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IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 16-1666
LINN COUNTY NO. LACV82464

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

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

APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

The Supreme Court should retain this appeal because it involves substantial questions of enunciating or changing legal principles. IOWA R. APP. P. 6.1101(2)(f).

STATEMENT OF THE CASE

NATURE OF THE CASE: This is an appeal by Plaintiff Nolan Deeds, pursuant to Rule 6.103(1) of the Iowa Rules of Appellate Procedure. Plaintiff seeks review of the district court's Ruling on Defendants' Motions for Summary Judgment.

COURSE OF PROCEEDINGS: On January 30, 2015, Plaintiff Nolan Deeds ("Nolan") filed a Petition[1] in Linn County, alleging disability discrimination in violation of the Iowa Civil Rights Act, Iowa Code § 216, *et seq.* ("ICRA"). In the Petition, Nolan alleged the City of Marion ("the City") discriminated against him based on his disability in violation of Iowa Code § 216.6(1)(a). Nolan also alleged St. Luke's Work Well Solutions, St. Luke's Healthcare and Iowa Health System (collectively referred to by the district court as the "Unity Point defendants") aided and abetted that discrimination in violation of Iowa Code § 216.11(1). On April 10, 2015, the City filed its Answer. On June 8, 2015, the Unity Point defendants filed their Answer.

On June 7, 2016, the City filed a motion for summary judgment and supporting documents.[2] On June 21, 2016, the Unity Point defendants filed a

[1] All pleadings referenced in this section are included in Plaintiff's Designation of Appendix, filed herewith.

[2] The City's summary judgment brief is cited herein as "Def. Br." and the Unity Point defendants' summary judgment brief is cited herein as "Def. UP Br."

separate motion for summary judgment and supporting documents. Plaintiff resisted the City's motion on June 24, 2016, and the Unity Point motion on July 8, 2016. Defendants then filed reply briefs and additional supporting materials. The Court held a hearing on the motions on August 5, 2016.

DISPOSITION OF THE CASE: The district court consolidated the motions and on August 29, 2016, granted both summary judgment motions and dismissed Plaintiff's case without a trial. (Ruling on Defendants' Motion for Summary Judgment) (hereinafter "Ruling") (App. 623-640).

STATEMENT OF FACTS

Nolan began to experience symptoms of Multiple Sclerosis ("MS") in mid-December 2011. Dr. Richard Neiman rendered a probable diagnosis of MS on December 22, 2011. (Dep. Ex. H) (App. 119-121). Nolan experienced MS-related symptoms again in January 2013, at which point Dr. Nieman diagnosed Nolan with MS, remitting-relapsing. (Dep. Ex. Z) (App. 152-153). Dr. Neiman and Dr. E. Torage Shivapour managed Nolan's care. (Deeds Dep. 152:6-14) (App. 74); (Dr. Shivapour Note, UIHC 6-8) (App. 156-158). Nolan's last MS relapse occurred in January of 2013; he has been symptom-free since then. (Deeds Dep. 149:1-6) (App. 508).

It is Nolan's life goal to become a paid firefighter, just like his dad. (Deeds Dep. 153:23-25) (App. 74). In March of 2012, Nolan took a step toward that life goal and applied to be a full-time firefighter with the City of Marion, Iowa.

(Marion Firefighter Application Paperwork) (App. 561-565). At the time, Nolan had an associate degree in Fire Science from Kirkwood Community College, had earned his Firefighter I and Firefighter II certifications, had experience as a volunteer firefighter, had earned his EMT-Basic certification, had earned a Hazardous Materials Operations certification, and was enrolled in EMT-Paramedic classes at the University of Iowa. (Marion Firefighter Application Paperwork) (App. 561-565); (Deeds Certifications) (App. 566-568). Nolan passed the City's written test for the position. (4/3/12 FireTEAM Test Scores) (App. 546); (Jackson Dep. 26:8-15) (App. 84). Nolan also took and passed a required physical agility test. (Jackson Dep. 26:8-15) (App. 84).

On April 3, 2012, the Marion Civil Service Commission certified Nolan as eligible "for entrance level firefighter positions within the Marion Fire Department." (4/3/12 Civil Service Commission Certified List) (App. 544-545). The City then invited Nolan to interview with Fire Chief Terry Jackson and Assistant Fire Chief Debra Krebill. (Jackson Dep. 26:16-21) (App. 84). Chief Jackson and Assistant Chief Krebill both thought that Nolan performed well during the interview, and neither of them observed anything during the interview that would have dissuaded them from hiring Nolan. (Jackson Dep. 26:16-25) (App. 84); (Krebill Dep. 8:24-9:2) (App. 91). Despite a successful interview, Nolan was not offered a job after the April 2012 interviews. (Krebill Dep. 9:3-5) (App. 91).

In October 2013, the City again invited Nolan to interview for a firefighter position. Chief Jackson and Assistant Chief Krebill were both present for the second interview, and both thought that Nolan again performed well. (Krebill Dep. 9:12-10:2) (App. 91-92); (Jackson Dep. 28:7-14) (App. 84). On approximately November 13, 2013, Chief Jackson offered Nolan a full-time paid firefighter position with the City. (Jackson Dep. 30:14-18) (App. 85); (11/13/13 Offer Letter) (App. 547). Chief Jackson explained that the job offer was conditioned on a successful physical examination and background check. (11/13/13 Offer Letter) (App. 547); (Jackson Dep. 30:19-23) (App. 85).

Assistant Chief Krebill conducted Nolan's background check. (Krebill Dep. 7:23-8:23) (App. 91). Nothing came up during Nolan's background check that would have disqualified him from employment with the City. (Krebill Dep. 7:23-8:23) (App. 91); (Jackson Dep. 30:24-31:2) (App. 85).

Nolan attended a fitness for duty examination at St. Luke's Work Well Solutions (one of the Unity Point defendants) on November 21, 2013. (11/21/13 Patient Demographic Information) (App. 550). As part of the physical examination process, Nolan signed a patient's waiver that expressly authorized "St. Luke's or St. Luke's Work Well to release medical information to City of Marion—Fire Dept. for treatment dates from 11/21/2013 for the purpose of Employment related screening or health care." (11/21/13 Authorization for Release of Medical Information) (App. 549). Dr. Ann

McKinstry, a St. Luke's Work Well physician, conducted Nolan's pre-employment examination. (11/21/13 McKinstry Dictation) (App. 552). Dr. McKinstry has never received training, for treatment purposes, on the Americans with Disabilities Act or the Iowa Civil Rights Act. (McKinstry Dep. 19:11-16, 39:11-13) (App. 100, 526). At the time, Dr. McKinstry had little experience conducting pre-employment examinations for potential firefighters. (McKinstry Dep. 15:14-16:2) (App. 99); (Westpheling Dep. 83:24-84:2) (App. 113).

The Municipal Fire and Police Retirement System of Iowa ("MFPRSI") is a governmental entity tasked with providing "a comprehensive disability program for police officers and firefighters to include standards for entrance physical examinations, guidelines for ongoing fitness and wellness, disability pensions, and postdisability retirement compliance requirements." Iowa Code § 411.1A(2). Iowa law *requires* that the "physical examination for applicants for appointment to the position[] of … firefighter . . . be held in accordance with the medical protocols established by the board of trustees of the fire and police retirement system … in accordance with the directives of the board of trustees." Iowa Code § 400.8(1).

In her occupational medicine practice, Dr. McKinstry relied on a computer printout to describe the medical protocol to apply for all pre-employment examinations, including firefighters, and she acknowledged it was important to follow that protocol. (McKinstry Dep. 23:15-25:2) (App. 101). The

computer printout, which was printed the day before Nolan's examination, specified the MFPRSI's "FIRE PROTOCOL" should be used, and that forms were available on the MFPRSI website. (11/20/13 "Job Description" Print from St. Luke's Work Well Solutions, p. 1) (App. 548). Though the entire MFPRSI protocol was included on Nolan's chart, Dr. McKinstry could only say that she "might" have referred to it. (MFPRSI Medical Examination Protocol for Firefighters) (App. 554-560); (McKinstry Dep. 47:10-48:1) (App. 527).

In addition to the guidelines for physical examinations established by the MFPRSI, the National Fire Protection Association ("NFPA") has issued guidelines regarding medical requirements of firefighter candidates. This includes NFPA 1582, a protocol that outlines how to determine whether firefighter candidates are medically qualified for a position. (NFPA 1582) (App. 571). NFPA Standard 1582 includes a **blanket exclusion** of any firefighter candidate with MS who has experienced any symptoms related to MS during the three years preceding a fitness for duty examination. (NFPA 1582 §§ 6.2.2, 6.17.1(4)) (App. 571). At the time of Dr. McKinstry's examination of Nolan, the MFPRSI protocol did not incorporate, refer to, depend upon, cite, or in any way require the application of NFPA 1582. (MFPRSI Medical Examination Protocol for Firefighters) (App. 554-560).

During the November 21, 2013, appointment, Dr. McKinstry spoke with Nolan, but never actually physically examined him. (McKinstry Dep. 48:11-15)

(App. 527). Dr. McKinstry believes Nolan "probably" could have performed all the essential functions of the firefighter job. (McKinstry Dep. 66:25-67:3) (App. 531). At some point during the appointment, Dr. McKinstry learned of Nolan's MS diagnosis. After learning of Nolan's MS diagnosis, Dr. McKinstry sought out and met with Dr. Jeffrey Westpheling, another physician at the Work Well Clinic. The doctors dispute exactly when this meeting occurred. Dr. McKinstry believes it happened before she made her qualification decision regarding Nolan. (McKinstry Dep. 21:6-17, 51:11-52:3, 72:12-73:3) (App. 100, 103, 105). Dr. Westpheling, on the other hand, believes he met with Dr. McKinstry after she had "already worked through the decision process and had already completed" her examination of Nolan. (Westpheling Dep. 54:15-21) (App. 542).

Dr. McKinstry and Dr. Westpheling spoke for about 15 to 20 minutes. (McKinstry Dep. 54:15-16) (App. 529); (Westpheling Dep. 54:10-12) (App. 542). During the meeting, Dr. Westpheling recalled that he saw Nolan in September 2013 for a pre-employment physical for a firefighter position with the City of Cedar Rapids.[3] (McKinstry Dep. 51:11-52:3, 55:8-56:17) (App. 24, 529). Dr. McKinstry and Dr. Westpheling pulled Nolan's chart from the September 2013

[3] Nolan filed a disability discrimination claim regarding the City of Cedar Rapids' failure to hire him. The district court granted summary judgment in that case, which is also on appeal. *Nolan Deeds v. City of Cedar Rapids, St. Luke's Work Well Solutions, St. Luke's Healthcare, and Iowa Health System, d/b/a Unity Point Health*, Iowa Supreme Court No. 16-779.

visit and reviewed records from Dr. Shivapour, one of Nolan's treating neurologists. (McKinstry Dep. 55:17-25) (App. 529). Nolan recalls Dr. McKinstry reviewing Dr. Westpheling's notes in Nolan's presence, a recollection Dr. McKinstry disputes. (Deeds Dep. 141:8-14) (App. 507); (McKinstry Dep. 52:25-53:5) (App. 528).

A fact dispute exists regarding how Dr. McKinstry found the NFPA standards. Dr. McKinstry believes Dr. Westpheling showed her the standards, though at her deposition, she was unsure on what NFPA edition she relied. (McKinstry Dep. 56:1-12) (App. 529). Dr. Westpheling testified he could not recall whether he instructed Dr. McKinstry to use the NFPA guidelines, and did not believe he gave her any advice on how she should decide Nolan's case. (Westpheling Dep. 54:1-21) (App. 542). In any event, after consulting the NFPA 1582 standard, which contains a **blanket exclusion** for **any** firefighter candidate with MS symptoms in the last three years, Dr. McKinstry decided Nolan was not medically qualified for the Marion firefighter position. (Dep. Ex. DD) (App. 179-191); (McKinstry Dep. 49:15-50:2) (App. 527).

Dr. McKinstry never actually conducted an examination to determine whether Nolan could perform the essential functions of the City firefighter job because, once she learned about Nolan's MS diagnosis and medical history, "it was sort of a moot point whether he was available to do it that day or not." (McKinstry Dep. 48:11-21, 67:4-8) (App. 527, 531). The only reason Dr.

McKinstry applied the NFPA standard, despite the statutorily-controlled nature of the examination, was because of Nolan's MS diagnosis and symptoms in the prior three years. (McKinstry Dep. 50:20-52:3, 74:15-20) (App. 528, 532). Nolan's MS diagnosis and symptoms in the last three years were the sole reason for Dr. McKinstry disqualifying Nolan from the firefighter position. (McKinstry Dep. 74:15-20) (App. 532).

Dr. McKinstry disqualified Nolan based on the NFPA 1582 protocol even though the City has never adopted the protocol and the fact that the MFPRSI makes no reference to NFPA standards. (Jackson Dep. 17:25-18:3, 33:6-8) (App. 510-511, 514); (Krebill Dep. 14:3-13) (App. 522); (Westpheling Dep. 33:17-20) (App. 541); (McKinstry Dep. 51:1-4) (App. 528). In fact, no federal, state, or local law, regulation, or directive permitted application of NFPA 1582 in this case. (McKinstry Dep. 50:20-25) (App. 528). Other than Dr. Westpheling's advice, no other source informed Dr. McKinstry to utilize the NFPA 1582 standard. (McKinstry Dep. 29:17-30:4, 56:13-57:20) (App. 525, 529). Dr. McKinstry has not had any training regarding the use or application of NFPA standards. (McKinstry Dep. 21:6-17, 23:10-14, 30:8-10) (App. 524-525). No policy required Dr. McKinstry to apply the NFPA standard. (Westpheling Dep. 46:10-12) (App. 541); (McKinstry Dep. 20:22-21:1) (App. 100).

Three physicians disagree with Dr. McKinstry's conclusion that Nolan was not medically qualified to perform the essential functions of the firefighter

position. Dr. Neiman, one of Nolan's treating physicians, opined that Nolan's MS diagnosis should not have categorically disqualified him from the City's firefighter position. (Neiman Dep. 44:21-45:8) (App. 534). Dr. E. Torage Shivapour, who also treated Nolan, released Nolan to work without restrictions, and did not believe Nolan posed any risk to himself or the public as a firefighter. (Shivapour Dep. 46:4-14) (App. 537); (Shivapour Physician's Report) (App. 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." (6/1/16 Hughes Letter) (App. 576-577).

The MFPRSI provides a form for physicians to indicate whether a firefighter candidate is medically qualified to perform the essential functions of the job. (11/21/13 MFPRSI Medical Examination – For Completion by Physician) (App. 551). If a physician medically disqualifies a firefighter candidate, "the basis for that conclusion should be set out in the 'Comments' section" of the form. (11/21/13 MFPRSI Medical Examination – For Completion by Physician) (App. 551). Dr. McKinstry completed the form but neglected to provide any information regarding the basis for Nolan's medical disqualification. (11/21/13 MFPRSI Medical Examination – For Completion by Physician) (App. 551).

Chief Jackson received Dr. McKinstry's examination form and rescinded Nolan's job offer. (11/25/13 Letter Rescinding Offer) (App. 553). Dr. McKinstry's medical disqualification was Chief Jackson's sole basis for rescinding Nolan's offer. (Jackson Dep. 25:0-12, 31:3-5, 37:14-18) (App. 512, 514, 515). Chief Jackson did not believe he had the authority to overrule Dr. McKinstry and hire Nolan despite the medical disqualification. (Jackson Dep. 39:19-23) (App. 516). The City of Marion never provided Chief Jackson with any training on disability discrimination. (Jackson Dep. 12:12-15) (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. (Jackson Dep. 38:4-8) (App. 516); (Krebill Dep. 25:23-26:2) (App. 263-264); (McKinstry Dep. 66:25-67:3) (App. 273). 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. (Jackson Dep. 22:14-25:12) (App. 512). Though Chief Jackson sought no details, he knew disqualification was related to a medical problem. (Jackson Dep. 53:4-55:1) (App. 517-518).

Chief Jackson telephoned Nolan to tell him of the disqualification and to rescind the job offer. Chief Jackson told Nolan he was not cleared for service per St. Luke's Work Well. (Deeds Dep. 148:5-8) (App. 508); (Jackson Dep. 23:2-

7) (App. 512). Chief Jackson followed up with a rejection letter on November 25, 2013. (Dep. Ex. CC) (App. 159-178).

ARGUMENT

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

To prevail on his disability discrimination claim under the ICRA, Nolan must prove: (1) he has a disability, (2) he is qualified to perform the essential functions of the firefighter position, and (3) the circumstances of the City's decision to rescind Nolan's job offer raise an inference of illegal discrimination. *Goodpaster v. Schwan's Home Serv., Inc.*, 849 N.W.2d 1, 6 (Iowa 2014); Iowa Code § 216.6. At every turn, the Iowa Civil Rights Act is to be "construed broadly to effectuate its purposes." Iowa Code § 216.18(1).

The district court held there were genuine issues of material fact as to the first and second elements. (Ruling, pp. 10-12) (App. 632-634). The only issue on appeal regarding the City's summary judgment motion, then, is the third element: whether the circumstances of the City's decision to rescind Nolan's job offer raise an inference of illegal discrimination. Regarding the third element, the district court entered summary judgment for two reasons. The first was that "the City did not withdraw its job offer because of Mr. Deeds' disability" rather, the City "withdrew the offer because Mr. Deeds, according to the screening physician, was not medically qualified to perform." (Ruling, p. 13) (App. 635).

The second was that the court believed there was no evidence of discriminatory motive by the City. (Ruling, p. 15) (App. 637).

Because this appeal is from the district court's improper entry of summary judgment, the standard of review is for correction of errors at law. *See Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 827 (Iowa 2007). Error was preserved by Plaintiff's timely resistance to the City's Motion for Summary Judgment. *See* App. 192-193.

A. The City Withdrew the Job Offer Based on Nolan's MS

The district court held the City's decision to withdraw Nolan's job offer was not based on Nolan's MS, but was based on Dr. McKinstry's opinion that Nolan was not medically qualified to perform the firefighter job. (Ruling, p. 13) (App. 635). While the district court is correct that the City withdrew the job offer because of Dr. McKinstry's opinion, the district court is incorrect in holding that does not constitute disability discrimination. The sole reason Nolan was medically disqualified was that he had MS-related symptoms in the last three years and a related risk of future exacerbations. (McKinstry Dep. 50:20-52:3, 74:15-20) (App. 528, 532). Dr. McKinstry testified that there was no medical reason *other than Nolan's MS diagnosis* that led Dr. McKinstry to declare Nolan medically unqualified for the firefighter position. (McKinstry Dep. 74:15-75:5) (App. 532). Based on this evidence, one can reach no other result than Nolan would not have been disqualified from the position if he did not have MS.

In turn, Chief Jackson rescinded Nolan's job offer solely because of Dr. McKinstry's medical disqualification. (Jackson Dep. 25:0-12, 31:3-5, 37:14-18) (App. 8, 514, 515). No one involved in the hiring decision was aware of any essential job function Nolan could not perform at the time the City rescinded the job offer. (Jackson Dep. 38:4-8) (App. 516); (Krebill Dep. 25:23-26:2) (App. 263-264); (McKinstry Dep. 66:25-67:3) (App. 531). The decision based on the disqualification was inherently a decision based on the MS itself.

There is no dispute that if Nolan did not have MS, or symptoms associated with the disease, he would have been hired. (Jackson Dep. 37:14-18) (App. 515). The only reason the City rescinded Nolan's offer of employment was Dr. McKinstry's medical disqualification. (Jackson Dep. 30:24-31:5) (App. 514). In other words, Nolan was qualified for the firefighter job despite his disability, and he is the exact type of person the ICRA is meant to protect. *See Boelman v. Manson State Park*, 522 N.W.2d 73, 80 (Iowa 1994). The City's decision to rescind Nolan's job offer based on his MS diagnosis and resulting symptoms violates the ICRA and the district court erred in concluding otherwise.

B. Dr. McKinstry and the City Acted with Discriminatory Motive

The district court also found Nolan's disability could not have motivated the City's decision to rescind the job offer because Dr. McKinstry's reliance on the NFPA does not reveal discriminatory intent or suggest pretext, *Rorrer v. City of Stow* is distinguishable, and the MFPRSI does not provide the sole standard to

assess firefighter qualifications. (Ruling, pp. 11-16) (App. 633-638). The district court erred in reaching each of these conclusions.

1. Dr. McKinstry's reliance on the NFPA standard evidences discriminatory motive

An employer must demonstrate any pre-employment testing, including a fitness for duty examination that has the practical effect of screening out disabled individuals, is "job-related for the position in question" and "consistent with business necessity." 42 U.S.C. § 12112(b)(6). The MFPRSI's Medical Examination Protocol for Firefighters is undoubtedly "job-related for the position in question" and "consistent with business necessity." The protocol is required by state law, considers the essential functions of a firefighter job, and requires an individualized assessment of a candidate's then-existing medical limitations. Despite the clear requirement that the MFPRSI protocol be used to examine potential firefighters, Dr. Westpheling (who Dr. McKinstry consulted about Nolan's fitness for duty) has never had any training by the organization. (Westpheling Dep. 8:18-20) (App. 110). Dr. McKinstry does not even know what the MFPRSI protocol is. (McKinstry Dep. 41:8-16, 52:7-11) (App. 527-528).

In contrast, the NFPA 1582 standard used by the Unity Point defendants to conduct Nolan's physical examination disqualifies everyone with MS who has experienced any symptoms in the three years preceding their physical

examination. Such blanket exclusions of people with particular medical conditions has long been held illegal. *See, e.g., Frank v. American Freight Sys., Inc.*, 398 N.W.2d 797, 801 (Iowa 1987) (a class-wide exclusion of disabled applicants would be inconsistent with a consideration of the applicant's training, experience, and ability); *Lundstedt v. City of Miami*, 1995 WL 852443, *14 (S.D. Fla. Oct. 11, 1995) (a defendant's "blanket reliance upon NFPA standards cannot avoid the legal duty under the ADA and Rehabilitation Act to provide an individualized assessment"); *Keith v. City of Oakland*, 703 F.3d 918 (6th Cir. 2013) (physician's brief review of applicant's file and determination he could not be a lifeguard because he was deaf was "precisely the type that the ADA was designed to prohibit."); *Lafata v. Dearborn Heights Sch. Dist. No. 7*, 2013 WL 6500068 (E.D. Mich. Dec. 11, 2013) ("[a] reasonable trier of fact could not find that the [employer] engaged in such an individualized inquiry" when the physician's "deposition testimony reflects that his examination of Plaintiff was neither lengthy nor comprehensive").

The MFPSI has recognized NFPA 1582's diagnosis-based standard as inconsistent with disability rights laws. Beginning in early 2016, the MFPSI began to communicate the following warning to those municipalities who choose to employ the NFPA 1582 standards:

> Please note: The NFPA 1582 standards automatically disqualify individuals with certain medical conditions. Under the Americans with Disabilities Act (ADA), however, an individual may not be

> automatically disqualified from a position based on a certain diagnosis or medical history. Instead, the ADA requires a case-by-case evaluation of the individual's ability to perform the essential functions of the job with or without reasonable accommodation and without posing a direct threat to self or others**. For that reason, any automatic disqualifiers in the above-referenced protocol standards must be disregarded**.

(2/10/16 MFPRSI Directive, Dep. Ex. 20) (App. 574-575) (emphasis added).

Dr. McKinstry's fitness for duty examination was not an individualized assessment. After she identified Nolan's disability and determined the disability fell within the NFPA 1582's list of blanket exclusions, she immediately determined Nolan was disqualified without considering whether Nolan could perform the essential functions of the Marion firefighter position. Dr. McKinstry admitted she did not perform a physical examination regarding whether Nolan could perform the essential functions of the firefighter position because, once she learned of his MS, whether he could still perform the essential functions of the firefighter position was "sort of a moot point." (McKinstry Dep. 48:11-21, 67:4-8) (App. 527, 531).

In applying NFPA 1582's blanket exclusion, Dr. McKinstry prevented Nolan from getting the firefighter job, a result she knew would "probably" occur when she disqualified Nolan. (Dep. Ex. DD) (App. 179-191); (McKinstry Dep. 49:15-50:2, 79:14-18) (App. 527-528, 106). Such an approach is the exact opposite of an individualized assessment and does not align with MFPRSI directives or disability discrimination laws.

Despite this uncontroverted evidence of Defendants' failure to individually analyze Nolan's ability to perform the essential functions of the Marion firefighter position, the district court held Dr. McKinstry's use of the NFPA standards did not support an inference of disability discrimination. (Ruling, p. 13-14) (App. 635-636). In arriving at that conclusion, the district court cited Dr. Westpheling's testimony regarding why *he* relied on the NFPA, and concluded those reasons would also be the reasons why Dr. Westpheling advised Dr. McKinstry the way he did and why Dr. McKinstry utilized the NFPA standards. (Ruling, p. 14) (App. 636). Dr. Westpheling testified that when there is a question about whether an applicant is medically qualified, the first standard to consult is the MFPRSI guidelines. (Westpheling Dep. 34:14-35:6) (App. 541); (Ruling, p. 14) (App. 636). Dr. Westpheling then testified that if the MFPRSI is not instructive, the next best guidance is the NFPA standards. (Westpheling Dep. 34:14-35:6) (App. 541); (Ruling, p. 14) (App. 636).

Dr. McKinstry, on the other hand, *has never even heard of the MFPRSI*. (McKinstry Dep. 41:8-10, 52:7-11) (App. 526, 528). Dr. McKinstry is unaware that the MFPRSI has an examination protocol for firefighters, and believes she has never reviewed any MFPRSI documents. (McKinstry Dep. 41:11-16) (App. 526). Dr. McKinstry has never had any training or other guidance, other than Dr. Westpheling's instruction the day of Nolan's appointment, that triggered her use of the NFPA guidelines. (McKinstry Dep. 19:13-16, 21:6-17, 23:10-14, 30:8-

10, 56:1-57:20) (App. 100-102, 104). While Dr. McKinstry thought her "co-workers" told her she was supposed to use the NFPA, she could only identify Dr. Westpheling as someone who used the guidelines. (McKinstry Dep. 56:1-57:20) (App. 104). When asked whether she had any reason (other than Dr. Westpheling) for consulting the NFPA guidelines, Dr. McKinstry vaguely responded, "[w]ell, we have this large binder in the clinic." (McKinstry Dep. 56:15) (App. 104). The district court incorrectly found Dr. Westpheling's purported justification for utilizing the NFPA guidelines also supports Dr. McKinstry's use of the guidelines.

Regardless of the reason, the NFPA guidelines should not have been used because reliance on the blanket exclusion runs afoul of the law. Dr. McKinstry and then the City were not permitted to simply disregard the ICRA in favor of a standardized protocol. *Accord Haynes v. City of Montgomery Alabama*, 2008 WL 695023 at *5 (M.D. Ala. March 12, 2008) (city's reliance on NFPA standards as reason to disqualify firefighter could be pretext for discrimination when, among other things, there was no evidence that the city ever formally adopted the relevant NFPA standard).

Taking the evidence in the light most favorable to Nolan, a reasonable jury could conclude that Dr. McKinstry's use of the NFPA standards, rather than the MFPRSI guidelines, coupled with Dr. McKinstry's failure to conduct an individualized assessment of Nolan's abilities, gives rise to an inference of

disability discrimination. The district court should not have granted summary judgment to the City.

2. *Rorrer v. City of Stow* Applies and Dr. McKinstry's reliance on NFPA 1582 Suggests Pretext

The district court distinguished *Rorrer v. City of Stow*, 743 F.3d 1025 (6th Cir. 2014), holding it did not apply because the physician in that case did not seem to really know what the NFPA was, could not identify what "'fire regs'" guided his medical opinion, and could not identify the NFPA regulations by name until prompted by his attorney. (Ruling p. 14) (App. 636). Contrary to the district court's conclusion, these facts do establish why *Rorrer* is on point and not factually distinguishable.

Dr. McKinstry testified that Nolan's situation was the *only* time she ever consulted NFPA regulations. (McKinstry Dep. 57:15-20) (App. 104). To be sure, Dr. McKinstry did not consult the NFPA regulations until Dr. Westpheling told her to do it, though Dr. Westpheling could not recall whether he instructed Dr. McKinstry to use the NFPA guidelines, and did not believe he gave her any advice on how she should decide Nolan's case. (McKinstry Dep. 56:1-4) (App. 104); (Westpheling Dep. 54:1-21) (App. 542). Dr. McKinstry claimed that her "co-workers" told her she was supposed to use the NFPA guidelines, but then clarified she was talking only about Dr. Westpheling. (McKinstry Dep. 56:1-57:20) (App. 104). When asked whether Dr. McKinstry had any other reason

for consulting the NFPA guidelines other that Dr. Westpheling, Dr. McKinstry vaguely responded, "[w]ell, we have this large binder in the clinic." (McKinstry Dep. 56:15) (App. 104). Finally, while Dr. McKinstry claimed "everyone" uses the NFPA guidelines, including Dr. Taylor (Work Well's Medical Director at the time Dr. McKinstry started practicing there), she could not recall whether Dr. Taylor specifically trained her to use the guidelines or told her to use the guidelines. (McKinstry Dep. 57:7-9) (App. 104).

While she claims everyone in the clinic uses the guidelines when performing fitness-for-duty examinations of potential firefighters, Dr. McKinstry could not identify a single other physician or co-worker in the clinic, other than Dr. Westpheling, who used or instructed her to use the NFPA guidelines. Her deposition testimony reveals she knew little about the NFPA guidelines and the information she does know comes entirely from a 15-20 minute meeting with Dr. Westpheling. Contrary to the district court's conclusion that the use of the NFPA standards by Dr. McKinstry did not suggest pretext, based on the analyses used by the court in *Rorrer*, these facts do support a finding of pretext. Dr. McKinstry had never used the guidelines before and she has not used them since (at least up to the time of her deposition).

3. <u>The City is required to rely on the MFPRSI standards, not NFPA standards</u>

Finally, the district court rejected Plaintiff's argument that the MFPRSI provides the sole standard to assess firefighter qualification, such that applying any other standard demonstrates discriminatory intent. (Ruling, pp. 15-16) (App. 637-638). In reaching that conclusion, the district court relied on Iowa Code § 400.8A and interpreted that Code section to give the City the right to consider guidelines not specifically recommended by the MFPRSI Board of Trustees. (Ruling, p. 15) (App. 637).

Iowa Code § 400.8A is titled "Guidelines for Ongoing Fitness for Police Officers and Firefighters." That code section does not apply to this case. Rather, it addresses protocols and guidelines "for **ongoing** wellness and fitness for police officers and firefighters **while in service**." (emphases added). For current police officers and firefighters, the MFPRSI board is to adapt protocols and guidelines "for the consideration of the cities" and states the protocols and guidelines "may be applied by a city for the purposes of determining continued wellness and fitness" for police officers and firefighters." *Id.*

Because Nolan was never in service, no ongoing protocols or guidelines would apply to him. No party referenced Iowa Code § 400.8A in their summary judgment materials. The code section that applies to applicants for firefighter positions like the one for which Nolan applied is Iowa Code § 400.8(1). That section requires the City to conduct physical examinations of applicants for firefighter positions "**in accordance with medical protocols established by**

the board of trustees of the fire and police retirement system" and "**in accordance with the directives of the board of trustees.**" Iowa Code § 400.8(1). The section contains no discretionary language like that in Iowa Code § 400.8A.

The board of trustees' directives that apply to physical examinations of firefighter applicants specifically note that "[h]iring decisions are subject to the requirements of the Americans with Disabilities Act," and that any medical protocols utilized by the cities "must be applied consistent with the Act." (2/10/16 MFPRSI Directive, Dep. Ex. 20) (App. 574-575). Even if the MFPRSI does not provide the sole standard to assess firefighter qualification, cities that utilize other standards or protocols do so at their own peril if those standards and protocols result in disability discrimination.

Like the ICRA and its administrative regulations, the MFPRSI warns cities that they must conduct a case-by-case evaluation and may not apply blanket exclusions. (2/10/16 MFPRSI Directive, Dep. Ex. 20) (App. 574-575). Even if, as the district court held, the City was free to use the examination guidelines of its choice, the City was **required** to disregard any blanket exclusions that would result from using the NFPA 1582 guidelines in the absence of an individualized assessment. (2/10/16 MFPRSI Directive, Dep. Ex. 20) (App. 574-575) ("any automatic disqualifiers in the above-referenced protocol standards must be disregarded.").

That did not happen here. From Dr. McKinstry's application of discriminatory NFPA 1582 standards and failure to conduct an individualized assessment of Nolan's ability to perform the essential functions of the firefighter position, a reasonable jury could conclude the City acted with discriminatory motive. The district court erred when it held otherwise.

4. The City cannot insulate itself from liability by contracting the medical evaluation out to Unity Point

In resisting summary judgment, Plaintiff argued the City cannot avoid liability by contracting out the fitness for duty examination to an agent who is not its employee. *See 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" and employers cannot enter a contractual or other arrangement that results in discrimination to applicants and employees) (quotation omitted); *Bates v. Dura Auto. Sys., Inc.*, 767 F.3d 566, 581 (6th Cir. 2014) (employers cannot use third parties to "circumvent ADA protections"); *Sahai v. Davies*, 557 N.W.2d 898, 902 (Iowa 1997) (employer's failure to ask physician follow-up questions regarding potential employee's medical disqualification might violate employment discrimination laws).

The district court was not persuaded by Plaintiff's argument. The court held Dr. McKinstry's medical opinion was not the "final say" regarding Nolan's

job offer. (Ruling, p. 16) (App. 638). The evidence is to the contrary. While Chief Jackson made the final decision to rescind Nolan's job offer, he based that decision entirely on Dr. McKinstry's medical opinion, and knew the disqualification was based on some sort medical problem. (11/25/13 Letter Rescinding Offer) (App. 553); (Jackson Dep. 25:4-12, 30:24-31:5, 37:14-18) (App. 512, 514, 515); (Krebill Dep. 31:8-11) (App. 93). Chief Jackson testified he spent little time reviewing pre-employment examination protocols because he instead relied entirely on medical professionals to make medical determinations. (Jackson Dep. 19:16-20:7) (App. 511). Jackson did not follow up with Dr. McKinstry regarding Nolan's disqualification because he felt, "[i]t's none of my business." (Jackson Dep. 31:18-32:13) (App. 514).[4]

More importantly, Chief Jackson did not believe he had any authority to overrule Dr. McKinstry and hire Nolan despite the medical disqualification. (Jackson Dep. 39:19-23) (App. 516). Even Dr. McKinstry admitted she knew Nolan would probably not get the job once Dr. McKinstry declared him medically disqualified. (McKinstry Dep. 79:14-18) (App. 106). This evidence contradicts the district court's conclusion that the City, not Dr. McKinstry, had

[4] Debra Krebill, who is now Marion's Chief, testified she would want more information than that provided by Dr. McKinstry to decide if a job offer should be rescinded. (Krebill Dep. 26:22-27:3) (App. 263-264). Krebill would want to know why the candidate had been disqualified, because that is her obligation as the person extending the offer of employment. (Krebill Dep. 27:4-9) (App. 264).

final say regarding the hiring decision. If Chief Jackson could not overrule Dr. McKinstry and did not think it was any of his business to ask her about the basis of her decision, how could Chief Jackson really have the "final say?" A reasonable jury could certainly find Dr. McKinstry exercised a significant amount of control over the hiring decision and the district court erred in ruling otherwise as a matter of law.

The district court was equally unpersuaded by Plaintiff's argument that an employer cannot avoid its obligations under disability discrimination laws by blindly relying on a contracted provider's assessment, especially when there is evidence that the provider's assessment was not individualized and did not account for the essential functions of the job at issue. *E.E.O.C. v. American Tool & Mold, Inc.*, 21 F. Supp. 3d 1268, 1284 (M.D. Fla. 2014). Citing the Restatement (Third) of Agency § 1.01, the district court found there was no evidence that the City manifested its assent to have Dr. McKinstry act on the City's behalf subject to the City's control, or evidence that Dr. McKinstry agreed to act subject to the City's control. In so finding, the district court held Dr. McKinstry exercised independent judgment in conducting the medical examination and had control over the process.

The Restatement defines agency as "the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's

control, and the agent manifests assent or otherwise consents so to act." Restatement (Third) of Agency, § 1.01. A principal is charged with the knowledge of its agents. Restatement (Third) of Agency § 5.03; *see also 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).

The City delegated all decision-making authority to the Unity Point defendants regarding whether Nolan was medically qualified to perform the job of firefighter. Whatever the Unity Point defendants decided, that was what the City followed. The Unity Point defendants' decision could not be overruled, even by the fire chief. The task of determining medical qualification was delegated entirely to the Unity Point defendants, who in turn acted on the City's behalf.

Under simple agency theory, the City knew everything that St. Luke's Work Well and Dr. McKinstry knew. There is no exception to this rule for situations in which the agent failed to pass its knowledge on to the principal. Such an exception would encourage employers to tell their agents to disqualify disabled applicants, but not communicate the reason for the disqualification, a practice anti-discrimination laws disallow. The City denied Nolan employment as a firefighter only based on the City's agent's representation that Nolan could not perform the essential functions of a Marion firefighter. The agent's representation was based solely on Nolan's MS diagnosis, the symptoms of the

disease, and a stereotyped, unsupported fear that Nolan may suffer additional symptoms in the future. To reach this conclusion, the City's agent applied a discriminatory standard that should also be imputed to the City.

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

The ICRA prohibits not only discrimination, but also aiding and abetting discrimination. Iowa Code § 216.11(1). "Liability under the ICRA is not limited to 'employers' of 'employees.'" *Platts v. Kelly Services, Inc.*, 2015 WL 3378257 at *11 (N.D. Iowa May 26, 2015). The ICRA imposes liability on any person, not just employers, who engages in or aides and abets conduct prohibited by the ICRA. *Id.* (citing Iowa Code §§ 216.6(1)(a) and 216.11). "[O]ne of the hallmarks of liability of a 'person' under the ICRA is whether that 'person' was in a position to control the employer's hiring decisions." *Whitney v. Franklin General Hosp.*, 2015 WL 1809586 at *9 (N.D. Iowa April 21, 2015).

Liability may attach to an entity other than the plaintiff's employer if the entity "is found to have intentionally aided, abetted, compelled or coerced" the employer in its violation of the ICRA. *Johnson v. BE & K Construction Co., LLC*, 593 F. Supp. 2d 1044, 1052 (S.D. Iowa 2009); *see also Vivian v. Madison*, 601 N.W.2d 872, 878 (Iowa 1999) (the legislature's use of the words "person" and "employer" in the ICRA indicates a clear intent to hold a "person" subject to liability separate from the liability of an employer). This is consistent with the

legislature's command that the ICRA be construed broadly to effectuate its purposes. Iowa Code § 216.18(1).

To succeed on his aiding and abetting claim against the Unity Point defendants, Nolan must prove a reasonable jury could find the Unity Point defendants intentionally aided, abetted, compelled, or coerced the City to engage in unlawful disability discrimination. Iowa Code § 216.11. In moving for summary judgment, the Unity Point Defendants focused on two arguments: 1) *Sahai v. Davies*, 557 N.W.2d 898 (Iowa 1997) applies and relieves Unity Point from liability, and 2) because Nolan's disability discrimination claim against the City fails as a matter of law, the Unity Point defendants could not have aided and abetted disability discrimination. The district court agreed with both.

Plaintiff has already addressed the second issue, the viability of Nolan's disability discrimination claim against the City, in Section I above. That argument is fully incorporated by this reference. Plaintiff will focus instead on whether *Sahai* applies. The district court found it does, and granted summary judgment to the Unity Point defendants.

Because this appeal is from the district court's improper entry of summary judgment, the standard of review is for correction of errors at law. *See Stevens*, 728 N.W.2d at 827. Error was preserved by Plaintiff's timely resistance to Defendants' Motion for Summary Judgment.

A. The District Court Improperly Interpreted *Sahai's* Holdings Regarding a Physician's Advisory Role and Exercise of Independent Judgment and then Improperly Applied that Interpretation to the Unity Point Defendants

In *Sahai*, a divided Court 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*, 601 N.W.2d at 876. That unanimous 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 Unity Point defendants from liability.

The district court found that two questions emerge from *Sahai* regarding whether a non-employer physician can be subjected to liability for discrimination under the ICRA. The first is whether the physician played an "advisory role" in the employment process. (Ruling, pp. 6-7) (App. 628-629). The second is

whether the physician exercised independent judgment in the form of an individualized assessment of the prospective candidate's ability to perform the job at issue. (Ruling, pp. 7-8) (App. 629-930).

1. Dr. McKinstry controlled the City's hiring decision

The district court held *Sahai* defined an "advisory role" as one in which the physician's motive in conducting the physical examination is to advise the employer of a prospective employee's ability to perform the job. (Ruling, p. 7) (App. 629). The district court then expanded that definition, finding "the meaning of 'advisory' relates to the *purpose* of the medical screening, rather than the *weight* the medical opinion has on the employer." (Ruling, p. 7) (App. 629) (emphases in original). The district court held Dr. McKinstry's role in the hiring process was advisory, and found nothing in the record to suggest any motive other than opining on Nolan's ability to perform the firefighter job. (Ruling, pp. 8-9) (App. 630-631). To the contrary, the record reveals Dr. McKinstry's opinion was far more than advisory and she had a significant amount of control over the City's hiring decision.

While Chief Jackson made the final decision to rescind Nolan's job offer, he based that 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. 553); (Jackson Dep. 25:4-12, 31:1-5, 37:14-18, 40:23-41:1, 53:4-55:1) (App. 512-513, 515-518). Jackson testified he spent little

time reviewing pre-employment examination protocols because he instead relied entirely on medical professionals to make medical determinations. (Jackson Dep. 19:16-20:7, 39:2-8, 44:11-14) (App. 511, 516, 86). More importantly, Chief Jackson did not believe he had any authority to overrule Dr. McKinstry and hire Nolan despite the medical disqualification. (Jackson Dep. 39:19-23) (App. 516). The City's heavy reliance on Dr. McKinstry and complete deference to her opinion negates any finding that Dr. McKinstry's role was merely advisory.

Further, in *Sahai* the defendant physician personally spoke with the employer and provided it with sufficient information to inform the employer of the medical reasoning underlying the physician's medical judgment so that the employer could make its own hiring decision. *Sahai,* 557 N.W.2d at 902. By contrast, Dr. McKinstry merely informed the City in writing that Nolan was disqualified from the firefighter position. (11/21/13 MFPRSI Medical Examination – For Completion by Physician) (App. 551). The district court found this evidence insignificant, stating, "[t]o suggest that a phone call would enable or prompt an employer to make a decision different from that of the medical expert defies common sense." (Ruling, p. 9) (App. 631). The court offered no support for this conclusion and no explanation as to why the logic defies common sense.

Indeed, it makes perfect sense that a phone call from Dr. McKinstry to the City could have elicited follow-up questions and answers regarding the

reasons behind Nolan's medical disqualification. A reasonable jury could certainly reach that conclusion. However unfounded Dr. Sahai's opinion, he at least communicated enough information to allow the employer to make some decision as to whether the plaintiff could perform the essential functions of her job despite her medical condition. Dr. McKinstry, on the other hand, provided the City with nothing more than a stark disqualification. This disqualification ended the hiring process for Nolan because Dr. McKinstry's opinion controlled the City's hiring decision in its entirety, something Dr. McKinstry herself knew would happen. (McKinstry Dep. 79:14-18) (App. 532)

Finally, there is evidence from which a reasonable jury could infer Dr. McKinstry was not merely acting "in furtherance of an independent duty" in disqualifying Nolan. At least three neurologists disagreed with Dr. McKinstry's opinion. Dr. 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. (Neiman Dep. 44:21-45:8, 88:9-12, 101:17-102:21) (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. (Nieman Dep. 86:19-25) (App. 535). Dr. Shivapour agreed with Dr. Nieman's sentiment. (Shivapour Physician's Report) (App. 570); (Shivapour Dep. 46:4-14) (App. 537). 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." (6/1/16 Hughes Letter) (App. 576-577).

If reasonable minds could differ, "it is for the trier of fact to balance the likelihood and nature of the risk of future exacerbations against the potential harm that could occur, considering plaintiff's job." *Maynard v. Nygren*, 2000 WL 876911 at *4 (N.D. Ill. June 19, 2000) (emphasis added). Thus, summary judgment was inappropriate in a case like this. A jury weighing this evidence, and Dr. McKinstry's credibility, could reasonably determine Dr. McKinstry's role was something more than advisory. In granting the Unity Point defendant's summary judgment motion, the district court improperly took the issue away from the jury. That decision should be reversed.

2. Dr. McKinstry did not render an independent medical judgment or conduct an individualized assessment of Nolan's ability to perform the firefighter job

The district court found Dr. McKinstry rendered an independent medical judgment. (Ruling, p. 9) (App. 631). In reaching that conclusion, the district court believed Dr. McKinstry's use of the NFPA standards was representative of the medical consensus at the time. (Ruling, p. 9) (App. 631). Dr. McKinstry's lack of familiarity, experience, and training with both MFPRSI and NFPA standards, discussed throughout this brief and incorporated by this reference,

belies the district court's conclusion. The district court further held it is not "reasonable to expect a physician to conduct an assessment in a vacuum." (Ruling, p. 9) (App. 631). Further argument regarding why a reasonable jury could find Dr. McKinstry did not conduct an individual assessment is addressed in Section I.B(1) above and fully incorporated by this reference.

3. *Sahai* does not apply to aiding and abetting claims

In granting the Unity Point defendant's summary judgment motion, the district court held that *Sahai* applies with equal force to both discrimination and aiding and abetting claims under the ICRA. *Sahai* involved a claim of discrimination under Iowa Code § 216.6(1)(a) which makes it an unlawful discriminatory practice for any:

> Person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability of such applicant or employee, unless based upon the nature of the occupation. If a person with a disability is qualified to perform a particular occupation, by reason of training or experience, the nature of that occupation shall not be the basis for exception to the unfair or discriminating practices prohibited by this subsection.

By contrast, this case involves an allegation that the Unity Point defendants violated Iowa Code § 216.11(1), which makes it unlawful 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." The

district court held that because the "twin requirements of *Sahai*" (advisory role and individualized assessment) essentially probe a defendant's motive, and liability under Iowa Code § 216.6(1)(a) also probes a defendant's motive, *Sahai* applies to both types of claims under the ICRA. (Ruling, p. 8) (App. 630).

The Plaintiff cannot find a published Iowa appellate case analyzing the aiding and abetting provision of the ICRA. *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 the absence of case law regarding aiding and abetting claims under the ICRA, tort law provides guidance.

Under Iowa tort law, liability for aiding and abetting attaches for harm resulting to a third person from the tortious conduct of another, if one "knows that the other's conduct constitutes a breach of duty and gives substantial assistance of encouragement to the other so to conduct himself." *Reilly v. Anderson*, 727 N.W.2d 102, 107 (Iowa 2007) (quoting Restatement (Second) of Torts § 876(b)). To recover for the tort of aiding and abetting, a plaintiff must prove: 1) a wrong committed by another, 2) the defendant knew of the wrong committed by another, 3) the defendant gave substantial assistance or encouragement to another in the commission of a wrong, and 4) the nature and extent of damage. IOWA CIVIL JURY INSTR. 3500.4.

Notably absent from Iowa's civil aiding and abetting jury instruction, and the cases analyzing a civil cause of action for aiding and abetting, is any reference to motive. The closest reference to motive can be found in an unpublished opinion of the Iowa Court of Appeals, listing the defendant's state of mind as just one factor to consider in determining whether the defendant gave substantial assistance. *State v. Lorenz*, 2015 WL 4158781 at *8 (Iowa Ct. App. July 9, 2015). *But see Heick v. Bacon*, 561 N.W.2d 45, 52 (Iowa 1997) (civil aiding and abetting can apply regardless of whether the other knows his act is tortious).

Whether a person is motivated by wrongful intent is not something Iowa's courts require for a plaintiff to recover under a civil aiding and abetting claim. Likewise, whether a person is motivated by discriminatory intent is not something Iowa's courts should require for a plaintiff to recover under an aiding and abetting claim under the ICRA. There is no appellate authority to support the district court's decision that *Sahai* applies to both discrimination and aiding and abetting claims under the ICRA. This holding, too, should be reversed.

CONCLUSION

For the reasons set forth herein, 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.

REQUEST FOR ORAL ARGUMENT

Counsel for Plaintiff-Appellant request to be heard in oral argument.

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