SUPREME COURT NO. 22-1599
POLK COUNTY 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

RESISTANCE TO APPLICATION FOR FURTHER REVIEW

(COURT OF APPEALS DECISION FILED JANUARY 10, 2024)

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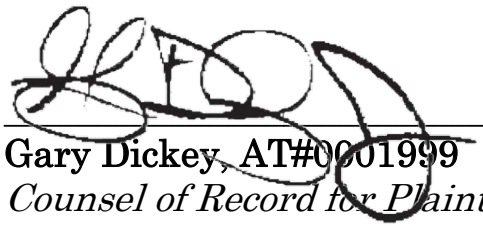
PROOF OF SERVICE & CERTIFICATE OF FILING

On February 9, 2024, I served this resistance on all other parties by EDMS to their respective counsel, and I emailed a copy to appellant.

I further certify that I did file this resistance with the Clerk of the Iowa Supreme Court by EDMS on February 9, 2024.



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STATEMENT OF ISSUES

IS FURTHER REVIEW WARRANTED ON THE NARROW, FACT-INTENSIVE ISSUE OF WHETHER GABUS'S SUSPICIONLESS DRUG TESTING SUBSTANTIALLY COMPLIED WITH IOWA CODE SECTION 730.5

Dix v. Casey's Gen. Stores, Inc., 961 N.W.2d 671 (Iowa 2021)
Hampe v. Charles Gabus Motors, Inc., 2024 Iowa App. LEXIS 49 (Iowa Ct. App. Jan. 10, 2024)
Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)
Tow Truck Country v. Iowa, Inc., 695 N.W.2d 36 (Iowa 2004)
Woods v. Charles Gabus Ford, Inc., 962 N.W.2d 1 (Iowa 2021)

Iowa Code § 730.5

STATEMENT OPPOSING FURTHER REVIEW

Charles Gabus Motors, Inc.'s application should be denied because the court of appeals' decision is correct in all the respects for which it seeks further review. The text of the relevant statutory provisions as well as precedent demonstrate that Gabus did not substantially comply with the straightforward requirements of Iowa Code section 730.5. As the court of appeals found, Gabus "admittedly [made] no effort to determine who was 'scheduled to be at work at the time the testing is conducted'" as required by section 730.5(8)(a)(1) when creating its testing pool. *Hampe v. Charles Gabus Motors, Inc.*, 2024 Iowa App. LEXIS 49 at *16 (Iowa Ct. App. Jan. 10, 2024). On top of that, Gabus's supervisor involved with the testing did not have training in two of the subjects enumerated in section 730.5(9)(h). As a result, Gabus's testing program was unlawful its inception. Gabus further violated section 730.5 through its discretionary disciplinary policy.

Gabus's counterarguments lack merit. It principally argues that its noncompliance was similar to that of the employer in *Dix*

v. Casey's Gen. Stores, Inc., 961 N.W.2d 671 (Iowa 2021). The court of appeals squarely addressed the *Dix* decision and identified several distinguishable features with Gabus's noncompliance. *Hampe*, 2024 Iowa App. LEXIS 49 at *14-24. The court of appeals' opinion accords with the unambiguous text of section 730.5 and is an unremarkable application of the *Dix* decision.

Finally, Gabus does not identify a substantial basis for further review. The decision below does not conflict with any decision of this Court on the grounds for which it seeks further review. Nor does Gabus ask this Court to overrule its prior precedent. Most notable, Gabus does not disagree with the court of appeals' interpretation of the straightforward text of section 730.5. Its only disagreement is about how the statute should be applied to the disputed facts of this case. That, of course, is the sort of issue that should be resolved by the finder of fact rather than as a matter of law by this Court.

If the Court determines that further review is necessary, then it should be plenary. Hampe identified several other means

by which Gabus violated the requirements of section 730.5, which the court of appeals determined were either not preserved or did not result in aggrievement. The court of appeals' rigid error preservation analysis is directly contrary to the flexible standard set forth in *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012). Similarly, the court's conclusion that Hampe was not aggrieved when the test collector twice discarded his urine sample cannot be squared with this Court's precedents. *See Tow Truck Country v. Iowa, Inc.*, 695 N.W.2d 36, 38-39 (Iowa 2004) (finding employee aggrieved for employer's violation of the statute even though the employee declined to take a retest); *see also Woods v. Charles Gabus Ford, Inc.*, 962 N.W.2d 1, 9 (Iowa 2021) ("Even though Woods testified he might have asked for a retest had he been informed of the cost of the test, he was aggrieved when he was prevented from making an informed decision, and there is no way to know what the outcome of the retest would have been"). These issues must be resolved by this Court on further review in the event it is granted.

STATEMENT OF THE CASE

In 2020, Scott Hampe ("Hampe") sued his former employer Charles Gabus Motors, Inc. d/b/a Toyota of Des Moines ("Gabus"), and a drug specimen collection company named Gadimina Enterprises, Inc. d/b/a Mid-Iowa Occupational Testing ("Mid-Iowa"), following his termination of employment from a car dealership in Des Moines. In his lawsuit, Hampe asserted claims of violation of Iowa's drug testing laws, fraud, invasion of privacy and conspiracy. The dispute centered around Gabus's unannounced drug test, administered by Mid-Iowa, which resulted in Hampe's termination from employment. (App. 22). In particular, Hampe claimed that Gabus and Mid-Iowa violated Iowa Code Section 730.5 in several ways:

1. Unlawfully using an alternate system to exempt employees from testing and targeted Hampe;

2. Failing to make any effort to determine what employees were scheduled to be at work during the test;

3. Failing to complete supervisor initial and annual training;

4. Destroying evidence of Hampe's urine specimens before sending them to a laboratory for

confirmatory testing or review by a medical review officer;

5. Directly monitoring and observing the collection of Hampe's sample by a female;

6. Having non-uniform disciplinary actions in its written drug testing policy; and

7. Failing to carry out the drug test within the written terms of its policy.

Hampe also asserted common law claims for fraud, invasion of privacy, reckless disregard, and conspiracy.

Following cross-motions for summary judgment, the district court granted Gabus and Mid-Iowa's motions in their entirety. The court held, as a matter of law, that Gabus and Mid-Iowa had either substantially complied with all applicable portions of Iowa Code section 730.5 or that Hampe was not aggrieved by one of their violations. The district court also dismissed Hampe's common law claims, finding that they were either untimely or preempted by Iowa Code section 730.5. (App. 16-17). The court also denied Hampe's motion for partial summary in its entirety. This appeal ensued.

STATEMENT OF FACTS

For nearly fifteen years, Scott Hampe worked as a salesperson and/or leasing manager at Gabus. (App. 277). In September 2019, Hampe received an updated employee handbook that advised him Gabus would conduct monthly unannounced drug testing "compliant with the requirements of Iowa Code section 730.5." (App. 198.) The handbook further stated that all testing would be done by Mid-Iowa "or another provider, selected by the Company, who is compliant with the requirements of Iowa Code [s]ection 730.5, including maintaining a Medical Review Officer" ("MRO"). (App. 198). Under Gabus's drug testing policy, all urine samples were supposed to be sent to a laboratory for analysis and reviewed by an MRO. (App. App. 193, 198). In addition, employees whose samples are sent for further testing were to be sent home until human resources receives a negative test result from the MRO. (App. 33).

Supervisor Training

Kelsey Gabus-McBride, the human resources director for Gabus, supervised the company's drug testing program. (App.

156, 373-74). Gabus-McBride never completed any initial drug testing training. (App. 377). On July 14, 2016, Gabus-McBride completed a thirty-minute course entitled "Reasonable Suspicion Supervisory Training," which "covered the physical, behavioral, speech and performance indicators of probably alcohol misuse and controlled substance use or abuse." (App. 220). On September 26, 2017, she completed sixty minutes of "Reasonable Suspicion Supervisor Training," which "covered the physical, behavioral, speech and performance indicators of probable alcohol misuse and controlled substance use or abuse." (App. 221). On June 19, 2018, she completed sixty minutes of "Reasonable Suspicion Supervisor Training," which "covered the physical, behavioral, speech and performance indicators of probable alcohol misuse and controlled substance use or abuse." (App. 222). On May 14, 2019, Gabus-McBride completed sixty minutes of "Annual Refresher Supervisor Training," which "covered the physical, behavioral, speech and performance indicators of probable alcohol misuse and controlled substance use or abuse." (App. 223).

December 5th Drug Test

Gabus-McBride decided to schedule a random drug test for December 5, 2019. (App. 72). In preparation for the test, she asked Mid-Iowa to generate two lists: a list of fifteen employees for testing and a second list of seven alternates.[1] (App. 210). Gabus's standard practice was to include all employees in the drug testing pool regardless of whether an employee was scheduled to be at work on the date of a particular drug test. (App. 384-85). Neither Gabus nor Mid-Iowa took any steps to determine which employees were not scheduled to be at the worksite on the day of testing. (App. 413-14).

December 5th Employee Selection

On November 27, 2019, Mid-Iowa generated a list of fifteen employees to be tested and eight alternates. (App. 440-41). Employees were to be tested in the order in which they were listed. (App. 445). Hampe was identified as the last alternate and twenty-third employee on the list. (App. 440-41). On the morning

[1] Gabus does not know whether the master list from which Mid-Iowa selected employees was current as of the date of test selection. (App. 59-60).

of the December 5th test, Gabus-McBride summoned the employees on the list for testing. If an employee was not present at work, Gabus-McBride summoned the next employee on the list. (App. 388).[2] Nine of the fifteen employees selected for testing were not at the worksite at the time of the test. One of the eight alternates was also not at the worksite at the time of the test. (App. 438, 440-41). Six employees on the initial list of seven alternates submitted to testing. (App. 438, 440-41).

Hampe's First Sample

Hampe reported for testing and submitted a urine sample to Mid-Iowa's collector named Sarah Ghee ("Ghee"). (App. 281-82, 402). Hampe's first sample was of a sufficient quantity. (App. 279-82). Ghee measured the temperature of the sample with a device, and Hampe saw that it was 101 degrees. (App. 281). Ghee dumped out the sample after characterizing the sample as looking "like Mountain Dew" and out of temperature range. (App. 281,

[2] This departed from past practice. In November of 2019, for example, Gabus summoned Hampe to come into work on his day off and submit to an unannounced drug test. (App. 282, 83, 469).

329). The only notation Ghee made in Mid-Iowa's testing form was: "out of temp at 9:45 at 104." (App. 189, 330).

Mid-Iowa's Collection Policies

Mid-Iowa's collection policies require the collector to directly observe urine sample collection. (App. 311). They also instruct the collector to smell the specimen to check for signs of adulteration. (App. 313). If a second collection occurs due to a sample testing out of temperature range, Mid-Iowa requires a second observed collection. (App. 323). The reason for a second collection is to use direct observation to obtain an acceptable specimen. (App. 297). Mid-Iowa is not a laboratory approved by SAMHSA. (App. 652).

Hampe's Second Urine Sample

After waiting for a period of time, Hampe submitted a second urine specimen. (App. 282). According to Ghee, Hampe's second sample was not the required amount so she discarded it. (App. 282). Hampe returned to the waiting area and drank more water. After about twenty minutes, he told Gabus-McBride that he had to go home because his daughter was sick. Gabus-McBride

told him, "You know if you leave, you're going to get fired." When Hampe asked whether she would "really do that," Gabus- McBride said, "Yeah." So Hampe sat back down for another fifteen minutes, "trying to weigh [his] options." He eventually decided to leave, though he told Gabus- McBride that he would come back. She repeated, "No. If you leave, you're fired." Hampe responded, "I shouldn't even be up here anyhow because my name's not on the list." Hampe then left the worksite and was terminated the same day for refusing the drug test. (App. 367).

Hampe's December 6th Urine Sample

On December 6, 2019, Hampe voluntarily presented to Mid-Iowa's facility and took the same drug test that had been administered to him the day prior. (App. 501). A male collector collected Hampe's sample. (App. 307). Hampe tested negative. (App. 501).

ARGUMENT

I. FURTHER REVIEW IS NOT WARRANTED BECAUSE THE COURT OF APPEALS CORRECTLY DECIDED THAT GABUS DID NOT COMPLY WITH THE STATUTORY REQUIREMENTS FOR IDENTIFYING EMPLOYEES SUBJECT TO SUSPICIONLESS DRUG TESTING

A. The court of appeals correctly interpreted section 730.5 to require employers to remove employees who are not scheduled to be at work from the testing pool, which Gabus did not do

Gabus first seeks further review on the basis that it substantially complied with the requirements of Iowa Code section 730.5(8)(a)(1). (Application at 8-18). That section provides:

> 8. Drug or alcohol testing. Employers may conduct drug or alcohol testing as provided in this subsection:
> a. Employers may conduct unannounced drug or alcohol testing of employees who are selected from any of the following pools of employees:
> (1) The entire employee population at a particular work site of the employer except for employees not subject to testing pursuant to a collective bargaining agreement, or *employees who are not scheduled to be at work at the time the testing* is conducted because of the status of the employees or who have been excused from work pursuant to the employer's work policy prior to the time the testing is announced to employees.

Iowa Code § 730.5(8)(a)(1) (emphasis added). Relying on the clear and unambiguous text, the court of appeals correctly concluded that Gabus did not substantially comply with statute because it

"admittedly [made] no effort to determine who was scheduled to be at work at the time the testing is conducted" when creating the testing pool. *Hampe*, 2024 Iowa App. LEXIS 49 at *16 (quotations omitted).

B. The court of appeals properly distinguished the *Dix* decision to conclude that Gabus did not substantially comply with the statute

Seeking to downplay its wholesale failure to comply with the statute, Gabus attempts to analogize its noncompliance to the circumstances in *Dix v. Casey's Gen. Stores, Inc.*, 961 N.W.2d 671 (Iowa 2021). The court of appeals squarely considered this argument and properly distinguished the *Dix* decision:

> The court in *Dix* did state that '[w]ith respect to providing an accurate list of employees scheduled to work on the day of testing, we agree with the district court that substantial compliance allows some give in compiling the list for the selection process' and room for human error. As a result, the court found substantial compliance with section 730.5(8)(a) where, on the day of testing, some employees were sick, no-showed, or made leave requests between the employer's compilation of the list and provision of the list to its third-party testing vendor. But there's an important difference between this case and *Dix*. On the day before the scheduled testing in *Dix*, the employer provided its outside vendor with a list of employees '*who were scheduled to work'* the next day. Here, Gabus just included *all* of its employees in the testing

> pool, admittedly making no effort to determine who was 'scheduled to be at work at the time the testing is conducted.'

Hampe, 2024 Iowa App. LEXIS 49 at *15-16 (quotations omitted). In other words, *Dix* excuses unforeseen and unavoidable deviations from the requirements of section 730.8(5)(a) that arise after the creation of the testing list. *Dix* does not, however, excuse an employer who makes no attempt to remove employees who are not scheduled to be at work from the pool. Because the court of appeals correctly applied *Dix*, and Gabus does not ask this Court to overrule it, there is no basis for further review on this ground.

C. The court of appeals correctly determined that Hampe was aggrieved by Gabus's failure to follow the requirements of section 730.8(5)(a)

In *Dix*, this Court established 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"). It is undisputed that Gabus terminated Hampe because he "refused to complete [the] random drug test." (App. 367). But, Hampe should never have been

tested in the first place. Gabus desired to randomly test fifteen employees. Had it limited its pool only to scheduled employees, there would have been no need to create the list of alternates from which Hampe was drawn. In other words, but for Gabus's failure to follow the statutory requirement to remove unscheduled employees, Hampe would not have been tested in the first place.[3] There is nothing erroneous about the court of appeals' decision that needs corrected by this Court.

II. FURTHER REVIEW IS NOT REQUIRED BECAUSE THE COURT OF APPEALS CORRECTLY FOUND THAT THE ONLY SUPERVISOR INVOLVED IN TESTING FAILED TO COMPLETE THE STATUTORILY MANDATED TRAINING

Gabus also seeks further review of the court of appeals' conclusion that summary judgment was not proper as to Hampe's claim that Gabus-McBride lacked the statutorily required training. (Application at 18-25). The training requirement is found in section 730.5(9)(h), which provides:

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[3] The court of appeals also noted that Gabus-McBride skipped two scheduled employees who were on the list but may have been off-site somewhere without making any effort to locate them or summon them for testing. *Hampe*, 2024 Iowa App. LEXIS 49 at 18 n.18.

> In order to conduct drug or alcohol testing under this section, an employer shall require supervisory personnel of the employer involved with drug or alcohol testing under this section 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. The training shall include, but is not limited to, 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 pursuant to paragraph 'c', subparagraph (2).

Iowa Code § 730.5(9)(h). The statute's text makes clear that supervisor training is the key to unlocking the door to conduct employee drug and alcohol testing. Without it, the employer may not "conduct drug or alcohol testing." *Id.*

The court of appeals reviewed the summary judgment record and determined that Gabus-McBride's training did not include documentation and corroboration of employee drug abuse or the referral of employees who abuse alcohol or other drugs. *Hampe*, 2014 Iowa App. LEXIS 49 at *19-20. From this undisputed fact, the court correctly concluded that without this training, "testing

was not statutorily authorized and Hampe would not have lost his job but for the illegal test."[4] *Id.* at *20.

Gabus's reliance on the *Dix* decision on this issue mischaracterizes its holding. In *Dix*, it was "undisputed that the supervisor in charge of the drug test and another HR employee completed [the required] training." *Dix*, 961 N.W.2d at 694. Because section 730.5(9)(h) applies only to "supervisory personnel," the Court in *Dix* concluded that an employer does not violate the statute "by failing to require adequate training of the other employees assisting with the testing." *Id.* In this case, Gabus-McBride is the supervisor, and she did not have the required training. Accordingly, Gabus's attempt to find a foothold in the *Dix* decision falls short.

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[4] Gabus's repeated assertion that Hampe was not "aggrieved" because it terminate his employment for walking off the job site is the reddest of herrings. As the court of appeals held, Hampe was subjected to testing when he should not have been by a supervisor who lacked the statutorily required training. In addition, he submitted two samples that were discarded without following the proper procedures. Under Gabus's logic, a test collector could demand a bribe or sexual favors as part of the drug testing process, and Hampe would not be aggrieved if he walked off the job site without assenting to the collector's illegal demands. Surely that cannot be how section 730.5 operates.

III. FURTHER REVIEW IS UNNECESSARY BECAUSE THE COURT OF APPEALS CORRECTLY DETERMINED THAT GABUS'S DRUG TESTING POLICY DID NOT COMPLY WITH SECTION 730.5(9)(B) BECAUSE IT DID NOT PROVIDE FOR UNIFORM DISCIPLINE

Finally, Gabus seeks further review of the court of appeals' finding that its drug testing policy failed to substantially comply with Iowa Code section 730.5(9)(b), which provides:

> The 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 policy shall provide that any action taken against an employee or prospective employee shall be based only on the results of the drug or alcohol test.

Iowa Code § 709.5(9)(b). Gabus asserts that this section "provides only that employers have to have a uniform written policy." (Application at 29). This reading grossly distorts plain language, which requires a "written policy" that provides "uniform requirements" disciplinary or rehabilitative actions. Here, the court of appeals accurately observed that Gabus's policy provides it "with discretion to select different adverse employment actions upon a violation." *Hampe*, 2024 Iowa App. LEXIS 49 at *26-27.

The discretionary nature of Gabus's policy is no small matter because it "gives the employer the ability to target certain employees for and exempt certain employees from adverse employment actions." *Id.* at *27. As the court aptly concluded, Hampe was aggrieved by virtue of being terminated for violating the drug testing policy while at least two other Gabus employees were not. *Id.* at *27-28. There is nothing remarkable about the court's analysis or worthy of further review.

IV. IF FURTHER REVIEW IS GRANTED, THIS COURT MUST CORRECT THE COURT OF APPEALS' ERRONEOUS ERROR PRESERVATION RULING

On appeal, Hampe asked the court of appeals to decide the issue this Court expressly reserved in *Dix*. That is, whether an employer's drug testing of employees drawn from a list of alternates violates Iowa Code section 730.5(1)(l). (Hampe Br. at 29-31). Oddly, the court of appeals held that Hampe did not raise this argument "under section 730.5(1)(l) but under section

730.5(8)(a)."[5] *Hampe*, 2024 Iowa App. LEXIS 49 at *13. Hampe's summary judgment brief proves just the opposite:

> iv. CGM and Mid-Iowa violated Subsection (8)(a)(1) because they included employees in the testing pool who were not scheduled to be at work at the time of testing to exempt employees from testing and to target Scott Hampe via an illegal alternate system
>
> * * *
>
> Similarly, "the selection of employees to be tested from the pool of employees…shall be done based on a neutral and objective selection process by an entity independent from the employer and shall be made by a computer-based random number generator…" *Id.* While CGM and Mid-Iowa may have used a random number generator to produce an output of a 23-employee selection sample, the generator's selection of at least ten (10) employees served no purpose at all. Ultimately, KGM and Mid-Iowa rejected the generator's selection by refusing to test the ten (10) employees it selected. This rejection was accomplished by manipulating the testing pools to include employees who were not at work at the time of testing and is a clear and obvious violation of Subsection 730.5(8)(a)(1) and in turn 730.5(1)(l).

[5] The court of appeals criticism of Hampe for raising the argument under 730.5(8)(a) rather than 730.5(1)(l) is especially curious for several reasons. First, both Gabus and Hampe's summary judgment briefs expressly cite to section 730.5(1)(l). Second, section 730.5(8) spells out the substantive requirements for an employer's drug testing policy whereas section 730.5(1) merely sets out the statute's definitions. If an employer's drug testing policy does not satisfy the definition of "unannounced drug or alcohol testing" under section 730.5(1)(l) then it necessarily violates section 730.5(8). Faulting Hampe for purportedly failing to cite to 730.5(1)(l) while acknowledging that he did cite to section 730.5(8) is an excessively hypertechnical line to draw in the sand.

(App. 679-81). Gabus clearly understood the use of an alternate list was contested because it addressed it preemptively in its summary judgment brief. (App. 133-35)("The use of alternates is not specifically referenced in § 730.5, but neither are they precluded. Iowa Code § 730.5(1)(l) states only that selection for unannounced testing 'shall be done based on a neutral and objection selection process . . .'"). Moreover, at the summary judgment hearing, Hampe's counsel cited directly to the *Dix* decision in support of his argument:

> I mean, our argument is exactly if the -- let's say your employer submitted to use alternates, it would be in the statute. *This issue is a matter of first impression. The court in Dix didn't take it up because the employees on that list weren't on the alternate list.* Hampe was on the alternate list, so I think it is appropriate for the District Court to address this particular claim if it gets there.

(10/28/22 MSJ Tr. at 45:17-24) (emphasis added). Along with that, the district court expressly considered the issue and ruled that the violations were only "technical" and Hampe was not aggrieved:

> Hampe alleges [Gabus] violated seven specific provisions of Iowa Code 730.5 in its attempt to test Hampe for drugs. . . . *Hampe alleges [Gabus] 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 [Gabus] 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. 941-42) (emphasis added).

The court of appeals' holding that Hampe did not raise the issue under section 730.5(1)(l) is demonstrably false. It is also worthy of further review because it is contrary to the decision in *Lamasters v. State*, 821 N.W.2d 856 (Iowa 2012). In that case, this Court explained that error is preserved even if the "court's ruling indicates the court *considered* the issue and necessarily ruled on it." *Id.* at 864. This is true even if "the court's reasoning is incomplete or sparse" or "the record or ruling on appeal contains incomplete findings or conclusions." *Id.* at 864. Consequently,

error was preserved when the district court declared that it "disposed of all of Hampe's claims by Summary Judgment in favor of both Defendants." (App. 941-42).

V. IF FURTHER REVIEW IS GRANTED, THIS COURT MUST REVERSE THE COURT OF APPEALS' CONCLUSION THAT GABUS DID NOT VIOLATE SECTION 730.5 WHEN THE TEST COLLECTOR DUMPED BOTH OF HAMPE'S URINE SAMPLES

Finally, if further review is granted, it should include the court of appeals' erroneous conclusion that Hampe was not aggrieved by Gabus's failure to maintain his urine specimens. There is no dispute that Hampe provided two urine samples. (App. 281-82). Instead of sending the samples to a certified laboratory for initial confirmatory testing, Gabus's test collector destroyed both samples at the testing site. (App. 281-82). In doing so, Gabus violated section 730.5(7) in multiple ways:

- A medical review officer never reviewed Hampe's specimens in violation of Iowa Code section 730.5(7) ("A medical review officer shall…review and interpret any confirmed positive test results…");
- Hampe's "test results" were disclosed to Gabus before they were reviewed by a medical review officer in violation of Iowa Code Section 730.5(7)(h) ("A medical review officer shall, *prior* to the results being reported

to an employer, review and interpret…") (emphasis added);

- Hampe did not have the opportunity to provide "any information which may be considered relevant to the test," to the medical review officer in violation of Iowa Code Section 730.5(7)(c)(2) and Section 730.5(7)(h) ("A medical review officer shall…review and interpret…test results, to ensure…that any information provided by the individual pursuant to paragraph "c", subparagraph (2), is considered").

- Hampe was never notified of his right to obtain a confirmatory test in violation of Iowa Code Section 730.5(7)(j) ("[t]he employer shall notify the employee in writing by certified mail, return receipt requested, of the results of the test, the employees' right to request and obtain a confirmatory test").

To its credit, the court below did not dispute that the destruction of the urine specimens violated section 730.5. Instead, the court of appeals affirmed on the basis that "Hampe was not aggrieved by any violation of this section." *Hampe*, 2024 Iowa App. LEXIS 49 at *21. The court's conclusion was based on Hampe's refusal to provide a third urine sample, which the court suggests could have allowed Gabus to follow the procedures set forth in section 730.5. This holding rests on a flawed understanding of what it means to be "aggrieved."

For starters, Gabus did not have any statutory authority to demand (or even request) that Hampe provide a second or subsequent urine sample. One troubling aspect of the court of appeals' analysis is the lack of any limiting principle. Suppose Hampe provided five (or fifty for that matter) more urine samples, and Gabus's test collector dumped them all. In the court of appeals' view, Hampe would not be aggrieved if he did not comply with a demand to provide a sixth (or fifty-first) urine sample. Taken literally, an employer may repeatedly dump out an employee's urine sample – *even in bad faith* – and the employee is not aggrieved if he or she refuses to comply with a demand for another specimen. The fact Gabus conditioned Hampe's employment on its unlawful demand to provide a third urine sample is sufficient to render him aggrieved.

At a more practical level, the demand for a third urine sample does not control the analysis of whether Gabus violated section 730.5 or whether Hampe was aggrieved. There is no requirement that Hampe must exhaust administrative remedies that may exist outside of section 730.5 to be considered aggrieved.

It is sufficient that but for Gabus's violation of the statute, Hampe would still be employed. This Court said as much years ago in *Tow Truck Country v. Iowa, Inc.*, 695 N.W.2d 36, 38-39 (Iowa 2004) (finding employee aggrieved for employer's violation of the statute even though the employee declined to take a retest) and more recently in *Woods v. Charles Gabus Ford, Inc.*, 962 N.W.2d 1, 9 (Iowa 2021) ("Even though Woods testified he might not have asked for a retest had he been informed of the cost of the test, he was aggrieved when he was prevented from making an informed decision, and there is no way to know what the outcome of the retest would have been"). To paraphrase *Woods*, "there is no way to determine" whether Hampe's initial urine sample would have tested positive or proven to be Mountain Dew "because the sample no longer exists." *Woods*, 962 N.W.2d at *9. We do know that Hampe voluntarily submitted to a drug test through Mid-Iowa on December 6th – which showed that he was negative for drugs or alcohol. (App. 501). Consequently, Hampe was aggrieved when Gabus demanded that he participate in drug testing that did not follow the statutory procedures for collection and terminated him

when he refused to comply with its unlawful demand for a third specimen.

CONCLUSION

The court of appeals faithfully applied the law and this Court's precedents in determining that Gabus failed to substantially comply with Iowa Code section 730.5, and Hampe was aggrieved as a result. Accordingly, the Court should deny further review. Alternatively, if further review is granted, it should be plenary.

CONDITIONAL REQUEST FOR ORAL ARGUMENT

If further review is granted, Hampe requests to be heard in oral argument.

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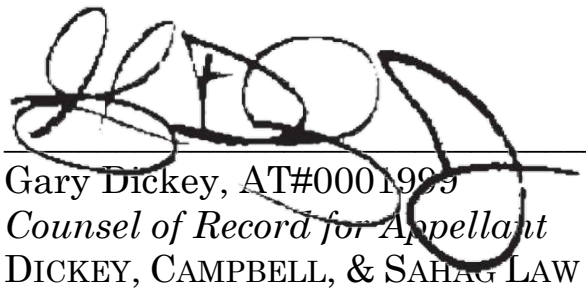

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