IN THE SUPREME COURT OF IOWA

Supreme Court No. 16-1666
Linn County No. LACV082464

NOLAN DEEDS,
Plaintiff-Appellant

v.

CITY OF MARION, ST. LUKE'S WORK WELL SOLUTIONS, ST. LUKE'S HEALTHCARE AND IOWA HEALTH SYSTEMS d/b/a UNITYPOINT HEALTH,
Defendants-Appellees

ON APPEAL FROM IOWA DISTRICT COURT FOR LINN COUNTY
HONORABLE CHRISTOPHER L. BRUNS

APPELLEE CITY OF MARION'S BRIEF AND ARGUMENT

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ROUTING STATEMENT

This case does not fall within the type of cases enumerated in Iowa R. App. P. 6.1101(2) and should, therefore, be transferred to the Court of Appeals pursuant to Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

This is an appeal by Appellant Nolan Deeds ("Mr. Deeds") from an adverse summary judgment ruling by the district court. Appellee City of Marion ("the City" or "Marion") defends the summary judgment ruling by the district court.

STATEMENT OF THE FACTS

A. *Key players*.

Plaintiff Nolan Deeds was an applicant for a professional firefighter position with the City in April, 2012, and again in November, 2013. (App. 71, 80, 91, 166-174.) Mr. Deeds was a volunteer firefighter with the City of Coralville until December, 2011, when he was diagnosed by neurologist Dr. Richard Neiman with Multiple Sclerosis ("MS"). (App. 119-121, 122 and 68.)

Dr. Ann McKinstry and Dr. Jeffrey Westpheling are doctors with the St. Luke's Work Well Solutions Clinic who performed pre-employment physical exams on Mr. Deeds in the fall of 2013 related to his employment

applications to Marion and the City of Cedar Rapids. (App. 72, 97-98, 103-104 and 179-180.)

Terry Jackson was the Marion Fire Department Chief at all times relevant to this case. He retired in June of 2014. (App. 79.)

Debra Krebill was the Marion Fire Department Assistant Chief at all relevant times to this case. She attained the rank of Chief when Mr. Jackson retired, around August, 2014. (App. 92.)

B. *Mr. Deeds' medical background.*

December 14, 2011, Plaintiff Nolan Deeds went to an Urgent Care facility because his right hand went numb, followed by his right foot, and the numbness had rapidly spread to his entire right side. (App. 114-118.) December 22, 2014, neurologist Dr. Richard Neiman rendered a "probable diagnosis" of Multiple Sclerosis ("MS"). (App. 119-121.) The right side weakness continued into January, 2012. (App. 123-124.)

The City of Coralville retained Dr. Patrick Hartley, an occupational medicine doctor with the University of Iowa Hospitals and Clinics, to perform a fitness for duty exam on Mr. Deeds. (App. 69 and 126-128.) Coralville's Fire Department did not permit Mr. Deeds to return to volunteer firefighting based on Dr. Hartley's April 19, 2012 evaluation. (App. 70.)

January 17, 2013, Mr. Deeds developed numbness in both feet, was dragging his right leg and had numbness in his buttocks, which Dr. Neiman deemed to be a "typical" MS exacerbation. (App. 152-153.)

B. *Mr. Deeds' application with the City*.

March 2, 2012, Mr. Deeds applied for a position as a professional firefighter with the City. (App. 159-163.) At the time, Mr. Deeds was certified as a Firefighter I and II and as an EMT-B (basic). (App. 67.) During 2012, Mr. Deeds was also taking classes and meeting other requirements to obtain a paramedic certification. (App. 67.) Mr. Deeds obtained his paramedic certification in 2013. (App. 67.)

Sometime in March, 2012, Mr. Deeds took and passed the written Civil Service Commission test to be eligible for hiring by the City. (App. 164-165.) Mr. Deeds also took and passed a physical agility test for the City. (App. 71 and 84.)

In April, 2012, Mr. Deeds interviewed with the City's now retired Fire Chief (Terry Jackson) and then Assistant Fire Chief (Deb Krebill). (App. 71, 91 and 166-170.) The City did not offer Mr. Deeds a job as a firefighter at that time. (App. 71 and 91.)

The City had another opening for a professional firefighter in November, 2013, and Mr. Deeds interviewed with Chief Jackson and

Assistant Chief Krebill again, but this time Chief Krebill led the interview. (App. 71, 80 and 171-174.) Both Chief Jackson and Assistant Chief Krebill thought Mr. Deeds performed very well in his second interview. (App. 84 and 91.)

During Mr. Deeds' interviews, he had no observable signs of a physical disability. (App. 87 and 93.) No one from the City asked Mr. Deeds about a physical disability during either interview. (App. 87 and 93.) No one from the City asked Mr. Deeds about a medical condition during either interview. (App. 87 and 93.) Mr. Deeds admitted no one from the City asked him about his medical condition in the April, 2012 interview or the November, 2013 interview. (App. 71.) Neither Chief Jackson nor Assistant Chief Krebill learned anything about Mr. Deeds' medical condition or a possible disability or medical leave from the Coralville Fire Department during the interviews. (App. 87 and 93-94.)

Assistant Chief Krebill performed various background checks on Mr. Deeds in November, 2013, including checks on his social media. (App. 91.) Assistant Chief Krebill did not observe any information on social media indicating that Mr. Deeds had a physical disability. (App. 94.)

C. *Mr. Deeds' tentative job offer and medical exam.*

November 13, 2013, Chief Jackson wrote to Mr. Deeds and made a tentative job offer to him, contingent on a medical exam that indicated "job readiness" and "all backgrounding has been completed." (App. 175.)

Mr. Deeds scheduled an appointment and saw Dr. Ann McKinstry at St. Luke's Work Well Solutions November 21, 2013. (App. 72 and 179.) Dr. McKinstry is a licensed medical doctor, board certified in family medicine. (App. 97-98.) Dr. McKinstry received on-the-job training for occupational medicine and reasonable accommodations. (App. 102 and 104.) Dr. McKinstry performed less than ten total pre-employment firefighter medical exams for Marion and the City of Cedar Rapids during her career at St. Luke's Work Well Solutions. (App. 99.)

Dr. McKinstry discovered in her meeting with Mr. Deeds that he had been diagnosed with MS and had active symptoms within the past year. (App. 103 and 105.) Thus, Dr. McKinstry sought out Dr. Jeffrey Westpheling, her colleague who is a licensed medical doctor, board certified in occupational medicine, to provide her guidance on Mr. Deeds' case. (App. 100, 103 and 110.)

Dr. Westpheling had performed around fifty-six pre-employment firefighter medical exams for Marion and the City of Cedar Rapids during his

career at St. Luke's Work Well Solutions. (App. 111.) When performing pre-employment medical exams for cities, both Drs. McKinstry and Westpheling rely on the forms and criteria loaded into the computer system to guide their testing so that the testing is related to the essential functions of the relevant position. (App. 101 and 112.)

Dr. Westpheling recalled that he had seen Mr. Deeds in September, 2013, for a pre-employment physical for the City of Cedar Rapids, at which time Dr. Westpheling sought and obtained (with a release provided by Mr. Deeds) his medical records from Dr. Shivapour. (App. 103-104.) Dr. Westpheling pointed Dr. McKinstry to the 2013 National Fire Protection Association ("NFPA") standards binder in the clinic, which contained not only "essential job tasks" for firefighters, but also contained a chapter on "Medical Evaluations of Candidates." (App. 104 and 129-151.) Dr. McKinstry read the NFPA standards on "Medical Evaluations of Candidates," specifically Section 6.17 relating to MS, and also reviewed Dr. Shivapour's records regarding Mr. Deeds' diagnosis, treatment and course of disease. (App. 103-104.)

Based on this information, Dr. McKinstry rendered an opinion that Mr. Deeds was not medically qualified to perform the essential functions of the

City's firefighting job. (App. 179.) This opinion matched Dr. Westpheling's opinion, rendered in September 2013. (App. 180.)

Mr. Deeds admits that the pre-employment medical exam is necessary to determine whether a candidate is capable of performing the essential functions of the job with or without accommodation. (App. 71.)

November 21, 2013, Chief Jackson received a two-page fax from St. Luke's Work Well Solutions which stated Mr. Deeds was "not medically qualified to do the essential functions of the job" and was signed by Dr. McKinstry. (App. 176-177.) The fax contained no other information about the reason Mr. Deeds did not qualify as a firefighter. (App. 82-83 and 176-177.) Chief Jackson did not seek any additional information from Dr. McKinstry regarding the fax. (App. 83.) While Mr. Deeds signed a medical release at St. Luke's Work Well Clinic, Chief Jackson stated he did not have a medical release from Mr. Deeds. (App. 292 and 85.) Mr. Deeds' summary judgment pleadings filed with the district court did not establish a factual dispute regarding Chief Jackson's claim regarding the medical release.

No one from St. Luke's Work Well Solutions offered any information about why Mr. Deeds did not qualify for the firefighter position, and Chief Jackson did not ask for that information. (App. 82.) Chief Jackson did not know "what the problem was" and said "[i]t could have been anything." (App.

83.) Nothing prevented Mr. Deeds from informing Chief Jackson or Assistant Chief Krebill about his MS diagnosis or asking for reasonable accommodations. (App. 87, 94 and 76.)

D. *The City's revocation of the job offer*.

Chief Jackson called Mr. Deeds about the fax and said there was an issue and he "was not fit for duty according to the physicians." (App. 83.) Mr. Deeds did not tell Chief Jackson during that call that he had MS. (App. 83.) Mr. Deeds did not offer any information about why he did not qualify. (App. 82.) Mr. Deeds did not ask Chief Jackson for a conversation about how to accommodate him at the Marion Fire Department. (App. 73.)

November 25, 2013, Chief Jackson sent a letter to Mr. Deeds stating that he regretted doing so, but he was revoking the tentative employment offer. (App. 178.) Chief Jackson decided to revoke the offer because Mr. Deeds "was not fit for duty as a firefighter," not because he thought Mr. Deeds was disabled or required reasonable accommodations. (App. 83 and 87.) Chief Jackson had "no idea what [Mr. Deeds'] physical limitations were." (App. 86.)

Assistant Chief Krebill testified that Chief Jackson never told her he was revoking Mr. Deeds' offer because he had a disability or required reasonable accommodations. (App. 94.)

STANDARD OF REVIEW

This court reviews summary judgment rulings made by the district court for corrections of errors at law. *Goodpaster v. Schwan's Home Serv., Inc*., 849 N.W.2d 1, 6 (Iowa 2014) (citing *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 717 (Iowa 2001); Iowa R. App. P. 6.907). "Summary judgment is proper when the movant establishes there is no genuine issue of material fact and it is entitled to judgment as a matter of law." *Id.* (citing *Swartzendruber v. Schimmel*, 613 N.W.2d 646, 649 (Iowa 2000); Iowa R. Civ. P. 1.981(3)). "The burden is on the moving party to demonstrate that it is entitled to judgment as a matter of law." *Id*. (quoting *Sallee v. Stewart,* 827 N.W.2d 128, 133 (Iowa 2013)). In determining whether the moving party has met this burden, the court views the record in the light most favorable to the nonmoving party. *Id.* (citing *Wright v. Am. Cyanamid Co.*, 599 N.W.2d 668, 670 (Iowa 1999)).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO THE CITY, FINDING THE CITY DID NOT DISCRIMINATE ON THE BASIS OF A DISABILITY, AND THAT RULING SHOULD BE AFFIRMED.

A. The City Did Not Discriminate On The Basis Of A Disability Because The City Did Not Know Mr. Deeds Had Been Diagnosed With MS.

Mr. Deeds alleges that the City discriminated against him on the basis of his alleged disability when it revoked its offer of employment.

Generally, the Iowa Civil Rights Act (the "ICRA") prohibits discrimination in employment, including hiring or discharge, ***"because of"*** the applicant's disability. *Goodpaster*, 849 N.W.2d at 6 (citing Iowa Code § 216.6(1)(a)) (emphasis supplied); *see Casey's Gen. Stores, Inc. v. Blackford*, 661 N.W.2d 515, 519 (Iowa 2003) (citing Iowa Code § 216.6(1), *Boelman v. Manson State Bank*, 522 N.W.2d 73, 79 (Iowa 1994)). Additionally, the Iowa Administrative Code ("IAC") requires employers to "make reasonable accommodation to the ***known*** physical or mental limitations of an otherwise qualified handicapped applicant . . . unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its program." Iowa Admin. Code r. 161-8.27(6) (2017) (emphasis supplied).

However, the ICRA "only pronounces a general proscription against discrimination and [the Courts] have looked to the corresponding federal statutes to help establish the framework to analyze claims and otherwise apply [the] statute." *Casey's Gen. Stores, Inc.*, 661 N.W.2d at 519 (citing *Schlitzer v. Univ. of Iowa Hosps. & Clinics*, 641 N.W.2d 525, 529 (Iowa 2002); *Boelman*, 522 N.W.2d at 79); *see also Beaves v. City of Dubuque*, 801 N.W.2d

33, 2011 WL 1584336, at *6 (Iowa Ct. App. Apr. 27, 2011). Thus, in cases of circumstantial evidence, Iowa courts analyze a claim using the federal prima facie case: that an applicant must prove "(1) he has a disability; (2) he is qualified to perform the essential functions of [the position]; and (3) the circumstances of [the adverse employment action] give rise to an inference of illegal discrimination." *Goodpaster,* 849 N.W.2d at 6 (citing *Schlitzer*, 641 N.W.2d at 530). Under a disparate treatment theory[1] of employment discrimination, Mr. Deeds must prove that the decision not to hire him was "because of" a disability. *See Casey's Gen. Stores*, 661 N.W.2d at 519 (citing *Schlitzer*, 641 N.W.2d at 530). "The final element [of the prima facie case] requires [Mr. Deeds] to show he…suffered an adverse employment decision because of his [] disability." *Id.* at 521 (citing *Schlitzer*, 641 N.W.2d at 530-32).

Here, the City focused on the third element, and the district court granted summary judgment on that element.

Mr. Deeds' case fails as a matter of law because it is undisputed that the decision-maker, Chief Jackson, did not know Mr. Deeds had an alleged disability. (App. 71, 87 and 93-94.) Mr. Deeds admits that when Chief

[1] Mr. Deeds' district court pleadings did not assert a disparate impact theory of employment discrimination.

Jackson called him to tell him about the revocation of his job offer because he "was not fit for duty according to the physicians," Mr. Deeds did not offer information about his MS to Chief Jackson during that phone call. (App. 83.) Furthermore, Mr. Deeds never asked Chief Jackson to have a conversation about his condition or job accommodations, nor did he seek a second opinion or ask to speak to the City's Human Resources office. (App. 73 and 87.)

On its face, the ICRA disability discrimination provision says the employer must act "because of" the disability. Iowa Code § 216.6(1)(a) (2016). On its face, the IAC says the employer must "know" of the disability. Iowa Admin. Code r. 161-8.27(6). The United States Supreme Court also requires knowledge, stating that where a decision-maker is "truly unaware that such a disability existed, it would be impossible for [his] hiring decision to have been based, even in part, on [Plaintiff's] disability. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 54 n. 7 (2003). "[I]f no part of the hiring decision turned on [Plaintiff's] status as disabled, [Plaintiff] cannot, *ipso facto*, have been subject to disparate treatment." *Id*. Other courts agree. *See, e.g.*, *Pulczinski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1003 (8th Cir. 2012) (citing *Raytheon Co. v. Hernandez*, 540 U.S. 44, 55 (2003)); *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 803 (7th Cir. 2005) (citing 42 U.S.C. § 12112(b)(5)(A)); *Estades-Negroni v. Assocs. Corp. of N. Am.*, 377 F.3d 58,

64 (1st Cir. 2004) (citing *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 261 (1st Cir. 2001), and EEOC, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act*, FEB (BNA) 405:7601, at 7605-06 (March 1, 1999)); *Whitney v. Bd. of Educ. of Grand Cty.*, 292 F.3d 1280, 1285 (10th Cir. 2002) (citing 42 U.S.C. § 12112(b)(5)(A)); *Streeter v. Premier Servs, Inc.,* 9 F.Supp. 3d 972, 979 (N.D. Iowa 2014) (granting summary judgment because the plaintiff could not prove he suffered an adverse employment action because of his disability where the employer did not know of the alleged disability).

Mr. Deeds argues that since Chief Jackson revoked the job offer because Dr. McKinstry stated that Mr. Deeds did not medically qualify for the position, he "should have known" he was discriminating on the basis of a disability. However, this argument cuts to a conclusion without considering all of this case's undisputed facts and applying them to the relevant case law.

Chief Jackson said he did not revoke the offer because he thought Mr. Deeds was disabled or may need accommodations. (App. 83 and 87.) Rather, in this case, Chief Jackson said he did not know "what the problem was" and that "it could have been anything." (App. 83.) In fact, when Chief Jackson called Mr. Deeds and told him that he "was not fit for duty according to the physicians," Mr. Deeds failed to inform Chief Jackson that he had MS or

provide any other information about why he may not have qualified. (App. 83 and 82.) Mr. Deeds admits he did not ask Chief Jackson for a conversation about how to accommodate him at the Marion Fire Department, nor did he ask for a second opinion or ask to speak to the City's Human Resources office. (App. 73 and 87.) Having no knowledge about Mr. Deeds' condition at all, Chief Jackson revoked the offer based on the physician's statement that Mr. Deeds "was not fit for duty as a firefighter." (App. 83 and 87.)

Further supporting the City's arguments, in order for a medical condition to qualify as a disability under Iowa law, it must be a physical or mental impairment which substantially limits one or more life activities. Iowa Admin. Code r. 161-8.26(1) (2017). Not all medical conditions qualify as a disability under Iowa's law. *See, e.g.*, *Jackson v. Bossard IIP, Inc.*, 725 N.W.2d 658, 2006 WL 3313780, at *2 (Iowa Nov. 16, 2006) (holding an employee's narcolepsy was not a disability under the ICRA); *Smith v. Creston Mun. Utils./Water Dept.*, 791 N.W.2d 711, 2010 WL 4792159, at *3-5 (Iowa Ct. App. Nov. 24, 2010) (holding arthritis was not a disability under the ICRA). Therefore, it does not automatically follow that because Mr. Deeds had a medical condition that medically disqualified him from the firefighter position, he also had a disability. Because the City did not have any knowledge about Mr. Deeds' condition, one cannot reach the conclusion Mr.

Deeds desires: that Chief Jackson knew or should have known that he was discriminating "because of" a disability. The district court's summary judgment decision for the City should be affirmed.

B. The City Did Not Have A Discriminatory Motive And Dr. McKinstry Was Not The City's Agent.

Mr. Deeds contends that summary judgment should not have entered on the third element of the prima facie case because: (i) Dr. McKinstry had a discriminatory motive and (ii) Dr. McKinstry was the City's agent. These arguments fail for many reasons.

First, Mr. Deeds admitted he did not have any evidence Dr. McKinstry wanted to sabotage his ability to work as a firefighter because of his MS. (App. 334.) Mr. Deeds said he had no knowledge that Dr. McKinstry held animus toward people with MS. (App. 334.) Mr. Deeds said he had no belief or evidence that Dr. McKinstry was "conspiring" with the City to exclude him from employment. (App. 334.) It was undisputed that Dr. McKinstry held no ill will against people with an MS diagnosis. (App. 106.) Finally, it was undisputed that Dr. McKinstry and Chief Jackson never spoke to each other about Mr. Deeds. (App. 106 and 87.)

Concerning Mr. Deeds' second argument, the district court correctly found that Dr. McKinstry was not the City's agent. The *Restatement (Third) of Agency* defines agency as "the fiduciary relationship that arises when one

person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." *Rest. (Third) of Age*ncy § 1.01. Here, the district court correctly found that the City cannot "control" Dr. McKinstry, who must exercise her own independent medical judgment in rendering an advisory opinion. *See, e.g.*, *Sahai v. Davies*, 557 N.W.2d 898, 901 (Iowa 1997) (finding physician contracted with employer to conduct employment physical was providing and had a right to provide his independent medical judgment).

While the City provided forms and criteria for St. Luke's Work Well Solutions to use to guide the testing of applicants with respect to the essential functions of the relevant position, Dr. McKinstry completed the forms using her own independent judgment. (App. 101 and 112.) Mr. Deeds provided no evidence that any City employee or agent directed Dr. McKinstry on ***how*** to complete the forms or what medical opinion to render. Dr. McKinstry never even spoke with Chief Jackson about Mr. Deeds. (App. 106 and 87.) Furthermore, it is undisputed that Dr. McKinstry chose, based upon her own judgment and that of her colleague's (without direction from the City), to

consult the NFPA guidelines[2] and Mr. Deeds' treating neurologist's records in order to render her opinion on Mr. Deeds' fitness for duty as a firefighter. (App. 393, 394 and 398-407.) Thus, there is no evidence that the City "controlled" Dr. McKinstry's medical opinion.

Mr. Deeds also contends that Dr. McKinstry (the alleged agent) controlled the City's (the alleged principal) hiring decision. (Deeds' Appeal Brief pp. 27-28.) However, Mr. Deeds' argument is based on an incomplete description of the record. While Chief Jackson said that he felt he could not overrule Dr. McKinstry's decision, he also said he did not know the reasons for her decision because he did not receive a medical release in this particular case. (App. 85.) Chief Jackson further testified that he relied on St. Luke's Work Well Solutions to advise him whether someone can perform the essential functions of the job. (App. 86.) But, if he received information from St. Luke's Work Well Solutions about the need for accommodations (which

[2] Mr. Deeds also contends the NFPA guidelines Dr. McKinstry relied upon are a blanket exclusion. First, Dr. McKinstry did not rely solely on the NFPA guidelines. Rather, she relied upon Mr. Deeds' occupational and health forms, "the time course" of Mr. Deeds' MS, Dr. Westpheling's records containing his educated and experienced opinion, Mr. Deeds' treating neurologist's records and her own medical knowledge about MS. (App. 393, 394 and 398-407.) Second, NFPA 1582 does not provide a blanket exclusion for all persons with MS. Instead, it is applicable only to those persons with MS activity or progression within the previous three years who desire to perform emergency firefighting functions. (App. 131 and 139.)

did not happen in this particular case), he would have taken that information to the City's Human Resources office. (App. 86.) And, the Chief said the ultimate decision on hiring firefighters was his, not St. Luke's Work Well Solutions. (App. 79 and 517.)

Because the undisputed facts make clear that Dr. McKinstry was not the City's agent, her knowledge (or alleged motives) cannot be imputed to the City and the district court's summary judgment ruling must be affirmed.

C. The City Was Entitled To Rely On Dr. McKinstry's Advisory Opinion.

Mr. Deeds contends that summary judgment should not have entered on the third element of the test because Dr. McKinstry's examination was "not an individualized assessment," should have only relied upon the Municipal Fire and Police Retirement System of Iowa ("MFPRSI") standards, and because the City was not permitted to "insulate itself from liability by contracting the medical evaluation out…" (Deeds' Appeal Brief pp. 23-28.) However, the City had arranged for an individualized assessment and had the right to rely on its contractor to perform such assessment.

Concerning the City's individualized assessment of Mr. Deeds, when Chief Jackson made the tentative job offer to Mr. Deeds contingent upon a medical exam that indicated "job readiness," Chief Jackson understood and relied upon St. Luke's Work Well Solutions to perform the individual medical

exam in a manner consistent with the essential functions of the position, professional medical standards, and the Municipal Fire and Police Retirement System standards. (App. 81-82, 86 and 175.) When performing pre-employment medical exams for Marion, both Drs. McKinstry and Westpheling rely on the forms and criteria from the City which are loaded into the computer system to guide their testing so that the testing was related to the essential functions of the relevant position. (App. 101 and 112.)

To Mr. Deeds' second argument, while the City had not formally adopted the NFPA standards, there is no legal bar to Dr. McKinstry using those guidelines to aid her in rendering an advisory opinion. The MFPRSI form Dr. McKinstry used contains general categories to check (e.g., heart, lungs, neurological, etc.) (App. 578.) The MFPRSI form does not, on its face, bar the physician from seeking guidance from their colleague or a medical text or the NFPA standards to better understand an applicant's condition. (Id.) Moreover, the Iowa Code sections in Chapter 400 direct the participating cities to follow certain protocols and guidelines. Iowa Code Chapter 400 does not state that it intends to direct or usurp the medical judgment of the examining physician. Instead, Iowa law provides that an employer "should be free to seek out [an] expert medical opinion and those professionals asked

to give such opinions should be free to make independent medical judgments." *Sahai*, 557 N.W.2d at 901.

Regarding his third argument, Mr. Deeds cites *EEOC v. Am. Tool & Mold Inc*., 21 F.Supp. 3d 1268, 1284 (M.D. Fla. 2014), for the proposition that an employer cannot "blindly" rely on a medical provider's opinion where the "examination could not have been, as a matter of law or logic, an individualized assessment that accounted for the essential functions of the position." However, that case is factually inapposite to this one because the employer in *American Tool & Mold Inc*. never provided job descriptions to the third party conducting/managing the pre-employment examination process. *Id.* Here, Chief Jackson believed that St. Luke's Work Well Solutions had everything it needed to conduct a pre-employment medical examination from the MFPRSI, and if the clinic did not, then the City's Human Resources office would have followed up. (App. 517.) This is consistent with what both St. Luke's Work Well Solutions physicians said: that they had pre-loaded forms to complete which were related to the essential functions of the particular position for which they were testing. (App. 101 and 112 and see App. 578.)

Finally, it appears Mr. Deeds argues that since Dr. McKinstry did not supply anything other than a medical disqualification to Chief Jackson, the

Chief "should have known" the assessment was somehow (allegedly) flawed. Yet, Chief Jackson explained he did not inquire further because he never received a medical release signed by Mr. Deeds. (App. 85.) There is no evidence in the record that Chief Jackson willfully ignored Mr. Deeds' release or even knew one existed. Finally, Mr. Deeds did not plead, did not provide evidence, nor argue that there was a policy to ignore an applicant's medical release.

For the reasons stated above, the district court's grant of summary judgment should be affirmed.

D. The Duty To Inquire Further Belonged To Mr. Deeds, And Not To The City.

Mr. Deeds argued the medical disqualification gave rise to a duty that Chief Jackson ask Mr. Deeds about his condition and whether he needed an accommodation. As argued above, the medical disqualification does not immediately lead to the conclusion Mr. Deeds required an accommodation. And, in any event, it was Mr. Deeds' duty to ask for an accommodation, not Chief Jackson's duty to inquire. *Magnussen v. Casey's Mkting. Co.*, 787 F.Supp. 2d 929, 956 (N.D. Iowa 2011) (*citing Ballard v. Rubin*, 284 F.3d 957, 960 (8th Cir. 2002)) (holding "[i]f an employee fails to make a request for accommodation, then his employer has no duty to accommodate"). Said differently, where a disability is not observable or known, it is the "disabled"

person's request for an accommodation which triggers the employer's obligation to participate in the interactive process. "[T]he employee cannot expect the employer to read [his] mind and know [he] secretly wanted" an accommodation. *Scheer v. City of Cedar Rapids*, 956 F.Supp. 1496, 1500 (N.D. Iowa 1997) (quoting *Morton v. GTE N., Inc.*, 922 F.Supp. 1169, 1180 (N.D. Tex. 1996) (internal quotation marks omitted)).

As noted, the exception to this rule is if a person's disability and the need to accommodate are obvious, then the person is not tasked with the obligation to request an accommodation. *Barnes v. Nw. Iowa Health Ctr.*, 238 F.Supp. 2d 1053, 1086 (N.D. Iowa 2002) (citing *Walsted v. Woodbury Cty.*, 113 F.Supp. 2d 1318 (N.D. Iowa 2000)). However, here it is undisputed there were no observable signs during the City interviews that Mr. Deeds had an alleged physical disability. (App. 75, 87 and 93.)

Furthermore, since Chief Jackson called Mr. Deeds before sending the revocation letter, Mr. Deeds had the opportunity to disclose his condition and to request an accommodation. (App. 83.) Yet, Mr. Deeds did not tell Chief Jackson about his condition nor ask for a conversation about accommodations. (App. 83 and 73.) Nothing prevented Mr. Deeds from informing Chief Jackson or Assistant Chief Krebill about his MS diagnosis or asking for reasonable accommodations. (App. 87, 94 and 76.) Mr. Deeds also admitted

that nothing prevented him from asking the St. Luke's Work Well Solutions doctors to share his medical information with the City. (App. 75-76.)

Finally, as a policy matter, finding the employer should have asked about an accommodation when the employer did not observe a disability or health condition; has no information about the condition causing the medical disqualification; ***and*** where the applicant does not offer any information to the employer, puts the employer between a rock and a hard place. If the medical condition is ***not*** a disability, then by asking the question the employer has created a cognizable legal claim for the applicant: that his job offer was revoked because he was "regarded as having an impairment." Iowa Admin. Code r. 161-8.26(5) (2017).

For these reasons, the district court's summary judgment ruling should be affirmed.

II. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO THE UNITYPOINT DEFENDANTS, FINDING THE UNITYPOINT DEFENDANTS DID NOT AID AND ABET DISABILITY DISCRIMINATION AND THAT RULING SHOULD BE AFFIRMED.

A. The City Joins In The UnityPoint Defendants' Arguments.

The City concurs with and joins in the UnityPoint Defendants' arguments with respect to Mr. Deeds' aiding and abetting claims. The district court's summary judgment ruling in favor of the UnityPoint Defendants should be affirmed for the reasons stated by the UnityPoint Defendants and the district court.

CONCLUSION

WHEREFORE, for all the reasons stated above, the district court correctly granted summary judgment to both the City and the UnityPoint Defendants and the district court ruling should be affirmed.

REQUEST FOR ORAL ARGUMENT

Because this case involves the application of settled legal principles applied to undisputed facts, the City respectfully requests the Court deny Mr. Deeds' request for oral argument. However, in the event the Court grants Mr. Deeds' request, the City respectfully requests to be heard in an amount equal to that which Mr. Deeds receives.

/s/ Amy L. Reasner

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