IN THE SUPREME COURT OF IOWA

Supreme Court No. 22-1599
Polk County No. CVCV060174

SCOTT HAMPE,

Plaintiff-Appellant,

vs.

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

Defendants-Appellees.

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

APPLICATION FOR FURTHER REVIEW BY DEFENDANT-APPELLEE CHARLES GABUS MOTORS, INC. D/B/A TOYOTA OF DES MOINES OF COURT OF APPEALS DECISION DATED JANUARY 10, 2024

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QUESTIONS PRESENTED FOR REVIEW

I. DID THE COURT OF APPEALS ERR WHEN OVERTURNING THE DISTRICT COURT'S DISMISSAL OF STATUTORY PRIVATE SECTOR DRUG-TESTING CLAIMS?

TABLE OF CONTENTS

STATEMENT SUPPORTING FURTHER REVIEW

Employers across the State of Iowa want to maintain drug-free workplaces safe for their employees and customers. In furtherance of this lofty goal, the Iowa Legislature has enacted a Private Sector Drug-Testing statute (i.e., Section 730.5) that allows employers to randomly test employees. The statute is intended to "protect the 'employer's right to ensure a drug-free workplace' and ensure the accuracy of drug tests used for adverse employment actions while also protecting 'employees who are required to submit to drug testing.'" Dix v. Casey's General Stores, Inc., 961 N.W.2d 671, 682 (Iowa 2021).

In the case-at-bar, Charles Gabus Motors (d/b/a Toyota of Des Moines)("CGM") was conducting random drug-testing in December 2019. One of its employees, Plaintiff Scott Hampe ("Hampe"), was randomly selected for testing but when the time came to be tested he provided specimens the independent third-party testing company, Gadminia Enterprises, Inc. (d/b/a Mid-Iowa Occupational Testing)("Mid-Iowa"), rejected as out-of-temperature, appearing to be "neon" in color

resembling "Mountain Dew", and of insufficient volume. (APP. 178-179). After being given opportunities to provide a valid specimen, Hampe opted to walk out of testing despite warnings and admonition from CGM's Human Resources Director Kelsey Gabus McBride ("KGM") that Hampe's employment would be terminated if he left. (APP. 178-181). He left anyways. (APP. 180-181).

After his employment was terminated Hampe sued both CGM and Mid-Iowa arguing he had been "targeted", claiming various violations of the drug-testing statute, and later asserting various common law claims. The District Court rejected Hampe's claims in full and entered summary judgment dismissing the case. Hampe appealed. The Court of Appeals affirmed dismissal of most of Hampe's claims, but revived several for reasons that would undermine private sector drug-testing programs across the State and reward employees who may seek to "game the system".

This request for further review meets all the considerations set forth by Appellate Rule 6.1103(1)(b). The Court of Appeals' decision is in conflict with the

pronouncements of this Court in Dix, 961 N.W.2d 671, as explained below. *See* I.R.A.P. 6.1103(1)(b)(1). This appeal presents important questions of law that should be settled by this Court as it pertains to the interpretation and application of the Private Sector Drug-Testing statute. *See* I.R.A.P. 6.1103(1)(b)(2). It could also be said this case involves "changing legal principles" as the Court of Appeals' opinion alters the application of "substantial compliance" and "aggrievement" principles for private sector drug-testing. *See* I.R.A.P. 6.1103(1)(b)(3). And, finally, private sector employers and employees across the State of Iowa are impacted by these legal questions such that this appeal involves issues of broad public importance. *See* I.R.A.P. 6.1103(1)(b)(4).

This Court should accept further review to vacate the Court of Appeals decision and affirm the District Court's dismissal of Hampe's claims in full.

ARGUMENT

I. THE COURT OF APPEALS ERRED WHEN OVERTURNING THE DISTRICT COURT'S DISMISSAL OF STATUTORY PRIVATE SECTOR DRUG-TESTING CLAIMS.

This matter came before the Court of Appeals upon Hampe's appeal from the District Court's ruling granting motions for summary judgment filed by CGM and Mid-Iowa. "The standard of review of a district court's grant of summary judgment is for correction of errors at law." Campbell v. Delbridge, 670 N.W.2d 108, 110 (Iowa 2003).

In this case, the District Court rightly granted summary judgment upon all claims against CGM. The Court of Appeals erred when finding genuine issues of fact regarding whether there had been "substantial compliance" with the statute and "aggrievement" to overturn the District Court upon three (3) claims addressed individually below.

A. THE PROCESS USED TO RANDOMLY SELECT EMPLOYEES SUBSTANTIALLY COMPLIED WITH IOWA CODE 730.5(8)(a) AND HAMPE WAS NOT AGGRIEVED BY THE SELECTION PROCESS.

First, this Court has made clear "that section 730.5 claims should be evaluated using a substantial compliance standard." Dix, 961 N.W.2d at 682. "'[I]f the employer's actions fall short of strict compliance, but nonetheless accomplish the important objective[s]' expressed by the particular part of section 730.5 in issue, 'the employer's conduct will substantially comply with the statute.'" Id. (*quoting* Sims v. NCI Holding Corp., 759 N.W.2d 333, 338 (Iowa 2009)). "What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case." Id. (*quoting* Brown v. John Deere Waterloo Tractor Works, 423 N.W.2d 193, 195 (Iowa 1988)).

Section 730.5(8)(a) allows for unannounced drug or alcohol testing of employees who are selected from pools composed of the "entire employee population at a particular work site" or the "entire full-time active employee population

at a particular work site".[1] *See* Section 730.5(8)(a)(1) & (2). This Court has described the statute as "identifying three types of pools the employer may use: the entire employee population at a particular work site, the entire full-time employee population at a work site, or '[a]ll employees at a particular work site who are in a pool of employees in a safety-sensitive position.'" Dix, 961 N.W.2d at 685. In the case-at-bar, Hampe was selected from a pool of the entire active employee population of CGM in accord with the statute. (APP. 212).

In Dix, this Court considered these employee pools and explained the legislative concern underpinning their creation. The Court stated "If the employer had carte blanche to identify which positions it chose to designate …, the employer could easily engage in the very targeting the complex statute was intended to avoid, by placing only certain employees in the pool." Dix, 961 N.W.2d at 688. In the present case, there would be no such "targeting" concern as CGM's list was an all-

[1] There is an additional potential pool for "[a]ll employees at a particular work site who are in a pool of employees in a safety-sensitive position," which is not applicable in this case. Iowa Code §730.5(8)(a)(3).

inclusive listing of all its active employees. (APP. 212). CGM did not distinguish between employee classes, positions, or job functions. Nor did CGM specifically include or "target" Hampe for testing.[2] (APP. 203-204, 421). In the most broad and inclusive manner possible, CGM subjected all of its employees to the potential for random selection for drug-testing from top to bottom. This process, that provided for equal opportunity of selection, comported with the important objectives of Section 730.5(8)(a).

This case presents a question regarding the application of statutory exceptions from pooling for employees not scheduled to be at work. Section 730.5(8)(a) excludes employees that are either not subject to testing pursuant to a collective bargaining agreement or employees not scheduled to be at work at the time of the testing because of the status of the employees or prior excusal from work. *See* Section 730.5(8)(a)(1) & (2). CGM's process did not involve looking at specific employees'

[2] KGM testified she never directed Mid-Iowa to place Hampe or any other employee on the drug testing list. (APP. 421)(Dep. 54:13-19). This testimony was consistent with KGM's prior affidavit that neither she nor anyone at CGM "requested or suggested in any way, shape, or form to anyone at Mid-Iowa that Plaintiff Scott Hampe be included on the list for random drug testing on December 5, 2019." (APP. 203-204). There is no contrary evidence.

schedules for information that could be used to include or exclude them from testing (which would arguably be more prone to "targeting" concerns. (APP. 204); (APP. 387-388)(Dep. 20:17-21:23). The important objectives of Section 730.5(8)(a) were met as CGM's protocol did not "target" or "exempt" any particular employees (and Hampe was not aggrieved by this protocol).

In Dix, this Court addressed a similar challenge to an employer's *inclusion* of twenty-seven (27) employees that were not scheduled to be at work as well as the *exclusion* of four (4) other employees who were at work. 961 N.W.2d at 689. Therein, this Court recognized "[t]he selection requirements are aimed at preventing employers from targeting or exempting specific employees for drug tests." Id. With this stated purpose, the Court found the employer had nonetheless "substantially complied with identifying employees scheduled to be at work to include on the selection list even though the list was not completely accurate". Id. at 691. There, the Court employed a pragmatic approach to difficulties with testing, holding (1) that finding violations due to the inclusion of six (6)

individuals on the list that missed work for illness or no-shows "would make it nearly impossible for any employer to comply with pooling requirements from a practical standpoint", (2) "the same is true for the two employees inadvertently excluded from the list", and (3) that including twenty-one (21) employees not scheduled to work when "actually selecting the employees to test" was still substantial compliance because "[r]equiring the employer to start the compiling process over each time an employee made a shift change up to the time of testing would make the process nearly impossible to complete." Id. at 690-691. The approach set forth in Dix recognizes the fluidity of today's workplace as well as the challenges presented by ever-changing schedules.

CGM was similarly pragmatic in its approach to testing as it attempted to employ a fair process that would involve all active employees. The CGM employee list provided to Mid-Iowa for random selection did not remove employees who were not scheduled for or excused from work. (APP. 203, 212). Instead, Mid–Iowa ran the CGM list of all active employees through a computer–based random number generator to select

fifteen (15) employees for testing and eight (8) alternate employees out of a 165-person pool. (APP. 206-207; 210; 212). The percentage of CGM employees selected for testing out of the pool was vastly smaller than the 90% in Dix. *See* 961 N.W.2d at 689. Mid-Iowa's output list was then given to CGM on November 27, 2019 for testing on December 5, 2019. (APP. 206-207; 215-216). On the testing date, KGM provided the Mid-Iowa list to CGM's department managers asking that listed employees be instructed to report for testing. (APP. 204). If an employee was not physically present in the workplace, then the department managers moved to the next employee on the list. Id. Employees not physically present could include those on leave, not scheduled to work, or those scheduled to work but away from the work site (e.g., on a service call). Id. Department Managers were required to find employees on the list if they were working at the time of testing. (APP. 391-392)(Dep. 26:21-27:7). CGM would not skip over employees just because a manager did not know where the employee was at the time. (APP. 391-392)(Dep.

26:25:-27:3). Employees were required to test. (APP. 392)(Dep. 27:4-10).

CGM's process substantially complied with the important objectives of Section 730.5(8)(a) to avoid "targeting or exempting specific employees for drug tests." *See* Dix, 961 N.W.2d at 689. In fact, because CGM did not specifically seek out particular employee schedules to check whether those employees would be present or not for testing, CGM's process is less susceptible to any "targeting" challenge as it was truly "blind". Looking through particular employees' schedules in setting up random testing would only increase the risk and propensity to "target" or "exempt" particular employees.

Neither the District Court nor the Court of Appeals found any "targeting" as alleged by Hampe. The District Court specifically held "[n]o evidence was shown that indicates any deficiencies in the list were attributable to an effort to single out Hampe for testing." (APP. 942). Nor did the Court of Appeals make any such finding. *See generally* Opinion, pp. 11-15. The Court of Appeals, however, believed CGM's process "exempt[ed] specific employees from testing by

skipping those who had been randomly selected but were not present at work for whatever reason." Opinion, p. 13. To characterize this process as "exempting" employees is a misnomer. CGM does not exempt employees from testing. (APP. 192). CGM's policy "is applicable to all groups of employees from executive to hourly employees. No group or employees shall be exempt from drug testing." Id. Much like the twenty-one (21) employees in Dix that were not scheduled at the time of testing or the six (6) employees that were scheduled but missed work for illness or no-shows at the time of testing, the handful of CGM employees that were not physically present in the workplace at the time of testing were not tested for the very practical and simple reason they were not present, but were never given any "exemption". There was no evidence whatsoever that CGM "exempted" any particular employee(s) from testing, which is the statutory concern. To the contrary, all evidence in the record shows CGM conducted a reasonable, fair, and practical selection process without "targeting or exempting specific employees for drug tests." *See* Dix, 961 N.W.2d at 689. The Court of Appeals was mistaken

to characterize employees' absence from the workplace at the time of testing as being given an "exemption" by CGM.

Furthermore, based upon the plain language of Section 730.5(8)(a)(1) and (2), the groups of employees protected by these statutory exceptions from testing pools are those *not* scheduled to be at work due to their "status" or who have been "excused" from work on the day of testing. CGM's process kept such employees from being tested on December 5, 2019. (APP. 204; 218). The intent and important objectives of Section 730.5(8)(a)'s "testing pools" was met in this regard. Hampe would not be entitled to claim the protections of this statutory exception for unscheduled employees because he was scheduled and present for work at the time of testing. (APP. 176)(Dep. 49:4-15).

Second, Hampe must establish that he was "aggrieved" by the alleged selection violation. *See* Iowa Code 730.5(15)(a); Dix, 961 N.W.2d at 692. "[N]ot every violation results in liability." Dix, 961 N.W.2d at 692. The District Court found "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." (APP. 942). The Court of Appeals seemingly reached a different conclusion, stating "[h]ad [CGM] limited its pool to scheduled employees, it's possible Hampe would never have been tested." Opinion, p. 15. In doing so, the Court of Appeals misapplied the law by speculating to find only *possible* "aggrievement".

CGM's inclusion of all active employees, without excluding unscheduled employees, for random selection by Mid-Iowa's computer–based random number generator only decreases the likelihood that Hampe would be selected for testing. This is, of course, true because the inclusion of additional employees makes it less likely that any particular employee amongst the larger group, such as Hampe, would be selected by the random number generator.[3] The inclusion of more people for random selection would not increase the odds

[3] In fact, the evidence shows CGM inadvertently included one (1) person that had not formally begun employment and seven (7) employees that had been terminated prior to testing within the 165-person pool. (APP. 816-817). These inclusions would further reduce the likelihood of Hampe being selected by the random number generator.

of Hampe's selection; and, therefore, could not support a "targeting" claim or "aggrievement" of Hampe. It was Hampe's burden to show "aggrievement" and he failed to do so. *See* Dix, 961 N.W.2d 694 (stating the employee must identify how the violation caused them harm). The Court of Appeals was mistaken to find a genuine issue of material fact on "aggrievement" and to speculate as to the *possibility* that Hampe could be tested under different circumstances.

The District Court's summary judgment should be affirmed because CGM substantially complied with Section 730.5(8)(a) and Hampe was not "aggrieved" by any violation.

B. CGM SUBSTANTIALLY COMPLIED WITH IOWA CODE 730.5(9)(h) AND HAMPE WAS NOT AGGRIEVED BY SUPERVISORY TRAINING.

Preservation of Error. Hampe's argument at the District Court was that KGM did not complete supervisory trainings and had KGM been trained "she would have known of the requirement for employees to be scheduled to be at work on the date of the test" and "the statute doesn't allow for alternates." (APP. 351-352). The District Court held "Hampe argues [KGM's] training is unsatisfactory, but does not state

any specific facts as to how the training is insufficient." (APP. 943).

Upon appeal, Hampe presented new arguments that KGM's "training did not include information about [] 'the documentation and corroboration of employee alcohol and other drug abuse,' or 'the referral of employees who abuse alcohol or other drugs to the employee assistance program or to the resource file" and claiming that "training surely would have taught KGM that she was not authorized to terminate Hampe". Hampe Brief, pp. 47-48. CGM submitted that Hampe's new appeal arguments had not been preserved for review. CGM Brief, pp. 47-48. The Court of Appeals did not address this preservation issue and rendered a substantive ruling upon this issue. CGM continues to believe Hampe failed to preserve error upon his newfound appeal arguments.

Argument. Section 730.5(9)(h) provides that supervisory personnel involved with drug or alcohol testing "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." Training is to include "information concerning the

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

The Court of Appeals reversed the District Court's dismissal of Hampe's supervisory training claim finding a genuine issue of material fact "about whether [CGM] substantially complied with the training requirement". Opinion, p. 16. It did so despite the uncontroverted evidence showing KGM, who oversaw drug testing, had certificates showing she had annually completed "Reasonable Suspicion Supervisory Trainings" with ARCpoint Labs and Mid-Iowa between 2016 and 2021. (APP 202-203, 220-224). These certificates show trainings prior to the testing in this case completed in 2016 (1 hour), 2017 (2 hours), 2018 (2 hours), and 2019 (1 hour), which more than meet the statutory requirements of Section 730.5(9)(h). (APP. 220-223).

As for substance, KGM's certificates describe training she received on alcohol misuse and controlled substance use "which covered the physical, behavioral, speech and performance indicators of probable alcohol misuse and controlled substance use or abuse." Id. KGM further testified these "Reasonable Suspicion Trainings" covered "what to look for in somebody who might be under the influence, how to conduct a reasonable suspicion training meeting, how to document, things like that." (APP. 376)(Dep. 11:16-12:8). This evidence establishes KGM's completion of extensive and repeated trainings, which is sufficient to substantially comply with Section 730.5(9)(h).

It would appear the Court of Appeals opted to reverse because "[n]one of the certificates for these trainings mentioned the two other topics required by the statute." Opinion, p. 16. While not entirely clear, the Court's reference to "two other topics" ostensibly pertains to (1) documentation and corroboration of abuse, and (2) referral of employees to the employee assistance program or resource file. *See* Iowa Code 730.5(9)(h). But there is evidence KGM's training

included these topics when she testified her trainings addressed "how to conduct a reasonable suspicion training meeting, how to document, things like that". (APP. 376)(Dep. 11:16-12:8). Furthermore, it is clear that CGM required such training as a matter of policy, which itself satisfies the statute.[4] (APP. 195). Again, this evidence meets the minimum threshold to find CGM's substantial compliance with Section 730.5(9)(h).

Even more, KGM's training with or without all subjects referenced in the statute would satisfy the important objectives of Section 730.5(9)(h). In Dix, this Court considered a challenge that lack of supervisory training was a violation of Section 730.5(9)(h). 961 N.W.2d at 694-695. That challenge was rejected in part because "[f]ailure to train employees who would have no involvement in trying to recognize patterns of drug or alcohol abuse has no effect on the objective of this portion of the statute." Id. at 695. Similarly, any failure in KGM's training in documentation/corroboration of abuse or in

[4] CGM's Substance Abuse Policy provides "Supervisors and other appropriate personnel will be trained annually in controlled substance abuse recognition. This training will include the Dealership's procedures for handling and assisting employees who are subject to the effects of controlled substance abuse."

referring employees to the employee assistance program or the resource file would have no bearing upon CGM's random drug testing in December 2019 or the important objectives of the statute. Hampe that walked out of testing without test results. (APP. 181). Training in documentation/corroboration of abuse or referrals for assistance had nothing to do with Hampe's walking out of testing. The important objectives of Section 730.5(9)(h) were met and there was substantial compliance.

The Court of Appeals erred in finding a fact question regarding "aggrievement" holding that if KGM's training was insufficient "then the testing was not statutorily authorized and Hampe would not have lost his job but for the illegal test." Opinion, p. 16. It was legal error to find potential "aggrievement" for this reason. "[N]ot every violation results in liability." Dix, 961 N.W.2d at 692. If the Court of Appeals' rationale were valid, then it would completely eviscerate the statutory requirement of "aggrievement". Indeed, by the Court of Appeals' logic, any insufficiency of supervisory training would alone be sufficient to negate employer's efforts to test and provide unmerited relief to employees with no true

"aggrievement" contrary to statutory intent. *See* Iowa Code 730.5(15)(a); Dix, 961 N.W.2d at 692.

Here, Hampe was terminated when he walked out of testing after submitting invalid specimens to Mid-Iowa, the third-party testing agent. (APP. 178-181). There is no reason to believe the result would have been any different if KGM's annual trainings had been any different. The discussion of subjects referred to by the Court of Appeals (i.e., documentation/corroboration of abuse and referral to employee assistance program or a resource file) would have no impact whatsoever upon the events resulting in Hampe walking out of testing or his resultant termination. Indeed, these training subjects would be entirely unrelated to the testing protocol as they pertain only to actions taken after uncovering employee abuse.

Section 730.5(9)(h) provides that employers require supervisory personnel to undergo initial and annual trainings "[i]n order to conduct drug and alcohol testing". CGM irrefutably requires training. (APP. 195). KGM undoubtedly underwent repeated trainings. (APP 202-203, 220-224). The

statute does not provide that all types of testing – e.g., random selection testing, post-rehabilitation testing, reasonable suspicion testing, pre-employment testing, investigating accidents in the workplace (*See* Iowa Code 730.5(8)(b)-(f)) – automatically becomes "illegal" and employees become "aggrieved" if a supervisor has not received sufficient training. The potential invalidation of such a wide expanse of testing and establishment of "aggrievement" in employees based solely upon inconsequential and unrelated subjects covered in supervisory trainings would severely hamper the ability of employers to provide drug-free workplaces to their staff and customers.

Section 730.5(9)(h) merely provides that employers, like CGM, require initial and annual trainings. CGM undoubtedly does require trainings. (APP. 195). As such, CGM substantially complied with this statutory requirement. Furthermore, because CGM's trainings would have no bearing upon Hampe's walking out of testing in this case Hampe was not "aggrieved" by any substantive training issue.

C. CGM SUBSTANTIALLY COMPLIED WITH IOWA CODE 730.5(9)(b) AND HAMPE WAS NOT AGGRIEVED BY CGM'S UNIFORM POLICY.

Preservation of Error. At the District Court, Hampe resisted summary judgment arguing he was "aggrieved" because he should have been given "a similar exception" to CGM's drug testing policy that he claimed had been given to others accused of having positive drug test results. (APP. 356). The District Court rejected Hampe's argument finding the other employees' circumstances were different and CGM "was not required to offer Hampe continuous employment." (APP. 943).

Upon appeal, Hampe changed his argument to claim the "written policy does not call for uniform disciplinary requirements" so Hampe was "aggrieved" because the testing was not authorized. Hampe Brief, pp. 63-64. The District Court had not issued a ruling upon Hampe's new appellate argument. (APP. 943-944). CGM raised this preservation issue. CGM Brief, pp. 55-56. The Court of Appeals, however, did not address this preservation issue and rendered a

substantive ruling. CGM continues to believe Hampe failed to preserve error upon his newfound appeal argument.

Argument. Section 730.5(9)(b) states an "employer's written policy shall provide uniform requirements for what disciplinary or rehabilitative actions an employer shall take against an employee or prospective employee upon receipt of a confirmed positive test result for drugs or alcohol or upon the refusal of the employee or prospective employee to provide a testing sample."

The Court of Appeals overturned the District Court finding an issue of fact based upon substantial compliance believing an employee handbook provision provided CGM "discretion to choose among different adverse employment actions." Opinion, p. 21. The Court of Appeals also believed there was an issue of fact relative to "aggrievement" because the Court questioned whether CGM "always terminated" employment in practice. Id. at 22. These holdings were erroneous.

First, the evidence shows CGM long ago instituted a Controlled Substance Abuse Policy. (APP. 191-195). This

policy provides that "refusal of any applicant and/or employee to consent to a drug test where required shall be grounds for denying them employment and/or termination of employment, even for a first offense." (APP. 192). It further provides that "[i]f an employee has a positive result, employment will be terminated." (APP. 194). The Court of Appeals recognized the Controlled Substance Abuse Policy did, in fact, "mandate termination for test refusal." Opinion, p. 21. Indeed, these provisions are uniform and consistent with CGM's practice.

The Court of Appeals' concern stemmed from provisions within CGM's Employee Handbook ("Handbook"). Opinion, p. 21. This is because the Handbook includes a "Drug and Alcohol Policy" that identifies potential actions that may be taken for violations including suspension, termination, refusal to hire a prospective employee, or other action "in conformance with the Company's written policy and procedures". (APP. 198-199). Of these potential actions, the only potential action against a current employee other than termination would be suspension. Id. Notably, CGM's Handbook also specifically provides "the Company may

suspend a current employee, with or without pay, pending the outcome of the test". (APP. 199). The Handbook's reference to suspension as a potential action addresses suspensions that may occur pending the outcome of testing, not when an employee (like Hampe) has refused testing. The potential actions listed in the Handbook are not inconsistent with CGM's "Controlled Substance Policy" that provides for termination in the event of an established violation. The Court of Appeals was mistaken to believe these policy provisions conflicted and to interpret the use of "may" in the Handbook as conferring discretion as a matter of policy. These policies treat employees uniformly for violations. CGM has been perfectly clear it "always terminates" for violations. (APP. 379)(Dep. 12:1-23).

Section 730.5(9)(b) provides only that employers have a uniform written policy. CGM's written policy was uniform as it provided that current employees would be terminated in the event of a violation or may be suspended while pending the outcome of testing. CGM was in substantial compliance as its

written policy met the important objectives of Section 730.5(9)(b).

Second, the evidence is clear CGM's practice was always to terminate employment for violations so Hampe would not have been "aggrieved" by any violation of Section 730.5(9)(b) when he chose to walk out of testing. KGM testified CGM's practice has been to "simply always terminate an employee if they tested positive for drugs." (APP. 379)(Dep. 12:1-23). In discussing CGM's written policy changes over time, KGM testified "[w]e always terminate, so it might as well just say we terminate." (APP. 379)(Dep. 12:5-6). In fact, Hampe admitted he understood that violations of the Controlled Substance Policy, even a first offense, could result in termination. (APP. 175)(Pl's Depo. 45:2–24). When Hampe decided to walk out of testing on the day in question, December 5, 2019, KGM had warned him that if he left testing his employment would be terminated. (APP. 181)(Pl's Depo. 70:1–25)("And she said, 'No. If you leave, you're fired'")). CGM's application of its policy was perfectly clear. There can be no "aggrievement" based upon the written policy when CGM has consistently terminated

employment for violations of its Controlled Substance Abuse Policy. Hampe knew this policy when he walked out.

The Court of Appeals found an issue of fact because it questioned whether other evidence cast doubt upon CGM's practice to "always terminate". Opinion, p. 22. In doing so, the Court misconstrued the evidence to create a fact question that does not exist.

Hampe submitted affidavits from two coworkers, Marcy Davis and Steven Fowler, to argue "CGM treated the results of Fowler's and Davis' drug tests differently" based upon these employees' interactions with Mid-Iowa's testing agent. Brief, p. 30. However, neither of these affidavits involved a "confirmed positive test result for drugs or alcohol" or "the refusal of the employee … to provide a testing sample." (APP. 494-496, 499-500). Both Davis and Fowler indicated they "passed" the drug-testing (APP. 494, 499), which is vastly different from Hampe who walked out of testing against the directive of KGM. (APP. 171-172)(Pl's Depo: 29:21-30:5); (APP. 191-200). CGM's disciplinary provisions within its written policy would not apply to the circumstances described by

Fowler or Davis. The Court of Appeals erred to question CGM's application of its policy based upon circumstances that did not implicate the policy.

As a matter of substance, Fowler claims Mid-Iowa's agent accused him of a having a diluted sample but then said he "passed the test". (APP. 495). Davis claims Mid-Iowa's agent said there was THC in her sample but the agent said she would "let it go this time". (APP. 499). Neither Fowler nor Davis indicated this information was ever shared with KGM, who oversaw CGM's drug testing program. (APP. 202, 494-496, 499-500). Resultantly, these affidavits do not impeach KGM's unrebutted testimony that CGM "always terminates" for violations of the Controlled Substance Abuse Policy.

The Court of Appeals also noted Davis' description of a conversation with her manager, JP Phillips ("JP"), following her interaction with Mid-Iowa's agent. Id. Davis said she told JP "what [the Mid-Iowa agent] accused me of and told him that I can assure him that there was no THC in my system" and that "JP responded by asking me if I liked working at Toyota. I said yes, and JP said then don't worry about it." (APP. 500).

Again, this testimony does nothing to indicate KGM was made aware of Davis' interactions with Mid-Iowa's agent. KGM not only oversaw CGM's drug testing program but also oversaw "all personnel operations and management". (APP. 202). Without evidence KGM knew of Davis' interactions with Mid-Iowa's testing agent, CGM's disciplinary policy was not applied. As such, KGM's testimony that CGM "always terminates" for violations remained unchallenged. If anything, Davis' testimony supports that CGM "always terminates" because her affidavit suggests Davis was advised not to inform CGM in order to avoid application of the disciplinary policy.

The Court of Appeals erred when finding "these employees' experiences, when viewed in the light most favorable to Hampe, raise a question of fact as to whether that was truly the case." Opinion, p. 22. They do not.

CGM substantially complied with Iowa Code §730.5(9)(b) and Hampe cannot show he was "aggrieved" by any claimed violation thereof. CGM "always terminates" and Hampe was well-aware of this fact prior to walking out of drug-testing against the warnings and admonitions of KGM.

CONCLUSION

For the foregoing reasons, further review should be granted, the decision of the Court of Appeals should be vacated, and the District Court affirmed with entry of dismissal of Plaintiff's claims against CGM.

REQUEST FOR ORAL ARGUMENT

Charles Gabus Motors, Inc. (d/b/a Toyota of Des Moines) requests to be heard orally in this matter.

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CERTIFICATE OF FILING

The undersigned hereby certifies that the Application for Further Review of the Defendant-Appellee Charles Gabus Motors, Inc. d/b/a Toyota of Des Moines was electronically filed via the Iowa Supreme Court's Electronic Data Management System (EDMS) on the 30th day of January, 2024.

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CERTIFICATE OF SERVICE

It is hereby certified that on the 30th day of January, 2024, the undersigned party, or person acting on its behalf, did file via EDMS the foregoing document, which gives notice thereof to the following:

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CERTIFICATE OF COMPLIANCE

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

This application has been prepared in a proportionately spaced typeface using Bookman Old Style in 14-point font and contains 5,400 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

/s/ Andrew T. Tice
Andrew Tice

JANUARY 30, 2024
Date

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