ELECTRONICALLY FILED JAN 27, 2020 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

LUCAS WOODS, **Plaintiff-Appellant-Resister,** **v.** **CHARLES GABUS FORD, INC.,** **Defendant-Appellee-Applicant.**	**S.C. CASE NO. 19-0002**

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

APPELLEE'S APPLICATION FOR FURTHER REVIEW OF THE COURT OF APPEALS' RULING, FILED JANUARY 9, 2020

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Question Presented

1. Whether the Court of Appeals erred in finding that the omission of the cost of the confirmatory test in the Iowa Code section 730.5(7)(j)(1) notice constitutes a lack of substantial compliance notwithstanding substantial compliance with Iowa Code section 730.5, including Iowa Code section 730.5(7)(j)(1), in all other respects?

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Application for Further Review

COMES NOW Applicant/Appellee, Charles Gabus Ford, Inc. (hereinafter "CGFI"), and in support of their application for further review of the Iowa Court of Appeals Ruling, filed January 9, 2020, states:

The opinion issued by the Iowa Court of Appeals in this matter has decided a case where there is an important question of changing legal principals, as other aspects of Iowa Code section 730.5 have been recently litigated. Simply stated, what constitutes **"substantial compliance"** with Iowa Code section 730.5, the test of whether an employer has complied with the statute regarding employee drug testing. CGFI seeks further review from this Court on the issue of specific inclusion of the cost of the confirmatory testing in Paragraph III(C) and Paragraph IV of the opinion issued by the Iowa Court of Appeals. The issue decided by the Iowa Court of Appeals in this matter is an important question of law that has not been, but should be, settled by the Iowa Supreme Court.

The Iowa Court of Appeals decision in this matter is tantamount to strict compliance, not substantial compliance, regarding the inclusion of the specific cost of confirmatory testing is required by an employer to substantially comply with the reasonable objectives of Iowa Code section 730.5(7)(j)(1)'s notice requirement to provide an employee a meaningful opportunity to consider whether to undertake a confirmatory drug test. However, in this case, the

employee at issue admitted using methamphetamine during his random drug testing and did nothing after receiving the Iowa Code section 730.5(7)(j)(1) notice that confirmed the presence of methamphetamine in his urine but inadvertently omitted the cost of the confirmatory testing.

The opinion issued by the Iowa Court of Appeals in this matter presents an issue of broad public importance that this Supreme Court should ultimately determine, as the determination by the Iowa Court of Appeals that an employer's inadvertent failure to include the cost of confirmatory testing in the notice required by Iowa Code section 730.5(7)(j)(1) while complying with Iowa Code section 730.5 in all other respects creates potential issues for all companies who seek to substantially comply with Iowa Code section 730.5 and ensure a drug-free workplace.

Therefore, this Court should grant further review to address the important questions of changing legal principals in this case and to further clarify what is "substantial compliance" for employers who seek to comply substantially with each provision of Iowa Code section 730.5.

Statement of the Facts

Lucas Woods (hereinafter "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*).

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 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*).

Woods signed an Acknowledgment, certifying that he read and understood its contents on August 27, 2014. (*App. Vol. 1 at 160*).

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 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.*). 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 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*). 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*).

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*).

At some point during the collection of Woods' samples of urine on August 9, 2017, Woods admitted recently using methamphetamine to the collector, Brandon Carter. (*App. Vol. 1 at 97:7-9*). After confirmatory testing pursuant to Iowa Code section 730.5, 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*).

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 complied with every provision of 730.5 except one, the cost of the confirmatory test, and 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*). Woods testified at trial that he was drug free on August 9, 2017 and acknowledged that CGFI would have paid for the cost of the confirmatory test if Woods was in fact drug-free. (Vol. 1 Tr. 27:8-13; 94:2-95:14).

Argument

1. 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. 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 Iowa Code section 730.5 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 did exactly

that: it 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 by including the following:

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. 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 because he believed and testified as such that he was drug free. (*App. Vol. 1 at 63:11-13;* Vol. 1 Tr. 27:8-13).

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.

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. The Iowa Court of Appeals incorrectly ruled that "[w]e do not find Gabus Ford's notice 'substantially complied with section 730.5(7)(i) and assured the reasonable objectives of the statute,' as concluded by the district court." *Iowa Court of Appeals Order, Page 9, filed January 9, 2020*. This Court should affirm the ruling of the district court in its entirety and overturn the Iowa Court of Appeals decision.

Request for Oral Argument

Counsel for Applicant/Appellee respectfully requests to be heard in oral argument upon submission of this case.

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 27th day of January 2020, the Application for Further Review was filed with the Supreme Court via EDMS and electronically served on all parties of record.

/s/ *James R. Hinchliff*
James R. Hinchliff

Certificate of Compliance with Typeface Requirements and Type-Volume Limitation

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

[X] this application has been prepared in a proportionally spaced typeface using Garamond in 14 point font and contains 3,310 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(*a*), or

[ ] this application has been prepared in a monospaced typeface using Garamond in 14 point font and contains _____ lines of text, excluding the parts of the resistance exempted by Iowa R. App. P. 6.1103(4)(*a*).

/s/ James R. Hinchliff — January 27, 2020
Signature — Date

ELECTRONICALLY FILED JAN 09, 2020 CLERK OF SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 19-0002
Filed January 9, 2020

LUCAS WOODS,
Plaintiff-Appellant,

vs.

CHARLES GABUS FORD, INC.,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Jeanie K. Vaudt, Judge.

Lucas Woods appeals the district court's order dismissing his petition asserting his employment was wrongfully terminated because his former employer violated Iowa's private sector employee drug-and-alcohol-testing statute, Iowa Code section 730.5 (2017). **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Harley C. Erbe of Erbe Law Firm, Des Moines, for appellant.

James R. Hinchliff and Steven H. Shindler of Shindler, Anderson, Goplerud & Weese, P.C., West Des Moines, for appellee.

Heard by Doyle, P.J., and Tabor and Schumacher, JJ.

DOYLE, Presiding Judge.

Charles Gabus Ford, Inc. (Gabus Ford) fired Lucas Woods after he failed an employee drug test. Woods filed a petition at law asserting he was wrongfully terminated because Gabus Ford violated Iowa Code section 730.5 (2017)—Iowa's private sector employee drug-and-alcohol-testing statute. After a bench trial, the district court dismissed Woods's petition.

Woods appeals, challenging the district court's ruling in three respects. He asserts Gabus Ford violated section 730.5 because it did not: (1) send its certified mailing of the post-test notice return receipt requested as required in subsection (7)(j)(1); (2) establish it complied with the supervisory personnel training described in subsection (9)(h); and (3) include in its notice to Woods the cost of a confirmatory drug test as required in subsection (7)(j)(1). Upon our review of the record, we find no reversible error in Woods's first two claims. But we agree Gabus Ford's failure to include the cost of the confirmatory drug test in its post-test notice to Woods violated the statute. So we reverse and remand for further proceedings.

I. Standard of Review.

The parties agree our review is for correction of errors at law. *See* Iowa R. App. P. 6.907; *Sims v. NCI Holding Corp.*, 759 N.W.2d 333, 337 (Iowa 2009). We will affirm the district court's findings of fact if they are supported by substantial evidence. Iowa R. App. P. 6.904(3)(a). "Evidence is substantial if a reasonable mind would accept the evidence as adequate to reach the same findings." *Sims*, 759 N.W.2d at 337.

II. Relevant Law.

Iowa's private sector employee drug-and-alcohol-testing statute, section 730.5, was enacted "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). The statute allows private sector employers to take disciplinary action against employees who test positive or refuse to test, including termination of their employment. Iowa Code § 730.5(10)(a)(3).

> Although the legislature now allows random workplace drug testing, it does so under severely circumscribed conditions designed to ensure accurate testing and to protect employees from unfair and unwarranted discipline. The importance of these protections, including the procedural safeguards contained in section 730.5(7), is highlighted by the statutory provision making an employer "who violates this section . . . liable to an aggrieved employee . . . for affirmative relief including reinstatement . . . or any other equitable relief as the court deems appropriate." Iowa Code § 730.5(15). 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.

Harrison v. Emp't Appeal Bd., 659 N.W.2d 581, 588 (Iowa 2003).[1] An employer's failure to comply with those detailed statutory protections in section 730.5 "create[s] a cause of action in favor of one who has been injured by [the employer's] failure." *McVey v. Nat'l Org. Serv., Inc.*, 719 N.W.2d 801, 803 (Iowa 2006). As a result, a private employee can be discharged from employment

[1] For a discussion of the statute's "byzantine provisions," see *Dix v. Casey's General Stores* also filed today. *Dix v. Casey's General Stores, Inc.*, No. 18-1464, 2020 WL _____, at *_ (Iowa Ct. App. Jan. 9, 2020).

"based on an employee drug-testing program only if that program is being carried out in compliance with the governing statutory law." *Id*.

Section 730.5 was enacted in 1987 and has been substantively amended over the years. *See* 1987 Iowa Acts ch. 208, § 1 (adding section 730.5); *see also* 1998 Iowa Acts ch. 1011, § 1 (amending section 730.5 to a similar version of 2017's section 730.5). Since its enactment, the Iowa Supreme Court has considered the section many times. *See, e.g.*, *Ferguson v. Exide Techs., Inc.*, ___ N.W.2d ___, ___, 2019 WL 6794312, at *1 (Iowa 2019) (holding a common law wrongful-discharge claim is unavailable to a person who already has a statutory remedy under section 730.5 for the same conduct); *Sims*, 759 N.W.2d at 337 (holding an employer's strict compliance with section 730.5 was not required where the employer substantially complied with the statute, and holding an employee was "not entitled to back pay, punitive damages, or reinstatement of his employment" even though the employer did not substantially comply with the statute's notice requirement because the employee's employment was not adversely affected by an erroneous test result); *McVey v. Nat'l Org. Serv., Inc.*, 719 N.W.2d 801, 803 (Iowa 2006) (finding summary judgment improper because a fact issue remained about whether an employee received copy of employee drug-testing policy as required by section 730.5); *Tow v. Truck Country of Iowa, Inc.*, 695 N.W.2d 36, 39 (Iowa 2005) (affirming district court's determination in summary judgment ruling that employer violated section 730.5, on which civil remedies could be predicated); *Harrison*, 659 N.W.2d at 588 (holding employee's positive drug test results could not be used against him in unemployment proceedings where the employer failed to substantially comply with section 730.5's requirements that the employer give

the employee written notice of positive test result by certified mail and inform employee of his right to have second confirmatory test done); *Pinkerton v. Jeld-Wen, Inc*., 588 N.W.2d 679, 681-82 (Iowa 1998) (concluding employer complied with section 730.5 under odd facts of the case); *Bhd. of Maint. of Way Emps. v. Chicago & N. W. Transp. Co.*, 514 N.W.2d 90, 93 (Iowa 1994) (finding federal law preempts section 730.5 claims by railway employees and union); *Reigelsberger v. Emp't Appeal Bd*., 500 N.W.2d 64, 66 (Iowa 1993) (finding employer substantially complied with section 730.5 under the case's "special circumstances" even though employee fired for refusing to undergo treatment for alcoholism was never subjected to the blood test then "specified in Iowa Code section 730.5(3)"); *Anderson*, 469 N.W.2d at 689 (finding notice sent to employee about a drug screen was adequate under section 730.5 and supported denial of unemployment benefits); *Waechter v. Aluminum Co. of Am*., 454 N.W.2d 565, 567 (Iowa 1990) (holding settlement between employee and employer was intended to cover and bar employee's section 730.5 claim).

One reoccurring question has concerned the statute's use of the words "must" and "shall," which traditionally impose a duty or state a requirement. *See, e.g.*, *Harrison*, 659 N.W.2d at 585 (discussing strict versus substantial compliance under section 730.5 and noting the definitions of "must" and "shall" defined in Iowa Code section 4.1(30)). Despite the legislature's use of "shall" and "must," the court has concluded *substantial* compliance with the notice provisions of section 730.5 may suffice if the employer's actions falling "short of strict compliance . . . *nonetheless accomplish the important objective* of providing notice to the employee of the positive test result *and a meaningful opportunity to consider*

whether to undertake a confirmatory test." *Sims*, 759 N.W.2d at 338 (emphasis added); *see also Harrison*, 659 N.W.2d at 585.

III. Discussion.

A. "Return Receipt Requested."

The notice requirement set out in section 730.5(7)(j)(1) states:

> If a confirmed positive test result for drugs . . . for a current employee is reported to the employer . . ., 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 . . . .

(Emphasis added.) There is no dispute that Woods received the section 730.5(7)(j)(1) notice of his positive-test results from Gabus Ford. But it appears from the record that the notice was not sent "return receipt requested" as required by section 730.5(7)(j)(1). According to Gabus Ford, the notice was sent by certified mail with tracking, and in evidence is a United State Postal Service Tracking printout showing delivery information for an item with a particular tracking number. Woods argues this did not meet the substantial-compliance threshold:

> [T]he return receipt requirement is for the employee's benefit, not the employer's, as the district court suggested. It is inaccurate to say that substantial compliance exists as long as the employer has proof that the employee received the post-test notice. This is not an issue of tracking for the employer; it is an issue of alerting the employee to a serious situation.

In considering the mailing requirements of a section 730.5(7)(j)(1) notice, our supreme court has stated:

> It is important to consider how these requirements serve to protect the employee. A written document, particularly one sent by certified mail, conveys a message that the contents of the document are important. Thus, an employee receiving notice in this fashion would be more likely to consider his decision with respect to a second test to be an important one. Likewise, he would more deliberately reflect

> on his options and the ramifications of his decision. The seven-day period given to the employee allows adequate time for the employee to make a thoughtful choice.

Harrison, 659 N.W.2d at 587.

It is the fact that the notice was sent by certified mail that gave the notice the requisite cachet of importance. Woods was indeed alerted to a serious situation. A return receipt request would add nothing more. We therefore find no error with the district court's conclusion Gabus Ford substantially complied with the mailing requirement of section 730.5(7)(j)(1). To stave off potential litigation, the better practice would be to follow the letter of the statute.

B. Supervisory Personnel Training.

Section 730.5(9)(h) instructs that the employer "*shall* require supervisory personnel of the employer involved with drug or alcohol testing . . . to attend a minimum of two hours of initial training and to attend, on an annual basis thereafter, a minimum of one hour of subsequent training." (Emphasis added.) Woods is correct that the statute mandates that an employer's personnel receive training about drug testing. He also accurately states paragraph (15)(b) places "the burden of proving that the requirements of [section 730.5] were met" on the employer. But nothing in section 730.5 places an affirmative burden upon an employer to defend non-existent claims of wrong doing. The training claim was not raised in Woods's petition. The claim was not raised in Woods's trial brief. The claim was not raised during trial. Without a specific claim that Gabus Ford did not provide the requisite section 730.5 training, Gabus Ford was not on notice it needed to prove it provided

training as required in section 730.5(9)(h).[2] The issue did not come to first light until after trial when Woods filed his proposed findings of facts and conclusions of law. Not surprisingly, the district court did not address the claim in its initial ruling because it was not presented or litigated at trial. Woods then filed an Iowa Rule of Civil Procedure 1.904(2) motion and supporting brief asserting, in part, "the Court did not address the uncontested fact that the supervisory employee involved in Plaintiff's drug testing lacked the training that Iowa Code § 730.5(9)(h) requires." "It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). Under the specific circumstances presented here, we conclude Woods simply failed to preserve the training claim for appellate review.

C. Cost of Confirmatory Test.

The notice requirement set out in section 730.5(7)(j)(1) states:

> If a confirmed positive test result for drugs . . . for a current employee is reported to the employer . . ., the employer shall notify the employee in writing . . . of the results of the test, the employee's right to request and obtain a confirmatory test of the second sample . . . 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.

(Emphasis added.)

The remaining issue is whether Gabus Ford's failure to include the cost of a confirmatory test in the notice meant it did not substantially comply with section

[2] The record shows Gabus Ford was poised to defend the claim if necessary.

730.5. Gabus Ford conceded it "incidentally omitted the cost of the confirmatory test in the notice," but argued it substantially complied with the substantive notice requirements of section 730.5. The court determined the evidence established Gabus Ford substantially complied with the requirements even though it failed to include the cost of the test in the notice. We disagree.

The district court noted Woods "testified that if the notice had included the cost of the confirmatory test he 'might' have requested one," but that "explanation begs the question of why [Woods] would not request the test, regardless of its cost, to exonerate himself because it would ultimately cost him nothing to do so if the confirmatory test result was negative for drug use." That may be true, but it was Gabus Ford's burden to inform Woods of the cost. Even though Woods was alerted he would be reimbursed if the second test was negative for drug use, there is nothing to show the cost would be minimal. For an employee just fired, alerting the employee that he had to pay for a second test without stating the cost did not give Woods "a meaningful opportunity to consider whether to undertake a confirmatory test." *Sims*, 759 N.W.2d at 338. We do not find Gabus Ford's notice "substantially complied with section 730.5(7)(i) and assured the reasonable objectives of the statute," as concluded by the district court. Without knowing the cost of the test, Woods could not make an informed decision. We find the district court erred in so concluding.

Our reversal does create an interesting dilemma on the correct remedy in the case. The civil remedies subsection of the statute states:

> a. This section may be enforced through a civil action.
>
> (1) A person who violates this section or who aids in the violation of this section is liable to an aggrieved employee or

> prospective employee for affirmative relief including reinstatement or hiring, with or without back pay, or any other equitable relief as the court deems appropriate including attorney fees and court costs.

Iowa Code § 730.5(15). The statute also provides for injunctive relief. *See id*. § 730.5(15)(a)(2). At trial, Woods did not request reinstatement. He requested $89,770 in back pay and $185,000 in front pay. He also requested attorney fees under section 730.5(15)(a)(1).

The laboratory was only required to "store the second portion of any sample until receipt of a confirmed negative test result or for a period of at least forty-five calendar days following the completion of the initial confirmatory testing, if the first portion yielded a confirmed positive test result." Iowa Code § 730.5(7)(b). That time has long passed. So we may never know what the results of a confirmatory test would be. And without that knowledge, the court is in no position to decide whether back pay or front pay is warranted. Even so, we have determined Gabus Ford violated the provisions of section 730.5. Gabus Ford is therefore liable to Woods. The district court may fashion equitable relief it deems appropriate under the circumstances, including attorney fees and costs. We therefore remand to the district court to determine the appropriate relief Woods is due from Gabus Ford.

IV. Conclusion.

Because we agree with Woods that Gabus Ford's failure to include the cost of the confirmatory drug test in its notice as required by section 730.5 violated the statute, we reverse and remand the matter to the district court for further proceedings consistent with this opinion. We affirm in all other respects.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
19-0002	Woods v. Charles Gabus Ford, Inc.

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