

**IN THE SUPREME COURT OF IOWA**

**No. 18-1600**

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DEBORAH FERGUSON,

Plaintiff-Appellee,

vs.

EXIDE TECHNOLOGIES, INC., AND FRED GILBERT

Defendants-Appellants.

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APPEAL FROM THE IOWA DISTRICT COURT OF DELAWARE  
COUNTY

THE HONORABLE MICHAEL SHUBATT  
CASE NO LACV008271

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**FINAL REPLY BRIEF OF APPELLANTS  
EXIDE TECHNOLOGIES, INC. AND FRED GILBERT**

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## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

1. Whether the district court erred in recognizing a common law claim for public policy discharge founded on Plaintiff's refusal to take a drug test when Iowa Code section 730.5(15) contains a private for an employer's violation of the statute.

### Authorities:

Iowa Code 730.5

*Springer v. Weeks & Leo Co.*, 429 N.W.2d 558, 560-61 (Iowa 1988)

Iowa Code 730.5(15)

*Wilcox v. Hy-Vee Stores, Inc.*, 458 N.W.2d 870 (Iowa App. 1990)

*Ackerman v. State*, 913 N.W.2d 610 (Iowa 2018)

Iowa Code 70A.28

Iowa Code 730.4

Iowa Code 70A.28(5)(a)

Iowa Code 91A

Iowa Code 88.9

*George v. Zinser Co.*, 762 N.W.2d 865 (Iowa 2009)

Iowa Code 88.9(3)

Iowa Code 91A.8

Iowa Code Section 91A.10(5)

*Tullis v. Merrill*, 584 N.W.2d 236, 239 (Iowa 1998)

2. Whether the district court abused its discretion in awarding substantial attorneys' fees and expenses without addressing Defendants' argument that various categories of work were unrelated to the fee-shifting claim.

Authorities:

Iowa Code 730.5(10)(a)

*Boyle v. Alum-Line, Inc.*, 773 N.W.2d 829, 833 (Iowa 2009)

*Dutcher v. Randall Foods*, 546 N.W.2d 889, 897

## ARGUMENT

### **I. A COMMON LAW CLAIM FOR PUBLIC POLICY DISCHARGE FOUNDED ON A VIOLATION OF SECTION 730.5 IS UNAVAILABLE BECAUSE THE LEGISLATURE PRESCRIBED THE EXCLUSIVE REMEDY FOR SUCH A VIOLATION.**

Plaintiff agrees this case should not be transferred to the court of appeals because it presents a substantial issue of first impression. Yet she erroneously argues Defendants seek to “overturn thirty years of precedent” in which statutes have been “reliable indicators of Iowa’s public policies.” (Appellee’s Final Brief, pp. 13, 17) Defendants agree that statutes are reliable indicators of public policy. But Defendants’ argument, to which Plaintiff offers little or no response, is that legislative preemption<sup>1</sup> precludes recognition of a public policy discharge claim in this situation because the very statute that provides the source of the “public policy” contains a remedy the legislature deemed to be adequate.

Defendants concede that section 730.5 contains a public policy prohibiting employers from requiring employees to undergo unauthorized drug tests. But the legislature also set forth what remedy would flow from

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<sup>1</sup> As noted in Defendant’s opening brief, the notion of “preemption” of a common law claim is the same thing as the statute providing the “exclusive remedy” for the claim. (Defendants’ Final Brief, p. 16 n.5.)

a violation of the statute.<sup>2</sup> Because the legislature chose the remedy available for a violation of section 730.5, a common law claim for public policy discharge<sup>3</sup> is not needed and not appropriate.

The reason the Iowa Supreme Court first recognized a common law tort claim for public policy discharge over thirty years ago in *Springer v. Weeks & Leo Co.*, 429 N.W.2d 558, 560-61 (Iowa 1988), is that there was an “absence of a remedy for at-will employees” who were discharged for exercising their right to pursue workers’ compensation benefits. The Court has been willing to expand the tort to various other situations since *Springer*, but only when employees terminated for engaging in certain protected activity would be left without a remedy. Here, there is no such concern. In enacting Iowa’s drug testing statute the legislature provided aggrieved employees with a private right of action and identified the specific remedy available for a violation of the statute.<sup>4</sup>

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<sup>2</sup> Section 730.5(15) permits an employee to bring a civil action in which the court may order “reinstatement or hiring, with or without back pay, and other equitable relief as the court deems appropriate including attorney fees and court costs.”

<sup>3</sup> “Public policy discharge” has also been referred to by the court as “retaliatory discharge” or “wrongful discharge in violation of public policy.”

<sup>4</sup> The same is true for Iowa’s polygraph testing statute, Iowa Code Section 730.4, which contains virtually identical language as Section 730.5. *Wilcox v. Hy-Vee Stores, Inc.*, 458 N.W.2d 870 (Iowa App. 1990), which recognized a public policy discharge claim for an employee’s refusal to

Here, the issue before the court is substantially similar to the issue the court recently declined to answer in *Ackerman v. State*, 913 N.W.2d 610 (Iowa 2018). In *Ackerman*, the court held the tort of retaliatory discharge applied not only to at-will employees who were terminated in violation of public policy, but also to contract employees. The court stated:

While the absence of a remedy to correct a wrong was an important factor in creating the tort for retaliatory discharge thirty years ago, it does not drive us so much in deciding whether to extend the tort to contract employees today. Instead, we are driven by other factors, such as ensuring that victims of intentional torts are fully compensated and that legislative schemes and public policy are not undermined.

*Id.* at 621. Defendant also argued on appeal that Iowa Code section 70A.28, which provides a direct cause of action for state employees who suffer adverse employment action in retaliation for whistleblowing, provides the exclusive remedy for a state employee who claims retaliation.<sup>5</sup> The court noted that this was an issue of statutory interpretation since Section 70A.28 “does not expressly declare that its remedies are the

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take a polygraph test, was decided prior to the legislature’s amendment to section 730.4 which (like section 730.5) now identifies the remedy for a violation of the statute. That *Wilcox* has been cited with approval in subsequent cases does not bear even remotely on the issue before this court of whether the remedy identified in section 730.5 is exclusive.

<sup>5</sup> The remedies in § 70A.28(5)(a) are identical to those in § 730.5(15), namely, “affirmative relief including reinstatement, with or without back pay, or any other equitable relief the court deems appropriate including attorney fees and costs.”



exclusive vehicle for state employees to recover for a wrongful discharge in retaliation for whistleblowing.” *Id.* at 622. However, the court stated “[t]he preclusive effect, if any, of section 70A.28 has not been properly litigated and raised on appeal and is therefore beyond our reach.” *Id.*<sup>6</sup>

Here, unlike *Ackerman*, Defendants did preserve the “exclusivity of statutory remedy” argument on appeal, as that was the basis for their motion for summary judgment and also directed verdict. Accordingly, this case presents an opportunity for the court to hold that a claim for retaliatory discharge premised on a refusal to take an unauthorized drug test is unavailable because the statute that provides the source of the public policy codifies a statutory right of action.

Defendants’ opening brief points out that, unlike Iowa Code Chapters 91A (Iowa Wage Payment Collection Act [“IWPCA”]) and 88.9 (IOSHA) – both of which prescribe an administrative remedy -- Section 730.5 provides a private right of action in district court to an aggrieved employee. Plaintiff counters that the Iowa Supreme Court has recognized a

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<sup>6</sup> In his dissent, Justice Waterman stated that “we have never recognized a common claim for wrongful discharge in violation of public policy when a statute, indeed the same statute providing the source of the public policy, also codifies a statutory right of action.” *Id.* at 623. The dissent stated that “we have no business as a court creating a common law public policy claim at odds with the statute of origin. Doing so violates the separation of powers.” *Id.*

claim for wrongful discharge in violation of public policy even where there is statutory language allowing for a private cause of action. (Appellee’s Final Brief, p. 21) Plaintiff is mistaken. The reason for recognition of a public policy discharge claim in *George v. Zinser Co.*, 762 N.W.2d 865 (Iowa 2009) was that Section 88.9(3) prohibits discrimination against an employee who files a IOSHA complaint, but the statute does not provide a remedy for violation of the anti-retaliation provision. *Id.* 872. That the statute “creates an administrative remedy does not indicate such a remedy is exclusive.” *Id.*

Likewise, with regard to the IWPCA, Plaintiff argues that employees “can and often do bring private causes of action directly to court for violations of Chapter 91A.” (Appellee’s Final Brief, p. 23) The IWPCA does allow an employee to proceed directly to court to recover wages due by an employer, and permits recovery of attorneys’ fees and court costs to a successful party. *See* Iowa Code § 91A.8 (also allowing liquidated damages for an intentional violation to pay wages). But a private right of action is not permitted for violation of the anti-retaliation provision of the statute. Section 91A.10(5) prohibits an employer from discriminating against an employee “because the employee has filed a complaint, assigned a claim, or brought an action under this section.” The section further states

an employee “may file a complaint with the commissioner alleging discharge or discrimination within thirty days after such violation occurs.”

*Id.* As such, the IWPCA’s remedy for a violation of the anti-retaliation provision has a short fuse, and does not permit a private right of action.

Accordingly, in *Tullis v. Merrill*, 584 N.W.2d 236, 239 (Iowa 1998), the court held that Chapter 91A “plainly articulates a public policy prohibiting the firing of an employee in response to a demand for wages due under an agreement with the employer.” The court cited administrative regulations that specifically state “[a] complaint made to the employer in good faith would be related to the Act, and an employee would be protected against discharge or discrimination caused by the complaint to the employer.” *Id.*

In short, while both IOSHA and IWPCA contain anti-retaliation provisions, neither contains a remedy for retaliation, other than to file an administrative complaint. Unlike IOSHA and IWPCA, section 730.5 does not contain an express anti-retaliation provision but does provide a private right of action. Plaintiff argues this “lack of a retaliation remedy makes a wrongful discharge in violation of public policy even more essential.”

(Appellee’s Final Brief, p. 25) Plaintiff’s argument ignores the fact that the remedy prescribed by the legislature expressly includes “reinstatement or hiring with or without back pay” together with attorneys’ fees and costs.

This remedy shows the legislature contemplated that an employer might terminate a current employee (or refuse to hire a prospective employee) who refuses to take (or who tests positive for) a drug/alcohol test.<sup>7</sup> The legislature provided aggrieved employees with a private cause of action and a remedy it deemed appropriate to redress situations where employers were not permitted to terminate employees due to an unauthorized drug test. It is not this court's role to expand that remedy by recognizing a common law claim for retaliatory discharge.

**II. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING ATTORNEYS' FEES FOR WORK UNRELATED TO THE STATUTORY CLAIM.**

Plaintiff complains that Defendants "failed to identify the time entries and expenses they contend should not be reimbursed." (Appellee's Final Brief, p. 39) To be clear, the relief sought by Defendants here is a remand directing the district court to address the "categories" of time entries for which attorneys' fees should not be awarded. As pointed out in Defendants' opening brief, Defendants filed a Motion to Enlarge or Amend Findings on the attorneys' fees/expenses issue. (Appellants' Final Brief, pp. 27-29) The Motion not only identified the categories of fees and

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<sup>7</sup> Indeed, Section 730.5(10)(a) permits an employer to refuse to hire a prospective employee, and to terminate a current employee, who either refuses to take a drug/alcohol test or tests positive.

expenses that were improperly assessed, but also included highlighted time entries totaling \$48,367.20 and expense entries totaling \$3,789.11 that should not have been awarded. (App. 322-342 [Exhibit A to Defendants' Motion to Enlarge or Amend Findings]) The court abused its discretion in failing to address these issues. *See Boyle v. Alum-Line, Inc.*, 773 N.W.2d 829, 833 (Iowa 2009) (district court must make "detailed findings of fact" to supply attorney fee award) (citing *Dutcher v. Randall Foods*, 546 N.W.2d 889, 897 (Iowa 1996)). Remand is appropriate.

### **CONCLUSION**

For the foregoing reasons, Defendants respectfully request this Court reverse the district court's entry of judgment on Count II (the wrongful discharge claim) and remand to the district court for an entry of judgment in their favor. Defendants further request the Court reverse the district court's award of attorneys' fees and expenses and remand to the district court for further reduction.


**CERTIFICATE OF ELECTRONIC FILING AND SERVICE**

I certify that on January 29, 2019, I electronically filed the forgoing with the Clerk of Court of the Supreme Court using the Iowa Electronic Document Management System, which will send notification of electronic filing to the following opposing counsel. Per Iowa Rule 16.317(1)(a)(2), this constitutes service of the document for the purposes of the Iowa Court Rules.

By:   
Thomas D. Wolle

**CERTIFICATE OF COMPLIANCE WITH TYPE REQUIREMENTS**

This brief complies with the typeface and type-volume requirements of Iowa Rule of Appellate Procedure 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-Point Times New Roman and contains 2,088 words, excluding the parts of the brief exempted by Iowa R. App. P.6.903(1)(g)(1).

By:   
Thomas D. Wolle