the frequency of unannounced testing, it could have done so. *Cf. Sims*, 759 N.W.2d at 339 ("Although the legislature could have mandated disclosure of the *employee's* right to a retest in the employer's written policy, it chose not to do so. … *We will not read into the statute a mandate which is not present in the plain language*." (Citations omitted; emphasis added.)).

Casey's Policy's reference to testing at "various" times, as opposed to "periodic" times substantially complied with section 730.5. Casey's "established a policy in accordance with the … policy safeguards provided for under this section."

E. Casey's Initiated a Substantially Compliant Testing Program.

It appears Appellees have two complaints about Casey's testing program (the thirteen elements listed in section I.B of

Casey's opening brief[4]): (1) Casey's did not require enough employees to undergo the training described in subsection 9(*h*), and (2) Casey's relied on its Policy's definition of "drug" to satisfy subsection 7(*c*)(2)'s "list of the drugs to be tested" requirement.

Training

Casey's substantially complied with subsection 9(*h*)'s training requirement because two HR staff members who had completed the training (Marcella Burkheimer and Melinda Karl) were on-site during the test event and available to answer any questions that arose. Subsection 9(*h*) requires training for "supervisory personnel of the employer involved with drug or alcohol testing under this section." It is undisputed that employees in addition to Ms. Burkheimer and Ms. Karl—both supervisory and non-supervisory personnel—played various administrative roles during the April 6 testing event. These employees were not involved with drug testing, per se. Rather, they were "employees whose duties include

[4] The thirteen elements Casey's refers to as the "program" initiation requirements are the same thirteen subsections Appellees refer to as "the 'conditions' required for testing."

responsibility for *administration* of the employer's drug … testing *program*," as referenced in the definition of "unannounced testing." Iowa Code § 730.5(1)(*l*) (emphasis added).

The legislature recognized a difference between administration of a testing program, and the actual *testing* itself. Training is only required for employees involved with *testing*—i.e., the procedures set forth in subsection 7, "Testing Procedures"). Preliminary and postliminary administration does not constitute being "involved with *testing*." While this may not perfectly align with the types of employees who would, as a practical matter, benefit from the testing, this is an issue for the legislature to address, not a basis for finding Casey's liable in this case.[5]

[5] The required content of the training is "information concerning the recognition of evidence of employee alcohol and other drug abuse, the documentation and corroboration of employee alcohol and other drug abuse, and the referral of employees who abuse alcohol or other drugs to the employee assistance program." Iowa Code § 730.5(9)(*h*). This content would be useful to two kinds of employees—those who have authority to request *reasonable-suspicion* tests under subsection 8(*c*), and those with employee-benefits-administration responsibilities (i.e., HR employees, who may or

List of Drugs

Casey's substantially complied with subsection 7(*c*)(2)'s directive to "provide an employee … with a list of the drugs to be tested" by including within its Policy a definition of the term "drug" that encompassed all the drugs for which employees were tested, and that specifically listed marijuana and amphetamines, the two drugs for which Appellees tested positive. App. p. 489. The parties agree the purpose of this requirement is to assist employees with knowing what medical information might be relevant to the test. In this case, each of the Appellees understood, based on the Policy they read and acknowledged only two months before the April 6 test, that they could be tested for marijuana and amphetamines. *See* 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); *see also* App. 546; (Dix

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may not be "supervisory" employees). Here, two HR employees (one supervisory and one not) knew how to refer employees who abuse drugs to the employee assistance program. The reasonable objective of the "training" requirement provision was met.

testing form, confirming for THC); App. 552; (Cattell testing form, confirming for "AMP, THC"). Thus, here, the "reasonable objectives of the statute" were served by the list of drugs provided in Casey's Policy and the testing forms provided to Messrs. Dix and Cattell at the time of sample-collection. *See Sims*, 759 N.W.2d at 407 ("'Substantial compliance is said to be compliance in respect to essential matters necessary to assure the reasonable objectives of the statute.'" (Citation omitted.)).

In conclusion, Casey's established all of the requirements of immunity under subsection 730.5(11)(*a*)—it acted in good faith, established a compliant policy, and initiated a compliant testing program. Accordingly, the Court should affirm the judgment against Messrs. Dix and Cattell, and reverse the judgment in favor of Mr. McCann and Ms. Eller.

F. Regardless of Immunity, Appellees Were Not Adversely Affected by an Erroneous Test Result and Thus Are Entitled to No Relief.

As the Court noted in *Sims*, an employee who *accurately* tests positive for drugs has not been "adversely affected by an erroneous test result." *Sims*, 759 N.W.2d at 340. Because the

purpose of the statute is "to ensure the accuracy of any drug test serving as the basis for adverse employment action," when the positive results are concededly accurate, the essential purposes of the statute have been served—substantial compliance exists. *See id.* at 407 ("'Substantial compliance is said to be compliance in respect to essential matters necessary to assure the reasonable objectives of the statute.'" (Citation omitted))). Furthermore, an employee who accurately tests positive for drugs is not an "aggrieved employee" to whom awarding "reinstatement … with or without back pay" is "appropriate" within the meaning of subsection 15(*a*)(1).

Because Mr. Dix, Mr. Cattell, and Mr. McCann all accurately tested positive for drugs, none of them was adversely affected by an erroneous test result. They were adversely affected by *accurate* test results, but that entitles them to no relief because under subsection 10(*a*)(1), Casey's was authorized to terminate their employment. *See* Iowa Code § 730.5(10)(*a*)(3) ("Upon receipt of a confirmed positive test result for drugs … which indicates a violation of the employer's written policy, … an employer may use that test result … as a

valid basis for disciplinary … actions pursuant to the requirements of the employer's written policy and the requirements of this section, which may include, among other actions, the following: … (3) Termination of employment."). Adopting Appellees' view would, as in *Pinkerton*, "effectively ignore [the employer's] statutory right … to fire him for being under the influence of alcohol or controlled substances while on the job." *Pinkerton*, 588 N.W.2d at 682. The judgment against Messrs. Dix and Cattell should be affirmed, and the judgment against Mr. McCann should be reversed.

As to Ms. Eller, because she did not provide a sample, she also was not adversely affected by an erroneous test result. Rather, she was affected by her refusal to submit to testing (as defined in Casey's Policy to include failure to provide an adequate specimen without a satisfactory medical explanation). Subsection 10(*a*)(1) gave Casey's the express, statutory right to terminate her employment at that time. *See* Iowa Code § 730.5(10)(*a*)(3) ("Upon … the refusal of an employee … to provide a testing sample, an employer may use that … test refusal as a valid basis for disciplinary … actions

pursuant to the requirements of the employer's written policy and the requirements of this section, which may include, among other actions, the following: … (3) Termination of employment.").

The obvious counter-argument to this analysis is to ask: "So an employer can ask employees to take an illegal test, and if they refuse, they can be terminated, without a remedy?" However, the answer is "yes, they can be terminated, but no, there is a potential remedy." Courts, like the Polk County District Court in the *Stackhouse* case Appellees cite, and the Delaware County District Court in the *Ferguson* case brought by Appellees' counsel, have allowed claims for wrongful discharge in violation of public policy under such circumstances. *See Ferguson v Saunders*, No. LACV008271, 2018 WL 3962982, at *1 (Iowa Dist. Jan. 17, 2018) (granting summary judgment *to the plaintiff* on her wrongful-discharge claim premised on her refusal to submit to an unauthorized drug test). In sum, allowing Ms. Eller relief under subsection 15(*a*) would "effectively ignore [the employer's] statutory right

… to fire h[er] for" refusal to submit. *Pinkerton*, 588 N.W.2d at 682.

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

For all of the reasons set forth above, Casey's complied "in respect to essential matters necessary to assure the reasonable objectives of the statute." *Sims*, 759 N.W.2d at 407. Although the April 6 test, in 20/20 hindsight, cannot be viewed as a perfectly executed event, that is not the standard required under section 730.5. The reasonable objectives of the statute—"protect[ing] an employer's right to ensure a drug-free workplace, and "ensur[ing] the accuracy of any drug test serving as the basis for adverse employment action"—were satisfied by the extensive efforts made by Casey's to comply with section 730.5. Accordingly, the judgment against of Messrs. Dix and Cattell should be affirmed, and the judgment in favor of Mr. McCann and Ms. Eller should be reversed.

V. NEITHER MCCANN NOR ELLER IS ENTITLED TO REINSTATEMENT, WITH OR WITHOUT BACKPAY, OR FRONTPAY.

It bears repeating that the relief provided for in subsection 15(*a*)(1) is *equitable* relief. It is inequitable to reward Mr. McCann, who admittedly accurately tested positive for drugs, for his behavior and for his subsequent decision to withdraw from the labor market and become a food truck entrepreneur. Similarly, it is inequitable to reward Ms. Eller, who chose to leave on April 6 without providing a sufficient sample, even though she was advised she would be resigning by doing so, because she "had plans," and who subsequently failed to apply for any work whatsoever.

The judgments in favor of Mr. McCann and Ms. Eller are quintessential windfalls. They ought to not be allowed to capitalize on statutory violations when their employment was not adversely affected by an erroneous test result.

CONCLUSION

The District Court erred when it found Casey's was not immune under subsection 11(*a*). 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.

The District Court also erred in awarding relief to Mr. McCann and Ms. Eller. Neither Mr. McCann nor Ms. Eller suffered adverse employment action because of an erroneous test result. Further, Casey's substantially complied with section 730.5, and Appellees are not entitled to relief afforded to aggrieved employees under section 730.5(15)(*a*)(1), including their attorney fees and costs.

In conclusion, Casey's respectfully requests the Court reverse the judgment in favor of Jimmy McCann and Julie Eller and affirm the judgment against Tyler Dix and Jason Cattell.

Respectfully submitted,

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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 6,225 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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