

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.

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

FINAL REPLY BRIEF FOR CROSS-APPELLANTS

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CERTIFICATE OF FILING

I, Matthew M Sahag, certify that I did file the attached brief with the Clerk of the Iowa Supreme Court by electronically filing the brief through the EDMS system on February 27, 2019.

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ARGUMENT

I. CASEY'S STIPULATED IN THE TRIAL SCHEDULING AND DISCOVERY PLAN THAT THE MATTER WAS TRIED AT LAW.

The parties agreed on page one (1) of the trial scheduling and discovery plan that this matter would be tried at law. Supp. App. 4. Casey's was also instructed by Judge Huppert during trial that he was trying the case at law. (T.T. 220:16-17). Accordingly, the standard of review in this matter should be for corrections of error at law.

II. AN EMPLOYEE'S REMEDY UNDER SUBSECTION FIFTEEN (15) IS INDEPENDENT OF ACTIONS IMPLICATING EMPLOYER IMMUNITY

A violation of a statute does not create a private cause of action, unless the statute "explicitly or implicitly, provides for such cause of action." *Shumate v. Drake University*, 846 N.W.2d 503, 507 (Iowa 2014). With respect to section 730.5, subsections eleven (11) and twelve (12) provide employers with immunity against some causes of action, such as defamation, libel, and slander, if certain criteria are met. Iowa Code §730.5(11-12). For example, an employer could assert an immunity defense against a negligence action brought by an employee for violations contained in subsection eleven (11) by arguing it established a policy and testing program in accordance with the statute.

It follows that an employer who is not entitled to immunity for causes of action brought under subsections eleven (11) and twelve (12) could be liable to an employee for traditional common law damages such as lost wages, pain and suffering, emotional distress, punitive, etc.

On the other hand, subsection fifteen (15) of the statute allows an employee to bring an enforcement action against an employer, who then has to prove it complied with the law. . Iowa Code §730.5(15). Unlike subsections eleven (11) and twelve (12), subsection fifteen (15) does not contain a qualified immunity provision. *Id.* Instead, the unambiguous language of subsection (15) provides for specific relief to an employee when an employer violates the statute. *Id.*

Here, Cross-Appellants did not bring a common law cause of action like negligence against Casey's. Supp. App. 16-20. Nor did they seek common law damages like pain and suffering or punitive damages for Casey's violations of the statute. Supp. App. 16-20. Instead, Cross-Appellants sought to enforce the statute against Casey's under subsection (15). Supp. App. 16-20. Hence, the immunity provisions do not apply, and Cross-Appellants are entitled to the relief provided for in the statute.

III. IMMUNITY IS ONLY AVAILABLE TO AN EMPLOYER WHO ADMINISTERS TESTING IN ACCORDANCE WITH THE STATUTE

Even if the immunity provision did apply statute-wide, it would not be available to Casey's. Casey's argues that an Iowa employer is granted complete immunity by merely drafting a policy comporting with the law, irrespective of whether the actual testing follows the law's requirements. Casey's Br. at 21-3. This would lead to the absurd result of immunity in the face of obvious illegality because an employer could draft a legitimate policy, completely disregard it during testing, but still be immune. Additionally, Casey's argument that an employer's requirement to follow the law ends after it "begins" testing also fails because an employer could simply conduct its first test legally then disregard the law for every subsequent test.

IV. CASEY'S VIOLATIONS OF THE STATUTE IN THE FIRST UNANNOUNCED DRUG TEST IT CONDUCTED UNDER ITS POLICY IS CONCLUSIVE EVIDENCE THAT CASEY'S HAD NOT INITIATED A TESTING PROGRAM IN ACCORDANCE WITH SECTION 730.5

Even if the qualified immunity provision applies based on an employer's initial testing, Casey's is still not entitled to immunity. Casey's acknowledged in its reply brief that while it made an effort to

comply with section 703.5, the April 6, 2016, test was not “a perfectly executed event.” Casey’s Br. at 39. This is significant because it is undisputed that the test was the first unannounced test under its drug and alcohol policy. App. 531. Thus, Casey’s cannot legitimately argue that it “initiated a testing program in accordance with the testing and policy safeguards...,” when it violated the statute in myriad ways on the very first test. The April 6, 2016, test is the benchmark for whether Casey’s initiated a testing program in compliance with the statute, and unfortunately for Casey’s it violated the statute in multiple ways. Therefore, Casey’s is liable to the Cross-Appellants for its violations of the statute, regardless of whether the immunity provision applies.

V. CASEY’S PRESENTED NO EVIDENCE OF IMPAIRMENT

Casey’s argues *ad nauseam* that Jimmy cannot be entitled to relief because he did not challenge the results of his urine test. Casey’s styles Jimmy’s entitlement to relief due to its illegal conduct as a “reward” and a “windfall,” even though it was Jimmy who lost his job of 16 years, had to cash out his 401k, and start over. Casey’s Reply Brief, p. 40. This is an equitable argument which should not be considered because as discussed above, this case was tried at law, not in equity. Further,

Casey's submitted no evidence of impairment and Jimmy testified unequivocally that he was not impaired at work. Casey's attempt to blur the enormous distinction between the results of a test which can look days and weeks in the past and an employee being impaired at work should be denied.

CONCLUSION

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

- 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);
- Plaintiff McCann asks this court to reverse the District Court's denial of front pay; and
- Plaintiffs ask this court to award attorney fees connected to this appeal and any other relief proper under Iowa Code 730.5.

COST CERTIFICATE

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

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