IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 16-1666
LINN COUNTY NO. LACV082464

NOLAN DEEDS,
Plaintiff-Appellant

vs.

CITY OF MARION, ST. LUKE'S WORK WELL SOLUTIONS, ST. LUKE'S HEALTHCARE, and IOWA HEALTH SYSTEM d/b/a UNITY POINT HEALTH,
Defendants-Appellees.

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

APPELLANT'S FINAL REPLY BRIEF

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ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING THE CITY'S DECISION TO RESCIND PLAINTIFF'S EMPLOYMENT OFFER WAS NOT MOTIVATED BY HIS DISABILITY

In *Goodpaster v. Schwan's Home Service, Inc.*, 849 N.W.2d 1, 6 (Iowa 2014), the Iowa Supreme Court unambiguously reiterated the elements of a disability discrimination claim under the Iowa Civil Rights Act. To prevail on such a claim, the plaintiff "must initially prove a prima facie case by showing: (1) he has a disability, (2) he is qualified to perform the essential functions of the … position, and (3) the circumstances of his termination raise an inference of illegal discrimination." *Id.* The City of Marion cites to *Goodpaster*, concluding that, "Mr. Deeds must prove that the decision not to hire him was 'because of' a disability." (City Brief[1], p. 13). The City's statement of the legal standard is correct, but stops one step short of a full explanation. To establish the causation element – "because of" – Nolan need only show that his disability "played a part" in Defendants' decision to rescind his offer of employment. *DeBoom v. Raining Rose, Inc.*, 772 N.W.2d 1, 13 (Iowa 2009).

The Court should review the district court's decision under the *Goodpaster* framework, examining whether the circumstances of the City's denial of employment raises an inference of illegal discrimination.

[1] References to "City Brief" and "Unity Point Brief" refer to the parties' Appeal Briefs.

The City's primary argument is that, since it outsourced its medical examination of Nolan and relied only on the outcome of the examination, rather than the reasons underlying it, then the City could not have discriminated against Nolan when its contracted agent disqualified Nolan because of his disability. (City Brief, pp. 14-17). None of the City's decision-makers could articulate a single function of the firefighter job Nolan could not perform when the offer was rescinded. (Jackson Dep. 38:4-8) (App. 256); (Krebill Dep. 25:23-26:2) (App. 263-264); (McKinstry Dep. 66:25-67:3) (App. 273). Instead, the medical disqualification from its contracted physician stands as the City's sole basis for rescinding Nolan's offer – and Chief Jackson admitted he knew the disqualification was related to a medical problem. (Jackson Dep. 53:4-55:1) (App. 257-258).

The City essentially maintains it cannot be liable for discrimination because it denied Nolan employment not because of his multiple sclerosis, but because he could not pass a medical examination *due to* his multiple sclerosis. (City Brief, p. 17). The district court was convinced, finding, "the City did not withdraw the job offer because of Mr. Deeds' disability. It withdrew the offer because Mr. Deeds, according to the screening physician, was not medically qualified to perform." (Ruling, p. 13) (App. 635). The district court's holding that the City *could not* have been motivated by Nolan's disability, because the City relied on a medical disqualification that was based exclusively upon the same

disability, contradicts the district court's earlier finding that "[f]acts exist both for and against Mr. Deeds' ability to safely discharge the duties of a firefighter" and "Mr. Deeds has generated a genuine issue of material fact on his qualification." (Ruling, p. 12) (App. 634).

In *Boelman v. Manson State Bank*, 522 N.W.2d 73, 80 (Iowa 1994), the plaintiff was a bank vice president responsible for "supervising bank personnel, overseeing bank operations, and handling loans." 522 N.W.2d at 76. The plaintiff was diagnosed with "probable multiple sclerosis" that manifested primarily in personality and attitude changes. *Id.* Employees complained about the plaintiff's personal interactions, and the plaintiff's supervisor noted the plaintiff was handling substantially less work than another vice president. *Id.* The bank fired the plaintiff because of its performance-related concerns. *Id.* The case turned on whether the evidence supported the district court's decision that the plaintiff was no longer qualified when the bank fired him. *Id.* at 78 ("the issue here … was whether Boelman's disability made him unqualified for his job").[2]

The City – and the district court – interpret the law in a way which would allow employers to filter out disabled prospective employees by outsourcing any task which touches on the applicant's disability, and asking their contracted agent

[2] The case was tried to the district court, which held, as the finder of fact, that the plaintiff was no longer qualified.

not to share any such information. Where *Boelman* clearly illustrates a situation where the connection between adverse action and disability is nearly *always* present, the district court's ruling provides a blueprint for staging an end-around the law. In *Boelman*, the district court found the bank fired the plaintiff because of his performance problems rather than his disability. *Id.* at 77. The Iowa Supreme Court held the district court "erred in concluding that the defendants did not discharge [the plaintiff] because of his disability" when the reason for the employee's discharge – performance concerns brought about by the disability – was "causally connected to" the employee's disability. *Id.*

The City's argument, and the district court's reason for granting summary judgment to the City, must fail for the same reason. The City's contracted medical examination disqualified Nolan solely because of his multiple sclerosis. Just like the "performance concerns" in *Boelman*, the failed medical examination was causally connected to Nolan's disability. The City's decision to rescind Nolan's job offer was therefore based on his MS diagnosis and resulting symptoms, and violates the ICRA. The district court erred in concluding otherwise.

Nolan recognizes there is no evidence showing Chief Jackson had actual knowledge of the particular health condition which led to the City's contracted physician to medically disqualify Nolan. However, Chief Jackson's admission that he knew Nolan was disqualified because of a medical condition, coupled

with Dr. McKinstry's admission that Nolan's multiple sclerosis diagnosis was the sole basis for the disqualification, is enough for a reasonable jury to find in Nolan's favor. *See Boelman*, 522 N.W.2d at 77; *Goodpaster*, 849 N.W.2d at 18 (company's reliance on "health issues" supports conclusion that plaintiff presented a jury issue on causation).

The City cites *Raytheon Co. v. Hernandez*, 540 U.S. 44, 54 n.7 (2003), in support of its argument that, even though its contracted physician had actual knowledge of Nolan's disability, the physician's decision to withhold that information from the City shields it from liability under the ICRA. (City Brief, p. 15). *Hernandez* involved an employer's refusal to employ a former employee who had previously been forced to resign from the same company because of a positive drug test. 540 U.S. at 47. Unlike this case, *Hernandez* did not involve an outsourced pre-employment medical examination which led to the disqualification of the applicant. The Court's comment that it would be impossible for the rehire decision to have been based on the applicant's disability was tempered – such a concept would only apply if the employer "was entirely unaware that such a disability *existed*." *Id.* at 54 n.7 (emphasis added). Here, unlike *Hernandez*, the employer knew – and admits – the adverse action arose out of a *medical examination*, not a sterile review of a personnel file.

The City also cites *Pulczinski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1003 (8th Cir. 2012). (City Brief, p. 15). But *Pulczinski* says nothing about the

actual knowledge dispute at issue in this case; it merely cites *Hernandez*. Many of the City's other citations are to failure to accommodate cases, where the employer's obligation to engage in the interactive process is only triggered once the employer knows, or should know, the employee has a disability which may require accommodation. Each of the "failure to accommodate" cases misses the mark because there is *no question* the City's contracted physician knew of Nolan's disability and based her decision solely upon the disability.

The City also cites *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 803 (7th Cir. 2005). (City Brief, p. 15). In that case, the Seventh Circuit explained that, "[w]here notice is ambiguous as to the precise nature of the disability or desired accommodation, but is sufficient to notify the employer that the employee *may have a disability* that requires accommodation, the employer must ask for clarification." *Id.* at 804 (emphasis added). Dr. McKinstry's medical evaluation was sufficient to alert the City to Nolan's medical condition, but the City simply rubber-stamped the disqualification and did nothing to clarify whether Nolan could perform the essential functions of the job.

The City's next case, *Estades-Negroni v. Associates Corp.*, 377 F.3d 58, 64 (1st Cir. 2004), is inapposite because the employee "had not yet been diagnosed with a disability at the time she sought [accommodations]." Here, the City's contracted physician unambiguously knew of, and based her decision upon, Nolan's multiple sclerosis diagnosis. The City also cites *Whitney v. Board of Educ.*

of Grand County, 292 F.3d 1280, 1285 (10th Cir. 2002), which turned on the date of knowledge, rather than circumstances in which knowledge may be implied or imputed to an employer. Just as unhelpful is *Streeter v. Premier Services, Inc.*, 9 F.Supp.3d 972, 979 (N.D. Iowa 2014), where it was undisputed that that employer had no knowledge of the plaintiff's disability.

The City did not provide any authority contradicting, or recognizing an exception to, the rule that a principal is charged with the knowledge of its agents. *See* Restatement (Third) of Agency § 5.03; *Huff v. United Van Lines*, 28 N.W.2d 793, 799 (Iowa 1947); *Wells Enter., Inc. v. Olympic Ice Cream*, 2012 WL 2562768 at *4 (N.D. Iowa); *see also* Appellant's Brief, pp. 28-29. Instead, the City argues Dr. McKinstry was exercising her independent medical judgment when she completed the exam requested by Defendants and reported her disqualification on the form provided by Defendants. (City Brief, p. 19). While the City may not have dictated the result of Dr. McKinstry's evaluation, it certainly controlled the type and scope of examination she conducted.

Chief Jackson based his decision *entirely* on Dr. McKinstry's medical opinion, and knew the disqualification was based on some sort of *medical problem.* (11/25/13 Letter Rescinding Offer) (App. 296); (Jackson Dep. 25:4-12, 31:1-5, 37:14-18, 40:23-41:1, 53:4-55:1) (App. 252, 254-258). And unlike the employer in *Sahai,* Chief Jackson believed he did not have any authority to overrule Dr. McKinstry and hire Nolan despite the medical disqualification. (Jackson Dep.

39:19-23) (App. 256). This was enough evidence for a reasonable jury to find the City knew of Nolan's disability when it rescinded his offer.

The City also asserts a policy basis for affirming the district court's grant of summary judgment. (City Brief, p. 27). The City claims that requiring an employer to make sure its employment decisions are not discriminatory would put the employer "between a rock and a hard place." *Id.* The opposing public policy implications in this case are more concrete. The district court's opinion provides a step-by-step guide for employers looking to eschew their responsibility to perform an individualized assessment in determining whether an applicant can perform the essential functions of the job they seek.

The method approved by the district court is clear. If an employer outsources its medical examinations and follows the qualification or disqualification of the medical provider without question, then as long as the medical provider does not share any information about the reason for disqualification, neither party will be subject to liability for violating the ICRA's prohibition against disability discrimination. This is precisely the type of shield against liability discussed in *Holiday v. City of Chattanooga*, 206 F.3d 637, 645 (6th Cir. 2000). This Court should reject the City's attempts to narrow the reach of the ICRA. *See* Iowa Code § 216.18(1).

II. THE DISTRICT COURT ERRED IN FINDING THE UNITY POINT DEFENDANTS DID NOT AID AND ABET DISABILITY DISCRIMINATION

The Unity Point Defendants[3] rely exclusively upon *Sahai v. Davies*, 557 N.W.2d 898 (Iowa 1997), to support their argument that a physician's recommendation "made on the basis of his independent medical judgment at the request of a prospective employer cannot constitute discriminatory action under the ICRA." (Unity Point Brief, p. 21). The Unity Point Defendants did not address the language from *Vivian v. Madison*, 601 N.W.2d 872, 876 (Iowa 1999), in which the Court clarified it had "simply denied that the physician was in a position to control the company's hiring decisions…" The Court should reject Unity Point's invitation to disregard *Vivian* and expand *Sahai* in a way that creates an exception to the ICRA that allows an expert to render a discriminatory opinion under the guise of an "independent medical judgment."

Four justices dissented in *Sahai*, pointing out the flaw in the reasoning now advocated by Unity Point:

> The majority justifies its position by noting "an employer should be free to seek out expert medical opinion." While this may be true, it is no justification for concluding the expert is free to discriminate simply because he or she does so under the guise of "professional judgment." The immunity created by the majority has no support in the broad

[3] Defendants-Appellees St. Luke's Work Well Solutions, St. Luke's Healthcare, and Iowa Health System d/b/a Unity Point Health responded in a single brief, with unified arguments, and are accordingly referenced collectively as the Unity Point Defendants.

> language of section 216.6(1)(a) or the purposes underlying discrimination laws.

Sahai, 557 N.W.2d at 907 (Lavorato, J., dissenting). *Vivian* provided a necessary check on what the *Sahai* dissenters feared would become an "immunity," and provides a sound legal basis for Nolan's argument in favor of liability for the Unity Point Defendants.

The district court erred in holding that "Dr. McKinstry's role in the hiring process was advisory." (Ruling, p. 8) (App. 630). Nolan put forth substantial evidence showing Dr. McKinstry's conclusory opinion – which lacked the clarifying information provided via telephone by the physician in *Sahai* – controlled the City's hiring decision. (Appellant's Brief, pp. 33-35). The Unity Point Defendants respond that the district court appropriately considered the *purpose* of the medical screening, rather than the *weight* the employer placed on the opinion. (Unity Point Brief, pp. 27-28). The district court's holding appears to be loosely connected to a few sentences in *Sahai*. (Ruling, p. 7) (citing *Sahai*, 557 N.W.2d at 901, 904) (App. 629). The district court, however, went far beyond *Sahai* and transformed the concept of an "advisory" opinion into an analysis of the examining physician's subjective state of mind: "whether she conducted the examination with the purpose of advising the City of Marion." (Ruling, p. 7) (App. 629). *Sahai* does not support a reading which would limit

liability based on what a physician believes about her role in a medical examination.

Even if *Sahai* established such an approach, there is evidence in the record from which a reasonable jury could infer Dr. McKinstry was acting beyond the scope of an advisory opinion. *See* Appellant's Brief, pp. 33-36. Contrary to the Unity Point Defendants' assertion, *McCormick v. Nikkel & Assocs., Inc.*, 819 N.W.2d 368, 374 (Iowa 2012), does not undermine this concept. (Unity Point Brief, p. 28 n.4). In *McCormick*, the Court provided a straightforward explanation of the purpose underlying the control rule: "The party in control of the work site is best positioned to take precautions to identify risks and take measures to improve safety." 819 N.W.2d at 374. The difference between the Unity Point Defendants in this case, and the power contractor in *McCormick*, is that Dr. McKinstry's conduct is closer to the "bad work" cases the Court distinguished. *Id.* at 374-75. Here, there is sufficient evidence for the jury to infer Dr. McKinstry did more than provide an advisory opinion, and that she exercised control over the City's hiring decision.

The Unity Point Defendants claim that "[h]olding physicians liable under the ICRA's aiding and abetting provision would have a chilling effect on their willingness to offer thorough and accurate medical advice." (Unity Point Brief, p. 31). The Court need not address this concern, however, since it is Dr. McKinstry's erroneous application of the applicable medical protocol, her

decision to apply a nonbinding, discriminatory standard, and her decision to conceal the basis for her medical disqualification of Nolan, that provide the foundation for a reasonable jury to find that Dr. McKinstry intentionally aided or abetted the City's discrimination. It is not a question of "ignoring or modifying" a physician's independent medical judgment, but instead holding the Unity Point Defendants accountable for exercising control over the hiring decision using inaccurate, unsupported, or incorrect stereotypes about multiple sclerosis, and then withholding information that the employer would have needed to make its own, independent employment decision.

The Unity Point Defendants next ask whether physicians would be forced to "insert themselves into private employment relationships…" (Unity Point Brief, p. 32). Again, the answer is nowhere near as dire as suggested by the question. Dr. McKinstry need only to have completed the paperwork required by the Municipal Fire and Police Retirement System of Iowa to have adequately communicated the basis for her disqualification, but she chose not to.

The Unity Point Defendants also ask whether a physician should be "forced to choose between complying with the mandates of federal HIPAA law or divulging the confidential health information of their patients…" (Unity Point Brief, p. 33). Again, not a problem in this case. Nolan provided an Authorization to Release Medical Information, but Dr. McKinstry still chose not

to communicate the bases of her disqualification. Justice Lavorato disposed of similar public policy arguments in his *Sahai* dissent:

> Sahai suggests that if a physician can be held liable under the circumstances of this case, the physician will be placed in a dilemma. The dilemma, he claims, is having to choose between (1) violating a physician's Hippocratic oath not to knowingly harm a patient or (2) facing discrimination allegations. By the tone of its opinion, the majority implicitly agrees.
>
> I see no such dilemma. Nissen employed Sahai to give a medical opinion on Davies' fitness to work. Davies was clearly able to perform assembly-line work when Sahai examined her, and Sahai should have approved her for this work. Such an opinion would not have prevented Sahai from honoring his Hippocratic oath. All Sahai had to do to comply with both his oath and the law was to (1) warn Davies of the increased risks associated with a pregnant woman doing assembly-line work, (2) advise her against taking the job because of these risks, and (3) leave the final decision to her. Instead, he made the decision for her.
>
> In essence, Sahai was like a gatekeeper to job opportunities at Nissen. A successful physical and favorable recommendation constituted the entry way to those opportunities. In Davies' case, passage was conditioned on a discriminatory criterion, nonpregnancy.
>
> In my opinion, Sahai's decision not to classify Davies as fit for employment solely because she was pregnant violated the Iowa Civil Rights Act. The commission correctly decided this case, and I would affirm.

Sahai, 557 N.W.2d at 907 (Lavorato, J., dissenting).

The public policy questions presented by the Unity Point Defendants are all easily mitigated, or completely inapplicable, under the facts of this case. A reasonable jury could find that the Unity Point Defendants intentionally aided or

abetted discrimination in violation of the Iowa Civil Rights Act, without any of the ominous public policy results implied by the Unity Point Defendants.

CONCLUSION

For the reasons set forth herein, and in his earlier Brief, Plaintiff-Appellant Nolan Deeds respectfully requests that the Court reverse the district court's grant of summary judgment and permit Plaintiff to have a jury of his peers, not a judge, resolve the merits of his claims against the Defendants.

CERTIFICATE OF COST

I, Nathan Borland, certify that there was no cost to reproduce copies of the preceding Plaintiff-Appellant's Final Reply Brief because the appeal is being filed exclusively in the Appellate Courts' EDMS system.

Certified by: *_/s/ Nathan Borland_*

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I, Summer Heeren, hereby certify that on the 24th day of April, 2017, I electronically filed the foregoing Final Reply Brief with the Clerk of the Iowa Supreme Court by using the EDMS system. Service on all parties will be accomplished through EDMS.

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