

PERSPECTIVES

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A periodic newsletter from the Labor & Employment Law Group at Dickinson, Mackaman, Tyler & Hagen, P.C.

“Substantial Compliance” with Iowa’s Drug Testing Statute

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The Iowa Supreme Court’s January 9, 2009, decision in *Sims v. NCI Holding Corporation*, dealt with a question the Court stated it had never before determined – whether strict compliance with the “notice” provisions of Iowa’s drug testing statute (Iowa Code Section 730.5) is required, or whether “substantial compliance” would be sufficient. The case reached the Iowa Supreme Court on appeals taken by both parties to a summary disposition by an Iowa district court.

In *Sims*, the plaintiff was employed by NCI in a position that no one contended was not a “safety sensitive position.” As that term is defined in Iowa’s law, it is one where, “an accident could cause a loss of human life, serious bodily injury or significant property or environmental damage.” When hired, the plaintiff was provided with (and acknowledged receipt of) a copy of the company’s written employee manual. Included in that manual was a drugs / narcotics and alcohol testing policy. That policy informed employees of the company’s random drug testing policy.

The plaintiff Sims was selected (by an identified-in-the-opinion third party) for a random drug test. There was apparently no issue raised regarding the selection process. The Court’s opinion provides some detail about the testing, noting that Sims was taken to a medical center where a urine specimen was collected and “consistent with Iowa Code section 730.5(7) . . . divided into two components,” preserving a “sufficient quantity to permit a second, independent confirmatory test.” The Court’s opinion continues, “The sample was sent by courier to Medtox Laboratory for screening. The collection and testing of the specimen were entirely consistent with the requirements prescribed in Iowa Code Section 730.5.”

The Court continued that the sample initially tested positive for amphetamines and methamphetamines, a result which was confirmed by gas chromatography with mass spectrometry. The opinion recites that the results were then sent by the lab for review by Dr. Jeffrey Brinton. “Dr. Brinton, a certified medical review officer, concluded Sims was likely under the influence of illegal methamphetamine at the time of the test. Dr. Brinton then contacted Sims and allowed him an opportunity to explain the positive test result.” While Sims provided an explanation, “Dr. Brinton opined this history was unlikely to have produced a positive test result.”

The Iowa Supreme Court continued that Dr. Brinton reported the positive drug test to an employer’s representative. That representative **orally** notified Sims not only of the result but also of his right to a second, independent confirmatory test at his own expense. Reportedly Sims responded that he didn’t have the money. He was fired the same day the results were reported – March 16, 2006.

On April 13, 2006, just one month after he was fired, Sims filed a lawsuit. He alleged that his termination violated the requirement of the Iowa drug testing statute that he be notified in writing by certified mail, return receipt requested, of the results of the drug test, of his right to request and obtain a confirmatory test at his own expense at an approved laboratory of his own selection, and of the fee payable by him for the confirmatory test. In the lawsuit, Sims also claimed that the employer’s written drug / alcohol testing policy was deficient under the statute because it did not contain a notification of the right to a confirmatory test on the second portion of the split sample as provided by the law.

On August 18, 2006 – some four months after the lawsuit and some five months after the MRO reported the test results to the employer and Sims was fired – the company sent Sims, by certified mail, return receipt requested, a notice of his right to a confirmatory test at an approved laboratory of his selection. In that letter, the **employer** unconditionally offered to **pay** for such a test. Sims accepted the offer, and requested the testing be conducted by Laboratory Corporation of America. That lab did conduct a confirmatory test, and the company paid for that additional testing. The result was that the original positive test results were confirmed.

As noted above, the Iowa Supreme Court stated that the primary issue presented to it by the appeal was whether an Iowa employer needed to strictly comply with the various notice provisions of the drug testing law, or whether “substantial compliance” would be sufficient. The Court noted that “substantial compliance” means compliance with respect to “essential matters necessary to assure the reasonable objectives of the statute.” It stated that the legislature’s intent was “to ensure the accuracy of any drug test serving as the

basis for adverse employment action.” With specific focus on the notice requirements, the Court noted the objective was “the protection of employees who are required to submit to drug testing.” The formal notice (that is, one that is written and sent by certified mail, return receipt requested) would “convey . . . a message that the contents of the document are important” and “worthy of the employee’s deliberate reflection.” The Court concluded that notice would be deemed to “substantially comply” if it **both** provided the employee notification of the positive test result and a “meaningful opportunity to consider whether to undertake the confirmatory drug test.”

The Iowa Supreme Court first took up the contention that the written policy of NCI was flawed because it lacked provisions dealing with the right to a second confirmatory test at the employee’s own expense. The Court gave this argument only summary consideration. It noted that there was nothing in the Iowa statute which required the written policy to make such a disclosure. **“We will not read into the statute a mandate which is not present in the plain language.”**

The Supreme Court next turned to the notice given to Sims. “Although the district court aptly noted ‘common sense would tell one that notice should be sent to the employee within a few days of the employer obtaining the results of the test,’ **the statute provides no specific timeline within which notice must be provided to the employee.**” In that observation, the Iowa Supreme Court is most certainly correct. The only “timeline” in Iowa Code Section 730.5(7)(i)(1), which was quoted in part by the Court in its opinion in *Sims*, provides that the **employee’s** response is due within seven days of the date the employer mails the notice by certified mail, return receipt requested. (The statute repeats twice both “certified mail, return receipt requested” and what is to be contained in the notice.)

It should be no great surprise that the Court concluded that the oral notice provided at the time of the termination, standing alone, did not constitute “substantial compliance.” It was both “incomplete” (presumably because it did not convey information about an “approved lab of your choice” or the “fee payable by the employee for reimbursement” for the costs of the second confirmatory test) and failed to convey the importance of the message.

But it may come as a surprise that a Court which said it was not going to read into the statute a mandate that is not present in the plain language, and which acknowledged there is no time frame within which the written notice must be sent “certified mail, return receipt requested,” ruled that the written notice mailed (certified mail, return receipt requested) “several months after he was discharged” and “after Sims had filed suit alleging noncompliance with the statute” did **not** bring the company into “substantial compliance.”

Having determined there was a violation of the statute, the Iowa Supreme Court turned to the question of relief or remedy. While the Court did not say so in so many words, Iowa Code Section 730.5(15)(1), which authorizes civil actions for violations, appears to limit a court to granting “equitable relief.” The Court did note that upon receipt of the initial positive test result (with regard to which there was apparently no real challenge), the company was authorized to terminate Sims’ employment. Given that the results of the confirmatory test on the second portion of the split sample – a test Sims had “requested” upon receipt of the belated written notice sent certified mail, return receipt requested – confirmed the initial results (i.e., a positive for methamphetamine), it was clear that “Sims’s employment was not adversely affected by an erroneous test result.” Therefore, concluded the Iowa Supreme Court, Sims was not entitled to back pay, to reinstatement of his employment, or to punitive damages.

However, it was clear to the Court that the litigation commenced by Sims within a month after the termination, which specifically alerted the employer to the failure to provide the notice required by the law, was in no small part the force which motivated NCI to provide the notice, with the “free of any cost to the employee” confirmatory test. Under those circumstances, the Iowa Supreme Court concluded that judgment should be entered against the employer, NCI, for attorney fees and costs – equitable relief which is authorized to be awarded against a “person” who violated the Iowa private sector drug testing law.

There are two very important lessons for employers in this case – and one very largely unanswered question.

The Iowa Supreme Court held that “substantial compliance” with the notice provisions of the Iowa drug testing statute will be acceptable, and provided the general guidance that the notice “must convey the message that the information in the notice is important and “worthy of the employee’s deliberate reflection.” What that may mean, the Court does not say. One recalls a statement in a 1964 United States Supreme Court opinion involving obscenity and pornography. In agreeing with the Court’s refusal to adopt a definition of the terms that could be applied in future cases, Justice Stewart observed, “But I know it when I see it, and the motion picture involved in this case is not that.” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Apparently the Court will “know” substantial compliance when it sees it, and what happened in this case “is not.”

Employers that do not wish to be a test case will comply with the directive of the statute for written notice - mailed certified mail return receipt requested - and will assure that the written notice contains the information called for by the statute. That is, the notice will inform the employee of the results of the test, the employee’s right to have the second portion of the specimen re-tested at an approved laboratory of the employee’s choice if the employee pays the cost, and what that cost will be. It is strongly suggested that the written notice also clearly and conspicuously inform the employee of the time frame within which the employer must receive the employee’s decision and payment of the necessary fee. By statute, that time frame can be **no shorter** than seven days after notice is mailed certified mail, return receipt requested.

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A subset of that first lesson: not only should the employer send the notice in writing, certified mail, return receipt requested, the notice should be sent promptly. Develop **now** a protocol and a specimen with blanks to be filled in so that it is done automatically the same day the results are received.

Another very important lesson is “better late than never,” tied with “don’t be penny wise and pound foolish.” One doesn’t know why it took NCI some four months after it was sued to provide the written notice. NCI did provide the notice, albeit in the Court’s mind “late.” And NCI offered the confirmatory test at **no cost** to the employee. In so doing, the company deprived the individual of an “I can’t afford it” argument. Individuals have a “duty to mitigate” their damages. If an employee were to decline such an offer, s/he would certainly open the door for several arguments for the employer. Here, the employee directed the retest, and the “positive for methamphetamine” result was confirmed. The net result: no reinstatement, no backpay.

It is also suggested that if the results of the testing on the second portion of the sample come back “negative, an employer should **unconditionally** offer the employee reinstatement, and unconditionally pay the employee “backpay” from the point of termination through the date designated for reinstatement **plus interest** as provided by law. An employer may still be “fighting over” attorney fees and costs, but the total costs should be a lot less than they would be if you did not follow such a course. One is reminded of an admonition given by the United States Circuit Court of Appeals for the Eighth Circuit more than two decades ago in *Moore v. City of Des Moines*, 766 F.2d 343, 346 (8th Cir. 1985): Under this court’s supervisory power, we feel it necessary to address the appropriateness of appeals of attorneys’ fees awards that contend the district court has abused its discretion. . . . The award of attorneys’ fees may be substantial; the cost to the losing party of paying the attorneys’ fees can be greater than the cost of paying the judgment awarded on the merits.

We suggest to the bar and to individual counsel that as officers of the court, lawyers have a responsibility in limiting litigation over attorneys’ fees. Most fee cases can be processed through amicable negotiation and agreement; the district courts should not become the inevitable haven for adversary proceedings concerning attorneys’ fees.

Finally, employers are reminded of a lesson given earlier: be prepared to demonstrate compliance with all the provisions of the statute. If a civil action is brought which challenges a drug test under Iowa’s laws, “the employer has the burden of proving that the requirements of [the law] were met.” Iowa Code Section 730.5(15)(b). The Iowa Supreme Court’s opinion went into great detail on what was done, and when it was done. Obviously those details were part of the record before the Court. That suggests the employer in the case went to some effort to build a record that demonstrated compliance with procedural requirements, at least through the point of the MRO’s actions. The details provided in the opinion regarding the process were clearly not necessary to the narrow legal issues before the Court. If the Court did not consider those details important, why discuss them?

If you have questions regarding drug testing requirements, please contact a member of the Firm’s [Employment and Labor Law Group](#) or the Dickinson attorney with whom you normally work.

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