SUPREME COURT NO. 18-1464
POLK COUNTY CASE NO. CVCV052834

**IN THE
SUPREME COURT OF IOWA**

TYLER DIX, JASON CATTELL, JIMMY MCCANN, AND JULIE ELLER

Plaintiffs-Appellees/Cross-Appellants,

v.

CASEY'S GENERAL STORES, INC. AND CASEY'S MARKETING COMPANY,

Defendants-Appellants.

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*ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE MICHAEL D. HUPPERT,
DISTRICT COURT JUDGE*

Final BRIEF FOR APPELLEES/CROSS-APPELLANTS

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ROUTING STATEMENT

Plaintiffs agree the Supreme Court should retain this case because it involves issues of first impression. *See* Iowa R. App. P. 6.1101(2)(c).

STATEMENT OF THE CASE

This appeal follows a district court trial tried to Judge Michael D. Huppert on February 5 and 6, 2018, in which Plaintiffs Tyler Dix, Jason Cattell, Julie Eller and Jimmy McCann asserted violations of Iowa Code section 730.5 surrounding an unannounced drug test conducted by Defendants. Findings of Fact, Conclusions of Law and Judgment were entered on March 21, 2018. The Court found in favor of Eller and McCann but dismissed Dix's and Cattell's claims. On July 23, 2018, by separate order, the Court granted Plaintiffs Eller and McCann their attorney fees. On August 21, 2018, the Court granted Eller equitable relief in the form of front pay but denied McCann such equitable relief.

Appellees and Cross-Appellants are filing one brief but will note which section applies to each Plaintiff.

STATEMENT OF FACTS

Pursuant to Iowa Rule of Appellate Procedure 6.903(3), Plaintiffs will include only those facts either in disagreement or not included by Defendants.

Casey's believed that its policy allowed it to drug test employees in safety sensitive positions at any time. (T.T. Vol. I. 11:19-22). Casey's has not conducted consistent testing. (T.T. 95:23-25 to 96:1-6).

Casey's believed a safety-sensitive position was any position where the employee could potentially face dangers in their work environment at some point during their shift, not matter how remote. (T.T.20:19-24). Per Casey's, McCann and Eller had safety-sensitive positions because they worked in the warehouse, and power equipment zipping around posed a potential danger. (T.T.22:17-25 to 23:1-2). McCann and Eller worked in a cage protected on all sides by metal fencing. (T.T.22:1-6). The cage had door that was closed while they worked in it. (T.T. 181:15-23). It was not possible to get in and out of the cage without going through the door. (T.T. 181:19-21). McCann and Eller's job duties consisted of counting cigarette returns. (T.T. (22:7-12). Casey's convenience stores would send tobacco products back to the warehouse and it was Eller's job to make sure the stores sent back the

correct amounts. (T.T. 181:12-14). For the duration of Eller's employment where she worked in the Cage, she was under a fifteen (15) pound medical restriction. App. 115; (T.T. 181:24-24 to 182:1-3). She also was restricted from repetitive motion over her shoulders. (T.T. 182:3-4). Eller did not believe that any of her job duties put her in danger of losing her life or getting seriously injured. (T.T. 182:13-20). At the time she was fired, Plaintiff Eller did not operate any heavy-duty machinery. App. 115.

> HOW DOES RESEARCH RANOMIZER GENERATE ITS NUMBERS?
>
> As with most computer-based "random number generators," this program is best described as a "pseudo-random number generator" because the numbers are generated by use of a complex algorithm (seeded by the computer's clock) that gives the appearance of randomness. For most purposes, this should be adequate. If, however, the demands of your experiment require "true" random numbers, or if you're interested in learning more about them, we suggest you visit HotBits.

App. 111.

Twenty-seven (27) employees who were included in the selection pool never provided a sample. (T.T. 14:5-10). Six (6) of those employees either called in sick, didn't show up, or left work early. (T.T. 14:11-17).

Casey's testing policy provides that people designated in a pool have to be scheduled to work at the time of testing. (T.T. 19:11-14). The remaining twenty-one (21) employees included in the pool by Casey's were not scheduled to be at work on April 6, 2016, at the time of testing. (T.T. 14:18-23).

There is a 100% chance that the test conducted by Casey's was not random. (T.T. 74:7-9). Because Casey's used 21 employees who weren't scheduled to be at work on the day of the testing, and Casey's tested all of the alternates, 100% of the employees in the pool were tested on April 6, 2016. T.T 74:10-16.

Vice President of Transportation and Distribution Jay Blair ("Blair") walks through the warehouse every day, but was not included in the April 6, pool. App. 109; (T.T.24 to 25:1-8). While working at Casey's, Cattell saw Blair every day in the warehouse. (T.T. 147:1-9). Eller also frequently saw Blair in the warehouse around forklifts, hand jacks and conveyer belts. (T.T. 216:7-14). Bill Brauer is the distribution center warehouse manager. (T.T.26:12-14). Bill Brauer was designated by Casey's as a safety-sensitive employee because he works at the distribution center warehouse work site. (T.T.26:15-25).

Bill Brauer was not included in the selection pool by Casey's. App. 514-517. Ed Vaske is the Director of Grocery Distribution and immediate supervisor of the Warehouse manager, Bill Brauer. (T.T.26:9-14; 26:25 to 27:1-2). Ed Vaske was not included in the pool of employees tested on April 6, 2016. App. 109; (T.T.27:3-8). As of April 6, 2016, human resources employees traveled through the warehouse. (T.T.27:13-25). No human resource employee was included in the April 6, 2016, pool. App. 113; (T.T. 28:1-3).

Jeffrey Loneman and Lindsay Alexander were on the list to be a part of the random selection. (T.T.62:5-8). Jeffrey Loneman and Lindsay Alexander were exempted from testing. (T.T. 61:22-25). Jeffrey Loneman and Lindsay Alexander had a 0% of being selected. (T.T. 62:9-12).

Blair had a zero percent chance of being selected to provide a sample. (T.T.25:9-11). Dix's, Cattell's, McCann's and Eller's chances of being selected were not equal to Blair's. (T.T.25:12-16). Vaske had a zero percent chance of being selected to provide a sample. (T.T. 27:9-12). Dix's, Cattell's McCann's and Eller's chances of selection were not equal to Vaske's. (T.T.27:9-12). Brauer had a zero percent chance of

being selected to provide a sample. (T.T. 15:11-19). Dix's, Cattell's, McCann's and Eller's chances of being selected were not equal to Brauer's. (T.T. 16:1-5). The twenty-one (21) employees in the pool who were not scheduled to be at work at the time of testing had a zero (0) percent chance of having to provide a sample. (T.T. 15:11-23). Dix's, Cattell's, McCann's and Eller's chance of providing a sample was not equal to the twenty-one (21) employees who were in the pool but not scheduled to be at work at the time of testing. (T.T. 16:1-5).

At that time, Casey's had not identified the distribution warehouse center as a collection facility. (T.T. 12:15-19). The April 6, 2016 drug test took place at Plaintiffs' normal work site – the Casey's warehouse. App. 113.

On the date of the test, Blair had not attended "a minimum of two hours of initial training required by Iowa law. App. 109.

Burkheimer was not in charge of a group of employees at the time of testing. (T.T. 40:25 to 41:1-2). Her role was limited to speaking to employees after they finished providing their samples. (T.T. 40:13-24). During the test, Supervisors assisted employees in filling out chain of custody forms. (T.T. 39:4-25). A human resources employee named

Jamie was responsible for talking to employees about resignation, getting security badges and advising the higher ups if anyone left. (T.T. 41:6-11). Jamie had not completed drug testing training. (T.T. 41:12-19).

Employees subject to testing attempted to provide Casey's with information they thought was relevant to testing including medications they might be using. (T.T. 29: 10-14). Employees were instructed not to provide information to Casey's prior to the drug test. (T.T. 29:4-9). Mr. Blair also stated: "If any of you wish to refuse to test, you are free to leave at any time and it is regarded as a resignation. Approximately ninety-five (95) percent of the employees tested on April 6, 2016, did not have an opportunity to provide any information relevant to the test. (T.T. 30:6-12).

Casey's drug test consists of testing for ten, specific drugs. (T.T. 34:1-2). Casey's policy did not inform employees of the list of the actual drugs that were going to be tested on April 6, 2016. (T.T. 30:18-23). Casey's did not provide its employees of a list of the actual drugs to be tested during the April 6, 2016, test. App. 113; (T.T. 31:3-12). If employees had been given a list of the ten drugs to be tested on April 6,

it would have put them in a better position to know if they had used any medications which could cause a positive test. (T.T. 36:6-9).

Plaintiff Eller was asked to provide a urine specimen at 1:21 p.m. and 2:13 p.m. App. 113. Plaintiff Eller was scheduled to get off work at 1:30 p.m. on April 6, 2016. App. 113. Employees were brought into the locker room in pairs, so that Plaintiffs provided their samples in a stall next to another employee who was simultaneously providing a sample. App. 113.

Other employees came into the locker-room with Cattell when it was his turn to provide a sample. (T.T.148:1-5). Cattell entered the locker-room and waited his turn as people were exiting the room. (T.T. 148:8-11). Someone was right next to Cattell in the neighboring stall providing a sample. (T.T.148:22-24). As Cattell looked down, he could see feet in the neighboring stall. (T.T. 148:25 to 149:1-4). Cattell could also see over the stall into the neighboring stall by looking over it. (T.T. 148:7-12). Cattell could see in and out of the stall through the cracks between the door and frame. (T.T. 149:13-18). Prior to the April 6, 2016, test, Cattell someone had peeked over the top of the stall and threw some wet toilet paper at him. (T.T. 150:1-7).

Cattell's urine sample was in his hand as he exited the stall. (T.T. 150:23-25). When Cattell exited the stall, he saw his co-employee Brad Rye finishing up his sample. (T.T. 150:13-15). Cattell also saw another sample at the end of the table with someone else's urine in it. (T.T. 150:14-22). Someone else was waiting in line behind Cattell as Cattell sat his sample down to be tested. (T.T. 150:14-18). Cattell exited the stall, his urine sample was visible to the individual standing approximately six (6) feet behind him. (T.T. 151:4-10). Cattell's urine sample was visible to Brad Rye while Cattell was holding it. (T.T. 151:1-3).

If someone was peeking through the stall on the date of Cattell's test, they would have seen his back because he was facing the wall. (T.T. 156:6-11).

Tyler Dix had a conversation with a co-employee named Brian Gordon in the locker-room while they both waited for their samples which were on the table to be tested. (T.T. 163:13-25 to 164:1-3).

In the women's locker-room it was possible to see over and under the stall walls and through the cracks between the door and frame. (T.T. 185:1-9). As Eller left the stall with her sample, she viewed other

women's urine samples sitting on a table within an arm's reach of her. (T.T. 186:16-25).

While McCann was holding his full cup of urine in his hands waiting for it to be tested, three female employees came into the locker-room. (T.T. 229:1-6). A female tested McCann's sample. (T.T. 227:10-21).

At the time he was fired, Plaintiff McCann worked in tobacco returns in a location known as "the cage" because of the chain-link-fence enclosure in which he worked. App. 115. At the time he was fired, Plaintiff McCann did not operate any heavy-duty machinery. App. 115.

At the time of trial, Eller was still under a fifteen (15) pound medical restriction. (T.T. 181:24-24 to 182:1-3). She also was restricted from repetitive motion over her shoulders. (T.T. 182:3-4). No medical restriction would prevent Eller from counting cigarette returns like she did at Casey's. (T.T. 217:6-13). If reinstated, no medical restriction would preclude Eller's employment at Casey's. (T.T. 218:14-16). Phil Davis opined that Eller's ability to obtain employment had been drastically if not totally eliminated. (T.T. 212:5-11).

He had considered working for a company called plumb supply warehouse, but his obligation to his daughter made it too difficult to negotiate the distance between Pleasantville (McCann's residence), Des Moines (Plumb supply warehouse location) and Pella (daughter's school). (T.T. 230:20-25 to 231:1-5). McCann's business is a food truck and is called Good Vibes, LLC. (T.T. Vol. II 52:3-12). He started the business in July of 2016 and currently operates it. App. 119; (T.T. Vol. II 52:6-8). It took some time for McCann to get the business up and running. (T.T. 231:10-12). McCann cleared out his 401(k). (T.T. 231:1-7). He had to seek out financing at multiple banks, create business plans and obtain permits. (T.T. 231:13-18). McCann's food truck presently services the Des Moines metro and Knoxville. (T.T. Vol. II 52:16-20).

This appeal ensued.

STANDARD OF REVIEW

Casey's incorrectly states throughout its brief that the standard of review in this case is *de novo.* (Casey's Br. p. 28, 55, 67, 72). The Court reviews questions of statutory construction for corrections of errors at law. *Estate of Ryan Heritage Trails Assocs., Inc.*, 745 N.W.2d 724, 728 (Iowa 2008). Review of other cases brought under Iowa Code section 730.5 has been for correction of errors at law. *See Skipton v. S&J Tube, Inc.*, 2012 WL 3860446, at *1,*5 (Iowa Ct. App. Sept. 6, 2012). Where uncertain, the litmus test the Court uses to decide between "*de novo*" and "corrections at law," is whether the trial court ruled on evidentiary objections. *Ernst v. Johnson Cnty.*, 522 N.W.2d 599, 602 (Iowa 1994). In this case, the trial court ruled on evidentiary objections. (T.T. 17:1-11). This case also involves questions of statutory construction. Thus, the appropriate standard for reviewing the district court's legal conclusions in this case is for correction of errors at law. IOWA RS. APP. P. 6.4, 6.14(6)(a); *Tow v. Truck Country of Iowa*, 695 N.W.2d 36, 38 (Iowa 2005).

The district court's findings of fact should be affirmed if they are supported by substantial evidence. *Id.* Evidence is substantial if a

reasonable mind would accept the evidence as adequate to reach the same findings. *Frontier Props. Corp. v. Swanberg,* 488 N.W.2d 146, 147 (Iowa 1992).

ARGUMENT

I. THE STATUTORY IMMUNITY PROVISION IN SECTION 730.5(11)(A) IS INDEPENDENT OF THE CAUSE OF ACTION AUTHORIZED BY SECTION 730.5(15)(A) (ALL PLAINTIFFS)

Plaintiffs agree Casey's preserved error on this issue. As articulated above, review in this case is for corrections of error at law.

A. Rules of statutory construction prohibit the Court from expanding the immunity conferred in Section 730.5(11) to other violations of the statute

In its haste to argue section 730.5(11)'s immunity provision should be interpreted broadly, Casey's forgets the threshold question of whether the statutory language chosen by the legislature is ambiguous. *See Hutchison v. Shull*, 878 N.W.2d 221, 231 (Iowa 2016) (citing *Zimmer v. Vander Waal*, 780 N.W.2d 730, 733 (Iowa 2010) (court determines whether the language chosen by the legislature is ambiguous prior to resorting to the rules of statutory construction). When the statute is unambiguous, the Court must "look no further than the statute's language." *In re J.C.*, 857 N.W.2d 495, 500 (Iowa 2014)

(citing *Bank of Am., N.A. v. Schulte,* 843 N.W.2d 876, 880 (Iowa 2014). "[U]nambiguous statutory language is the strongest evidence of the legislature's intent." *Id.* at 500-01 (citing *McGill v. Fish,* 790 N.W.2d 113, 118 (Iowa 2010) ("When the language is unambiguous, it expresses the intent of the legislature that can otherwise be obscured by ambiguous language in a statute."). Courts are prohibited from extending or expanding a statute or changing its meaning under the pretext of construction. *Schulte,* 843 N.W.2d at 880.

Casey's sidesteps the question of ambiguity because section 730.5 is plainly unambiguous:

> 11. **Employer Immunity**. A cause of action shall not arise against an employer who has established a policy and initiated a testing program in accordance with the testing and policy safeguards provided for under this section, for *any of the following*:
>
> a. Testing or taking action based on the results of a positive drug or alcohol test result, indicating the presence of drugs or alcohol, in good faith, or on the refusal of an employee or prospective employee to submit to a drug or alcohol test.
> …
> f. Testing or taking action against an employee or prospective employee with a confirmed positive test result due to the employee's or prospective employee's use of medical cannabidiol as authorized under chapter 124E.

IOWA CODE § 730.5(11). By using the phrase, "any of the following," the words of the statute limit an employer's entitlement to immunity to six subsets of acts or omissions. The legislature is clearly aware of the limited use of immunity as it added subsection (f) in 2018. Because the Court is not permitted to extend or expand the unambiguous categories of acts or omissions that qualify for immunity, Casey's is not entitled to immunity for violations not delineated in subsection 730.5(11).

Plaintiffs' claims arise under subsection 15(a) and are premised on violations of sections of 730.5 other than those listed in subsection 11(a). Casey's is not immune because the immunity granted under subsection 11(a) is independent of the cause of action allowed by subsection 15(a). App. 197.

Assuming arguendo the statute is ambiguous, Casey's attempt to garner immunity for its actions endangers the employee protections provided for in the statute and contrary to the purpose of Iowa's drug testing law. *See Sims v. NCI Holding Corp.*, 759 N.W.2d 333. 338 (Iowa 2009) (citing *Harrison v. Employment Appeal Bd.*, 659 N.W.2d 581, 588 (Iowa 2003). If a positive test result negated an employer's violations of the law, employers would have an incentive to violate the statute. An

employer that flouts the protections afforded by the statute cannot benefit from the results of the test. *See id.*; *see also Wong Sun v. U.S.*, 371 U.S. 471, 487 (1963) (excluding evidence that is the fruit of the poisonous tree); *see also Dalarna Farms v. Access Energy Coop.*, 792 N.W.2d 656, 660 (Iowa 2010) (the court's goal is to achieve a statute's purpose and avoid absurd results).

B. Casey's is not immune

Even if immunity was potentially available, Casey's would be entitled to it only if it (1) established a legally-compliant drug testing policy, (2) conducted the April 6, 2016, drug test in compliance with the law, and (3) took action on the results of a positive drug test result in good faith. IOWA CODE § 730.5(11)(a). Casey's argues that, under the law, "initiate" means nothing more than start the drug testing process. The defendant in *Skipton* made a similar argument, but the Court declined to address whether the its written policy followed the law because "the evidence clearly shows that its testing program was not *administered* in accordance with the testing and policy safeguards in that code section. *Skipton*, 2012 WL 3860446, at *2012 WL 3860446 at *7. It is Casey's burden to *prove* it followed each of the law's mandates,

including administering testing in according with the law. *See* IOWA CODE § 730.5 ("In an action brought under the subsection . . . the employer has the burden of proving that the requirements of this section were met."). Here, Casey's cannot prove it conducted the April 6 test in accordance with the law. Because Casey's did not "administer a testing program in accordance with the testing and policy safeguards provided for in section 730.5, it would not be entitled to immunity anyways under 730.5(11)." *See Skipton*, 2012 WL 3860446 at *7.

The drug testing statute defines "good faith" as "reasonable reliance on facts, or that which is held out to be factual, without the intent to be deceived, and without reckless, malicious, or negligent disregard for the truth." IOWA CODE § 730.5(1)(f). A violation of the statute surely constitutes negligence, if not deception, recklessness or maliciousness. *See id.* Casey's cannot have it both ways. If Casey's recognizes that its policy and testing must conform with the law, it cannot genuinely argue it was not negligent when it violated the statute. A violation of the statute constitutes bad faith and precludes immunity.

II. SUBSTANTIAL COMPLIANCE IS A LIMITED EXCEPTION; STRICT COMPLIANCE IS THE RULE (ALL PLAINTIFFS)

Plaintiffs agree Casey's preserved error on this issue. Likewise, Cross-Appellants preserve error in this issue by arguing it in their trial brief and post-trial brief. App. 81, 180. As articulated above, review in this case is for corrections of error at law.

A. Iowa Code Section 730.5 does not allow for "substantial compliance."

The phrase "substantial compliance," appears nowhere in Iowa's drug testing statute. *See* IOWA CODE § 730.5(1). The legislature did not make 730.5 a statute for which substantial compliance is available, and the Court should not re-write it. *See Dubuque Retirement Cmty. v. Iowa Dep't of Inspection and Appeals*, 2013 WL 535780, at *9 (Iowa Ct. App. Feb. 13, 2013) ("The legislature could have amended section 231C.14 to include a substantial compliance provision, but it did not. Thus, we find the substantial compliance standard does not apply to the imposition of regulatory insufficiencies under section 231C.14.").

The Iowa Supreme Court has consistently and properly refused to amend the drug-testing statute by judicial fiat. *Eaton v. Iowa Employment Appeal Bd.*, 602 N.W.2d 553, 556 (Iowa 1999) (noting the court focuses on what the legislature said in the statute); *Anderson v.*

Warren Distrib. Co., 469 N.W.2d 687 (Iowa 1991) (stating the court will not mandate a requirement not present in the statute); *See also Schulte,* 843 N.W.2d at 880 (prohibiting the extension or expansion a statute or changing its meaning where language is unambiguous); *Sims*, 759 N.W.2d at 340. In *Sims*, the Court found an employer's policy did not violate the law by not including a provision about an employee's right to a confirmatory test because the plain language of the statute did not require it. *Id.* The Court refused to "read into the statute a mandate which is not present in the plain language." *Id.* at 337.

In *Noll v. Iowa District Court for Muscatine County*, the Court held that by prescribing a maximum sentence for OWI offenses, such offenders could not be subjected to heighted punishment under the "habitual offender" code section. 919 N.W.2d 232 (Iowa 2018). The Court noted "[a]lthough this outcome may not have been the actual intent of the legislature, it is the intent expressed by the words the legislature chose to use." *Id.*

Regarding 730.5, the legislature used clear, mandatory language and chose not to include substantial compliance. The statue has been amended numerous times and never has the legislature suggested

substantial compliance applies. Instead, it used the word "shall" 100 times. *See* IOWA CODE § 730.5; The legislature's intent regarding Iowa Code section 730.5 is clear; substantial compliance does not apply. "To adopt another interpretation of this language would be nothing short of judicial legislating. *Noll*, 919 N.W.2d 232.

A. "Substantial compliance" has been applied to 730.5 in one very limited circumstance involving ambiguous language

The Iowa Supreme Court has found an employer's "substantial compliance" satisfactory as to the notice provisions of section 730.5 only, not the statute as a whole. *Sims*, 759 N.W.2d at 338 (concluding "substantial compliance with the *notice provisions* of Iowa Code section 730.5 *may* suffice"). Applying substantial compliance to all aspects of the statute would violate the rule that a statute's text must be ambiguous before the rules of statutory construction apply. *See State v. Iowa District Court for Jones County*, 902 N.W.2d 811, 815 (Iowa 2017) (first step in statutory interpretation is to determine if the language has a plain and clear meaning within the context presented by the dispute).

B. In practice, "substantial compliance," does not always equate to a lesser standard that "strict compliance."

While the *Sims* Court inferred that substantial compliance is a standard short of strict compliance, the Court's application of the

phrase was anything but. After terminating Sims based on a positive drug test result, NCI waited to send Sims written notification of his right to a confirmatory test until after Sims brought suit, at least five months after Sim's termination. *Sims*, 759 N.W.2d at 340. Sims claimed NCI violated the law by failing to provide post-testing notice as prescribed by section 730.5 (7)(i)(1). *Id.* at 337. The statute was silent as to *when* the employer needed to provide written notice. *Id.* NCI argued it had substantially complied because it eventually provided Sims with notice, albeit five months late. *Id.*

In rejecting NCI's argument, the Court applied the narrow exception to the rule of statutory construction that "[w]hen a literal interpretation of a statute results in absurd consequences that undermine the clear purpose of the statute, an ambiguity arises." *Sherwin–Williams Co. v. Iowa Dep't of Revenue,* 789 N.W.2d 417, 427 n.8 (Iowa 2010). The Court concluded that "common sense determines that the notice should be sent to the employee within a few days of receiving the results of the test," and that given the important purpose served by the notice provisions, it would be absurd to find compliance where the letter was sent to the employee five months after receipt of

the positive test result. *Sims*, 759 N.W.2d at 340; *see also Sherwin-Williams*, 789 N.W.2d at 427. In the end, the Court construed the statute in a way that further protected employee's rights and imposed a *higher* burden on the employer. *Id.*

III. A VIOLATION OF THE STATUTE ADVERSELY AFFECTS AN EMPLOYEE AND EXCLUDES THE TEST RESULT (ALL PLAINTIFFS)

Plaintiffs agree Casey's preserved error on these issues. Similarly, Plaintiffs-Cross Appellants preserved error on this and each of the following issues addressing Casey's violations of the statute. App. 78, 121.

The district court erred when it denied relief to Plaintiffs Dix and Cattell on the basis that each did not qualify as an aggrieved employee because each failed to explain the results of their positive drug tests. App. 208. The law does not permit Casey's to conduct an illegal drug test and then use information obtained during the illegal test as a basis for firing workers. *Eaton*, 602 N.W.2d at 558 (employers cannot "benefit from an unauthorized drug test"); *Skipton*, 2012 WL 3860446 at *1 (rejecting employer's argument that admission of drug use precluded relief because admission would not have happened "If the company had

not improperly requested a drug test"); *Harrison,* 659 N.W.2d 588 (employers conducting unannounced tests cannot "ignore the protections afforded by this statute"); *Stackhouse v. Casey's General Stores, Inc.*, Case No. LACL137251 (Iowa Dist. Ct. 2018) ("the determining factor is not whether the employee was specifically adversely affected by an erroneous test, but whether the employee was adversely affected by the employer's alleged violation of section 730.5."). In criminal law, this principle is known as the "fruit of the poisonous tree" doctrine, which "refers to indirect or secondary evidence obtained as a result of a prior illegality." *State v. Lane*, 726 N.W.2d 371, 380 (Iowa 2007) (citing *Nardone v. United States*, 308 U.S. 338, 341 (1939)). Notably, Iowa's drug-testing statute is part of the *criminal* code. *See* IOWA CODE § 730.5.

The holding of *Harrison* is important because it was the Court's first decision involving the legal use of unannounced testing. *Id.* The Court emphasized that while unannounced testing was now permissible, it could only be done "under severely circumscribed conditions designed to ensure accurate testing and to protect employees from unfair and unwarranted discipline." *Id.* If the employer violated

the protections afforded to employees, then it could not use the results of the test. *Id.*

IV. CASEY'S VIOLATED SIX DEFINED, UNAMBIGIOUS PROVISIONS OF THE STATUTE (ALL PLAINTIFFS)

When the legislature has defined words in a statute—that is, when the legislature has opted to "'act as its own lexicographer'"—***those definitions bind us***. *State v. Fischer,* 785 N.W.2d 697, 702 (Iowa 2010) (quoting *Henrich v. Lorenz,* 448 N.W.2d 327, 332 (Iowa 1989)); *see also Hornby v. State,* 559 N.W.2d 23, 25 (Iowa 1997) ("[W]here the legislature defines its own terms and meanings in a statute, ... definitions which may not coincide with the legislative definition must yield to the language of the legislature." (internal quotation marks omitted) (emphasis added).

A. Casey's violated the law when it included employees in the drug testing pool who were not scheduled to be at work at the time of testing

To find in favor of the Plaintiffs, the Court need not look any further than Casey's' violations of the testing pools defined in section 730.5(8)(a)(3). The statutory *definition* of the pool Casey's used is as follows:

> 8. Drug or alcohol testing. Employers may conduct drug or alcohol testing as provided in this section:

> a. Employers may conduct unannounced drug or alcohol testing of employees who are selected from any of the following pools of employees:
>
> …
>
> (3) All employees at a particular work site who are in a pool of employees in a safety-sensitive position *and who are scheduled to be at work at the time testing is conducted*, other than 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 to be conducted or who have been excused from work pursuant to the employer's work policy prior to the time the testing is announced to employees.

Id. (emphasis added). It was error for the court to conclude that Casey's did not violate the statute when Casey's indisputably included 21 employees in the pool who were not scheduled to be at work at the time of testing or had been excused from work prior to when the test was announced on April 6. The evidence showed that Burkheimer sent the list of employees in the pool to the independent testing facility the *day prior* to the test. App. 542. Therefore, Casey's' improper inclusion of the employees does not equate to the example the District Court mentioned – one of perpetual frustration due to unforeseen changes in personnel. App. 199. On the contrary, Casey's knew the 21 employees were not scheduled to be at work at the time they were selected, yet it

still included them in the pool. Casey's' inclusion of 21 employees who were not available for testing is an indisputable violation of the statute and sufficient on its own for Plaintiffs to win.

B. Casey's violated the law when it improperly exempted two employees from the testing pool

The *definition* of unannounced drug or alcohol testing mandates that selection process *shall* be conducted such that "each member of the employee population subject to testing has an equal chance of selection…" IOWA CODE § 730.5(1)(l); *see Fischer*, 785 N.W.2d at 702. The undisputed evidence at trial established that two employees, Lindsay Alexander and Jeffrey Loneman, were on the list of employees selected by ARCpoint to be tested but were exempted from testing. App. 508, 514, 520, 560. The reason for their exemption – clerical error, intentional omission, or otherwise – was never explained. Casey's' improper exemption of Ms. Alexander and Mr. Loneman meant both employees had a zero percent chance of being tested. Plaintiffs were not exempted, and thus had a higher (also unequal) chance of being tested as compared to Ms. Alexander and Mr. Loneman. Accordingly, Casey's violated Iowa Code section 730.5(1)(l).

C. Casey's violated the law when it improperly excluded employees from the pool

Casey's claims all jobs in the distribution facility warehouse are safety-sensitive because every single person in the warehouse could *potentially* be exposed to danger. (T.T. 20:19-24) Casey's surmised at trial that an "out of control forklift," could endanger anyone who sets foot in the warehouse. (T.T. 22:17-25 to 23:1-2).

Even assuming Casey's theory of "safety-sensitive" is sanctioned under the law, Casey's still violated the law by excluding employees that should have been included in the April 6 pool. It was undisputed that human resources employees travelled through the warehouse – typically in pairs – to perform job duties, yet not a single human resources employee was included in the testing pool for the April 6 test. App. 113.

Likewise, the evidence showed Vice President Jay Blair spends a significant amount of time in the warehouse. (T.T. 24 to 25:1-8). Mr. Blair admitted it was common for him to be in the warehouse and that he walks through the warehouse every single day and stops in randomly to remind the employees who was in charge. App. 528. Despite this, Mr. Blair was not included in the April 6 pool. App. 109.

Finally, if Warehouse Manager Bill Brauer was a safety-sensitive employee by virtue of having his office in the warehouse, then by law and by Casey's policy, Mr. Brauer's immediate supervisor, Director of Grocery Distribution Ed Vaske, should have also been considered safety-sensitive and should have been in the pool. *See* IOWA CODE § 730.5(1)(j); (T.T. 26:9-14; 26:25 to 27:1-2). Mr. Vaske was also excluded from the April 6 pool. App. 109.

Casey's' decision to not test human resources, administrative, and corporate employees establishes one of two things: either simply travelling through the warehouse as part of one's job duties does *not* mean the person occupied a safety-sensitive position, or Casey's did not follow their own definition of "safety sensitive" when creating the April 6 pool by excluding human resources, administrative, and corporate employees from the pool. Either way, Casey's broke the law.

D. Casey's violated the law when it used the distribution center as a collection site

Casey's failed to carry out the drug test within the terms of its own written policy. "Drug or alcohol testing or retesting by an employer *shall be carried out within the terms of a written policy*." IOWA CODE § 730.5(9)(a)(1) (emphasis added). While the statute allows employers to

conduct tests at an employee's normal work site, Casey's chose to implement a policy wherein testing occurs at a "collection facility." IOWA CODE § 730.5(6)(c); App. 488. Casey's *defined* a "collection facility" as "[a] certified collection site such as an occupational health center, a hospital or otherwise identified clinic or facility to which a prospective or current employer may be sent for a drug test or alcohol test." App. 488; (emphasis added). Casey's never identified the distribution center warehouse as a "collection facility." App. 488. The District Court correctly concluded that Casey's violated its policy. However, the Court then stated "[a] violation of an employer's drug testing policy without a corresponding violation of § 730.5 is not actionable." App. 205. However, Iowa Code section 730.5(9)(a) is clear that testing "shall be carried out within the terms of a written policy." If an employer fails to test within the terms of its policy, it violates this mandate. Thus, it was error to hold that a violation of the policy is not a violation of the statute. *Id.*

E. Casey's violated the law when it utilized a "pseudo-random" number generator

To ensure a random selection, the statute has very strict requirements as to how employees must be selected for unannounced

periodic testing. IOWA CODE § 730.5(1)(l). The selection must be done based through use of a "computer-based random number generator." *Id.* ARCpoint used a website, www.randomizer.org, to select employees for testing on April 6, 2016. The site defines itself as a "pseudo-random number generator" and directs users to another randomizer if they need "true random numbers." App. 109-110. "Pseudo" means being apparently rather than actually stated: sham, spurious. *Definition of Pseudo*, https://www.merriam-webster.com/dictionary/pseudo (last visited November 21, 2018). In other words, the "bogus randomizer" used by Casey's in the April 6, 2016, drug test is admittedly insufficient to generate truly random numbers.

At trial, Casey's attempted to shirk responsibility for this violation by blaming ArcPoint. However, Iowa Code section 730.5(15)(a)(1) makes it clear that "A person who violates this section *or who aids in the violation* of this section is liable." Having an independent entity conduct the random selection should benefit both employee and employer. The only way to ensure the process is actually "a neutral and objection selection process" that provides a truly "equal chance of

selection" is for the employer to ensure the process is truly random. IOWA CODE § 730.5(1)(l).

In this case, ARCpoint specifically told Casey's it was going to use "a randomizer we have set up from the **old days** before we had software that does it for us" for the April 6 test. App. 542; (emphasis added). ARCpoint employee Anthony Burriola even testified that, after the April 6 test, ARCpoint stopped using Randomizer.org and started using internal software designed specifically for alcohol and drug testing. (T.T. 30:4-23). Casey's knew ARCpoint was using an improper number generator and did nothing about it, thereby aiding in the violation of Iowa Code section 730.5(1)(l).

F. Casey's violated the law when it did not ensure employee privacy

Iowa Code section 730.5(7)(a) requires drug testing to be conducted "to provide for individual privacy in the collection of the sample." Employers must provide a location "where urination can occur in private, which has been secured by visual inspection to ensure that other persons are not present, which provides that undetected access to the location is not possible during hair collection or urination, and which provides for the ability to effectively restrict access to the location

during the time the sample is provided." *Id.* "Collection" of samples extends beyond urination; "collection" includes the splitting and marking of samples. IOWA CODE § 730.5(7)(b). Casey's was under an obligation to provide individual privacy for its employees throughout the "collection" process, which runs from when the employee enters the bathroom to when the employee's sample is initially tested. *See id.*

As mentioned previously, the law required Casey's to carry out the drug test within the terms of its own written policy. IOWA CODE § 730.5 (9)(a)(1). As such, because "privacy means a location at the collection site," and the testing did not occur at a collection site defined in Casey's policy, Casey's did not provide the privacy required under the statute.

Individual privacy means a location "where urination can occur in private that has been secured by visual inspection to ensure that others are not present." IOWA CODE § 730.5(7)(b). Contrary to the District Court's findings, traffic was not "limited to preclude other employees from being in the collection room until the samples had been provided." App. 206. Individuals submitted their samples together because Casey's brought individuals into the locker-room in pairs. App. 113. As such, no employee provided a sample without at least one other

individual present. Second, Casey's required employees to stand next to each other holding a cup of urine in their hands while waiting in line for their sample to be tested. (T.T. 150:14-18, 151:1-3, 163:13-25, 186:16-25). As such, employees provided their sample while others were present because they were looking at each other's excrements. (T.T. 150:14-22). In fact, Jimmy McCann testified that multiple women were in the locker-room while he was holding his cup of urine waiting for it to be tested. (T.T. 229:1-6). Third, the District Court was incorrect when it stated that the actual urination occurred in a way where no one else could view it. App. 206. Jason Cattell testified that he could see through the cracks in the stall walls and over and under the walls to into the neighboring stall. In fact, standing six foot, three inches, Mr. Cattell could have peaked into the stall next to him by simply turning his head. (T.T. 148:7-12). The ability to witness someone provide a urine sample does not meet the definition of individual privacy because under the statute privacy requires that the testing location be "secured by visual inspection to ensure that others are not present." *See* IOWA CODE 730.5(7)(a).

To comply with the statute's definition of individual privacy, Casey's was also required to provide a location where "*undetected* access to the location is not *possible* during urination…" IOWA CODE § 730.5(7)(b) (emphasis added). Cattell's testimony objectively demonstrates that Casey's failed to adhere to this mandate as well. As Cattell pointed out, he was able to see into the stall next to him by simply turning his head. (T.T. 148:7-12). This means that it is possible an employee could provide his sample yet not notice his neighbor watching him. *See* IOWA CODE § 730.5(7), § 730.5(15)(b).

Individual privacy also requires the ability to effectively restrict access to the location during the time when the specimen is being provided. IOWA CODE § 730.5(7)(b). The District Court correctly acknowledged that a handful of employees entered the restroom after McCann had provided his sample. App. 206. However, it incorrectly inferred there was nothing to suggest that they were close to a part of the room where samples were processed. McCann's testimony was that female coworkers literally saw him holding his own urine while he was waiting his turn for it to be tested. (T.T. 229:1-6). Casey's clearly did not "effectively" restrict access to the testing location.

V. CASEY'S VIOLATED UNDEFINED, UNAMBIGUOUS PROVISIONS OF THE STATUTE (ALL PLAINTIFFS)

The next set of Plaintiffs' allegations pertain to violations of undefined, unambiguous portions of the statute. While the provisions are undefined in the statute, because they are clear, the Court is still bound by the statute's plain language. *See In re J.C.*, 857 N.W.2d 495, 500 (Iowa 2014).

A. Casey's did not provide employees with an opportunity to provide information which may be relevant to the drug test

Iowa Code section 730.5(7)(c)(2) requires an employee be given an opportunity to provide relevant information before a test. The language in section 730.5(7)(c)(2) is mandatory: "An employee or prospective employee *shall* be provided an opportunity to provide any information which may be considered relevant to the test." (emphasis added). Despite that mandate, Vice President Jay Blair told employees at the outset of the April 6 test: "If any of you are taking a prescription do not discuss it with us." App. 112. At trial, Casey's did not dispute that employees had the right to provide information, but argued it was under no obligation to give them that chance. The clear language of the statute refutes Casey's position. Section 730.5(7)(c)(2) also requires

that the employer provide a "list of the drugs *to be* tested." (emphasis added). When the whole paragraph is read, it becomes clear that the opportunity to provide relevant information must occur prior to the test. *Id.*

Casey's policy and argument that the statute is satisfied because an employee may get a chance to talk with an MRO is flawed. Though the MRO only gets involved in cases with a confirmed positive, the statute mandates that *all* employees be provided the opportunity to provide relevant information. IOWA CODE § 730.5(7)(c)(2). Accordingly, the *employer*, not the MRO, must provide employees the opportunity to provide relevant information. Otherwise, any employees without a confirmed positive would be robbed of their statutory right to provide such information.

Additionally, McCann testified that he answered the MRO's questions, but that she only asked about prescription medications, and not about non-prescription drugs. (T.T. Vol. II 64:17-19). McCann testified that he was taking allergy medication that did not require a prescription, but which had to be retrieved from behind the pharmacy counter. (T.T. Vol. II 64:13-16). Such medications, like

pseudoephedrine, share similar structural characteristics with amphetamines. Had Casey's asked McCann to list *all* his medications, he would have had known to discuss his non-prescription drugs as well.

The District Court correctly and succinctly summarized Plaintiffs' position with respect to this violation when it stated,

> It is telling that this language occurs prior to the statutory description of how initial positive test results are confirmed and the eventual involvement of a medical review officer. See Iowa Code § 730.5(d)-(g) (2017). Accordingly, the court agrees with the plaintiffs that the opportunity to provide relevant information must occur at the time the sample is initially obtained, and not at the time the employee interacts with the MRO. The record is clear that the employees tested on April 6 were expressly admonished to not provide any relevant information about the test at time; this is a clear violation of the statute.

App. 207. However, as discussed throughout this brief, the Court errored when it denied relief based on its "adversely affected" analysis.

B. Casey's violated the law when it did not provide employees with a list of the drugs to be tested

The statute requires employers to provide employees with a list of the drugs to be tested. IOWA CODE § 730.5(7)(c)(2). Rather than comply with the statute, Casey's provided employees a drug testing policy which merely defined the words "drug test," "drug," and "controlled substance." App. 489.

Providing an indefinite list of "drugs" is different from providing a "list of the drugs to be tested." IOWA CODE § 730.5(7)(c)(2) (emphasis added). The entire purpose of requiring an employer to provide employees with a list of drugs to be tested is "[t]o assist an employee . . . in providing the information described in" section 730.5(7)(c)(2). *Id.* In other words, employees must be provided with a list of drugs to be tested so they can figure out what additional information might be relevant to the test. *See id.*

It is not as if Casey's did not know what drugs were going to be tested. ARCpoint Labs provided Casey's with a specific list of drugs to be tested in the 10-point panel test Casey's elected to use. Ms. Burkheimer testified she received this list, but that it was not provided to the Plaintiffs. (T.T. 30:6-12, 34:1-18, 36:1-5). Had Casey's provided this list to Plaintiffs, Casey's would have fulfilled its obligation to provide "a list of the drugs to be tested" on April 6. *See* IOWA CODE § 730.5(7)(c)(2). The District Court correctly found Casey's "wholly failed to provide a list of the drugs to be tested violated Iowa Code § 730.5." App. 208.

VI. CASEY'S VIOLATED DEFINED, AMBIGUOUS PROVISIONS OF THE STATUTE (ALL PLAINTIFFS)

The next set of Plaintiffs' allegations also consist of violations of defined terms in the statute. However, they can be distinguished from Plaintiffs' prior allegations because when considered in context, a word or phrase in the definition is ambiguous. Accordingly, here, it is appropriate to apply rules of statutory construction and consider the intent of the legislators when the statute was enacted. *See McGill*, 790 N.W.2d at 118.

A. Casey's violated the law when it improperly included non-safety-sensitive employees in the testing pool

The district court properly held a safety-sensitive position is defined by the position's job functions, not its environment:

> "The statutory definition of "safety-sensitive position" is identical to the definition found within defendants' drug testing policy…As noted earlier, the defendants take the position that any employee who works in the Distribution Center warehouse is in a safety-sensitive position, regardless of the job functions they undertake. This classification is contrary to the scheme outline in the statutory language quoted above. The definition of "safety sensitive position" is not dependent on the location one does his or her job, but rather the nature of the job itself. The opening language of the definition makes this clear – "Safety-sensitive position" means a job…" *Id.* (emphasis added).

This analysis is consistent with the approach taken by other jurisdictions that have looked at this issue:

> For an employee to occupy a truly safety sensitive position, it is not enough to show that the employee has **some** interest or role in safety. Rather, the government must demonstrate that the employee's position is one that in the ordinary course of its job performance carries a concrete risk of massive property damage, personal injury or death.

American Federation of Teachers – West Virginia, AFL-CIO v. Kanawha County Bd. of Supervisors, 592 F. Supp. 2d 883, 902 (S.D.W.Va. 2009) (citations omitted) (emphasis in original).

"Safety sensitive positions are those positions that involve 'discharge of duties fraught with risks of injury to others that even a momentary lapse of attention could have disastrous consequences.'" Kreig v. Seybold, 427 F. Supp. 2d 842, 853 (N.D. Ind. 2006) (quoting Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 628, 109 S.Ct. 1402, 1419 (1989); *see also* Bryant v. City of Monroe, 593 Fed. Appx. 291, 297 (5th Cir. 2014) (job duties justified classification of position as safety-sensitive).

These cases make it clear that it is the duties of the employee and not the environment in which those duties are discharged that goes into whether a particular position is safety-sensitive. It is not enough that a person finds himself in the warehouse and subject to injury, but whether the job in question creates a substantial risk of injury or damage. Put another way, the fact that a light-duty warehouse employee (or a human resources employee) is injured in the warehouse when struck by an errant forklift driver does not make the former a safety-sensitive position. It is the operation of the forklift that makes its driver a safety-sensitive position, not the environment in which it is operated.

> Accordingly, the defendants' drug testing policy violated Iowa Code § 730.5 by including persons who were not safety-sensitive positions in the pool eligible for testing on April 6. As the defendants point out, it was appropriate for them to limit the pool of employees to a particular work site (i.e., the Distribution Center warehouse), but it was wrong to include in that pool employees who were not in safety-sensitive positions.

App. 201. Casey's now argues, for the first time, that because employers can designate employees as being in safety-sensitive positions for the purpose of assigning them to a testing pool, employers get to define what "safety-sensitive means." (Casey's Br., p. 52). However, definitions come before designations. The statute gives employers the ability to *designate* employees as being in a safety-sensitive position; it does not give the employer the ability to *define* what qualifies as a safety-sensitive position. This is a critical distinction. If the legislature wanted to give employers the ability to define what constitutes a safety-sensitive position, it would have said so and not included a specific definition of safety-sensitive in the statute. *See* IOWA CODE § 730.5(1)(j).

Casey's is correct that it gets to designate which of their employees are in safety-sensitive positions for the purposes of placing them in testing pools, but before they get to make that designation, the

position must meet the legal definition. *Id.* Casey's claims it "designated" all employees as safety-sensitive based on the warehouse environment. (Casey's Br., pp. 51-52). That is a definition, not a designation, and that is something Casey's is not allowed to do.

B. Casey's violated the law when supervisory personnel lacked the required training

While there is no question that training is explicitly required, the phrase "involved with" testing in section 730.5(9)(h), is ambiguous because its scope is undefined. *See id.* Where a phrase is not defined in a statute, the Court is permitted to refer to dictionary definitions and common usage to determine the phrase's meaning. *Cubit v. Mahaska* C*ounty*, 677 N.W.2d 777, 783 (Iowa 2004)(citing *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996); *accord Net Midwest, Inc. v. State Hygienic Lab.,* 526 N.W.2d 313, 315 (Iowa 1995); *State v. Williams*, 315 N.W.2d 45, 49 (Iowa 1982); *Mason v. Schweizer Aircraft Corp.*, 653 N.W.2d 543, 548 (Iowa 2001).

At trial, the District Court held that the supervisors involved with the April 6 test conducted ministerial tasks and were "not part of the process of the actual drug testing, but rather dealt with HR paperwork,

traffic flow and providing bottles of water to employees as they awaited testing. App. 205.

According to the Merriam-Webster Dictionary, the word "involved," means to have a part in something or be in included in something. *See Merriam-Webster, Dictionary*, https://www.merriam-webster.com/dictionary/involved (last visited November 25, 2018).

The District Court mischaracterized many of the tasks the supervisors conducted as "ministerial." Many supervisory employees were directly involved in pivotal parts of the test, including assisting with resignations, accounting for employees, being in charge of testing groups, and recording employees' test status. App. 512-513. The owner of the testing company had testified that supervisors were also involved with making sure employees did not go to their lockers or cars, watching out for employees with "shy bladders" (those who could not physically provide a sample), and even in assisting with filling out custody control forms. App. 534. Vice President Jay Blair, who had no training, announced the test, explained the testing process, and *gave directions relating to specific statutory mandates* when he instructed employees to not share prescription information. App. 112; *see* IOWA

CODE § 730.5(7)(c)(2) (mandating that an employee or prospective employee be provided an "opportunity to provide *any* information which may be considered relevant to the test…") (emphasis added).

While at least 23 people were involved with the April 6 test, only two had the requisite training. (T.T. 77:11-15). Ironically, it was the supervisors in the exact position contemplated by the statute who lacked training. IOWA CODE § 730.5(9)(h). The required training involves learning how to recognize evidence of employee alcohol and drug abuse. *Id.* Such training would have been useful to those supervisors out among employees assisting with the test. *Id.* It would make no sense to require training on how to personally recognize employee alcohol and drug abuse if the requirement only applied to the drafter of the policy or the overseer of the test. Recognition training would have been particularly useless to Ms. Burkheimer, who testified that her role was limited to speaking with employees *after* their samples had been tested.

Finally, the evidence at trial showed that in Ms. Burkheimer's absence, Senior VP of Human Resources Cindi Summers acted as the main point of contact for a drug test conducted on April 18, 2016. (T.T.

43:9-18). Casey's presented zero evidence that Ms. Summers has undergone the required training. There is a difference between employees in charge of drug testing and employees involved with drug testing. The statute references the latter and requires those employees to undergo initial and ongoing training. IOWA CODE § 730.5(9)(h).

VII. CASEY'S VIOLATED UNDEFINED, AMBIGUOUS PROVISIONS OF THE STATUTE (ALL PLAINTIFFS)

A. Casey's' "across-the-board" drug test was not random

On April 6, 2016, Casey's tested 100 percent of its "safety sensitive" pool of employees, something all parties agree is not random. In January 2016, Ms. Burkheimer told Mr. Bucher "I would love to pull 100%, but then we can't justify it as a 'random' test." App. 498. This position has remained unchanged, as Casey's admitted at the summary judgment hearing that a 100 percent test would not be random, and that Casey's was not arguing otherwise.

By including the 21 employees who were not scheduled to be at work at the time of testing in the testing pool, Casey's started with an inflated pool of 184 employees, rather than the 163 employees *scheduled* to be at work at the time of testing. Casey's sent ARCpoint the list of 184 employees, from which ARCpoint was to pluck "90

percent," or 165.6 employees. App. 109. Casey's goal was to test 165 workers. (T.T. 57:5-8). Casey's then used the 17 workers not selected in the "90 percent" as alternates, who would be added to replace any workers who were unavailable for testing, to reach the goal of testing 165 people. (T.T. 68:8-14).

By improperly inflating the pool and using alternates, Casey's guaranteed that *every* employee who showed up for work on April 6 would be tested. That is *not* a random selection; it is an "across the board" test which, if allowed, would eviscerate crucial protections of the drug testing law and the reason for having different pools in the first place. IOWA CODE § 730.5(1)(l), (8)(a), (14)(a). The April 6 test exemplifies how—if left unchecked by this Court—an employer can manipulate the system and target employees through a combination of including non-scheduled employees and the use of alternates.

Allowing this sort of testing destroys the employer/employee balance in the statute because it guts the "reasonable suspicion" section. IOWA CODE § 730.5(1)(i). What Casey's did is precisely what an employer would do if it wished to target an employee but lacked the reasonable suspicion to do so. By testing every single person, the

employer could accomplish its illegal goal under the guise of a legal test. The legislature did not intend for employer to be able to use the "equal chance of selection" language as a loophole to circumvent reasonable suspicion. *See* IOWA CODE § 730.5(l).

B. Casey's violated the law when it used alternates for the test

Under Iowa's drug testing law, "[a]ll sample collection and testing for drugs or alcohol under this section *shall* be performed in accordance with [certain] conditions." IOWA CODE § 730.5(7) (emphasis added). The language in section 730.5(7) is mandatory. IOWA CODE § 4.1(30) ("The word '*shall*' imposes a duty"). The drug testing law contains 13 subsections setting forth the "conditions" required for testing. *Id.* None allow an employer to use alternates. *Id.*

Alternates are not mentioned nor implied in any part of the statute. In using a procedure not sanctioned by the statute, Casey's failed to test "in accordance with" the conditions of section 730.5(7).

In *Eaton*, the Iowa Supreme Court indicated that a court interpreting 730.5 needs to follow "the rule that 'legislative intent is expressed by omission as well as inclusion.'" *Eaton*, 602 N.W.2d at 556

(quoting *Wiebenga v. Iowa Dep't of Transp.*, 530 N.W.2d 732, 735 (Iowa 1995).

> We believe that if the legislature had intended to allow random drug testing of long-term employees who had been given a 'last chance,' then it would have specifically said so in the statute. The fact that it did not indicates that the legislature did not intent to include such an exception.

Id. Just as employers were disallowed from conducting unannounced testing until the legislature amended the statute, current Iowa employers cannot use alternates unless and until the legislature deems it appropriate. *See id.* To acquiesce in Casey's uses of alternates "'would require [the court] to read something into the law that is not apparent form the words chosen by the legislature. This [the court] cannot do.'" *Id.* (quoting *State v. Guzman-Juarez*, 591 N.W.2d 1, 2 (Iowa 1999).

Finally, Iowa Code section 730.5(9)(f) allows employers to place employees in only one safety-sensitive pool. Casey's claims the April 6 test consisted entirely of safety-sensitive employees. Casey's instructed ARCpoint to make a primary selection from the entire pool, and then make a secondary selection, from those not chosen for testing, to create a new pool of alternates. Casey's violated the law because every

alternate was, by definition, in two safety-sensitive pools: (1) the pool of all safety-sensitive employees used to pick the employees who would be tested, and (2) the pool of unselected safety-sensitive employees used to pick the alternates. This approach violated Iowa Code section 730.5(9)(f).

C. Casey's violated the law when it failed to show that it tests on a periodic basis

The law permits testing on a "periodic basis," but does not define "periodic." IOWA CODE § 730.5(1)(l). Likewise, Casey's policy does not define "periodic." Instead, the policy provides that "[s]elections are made at *various*, unannounced times throughout the year." The law does not allow for testing at "various" times; it allows for "periodic" testing." IOWA CODE § 730.5(1)(l). Ms. Burkheimer testified that Casey's could test "at any time" and "as many [tests] as we want," including testing every single day. (T.T. 11:19-22). Such a scattershot approach runs contrary to the dictionary definition of "periodic," which is "occurring or recurring at **regular intervals**." *Periodic*, Merriam-Webster, Inc. (Jan. 4, 2018, 3:45 PM), https://www.merriam-webster.com/dictionary/periodic (emphasis added).

Casey's distorts the "unannounced or 'random'" language of 730.5(8)(a). While subsection 8 allows employers to conduct "unannounced drug or alcohol testing," it does not allow for "random" scheduling of drug or alcohol testing. IOWA CODE § 730.5(8)(a). The legislature used the word "random" to describe how an employee is selected for testing. IOWA CODE § 730.5(1)(l). The legislature did not use the word "random" to delineate the timing or frequency of testing. *Id.* In drafting a policy permitting testing at *various* times, and in claiming to be able to test at any time, including every single day, Casey's policy conflicts with the law's requirement that testing occur on a *periodic* basis. Accordingly, the policy violates Iowa Code section 730.5(1)(l).

The District Court incorrectly absolved Casey's of its responsibility to have initiated a periodic testing program simply because it was the first test. App. 204. The Court is not permitted to depart from the words of the statute, and for Casey's to initiate random drug testing, it must have initiated it on a periodic basis. *See* IOWA CODE §730.5(1)(l). It would have been easy for Casey's to comply with this requirement by simply defining periodic in its policy or determining

internally the frequency in which the tests would actually be conducted. Without initiating a *periodic* testing program, Casey's was not authorized to conduct the test in the first place.

VIII. THE RESULTS OF ONE RANDOMIZATION CANNOT BE USED TO PREDICT THE RESULTS OF ANOTHER RANDOMIZATION (PLAINTIFFS DIX AND CATTELL)

A random assortment of numbers cannot be predicted and cannot predict; that's the nature of 'random'[1]. In probabilities theory, this is known as independence. Events are considered "independent" if the occurrence of one event does not affect the probability of the occurrence of the other. For example, if an individual reveals a "4" on the first roll of a six-sided dice, that outcome has zero effect on the outcome of the second roll. Similarly, the fact that Tyler and Jason were selected from a pool of 184 employees has zero effect on whether they would have been selected from a properly-created pool. Tyler and Jason were chosen as part of a randomization of 183 employees.[2] Had the pool not included the scores of non-safety-sensitive employees and the 21

[1] That Randmizer.org is not truly random does not take away from the fact that another "randomization" would likely have had different results.

[2] Casey's sent ARCpoint a list of 184 employees, but ARCpoint only randomized the first 183.

employees not scheduled to be there, ARCpoint would have conducted a different randomization. It is possible that Tyler and Jason would have been selected, but it is just as possible that they would not have been selected. Casey's has the burden of proof in this case and they cannot prove Tyler and Jason would have been chosen any more than they could prove the results of an unrolled die.

The district court found that including employees in non-safety-sensitive positions in the selection pool did not affect Tyler and Jimmy because they were admittedly in safety-sensitive positions. (3.21.18 Order, pp. 17-18). Essentially, the court reasoned that because Tyler and Jason were properly included in the pool, the improper inclusion of other employees was immaterial. This is error because it fails to account for the independence of the April 6 randomization. Had Casey's followed the law, Tyler and Jason may not have been chosen to provide a sample at all.

IX. THE DISTRICT COURT CORRECTLY AWARDED JULIE ELLER TWENTY-TWO (22) MONTHS OF BACK PAY AND TWO YEARS OF FRONTPAY (PLAINTIFF ELLER)

Plaintiff agrees Casey's preserved error on this issue. As articulated above, review in this case is for corrections of error at law.

To "prove" a failure to mitigate defense, Casey's bears the burden of establishing by a preponderance of the evidence that "other substantially equivalent positions were available" to Eller, and Eller "failed to use reasonable diligence in attempting secure such a position." *Baker v. Gary Morrell & Co.*, 263 F. Supp. 2d 1161, 1180 (N.D. Iowa 2003). "Initially, there must be substantial evidence that there was something that the plaintiff could do to mitigate [her] loss and that requiring the plaintiff to do so was reasonable under the circumstances." *Greenwood v. Mitchell*, 621 N.W.2d 200, 205 (Iowa 2001).

At trial, the district court found Casey's failed to meet its burden. App. 209. Casey's failed to present any evidence of available jobs or that Eller's conduct was unreasonable. *See id.* "Moreover, a finding of diligence is not a condition precedent to an award of back pay. Again, it is [the employer] not [the employee], who bears the burden of establishing that the claimant willfully failed to mitigate damages and this burden is not met merely by showing that further actions could have been taken in the pursuit of employment." *Children's Home of*

Cedar Rapids v. Cedar Rapids Civil Rights Comm'n, 464 N.W.2d 478, 482 (Iowa App. 1990).

Casey's' reliance on *Denesha v. Farmers Insurance Exchange*, 161 F.3d 491 (8th Cir. 1998) is misplaced. In *Denesha*, the Court reduced the award *only* because the employer proved mitigation by soliciting credible expert testimony "that there were a number of different positions that Denesha could have tried to obtain." *Id.* at 502 (emphasis added). Here, unlike *Denesha*, Casey's did not present expert testimony or put on *any* evidence of available positions for which Eller could have applied.

Casey's also misses the mark in citing *Quint v. A.E. Staley MFG. Co.*, 172 F.3d 1 (1st Cir. 1999) for the proposition that because Eller has not applied for jobs, Casey's is absolved of its duty to show the availability of substantially equivalent positions. In *Quint*, the First Circuit Court of Appeals recognized an employer's obligation to "prove the availability of substantially equivalent jobs in the relevant geographic area." *Id.* at 16. The court acknowledged the Third, Sixth, and Seventh Circuits require an employer to put on their proof even "where an employee has remained completely idle following her

discharge." *Id.* The court then adopted a rule that when a claimant unjustifiably makes no effort to secure suitable employment, the employer is absolved of its duty. *Id.* The analysis, however, does not end there:

> Where an ADA claimant refrains from pursuing alternative employment, we consider it reasonable to presume at the outset that she did so for an articulable reason, *perhaps because she possessed information which suggested that a job search would have been futile*. Since it is the claimant who would possess any such information, however, she is likely to be in the better position to explain her preemptive decision to take no action to obtain employment.

Id. (emphasis added). Eller presented evidence suggesting that due to her medical restrictions a job search would be futile. App. 579. "In determining whether a party has failed to mitigate damages, the defendant has the burden of demonstrating that the failure to mitigate was unreasonable under the circumstances." *Kirk v. Union P. R.R.*, 514 N.W.2d 734, 737 (Iowa App. 1994) (rejecting employer's argument that plaintiff failed to mitigate damages by not seeking or accepting employment after leg amputation when the plaintiff's counselor opined his job prospects "were rather grim"). "The reasonableness of the effort to find substantially equivalent employment should be evaluated in light of the individual characteristics of the claimant and the job

market." *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 624 (6th Cir. 1983). Considering Eller's individual circumstances and that her restrictions all but completely removed her from the relevant job market, Casey's failed to prove her efforts were unreasonable. *See id.*

Due to Casey's failure to produce any evidence to support its defense, the jury would have to have resorted to speculation to find that equivalent positions were available, and that Eller failed to use reasonable diligence in attempting to secure those positions. *See Kirk*, 514 N.W.2d at 737. "When a [factfinder] is left to speculate. . . the evidence is insufficient." *Hasselman v. Hasselman*, 596 N.W.2d 541, 546 (Iowa 1999).

Casey's also attacks Eller's physical ability to work. In doing so, Casey's posits two contradictory arguments, both of which fail. Casey's' first position is that Eller is not as restricted as her medical notes indicate. This claim is pure argument and not based on any *evidence*. The record reflects that Eller's medical restrictions "drastically reduced if not totally eliminated" her ability to find similar work. App. 580. This is important, as "[f]inding suitable employment does not require a

party to go into another line of work, accept a demotion, or take a demeaning position." *Mathieu v. Gopher News Co.*, 273 F.3d 769, 784 (8th Cir. 2001). If Casey's wanted to challenge Eller's restrictions, it needed to bring in a medical expert to opine on Eller's restrictions and her ability to find suitable employment. It failed to do so.

Casey's' second argument against Eller belies its first, as Casey's claims that Eller is not entitled to damages not because she is unrestricted, but because she is *physically unable* to work. This position reverses course from the first claim, but similarly lacks any supporting evidence in the record. Casey's improperly conflates Eller's statement that she "has not worked" as equivalent to an *inability* to work the restricted, light-duty position she had been doing at Casey's for approximately five years. *Id.* Casey's argues the two extremes but ignores the middle ground that was supported by the evidence: Eller had significant medical restrictions but was still perfectly able to perform the job she held at Casey's. Eller testified she would have continued working at Casey's, and Casey's did not adduce any evidence that she was physically unable to count cigarette boxes. Casey's never

questioned Eller about her ability to perform the essential functions of the Tobacco Returns position.

At trial, Casey's mention of Social Security Disability Insurance (SSDI), also fell flat. First, while Eller discussed the possibility about applying for SSDI in the future, there was no evidence Eller had actually applied. More importantly, SSDI "does not take the possibility of 'reasonable accommodation' into account." *Cleveland v. Policy Mgt. Sys. Corp.*, 526 U.S. 796, 803 (1999). Eller's testimony is irrelevant because she was being reasonably accommodated at her job at Casey's and could still do the job today.

X. THE DISTRICT COURT CORRECTLY AWARDED MCCANN 22 MONTHS OF BACK PAY (PLAINTIFF MCCANN)

Plaintiff agrees Casey's preserved error on this issue. As articulated above, review in this case is for corrections of error at law.

First, for the same reasons articulated previously, Casey's asserted standard of review is incorrect. The appropriate standard for the district court's legal conclusions in this case is for correction of errors at law. IOWA RS. APP. P. 6.4, 6.14(6)(a); *Tow*, 695 N.W.2d at 38. The District Court's findings of fact should be affirmed if they are supported by substantial evidence. *See id.*

Casey's attempt to use the "unclean hands maxim" is intriguing considering how many ways it violated the law. *See id.* McCann lost his job at Casey's because Casey's violated the drug testing law – not because of McCann's own wrongdoing. Also, Casey's incorrectly argues it should not be liable for McCann's backpay or front pay because McCann decided that opening his own business was in his and his family's best interest. "The notion that starting one's own business cannot constitute comparable employment for mitigation purposes not only lacks support in the cases, but has a distinctly un-American ring." *Smith v. Great Am. Rest., Inc.*, 969 F.2d 430, 438 (7th Cir. 1992).

"[T]he plaintiff's burden to mitigate damages does not require success, but only an honest, good faith effort." *Id.* At trial, Casey's presented no evidence and did not argue that McCann's efforts have been anything but honest and reasonable. McCann testified at length about the work required to start and maintain a food truck business and that serving the food was the easiest part. (T.T. 231:13-18; Vol. II 52:3-12). That McCann's business failed to turn a profit early in its existence—when expenses are highest and presence in the market is lowest— "does not make his decision to go in a different direction

unreasonable." App. 209; *Smith*, 969 F.2d at 439 (the fact that the plaintiff's self-owned restaurant failed to turn a profit until its third year did not make her mitigation efforts unreasonable). Had McCann's business been successful, Casey's would rightfully argue he could not collect damages for the amount his food truck earned him in mitigation. The inverse is just as true.

In *Smith*, a former restaurant manager decided to open her own restaurant one week after being fired. *Id.* at 434. Smith had applied for only one job before deciding to open her restaurant. *Id.* The restaurant had failed to turn a profit until its third year, when it made $2,261.85. *Id.* at 439. A jury awarded the full amount of requested back pay, totaling 34 months, but the district court cut wages off after 11 months, determining Smith should have known by then that the restaurant was unsuccessful. *Id.* The appellate court reversed, finding 34 months was not too long for the restaurant venture to be considered a reasonable attempt at mitigation. *Id.* The appellate court pointed out that the defendant had failed to prove its failure to mitigate defense, and that "the 'sting' of discrimination did not end at the 11-month point." *Id.* In this case, Casey's failed to prove its defense, and the

reverberations of McCann's illegal firing are still being felt to this day. *See id.* at 438.

Casey's argument that McCann "withdrew from the job market" because he pursued "one, single warehouse job" is equally unavailing. McCann did not withdraw from the job market; he worked extremely hard to start his own business. Deciding to start his business rather than chase a job opportunity that had not yet materialized does not make McCann's effort unreasonable. *Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061, 1065 (8th Cir. 1988) (upholding backpay and front pay awards because Plaintiff's decision to turn down a job offer in a related field for comparable pay and start his own business less than two months after being fired was reasonable and made in good faith). For these reasons, the District Court's award of twenty-two (22) months of backpay should be upheld.

XI. MCCANN IS ENTITLED TO FRONT PAY (PLAINTIFF MCCANN)

Plaintiff preserved error on this issue by raising it in his trial brief at trial, his post-trial brief and in his motion to amend (App. 78, 121, 213). As articulated above, review in this case is for corrections of error at law.

Front pay is a form of relief that assumes the plaintiff would have continued in his position. *Channon v. United Parcel Serv., Inc.*, 629 N.W.2d 835 (Iowa 2001). While the court found McCann's mitigation efforts reasonable, it did not award front pay because McCann was "in the prime of his work life and able-bodied" and there was nothing preventing him from "making a timely return to the job market." 8.22.2018 Order on Front Pay, p. 3. This is error because McCann *did* make a timely return to the job market by starting his business. More importantly, the proper analysis for front pay is not whether McCann was physically able to return to the work force but whether his business venture was done with "an honest, good faith effort." *Brooks*, 852 F.2d. at 1065. McCann's efforts are analogous to *Brooks*. In *Brooks*, the plaintiff sought employment for one month after he was fired, started his own business, and then turned down a job offer in a related field for comparable or greater pay. *Id.* In upholding an award of back pay and of 22 months' front pay, the Eighth Circuit noted "[w]rongfully discharged claimants must use reasonable efforts to mitigate their damages . . . but this burden is not onerous and does not require success." *Id.* Although it took time to get his business off the ground,

McCann began working on it shortly after being illegally fired. App. 119; (T.T. Vol. II 52:6-8). McCann put forth sufficient financial evidence of his business efforts. (T.T. 231:1-7). Casey's did not present evidence of when McCann's business would catch up to his losses at Casey's, so front pay should be awarded until such time the court deems it would have turned a profit or become unreasonable for McCann to continue. *See Smith*, 969 F.2d at 439.

XII. THE DISTRICT COURT PROPERLY AWARDED ATTORNEY FEES

Plaintiffs agree Defendants preserved error on this issue. The Court properly found McCann and Eller were aggrieved employees and awarded attorney fees to McCann and Eller. For the reasons argued above, Dix and Cattell were also aggrieved employees entitled to relief under the statute and should be awarded any fees disallowed because of the district court's ruling dismissing their claims.

CONCLUSION

For the reasons articulated herein, Plaintiffs request the following relief:

- Plaintiffs Julie Eller and Jimmy McCann ask this court to affirm the District Court's Order in their favor;

- Plaintiff Jimmy McCann asks this court to reverse the District Court's order denying an award of front pay;
- Plaintiffs Tyler Dix and Jason Cattell ask this court to reverse the District Court's order granting judgment in favor of Casey's, and to remand this case back to District Court to address their entitlement to relief under Iowa Code section 730.5(15); and
- Plaintiffs ask this court to award attorney fees connected to this appeal and any other relief proper under Iowa Code

REQUEST FOR ORAL ARGUMENT

Counsel for Plaintiffs request to be heard in oral argument.

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