

IN THE SUPREME COURT OF IOWA

LUCAS WOODS,

Plaintiff-Appellant,

v.

CHARLES GABUS FORD, INC.,

Defendant-Appellee.

S.C. CASE No. 19-0002

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

APPELLEE'S BRIEF AND
REQUEST FOR ORAL ARGUMENT

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Statement of Issues Presented for Review

- 1. The district court correctly found that CGFI's drug testing of Woods and subsequent termination of Woods were lawful and substantially complied with Iowa Code § 730.5.**

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

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

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

Superior/Ideal, Inc. v. Bd. of Review, 419 N.W.2d 405 (Iowa 1988)

Iowa Code § 730.5 (2017)

- A. Woods failed to preserve error on the issue raised post-trial regarding Iowa Code § 730.5(9)(h) training requirements.**

Benavides v. J.C. Penney Life Ins. Co., 539 N.W.2d 352 (Iowa 1995)

Linge v. Ralston Purina Co., 293 N.W.2d 191 (Iowa 1980)

Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002)

Metz v. Amoco Oil Co., 581 N.W.2d 597 (Iowa 1998)

Yee v. City of Escondido, 503 U.S. 519 (1992)

Iowa Code § 730.5(9)(h) (2017)

- B. If this Court finds that Plaintiff preserved error on the Iowa Code § 730.5(9)(h) training requirements, the district court correctly found that CGFI substantially complied with Iowa Code § 730.5.**

Iowa Code § 730.5 (2017)

Iowa Code § 730.5(9)(h) (2017)

2. The district court correctly concluded that CGFI substantially complied with the Iowa Code § 730.5 and the Iowa Code § 730.5(7)(j) post-positive test notice requirement.

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

Iowa Code § 730.5 (2017)

Iowa Code § 730.5(7)(j) (2017)

A. Relevant statutory language relating to Notice.

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

Iowa Code § 730.5 (2017)

Iowa Code § 730.5(7)(j) (2017)

B. The employer's actions and inactions in *Skipton* are distinguishable from the present case.

Skipton v. S & J Tube, Inc., 2012 WL 3860446 (Iowa Ct. App. 2012)

Iowa Code § 730.5 (2017)

Iowa Code § 730.5(7) (2017)

Iowa Code § 730.5(7)(j) (2017)

C. CGFI properly notified Woods per Iowa Code § 730.5 and Woods did nothing in response to said notice.

Iowa Code § 730.5 (2017)

D. CGFI terminated Woods based upon his failed random drug test for methamphetamine and his violation of CGFI policies.

McVey v. Nat'l Org. Serv., Inc., 719 N.W.2d 801 (Iowa 2006)

Iowa Code § 730.5 (2017)

Iowa Code § 730.5(7)(j) (2017)

Iowa Code § 730.5(10) (2017)

Iowa Code § 730.5(10)(a)(1)-(5) (2017)

3. The district court correctly found that the method by which CGFI sent the post-positive test notice substantially complied with Iowa Code § 730.5.

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

Iowa Code § 730.5 (2017)

Iowa Code § 730.5(7)(j) (2017)

Routing Statement

This case should be transferred to the Court of Appeals because no basis exists for the Supreme Court to retain this case for appellate review. *See* Iowa R. App. P. 6.1101. Further, this case should be transferred to the Court of Appeals because it involves questions that can be resolved by applying existing legal principles. *See* R. 6.1101(3)(b).

Statement of the Case

The Appellee, Charles Gabus Ford, Inc. (hereinafter “CGFI”) is dissatisfied with the Appellant’s statements in his statement of the case section within his proof brief. *See* Iowa R. App. P. 6.903(3). Pursuant to Iowa Rule of Appellate Procedure 6.903(2), Appellant’s brief must conform to the requirements set forth therein. Iowa Rule of Appellate Procedure 6.903(2)(e) requires all statements made in the statement of the case be supported by appropriate references to the record or the appendix in accordance with Iowa Rule of Appellate Procedure 6.904(4).

In his brief, Appellant’s statement of the case section is argumentative, does not cite sufficiently to the record, and should be stricken from his brief because it is rule violative. CGFI intends to supplement Appellant’s statement of the case with the following to comply with Iowa Rule of Appellate Procedure 6.903(3) and in turn, Iowa Rule of Appellate Procedure 6.904(4).

Nature of the case

The sole issue in this case arises from random drug testing administered to Plaintiff-Appellant Lucas Woods (hereinafter “Woods”) on August 9, 2017 and whether Defendant-Appellee Charles Gabus Ford, Inc. (hereinafter “CGFI”) substantially complied with Iowa Code section 730.5 in administering said test to Woods. (*App. Vol. 1 at 37, 45*).

Course of proceedings and disposition in district court

Woods filed his Petition at Law on October 31, 2017 alleging wrongful termination by CGFI pursuant to Iowa Code 730.5(15)(a). (*App. Vol. 1 at 5*). CGFI answered and denied that Woods was wrongfully terminated, citing that Woods failed his drug test and was discharged as a result of his failed drug test. (*App. Vol. 1 at 7*).

This case came before the court for trial on October 15 and 16, 2018. (*App. Vol. 1 at 37, 59, 110*). After hearing testimony of witnesses, assessing each witness’s credibility, and reviewing numerous exhibits, the district court made findings of fact and conclusions of law. (*App. Vol. 1 at 37-54*). The district court concluded that CGFI “substantially complied with essential matters necessary to assure the reasonable objectives of Iowa Code section 730.5 regarding CGFI’s random drug testing of Lucas [Woods] as a CGFI employee” and dismissed Woods’ Petition. (*App. Vol. 1 at 53*).

Woods filed a motion to reconsider, enlarge, or amend the district court's Order on December 18, 2018. (*App. Vol. 1 at 27-28*). The district court denied Woods' motion to reconsider, enlarge, or amend on December 28, 2018. (*App. Vol. 1 at 55-56*). Woods timely appealed to this Court on January 2, 2019. (*App. Vol. 1 at 57-58*).

Statement of the Facts

The Appellee, Charles Gabus Ford, Inc. (hereinafter "CGFI") is dissatisfied with the Appellant's statements in his statement of the facts section within his proof brief as it ignores the district court's findings of fact and fails to provide adequate specificity in citation to the record. *See* Iowa R. App. P. 6.903(3). Iowa Rule of Appellate Procedure 6.903(2)(e) requires all statements made in the statement of the case be supported by appropriate references to the record; Appellant's references to exhibits omit page numbers in his statement of the facts section. Furthermore, Appellant omits facts relevant to the issues presented for review, as this case deals with substantial compliance. Therefore, CGFI intends to supplement Appellant's statement of the facts with the following statement of the facts to comply with Iowa Rule of Appellate Procedure 6.903(3) and in turn, Iowa Rule of Appellate Procedure 6.904(4). The facts cited herein are largely addressed in the district court's Findings of Fact section of the Order, supported by testimony and exhibits educed at trial.

Plaintiff-Appellant Lucas Woods (hereinafter “Woods”) applied for a lube tech position at Charles Gabus Ford on August 18, 2014. (*App. Vol. 1 at 98:1-4; App. Vol. 1 at 114-117, generally*). At the time Woods initially applied for the lube tech position, Woods testified that he read his employment application, that he signed and submitted his Application to CGFI (hereinafter “Application”) certifying that its contents were true and accurate, and that he fully understood its contents. (*App. Vol. 1 at 60:21-25; App. Vol. 1 at 114-117, generally*). Woods’ Application certified twice that he affirmed and understood that if any drug screen he took was positive for any illegal substances, that his offer of employment would be rescinded; or if he had already commenced work, he would be terminated. (*App. Vol. 1 at 114 ¶ 3; App. Vol. 1 at 117*).

Woods’ Application also indicated that he would be required, and that he consented to taking any physical examinations, including random drug tests requested by CGFI. (*App. Vol. 1 at 65:7-10; App. Vol. 1 at 114 ¶ 3*). Woods took his pre-employment drug screen on August 20, 2014 and passed. (*App. Vol. 1 at 67:11-14; App. Vol. 1 at 161*). CGFI hired Woods thereafter.

Also, on August 20, 2014, Woods signed an Agreement, Medical Authorization and Controlled Substance Abuse Policy Acknowledgement (the “Acknowledgment”) stating that he was to undergo random forensic drug testing throughout his employment with CGFI in consideration for his continued employment at CGFI. (*App. Vol. 1 at 99:13-20; App. Vol. 2 at 4*). Woods

certified in the Acknowledgment that any urine specimen he provided would be his own, that said specimen would not be altered in any way, and that submitting an altered urine specimen would be treated the same as a positive result and would be grounds for termination. (*App. Vol. 1 at 66:17-67:1; App. Vol. 2 at 4*). Woods acknowledged that he would disclose and release all information and would authorize any physician or medical facility to disclose all information and/or results to CGFI. (*App. Vol. 1 at 65:21-23, 99:21-25; App. Vol. 2 at 4*). Woods further acknowledged that on August 20, 2014 that he agreed to adhere to CGFI's Auto Group Controlled Substance Abuse Policy (hereinafter the Drug Policy). (*App. Vol. 1 at 155-159*).

The Drug Policy identifies that employees have a right to work in a drug-free environment and to work with persons free from the effect of drugs. (*App. Vol. 1 at 155 ¶ 3*). The Drug Policy also states that employees who abuse drugs are a danger to themselves, to other employees, and to the public. (*App. Vol. 1 at 155 ¶ 3*). Woods agreed with this portion of the Drug Policy at trial. (*App. Vol. 1 at 70:21-24*). CGFI identifies within the Drug Policy that CGFI is committed to maintaining a safe and healthy workplace free from the influences of drugs and will comply with all applicable state and federal regulations concerning drugs. (*App. Vol. 1 at 155 ¶ 4*). The Drug Policy contains notice of a Controlled Substance Testing Program to employees of CGFI which identifies random monthly testing, a drug collection policy, drug testing

procedures, and notification of test results as parts of the Drug Policy. (*App. Vol. 1 at 156-159*). The Acknowledgment that accompanies the Policy identifies that if an employee has a positive test result, employment will be terminated even for a first offense. Woods signed said Acknowledgment, certifying that he read and understood its contents on August 27, 2014. (*App. Vol. 1 at 160*).

On August 27, 2014, Woods also signed an acknowledgement that his employment was at-will and that he received a copy of the CGFI Employee Handbook (hereinafter the “Handbook”). (*App. Vol. 1 at 118*). Contained within the Handbook is a drug and alcohol policy that identifies that “Charles Gabus Ford strives to maintain a workplace free of drugs and alcohol and to discourage drug and alcohol abuse by its employees.” (*App. Vol. 1 at 119-120, 133-134*). Woods acknowledged at trial that while he was a CFGI employee, this portion of the Handbook applied to him. (*App. Vol. 1 at 70:3-10*). The illegal drugs section of the drug and alcohol policy within the Handbook identifies those employees who violate the policy while working at CGFI facilities can be terminated. (*App. Vol. 1 at 119-120, 113 ¶ 4*). Woods acknowledged at trial that he understood if he tested positive for methamphetamine, he would be terminated pursuant to the drug and alcohol policy within the Handbook. (*App. Vol. 1 at 71:1-5*).

The Handbook received by Woods in August of 2014 was substantially similar in all respects to the Handbook offered into evidence by CGFI at the time of trial. (*App. Vol. 1 at 118; Cf. App. Vol. 1 at 121-154, 69:12-19*). The Handbook further confirmed that Woods' employment with CGFI was at will. (*App. Vol. 1 at 122 ¶ 5, 143 ¶ 9*).

After Woods' pre-employment test and throughout his employment with CGFI, Woods completed three random drug tests with Mid-Iowa Occupational Testing. (*App. Vol. 1 at 161; 67:15-68:12; 101:3-8*). Said random drug tests were on August 12, 2015, June 30, 2017, and August 9, 2017. (*Id.*). Lucas tested positive for methamphetamine as a result of the August 9, 2017 random drug test. (*App. Vol. 1 at 74:19-22, 165*).

On August 8, 2017, CGFI's human resources director, Kelsey Gabus-McBride (hereinafter "Kelsey"), received the random selection summary from Mid-Iowa Occupational Testing (hereinafter "Mid-Iowa"). (*App. Vol. 1 at 102:21-103:17; App. Vol. 2 at 5*). CGFI provides an employee list to Mid-Iowa; Mid-Iowa maintains said list and randomly selects ten employees for random drug urinalysis testing by computer-based-name-generating software. (*App. Vol. 1 at 79:2-20*). No employee of CGFI is exempt from random drug testing; including the CEO and General Managers. (*App. Vol. 1 at 79:21-23, 100:22-25, 156 ¶ 2*). The random selection summary at issue identified Lucas Woods as

the 10th random selected individual set for an August 9, 2017 urine random substance test. (*App. Vol. 2 at 5*).

On August 9, 2017, Woods arrived at work at approximately 8:00 am. (*App. Vol. 1 at 60:22-23*). Woods claimed he used the restroom shortly after arriving at work. (*App. Vol. 1 at 62:2-15*). Shortly after using the restroom, Woods was informed by a supervisor that he was to attend a random drug test at Mid-Iowa Occupational Testing. (*Id.; App. Vol. 1 at 61:9-11*). Woods arrived at the Mid-Iowa facility about an hour later, at approximately 9:00 am., to take his random drug test. (*App. Vol. 1 at 76:23-77:11*).

Upon his arrival to Mid-Iowa Occupational Testing, Woods met Brandon Carter (hereinafter “Carter”). Carter was a certified professional lab technician and a certified professional collector of urine samples for Mid-Iowa. (*App. Vol. 1 at 78:9-14, 169*). Over his career, Carter has collected over 2,000 samples of urine for urine drug tests. (*App. Vol. 1 at 80:19-21*). Carter collected Woods’ urine on August 9, 2017 and detailed the collection procedure he performed on Woods to the Court. (*App. Vol. 1 at 81:10-94:18*).

Upon arrival, Woods used the bathroom and was asked to provide a sample of at least 50 milliliters of urine for testing. (*App. Vol. 1 at 83:4-6*). Woods complied but provided his first sample short of the 50-milliliter line. (*Id.*). Both Woods and Carter testified that no one watched Woods urinate to provide his sample. (*App. Vol. 1 at 73:15-17, 84:8-10*).

Carter identified two issues with Woods' first urine sample upon receipt. The first issue was that the amount of urine provided by Woods in his first sample was insufficient to perform the remainder of the testing procedures; Woods only provided approximately 30 milliliters of urine. (*App. Vol. 1 at 84:4-7*). The second issue identified by Carter was the color of the urine of Woods' first sample. (*App. Vol. 1 at 84:11-24*). The color of the urine of the first sample was not conducive to human urine. (*App. Vol. 1 at 84:13-14*). Carter testified that based on his training and experience, the urine produced in Woods' first sample was likely "fake pee" and had been adulterated or tampered with. (*App. Vol. 1 at 84:20-22, 96:19-20*).

Carter took the first sample, returned to the restroom where Woods provided the sample, and dumped Woods' first sample into the toilet. (*App. Vol. 1 at 87:5-12*). During this time, Woods returned to the lobby to drink water in order to provide a second sample. (*App. Vol. 1 at 62:16-19, 85:20-23*). Carter informed Woods that he was not to drink more than 40 milliliters of water using the cups provided by Mid-Iowa; 40 milliliters was approximately ten cups of water. (*App. Vol. 1 at 85:24-86:2*). After approximately 40-45 minutes, Woods returned to the same restroom at Mid-Iowa to provide a second sample. (*App. Vol. 1 at 62:20-25, 86:3-6*).

Woods' second sample contained a sufficient amount of urine to complete the testing procedure. (*App. Vol. 1 at 89:23-25*). Also, the urine provided by

Woods was a lighter color that appeared diluted because of water intake and appeared more conducive to human urine than the first insufficient urine sample. (*App. Vol. 1 at 89:5-19*). Finally, the temperature of the urine was within an acceptable range, as measured by a laser temperature gauge. (*App. Vol. 1 at 88:22-89:4*). Carter recorded the temperature of Woods' second urine test at 94 degrees Fahrenheit. (*App. Vol. 1 at 88:16-17, 88:22-23*).

At some point during the collection of Woods' samples of urine on August 9, 2017, Woods admitted recently using methamphetamine to Carter. (*App. Vol. 1 at 97:7-9*).

After Woods provided the second urine sample to Carter, Carter began processing the sample for further testing. (*App. Vol. 1 at 87:13-18*). Carter performed his testing pursuant to Mid-Iowa's testing procedures and protocol for urine collection. (*App. Vol. 1 at 95:13-15, 171-185*). Prior to vialing the sample, Carter tested Woods' second urine sample with a strip that identified a non-negative that required secondary confirmatory testing at a lab. (*App. Vol. 1 at 87:16-23, 171-185*).

Thereafter, Carter separated the sample into two separate vials, filled both vials up with urine (minimum: one with 30 milliliters, the other with 15 milliliters), and placed the lids back on. (*App. Vol. 1 at 90:3-91:9, 171-185*). Carter also created a series of labels and pulled the tab off the tubes that identified a sterile container. (*App. Vol. 1 at 91:10-93:14, 171-185*). Carter performed all

necessary subsequent steps in the presence of Woods. (*Id.*) Woods initialed and dated the vials in Carter's presence. (*App. Vol. 1 at 91:8-25; App. Vol. 2 at 6; App. Vol. 1 at 171-185*).

Confirmatory testing at a secondary laboratory results from compliance with the forensic drug testing policy which utilizes the custody and control form (hereinafter the "CCF"); which Carter completed with Woods. (*App. Vol. 2 at 6*). The CCF identified that Carter collected Woods' sample and the read specimen temperature within 4 minutes of collection was between 90 degrees and 100 degrees Fahrenheit. (*App. Vol. 2 at 6*). The CCF further identified that Carter split Woods' specimen. (*App. Vol. 2 at 6*). The CCF further identified at approximately 9:50 am, Carter certified that Woods gave the specimen to him, Carter prepared the sample for confirmatory testing in Woods' presence, and that Woods signed the CCF in his presence. (*App. Vol. 2 at 6*).

Woods certified on the CCF that his sample was collected, labeled, sealed, and released to the delivery service for Quest Diagnostics for secondary testing in accordance with applicable requirements. (*App. Vol. 2 at 6*). Woods then signed the CCF and certified that he provided his specimen to Carter, that he had not adulterated it in any manner, that each specimen bottle used was sealed with a tampered-evidence seal in his presence, and that the information and numbers provided on the form and on the label affixed to each specimen bottle were correct. (*App. Vol. 2 at 6*).

Upon confirmation of the non-negative with Lucas Woods, and the placement of the properly sealed and affixed CCF, Mid-Iowa Occupational Testing sent Woods's second sample via courier service by Quest Diagnostics to request confirmatory testing via laboratory in Lenexa, Kansas. (*App. Vol. 1 at 111:11-19, 186*). Janet Kruse from Quest Diagnostics received Lucas Woods' specimen bottles at the laboratory in Lenexa, Kansas on August 10, 2017. (*App. Vol. 1 at 186*). The primary specimen bottle seal was intact. (*App. Vol. 1 at 186*).

A forensic drug testing report was completed by the lab on August 12, 2017. (*App. Vol. 1 at 187*). That forensic drug testing report showed Woods tested positive for methamphetamine. (*App. Vol. 1 at 187*). Woods' sample contained 500 ng/mL or more of methamphetamine. (*App. Vol. 1 at 187*).

The lab in Lenexa, KS forwarded the results of the test to a medical review officer, Dr. Charleton Owensby. (*App. Vol. 2 at 7; App. Vol. 1 at 188*). The medical review officer received said lab report on August 14, 2017. (*App. Vol. 2 at 7; App. Vol. 1 at 188*). The medical review officer issued his report on August 15, 2017. (*App. Vol. 2 at 7; App. Vol. 1 at 188*). The medical review officer's report identified and verified that Woods tested positive for methamphetamine. (*App. Vol. 1 at 112:3-13, 188-190*).

The medical review officer report identified that the medical review office was unable to contact Woods at the number listed on the CCF by Woods himself.

(*App. Vol. 2 at 7; App. Vol. 1 at 188*). Despite numerous attempts to contact Woods, corresponding notes identify that four calls were made to the number provided by Woods on the CCF and voicemails were left at the number provided by Woods. (*App. Vol. 1 at 192*).

Dr. Owensby forwarded his report to Mid-Iowa on August 15, 2017, which in turn notified CGFI. (*App. Vol. 1 at 113:3-16; App. Vol. 2 at 7; App. Vol. 1 at 188*). Mid-Iowa informed Kelsey that Woods' drug test results were confirmed positive for methamphetamine on August 15, 2017. (*App. Vol. 1 at 104:24-105:8, 165*). Upon learning of Woods' positive confirmed test on August 15, 2017, Kelsey terminated Woods for violating the Charles Gabus Ford controlled substance abuse policy, the Charles Gabus Ford drug and alcohol policy, and Charles Gabus Ford's illegal drug policy – collectively known as the Gabus Group Drug Free Workplace Policy. (*App. Vol. 1 at 105:19-106:7, 168*).

On August 16, 2017, Kelsey sent Woods a notice of his confirmed positive drug test, enclosing a copy of the confirmed positive result and the relevant CGFI policy. (*App. Vol. 1 at 106:15-22, 166-168*). The Notice identified that “As part of the Iowa Code Section 730.5 and Gabus Group Drug Free Workplace Policy” that: (1) Woods had the opportunity to request and obtain a confirmatory test of the second sample collected at an approved laboratory of his choice at his own cost; (2) Woods had a timetable by which he could contact Kelsey to request a second confirmatory test of the second sample; (3) Woods

could if he, by certified mail or in person, requested a confirmatory test on the second sample by either certified mail or in person within seven days of receipt of the Notice; (4) the Notice specified that the results of the second confirmatory test would be reported to Dr. Owensby for review; (5) the Notice detailed that Dr. Owensby would review the results and issue a report to Woods on whether or not the results of the second confirmatory test confirmed the initial confirmatory test as to the presence of an illegal drug; (6) the Notice indicated to Woods that if the results of the second test did not confirm the results of the initial confirmatory test that CGFI would reimburse Woods for the fee paid by Woods for the second test; (7) the Notice further identified that the initial confirmatory test would not be considered a positive test result for drugs and for purposes of taking disciplinary action against Woods if confirmed negative. (*App. Vol. 1 at 106:23-108:4, 166-168*).

Kelsey inadvertently omitted the exact dollar amount cost of the test from the Notice. (*App. Vol. 1 at 108:5-9*). Kelsey sent the Notice to Woods via certified mail with tracking. (*App. Vol. 1 at 166-168*). CGFI's Notice was delivered on August 19, 2017 at 3:57 p.m. via certified mail. (*App. Vol. 1 at 166-168*). Woods did nothing after he received the Notice from CGFI. (*App. Vol. 1 at 45*).

Argument

- 1. The district court correctly found that CGFI's drug testing of Woods and subsequent termination of Woods were lawful and substantially complied with Iowa Code § 730.5.**

The district court correctly found that Defendant-Appellee Charles Gabus Ford, Inc.'s (hereinafter "CGFI") testing of Plaintiff-Appellant Lucas Woods (hereinafter "Woods") were lawful and substantially complied with Iowa Code section 730.5 because CGFI substantially complied with essential matters necessary to assure the reasonable objectives of the statute. Appellants brief seeks to undermine the well-established principal of substantial compliance in favor of a piecemeal strict-compliance analysis of the issues. *See Sims v. NCI Holding Corp.*, 759 N.W.2d 333, 337 (Iowa 2009). Strict compliance by the employer with the statute is not required. *Id.* "Substantial compliance is said to be compliance in respect to essential matters necessary to assure the reasonable objectives of the statute." *Superior/Ideal, Inc. v. Bd. of Review*, 419 N.W.2d 405, 407 (Iowa 1988).

Iowa Code section 730.5 protects an employer's right to ensure a drug-free workplace. *Anderson v. Warren Distrib. Co.*, 469 N.W.2d 687, 689 (Iowa 1991). By passing Iowa Code section 730.5, the Legislature intended to "ensure the accuracy of any drug test serving as the basis for adverse employment action." *Harrison v. Employment Appeal Bd.*, 659 N.W.2d 581, 586-87 (Iowa 2003). Accurate drug testing is for the benefit of both employers and their employees.

Id. at 587. As demonstrated herein, CGFI substantially complied with essential matters necessary to assure the reasonable objectives of Iowa Code 730.5. Therefore, this Court should affirm the ruling of the district court in its entirety.

A. Woods failed to preserve error on the issue raised post-trial regarding Iowa Code § 730.5(9)(h) training requirements.

Woods failed to preserve error on the issue raised post-trial regarding the Iowa Code § 730.5(9)(h) training requirements because the issue was not properly raised at or before the time of trial.

It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before a reviewing court will decide them on appeal. *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998) (“issues must be presented to and passed upon by the district court”). It is not a sensible exercise of appellate review to analyze facts of an issue “without the benefit of a full record or lower court determination[.]” *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992) (quoting *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 552 n. 3, (1990)). When a ruling is strictly limited to a question of law, a motion to reconsider amounts to nothing more than a rehash of the legal question. *Meier v. Senecaut*, 641 N.W.2d 532, 538 (Iowa 2002) (citing *Explore Info. Servs. v. Iowa Ct. Info. System*, 636 N.W.2d 50, 57 (Iowa 2001); *Bellach v. IMT Ins. Co.*, 573 N.W.2d 903, 905 (Iowa 1998)).

The preservation of error rule requires a party seeking to appeal an issue presented to, but not considered by, the district court to call to the attention of

the district court its failure to decide the issue. *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995). 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. *See Linge v. Ralston Purina Co.*, 293 N.W.2d 191, 195–96 (Iowa 1980) (issue not preserved where it was not specifically addressed in the district court ruling and the record and ruling did not infer the issue was decided).

In this case, the record fails to show that Woods raised the issue alleging that the Iowa Code § 730.5(9)(h) training requirements were not met by CGFI at any time prior to his 1.904(2) Motion or that the court litigated the issue at the time of trial. On the issue of random drug testing, Woods testified that he understood that if he was randomly drug tested by CGFI during his employment and he tested positive for methamphetamine, that he would be terminated. (*App. Vol. 1 at 71:1-5, 119-120*). Woods further acknowledged that the CGFI controlled substance abuse policy in effect during his employ at CGFI identified that methamphetamine was one of the substances that would be tested in a random drug test by urinalysis by CGFI. (*App. Vol. 1 at 72:4-7, 155-159*). Woods further testified that prior to his employ at CGFI, he understood that CGFI had random drug testing procedures. (*App. Vol. 1 at 72:16-20*). Woods further testified that he had no evidence that the CGFI drug testing procedures

contained within CGFI policies were not used in his drug test. (*App. Vol. 1 at 72:21-24*).

The CGFI Drug and Alcohol Policy within the Handbook identified that “random drug testing will be done monthly” upon CGFI employees. (*App. Vol. 1 at 119, 133; see App. Vol. 1 at 156*). The CGFI Controlled Substance Abuse Policy identifies that “the drug test procedures contained in [Controlled Substance Abuse Policy] comply with the Federal and the State of Iowa guidelines.” (*App. Vol. 1 at 156*).

For Woods to now argue that the issue of training was preserved and make the assertion that CGFI was “not allowed to conduct” drug testing to this Court is noncongruent at best. Woods failed to properly raise the issue of training. Even if the issue had been properly raised to the district court, nothing in the district court's ruling indicates it considered, much less ruled upon, the argument Woods now makes. The district court's ruling focused entirely upon the issues Woods raised at trial as he acknowledged the valid policy of random drug testing performed by CGFI that he voluntarily participated in. Therefore, Woods failed to properly preserve error on the issue of training and this Court should find that error was not preserved on this issue.

B. If this Court finds that Plaintiff preserved error on the Iowa Code § 730.5(9)(h) training requirements, the district court correctly found that CGFI substantially complied with Iowa Code § 730.5.

If this Court finds that Plaintiff preserved error on the Iowa Code section 730.5(9)(h) training requirements, the district court correctly found that CGFI substantially complied with Iowa Code section 730.5 because CGFI presented documentary and testimonial evidence that substantially complied with essential matters necessary to assure the reasonable objectives of Iowa Code section 730.5.

CGFI agrees with Appellant-Plaintiff's scope and standard of review if this Court finds that Appellant-Plaintiff properly preserved error on the issue. Even if the issue had been properly raised and preserved, Woods still would not prevail. Woods states in his brief that "[d]efendant [CGFI] had the burden of proving that 730.5's requirements were met." Woods acknowledged at trial that CGFI's policies regarding random drug testing were valid and that he had no evidence to prove the random drug testing procedures were improper. Furthermore, the district court found that the evidence presented at the time of trial identified that CGFI substantially complied with essential matters necessary to assure the reasonable objectives of Iowa Code 730.5. Therefore, this Court should affirm the district court's findings in their entirety.

2. The district court correctly concluded that CGFI substantially complied with the Iowa Code § 730.5 and the Iowa Code § 730.5(7)(j) post-positive test notice requirement.

The district court correctly concluded that CGFI substantially complied with essential matters necessary to assure the reasonable objectives of Iowa Code section 730.5 and that CGFI substantially complied with the Iowa Code section 730.5(7)(j) post-positive test notice requirement to Woods. CGFI agrees with Appellant-Plaintiff's scope and standard of review for this section that the district court's legal conclusions are reviewed for correction of errors at law and its findings of fact are affirmed if supported by substantial evidence. *Sims v. NCI Holding Corp.*, 759 N.W.2d 333, 337 (Iowa 2009). Woods asserts that Charles Gabus Ford's notice to him of the results of his positive drug test for methamphetamine did not identify Plaintiff's cost for retesting in violation of Iowa Code section 730.5 but disregards the substantial steps taken by CGFI to comply with the statute's post-positive test notice requirement.

A. Relevant statutory language relating to Notice.

The text of the statute at issue reads as follows:

7. Testing procedures. All sample collection and testing for drugs or alcohol under this section shall be performed in accordance with the following conditions:

....

j. (1) If a confirmed positive test result for drugs or alcohol for a current employee is reported to the employer by the medical review officer, the employer shall notify the employee in writing by certified mail, return receipt requested, of the results of the test, the employee's right to request and obtain a confirmatory test of the

second sample collected [. . .] at an approved laboratory of the employee's choice, and the fee payable by the employee to the employer for reimbursement of expenses concerning the test. The fee charged an employee shall be an amount that represents the costs associated with conducting the second confirmatory test, which shall be consistent with the employer's cost for conducting the initial confirmatory test on an employee's sample. If the employee, in person or by certified mail, return receipt requested, requests a second confirmatory test, identifies an approved laboratory to conduct the test, and pays the employer the fee for the test within seven days from the date the employer mails by certified mail, return receipt requested, the written notice to the employee of the employee's right to request a test, a second confirmatory test shall be conducted at the laboratory chosen by the employee. The results of the second confirmatory test shall be reported to the medical review officer who reviewed the initial confirmatory test results and the medical review officer shall review the results and issue a report to the employer on whether the results of the second confirmatory test confirmed the initial confirmatory test as to the presence of a specific drug or alcohol. If the results of the second test do not confirm the results of the initial confirmatory test, the employer shall reimburse the employee for the fee paid by the employee for the second test and the initial confirmatory test shall not be considered a confirmed positive test result for drugs or alcohol for purposes of taking disciplinary action [. . .].

(2) If a confirmed positive test result for drugs or alcohol for a prospective employee is reported to the employer by the medical review officer, the employer shall notify the prospective employee in writing of the results of the test, of the name and address of the medical review officer who made the report, and of the prospective employee's right to request records [. . .].

Iowa Code § 730.5(7)(j) (2017).

The notice requirement within Iowa Code section 730.5 attempts to convey to the “addressee ‘a message that the contents of the document are important’ and worthy of the employee's deliberate reflection.” *Sims v. NCI Holding Corp.*, 759 N.W.2d 333, 338 (Iowa 2009) (internal citation to *Harrison*, 659

N.W.2d at 587). The Notice sent to Woods by Charles Gabus Ford upon receipt of the confirmed positive test result from the medical review officer, Dr. Charlton Owensby, conveyed such a message that the contents of the Notice were important and were worthy of Woods' deliberate reflection. (*See App. Vol. 1 at 167*).

The contents of the Notice suggest that the Notice conveyed to Woods a message that the contents of said Notice were important and worthy of his deliberate reflection:

1. Enclosure of the results of his random drug test on August 9, 2018, thereby confirming his positive test for methamphetamine;
2. Enclosure of the Charles Gabus Ford drug policy;
3. Notice that he could request and obtain a confirmatory test of the second sample collected from him at an approved laboratory of his choice at his own cost;
4. Notice that if he elected to exercise the option of obtaining a confirmatory test at his own cost, that he must request said confirmatory test within seven (7) days of receipt of the notice in person or via certified mail;
5. Notice that if he obtained a confirmatory test at his own cost, and the results of the second test did not confirm the results of the initial confirmatory test, Charles Gabus Ford would reimburse him for the fee he paid to obtain his confirmatory test; and
6. Notice that if the results of the second test did not confirm the results of the initial confirmatory test, that the initial confirmatory test would not be considered a positive test result for taking disciplinary action.

App. Vol. 1 at 167; Cf. Iowa Code § 730.5(7)(j) (2017).

Therefore, based upon the contents of the Notice, Woods was provided notice of the positive test result and a meaningful opportunity to consider

whether to undertake a confirmatory test in substantial compliance with the statute at issue. *See Sims v. NCI Holding Corp.*, 759 N.W.2d 333, 338 (Iowa 2009).

B. The employer's actions and inactions in *Skipton* are distinguishable from the present case.

Woods attempts to liken the facts of the present case to the facts criticized in *Skipton v. S & J Tube, Inc.*, 2012 WL 3860446 at *2 (Iowa Ct. App. Sept 6, 2012) in his brief. The facts before this Court are distinguishable from the facts in the *Skipton* decision. In *Skipton*, the trial court found that the “employer did not send [the employee] a letter by certified mail or inform her of the cost of a confirmatory test, and thus violated the code section.” *Skipton v. S & J Tube, Inc.*, 2012 WL 3860446 at *2 (Iowa Ct. App. Sept 6, 2012).

This is not the case here. CGFI informed Woods by certified mail that the fee payable by Woods to obtain his confirmatory test with the second sample would be reimbursed by CGFI if the results of his confirmatory test did not confirm the results of the initial confirmatory test. (*See App. Vol. 1 at 166-167*). Additionally, CGFI informed Woods that if the results of Woods' confirmatory test did not confirm the positive results of the initial confirmatory test, the initial confirmatory test would not be considered a positive test result for purposes of taking disciplinary action. (*See App. Vol. 1 at 167*). CGFI incidentally omitted the cost of the confirmatory test in the notice, while complying with all other conditions of the statute to provide notice to Woods and substantially comply

with Iowa Code section 730.5(7)(j). *See App. Vol. 1 at 166-168; Cf. Iowa Code section 730.5(7)(j) (2017).*

The employer in *Skipton* also claimed it: (1) “substantially complied with the statute because it hand delivered a notice to [the employee], rather than sending it by certified mail . . . and the notice the employer handed to [the employee] specifically stated in two places that a letter would be sent to her by certified mail, and in fact no such letter was ever sent . . .”; and (2) “the medical review officer gave [the employee] a possible price range, and not the fee payable, for a confirmatory test . . . orally.” *Skipton v. S & J Tube, Inc.*, 2012 WL 3860446 at *4 (Iowa Ct. App. Sept 6, 2012) (internal quotations omitted).

This is also not the case in the present action. CGFI delivered the statutory notice via certified mail with tracking and provided written notice of the option for Woods to take a confirmatory test, unlike the employer in *Skipton*. (*App. Vol. 1 at 166-168*). The medical review officer report identified that the medical review office was unable to contact Woods at the number listed on the CCF by Woods himself. (*App. Vol. 2 at 7; App. Vol. 1 at 188*). Corresponding notes identify that four calls were made to the number provided by Woods on the CCF and voicemails were left at the number provided by Woods by the medical review officer’s staff. (*App. Vol. 1 at 192*).

The court in *Skipton* identified multiple violations of Iowa Code section 730.5, identifying that “[n]ot only did the company violate the notice provisions

of section 730.5(7), but the company was not authorized by section 730.5(8)(f) to request a drug test.” *Skipton v. S & J Tube, Inc.*, 2012 WL 3860446 at *7 (Iowa Ct. App. Sept 6, 2012) (internal quotations omitted).

This is also not the case here. The district court found that CGFI complied with the notice provisions of section 730.5(7). (*App. Vol. 1 at 46-52*). The non-authorization referred to in the *Skipton* decision involved an on-the-job accident whereby the employer wrongfully requested a drug test based upon a perceived “new injury” based upon an employee’s carpal tunnel syndrome. See *Skipton v. S & J Tube, Inc.*, 2012 WL 3860446 at *5-6 (Iowa Ct. App. Sept 6, 2012). Woods was administered a random drug urinalysis according to multiple policies of CGFI and pursuant to the employee handbook whereby no employee was exempt from testing. Therefore, CGFI’s notice and subsequent actions in this case are distinguishable from the notice and actions by the employer in *Skipton*.

C. CGFI properly notified Woods per Iowa Code § 730.5 and Woods did nothing in response to said notice.

Woods testified that he received the notice of termination sent on August 16, 2017 via certified mail. (*App. Vol. 1 at 74:19-75:4, 166-168*). Kelsey testified that Woods neither contacted her via certified mail nor contacted her in person after she received confirmation that USPS delivered the Notice on August 19, 2017. (*App. Vol. 1 at 108:10-15*). In fact, Woods never contacted Kelsey regarding a confirmatory test after he received the notice on August 19, 2017 in any form to dispute the results of the confirmatory test. (*App. Vol. 1*

at 109:16-19). Woods testified that if the Notice had contained the dollar amount of the confirmatory test and had known the dollar amount cost of the test as a result, he may have requested a confirmatory test. (*App. Vol. 1 at 63:11-13*).

Woods' testimony does not explain that if the request for confirmatory testing was the only vehicle by which Woods could exonerate himself at no ultimate cost to himself (if he was in fact drug-free) or why he chose to do nothing to pursue the confirmatory test and exonerate himself.

Woods' testimony establishes that not only did he deliberately reflect upon the contents of the Notice at the time he received the letter, but also continued reflecting upon the contents of the Notice until the date of trial because the contents of the notice were important. Woods' focus on the absence of the cost of the confirmatory test in the Notice confirms that he knew the contents of the Notice were important when he received and read the Notice. The content of the Notice provided to Woods substantially complied with Iowa Code 730.5 and provided Woods with the idea that the contents of the Notice were important and worthy of his deliberate reflection at the time of receipt of the Notice.

D. CGFI terminated Woods based upon his failed random drug test for methamphetamine and his violation of CGFI policies.

CGFI provided evidence that Medical Review Officer Dr. Charlton Owensby confirmed Woods' positive test result for methamphetamine on

August 15, 2017. (*App. Vol. 1 at 113:3-6; App. Vol. 2 at 7; App. Vol. 1 at 188*). CGFI effectively terminated Woods' employment on the date of the Notice, August 16, 2017. (*App. Vol. 1 at 44 ¶ 4*). Woods admitted to Carter that he used methamphetamine days prior to August 9, 2017 in violation of the CGFI Drug Free Workplace Policy. (*App. Vol. 1 at 97:7-9*). The plain language of Iowa Code section 730.5(10)(a)(3) states:

10. Disciplinary procedures.

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 pursuant to the requirements of the employer's written policy and the requirements of this section, which may include, among other actions, the following:

(1) A requirement that the employee enroll in an employer-provided or approved rehabilitation, treatment, or counseling program, which may include additional drug or alcohol testing, participation in and successful completion of which may be a condition of continued employment, and the costs of which may or may not be covered by the employer's health plan or policies.

(2) Suspension of the employee, with or without pay, for a designated period of time.

(3) Termination of employment.

(4) Refusal to hire a prospective employee.

(5) Other adverse employment action in conformance with the employer's written policy and procedures, including any relevant collective bargaining agreement provisions.

Iowa Code § 730.5(10)(a)(1)-(5) (2017).

The Gabus Group Drug Free Workplace Policy has uniform requirements for what disciplinary or rehabilitation actions CGFI could take against Woods upon receipt of his positive drug test. (*See App. Vol. 1 at 155-159*). *See also McVey v. Nat'l Org. Serv., Inc.*, 719 N.W.2d 801, 803–04 (Iowa 2006). The Gabus Group Drug Free Workplace Policy identifies, and the Notice provided to Woods identifies, that if the results of the second confirmatory test were negative, then Woods' initial positive confirmatory test would not be used against him for purposes of disciplinary action pursuant to the Gabus Group Drug Free Workplace Policy. (*App. Vol. 1 at 155-159; Cf. App. Vol. 1 at 166-168*).

Woods' initial drug-testing results were confirmed positive for methamphetamine by Dr. Owensby on August 15, 2017. (*App. Vol. 2 at 7*). Woods' confirmed positive results were never retested with the second sample because Woods failed to exercise his statutory option for retesting provided by the Notice at any point prior to trial. Therefore, because Woods was an at will employee, he admitted to violating the Gabus Group Drug Free Workplace

Policy, and never exercised his statutory right to retest the second sample, CGFI properly terminated Woods' employment per the Gabus Group Drug Free Workplace Policy and Iowa Code section 730.5(10). Therefore, the district court's finding regarding the method of termination by CGFI of Woods substantially complied with Iowa Code section 730.5 and assured the reasonable objectives of the statute.

Therefore, the district court correctly found that CGFI substantially complied with essential matters necessary to assure the reasonable objectives of Iowa Code 730.5 and CGFI substantially complied with the Iowa Code section 730.5(7)(j) post-positive test notice requirement to Woods. This Court should affirm the ruling of the district court in its entirety.

3. The district court correctly found that the method by which CGFI sent the post-positive test notice substantially complied with Iowa Code § 730.5.

The district court correctly concluded that CGFI substantially complied with essential matters necessary to assure the reasonable objectives of Iowa Code section 730.5 and that CGFI substantially complied with Iowa Code section 730.5(7)(j) and the delivery method of the post-positive test notice. CGFI agrees with Appellant-Plaintiff's scope and standard of review for this section that the district court's legal conclusions are reviewed for correction of errors at law and its findings of fact are affirmed if supported by substantial evidence. *Sims v. NCI Holding Corp.*, 759 N.W.2d 333, 337 (Iowa 2009). Woods asserts

that CGFI's notice to him of the results of his positive drug test for methamphetamine were not sent via certified mail, return receipt requested, in violation of Iowa Code section 730.5. Woods' second alleged violation also concerns Iowa Code section 730.5(7)(j).

It is undisputed by the parties that Kelsey sent the Notice to Woods via certified mail with a tracking method. (*App. Vol. 1 at 166*). Woods asserts that the tracking method associated with the Notice is not "return receipt requested" and therefore violates the statute. As the district court properly found, the return receipt requested aspect of the Notice's delivery inures to the benefit of the employer in order to confirm that the employee received the statutory Notice on a certain date and time. (*App. Vol. 1 at 49 ¶ B*).

The tracking receipt notified CGFI that Woods received the Notice, together with enclosures, on August 19, 2017 at 3:57 p.m. (*App. Vol. 1 at 166*). Woods admitted to receiving said Notice, together with enclosures on or about the date identified on the receipt. (*App. Vol. 1 at 74:19-75:23*). Therefore, CGFI substantially complied with Iowa Code section 730.5(7)(j) while simultaneously substantially complying with essential matters necessary to assure the reasonable objectives of Iowa Code section 730.5. The Order of the district court should be affirmed in its entirety.

Conclusion

This Court should affirm the Order of the district court in its entirety as its findings of fact and conclusions of law correctly concluded that CGFI substantially complied with essential matters necessary to assure the reasonable objectives of Iowa Code section 730.5 regarding CGFI's random drug testing of Woods as a CGFI employee.

Request for Oral Argument

Counsel for Appellee respectfully requests to be heard in oral argument upon submission of this case if Appellant's request to be heard is granted by this Court.

Respectfully submitted,

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Certificate of Service

Pursuant to Iowa Appellate Procedure 6.701 and 6.901, the undersigned hereby certifies that on the 10 day of May 2019, the Brief was filed with the Supreme Court via EDMS and electronically served on all parties of record.

/s/ James R. Hinchliff
James R. Hinchliff

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