IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 16-1666

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 UNITYPOINT HEALTH

Defendants-Appellees

On Appeal From The Iowa District Court For Linn County
The Honorable Christopher L. Bruns

UNITYPOINT'S RESISTANCE TO DEEDS' APPLICATION FOR FURTHER REVIEW

IOWA COURT OF APPEALS DECISION OF OCTOBER 11, 2017

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BACKGROUND AND PROCEDURAL HISTORY

Deeds' aiding and abetting claim against UnityPoint stems from the medical opinion offered to the City of Marion by a UnityPoint family medicine physician, Dr. Ann C. McKinstry, M.D., that Deeds—who had previously been diagnosed with Multiple Sclerosis ("MS")—was not medically qualified to perform the essential job duties of the firefighter position conditionally offered to him.

Dr. McKinstry is a family practice physician at St. Luke's Work Well Solutions clinic ("Work Well"). App. 99 (Tr. 16:3-24). One of the responsibilities of Work Well clinic physicians is to perform pre-employment medical screenings of prospective firefighters on behalf of cities such as the City of Marion. App. 99 (Tr. 14:24 – 16:12); App. 111 (Tr. 12:2-5).

The procedure Dr. McKinstry and her Work Well colleague Dr. Westpheling followed when examining prospective firefighters was dictated in part by the medical protocol promulgated by the Municipal Fire & Police Retirement System of Iowa ("MFPRSI") Board. App. 99 (Tr. 14:15 – 15:22). The primary purpose of the MFPRSI medical protocol is to ensure the longevity and solvency of the disability retirement system for police and firefighters. App. 422 (Tr. 66:8-24). Consistent with its disability

retirement focus, the MFPRSI protocol only established baseline criteria aimed at identifying pre-hire conditions that may later affect an individual's ability to serve as a firefighter. App. 99 (Tr. 14:15-24); App. 422 (Tr. 66:8 – 67:13). The MFPRSI protocol places emphasis on heart and lung-related conditions. App. 422 (Tr. 66:8-24). The MFPRSI "can't possibly address every situation which may present to an examiner when evaluating a firefighter or police candidate." App. 422 (Tr. 67:2-5). The MFPRSI medical protocol does not preclude physicians from exercising their independent judgment—including the consultation and application of available industry standards—in advising as to whether a patient is medically qualified to work as a firefighter. App. 99 (Tr. 14:15-24); App. 422 (Tr. 66:8 – 67:13).

The National Fire Protection Association 1582 "Standard on Comprehensive Occupational Medical Program for Fire Departments" ("NFPA 1582")—which provides descriptive medical requirements and guidance for fire departments—is also relevant in evaluating the medical qualification of firefighter candidates. App. 415 (Tr. 34:14 – 35:6). NFPA 1582 was developed by individuals with a broad array of applicable knowledge, and represents the "consensus opinion of expert panels including fire chiefs, fire service members, physicians, [and] specialists." App. 415

(Tr. 34:23 – 35:1). Relevant here, the 2013 edition of NFPA 1582 provides that "multiple sclerosis with activity or evidence of progression within the previous three years" is a "Category A" medical condition that "preclude[s] a person from performing as a member in a training or emergency operation environment" and presents a "significant risk to the safety and health of the person or others." App. 427.

In addition to the MFPRSI protocol and NFPA 1582 guidelines available to Dr. McKinstry and Dr. Westpheling at the time they examined prospective firefighters, both physicians had access to the applicable firefighter job description. App. 266-67 (Tr. 18:1-12, 23:15 – 25:2); App. 413 (Tr. 22:8-24). Dr. Westpheling, who himself served as a City of Des Moines firefighter for more than five years, also was personally familiar with the essential job functions of a firefighter. App. 409-10, 420-21 (Tr. 5:19 – 6:14, 61:22 – 62:19).

On September 4, 2013, Dr. Westpheling performed a pre-employment medical screening of Deeds in connection with a conditional job offer to serve as a firefighter for the City of Cedar Rapids. App. 374 (Tr. 177:6-11); App. 427. Based on Dr. Westpheling's knowledge of MS, his own experience working as a firefighter, his review of Deeds' medical records, and the consensus guidance set forth in NFPA 1582, Dr. Westpheling

concluded that Deeds was not at that time medically qualified to work as a firefighter. App. 418, 420-22 (Tr. 47:10-24, 61:22 – 62:19, 67:21-25).

On November 21, 2013, Deeds underwent a second pre-employment medical screening, this time performed by Dr. McKinstry in connection with a conditional offer of employment by the City of Marion. App. 371-72 (Tr. 137:13 – 138:19); App. 389. During the examination, Dr. McKinstry learned Deeds had been diagnosed with MS and had experienced symptoms within the past year. App. 394, 399-400 (Tr. 28:17 – 29:9, 49:4 – 50:13); App. 427. This information led Dr. McKinstry to consult with her colleague, Dr. Westpheling. App. 394-95, 400 (Tr. 29:17 – 30:4, 51:9 – 52:3). Dr. Westpheling, who recalled examining Deeds, provided his records concerning that examination to Dr. McKinstry, including the NFPA guidelines. App. 393-94, 400-01 (Tr. 21:2 – 22:2, 50:1-16, 54:4 – 56:8). Dr. McKinstry believed at that time the NFPA 1582 standard represented the consensus opinion of specialized medical professionals and firefighters, and she believed it was reasonable and prudent to consult an industry specific guideline. App. 401, 405-06 (Tr. 55:8 – 56:23, 81:16-20, 84:23 – 85:2).

Dr. McKinstry also reviewed the records from the examination performed by Dr. Westpheling in connection with the City of Cedar Rapids' conditional job offer. App. 400-01 (Tr. 53:22 – 54:14). These records

included those generated by Deeds' treating neurologists, Dr. Shivapour and Dr. Neiman, which Deeds had previously provided to the Work Well clinic. App. 401 (Tr. 55:8 – 56:6). The records of Deeds' treating neurologists noted that, at the onset of Deeds' MS symptoms in December 2011, Deeds experienced "right hemibody numbness and right lower extremity weakness that lasted for approximately 2-3 months." App. 401 (Tr. 55:8 – 56:6); App. 412 (Tr. 20:5-22); App. 428-31. Then, in December 2012, Deeds experienced a recurrence that included "right foot numbness" that "spread to involve his right foot as well," then "began to involve both legs and the back of both thighs," and later experienced a "wobble[] when he walk[ed]." App. 428-31. Dr. McKinstry believed the risk that these symptoms could become exacerbated in the future made it unsafe for Deeds to work as a firefighter. App. 270, 273 (Tr. 51:9-20, 68:6-21).

Based on Dr. McKinstry's general knowledge of MS, the duration of time since Deeds had last experienced symptoms of MS, and her application of the NFPA 1582 guidelines to Deeds' particularized circumstances, Dr. McKinstry reached the medical opinion that Deeds was not at that time medically qualified to perform the job of firefighter. App. 389; App. 399, 402-03 (Tr. 49:15-25, 60:3-21, 71:1-5). Dr. McKinstry communicated her

opinion to the City of Marion by facsimile on November 21, 2013. App. 432-33.

Dr. McKinstry did not share with the City of Marion the reasons underlying her medical opinion, because she believed doing so would breach patient confidentiality. App. 396, 403 (Tr. 34:9 – 36:5, 70:9-14). It was Dr. McKinstry's practice not to share such information in the absence of a specific request from the patient or the employer and receipt of express permission from the patient. App. 396 (Tr. 35:22 – 37:7). Here, neither Deeds nor the City of Marion requested that Dr. McKinstry share additional information concerning Deeds' medical condition. App. 396, 405 (Tr. 36:20 – 37:1, 80:19 – 81:8); App. 435, 437 (Tr. 20:11 – 21:16, 31:18-22). Nothing, however, would have prevented Deeds from sharing any medical information he wished with his prospective employer. App. 378-79 (Tr. 245:12 – 246:10); App. 396 (Tr. 36:20 – 37:7).

Following receipt of Dr. McKinstry's medical opinion, the City of Marion withdrew its conditional offer of employment to Deeds. App. 436 (Tr. 23:2-7, 24:2-8); App. 442. The City of Marion stated it retracted its job offer "[b]ased on the medical fitness for duty report." App. 442. Fire Chief Terry Jackson believed, based on the medical disqualification by Work

Well, that Deeds posed a risk to the health or safety of himself or others. App. 256 (Tr. 41:2-24).

City of Marion Fire Department Chief Terry Jackson alone made the decision to withdraw Deeds' conditional job offer. App. 79, 82-83, 257 (Tr. 9:3-5, 19:4-15, 23:2-7, 50:18 – 51:5); App. 93 (Tr. 32:9-15). Jackson did not know Deeds had MS when he made his decision. App. 83, 256 (Tr. 22:22 – 24:1, 38:22 – 39:1). When Chief Jackson subsequently spoke with Deeds over the telephone to discuss his withdrawal of his job offer, Deeds did not offer to Chief Jackson that he had MS, request any accommodation, or ask for a second medical opinion at that time. App. 83, 87 (Tr. 22:22 – 24:1, 47:6-19).

At all times, the authority to hire or not hire Deeds rested with the City of Marion. App. 79, 251 (Tr. 9:3-5, 19:4-15). Work Well did not have the authority to hire or fire Deeds, or any other prospective or current firefighter, on the City's behalf. App. 257 (Tr. 50:18 – 51:5). Dr. McKinstry could merely provide her recommendation about whether Deeds was medically qualified to perform the job of firefighter, which the City could accept or not accept. App. 378 (Tr. 244:14 – 245:2); App. 404 (Tr. 77:7-10).

Deeds testified during his deposition that he does not allege Dr. McKinstry was out to "sabotage" Deeds' job offer because of his MS diagnosis. App. 375 (Tr. 180:6-13). Deeds does not have any knowledge that Dr. McKinstry harbors any animus toward people who have MS. App. 375 (Tr. 180:25 – 181:2). Finally, in response to counsel's inquiry as to whether Deeds believed Dr. McKinstry and the City of Marion were working together to exclude him from employment, Deeds answered: "No. I don't think they were conspiring with each other." App. 375 (Tr. 180:14-21). Consistent with Deeds' beliefs, Dr. McKinstry testified she wished she had been in a position to recommend Deeds for the firefighter position. App. 405 (Tr. 81:12-15).

On August 29, 2016, the District Court granted summary judgment in favor of both the City of Marion and UnityPoint. App. 623-40. The Court held Deeds had failed to generate a material issue of disputed fact as to whether the City of Marion declined to hire Deeds because of his disability. App. 634-38. As to UnityPoint, the Court—relying on this Court's decision in *Sahai v. Davies*, 557 N.W.2d 898 (Iowa 1997)—held Deeds could not prevail on his aiding and abetting claim because Dr. McKinstry had rendered an advisory opinion based on her own independent medical judgment. App. 631.

Deeds appealed, and in a ruling dated October 11, 2017, the Iowa Court of Appeals affirmed the District Court's ruling. Opinion, p. 9. The Court of Appeals held the District Court correctly concluded that Deeds' had failed to establish the City of Marion withdrew its conditional job offer because of his MS diagnosis. *Id.* at p. 8. The Court of Appeals also held the absence of a direct claim of discrimination against the City barred Deeds' aiding and abetting claim pursuant to Iowa Code § 216.11 against UnityPoint. *Id.* at p. 9.

ARGUMENT

I. Introductory Statement in Resistance of Further Review.

The procedural rules guiding this Court's determination of whether to grant further review of a decision of the Court of Appeals instruct that "[a]n application for further review will not be granted in normal circumstances." Iowa R. App. P. 6.1103(1)(b). Nothing outside of the "normal circumstances" is presented here. Indeed, both the Court of Appeals and the District Court correctly applied existing Iowa law in a manner consistent with the precedent of this Court. *See generally* Iowa R. App. P. 6.1103(1)(b)(1), (4).

II. The Court of Appeals Correctly Affirmed the District Court's Decision Granting Summary Judgment to UnityPoint.

A. The Court of Appeals' Decision Regarding Deeds' Discrimination Claim Against the City of Marion—and Its Dependent Ruling as to the Aiding and Abetting Claim Against UnityPoint—Are Based on Settled Principles of Law that Implicate No Issues of Public Importance.

As an initial matter, and as set forth more fully in the City of Marion's Resistance to Deeds' Application for Further Review, the District Court appropriately granted summary judgment to the City of Marion on Deeds' discrimination claim based on a settled application of the Iowa Civil Rights Act. Specifically, the Court accurately concluded Deeds had not generated a disputed issue of material fact as to whether the City declined to hire Deeds "because of" his disability. App. 634-38. The Court further concluded the City's decision was based on the individualized medical examination performed by Dr. McKinstry revealing Deeds was not medically qualified to perform the essential functions of the firefighter position. App. 631. Moreover, Fire Chief Terry Jackson—who made the decision not to hire Deeds—was aware only that Deeds had not passed the medical examination, and did not know Deeds had been diagnosed with MS. App. 79, 82-83, 256-57 (Tr. 9:3-5, 19:4-15, 23:2-7, 38:22 – 39:1, 50:18 – 51:5); App. 93 (Tr. 32:9-15).

The Court of Appeals therefore properly affirmed the decision of the District Court as to the City of Marion, and did so based on the application of settled principles of Iowa law. *See* Opinion, p. 8; *see also Casey's Gen. Stores, Inc. v. Blackford*, 661 N.W.2d 515, 519 (Iowa 2003) (setting forth the *prima facie* elements of a disability discrimination claim). And, as the Court of Appeals further held, this finding bars Deeds from prevailing on an aiding and abetting claim pursuant to Iowa Code § 216.11 against UnityPoint. *See* Opinion, pp. 8-9.

The premise on which the Court of Appeals relied to reach its decision—that Deeds' failure to establish a claim of discrimination against the City of Marion precludes him from prevailing on an aiding and abetting claim—is compelled by the plain wording of the statute. *See* Iowa Code § 216.11(1) (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*." (emphasis

added)).[1]

Importantly, Deeds has never disputed the premise that an underlying discriminatory practice must exist to establish an aiding and abetting claim.[2] And Deeds does not now advance the view that the Court of Appeals' recognition of this premise is inconsistent with Iowa Code § 216.11. *See generally* Deeds' Application for Further Review. The present appeal was therefore appropriately transferred to and decided by the Court of Appeals as one "presenting the application of existing legal principles." Iowa R. App. P. 6.1101(3)(a).

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[1] The Court of Appeals' interpretation is consistent with the Federal decisions interpreting Iowa law that have reached this issue. *See Stoddard v. BE & K, Inc.*, 993 F. Supp. 2d 991, 1007 (S.D. Iowa 2014) (aiding and abetting discrimination claim necessarily fails if underlying discrimination claim is dismissed); *Asplund v. iPC's Wireless, Inc.*, 602 F. Supp. 2d 1005, 1011 (N.D. Iowa 2008) (observing that criminal jurisprudence addressing aiding and abetting claims suggests liability under Iowa Code § 216.11 is only triggered when a defendant "actively participates or in some manner encourages *the commission* of an unfair or discriminatory practice *prior to or at the time of its commission*." (emphasis added)).

[2] In Deeds' opening brief, he challenged the District Court's findings related to the "viability of Nolan's disability discrimination claim against the City," but not the independent premise that an aiding and abetting claim depends upon the establishment of an underlying discrimination claim. *See* Deeds' Final Brief and Request for Oral Argument, p. 31.

B. *Sahai, Vivian,* and Iowa's Well-Settled Control Principle Preclude Aiding and Abetting Liability Against UnityPoint.

While Deeds has never asserted that an entity may be liable for aiding and abetting discrimination without a viable underlying discrimination claim, in his Application for Further Review he presents the following issue to be decided: "[d]id the Court of Appeals err in failing to analyze the merits of Plaintiff's aiding and abetting claim?" Deeds' Application for Further Review, p. 2. Deeds analyzes that question by discussing this Court's opinions in the cases of *Sahai v. Davies*, 557 N.W.2d 898 (Iowa 1997) and *Vivian v. Madison*, 601 N.W.2d 872 (Iowa 1999).

But irrespective of whether the Court concludes further review is necessary as to the viability of Deeds' claim against the City of Marion or whether the absence of a viable, underlying discrimination claim alone bars an aiding and abetting claim, denial of Deeds' Application is warranted as to the judgment in favor of UnityPoint. The District Court's reasoning as to Deeds' aiding and abetting claim flowed directly from this Court's decision in *Sahai*, and therefore is not in conflict with previous court precedent. *See* Iowa R. App. P. 6.1103(1)(b)(1). And to the extent issues of broad public importance are raised in this appeal, they are issues that have already been resolved by that very precedent established by this Court. *See* Iowa R. App.

P. 6.1103(1)(b)(4).

Specifically, the holding of *Sahai* controls the outcome here: medical advice based upon a physician's independent medical judgment and offered in an advisory capacity will not result in liability under Iowa Code § 216.11. App. 845; *Sahai*, 557 N.W.2d at 901. This Court subsequently interpreted *Sahai*'s holding, in dicta, to mean a physician is not liable for aiding and abetting unless he or she is "in a position to control the company's hiring decisions." *Vivian*, 601 N.W.2d at 876. Taken together, *Sahai* and *Vivian* stand for the proposition that control over an employer's hiring decisions requires more than the mere ability to offer an advisory opinion based on independent medical judgment.

Deeds' continued reliance on the mere fact that Chief Jackson chose to follow Dr. McKinstry's advice as evidence that UnityPoint exercised control over the City's hiring decision stretches the concept of control beyond its legal meaning. Conversely, the dictates of *Sahai* and *Vivian*—that proffering an advisory opinion that the employer may accept or reject does not result in liability—is consistent with the control principle. This Court, for example, has previously construed control as the ability to prevent a wrong from occurring. *See McCormick v. Nikkel & Assocs., Inc.*, 819 N.W.2d 368, 374 (Iowa 2012). Control is similarly viewed as the ability to direct the manner

and method of another's activity. *See generally Iowa Mut. Ins. Co. v. McCarthy*, 572 N.W.2d 537, 543 (Iowa 1997); *Downs v. A & H Const., Ltd.*, 481 N.W.2d 520, 525 (Iowa 1992).

Here, the only conclusion supported by the record is that Dr. McKinstry lacked control over the City of Marion's hiring decision. Indeed, the undisputed testimony is that the City of Marion alone held the authority to revoke Deeds' offer of employment, and that Dr. McKinstry lacked both the power and authority to disqualify prospective employees. App. 79, 82, 257 (Tr. 9:3-5, 19:4-15, 50:18 – 51:5); App. 378 (Tr. 244:14 – 245:2); App. 404 (Tr. 77:7-10). In other words, Dr. McKinstry could not direct the outcome of the City of Marion's hiring decision; to the contrary, even after Dr. McKinstry provided her advisory opinion, the City remained free to hire Deeds for any position it desired.

Moreover, Deeds conceded during his deposition he had no evidence of discriminatory intent or assistance on the part of Dr. McKinstry: Deeds testified he did not believe Dr. McKinstry gave her medical opinion in an attempt to "sabotage" his chances for employment with the City (App. 375 [Tr. 180:6-13]); he testified he was not aware of any animus Dr. McKinstry held toward individuals with MS (App. 375 [Tr. 180:25 – 181:2]); and he acknowledged he had no reason to believe that Dr. McKinstry and the City

had conspired to exclude him from employment because of his MS (App. 375 [Tr. 180:14-21]). Consistent with Deeds' beliefs, Dr. McKinstry testified she wished she had been in a position to recommend Deeds for the firefighter position. App. 405 (Tr. 81:12-15).

Following the line of authority marked by *Sahai* and *Vivian*, and consistent with the principle of control as defined by this Court, the District Court therefore properly held UnityPoint was not as a matter of law liable under Iowa Code § 216.11.

Two final points raised in Deeds' Application require response. *First*, Deeds misconstrues Dr. McKinstry's testimony as to the ability of Deeds to perform the essential functions of the firefighter position. Deeds contends Dr. McKinstry made an "admission" as to Deeds's ability to perform the essential functions of the firefighter position. Deeds' Application for Further Review, pp. 18, 20. To the contrary, Dr. McKinstry testified that because Deeds had experienced symptoms fairly recently, the risk that they would come on again made it unsafe for him to work as a firefighter. App. 531 (Tr. 66:14-21), App. 270 (Tr. 51:9-20), App. 273 (Tr. 68:6-21). These considerations formed the basis for her opinion that Deeds *was not* medically qualified to perform as a firefighter. App. 389; App. 399, 402-03 (Tr. 49:15-25, 60:3-21, 71:1-5).

Second, Deeds' reliance on the opinions offered by other physicians is misplaced. *See* Deeds' Application for Further Review, pp. 21-22. The relevant inquiry is not whether a reasonable physician in Dr. McKinstry's position would have reached a contrary conclusion; rather, it is whether the opinion offered by Dr. McKinstry was based on her independent medical judgment and offered in an advisory capacity. *Sahai*, 557 N.W.2d at 901. The medical opinions of other physicians have no bearing whatsoever on this inquiry.

CONCLUSION

The reasoning of the Court of Appeals' decision that an aiding and abetting claim is not actionable absent an underlying finding of discrimination, and the reasoning of the District Court finding an advisory opinion based on independent medical judgment does not result in liability under Iowa Code § 216.11, both flow directly from and are consistent with the principles of Iowa law that this Court has previously recognized. Accordingly, the circumstances do not warrant granting Deeds' Application for Further Review.

Dated: November 16, 2017.

Respectfully submitted,

/s/ Karin A. Johnson

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ATTORNEY'S COST CERTIFICATE

I, Mitch G. Nass, certify that there was no cost to reproduce copies of the preceding Resistance to Deeds' Application for Further Review because the appeal is being filed exclusively in the Appellate Courts' EDMS system.

Certified by: /s/ *Mitch G. Nass*

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1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) and 6.1103(4) because: this brief contains 3,535 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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I hereby certify that on November 16, 2017, I electronically filed the foregoing brief with the Clerk of The Iowa Supreme Court by using the EDMS system. Participants in the case who are registered EDMS users will be served by the EDMS system.

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