IN THE COURT OF APPEALS OF IOWA

No. 2-573 / 11-1902
Filed September 6, 2012

AMANDA SKIPTON,
Plaintiff-Appellee,

vs.

S & J TUBE, INC.,
Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines County, Michael J. Schilling (summary judgment) and Mary Ann Brown (trial), Judges.

Defendant appeals the district court decision granting back pay and attorney fees to plaintiff after her employment was terminated for a positive drug test. **AFFIRMED.**

Timothy D. Roberts of Anderson, Roberts, Porth & Wallace, P.L.C., Burlington, for appellant.

Toby J. Gordon of Swanson, Engler, Gordon, Benne & Clark, L.L.L.P., Burlington, for appellee.

Considered by Eisenhauer, C.J., Tabor, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MILLER, S.J.

I. Background Facts & Proceedings

Amanda Skipton was employed by S & J Tube, Inc. as an inter-channel gluing operator.[1] Skipton's job required repetitive use of her hands, wrists, and arms. She developed pain in her left wrist, and the employer submitted a first report of injury to the workers' compensation commissioner identifying November 6, 2006 as the date of injury.[2] Skipton had medical treatment, and was diagnosed with mild left carpal tunnel syndrome. With conservative treatment she improved to the point where on April 12, 2007, she was minimally symptomatic. The workers' compensation insurance adjuster closed the case on July 13, 2007. Some of Skipton's repetitive job duties were changed in 2007. The change was designed to decrease the potential for carpal tunnel injuries.

In September 2007, S & J implemented a "Drug and Alcohol-Free Workplace Policy," as permitted by Iowa Code section 730.5 (2007). The policy provided the company would conduct drug and alcohol testing when "[c]urrent member(s) [were] involved in a workplace accident involving an injury which requires medical treatment." S & J had a zero tolerance policy, so that a positive drug test would result in immediate termination of the employee. The policy

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[1] Skipton worked the third shift. On this shift, employees worked seven hours per day, but were paid for eight hours of work. Skipton was paid $8.40 per hour. She was also eligible to receive incentive pay, and normally received incentive pay of $1.18 per hour for the thirty-five hours she actually worked per week.

[2] A compromise settlement for $1500 between Skipton and S & J was approved by the workers' compensation commissioner on October 21, 2008, based on her injury of November 2006.

became effective thirty days after it was enacted. Skipton signed an acknowledgment of the policy on September 13, 2007.

Skipton had a medical appointment with Dr. Rhea Allen on September 27, 2007, which noted she had been observed for carpal tunnel syndrome for more than a year and was "more symptomatic recently." Additionally, Skipton had developed a nodule over the left wrist. The medical report noted, "She is not aware of any particular injury associated with that." No new first report of injury was submitted.

Skipton had a medical appointment on October 24, 2007, with Dr. Randy Gipple, an orthopedist. A diagnosis was made of "[p]ersistent symptoms of left carpal tunnel syndrome" and the possibility of surgery for her condition was discussed. At this medical appointment Skipton was informed she needed to have a drug test under the company's new drug policy.[3] That same day, a medical case manager for the workers' compensation insurance adjuster sent an e-mail to Penny Evans, the human resources manager for S & J, noting Dr. Gipple felt Skipton had the same problem she had previously, as her symptoms for carpal tunnel syndrome would "wax and wane."

The drug test came back positive for cocaine. The medical review officer for S & J telephoned Skipton on October 29, 2007, and discussed the results with her. The medical review officer also told Skipton she was unaware what a confirmatory test would cost, but believed it would cost between $200 and $300. Skipton met with Evans on October 30, 2007, and was informed that she was

[3] As required by section 730.5(7)(b), the test sample was split in two so as to permit a second test if requested by Skipton.

terminated from employment immediately based on the company's new drug policy.[4] Evans handed Skipton a "Positive Drug or Alcohol Test Notification," at this meeting, which Skipton signed.[5] When discussing the possibility of a confirmatory test, Skipton stated a second test would not be worthwhile because it would probably come out positive too.

Skipton had a carpal tunnel release performed by Dr. Gipple on November 16, 2007. In May 2008, Skipton moved to Beardstown, Illinois. She began working at a Casey's convenience store in June 2008. She worked between twenty to thirty hours per week, and eventually earned $8.35 per hour. She quit her job at Casey's in September 2010, and began working at Dairy Queen on November 2, 2010. At Dairy Queen she worked thirty to forty hours per week and earned $8.25 per hour.

Dr. Gipple provided an affidavit on August 27, 2010, that stated that he continued to believe that his statements in the e-mail sent on October 24, 2007, were accurate based on the information he had at that time. He went on to state, "it is possible there was a new injury or event that triggered the injury in September or October 2007 and I cannot give an [un]equivocal opinion as to whether there was a new injury or not from the medical history in the file." He

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[4] An administrative law judge determined Skipton was not discharged for work-related misconduct, and she was entitled to unemployment benefits because the employer did not give her adequate notice, as required by section 730.5(7)(i)(1).

[5] The notice provides, "You will receive a letter by certified mail within 10 business days." It also states, "I must inform the MRO of my request for split testing within a week of the issue date of the certified letter confirming my positive test result." S & J never sent a certified letter to Skipton concerning the positive drug test.

noted that cocaine use could cause a person to work faster than reasonable, resulting in re-injury of an old problem.

On October 5, 2008, Skipton filed a petition against S & J, alleging wrongful termination and violation of section 730.5. Skipton filed a motion for partial summary judgment. In a ruling filed November 23, 2010, the district court granted summary judgment on the issue of whether S & J failed to give Skipton proper notice of her right to a confirmatory test under section 730.5(7)(i)(1). The court found the employer did not send Skipton a letter by certified mail or inform her of the cost of a confirmatory test, and thus violated the code section. The court found Skipton was not entitled to summary judgment on her claim that she was wrongfully terminated or that the employer improperly applied its drug policy.

The case proceeded to a trial before the court, commencing on May 4, 2011. James Mott and Jeanne Mott, co-owners of S & J, gave background information about the company. Evans testified that she consulted with Richard Swanson of Alcohol and Drug Dependency Services (ADDS) in writing S & J's drug policy. She stated she believed that under the policy if there was an accident or an injury that resulted in medical treatment the employer could request a drug test. Evans also testified that in her opinion because the workers' compensation insurance adjuster had closed its file on Skipton's injury from 2006, at the time the drug test was requested there had been a new injury. She stated she did not have any reason to terminate Skipton prior to the positive drug test.

Julie Belger became employed as the human resource manager at S & J in March 2008, after Skipton had been terminated. Belger testified that in her opinion the employer could require a drug test if an employee was sent to the doctor because the employee was hurt, and there was no requirement that there be a precipitating accident. Belger furthermore testified that S & J laid off twenty-nine employees in June 2009, and she believed that if Skipton had been there at that time she would have been laid off.

The district court issued a decision on September 13, 2011. The court found S & J failed to follow section 730.5(8)(f) which permits an employer to conduct a drug test, "in investigating accidents in the workplace in which the accident resulted in an injury to a person," and its own drug policy, which provided the employer could conduct a drug test of an employee, "involved in a workplace accident involving an injury which requires medical treatment." The court found that even if there was a second injury after the original cumulative injury from 2006, this would have been around September 27, 2007, when Skipton's carpal tunnel syndrome became more symptomatic. The court determined the drug test administered on October 24, 2007, was too remote in time from even a second injury date of September 27, 2007. The court concluded the employer was not authorized by section 730.5 or its drug policy to require a drug test on October 24, 2007.

Under section 730.5(15), the court concluded Skipton was entitled to back pay and attorney fees. The court found the termination of Skipton was not against public policy, and therefore she was not entitled to front pay or punitive

damages. The court calculated Skipton was entitled to back pay of $22,805. The court also awarded her attorney fees of $13,275 and costs of $927.35.

S & J filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2), and Skipton resisted. The court determined there was not competent evidence that Skipton would have been terminated during the lay-offs in June 2009. The court also found the employer had failed to show that Skipton had not mitigated her damages. The court furthermore determined that the employer was not immune from liability under section 730.5(11). The court found S & J should pay $1365 in supplemental attorney fees in connection with the post-trial motion. The employer now appeals the decision of the district court. Skipton requests an award of appellate attorney fees.

II. Summary Judgment

S & J contends the district court erred by granting summary judgment to Skipton on her claim that it did not adequately meet the notice requirements of section 730.5(7)(i)(1). A ruling on a motion for summary judgment is reviewed for the correction of errors at law, even when a case is brought in equity. *Freedom Fin. Bank v. Estate of Boesen*, 805 N.W.2d 802, 806 (Iowa 2011). Summary judgment may be granted when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3). We review the facts in the light most favorable to the party opposing the motion for summary judgment. *Moore v. Davenport Civil Serv. Comm'n*, 790 N.W.2d 809, 813 (Iowa Ct. App. 2010).

Section 730.5(7)(i)(1) provides:

> If a confirmed positive test result for drugs or alcohol for a current employee is reported to the employer by the medical review officer, the employer shall notify the employee in writing by certified mail, return receipt requested, of the results of the test, the employee's right to request and obtain a confirmatory test of the second sample . . . and the fee payable by the employee to the employer for reimbursement of expenses concerning the test.

An employer must substantially comply with these notice requirements. *Sims v. NCI Holding Corp.*, 759 N.W.2d 333, 338 (Iowa 2009). An employer substantially complies when it "accomplish[es] the important objective of providing notice to the employee of the positive test result and a meaningful opportunity to consider whether to undertake a confirmatory test." *Id.* Sending a formal notice to the employee sends "'a message that the contents of the document are important' and worthy of the employee's deliberate reflection." *Id.* (citation omitted).

S & J claims it substantially complied with the statute because it hand delivered a notice to Skipton, rather than sending it by certified mail. One problem here is that the notice the employer handed to Skipton specifically stated in two places that a letter would be sent to her by certified mail, and in fact no such letter was ever sent. Furthermore, the notice given to Skipton by the employer did not convey any information regarding the cost of a confirmatory test. While the medical review officer gave Skipton a possible price range, and not "the fee payable," for a confirmatory test, even this was done orally. Merely giving an employee the information orally is not considered substantial compliance. *Harrison v. Emp't Appeal Bd.*, 659 N.W.2d 581, 588 (Iowa 2003).

We determine the district court properly granted summary judgment to Skipton on her claim S & J did not substantially comply with the notice requirements of section 730.5(7)(i)(1).

III. Trial

A. *Standard of Review.*

At the beginning of the trial, the district court noted that based on section 730.5(15)(a), it believed the issue of whether there had been a violation of section 730.5 should be tried in equity.[6] Section 730.5(15)(a) provides that a person who violates section 730.5 is liable to an aggrieved employee "for affirmative relief including reinstatement or hiring, with or without back pay, or any other equitable relief as the court deems appropriate including attorney fees and court costs." The court noted that it "tried the case as an equity case concerning evidentiary rulings."

We note that in several previous cases brought under section 730.5, our review was for the correction of errors at law. *See Sims*, 759 N.W.2d at 337 (finding review was for the correction of errors at law); *Tow v. Truck Country of Iowa, Inc.*, 695 N.W.2d 36, 38 (Iowa 2005) (finding action was at law and issue of damages was reviewed for substantial evidence); *Pinkerton v. Jeld-Win, Inc.*, 588 N.W.2d 679, 680 (Iowa 1998) (finding review of challenged legal determinations was on error). *But see id.* (noting, however, that a separate issue requesting

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[6] The court noted that the issue of whether Skipton had been wrongfully discharged was based in law. Neither party has appealed the district court's finding that Skipton had failed to show her termination was against public policy, and therefore, had not established a claim of wrongful discharge. Thus, the issue that was tried at law is not before us on appeal.

injunctive relief was in equity, and would be reviewed de novo); *Waechter v. Aluminum Co.*, 454 N.W.2d 565, 568 (Iowa 1990) (finding review was de novo of action brought in equity). It is not clear that in any of these cases the scope and standard of review was raised as an issue.

"Where there is uncertainty about the nature of a case, a litmus test we use in making this determination is whether the trial court ruled on evidentiary objections." *Ernst v. Johnson Cnty.*, 522 N.W.2d 599, 602 (Iowa 1994). Although this is an important consideration, it is not dispositive. *Sutton v. Iowa Trenchless, L.C.*, 808 N.W.2d 744, 748 (Iowa Ct. App. 2011).

We determine the case was tried in equity before the district court.[7] The court found the issues now raised on appeal were brought in equity, and the court did not rule on evidentiary objections. Therefore, our review is de novo. *See* Iowa R. App. P. 6.907. When considering the credibility findings of the district court, we give weight to the factual findings of the district court, but are not bound by them. Iowa R. App. P. 6.904(3)(g).

B. *Authorization for Drug Test.*

S & J claims it properly followed section 730.5(8)(f) and the company's drug policy when it required Skipton to have a drug test on October 24, 2007. Section 730.5(8)(f) provides:

> Employers may conduct drug or alcohol testing in investigating accidents in the workplace in which the accident resulted in an injury to a person for which injury, if suffered by an employee, a record or report could be required under chapter 88, or

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[7] If we had determined this case had been tried as a law action, and our review was for the correction of errors at law, we would still come to the same result, finding no merit to the appellant's claims of error.

> resulted in damage to property, including to equipment, in an amount reasonably estimated at the time of the accident to exceed one thousand dollars.

The company's policy provided the company could conduct a drug test when "[c]urrent member(s) [were] involved in a workplace accident involving an injury which requires medical treatment."

The company argues that Skipton's cumulative trauma injury could be characterized as an accidental injury. The Iowa Supreme Court has defined "accident" as a "sudden event or change occurring without intent or volition through carelessness, unawareness, ignorance, or a combination of causes and producing an unfortunate result." *State v. Carpenter*, 334 N.W.2d 137, 140 (Iowa 1983) (quoting *Webster's Third New Int'l Dictionary* 11 (1976)). A cumulative injury is not a sudden event or change, and we conclude it is not an accidental injury. *See Branson v. Mun. Fire & Police Ret. Sys.*, 591 N.W.2d 193, 197-98 (Iowa 1999) (finding officer who suffered a cumulative injury was not entitled to accidental disability retirement benefits, and noting an "accident" was generally a specific event).

Even if we put aside the question of whether there was an "accident" as required by section 730.5(8)(f), we are still faced with the issue of whether Skipton suffered a new injury at the time S & J required a drug test. The employer points to the affidavit of Dr. Gipple from August 27, 2010, in which he states it is possible Skipton had a new injury or event that triggered the injury in September or October 2007. It also notes that the workers' compensation insurance adjuster had closed its file from the earlier 2006 injury.

The medical notes from Skipton's appointment with Dr. Allen on September 27, 2007, clearly state, "[s]he has had carpal tunnel syndrome that has been observed for almost a year and seems to be more symptomatic recently." Furthermore, an e-mail sent from the medical case manager for the insurer to Evans on October 24, 2007, states, "Dr. Gipple felt this was the same problem," and notes that for carpal tunnel syndrome the symptoms would "wax and wane." Additionally, S & J never submitted a new first report of injury for workers' compensation purposes after the initial first report of injury was submitted in November 2006. Based on all of these factors, we conclude there was not a new injury at or around the time S & J required a drug test from Skipton on October 24, 2007.

We concur in the district court's conclusion that S & J did not have authority under section 730.5(8)(f), or its own drug policy, to require Skipton to take a drug test on October 24, 2007.

C. *Statutory Immunity*.

S & J claims it is immune from liability under section 730.5(11), which provides:

> 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, or any of the following:
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> 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 the refusal of an employee or prospective employee to submit to a drug or alcohol test.

The term "good faith" is defined in this section 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).

We leave aside the question of whether S & J's written policy was in accordance with section 730.5 because the evidence clearly shows that its testing program was not administered in accordance with the testing and policy safeguards in that code section. As noted above, section 730.5(8)(f) provides, "[e]mployers may conduct drug or alcohol testing in investigating *accidents* in the workplace in which the *accident* resulted in injury to a person . . . ." (Emphasis added.) In applying its testing program, the employer ignored the statutory requirement that there be an accident. Belger, the current human resources manager, testified, "if I send somebody to the doctor to seek medical treatment, then they are tested," and stated she did not require that there be a precipitating accident. Evans, the former human resources manager, testified that if an employee had an accident *or* an injury that resulted in medical treatment, the company could require a drug test.

Because S & J did not administer a testing program in accordance with the testing and policy safeguards provided for in section 730.5, it is not entitled to immunity under section 730.5(11). We therefore affirm the district court's conclusion that S & J was not immune from liability in this litigation.

D. *Amount of Back Pay.*

S & J claims the district court improperly calculated Skipton's lost wages. It first asserts Skipton is not entitled to any damages for lost wages because she admitted at the time she was discharged that if she had a confirmatory test it

would likely also be positive for cocaine. At her meeting with Evans on October 30, 2007, Skipton told Evans that she was assuming there was still cocaine in her system, so she was not going to retest.

The employer relies upon *Sims*, 759 N.W.2d at 340, where the Iowa Supreme Court found an employer had not substantially complied with the notice requirements of section 730.5(7) in informing an employee of the right to have a confirmatory test. A later confirmatory test was in fact taken, however. *Sims*, 759 N.W.2d at 337. The result was also positive for an illegal substance. *Id.* The court concluded that although the employer had violated section 730.5, the employee was not entitled to back pay because his employment was not adversely affected by the violation. *Id.* at 340. The employee was awarded only attorney fees and costs. *Id.* at 341.

Unlike *Sims*, Skipton's employment was adversely affected by S & J's violation of section 730.5. Not only did the company violate the notice provisions of section 730.5(7), but the company was not authorized by section 730.5(8)(f) to request a drug test. If the company had not improperly requested a drug test, no discussion between Evans and Skipton would have arisen concerning whether Skipton would take a confirmatory test. We agree with the district court's conclusion that under section 730.5(15)(a), the company should be liable to Skipton for back pay.

S & J next argues that if Skipton is entitled to back pay, she is only entitled to back pay until June 2009, because she would have been discharged at that time when the company down-sized. The district court considered this issue and

concluded there was no competent evidence Skipton would have been among those terminated in June 2009. In general, we do not base damages on overly speculative evidence. *See Tredea v. Anesthesia & Analgesia, P.C.*, 584 N.W.2d 276, 288 (Iowa 1998).

Belger testified she believed Skipton would have been discharged from employment in June 2009. She stated the employees that were laid off were those that had disciplinary actions in their file, and Skipton had problems with absenteeism. Jeanne Mott testified she relied upon Belger's analysis on the issue of whether Skipton would have been among those who were laid off. Belger, however, never worked with Skipton and was not personally aware of her job performance. Only one performance evaluation for Skipton, from June 30, 2007, was entered into evidence, and this stated, "Amanda is a great worker who is willing to do whatever it takes to get the job done." Based on the evaluation she was given a pay raise. There was no evidence that she had been subjected to disciplinary measures in the past. We, like the district court, conclude that the evidence does not establish that Skipton would have been discharged in June 2009.

S & J furthermore contends the award of back pay to Skipton should be reduced because she did not adequately mitigate her damages, as she failed to work continuously, and failed to obtain full-time employment. The employer had the burden of proof to show Skipton failed to mitigate her damages. *See Tow*, 695 N.W.2d at 40. The district court found Skipton made reasonable efforts to find other employment and she had obtained employment to her earning ability.

Skipton was discharged from her employment with S & J on October 30, 2007. She had carpal tunnel surgery on November 16, 2007. Skipton began working at a Casey's convenience store in Illinois in June 2008. She quit her job at Casey's in September 2010, and began working at Dairy Queen on November 2, 2010. At the time she was discharged she was paid $8.40 per hour, and received $1.18 per hour in incentive pay.[8] She received $8.35 per hour at Casey's and $8.25 per hour at Dairy Queen.[9] We concur in the district court's conclusion that Skipton's efforts to obtain other employment were sufficient to satisfy her duty to mitigate damages. *See id.* (considering mitigation of damages in claim for lost wages under section 730.5).

Finally, S & J claims the district court improperly calculated the amount of lost back pay. S & J asks to have the award of damages reduced to $8726. The calculation of back pay should be based on the difference between what an employee would have earned if she had remained employed by a defendant and what she earned from other employment during that time. *See id.* at 39-40. An employee's loss of earnings should be computed on the basis of actual earnings. *See Van Meter Indus. v. Mason City Human Rights Comm'n*, 675 N.W.2d 503, 513 (Iowa 2004). An award of damages must be supported by the evidence.

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[8] On the third shift, Skipton was paid for eight hours of work at $8.40 per hour, although she actually only worked seven hours each day. She received incentive pay of $1.18 per hour for the hours she worked. Thus, she received $75.46 per day, which would be about $19,620 annually.

[9] We also note that working the third shift at S & J, Skipton only worked seven hours per day, or thirty-five hours per week. She worked between twenty to thirty hours per week at Casey's. At Dairy Queen she worked thirty to forty hours per week.

See Midwest Hatchery & Poultry Farms, Inc. v. Doorenbos Poultry, Inc., 783 N.W.2d 56, 65 (Iowa Ct. App. 2010).

The district court properly calculated Skipton's projected earnings at S & J from the time she was discharged until the time of the trial, and subtracted from that her actual earnings, to calculate damages of $22,805.[10] We affirm the district court on this issue.

E. *Attorney Fees.*

S & J does not dispute that the award of attorney fees was fair and reasonable, but asserts Skipton should only have been awarded a nominal amount of attorney fees in order to discourage other litigants. Section 730.5(15)(a) permits an award of attorney fees. *Sims*, 759 N.W.2d at 340; *Tow*, 695 N.W.2d at 40. We affirm the award of attorney fees.

Skipton requests appellate attorney fees. We determine she should be awarded $3000 for appellate attorney fees.

IV. Conclusion & Disposition

We affirm the decision of the district court. We award Skipton $3000 in appellate attorney fees. Costs of this appeal are assessed against S & J.

AFFIRMED.

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[10] The district court did impute income to Skipton from the time she quit her job at Casey's until she started her new job with Dairy Queen, because she was voluntarily unemployed during that period. The court also calculated what her earnings would be for 2011, until the date of the trial.