IN THE IOWA SUPREME COURT
Supreme Court No. 19-0002

LUCAS WOODS,

Plaintiff/Resistant,

v.

CHARLES GABUS FORD, INC.,

Defendant/Applicant.

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

PLAINTIFF/RESISTANT LUCAS WOODS'S RESISTANCE TO DEFENDANT/APPLICANT CHARLES GABUS FORD, INC.'S APPLICATION FOR FURTHER REVIEW OF JANUARY 9, 2020 IOWA COURT OF APPEALS DECISION

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ARGUMENT

A. Introduction.

"An application for further review will not be granted in normal circumstances." Iowa R. App. P. 6.1103(1)(b). There is nothing abnormal about the circumstances here. This is a simple case with an obvious, logical, and foregone conclusion based on Iowa Code § 730.5's plain language and this Court's prior on-point precedent. The correct decision, as the Iowa Court of Appeals quickly recognized, is that Defendant violated 730.5 and unlawfully fired Plaintiff based upon an employee drug test.

The Iowa Court of Appeals needed only two or three pages of its opinion to confirm that Defendant's liability was a foregone conclusion based on existing statutory provisions and this Court's decisions, demonstrating the simplicity of this issue and the obviousness of that decision when the statutory language and interpretive caselaw are properly adhered to. Consequently, there is no need to consider this matter on further review. To do so would only wastefully force this Court to confirm Iowa Code § 730.5's plain language and what the Court has been telling employers that language means since *Harrison v. Employment Appeal Board*, 659 N.W.2d 581 (Iowa 2003). In *Harrison* the Court directly answered the very substantial compliance question that Defendant finds so

vexing and informed Iowa's employers that doing what Defendant did is illegal and will expose them to liability under 730.5.

There is no need for the Court to spend time quoting Iowa Code § 730.5, reiterating its *Harrison* decision, and giving Defendant and Iowa employers the same instruction that it provided in 2003. Further review in a case whose result in Plaintiff's favor is already mandated by explicit statutory language and existing decisions from this Court would be a waste of judicial resources and the parties' time. It would also be an unnecessary further delay of the resolution of this case for Plaintiff, who waited over a year for appellate confirmation that the district court misapplied Iowa Code § 730.5 and this Court's interpretive cases, especially *Harrison*. Defendant's Application For Further Review should thus be denied.

B. Course Of Proceedings.

This is an employee drug testing case brought pursuant to Iowa Code § 730.5. Defendant fired Plaintiff after Plaintiff allegedly failed a drug test. Plaintiff then filed a petition against Defendant under Iowa Code § 730.5(15)(a)(1).

This matter was submitted to the district court for a nonjury trial on October 15 and 16, 2018. The district court issued its order on December 15,

2018. It found no violations of 730.5 and entered judgment against Plaintiff and dismissed Plaintiff's petition.

Three components of the lower court's decision were at issue on appeal. One issue was whether Defendant substantially complied with 730.5 even though Defendant's post-notice to Plaintiff omitted the cost to Plaintiff of any retesting, as Iowa Code § 730.5(7)(j)(1) requires. On January 9, 2020, the Iowa Court of Appeals entered its order affirming in part and reversing in part the district court's judgment. The court of appeals reversed the district court on Plaintiff's argument that the substance of Defendant's post-test notice did not comply with Iowa Code § 730.5(7)(j)(1) and ordered the case remanded for further proceedings. Defendant seeks further review of the Iowa Court of Appeals's decision.

C. Factual Background.

Defendant fired Plaintiff on August 15, 2017 because Plaintiff supposedly failed a random drug test. (Def.'s Ex. Q, App. Vol. 1 at 168.) That drug test occurred on August 9, 2017. (Def.'s Ex. Q, App. Vol. 1 at 167.) Plaintiff's August 9, 2017 urine test was allegedly positive for methamphetamine. (Def.'s Ex. O, App. Vol. 1 at 165.) Defendant sent Plaintiff a letter on August 16, 2017 concerning the results of his August 9, 2017 drug test. (Def.'s Ex. Q, App. Vol. 1 at 167.) Defendant's August 16,

2017 notice to Plaintiff regarding the drug test results did not specify the cost of retesting. (Def.'s Ex. Q, App. Vol. 1 at 167.)

Plaintiff did not use drugs on August 9, 2017 (the day of the drug test) or in the weeks before the test. (Tr. Vol. I 27:8-13; 94:10-15.) He did not tell anyone that he had used methamphetamine before the August 9, 2017 drug test, (Tr. Vol. I 27:22-25), nor was there any evidence that Defendant knew about Plaintiff's supposed drug use admission at any time before this litigation began. Plaintiff thought that the positive drug test was wrong. (Tr. Vol. I 29:22-30:5.)

Plaintiff would have requested a retest if Defendant's August 16, 2017 notice had told him how much the retest would cost. (Tr. Vol. I 34:8-18.) He would have done so because he thought that the first test was wrong. (Tr. Vol. I 34:22-25.) But the unknown cost of the test was also a consideration. (Tr. Vol. I 34:14-18; 93:9-15.) He had not previously had to pay for a drug retest. (Tr. Vol. I 97:2-3.)

Plaintiff's job with Defendant was his only employment at the time of the drug test. (Tr. Vol, I 14:4-11.) Plaintiff has two children who live with him. (Tr. Vol. I 12:24-13:4.) He was the sole provider for his family. (Tr. Vol. I 93:6-7.) He was not eligible for unemployment benefits at the time he received Defendant's notice. (Tr. Vol. I 34:19-21.)

D. Further Review Is Not Appropriate.

1. Further Review Is Not Justified Under These Circumstances.

As previously noted, this case does not involve changing legal principles or a need to clarify existing law. Plaintiff will discuss how this Court has already decided and settled the very question that Defendant claims warrants further review. Quite simply, Iowa Code § 730.5(7)(j)(1) clearly and explicitly requires, and this Court has recognized, that the post-test notice to the employee must identify the cost to the employee of any retesting or the employer has failed to substantially comply with 730.5.

Defendant did not include the retesting cost in its post-notice to Plaintiff. It thus did not substantially comply with 730.5. It follows that it unlawfully discharged Plaintiff based on Plaintiff's drug test. This is not a newly litigated issue, but rather basic application of established law to a simple set of facts, requiring no more than a few pages of the Iowa Court of Appeals's attention to decide.

Nor are there any issues of broad public importance attached to this case. Employers can easily ensure compliance with 730.5, as the Iowa Court of Appeals applied it to this case, by following Iowa Code § 730.5(7)(j)(1)'s express language and this Court's opinions interpreting that section that have been available for employers' review since 2003. The Iowa Court of

Appeals did not add any new requirements to Iowa's private employee drug testing regime. It merely confirmed what should have already been readily apparent to employers from Iowa Code § 730.5(7)(j)(1)'s provisions and this Court's decisions interpreting that section.

There is no guesswork for employers after the Iowa Court of Appeals's decision because the court of appeals merely did what employers should already have been doing. It read Iowa Code § 730.5(7)(j)(1) and this Court's rulings about that section, applied those authorities to the undisputed facts of this case, and concluded that Defendant failed to substantially comply with Iowa Code § 730.5(7)(j)(1). So, whatever public interest concerns may derive from Iowa Code § 730.5(7)(j)(1), this Court already addressed them in 2003 when it issued its *Harrison* decision. The question Defendant raises has been a nonissue since the Court settled it in 2003.

Contrary to Defendant's argument, the Iowa Court of Appeals has not required strict compliance with Iowa Code § 730.5(7)(j)(1). It merely imposed the level of substantial compliance that this Court mandated in *Harrison*—The post-test notice must tell the employee what the cost of retesting will be in order for the employer to establish substantial compliance with Iowa Code § 730.5(7)(j)(1). The Iowa Court of Appeals has

required strict compliance with *Harrison*, but that is not the same as requiring strict compliance with Iowa Code § 730.5(7)(j)(1).

There is no need for further review to evaluate Defendant's position at page five of its application that a failure to substantially comply with one material aspect of 730.5 is excused as long as the balance of the statute was followed. That argument is baseless and contrary to this Court's 730.5 decisions. It would also lead to absurd circumstances under which the parties argue over how many substantial compliance violations are too many. One is acceptable according to Defendant, but how many more than one are necessary before an employer crosses the line? Is this Court to establish a set number of substantial compliance "strikes" after which the employer is out? Does the type of substantial compliance violation matter, such that more violations of one type are bearable than others of a different type might be?

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

substantially complied with each of 730.5's requirements, regardless of its level of compliance with other sections.

The Court's decisions regarding Iowa Code § 730.5 bear this out. Iowa's drug testing decisions always focus on specific statutory requirements and whether such requirements were violated. No appellate decision has ever taken a global substantial compliance view of 730.5 in the manner that Defendant suggests. For example, in *Harrison* the Court held that the employer's noncompliance with 730.5's notice provisions was sufficient to bar the employer's reliance on the drug test results and consequently declined to address other arguments concerning the employer's compliance with the technical requirements for drug testing or the validity of the employer's drug testing policy. 659 N.W.2d at 586. In *McVey v. National Organization Service, Inc.*, 719 N.W.2d 801 (Iowa 2006), the sole issue on appeal was whether the employer had complied with 730.5's written policy requirement, which is "[a]mong the detailed requirements for employee drug testing that are contained in section 730.5 . . . ," *id.* at 803.

The proper method of evaluating Defendant's compliance with Iowa Code § 730.5 is to individually analyze each claimed violation to determine whether substantial compliance exists in each instance. That is what the Iowa Court of Appeals did. There is no need for the Court to spend time on

further review analyzing a theory by Defendant that has no support in any 730.5 decision this Court has issued.

2. Iowa Code § 730.5 Generally.

Iowa Code § 730.5(15)(a)(1) provides a private cause of action for violations of its provisions:

> 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.

Defendant has the burden of proving that 730.5's requirements were met. Iowa Code § 730.5(15)(b).

Iowa Code § 730.5 is a remedial statute. A remedial statute remedies a wrong to an individual. *City of Waterloo v. Bainbridge*, 749 N.W.2d 245, 249 (Iowa 2008). Remedial statutes must be liberally interpreted in favor of the persons they are intended to protect. *State ex rel. Miller v. Cutty's Des Moines Camping Club, Inc.*, 694 N.W.2d 518, 529 (Iowa 2005).

Defendant must prove substantial compliance with 730.5(7)(j)(1)'s notice requirement. *Sims v. NCI Holding Corp.*, 759 N.W.2d 333, 337 (Iowa 2009). Substantial compliance is compliance in respect to essential matters necessary to assure the reasonable objectives of the statute. *Id.* at 338. The

court of appeals correctly determined that Defendant did not substantially comply with Iowa Code § 730.5(7)(j)(1).

3. Defendant Violated Iowa Code § 730.5(7)(j)(1) In A Manner That This Court Has Proscribed Since 2003.

Defendant's lengthy and mostly irrelevant Statement Of Facts is an exercise in obfuscation intended to distract the Court from the narrow issue underlying Defendant's Application For Further Review – Defendant's noncompliance with Iowa Code § 730.5(7)(j)(1)'s post-test notice requirements because Defendant's notice to Plaintiff did not specify the cost of retesting. Defendant goes to great lengths to keep the focus on its general drug testing policies and procedures and on Plaintiff's allegedly positive drug test, as if those are the only issues and the beginning, middle, and end of the discussion. But when Defendant chose to fire Plaintiff based on those alleged test results, Defendant also committed itself to complying with Iowa Code § 730.5. Drug testing policies and procedures and a supposedly positive drug test are only part of the analysis.

It was undisputed that Defendant's post-test notice to Plaintiff, (Def.'s Ex. Q, App. Vol. 1 at 167), did not tell Plaintiff the cost payable to Defendant for retesting. Iowa Code § 730.5 required that information. The court of appeals accurately applied *Harrison* to determine that the omission

of the retesting cost precluded a finding that Defendant substantially complied with Iowa Code § 730.5(7)(j)(1).

Defendant failed 730.5(7)(j)(1)'s notice requirement because its notice to Plaintiff did not specify the cost to Plaintiff of any retesting. The notice is supposed to tell employees "the fee payable by the employee to the employer for reimbursement of expenses concerning the test." Iowa Code § 730.5(7)(j)(1). That means the notice "must tell the employee what the cost of that test will be." *Harrison,* 659 N.W.2d at 587. The requirement that an employee be informed of the cost of the second test is meant to protect the employee from an erroneous test result and ensures that the employee's decision in that regard will be a well-informed one based upon accurate and complete information. *Id.* at 587-88. Employers must provide the cost of retesting in the post-testing notice in order to substantially comply with 730.5. *Id.* at 587-88.

Iowa Code § 730.5(7)(j)(1)'s notice requirement focuses on the protection of employees who submit to drug testing. *Sims,* 759 N.W.2d at 338. It accomplishes that protective purpose by mandating written notice by certified mail of (1) any positive drug test, (2) the employee's right to obtain a confirmatory test, and (3) the fee payable by the employee to the employer for reimbursement of the expense of the test. *Id.* Such a formal notice

conveys to the addressee a message that the contents of the document are important and worthy of the employee's deliberate reflection. *Id.* Iowa Code § 730.5(7)(j)(1)'s important objective is to provide notice to the employee of the positive test result and a meaningful opportunity to consider whether to undertake a confirmatory test. *Id.*

Defendant's August 16, 2017 notice to Plaintiff about his allegedly positive drug test did not specify the cost of retesting. It merely told Plaintiff that any retesting would occur "at your own cost." The notice further stated that if the retest did not confirm the initial test, Defendant would "reimburse the employee for the fee paid by the employee for the second test. . . ."

Plaintiff's situation is similar to that criticized in *Skipton v. S & J Tube, Inc.*, 2012 WL 3860446 (Iowa Ct. App. Sept. 6, 2012). The post-test notice in *Skipton* merely gave the employee a possible price range, and not "the fee payable," for a confirmatory test. *Id.* at *4. That was not substantial compliance with Iowa Code § 730.5. *Id.*

Defendant's 730.5(7)(j)(1) notice in this matter did not tell Plaintiff the cost of re-testing. It thus did not substantially comply with that section. Defendant violated Iowa Code § 730.5.

Defendant spends much time identifying what the post-test notice to Plaintiff stated. That is the wrong focus. In this situation, it is not the

contents of the notice that are important. What matters is what was missing from that notice – The statement of the cost of retesting to Plaintiff that Iowa Code § 730.5(7)(j)(1) mandates. That omission of statutorily required information from Defendant's post-test notice to Plaintiff, regardless of any other language in the notice, precludes a finding of substantial compliance.

An opportunity for a retest would been important to Plaintiff had he known the cost of the test. Plaintiff did not use drugs on August 9, 2017 (the day of the drug test) or in the weeks before the test. (Tr. Vol I 27:8-13; 94:10-15.) He did not tell anyone that he had used methamphetamine before the August 9, 2017 drug test. (Tr. Vol. I 27:22-25.) Plaintiff thought that the positive drug test was wrong. (Tr. Vol. I 29:22-30:5.)

Plaintiff would have requested a retest if Defendant's August 16, 2017 notice had told him how much the retest would cost. (Tr. Vol. I 34:8-18.) He would have done so because he thought that the first test was wrong. (Tr. Vol. I 34:22-25.) But the unknown cost of the test was also a consideration. (Tr. Vol. I 34:14-18; 93:9-15.) He had not previously had to pay for a drug retest, (Tr. Vol. I 97:2-3), so he had no reason to formulate a speculative guess concerning the mandatory cost information that Defendant failed to provide in its post-test notice.

The cost of a retest was important to Plaintiff because his job with Defendant was his only employment at the time of the drug test. (Tr. Vol. I 14:4-11.) Plaintiff has two children who live with him. (Tr. Vol. I 12:24-13:4.) He was the sole provider for his family. (Tr. Vol. I 93:6-7.) He was not eligible for unemployment benefits at the time he received Defendant's notice. (Tr. Vol. I 34:19-21.)

The district court did not specifically discuss whether Defendant's omission of the cost of retesting from the notice constituted a failure to substantially comply with 730.5. The district court should have found a lack of substantial compliance based on *Harrison* and *Skipton*. Those cases preclude a substantial compliance finding when the post-test notice omits the cost of retesting. Further, as previously noted, Iowa Code § 730.5 is a remedial statute that should be liberally construed in Plaintiff's favor. The Iowa Court of Appeals properly applied *Harrison* on this point and reversed the district court.

The Iowa Court of Appeals also justifiably ignored the focus of the district court and Defendant on what Plaintiff did after he received the defective post-test notice. Defendant wants that to be the discussion's focus, instead of whether Defendant substantially complied with Iowa Code § 730.5(7)(j)(1)'s requirements, even though it was Defendant's burden to

prove substantial compliance with 730.5. None of Plaintiff's post-notice actions matter. No Iowa appellate court has held that an employer's lack of substantial compliance with 730.5 can be excused by an employee's inaction. Such a principle would be perverse – The point of the post-testing notice provisions is to encourage employees to protect themselves if they wish to contest a positive drug test. When one of those mandatory protective provisions is ignored, thus causing an employee's inaction because of an information vacuum, the inaction caused by the employer should not be reason for excusing the employer's noncompliance that led to the employee's inaction. Plaintiff's post-notice actions were irrelevant once it was indisputably established that Defendant did not substantially comply with Iowa Code § 730.5(7)(j)(1).

It is also unfair to blame Plaintiff for not requesting a retest at an unknown cost because he would be reimbursed if the first test was not confirmed to be positive. Section 730.5's notice provisions are intended to allow employees to make informed decisions concerning their response to an allegedly positive drug test. Notice of the cost of retesting is a mandatory, statutorily-required aspect of that information. When that information is omitted, leaving the employee to make an uninformed decision, it contradicts the legislature's policy reasons for including the notice

provisions to criticize a discharged employee for not requesting a retest at an unknown charge. Had Defendant followed the notice provisions, there would have been no uncertainty about the cost of retesting.

Regardless, even if Plaintiff's inaction after receiving the post-test notice was somehow relevant and could excuse Defendant's noncompliance, Plaintiff explained his reasons for not requesting a retest at an unknown cost. He had not previously had to pay for a drug retest. He had no way of even estimating what a retest would cost. Plaintiff was unemployed, had no other source of income, and was not receiving unemployment benefits. He had family and housing costs to cover. Plaintiff could not decide whether a retest was affordable under those circumstances without knowing what the cost of retesting would be, information that Defendant was supposed to provide him for that very reason. The court of appeals rightfully concluded that Defendant did not substantially comply with Iowa Code § 730.5(7)(j)(1)'s notice requirement and that Plaintiff's post-notice inaction was either irrelevant or did not excuse Defendant's statutory violation.

CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendant's Application For Further Review.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This resistance complies with the typeface requirements and type-volume limitation of Iowa Rule of Appellate Procedure 6.1103(4) because this resistance has been prepared in a proportionally spaced typeface using Times New Roman in fourteen-point font and contains 3,485 words, excluding the parts of the resistance exempted by Iowa Rule of Appellate Procedure 6.1103(4)(a).

Dated: January 28, 2020

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 28, 2020, one copy of Plaintiff's Resistance To Defendant's Application For Further Review was served upon all parties to the above cause through the Court's EDMS system as follows:

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