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SUPREME COURT NO. 22-1599
POLK COUNTY CASE NO. CVCV060174

IN THE
SUPREME COURT OF IOWA

SCOTT HAMPE,

Plaintiff-Appellant
v.

CHARLES GABUS MOTORS, INC. D/B/A TOYOTA OF DES MOINES AND GADAMINA ENTERPRISES, INC. D/B/A MID-IOWA OCCUPATIONAL TESTING,

Defendants-Appellees.

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE JOSEPH SEIDLIN,
DISTRICT COURT JUDGE

FINAL REPLY BRIEF FOR APPELLANT

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

PROOF OF SERVICE

On May 19, 2023, I filed this brief electronically through the EDMS system, which will serve the parties:

Andrew Tice
atice@ahlerslaw.com

Margaret Hanson
maggiehanson@dentons.com

Katelynn McCollough
Katelynn.mccollough@dentons.com

Jo Ellen Whitney
joellenwhitney@dentons.com

/s/ Matthew M. Sahag__
Matthew M Sahag, AT#0008849
Counsel of Record for Plaintiff-Appellee
DICKEY, CAMPBELL & SAHAG LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: matthew@iowajustice.com

CERTIFICATE OF FILING

I, Matthew M Sahag, certify that I did file the attached brief with the Clerk of the Iowa Supreme Court by electronically filing the brief through the EDMS system on June 2, 2023.

/s/ Matthew M Sahag __
Matthew M. Sahag, AT#0008849
Counsel of Record for Plaintiff-Appellant
DICKEY, CAMPBELL & SAHAG LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: matthew@iowajustice.com

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REPLY ARGUMENT

I. HAMPE PRESERVED ERROR ON ALL ISSUES RAISED IN HIS INITIAL MERITS BRIEF

A. CGM and Mid-Iowa misconstrue Iowa's error preservation doctrine

As an initial matter, CGM and Mid-Iowa argue that Hampe failed to preserve error on his allegations of statutory violations under Iowa Code section 730.5. (CGM Proof Br. at 29, 47-48, 56-57, 60-61, Mid-Iowa Proof Br. at 26-27). Their arguments misconstrue Iowa's error preservation jurisprudence. Error preservation requires the party first to present an issue to the district court before it can be considered on appeal. *Lamasters v. State*, 821 N.W.2d 856, 862 (Iowa 2012). "When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal." *Id.* (quoting *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002)).

CGM and Mid-Iowa confuse the "rule of error preservation" with the "rule governing [this Court's] scope of review when an issue is raised and decided by the district court and the record or

ruling on appeal contains incomplete findings or conclusions." *Meier*, 641 N.W.2d at 539. The former covers "the situation where the issue was not considered by the district court and thus error was not preserved" while the latter covers "the situation where error was preserved even though the record or ruling on appeal" is "incomplete or sparse." *Lamasters*, 821 N.W.2d at 864. "If the court's ruling indicates that the court *considered* the issue and necessarily ruled on . . . the issue has been preserved." *Id.*

Hampe preserved error by asserting claims that CGM and Mid-Iowa violated the requirements of chapter 73.5 by raising them in his resistance to their motions for summary judgment as well as in his cross-motion for summary judgment. Indeed, the district court specifically noted Hampe's claims at the outset of its analysis. App. 941. (noting that Hampe asserts violations of "seven specific provisions of Iowa Code section 730.5"). And, to the extent that Hampe did not raise the issues, CGM surely did:

> CGM asserts that as a matter of law it either substantially complied with the various provisions of section 730.5, Hampe was not an aggrieved employee,

> or it is immune because the alleged acts are attributable to Mid-Iowa.

App. 941.

The fact that the court below summarily addressed the claims does not affect preservation of error. *Meier*, 641 N.W.2d at 540 ("The claim or issue raised does not actually need to be used as the basis for the decision to be preserved, but the record must at least reveal the court was aware of the claim or issue and litigated it"). "Where the trial court's ruling, as here, expressly acknowledges that an issue is before the court and then the ruling necessarily decides that issue, that is sufficient to preserve error." *Lamasters*, 821 N.W.2d at 954. This accords with the Iowa Supreme Court's "long-standing presumption that a district court found facts essential to sustain the judgment." *Meier*, 641 N.W.2d at 540.

B. Hampe preserved error on his claim that he was aggrieved by the failure to substantially comply with the procedures set forth in section 730.5(8)(a) regarding the selection of employees

In his initial merits brief, Hampe asserts that GCM and Mid-Iowa violated Iowa Code section 730.5 by creating a second

list of alternates from which to test employees as well as exempt nine employees from testing. (Hampe Proof Br. at 26-43). Both CGM and Mid-Iowa assert that error was not preserved on this issue. (CGM Proof Br. at 29, Mid-Iowa Proof br. at 26). But, the district court expressly considered the issue and ruled that the violations were only "technical" and Hampe was not aggrieved:

> Hampe alleges CGM failed to send a list of employees to be tested to Mid-Iowa in compliance with Iowa Code section 730.5. . . . It can be argued that the list here did not technically comply with the statute. Nevertheless, Hampe has not produced any facts showing there is a genuine issue as to whether he was aggrieved. At best, it is purely speculative as to whether Hampe would or would not have been selected for testing had the list included any employees who were not scheduled to work the day of the test or who were otherwise excused. No evidence was shown that indicates any deficiencies in the list were attributable to an effort to single out Hampe for testing.
>
> * * *
>
> Hampe alleges CGM and Mid-Iowa are liable for their alleged violations of Iowa Code section 730.5. *The court has disposed of all Hampe's claims by Summary Judgment in favor of both Defendants.*

App. at 941-42 (emphasis added). With respect to Mid-Iowa, Hampe asserted in his cross-motion that it too was liable for violating section 730.5(8)(a). App. at 672-84. The district court

expressly considered the claims in Hampe's motion and ruled them "moot." App. 951.

C. Hampe preserved error on his claim that supervisory personnel failed to possess the training required under section 730.5(9)(h)

Hampe also argues that CGM and Mid-Iowa failed to substantially comply with section 730.5(9)(h) because supervisory personnel lack the necessary training required under the statute. (Hampe Proof Br. at 43-47). Both CGM and Mid-Iowa assert that Hampe did not preserve error on this issue. (CGM Proof Br. at 47-48, Mid-Iowa Proof br. at 26-7). In the court below, Hampe argued that the supervisor, Kelsey Gabus McBride, did not have training in the "specific topics" set forth in section 730.5(9)(h). App. 351. He also raised the issue at the summary judgment hearing:

> The other issue for Charles Gabus Motors is that statute describes the specific type of training that the supervisors have to undertake, and it's Charles Gabus Motors' burden. In this case, it's their burden. It's not the plaintiff's burden to prove that the requirements of the subsection -- the section were met. They have offered no evidence in the record indicating that. Even with the insufficient training that Kelsey Gabus McBride completed, it's the training that's actually required in the statute. I mean, the statute identifies exactly what it is.

(10/28/22 MSJ Tr. at 37:17 to 38:1). In turn, the district court considered the issue and ruled that Hampe had not demonstrated a genuine issue of material fact as to how the supervisor's training was statutorily deficient:

> Hampe argues CGM failed to substantially comply with section 730.5(9)(h) as the supervisor involved with testing, McBride, was not properly trained. . . . Hampe argues McBride's training is unsatisfactory, but does not state any specific facts as to how the training is insufficient. Hampe has not met his burden to show there is a genuine issue of material fact regarding CGM's alleged failure to substantially comply with Iowa Code section 730.5(9)(h).

App. 942-42. (emphasis added). With respect to Mid-Iowa, Hampe asserted in his cross-motion that it violated section 730.5(9)(h). App. 670-72. The district court expressly considered the claims in Hampe's cross-motion and ruled them "moot." App. 951.

D. Hampe preserved error on his claim that he was aggrieved by the arbitrary enforcement of the punishment provisions of CGM's testing policy

Next, Hampe argues that CGM's drug testing policy fails to provide for uniform disciplinary as required by section 730.5(9)(b). (Hampe Proof Br. at 61-64). CGM asserts that error has not been

preserved. (CGM Proof Br. at 56-57, Mid-Iowa Proof br. at 27). In the court below, Hampe argued that CGM's policy provided for discretionary discipline, which was not applied uniformly. App. 356. The district court considered the issue and ruled:

> Hampe argues that CGM applies its drug testing policy differently amongst its employees. . . . CGM's policy states "[r]efusal of an employee [ ] to submit to a drug [ ] test [ ] will be deemed as a positive test result in violation of this policy." CGM APP 34. CGM lists "termination of employment" as a potential action the company could take. In support of his contention that CGM does not apply its policy fairly to every employee, Hampe presents two employees whos' drug test results proved to be erroneous in some form, and they were not terminated. Those employees, however, submitted samples for their drug tests, and the results of the test were then contested by the employees and found to be mistaken. Hampe was terminated for refusal to take the test. While the other employees were allowed to maintain their positions, CGM was not required to offer Hampe continuous employment.

App. 943.

E. Hampe preserved error on his claim that he was aggrieved by CGM and Mid-Iowa's violations of Chapter 730.5 and accompanying written drug testing policy

Throughout his merits brief, Hampe identifies various ways in which he was aggrieved by CGM and Mid-Iowa's violations of chapter 73.5 and CGM's written drug testing policy. (Hampe

Proof Br. at 38, 43, 47, 54, 60, 64, 66). At the summary judgment hearing, Hampe's counsel explained how he was aggrieved:

> The statute literally provides in order to conduct drug and alcohol testing under this section, supervisors involved in training must complete initial training and annual training. In order to conduct this, this was an unauthorized drug test from the get-go, and the cases that went before Dix actually support the fact that employers may not benefit from unauthorized drug tests. If you can't test the plaintiff in the first place, he's aggrieved. This should have never happened.
>
> * * *
>
> Here is much different because it's undisputed that Hampe was terminated for what they call "refusing to test," and I don't think they can make a credible argument to this Court that he wasn't because on page two of the plaintiff's appendix, there is a notice of employment termination, and it says, "I'm discharging the employee." And the reason is refusal to complete a random drug test. So it's undisputed that Hampe gets fired because they say he refused. So this is not a situation where the employee was fired for reasons independent of section 730.5 testing.

(10/28/22 MSJ Tr. at 37:8-16, 44:17 to 45:1). Nevertheless, CGM asserts that Hampe did not preserve error. (CGM Proof Br. at 60-61). This assertion overlooks the district court's conclusion in its ruling:

> For all the reasons stated above, the court concludes that there are no genuine issues of material fact

> supporting Hampe's claims that CGM or Mid-Iowa did not substantially comply with Iowa Code section 730.5, or that Hampe was aggrieved by any non-compliance, Further, there are are (sic) no genuine issues of material fact that CGM and Mid-Iowa acted together or separately to target Hampe for drug testing under the guise of a random drug test.

App. 951-52.

II. CGM AND MID-IOWA DID NOT SUBSTANTIALLY COMPLY WITH THE TRAINING REQUIREMENTS FOR SUPERVISORY PERSONNEL

By its plain terms, section 730.5(9)(h) requires "supervisory personnel of the employer involved with drug or alcohol testing" be trained in three areas:

- "recognition of evidence of employee alcohol and drug abuse;"
- "documentation and corroboration of employee alcohol and other drug abuse;" and
- "referral of employees who abuse alcohol or other drugs to the employee assistance program or to the resource file maintained by the employer."

Iowa Code § 730.5(9)(h). Hampe does not dispute that McBride received training on the recognition of evidence employee alcohol and drug abuse. App. 220-23. But, neither CGM nor Mid-Iowa has offered evidence that any supervisory personnel received

training on the other subjects required by section 730.5(9)(h). Absent evidence of proper training, CGM and Mid-Iowa had no authority to test Hampe. Training is a prerequisite "[i]n order to conduct drug or alcohol testing under [section 740.5]," and the burden of proof of compliance rests with the employer. Iowa Code §§ 730.5(9)(h), (15)(b).

III. CGM AND MID-IOWA DID NOT SUBSTANTIALLY COMPLY WITH THE STATUTORY REQUIREMENTS FOR IDENTIFYING EMPLOYEES TO SUBJECT TO SUSPICIONLESS DRUG TESTING

There is no real question that that CGM and Mid-Iowa violated the requirements of section 730.5(8)(a) in selecting the employees to subject to suspicionless drug testing in at least three material ways. First, CGM and Mid-Iowa failed to remove "employees who are not scheduled to be at work at the time of testing" from the testing pool. Iowa Code § 730.5(8)(a). Second, they created two lists of employees to subject to testing—a fifteen-person "selected list" along with an eight-person list of "alternates." App. 440-42. Third, CGM and Mid-Iowa skipped

over employees who were at the worksite on the day of testing. App. at 440-42.[1]

To its credit, CGM does not dispute that it violated the statutory requirements of section 730.5. (CGM Proof Br. at 29). Instead, it downplays the violations as merely "technical" in the same way the district court did. (CGM Proof Br. at 29). Additionally, it argues that the violations do not amount to proof of targeting. (CGM Proof Br. at 35-39). In this way, CGM double-faults.

The substantial compliance analysis requires consideration of whether the employer "nonetheless accomplish[ed] the important objectives expressed by the particular part of section 730.5 in issue" despite the violations. *Dix v. Casey's Gen. Stores, Inc.*, 961 N.W.2d 671, 682 (Iowa 2021) (quoting *Sims v. NCI Holding Corp.*, 759 N.W.2d 333, 338 (Iowa 2009)). In *Dix*, the Iowa Supreme Court identified the twin purposes of section

[1] Nothing in section 730.5 or CGM's policy allows for multiple lists of employees to be tested or for CGM or Mid-Iowa to skip an employee who is scheduled to be at work at the time of testing but temporarily off the worksite. *Id.* §§ 730.5(7), 730.5(9)(a)(1).

730.5(8)(a). First, it allows an employer the flexibility to test all employees at a worksite or a more limited pool. *Dix*, 961 N.W.2d at 687-88. Second, it was "intended to avoid" the potential for "targeting" that would exist if the employer had "carte blanche" to decide which employees to include in the pool. *Id.* at 688. For this reason, section 730.5(8)(a) must be read in conjunction with section 730.5(1)(l), which requires the selection of employees to be tested "be done based on a neutral and objective selection process." Iowa Code § 730.5(1)(l); *see Dix*, 961 N.W.2d at 683 (explaining that when interpreting section 730.5, the subsections "must be read in conjunction" with one another). Thus, the benefit to employees from section 730.5(8)(a) is that it completely removes the employer discretion from the employee selection process so there can be no possibility of targeting.

Each of CGM's and Mid-Iowa's violations undermined the essential protections provided to employees under section 730.5(8)(a). For starters, the creation of two lists allowed CGM and Mid-Iowa discretion on the number of employees to test. Had there been no "alternates" list, CGM and Mid-Iowa would not have

been able to move beyond the fifteen "selected" employees. This problem was compounded by their failure to remove employees who were not scheduled to be at work from the selection pool. As a result, both lists included people who were not at work, which allowed CGM and Mid-Iowa added discretion to move down the lists. The same is true for CGM's and Mid-Iowa's exemption of three employees on the "selected" list who clocked in but were never tested. CGM asserts that they were not at the worksite at the time of testing, but nothing in section 730.5 or its written drug testing policy affords it the discretion to grant them an exemption under those circumstances. *See Eaton v. Iowa Empl. Appeal Bd.*, 602 N.W.2d 553, 556 (Iowa 1999) ("In interpreting section 730.5(2) . . . we follow the rule that legislative intent is expressed by omission as well as by inclusion").

The statutory scheme is "detailed and comprehensive" for a reason. *Dix*, 961 N.W.2d at 678. The "severely circumscribed conditions [are] designed to ensure accurate testing and protect employees from unfair and unwarranted discipline." *Harrison v. Emp. Appeal Bd.*, 659 N.W.2d 581, 588 (Iowa 2003). To that end,

section 730.5(8)(a) is designed to remove the give from the joints of the employee testing process so there can be no appearance of impropriety. CGM and Mid-Iowa added leeway back into the process. In the very least, there is a genuine issue of material fact as to whether there has been substantial compliance.

As a fallback position, CGM and Mid-Iowa suggest that summary judgment is warranted because Hampe offered no proof of actual targeting. (CGM Proof Br. at 33-39; Mid-Iowa Proof Br. at 72). The Court should reject their attempt to shift the goal post. When a party fails to substantially comply with section 730.5, it is strictly liable to the aggrieved party. Iowa Code § 730.5(15)(a)(1). Evidence of targeting is not an essential element of the aggrieved party's prima facie case. Nonetheless, Hampe's contention that he was targeted underscores the problems with CGM's and Mid-Iowa's employee selection process. The summary judgment record contains evidence that Hampe and others were called into work on their days off to undergo drug tests on prior occasions when employees were not called into work for the December 2019 testing. App. at 900-03. Had CGM and Mid-Iowa

properly followed the mandates of section 730.5(8)(a) there would be no possibility for targeting.

IV. HAMPE IS AN AGGRIEVED EMPLOYEE BECAUSE HE WAS TERMINATED FOR REFUSING TO COMPLY WITH A DRUG TEST THAT DID NOT COMPLY WITH SECTION 730.5

After *Dix*, it is black-letter-law that an employee who loses his or her job because they were subjected to unauthorized testing is "aggrieved." *Dix*, 961 N.W.2d at 689 ("Eller and McCann were aggrieved by losing their jobs because they should never have been tested"). Implicitly raising the white flag, CGM contends that it simply terminated Hampe "for violating a directive by his employer not to leave [the] dealership premises." (CGM Proof Br. at 25). That is too cute by a half. Indeed, the notice of termination makes clear that the "reason for separation of employment" was that he "refused to complete random drug test." App. at 367. But, Hampe never should have been subjected to random drug testing in the first place because CGM and Mid-Iowa failed to substantially comply with section 730.5. In other words, but for their failure to follow section 730.5, Hampe would not have been tested in the first place.

V. MID-IOWA IS LIABLE FOR AIDING CGM IN ITS VIOLATIONS OF SECTION 730.5

Liability for violations of section 730.5 extend to any "person who violates [the] section *or who aids in the violation of [the] section*." Iowa Code § 730.5. To "aid" another means "to support, help, assist or strengthen; act in cooperation with, supplement the efforts of others." *State v. Upton*, 167 N.W.2d 625, 628 (Iowa 1969). It is borderline frivolous to suggest that Mid-Iowa and CGM did not act in cooperation and supplement each other. Indeed, CGM's drug testing policy expressly identifies Mid-Iowa as its testing agent:

> All testing will be done by Mid-Iowa Occupational Testing or another provider, selected by the Company, who is compliant with the requirements of Iowa Code Section 730.5, including maintaining a Medical Review Officer. In accordance with Iowa law, evidential breath testing devices, alcohol screening devices, and the qualifications for personnel administering initial and confirmatory testing, will be consistent with regulations adopted as of July 1, 2017, by the United States Department of Transportation governing alcohol testing required to be conducted pursuant to the federal Omnibus Transportation Employee Testing Act of 1991.

App. 198.

Mid-Iowa offers no meaningful response on this issue. Instead, it attempts to conflate the word "aid" to mean "aiding and abetting." (Mid-Iowa Proof Br. 29-31). Spot the fallacy? The Iowa General Assembly knows how to qualify "aid" with "abetting," and has done so in many instances. Iowa Code §§ 155A.23, 703.1, 731.6. When the legislature uses "aid" without the modification of "abetting," "we must assume the legislative intent" was that it would be given its common meaning. *Iowa Land Title Ass'n v. Iowa Fin. Auth.*, 771 N.W.2d 399, 402-03 (Iowa 2009).

CONCLUSION

For the reasons articulated herein, the district courts order on September 27, 2022, should be reversed and the matter should be remanded back to district court for 1) trial on Hampe's common law claims and 2) to enter judgment in favor of Hampe as to liability on his Iowa Code section 730.5 claim and then procced to trial on damages.

COST CERTIFICATE

I hereby certify that the costs of printing this brief was $0.00 because it was filed electronically.

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/s/ Matthew M. Sahag_____
Matthew M Sahag, AT#0008849
Counsel of Record for Appellant
DICKEY, CAMPBELL & SAHAG LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008
FAX: (515) 288-5010
EMAIL: matthew@iowajustice.com