IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 16-1779
LINN COUNTY NO. LACV082466

NOLAN DEEDS,
Plaintiff-Appellant

vs.

CITY OF CEDAR RAPIDS, 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 PAUL D. MILLER

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

Less than two years ago, 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." *Goodpaster v. Schwan's Home Service, Inc.*, 849 N.W.2d 1, 6 (Iowa 2014). Despite this clear-cut language, the City of Cedar Rapids ("the City") recites a modified version of the third element, citing a federal district court decision which relied on an Iowa Supreme Court opinion that predates *Goodpaster* by a decade. (City Brief[1], p. 16) (citing *Peterson v. Martin Marietta Materials, Inc.*, 2016 WL 2886376 at *5 (N.D. Iowa May 17, 2016)).

The *Goodpaster* elements enjoy significant support. *See, e.g.*, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (third element requires showing of "circumstances which give rise to an inference of unlawful discrimination"); *see also Jones v. University of Iowa*, 836 N.W.2d 127, 147 (Iowa

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

2013); *DeBoom v. Raining Rose, Inc.*, 772 N.W.2d 1, 6 (Iowa 2009); *Smidt v. Porter*, 695 N.W.2d 9, 14 (Iowa 2005); *Fuller v. Iowa Dept. of Human Services*, 576 N.W.2d 324, 328 (Iowa 1998); *Cole v. Staff Temps*, 554 N.W.2d 699, 703 (Iowa 1996). The City offers no reason, let alone a compelling one, to abandon the *Goodpaster* elements and the well-established underlying precedent. *See Book v. Doublestar Dongfeng Tyre Co., Ltd.*, 860 N.W.2d 576, 594 (Iowa 2015) ("Stare decisis alone dictates continued adherence to our precedent absent a compelling reason to change the law"). 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.

The City argues that Plaintiff "must prove the City's subjective intent was to discriminate against him on the basis of his disability." (City Brief, pp. 17-18) (citing *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d 512, 516 (Iowa 1990)). But the City is overreaching – the phrase "subjective intent" does not appear anywhere in the *Hy-Vee* opinion. The cited portion of *Hy-Vee* includes the following quote from *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977): "Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." 453 N.W.2d at 516. The quote, which appears on the page cited by the City, plainly allows a plaintiff to establish discriminatory motive through circumstantial evidence, without requiring the plaintiff to prove "subjective intent to

discriminate." The Iowa Supreme Court has flatly rejected the rule proposed by the City. *Cole,* 554 N.W.2d at 706 ("To establish a prima facie case, [the plaintiff] is not required to prove that she suffered an adverse employment action "because of" a disability; rather, she need only make a showing that gives rise to an "inference" of discrimination on the basis of disability"). The law distinguishes between motive and intent. (Appellant's Brief, p. 21 n.4); (City Brief, p. 22) ("motive or intent").

The City 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, pp. 19-22). The district court was convinced, finding, "the City did not withdraw its job offer because of Mr. Deeds' disability; it withdrew the offer because Mr. Deeds … was not medically qualified to perform the essential functions of the firefighting duties." (Ruling, p. 15) (App. 849). 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 "Mr. Deeds has put forward a fact question on his ability to discharge firefighting duties." (Ruling, p. 14) (App. 848).

The City cites *Boelman v. Manson State Bank*, 522 N.W.2d 73, 80 (Iowa 1994) in support of the district court's finding that Nolan was not hired because he was

not medically qualified to be a firefighter. (City Brief, pp. 19-20). In *Boelman*, 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]

While the City and district court both turned to *Boelman* for support, the case actually works in Nolan's favor. 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

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

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.

The City also argues that "medical qualification" is a job requirement for its firefighters. (City Brief, p. 26). It relies, in part, on *Roberts v. City of Chicago*, 817 F.3d 561 (7th Cir. 2016), in which the Seventh Circuit held that adverse employment actions taken "because of a consequence of" a disability are beyond the scope of the ADA's prohibition against disability discrimination. 817 F.3d at 565-66; City Brief, p. 26. The *Roberts* decision cites *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194, 1196 (7th Cir. 1997), in which the Seventh Circuit proclaimed:

> Even if the individual is qualified, if his employer fires him for any reason other than that he is disabled there is no discrimination "because of" the disability. This is true even if the reason is the consequence of the disability…. The employer who fires a worker because the worker is a diabetic violates the Act; but if he fires him because he is unable to do his job, there is no violation, even though the diabetes is the cause of the worker's inability to do his job.

The commentary from *Matthews*, the sole source cited in the relevant portion of *Roberts*, is belied by Iowa Supreme Court precedent. *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 Seventh Circuit's unsupported proclamation should not supplant precedent.

The City takes issue with Nolan's inclusion of a February 10, 2016, memo from the Municipal Fire and Police Retirement System of Iowa which specifically warned providers about class-based exclusions presented by NFPA standards. (City Brief, p. 34). To the extent the City believes the memo is inapposite because it was published after the City denied Nolan employment, similar language can be found in a December 10, 2004 memo from the same organization. (12/10/04 MFPRSI Memo, p. 2) (App. 867). The memo, which was produced by Unity Point, specifically warns against what happened in this case: "An individual with a disability who is currently able to perform the essential job functions may not be disqualified because of speculation that the individual's disability may cause a risk of future injury." (12/10/04 MFPRSI Memo, p. 2) (App. 867).

The City reiterates its argument that "no one with hiring authority for the City was even aware Deeds had any disability until well after Chief English made the decision to rescind the conditional offer of employment…" (City Brief, p. 18). 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. 25-26.

The City admits one of its own employees, occupational health nurse Jenifer Stefani, knew about Nolan's MS. (Def. CR Br., p. 9) (App. 93). Chief English testified he understood the information communicated to the City by St. Luke's Work Well was that Nolan had "a condition that would not meet the standards and would thus disqualify him." (English Dep. 65:11-16) (App. 363). This was enough evidence for a reasonable jury to find the City knew of Nolan's disability when it rescinded his offer.

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, pp. 19-20). The Unity Point Defendants did not address the language from *Vivian v. Madison*, 601 N.W.2d 872, 876 (Iowa 1999),

[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.

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 Iowa Civil Rights Act 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 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. Westpheling merely played an "advisory role" in the employment process. (Ruling, p. 7) (App. 841). Nolan put forth substantial evidence showing Dr. Westpheling'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. 32-33). 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. 25-26). The district court's holding appears to be loosely connected to a few sentences in *Sahai*. (Ruling, pp. 7-8) (citing *Sahai*, 557 N.W.2d at 901, 904) (App. 841-842). 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: i.e. whether he conducted the examination with the purpose of advising the City on its prospective employee's physical qualification." (Ruling, p. 8) (App. 842). *Sahai* does not support a reading which would limit liability based on what a physician believes about his 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. Westpheling was acting beyond the scope of an advisory opinion. *See* Appellant's Brief, pp. 32-34. 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. 25 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. Westpheling'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. Westpheling did more than provide an advisory opinion, and that he 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. 27). The Court need not address this concern, however, since it is Dr. Westpheling's erroneous application of the applicable medical protocol, his decision to apply a nonbinding, discriminatory standard, and his decision to conceal the basis for his medical disqualification of Nolan, that provide the foundation for a reasonable jury to find that Dr. Westpheling 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. 28). Again, the answer is nowhere near as dire as suggested by the question. Dr. Westpheling 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 his disqualification, but he 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, pp. 28-29). Again, not a problem in this case. Nolan provided an Authorization to Release Medical Information, but Dr. Westpheling still chose not to communicate the bases of his 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.

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I, Summer Heeren, hereby certify that on the 3rd day of March, 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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