IN THE IOWA SUPREME COURT

SUPREME COURT NO. 18-1464
POLK COUNTY NO. CVCV052834

JIMMY MCCANN and JULIE ELLER,
Plaintiffs/Appellees

vs.

CASEY'S GENERAL STORES, INC. and CASEY'S MARKETING COMPANY,
Defendants/Appellants

APPEAL FROM THE IOWA COURT OF APPEALS

PLAINTIFFS/APPELLEES'
RESISTANCE TO DEFENDANTS' APPLICATION FOR FURTHER REVIEW

IOWA COURT OF APPEALS DECISION DATED JANUARY 9, 2020

Matthew M. Sahag
DICKEY & CAMPBELL LAW FIRM, PLC
301 East Walnut Street, Suite 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008
FAX: (515) 288-5010
matthew@dickeycampbell.com

David Albrecht
FIEDLER LAW FIRM, PLC
8831 Windsor Parkway
Johnston, IA 50131
PHONE: (515) 254-1999
FAX: (515) 254-9923
david@employmentlawiowa.com

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INTRODUCTION

None of Defendants' arguments merit further review. Defendants contend the Court of Appeals erred in finding that Plaintiffs, who worked in a caged-in area counting cigarette boxes, were not in "safety-sensitive positions." Although Defendants claim the Court of Appeals "rewrote the statutory definition of 'safety-sensitive,'" the Court simply applied the definition found at Iowa Code section 730.5(1)(j).

Defendants next contend the Court of Appeals erred in construing the immunity provisions of section 730.5. However, the immunity provision of section 730.5 cannot logically be applied to violations of section 730.5 itself.

Finally, Defendants claim the Court of Appeals erred in upholding the damages awarded to Plaintiffs. Defendants failed to prove their failure to mitigate defense. They want to get around that by asking this Court to apply the "unclean hands" doctrine. This maxim cannot apply because this case was not tried in equity. Even if such a defense was available, it would not apply here.

For all these reasons, Defendants' Application for Further Review should be denied.

ADDITIONAL FACTS RELEVANT TO THIS APPLICATION

At the time they were fired, Plaintiff Jimmy McCann had worked for Defendants for more than 15 years and Plaintiff Julie Eller had worked for Defendants for 5 years. Both had suffered workplace injuries resulting in

medical restrictions, so both worked in a location protected on all sides by metal fencing, known as "the cage." (T.T.22:1-6). The cage door was closed while they worked. (T.T. 181:15-23). It was not possible to get in or out of the cage without going through the door. (T.T. 181:19-21).

McCann and Eller's job duties consisted of counting cigarette boxes returned by Defendants' convenience stores to make sure the invoice matched the actual amount of product. (T.T. 22:7-12; T.T. 181:12-14). Neither Plaintiff operated heavy machinery or performed any other job functions that could cause significant injury or death. Both were fired as result of a drug test that was supposed to involve only employees in "safety-sensitive" positions.

ARGUMENT

I. THE COURT PROPERLY HELD THAT "SAFETY-SENSITIVE" MEANS "SAFETY-SENSITIVE"

The Court of Appeals properly found that Plaintiffs' jobs were not "safety-sensitive" positions as defined by Iowa Code section 730.5. *Dix v. Casey's General Stores, Inc.*, 2020 WL 105087, *7-8 (Iowa App. January 9, 2020). This well-reasoned conclusion should not be disturbed.

The statute provides a specific definition for a safety-sensitive position:

> "*a job* wherein an accident could cause loss of human life, serious bodily injury, or significant property or environmental damage, including a job with duties that include immediate supervision of a person in a job that meets the requirement of this paragraph.

IOWA CODE § 730.5(1)(j) (emphasis added).

The Court of Appeals agreed with the District Court's ruling that this definition clearly indicates it is the job *duties*, not the *environment*, that determines whether a job is safety-sensitive. *Dix*, 2020 WL 105087 at *7. The statute defines supervisors of safety-sensitive employees as safety-sensitive employees—even if their own duties would not classify them as such. IOWA CODE § 730.5(1)(j).

While there is a dearth of Iowa precedent on point, what does exist supports this view. *Sims v. NCI Holding Corp.*, 759 N.W.2d 333, 337 (Iowa 2009) (employee was in a safety-sensitive position due to the dangerous functions of his position, which required him to "oversee the operation of steel decoiling machines, program computers controlling them, and operate a forklift in transporting bundles of steel weighing approximately 10,000 pounds"); *Welcher v. American Ordnance, L.L.C.*, 711 N.W.2d 732 (Iowa App. 2006) (employee who handled explosive materials could be considered safety-sensitive per broad federal regulations).

Six transportation-related federal agencies have established drug and alcohol testing programs for certain employers and employees. https://www.transportation.gov/odapc/agencies (accessed February 10, 2020). While each agency has specific sections devoted to which workers can be tested, *all six* agencies define safety-sensitive in relation to a position's functions, not the work environment. *See* 14 C.F.R. Part 120 (Federal Aviation Administration); 49 C.F.R. Part 382 (Federal Motor Carrier Safety Administration); 49 C.F.R. Part

219 (Federal Railroad Administration); 49 CFR Part 655 (Federal Transit Administration); 49 C.F.R. Part 199 (Pipeline & Hazardous Materials Safety Administration); 46 C.F.R. Part 16 and 46 C.F.R. Part 4 (United States Coast Guard).

There is an outer limit to the nature of the safety threat that might justify an unannounced drug test. *See, e.g. Krieg v Seybold*, 481 F. 3d 512, 518 (7th Cir. 2007) (collecting cases) (elevator operators, carpenters, masons, plumbers, sign painters, power distribution managers, and employees are not safety-sensitive positions); *Eastham v. Housing Authority of Jefferson County*, 22 N.E. 3d 499, 502, 507 (Ill. App. Ct. 2014) (plaintiff employed in a housing authority's maintenance facility did not occupy a safety-sensitive position); *Jones v. Graham County Bd. of Educ.*, 677 S.E.2d 171, 173, 180-81 (N.C. App. 2009) (rejecting outright school district's position that all positions should be designated as safety-sensitive).

As of April 6, 2016, the jobs McCann and Eller performed were far from dangerous. They counted cigarette boxes in an enclosed area surrounded by fencing, did not operate any heavy-duty machinery, and were in "the cage" because they were on medical restrictions. Counting cigarette boxes is simply not a job wherein an accident could cause loss of life. *See* IOWA CODE § 730.5(1)(j); *NewMech Cos., Inc. v. Youness*, 2001 WL 1083933, at *3 (Minn. Ct. App. Sept. 18, 2001) (no evidence in the record that the job the plaintiff did was safety-sensitive, even though it was categorized by the employer as such).

By statute, Iowa employers wishing to conduct drug and alcohol testing can select one of three pools of employees. They generally include (1) all employees at a particular work site; (2) all full-time, active employees at a particular work site; or (3):

> All employees at a particular work site who are in a pool of employees in a safety-sensitive position and who are scheduled to be at work at the time testing is conducted, other than employees not subject to testing pursuant to a collective bargaining agreement, or employees who are not scheduled to be at work at the time the testing is to be conducted or who have been excused from work pursuant to the employer's work policy prior to the time the testing is announced to employees.

IOWA CODE § 730.5(8)(3). Describing safety-sensitive pool as "employees at a particular work site who are in a pool of employees in a safety-sensitive position" is further proof that the safety-sensitive designation is a subset of other, non-safety-sensitive employees. IOWA CODE § 730.5(1)(j). Defendants could have chosen to perform testing on one of the other two pools, but they did not. Instead, they drafted a policy applying to only safety-sensitive employees. That policy bound them. IOWA CODE § 730.5(9) (testing "shall be carried out within the terms of a written policy").

Defendants argue that anyone and everyone in the Distribution Center warehouse was a "safety-sensitive employee" because every single person in the warehouse could *potentially* be exposed to danger, even if it has nothing to do with their job and regardless of how remote the chance. Allowing such a broad

interpretation contravenes the plain language of the statute. If the Legislature intended the safety-sensitive classification to apply to everyone within a worksite, there would have been no point in having three different pools. Cf. IOWA CODE § 730.5(8).

The District Court rejected Defendants' classification as "contrary to the scheme outline in the statutory language quoted above. The definition of 'safety sensitive position' is not dependent on the location one does his or her job, but rather the nature of the job itself. The opening language of the definition makes this clear – 'Safety-sensitive position' means a job…' *Id.* (emphasis added)." District Court Order, p. 16. After reviewing relevant case law, the Court concluded:

> These cases make it clear that it is the duties of the employee and not the environment in which those duties are discharged that goes into whether a particular position is safety-sensitive. It is not enough that a person finds himself in the warehouse and subject to injury, but whether the job in question creates a substantial risk of injury or damage. Put another way, the fact that a light-duty warehouse employee (or a human resources employee) is injured in the warehouse when struck by an errant forklift driver does not make the former a safety-sensitive position. It is the operation of the forklift that makes its driver a safety-sensitive position, not the environment in which it is operated.

District Court Order, p. 17.

If Defendants' theory of "safety-sensitive" is correct, then they violated the law by failing to test numerous employees who should have been included in the April 6 pool. Human Resources employees frequented the warehouse.

Vice President Jay Blair spent a significant amount of time (almost daily) in the warehouse among the foreboding forklifts. As the Warehouse Manager's supervisor, Director of Grocery Distribution Ed Vaske would be considered safety sensitive. All would meet Defendants' "definition" of safety-sensitive; none were tested.

Defendants' decision to not test human resources, administrative, and corporate employees means one of two things: Defendants do not actually think that one's presence in the warehouse means the person occupied a safety-sensitive position or Defendants did not follow their own definition of "safety sensitive." Either way, Defendants broke the law.

On appeal Defendants argued, for the first time, that because employers can designate employees as being in safety-sensitive positions for the purpose of assigning them to a testing pool, employers get to define what "safety-sensitive means." But definitions come before designations. Section 730.5(1)(j) defines "safety-sensitive." The discretion to assign safety-sensitive employees to testing pools shows up five pages later in a section of the statute governing "written testing policy and other testing requirements." IOWA CODE § 730.5(9)(f).

As the Court of Appeals pointed out, "section 730.5(9)(f) only admonishes the employer not to multiply a particular employee's chance of being selected for testing by placing that employee in more than one pool of

safety-sensitive employees." *Dix*, 2020 WL 105087 at *8. Provided that an employee meets the statutory definition of safety-sensitive, section 730.5(9)(f) allows employers the discretion to decide whether those employees will be selected for testing pools. Defendants are correct that they get to designate which of their employees are in safety-sensitive positions for the purposes of placing them in testing pools--but only if the job's duties first meet the legal definition. *See id.* Defendants claim it "designated" all employees as safety-sensitive based on the warehouse environment, but that is a definition, not a designation, and Defendants have no power to redefine words in the statute.

Defendants argue that section 730.5(9)(f) would be superfluous if "a position was or was not, objectively speaking, safety-sensitive." This also misses the point by focusing on a position's title. Def. Br. p. 12. The statutory definition focuses on job *functions*, not titles or environment. The fact that the statute defines "safety sensitive" does not mean a position is "objectively" safety-sensitive or not. For instance, the job duties of a custodian (to take Defendants' example), may be different in an office building than in a nuclear power plant. If a custodial employee at a nuclear plant simply cleans windows and removes office waste, his job would not be a safety-sensitive position. If instead he disposed of nuclear waste and enriched uranium, that would certainly qualify.

Defendants demand that Iowa courts are "not to question" employers' business judgment. This case does not involve business judgment, but even if it

did, the Court of Appeals rightly held there was "no authority for the view that the employer's designation trumps the statutory definition, particularly when Casey's handbook definition tracks the statute." *Dix*, 2020 WL 105087 at *8.

II. THE IMMUNITY PROVISION OF SECTION 730.5 DOES NOT APPLY TO VIOLATIONS OF SECTION 730.5

In drafting section 730.5, the legislature wanted to make sure that employers following one law would not accidentally incur liability under another law. Therefore, the legislature drafted an "immunity" provision applying to six specific situations:

> A cause of action shall not arise against an employer who has established a policy and initiated a testing program in accordance with the testing and policy safeguards provided for under this section, for any of the following

IOWA CODE § 730.5(11). Defendants argue the phrase "a cause of action" includes a claim under section 730.5. Def. Br. pp. 18-19. This interpretation conflicts with the text of the statute holding a person liable for violating section 730.5. An employer cannot simultaneously violate 730.5 and be immune from liability for those violations.

The Court of Appeals pointed out the clearest problem with Defendants' argument:

> An employer who violates the statute cannot benefit from the immunity, but an employer who does not violate the statute has no need for immunity because an employee would have no viable claim. We strive to construe the statute to avoid that circularity.

Dix, 2020 WL 105087, at *5. The Court resolved this issue by holding section 730.5(11)(a) applied to third-party conduct. *Id.* at 6. Plaintiff agrees that section 730.5(11)(a) could sometimes cover third-party conduct, but not in the way the Court decreed. Section 730.5 uses the phrase "a cause of action" four times; all imply suits brought outside of section 730.5. IOWA CODE § 730.5(3); IOWA CODE § 730.5(11); IOWA CODE § 730.5(12)(a); and IOWA CODE § 730.5(12)(b). Section 730.5(11) therefore provides immunity for causes of action *other than* those under section 730.5.

The immunity provision outlines six scenarios in which an employer that otherwise follows the provisions of section 730.5 is immune from liability. IOWA CODE § 730.5(11)(a)-(f).

> At issue in this case is subsection (a):
>
> (a): Testing or taking action based on the results of a positive drug or alcohol test result, indicating the presence of drugs or alcohol, in good faith, or on the refusal of an employee or prospective employee to submit to a drug or alcohol test.

Defendants argue that because they took action based on the results of a positive test, they are absolutely immune from all their other violations of the same statute. This interpretation is, frankly, absurd. Immunizing an employer from liability under section 730.5 simply because it obtained a positive result makes no sense; it would gut the rest of the statute. The Legislature carefully drafted "a comprehensive scheme" of detailed checks and balances to govern

drug testing in the workplace, including detailed remedies to enforce those rules. *Ferguson v. Exide Tech., Inc.*, 936 N.W.2d 429, 433 (Iowa 2019). It seems unlikely that it would go to all that trouble, only to cancel those rules later in the same statute.

Plaintiff suggests an alternative interpretation of section 730.5(11)(a). It would make perfect sense for the Legislature to say that an employer's proper invocation of section 730.5's authorization to conduct drug testing cannot be used as the basis for another cause of action. For example, an employee fired based on the results of a wholly compliant drug test could not bring a discrimination claim on the basis that ingesting that drug was part of his religion. An employee who was lawfully forced to urinate under direct observation would likewise be barred from bring a cause of action for invasion of privacy. *See* IOWA CODE § 730.5(7)(a) (urination must occur in private unless employer has reasonable suspicion the employee will try and adulterate the sample).

This Court recently made clear that section 730.5(15) provides the exclusive remedy for violations of the statute. *Ferguson*, 936 N.W.2d 429. Section 730.5's immunity provision is the flip side of that coin. An employer who follows all of section 730.5's mandates is granted immunity against certain other causes of action. This is the only way to harmonize the plain language of section 730.5 with the circularity issue identified by the Court of Appeals. It

also provides the sort of "broad immunity" for which Defendants argue. In short, the immunity provision does not, and cannot, apply in this case because Plaintiffs' claims were premised on actual violations of section 730.5.

III. THE COURT PROPERLY UPHELD DEFENDANTS' LIABILITY

Defendants want this Court to impose an equitable remedy in a case tried at law. The parties agreed on page one (1) of the trial scheduling and discovery plan that this matter would be tried at law. Supp. App. 4. Defendants were also instructed by Judge Huppert during trial that he was trying the case at law. (T.T. 220:16-17). The "unclean hands" maxim does not apply.

A. The Court of Appeals Properly Upheld the Award to Eller

As the Court of Appeals noted, the standard of review is for errors at law. If the District Court's findings of fact were supported by substantial evidence, they are binding. To prove a failure to mitigate defense, Defendants bore the burden of establishing by a preponderance of the evidence that "other substantially equivalent positions were available" to Eller, and Eller "failed to use reasonable diligence in attempting secure such a position." *Baker v. Gary Morrell & Co.*, 263 F. Supp. 2d 1161, 1180 (N.D. Iowa 2003). "Initially, there must be substantial evidence that there was something that the plaintiff could do to mitigate [her] loss and that requiring the plaintiff to do so was reasonable

under the circumstances." *Greenwood v. Mitchell*, 621 N.W.2d 200, 205 (Iowa 2001).

The Court of Appeals found Defendants failed to meet their burden. *Dix*, 2020 WL 105087 at *8. Defendants failed to present any evidence of available jobs or that Eller's conduct was unreasonable. *See id.* "Moreover, a finding of diligence is not a condition precedent to an award of back pay. Again, it is [the employer] not [the employee], who bears the burden of establishing that the claimant willfully failed to mitigate damages and this burden is not met merely by showing that further actions could have been taken in the pursuit of employment." *Children's Home of Cedar Rapids v. Cedar Rapids Civil Rights Comm'n*, 464 N.W.2d 478, 482 (Iowa App. 1990). Eller presented evidence suggesting that due to her medical restrictions a job search would be futile. App. 579. "In determining whether a party has failed to mitigate damages, the defendant has the burden of demonstrating that the failure to mitigate was unreasonable under the circumstances." *Kirk v. Union Pac. R.R.*, 514 N.W.2d 734, 737 (Iowa App. 1994) (rejecting employer's argument that plaintiff failed to mitigate damages by not seeking or accepting employment after leg amputation when the plaintiff's counselor opined his job prospects "were rather grim"). "The reasonableness of the effort to find substantially equivalent employment should be evaluated in light of the

individual characteristics of the claimant and the job market." *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 624 (6th Cir. 1983).

> Where an ADA claimant refrains from pursuing alternative employment, we consider it reasonable to presume at the outset that she did so for an articulable reason, perhaps because she possessed information which suggested that a job search would have been futile. Since it is the claimant who would possess any such information, however, she is likely to be in the better position to explain her preemptive decision to take no action to obtain employment.

Quint v. A.E. Staley MFG. Co., 172 F.3d 1 (1st Cir. 1999). Considering Eller's individual circumstances and that her restrictions all but completely removed her from the relevant job market, Defendants failed to prove her efforts were unreasonable. *See id.* As the Court of Appeals pointed out, Eller provided medical evidence that her restrictions "drastically reduced if not totally eliminated" her ability to find similar work. App. 580. Defendants "did not offer any countering evidence." *Dix*, 2020 WL 105087 at *13. This is important, as "[f]inding suitable employment does not require a party to go into another line of work, accept a demotion, or take a demeaning position." *Mathieu v. Gopher News Co.*, 273 F.3d 769, 784 (8th Cir. 2001). If Defendants wanted to challenge Eller's restrictions, they needed to bring in a medical expert to opine on Eller's restrictions and her ability to find suitable employment. They failed to do so.

Defendants now posit two contradictory arguments. First, they claim Eller was not as restricted as her medical notes indicate. This claim is pure argument and not based on any evidence. Second, Defendants argue Eller is *too restricted*, to the point of not being able to work at all. This position undercuts the first, but similarly lacks any supporting evidence in the record. Defendants conflate Eller's statement that she "has not worked" as equivalent to an inability to work the restricted, light-duty position she had been doing at Defendants for approximately five years. *Id.*

Defendants argue the two extremes but ignore the middle: Eller had significant medical restrictions but was still perfectly able to perform the job she held with Defendants. Eller testified she would have continued working at Defendants, and Defendants did not adduce any evidence that she was physically unable to count cigarette boxes. Defendants never questioned Eller about her ability to perform the essential functions of the Tobacco Returns position.

Defendants discuss Eller's consideration of Social Security Disability Insurance (SSDI), but there was no evidence Eller had applied. More importantly, SSDI "does not take the possibility of 'reasonable accommodation' into account." *Cleveland v. Policy Mgt. Sys. Corp.*, 526 U.S. 796, 803 (1999).

B. The Court of Appeals Properly Upheld the Award to McCann

As stated above, Defendants cannot make the "unclean hands" argument because this case was tried at law. Even if the case was tried in equity, the Court of Appeals properly declined to apply the maxim because Defendants were not authorized to test McCann in the first place. *Dix*, 2020 WL 105087, at *12. If Defendants' argument were adopted, there would be no reason for employers to follow the law. An employer could violate the entire law, but as long as it obtained a confirmed positive result, an aggrieved plaintiff would have no recourse. This would be like telling every person who is subjected to a warrantless search that, even if they successfully challenge the search, the illegal evidence is still admissible. The legislature did not intend such an absurd result.

Section 730.5 governs employer conduct, not employee conduct. *Tow v. Truck Country of Iowa*, 695 N.W.2d 36, 39 (Iowa 2005) ("The manifest purpose of section 730.5 is to regulate drug testing initiated by employers for the purpose of influencing employment decisions." McCann lost his job of 16 years, had to cash out his 401k, and start over. Defendants submitted no evidence of impairment and McCann testified unequivocally that he was never impaired at work.

Defendants argue McCann gave up on mitigation by deciding that opening his own business was in his family's best interest. "The notion that starting one's own business cannot constitute comparable employment for

mitigation purposes not only lacks support in the cases, but has a distinctly un-American ring." *Smith v. Great Am. Rest., Inc.*, 969 F.2d 430, 438 (7th Cir. 1992). "[T]he plaintiff's burden to mitigate damages does not require success, but only an honest, good faith effort." *Id.* At trial, Defendants presented no evidence and did not argue that McCann's efforts have been anything but honest and reasonable. McCann testified at length about the work required to start and maintain a food truck business and that serving the food was the easiest part. (T.T. 231:13-18; Vol. II 52:3-12).

That McCann's business failed to turn a profit early in its existence—when expenses are highest and presence in the market is lowest— "does not make his decision to go in a different direction unreasonable." App. 209; *Smith*, 969 F.2d at 439 (the fact that the plaintiff's self-owned restaurant failed to turn a profit until its third year did not make her mitigation efforts unreasonable). Had McCann's business been successful, Defendants would rightfully argue he could not collect damages for the amount his food truck earned him in mitigation. The inverse is just as true.

In *Smith*, a former restaurant manager decided to open her own restaurant one week after being fired. *Id.* at 434. Smith had applied for only one job before deciding to open her restaurant. *Id.* The restaurant had failed to turn a profit until its third year, when it made $2,261.85. *Id.* at 439. A jury awarded the full amount of requested back pay, totaling 34 months, but the district

court cut wages off after 11 months, determining Smith should have known by then that the restaurant was unsuccessful. *Id.* The appellate court reversed, finding 34 months was not too long for the restaurant venture to be considered a reasonable attempt at mitigation. *Id.* The appellate court pointed out that the defendant had failed to prove its failure to mitigate defense, and that "the 'sting' of discrimination did not end at the 11-month point." *Id.*

Defendants' argument that McCann "withdrew from the job market" because he pursued "one, single warehouse job" is equally unavailing. McCann did not withdraw from the job market; he worked extremely hard to start his own business. Deciding to start his business rather than chase a potential job opportunity that had not yet materialized does not make McCann's effort unreasonable. *Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061, 1065 (8th Cir. 1988) (upholding backpay and front pay awards because Plaintiff's decision to turn down a job offer in a related field for comparable pay and start his own business less than two months after being fired was reasonable and made in good faith). A district court's finding of facts will be affirmed if supported by substantial evidence. *Tow*, 695 N.W.2d at 38. Defendants may disagree with the Court's findings of fact, but they cannot claim the Court lacked substantial evidence for its findings.

CONCLUSION

This Court should deny Defendants' application for further review.

ATTORNEY'S COST CERTIFICATE

I, David Albrecht, certify that there was no cost to reproduce copies of the preceding Resistance to Defendants' Application for Further Review because the Resistance is being filed exclusively in the Appellate Courts' EDMS system.

Certified by: */s/ David Albrecht*

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type-Style Requirements

1. This application complies with the type-volume limitation of Iowa R. App. P. 6.1103 (4) because:

[X] this application contains 4277 words, excluding parts of the application exempted by Iowa R. App. P. 6.1103 (4).

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CERTIFICATE OF SERVICE AND FILING

I, David Albrecht, hereby certify that on the 10th day of February 2020, I electronically filed the foregoing Application for Further Review with the Clerk of the Iowa Supreme Court by using the EDMS system. Service on all parties will be accomplished through EDMS.

By: */s/ David Albrecht*