IN THE IOWA SUPREME COURT

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

PLAINTIFF-APPELLANT NOLAN DEEDS' APPLICATION FOR FURTHER REVIEW

IOWA COURT OF APPEALS DECISION DATED OCTOBER 11, 2017

Brooke Timmer AT0008821
brooke@employmentlawiowa.com
Katie Ervin Carlson AT0008958
katie@employmentlawiowa.com
Nathan Borland AT0011802
nate@employmentlawiowa.com
FIEDLER & TIMMER, P.L.L.C.
8831 Windsor Parkway
Johnston, IA 50131
Telephone: (515) 254-1999
Fax: (515) 254-9923
ATTORNEYS FOR PLAINTIFF-APPELLANT

QUESTIONS PRESENTED FOR REVIEW

- Did the Court of Appeals err in recognizing an exception to the Iowa Civil Rights Act that allows employers to escape liability for denying employment to qualified people with disabilities by outsourcing their post-offer physical examinations?

- Did the Court of Appeals err in failing to analyze the merits of Plaintiff's aiding and abetting claim?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

GROUNDS FOR FURTHER REVIEW

Plaintiff Nolan Deeds seeks further review, pursuant to Iowa Rule of Appellate Procedure 6.1103, of the October 11, 2017, decision of the Iowa Court of Appeals. In that decision, the court upheld summary judgment in favor of the Defendants on Nolan's claims of disability discrimination and aiding and abetting discrimination. This Court should grant further review because the decision of the Court of Appeals conflicts with the decisions in *Goodpaster v. Schwan's Home Service, Inc.*, 849 N.W.2d 1 (2014), *Sahai v. Davies*, 557 N.W.2d 898 (Iowa 1997), *Courtney v. American Nat. Can Co.*, 537 N.W.2d 681 (Iowa 1995), and *Boelman v. Manson State Bank*, 522 N.W.2d 73 (Iowa 1994). Iowa R. App. P. 6.1103(1)(b)(1).

This Court also should grant further review because this case presents an issue of broad public importance that the Supreme Court should ultimately determine. Iowa R. App. P. 6.1103(1)(b)(4).

The purpose of Iowa's prohibition against disability discrimination is to prevent employers from relying upon fear or stereotypes about disabilities in making employment-related decisions. Instead of relying on such stereotypes, the law requires employers to make employment decisions based upon an applicant's ability to perform the essential functions of a job, with or without reasonable accommodation, despite his disability.

The Iowa Civil Rights Act ("ICRA") was passed in 1965 "to establish parity in the workplace and market opportunity for all." *Vivian v. Madison*, 601 N.W.2d 872, 873 (Iowa 1999).

The decision of the Court of Appeals recognizes immunities for employers and third-party medical providers that will eviscerate the disability discrimination provision of the ICRA and gut the purpose of the ICRA. If allowed to stand, the decision will permit thinly-veiled discrimination against qualified job applicants with disabilities, undermining the purpose of the ICRA.

INTRODUCTION AND PROCEDURAL HISTORY

Nolan was diagnosed with relapsing remitting multiple sclerosis in December 2011. (App. 119-121). In March 2012, Nolan applied to be a full-time firefighter for the City of Marion. (App. 561-565). As part of the application process with the City, Nolan passed a written test and a physical agility test. (App. 84, 546). On April 3, 2012, the Marion Civil Service Commission certified that Nolan was qualified for selection as a firefighter. (App. 544-545). On November 13, 2013, the City offered Nolan a full-time paid firefighter position, contingent upon satisfactory completion of a physical examination and background check. (App. 85, 547).

On November 21, 2013, Nolan underwent a post-offer fitness for duty examination at St. Luke's Work Well Solutions in Cedar Rapids.[1] (App. 550). UnityPoint physician Dr. Ann McKinstry conducted the examination. Although she admits Nolan "probably" could perform all the essential functions of the firefighter job, Dr. McKinstry nonetheless decided that Nolan could not be a firefighter because he has multiple sclerosis. (App. 531). Dr. McKinstry's disqualification was based on an industry guideline which contradicted the

[1] The parties and lower courts have referred to St. Luke's Work Well Solutions, St. Luke's Healthcare, and Iowa Health System d/b/a UnityPoint Health collectively as the "UnityPoint Defendants" throughout the proceedings. For the sake of clarity, Plaintiff continues that practice herein.

statutorily-mandated physical examination protocol, and which the City never adopted. (App. 510-11, 514, 522, 528, 541). The industry standard excludes from employment *all* applicants with multiple sclerosis who have had any symptoms in the three years prior to their application. (App. 179-191, 527). Once she knew Nolan had MS, Dr. McKinstry felt like determining whether Nolan could perform the essential functions of the firefighter job was "sort of a moot point." (App. 527, 531).

The Municipal Fire and Police Retirement System of Iowa (MFPRSI) provides a form for physicians to indicate whether a firefighter candidate is medically qualified to perform the essential functions of the job. (App. 551). If a physician medically disqualifies a candidate, "the basis for that conclusion should be set out in the 'Comments' section" of the form. (App. 551). Dr. McKinstry completed the form but neglected to provide any information regarding the basis for Nolan's medical disqualification. (App. 551).

The City revoked Nolan's offer of employment without seeking any additional information. (App. 512, 514, 515-16, 553). Fire Chief Terry Jackson did not believe he had the authority to overrule Dr. McKinstry. (App. 516).

On January 30, 2015, Nolan filed a Petition charging Defendant City of Marion with disability discrimination in violation of the ICRA, and charging the UnityPoint Defendants with aiding and abetting discrimination in violation of the ICRA. (App. 1-6).

On June 21, 2016, the UnityPoint Defendants filed a Motion for Summary Judgment (App. 336-356), which Nolan resisted (App. 448-476). The City of Marion filed its own Motion for Summary Judgment (App. 22-50), which Nolan also resisted (App. 192-212). On August 29, 2016, the trial court granted both Motions for Summary Judgment and dismissed all Nolan's claims. (App. 623-640).

This is an appeal by Nolan of the summary judgment entered for Defendants on his disability discrimination and aiding and abetting claims under the ICRA. Nolan filed timely Notice of Appeal on September 27, 2016. (App. 641-42). On October 11, 2017, the Court of Appeals issued its opinion affirming the district court's decision granting summary judgment on Nolan's claims.

There is no dispute that the City revoked Nolan's offer *because of* his disability, but the district court and Court of Appeals excused the discrimination, holding that Nolan could not show the City intended to discriminate against him when it blindly accepted Dr. McKinstry's medical disqualification. In so doing, the Court of Appeals created a loophole in Iowa law that permits employers to escape liability for disability discrimination. This Court should vacate the opinion of the Court of Appeals, reverse the judgment of the district court, and remand the case for trial because a reasonable jury can find that the City discriminated against Nolan because of his disability and that the UnityPoint Defendants aided and abetted discrimination.

ARGUMENT

I. The decision of the Court of Appeals invites employers to discriminate against qualified applicants with disabilities by outsourcing their post-offer physical examinations.

To prevail on his disability discrimination claim under the Iowa Civil Rights Act, Nolan must prove: (1) that he has a disability, (2) that he is qualified to perform the essential functions of the firefighter position, and (3) that the circumstances of the City's decision to rescind his job offer raise an inference of illegal discrimination. *Goodpaster v. Schwan's Home Serv., Inc.*, 849 N.W.2d 1, 6 (Iowa 2014). The district court held that Nolan "created a genuine factual dispute regarding the existence of a disability," (App. 633) and "generated a genuine issue of material fact on his qualification." (App. 634). The decisions of both the district court and the Court of Appeals turned on the third element.

Despite finding a genuine dispute of material fact on Nolan's qualification to perform the job to which he had applied, the district court then held, "the City did not withdraw the job offer because of Mr. Deeds' disability. It withdrew the offer because Mr. Deeds … was not medically qualified to perform." (App. 635). In so holding, the district court endorsed the City's argument that it did not deny Nolan employment because of his *disability*, but because he could not pass a medical screening because of his disability. That holding was erroneous considering *Boelman v. Manson State Bank*, 522 N.W.2d 73, 77 (Iowa 1994) in which this Court held that when the reason for an employee's discharge is

"causally connected to" the employee's disability, the discharge is "because of" the employee's disability.

The Court of Appeals acknowledged that the City relied on Dr. McKinstry's medical disqualification. Opinion, 6. With this key fact in mind, the Court of Appeals next should have asked, "Was the physician's disqualification discriminatory?" After all, if Nolan could perform the essential functions of the firefighter job despite his disability, then he was qualified to perform the job and should not have been denied employment. *Boelman*, 522 N.W.2d at 80; *see also Courtney v. American Nat. Can Co.*, 537 N.W.2d 681, 685 (Iowa 1995) ("A person is qualified within the meaning of chapter 216 if the person 'can perform the essential functions of the job 'in spite of' his or her disability").

"[A]n employer may not base its employment decisions on 'prejudice, stereotypes, or unfounded fear.'" *Courtney*, 537 N.W.2d at 685 (quoting *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987)). "Consequently, a blanket exclusion of a particular class of disabled persons is not allowed unless the disability necessarily renders all members of the class incapable of performing the essential functions of the job." *Id.* (citing *Frank v. American Freight Sys., Inc.*, 398 N.W.2d 797, 801 (Iowa 1987)). A decision to disqualify Nolan based on his multiple sclerosis diagnosis, despite the *undisputed fact* that he could perform the essential functions of the job, runs afoul of the ICRA. It is *precisely* the type of

discrimination the ICRA is meant to eradicate. *See, e.g.* 42 U.S.C. § 12101(a)(5) ("individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, … exclusionary qualification standards and criteria, … and relegation to lesser … jobs"); *see also Goodpaster*, 849 N.W.2d at 15 ("whether an individual is qualified for a particular job, despite his or her disability, requires an *individualized* inquiry") (quoting *Courtney*, 537 N.W.2d at 685) (emphasis added).

But rather than ask whether the disqualification was discriminatory, the Court of Appeals asked whether the City *directed* its contracted physician to apply a discriminatory standard. Opinion, 7. Answering the question in the negative, the Court of Appeals held that, "[t]he evidence only supports a finding that the City contracted with UnityPoint to complete the medical evaluation of any firefighter candidates and relied on its doctors' professional judgment in making its final hiring decisions. This does not provide a sufficient basis for liability under the ICRA." Opinion, 7. With those words, the Court of Appeals created a shield against liability for employers who outsource their post-offer physical examinations. Put another way, the Court of Appeals authorized employers to discriminate, via proxy, against qualified applicants with disabilities.

The Court of Appeals did not cite any authority to support its holding. *See* Opinion, 6-7. There is, however, ample authority to the contrary. *See Bates v. Dura Auto. Sys., Inc.*, 767 F.3d 566, 581 (6th Cir. 2014) (employers cannot use

third parties to "circumvent ADA protections"); *Holiday v. City of Chattanooga*, 206 F.3d 637, 645 (6th Cir. 2000) ("Employers do not escape their legal obligations under the ADA by contracting out certain hiring and personnel functions to third parties"); *Fromm v. MVM, Inc.*, 371 Fed.Appx. 263, 271 (3d Cir. 2010) (unpublished) (employer "cannot rest on blind contractual compliance to escape liability for discrimination"); *Wagner v. Inter-Con Security Systems, Inc.*, --- F.Supp.3d ----, 2017 WL 4382135 at *7 (S.D.N.Y. Sep. 29, 2017) ("the court is skeptical of an argument that suggests an employer, via contract, can delegate" an essential functions determination "in its entirety"); *Keneipp v. MVM, Inc.*, --- F.Supp.3d ---, 2017 WL 3197732 at *4 (N.D. Okla. July 27, 2017) ("the ADAAA does not permit MVM to utilize such a contract as a shield for any disability discrimination"); *E.E.O.C. v. American Tool & Mold, Inc.*, 21 F.Supp.3d 1268, 1284 (M.D. Fla. 2014) (argument that an individualized assessment was made was belied by evidence that examiner did not know what essential functions were); *Wise v. Akal Sec., Inc.*, 2005 WL 3487741 at *3 (W.D. Tex. Dec. 21, 2005) (employer prohibited from relying upon retained physician "to avoid its ADA obligations").

Most importantly, this Court's precedent makes it clear that blind reliance upon a contracted medical examination is no excuse for denying employment to a *qualified* applicant with a disability. In *Sahai v. Davies*, 557 N.W.2d 898, 901 (Iowa 1997) this Court held that "an employer should be free to seek out expert

medical opinion[s] and those professionals asked to give such opinions should be free to make independent medical judgments." The Court specifically warned, however, that an employer's failure to ask follow-up questions concerning a physician's finding that an employee could not perform the essential functions of a job might violate "employment discrimination laws." *Id.* at 902.

The Court's language in *Sahai*, warning against blindly accepting a third-party medical provider's view on an applicant's qualification, is consistent with the Court's decisions in *Boelman* and *Courtney*, which both highlighted the need to determine an applicant's ability to perform the essential functions of a job. *Boelman*, 522 N.W.2d at 80; *Courtney*, 537 N.W.2d at 685. The decision of the Court of Appeals conflicts with *Sahai*, *Boelman*, and *Courtney* because it excuses an employer's denial of employment to qualified applicants with disabilities. If an applicant can perform the essential functions of a job, "the qualified person element is met." *Casey's General Stores, Inc. v. Blackford*, 661 N.W.2d 515, 520 (Iowa 2003).

A key argument made by the parties at the district court, and briefed again by the parties before on appeal, was whether the City should be charged with the knowledge of Nolan's physical impairment that the UnityPoint Defendants obtained in the scope of their agency with the City. The Court of Appeals broadly held that there was no "evidence that the City knew of Deeds's MS diagnosis." Opinion, 7. However, the standard for liability is not whether the

City had knowledge that Nolan had a physical impairment that constitutes a disability *under the law*. Rather, the standard is whether the City had knowledge that Nolan had a physical impairment. *Adams v. Rice*, 531 F.3d 936, 953 (D.C. Cir. 2008) ("in pure discrimination cases … an employer's knowledge of the precise limitation at issue is irrelevant; so long as the employee can show that her impairment ultimately clears the statutory hurdle for a disability … the employer will be liable if it takes adverse action against her based on that impairment"); *Schmidt v. Safeway Inc.*, 864 F.Supp. 991, 997 (D. Or. 1994) ("an employer knows an employee has a disability when the employee tells the employer about his condition, *or* when the employer otherwise becomes aware of the condition, *such as through a third party* or by observation") (emphasis added). The City clearly had that knowledge because the UnityPoint Defendants communicated their *medical* disqualification of Nolan to the City. (App. 551).

Moreover, in holding the City had no knowledge of Nolan's physical limitations, the Court ignored the principles of agency. Opinion, 7. 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 June 29, 2012).

Under simple agency theory, the City knew everything that the UnityPoint Defendants knew about Nolan's physical impairment. There is no exception to this rule for situations in which the agent fails to expressly pass its knowledge on

to the principal. Such an exception would encourage employers to have their agents disqualify disabled applicants, but not communicate the reason for the disqualification, a practice anti-discrimination laws disallow.

There is no authority allowing an employer to deny employment to a *qualified* applicant with a disability, just as there is no authority supporting an exception to the ICRA's prohibition against disability discrimination for employers that do the same by outsourcing their post-offer physical examinations. Allowing employers to break the law so long as they use non-employee agents to do so contradicts the legislature's command to broadly construe the ICRA. Iowa Code § 216.18(1). Plainly, employers cannot bury their heads in the agency sand to avoid liability.

UnityPoint, the City's third-party medical provider, disqualified Nolan from employment because of his disability. The City relied *solely* upon the medical provider's disqualification in reaching its decision to rescind Nolan's offer of employment. *There is no clearer example of a qualified applicant being denied employment because of his disability*. The decisions of the trial court and the Court of Appeals should be vacated, and the case should be remanded for trial.

II. The decision of the Court of Appeals failed to analyze the propriety of the district court's grant of immunity to medical providers who utilize discriminatory standards to exclude qualified applicants for employment.

With respect to the UnityPoint Defendants, the district court held that *Sahai v. Davies*, 557 N.W.2d 898 (Iowa 1997), a discrimination case, is "equally applicable to an aiding and abetting claim" under the ICRA. (App. 630). Although it failed to cite any Iowa cases supporting its interpretation, the district court read *Sahai* to provide the UnityPoint Defendants with immunity from liability so long as Dr. McKinstry's involvement was "advisory" and she rendered an independent medical judgment on Nolan's physical qualification. (App. 630). The district court held that Dr. McKinstry subjectively believed the examination was advisory, and despite Dr. McKinstry's admission that Nolan was qualified to perform the essential functions of the job, that the disqualification was based on Dr. McKinstry's independent medical judgment. (App. 630-631). Based on these conclusions, the district court found the UnityPoint Defendants did not aid and abet disability discrimination.

Despite the district court's analysis wholly lacking any legal support, the Court of Appeals did not analyze the district court's holding on the aiding and abetting issue and simply assumed that *Sahai* did not apply to Nolan's aiding and abetting claim. Opinion, 8. Although Nolan agrees that *Sahai* should not apply to his aiding and abetting claims, the Court of Appeals failed to analyze the merits of the issue.

The Court of Appeals reached its conclusion, and did not consider whether *Sahai* controlled the outcome of the aiding and abetting claim,

"[b]ecause [Plaintiff] has failed to show the City engaged in a discriminatory employment practice, his claim that UnityPoint aided or abetted in the discriminatory employment practice necessarily fails." Opinion, 9. For the reasons set forth above, the City's outsourcing of post-offer physical examinations should not insulate it from liability for its denial of employment to a qualified applicant. Thus, Nolan's aiding and abetting claim should be analyzed on the merits.

To succeed on his aiding and abetting claim against the UnityPoint Defendants, Nolan must prove a reasonable jury could find the UnityPoint Defendants intentionally aided, abetted, compelled, or coerced the City to engage in unlawful disability discrimination. Iowa Code § 216.11. Unfortunately, there is a drought of Iowa appellate cases interpreting the ICRA's aiding and abetting provision. *See, e.g.*, *Blazek v. U.S. Cellular Corp.*, 937 F. Supp. 2d 1003, 1024 (N.D. Iowa 2011) ("[t]he parties have not cited, and I have not found, any other decision of the Iowa Supreme Court interpreting the 'aiding and abetting' portion of § 216.11."). In moving for summary judgment, the Unity Point Defendants focused on the argument that *Sahai* controls the outcome of the aiding and abetting claim and relieves UnityPoint of any liability.

In *Sahai*, this Court narrowly held that a third-party physician who recommended a pregnant employee should not be hired, and telephoned the employer to explain that reasoning, was not liable for discrimination under the

ICRA because "within the context of the [employer's] hiring decision the clinic's role was advisory." *Sahai*, 557 N.W.2d at 901 (emphasis added). The Court further explained that, "[r]ecommendations made in this context that are directly responsive to a prospective employer's request are not in our view discriminatory actions." *Id.*

Two years after deciding *Sahai*, the Court clarified its holding, explaining it "simply denied that the physician was in a position to control the company's hiring decisions…" *Vivian v. Madison*, 601 N.W.2d 872, 876 (Iowa 1999). The unanimous *Vivian* opinion clearly establishes the difference between the physician in *Sahai* and Dr. McKinstry in this case and should have provided the basis for the district court to conclude *Sahai* does not relieve the UnityPoint Defendants from liability.

Chief Jackson received the examination form and rescinded Nolan's job offer. (App. 553). Dr. McKinstry's medical disqualification was Chief Jackson's sole basis for rescinding Nolan's offer. (App. 512, 514, 515). Chief Jackson did not believe he had the authority to overrule Dr. McKinstry and hire Nolan despite the medical disqualification. (App. 516). The City of Marion never provided Chief Jackson with any training on disability discrimination. (App. 80).

Chief Jackson, Assistant Chief Krebill, and Dr. McKinstry all agree that there were no essential functions of the firefighter job that Nolan could not perform at the time the City rescinded the job offer. (App. 263-64, 273, 516).

Chief Jackson did not investigate the basis for Dr. McKinstry's opinion that Nolan was not medically qualified for the firefighter job, nor was the Chief bothered that Dr. McKinstry provided absolutely no justification for her opinion. (App. 512). Though Chief Jackson sought no details, he knew disqualification was related to a medical problem. (App. 517-518). Dr. McKinstry provided the City with nothing more than a stark disqualification. This disqualification ended the hiring process for Nolan because the opinion controlled the City's hiring decision in its entirety, something Dr. McKinstry herself knew would happen. (App. 532). The City's decision blindly to follow Dr. McKinstry's disqualification renders *Sahai* inapposite.

There is evidence from which a reasonable jury could infer that Dr. McKinstry was not merely acting "in furtherance of an independent duty," but that she personally sought to keep Nolan from serving as a firefighter because of his MS diagnosis. At least three neurologists disagreed with Dr. McKinstry's opinion. Dr. Richard Neiman, one of Nolan's treating neurologists, testified Nolan could have performed the essential functions of his job without posing a significant risk to the health or safety of others. (App. 534, 536). Dr. Neiman also testified there is no reason to disqualify a person from working as a firefighter just because he had some activity related to an MS diagnosis in the previous three years. (App. 535). Dr. Torage Shivapour agreed with Dr. Nieman's sentiment. (App. 537, 570). A third neurologist, Dr. Bruce Hughes, opined that "the reason

for the disqualification was not based in fact that Mr. Deeds could not safely perform any of these duties" and that Nolan's MS would not "pose a direct threat to the health or safety of himself or others if he were permitted to work as a firefighter." (App. 576-577).

Armed with the unambiguous professional opinion of three neurologists that Nolan could safely perform the essential functions of the firefighter position, a reasonable jury could conclude that Dr. McKinstry was relying on prejudice, stereotypes, or unfounded fear when she disqualified Nolan from employment because of his disability.

The decision of the Court of Appeals should be vacated, and the decision of the district court should be reversed, because a reasonable jury could find that the UnityPoint Defendants aided and abetted discrimination.

CONCLUSION

The decision of the Court of Appeals invites employers to implement post-offer medical examination schemes utilizing third parties to identify and exclude qualified candidates with disabilities without regard for the candidate's ability to perform the essential functions of the job, thus undermining the clear purpose of the ICRA. Under the Court of Appeals' decision, employers have unprecedented freedom to deny employment to qualified applicants with disabilities by relying blindly upon medical disqualifications from outside medical providers. Such practices cannot be sanctioned under Iowa law.

This Court should grant further review, vacate the decision of the Court of Appeals, reverse the decision of the district court, and remand this matter for a jury trial on Nolan's claims of disability discrimination and aiding and abetting discrimination.

ATTORNEY'S COST CERTIFICATE

I, Nathan Borland, certify that there was no cost to reproduce copies of the preceding Application for Further Review because the Application is being filed exclusively in the Appellate Courts' EDMS system.

Certified by: */s/ Nathan Borland*

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type-Style Requirements

1. This application complies with the type-volume limitation of Iowa R. App. P. 6.1103(4) because:

   [_X_] this application contains 3,894 words, excluding parts of the application exempted by Iowa R. App. P. 6.1103(4).

2. This application complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because:

   [_X_] this application has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font size in Garamond type style.

Certified By: */s/ Nathan Borland*

CERTIFICATE OF SERVICE AND FILING

I, Cheryl Smith, hereby certify that on the 31st day of October, 2017, I electronically filed the foregoing Application for Further Review with the Clerk of the Iowa Supreme Court by using the EDMS system. Service on all parties will be accomplished through EDMS.

Certified By: */s/ Cheryl Smith*

IN THE COURT OF APPEALS OF IOWA

No. 16-1666
Filed October 11, 2017

NOLAN DEEDS,
Plaintiff-Appellant,

vs.

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

Appeal from the Iowa District Court for Linn County, Christopher L. Bruns, Judge.

Nolan Deeds appeals the district court order granting summary judgment in favor of the defendants on his claims of disability discrimination. **AFFIRMED.**

Nathan J. Borland, Brooke Timmer, and Katie Ervin Carlson of Fiedler & Timmer, P.L.L.C., Johnston, for appellant.

Amy L. Reasner of Lynch Dallas, P.C., Cedar Rapids, for appellee City of Marion.

Samantha M. Rollins, Karin A. Johnson, and Mitch G. Nass of Faegre Baker Daniels LLP, Des Moines, for appellees St. Luke's Work Well Solutions, St. Luke's Healthcare, and Iowa Health System d/b/a UnityPoint Health.

Heard by Vaitheswaran, P.J., and Doyle and Bower, JJ.

DOYLE, Judge.

Nolan Deeds appeals the district court order granting summary judgment in favor of the defendants on his claims of disability discrimination. He contends the district court erred in finding his disability did not motivate the City of Marion (City) to rescind its offer of employment as a firefighter. He also contends the court erred in finding UnityPoint Health (UnityPoint)[1] did not aid and abet the City in its discriminatory conduct.

I. Background Facts and Proceedings.

Deeds received a probable diagnosis of Multiple Sclerosis (MS) after he experienced numbness and weakness on the right side of his body in 2011. When the numbness returned approximately one year later, this time affecting both sides of his body, Deeds was diagnosed with relapse and remitting MS. Since that time, he has been asymptomatic.

Deeds has wanted to be a firefighter since he was a child. In preparation for that career, he earned an Associate's Degree in Fire Science and became nationally certified for Fire Fighter I, Fire Fighter II, and Hazardous Material Operations by the International Fire Service Accreditation Congress. He also received his National EMS Certification as an EMT-Basic.

In March 2012, Deeds applied for a position as a firefighter with the City. The City did not offer Deeds the position at that time but interviewed Deeds for the position again when it had another opening in the fall of 2013. On November

[1] Deeds claims three entities—St. Luke's Work Well Solutions, St. Luke's Healthcare, and Iowa Health Systems d/b/a UnityPoint Health—aided and abetted the City in its discriminatory conduct. We will refer to these defendants collectively as UnityPoint.

13, 2013, the City extended Deeds "a tentative job offer," which was conditioned on a physical examination indicating his "job readiness" and a background check.

The City employed UnityPoint to conduct its medical examinations for those it offered the firefighter position. In conducting the medical examination, Dr. Ann McKinstry spoke with Deeds but did not perform a physical examination of him. During her meeting with Deeds, Dr. McKinstry discovered Deeds had been diagnosed with MS and had active symptoms within the previous year.

Iowa law requires the Municipal Fire and Police Retirement System of Iowa (MFPRSI) to set the standards for entrance physical examinations. *See* Iowa Code §§ 400.8(1), 411.1A (2013). Because the MFPRSI standards to not specifically reference MS, Dr. McKinstry consulted guidelines of the National Fire Protection Association (NFPA), which exclude from service any firefighter candidate with MS who has experienced symptoms during the three years preceding an examination for fitness. Based on the NFPA guidelines, Dr. McKinstry determined that Deeds was not medically qualified to perform the essential functions of the firefighter position.

Dr. McKinstry completed the MFPRSI form, stating Deeds was not medically qualified. Although the form requested the examining physician set out any basis for this conclusion, Dr. McKinstry did not provide any additional information on the form. After receiving the examination form, the City rescinded its job offer to Deeds without seeking additional information.

Deeds filed a complaint with the Iowa Civil Rights Commission in February 2014, alleging the City discriminated against him based on disability by rescinding its offer of employment. The commission issued Deeds an

administrative release concerning his employment discrimination claims in November 2014.

In January 2015, Deeds filed a petition alleging the City engaged in disability discrimination when it rescinded his job offer based on his disability. He also alleged UnityPoint aided and abetted the City in its discrimination. The City and UnityPoint separately moved for summary judgment on Deeds's claims. Following a hearing, the district court granted summary judgment on Deeds's claims in favor of both defendants.

II. Scope and Standard of Review.

We review the district court's grant of summary judgment for correction of errors at law. *See Barker v. Capotosto*, 875 N.W.2d 157, 161 (Iowa 2016). To succeed on a motion for summary judgment, the moving party must show the material facts are undisputed and, applying the law to those facts, the moving party as entitled to judgment as a matter of law. *See id.*; *Nelson v. Lindaman*, 867 N.W.2d 1, 6 (Iowa 2015). Therefore, our review is limited to two questions: (1) whether there is a genuine dispute regarding the existence of a material fact and (2) whether the district court correctly applied the law to the undisputed facts. *See Homan v. Branstad*, 887 N.W.2d 153, 164 (Iowa 2016).

A fact is material if it may affect the lawsuit's outcome. *See id*. There is a genuine dispute as to the existence of a fact if reasonable minds can differ as to how the factual question should be resolved. *See id*. "Even if facts are undisputed, summary judgment is not proper if reasonable minds could draw from them different inferences and reach different conclusions." *Walker Shoe Store v. Howard's Hobby Shop*, 327 N.W.2d 725, 728 (Iowa 1982).

We review the facts in the light most favorable to the nonmoving party. *See Nelson*, 867 N.W.2d at 6. We draw all legitimate inferences supported by the record in favor of the nonmoving party. *Id*. We also give the nonmoving party the benefit of the doubt when determining whether the grant of summary judgment was appropriate. *See Butler v*. *Hoover Nature Trail*, *Inc*., 530 N.W.2d 85, 88 (Iowa Ct. App. 1994).

III. Discrimination Claim Against the City.

The Iowa Civil Rights Act (ICRA) prohibits discrimination in employment based on disability. *See* Iowa Code § 216.6(1)(a). To establish a prima facie case of disability discrimination, Deeds must show: (1) he is a person with a disability, (2) he was qualified to perform the job either with or without an accommodation for his disability, and (3) he suffered an adverse employment decision because of his disability. *See Casey's Gen*. *Stores*, *Inc*. *v*. *Blackford*, 661 N.W.2d 515, 519 (Iowa 2003).

The district court concluded a genuine issue of material fact exists as to whether Deeds is a person with a disability and whether he is qualified to perform the job. However, it concluded Deeds failed to show a genuine issue of fact exists as to whether the City took adverse action based on his disability. Rather, the court found the City withdrew its offer of employment because Deeds was not medically qualified to perform the job. The court further determined Deeds failed to show the City had a discriminatory motive in rescinding its offer. On this basis, the court granted summary judgment in favor of the City on Deeds's disability discrimination claim.

Deeds argues there is sufficient evidence to support a finding that the City rescinded its job offer based on his MS, which qualifies him as a person with a disability. He claims the reason the City rescinded its employment offer was based on his MS diagnosis; but for his MS diagnosis, Deeds claims he would have been hired.

Fire Chief Terry Jackson, who made the ultimate hiring determination, made the determination to rescind the conditional job offer to Deeds after reviewing the medical evaluation form completed by Dr. McKinstry. The form only stated that Deeds was not medically qualified to perform the essential functions of the firefighter position; the form provided no further explanation for this determination. Chief Jackson did not ask anyone from UnityPoint the basis for the finding Deeds was not medically qualified, nor did anyone from UnityPoint offer him that information. Chief Jackson did not learn the reason from Deeds. Chief Jackson testified that because he had no further explanation for the finding, he "had no idea what the problem was" and believed "[i]t could have been anything."

Deeds's argument that the City discriminated against him based on his disability pivots on Dr. McKinstry's use of the NFPA guidelines in reaching her determination that Deeds was not medically qualified to perform the essential functions of the firefighter position. He argues the NFPA guidelines exclude all applicants who have shown MS symptoms in the three preceding years from employment as a firefighter rather than determining each individual's qualifications based on an individualized assessment and therefore violate the ICRA. Accordingly, Deeds claims that Dr. McKinstry's reliance on the NFPA

guidelines gives rise to an inference of disability discrimination. He notes the City has never adopted the NFPA protocol and the MFPRSI's protocol, which is controlling, makes no reference to NFPA standards.

Assuming the use of the NFPA guidelines was inappropriate, the problem with Deeds's argument is that the City never instructed UnityPoint or Dr. McKinstry to use the NFPA guidelines in determining whether any applicant for a firefighter position was medically qualified to perform the essential functions of the job. There is no evidence to support a finding that the City knew UnityPoint or Dr. McKinstry utilized these guidelines to determine Deeds's job eligibility. The evidence only supports a finding that the City contracted with UnityPoint to complete the medical evaluation of any firefighter candidates and relied on its doctors' professional judgment in making its final hiring decisions. This does not provide a sufficient basis for liability under the ICRA.

To summarize, Dr. McKinstry was to assess Deeds's medical qualification for the firefighter position based on the statutorily mandated MFPRSI standards. The MFPRSI standards do not refer to MS. Upon learning Deeds had a diagnosis of MS, Dr. McKinstry took it upon herself to consult the NFPA standards regarding MS to determine whether Deeds was medically qualified for the firefighter position. There is no evidence the City knew Dr. McKinstry used the NFPA guidelines or went outside the MFPRSI standards in determining Deeds was not medically qualified, nor is there evidence that the City knew of Deeds's MS diagnosis.

Because Deeds's has failed to show the City rescinded its job offer based on his MS diagnosis, we affirm the grant of summary judgment in favor of the City.

IV. Aiding-and-Abetting Claim Against UnityPoint.

The ICRA prohibits not only discrimination but also aiding and abetting discrimination. *See* Iowa Code § 216.11(1); *Johnson v*. *BE & K Constr*. *Co*., 583 F. Supp. 2d 1044, 1052 (S.D. Iowa 2009). Deeds alleged UnityPoint aided and abetted the City in its discrimination against him based on his disability.

The district court granted summary judgment in favor of UnityPoint on Deeds's aiding and abetting claim because it found UnityPoint's role in the hiring process was merely advisory, citing *Sahai v*. *Davies*, 557 N.W.2d 898, 900-01 (Iowa 1997) (holding a third-party physician who recommended that an employer not hire a pregnant person for assembly line positions was not liable for discrimination under the ICRA because his role in the employer's hiring decision was only advisory). However, the plaintiff in *Sahai* brought a claim of discrimination under Iowa Code section 216.6(1), 557 N.W.2d at 901, not an aiding and abetting claim under section 216.11(1). On this basis, Deeds argues *Sahai* is distinguishable.

Assuming the *Sahai* holding does not apply to claims brought under section 216.11(1), Deeds's claim still fails. Iowa Code section 216.11(1) states that it is "an unfair or discriminatory practice for . . . [a]ny person to intentionally aid, abet, compel, or coerce another person to engage in any of the practices declared unfair or discriminatory by this chapter." In order to impose liability on one who aids and abets an employer's participation in a discriminatory

employment practice, the plaintiff must first establish the employer's participation in the discriminatory practice. *See Pellegrini v*. *Sovereign Hotels*, *Inc*., 760 F. Supp. 2d 344, 356 (N.D.N.Y. 2010) (interpreting New York Executive Law section 296(1), which makes it an unlawful employment practice to "aid, abet, incite, compel or coerce" employment discrimination); *cf*. *Tarr v*. *Ciasulli*, 853 A.2d 921, 929 (N.J. 2004) (holding that "in order to hold an employee liable as an aider or abettor, a plaintiff must show that . . . 'the party whom the defendant aids must perform a wrongful act that causes an injury'" (quoting *Hurley v*. *Atlantic City Police Dep't*, 174 F.3d 95, 127 (3d Cir. 1999))). Because Deeds has failed to show the City engaged in a discriminatory employment practice, his claim that UnityPoint aided or abetted in the discriminatory employment practice necessarily fails. Accordingly, we affirm the grant of summary judgment in favor of UnityPoint. *See Veatch v*. *City of Waverly*, 858 N.W.2d 1, 7 (Iowa 2015) (noting the appellate court can affirm summary judgment on a ground not relied upon by the district court so long as the ground was urged in that court and on appeal).

AFFIRMED.

Bower, J., concurs; Vaitheswaran, P.J., partially dissents.

VAITHESWARAN, Presiding Judge. (concurring in part and dissenting in part)

I concur in part and dissent in part. I agree with the majority's disposition with respect to UnityPoint, but I would find a genuine issue of material fact on the third element of the disability discrimination claim against the City. *See, e.g.*, *Goodpaster v. Schwan's Home Serv., Inc.*, 849 N.W.2d 1, 18 (Iowa 2014). Accordingly, I would reverse and remand the summary judgment ruling as to the City.

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
16-1666	Deeds v. City of Marion

Electronically signed on 2017-10-11 09:28:14