IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 16-1779
LINN COUNTY NO. LACV82466

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 UNITYPOINT HEALTH,
Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR LINN COUNTY
HONORABLE PAUL D. MILLER

APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

Brooke Timmer AT0002496
brooke@employmentlawiowa.com
Katie Ervin Carlson AT0008958
katie@employmentlawiowa.com
Nathan Borland AT0011802
nate@employmentlawiowa.com
FIEDLER & TIMMER, P.L.L.C.
8831 Windsor Parkway
Johnston, IA 50131
Telephone: (515) 254-1999
Fax: (515) 254-9923

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Rules

Other Authorities

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

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

Cases

Bates v. Dura Auto. Sys., Inc., 767 F.3d 566 (6th Cir. 2014)
Boelman v. Manson State Park, 522 N.W.2d 73 (Iowa 1994)
Brown v. M&M/Mars, 883 F.2d 505 (7th Cir. 1989)
Burlew v. Eaton Corp., 869 F.2d 1063 (7th Cir. 1989)
DeBoom v. Raining Rose, Inc., 772 N.W.2d 1 (Iowa 2009)
E.E.O.C. v. American Tool & Mold, Inc., 21 F. Supp. 3d 1268 (M.D. Fla. 2014)
Frank v. American Freight Sys., Inc., 398 N.W.2d 797 (Iowa 1987)
Goodpaster v. Schwan's Home Serv., Inc., 849 N.W.2d 1 (Iowa 2014)
Haynes v. City of Montgomery Alabama, 2008 WL 695023 (M.D. Ala. March 12, 2008)
Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993)
Huff v. United Van Lines, 28 N.W.2d 793 (Iowa 1947)
Keith v. City of Oakland, 703 F.3d 918 (6th Cir. 2013)
Kimbro v. Atlantic Richfield Co., 889 F.2d 869 (9th Cir. 1989)
Lafata v. Dearborn Heights Sch. Dist. No. 7, 2013 WL 6500068 (E.D. Mich. Dec. 11, 2013)
Lundstedt v. City of Miami, 1995 WL 852443 (S.D. Fla. Oct. 11, 1995)
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)
Rizzo v. Children's World Learning Ctrs., Inc., 173 F.3d 254 (5th Cir. 1999)
Roberts v. City of Chicago, 817 F.3d 561 (7th Cir. 2016)
Sahai v. Davies, 557 N.W.2d 898 (Iowa 1997)
Stevens v. Iowa Newspapers, Inc., 728 N.W.2d 823 (Iowa 2007)
Thomas v. Eastman Kodak Co., 183 F.3d 38 (1st Cir. 1999)
Wells Enter., Inc. v. Olympic Ice Cream, 2012 WL 2562768 (N.D. Iowa June 29, 2012)

Other Authorities

Iowa Code § 216.6
Iowa Code § 216.18
Iowa Code § 400.8
Iowa Code § 400.8A
42 U.S.C. § 12112(b)(6)

Black's Law Dictionary at 727 (5th ed. 1979)
Restatement (Third) of Agency § 5.03

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

Cases

Blazek v. U.S. Cellular Corp., 937 F. Supp. 2d 1003 (N.D. Iowa 2011)
Heick v. Bacon, 561 N.W.2d 45 (Iowa 1997)
Johnson v. BE & K Construction Co., LLC, 593 F. Supp. 2d 1044 (S.D. Iowa 2009)
Maynard v. Nygren, 2000 WL 876911 (N.D. Ill. June 19, 2000)
Platts v. Kelly Services, Inc., 2015 WL 3378257 (N.D. Iowa May 26, 2015)
Reilly v. Anderson, 727 N.W.2d 102 (Iowa 2007)
State v. Lorenz, 2015 WL 4158781 (Iowa Ct. App. July 9, 2015)
Stevens v. Iowa Newspapers, Inc., 728 N.W.2d 823 (Iowa 2007)
Vivian v. Madison, 601 N.W.2d 872 (Iowa 1999)
Whitney v. Franklin General Hosp., 2015 WL 1809586 (N.D. Iowa April 21, 2015)

Other Authorities

Iowa Code § 216.6
Iowa Code § 216.11
Iowa Code § 216.18
IOWA CIVIL JURY INSTR. 3500.4

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 Cedar Rapids ("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 6, 2015, the City filed its Answer. On June 8, 2015, the Unity Point Defendants filed their Answer.

On June 9, 2016, the City and Unity Point filed separate motions for summary judgment and supporting documents.[2] Plaintiff separately resisted

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

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

both motions on June 27, 2016. After Defendants filed reply briefs and additional supporting materials, the Court entered an order without oral argument by agreement of all parties.

DISPOSITION OF THE CASE: The district court consolidated the motions and on September 21, 2016, granted both summary judgment motions and dismissed Plaintiff's case without a trial. (Ruling on Defendants' Motion for Summary Judgment) (hereinafter "Ruling") (App. 835-853).

STATEMENT OF FACTS

Nolan Deeds began to experience symptoms of Multiple Sclerosis ("MS") in mid-December 2011. (Deeds. Ans. to Interr. 14) (App. 112-114). Dr. Richard Neiman diagnosed Nolan with relapse remitting MS on December 14, 2011. (Deeds. Ans. to Interr. 14) (App. 112-114). Nolan was symptom free until December 2012 or January 2013, when he started to notice some numbness. (Deeds. Ans. to Interr. 14) (App. 112-114). Dr. Neiman and Dr. E. Torage Shivapour managed Nolan's care, and he was again symptom-free by early February 2013. (Deeds. Ans. to Interr. 14) (App. 112-114).

In July 2012, Nolan applied for a full-time firefighter job with the City. (Cedar Rapids Firefighter Application Paperwork) (App. 538-542). At that time, Nolan held an Associate's 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 in EMT-Paramedic classes at the University of Iowa. (Cedar Rapids Firefighter Application Paperwork) (App. 538-542); (Deeds' Certifications) (App. 533-537).

As part of the application process with the City, Nolan passed a written test conducted by the City. (Fredericks Dep. 49:25-50:2) (App. 369-370). Nolan also took and passed a physical agility test. (Candidate Physical Ability Test Evaluation Form) (App. 386). The City selected Nolan as one of the top 30 candidates after one round of interviews, and then selected him as one of the top 20 candidates after a round of Civil Service Commission interviews. (Fredericks Dep. 50:8-10) (App. 370).

On September 25, 2012, the Cedar Rapids Civil Service Commission certified Nolan as qualified for selection as a Cedar Rapids firefighter. (9/25/12 Civil Service Commission Certified List) (App. 387). The City did not offer Nolan a firefighter position during the City's first round of hiring from the September 2012 certified list, but invited Nolan to participate in another interview in July 2013. (10/4/12 Decline Letter) (App. 388); (Firefighter Candidate Interview Schedule) (App. 391). On July 25, the City offered Nolan a full-time paid firefighter position, contingent upon (among other things) satisfactory completion of a medical screening and a complete work physical. (7/25/13 Offer Letter) (App. 390).

Following the City's conditional offer of employment, Nolan completed a health screening with the City's occupational health nurse, Jennifer Stefani (f/k/a Jennifer Motroni). (Stefani Affidavit and Exhibits) (App. 291-304). During that health screening, Nolan disclosed to Stefani that he had MS and gave Stefani a note from Nolan's treating neurologist clearing Nolan to work as a firefighter without restrictions. (Stefani Affidavit and Exhibits) (App. 291-304); (Shivapour Physician's Report) (App. 525). After Nolan completed the paperwork and health screening, Stefani transmitted all documents, including information regarding Nolan's MS diagnosis, to St. Luke's Work Well Solutions. (Stefani Affidavit and Exhibits) (App. 291-304).

On September 4, 2013, Nolan attended a fitness for duty examination with Dr. Jeffrey Westpheling at St. Luke's Work Well Solutions. (9/4/13 Patient Demographic Information) (App. 648); (9/5/13 Westpheling Dictation) (App. 737). Prior to the examination, Nolan signed a release that expressly authorized "St. Luke's or St. Luke's Work Well to release medical information to the City of Cedar Rapids for treatment dates from 09/04/2013 for the purpose of Employment related screening or health care." (9/4/13 Authorization for Release of Medical Information) (App. 649). During the physical examination, Dr. Westpheling had access to a copy of Nolan's medical file and Nolan discussed his MS diagnosis with Dr. Westpheling, including the dates of Nolan's symptoms and the symptoms themselves. (Deeds Dep. 184:5-19) (App. 48).

Following the examination, Nolan provided Dr. Westpheling with records from Nolan's treating neurologist, Dr. Shivapour. (Deeds Dep. 184:20-185:12) (App. 48).

Dr. Westpheling has no memory of conducting Nolan's physical examination. (Westpheling Dep. 26:15-20) (App. 66). Dr. Westpheling admits Nolan was asymptomatic at the time of the examination. (Westpheling Dep. 22:25-23:7) (App. 65). Dr. Westpheling also admits that, at the time of the examination, Nolan "likely would have been able to perform" all the essential functions of the Cedar Rapids firefighter job. (Westpheling Dep. 23:4-7, 23:23-24:1, 47:25-48:5) (App. 65, 71). Dr. Westpheling had no concerns about Nolan's health or ability to perform the essential functions of the firefighter job, other than the fact that Nolan had MS. (Westpheling Dep. 19:3-7, 24:16-19) (App. 64, 65).

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 fire fighters 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 mandates that the City's "physical examination for applicants for appointment to the position[] of . . . fire fighter shall 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).

The medical protocol for Dr. Westpheling's examination, as described in the St. Luke's Work Well computer system, was supposed to be based on the MFPRSI Medical Examination Protocol for Firefighters. (Westpheling Dep. 15:23-17:2) (App. 63); (Selection from St. Luke's Work Well Chart – Cedar Rapids) (App. 439-445). The City was required to abide by the MFPRSI Protocol. (Fredericks Dep. 47:11-17) (App. 369). The protocol, per Dr. Westpheling, should be followed "in each case a firefighter candidate is examined." (Westpheling Dep. 15:23-17:2) (App. 63). The protocol does not contain any references to MS. (Westpheling Dep. 18:2-9) (App. 64).

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. (Excerpts from NFPA 1582) (App. 855-865). 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 §§ 9.13.5.1, 9.13.5.2) (App. 855-865).

When Dr. Westpheling examined Nolan, the MFPRSI's Medical Examination Protocol for Firefighters did not reference or in any way require the application of NFPA 1582. (MFPRSI Medical Examination Protocol for Firefighters) (App. 392-398); (Westpheling Dep. 33:21-23) (App. 67). Likewise, the City has never adopted the NFPA 1582 standard. (English Dep. 90:22-91:3) (App. 366); (Fredericks Dep. 146:14-17) (App. 373). Despite that, Dr. Westpheling consulted NFPA Standard 1582 with respect to Nolan's MS diagnosis. (Westpheling Dep. 33:3-8) (App. 67). Because of NFPA 1582's **blanket exclusion** regarding MS symptoms, Dr. Westpheling disqualified Nolan for the City's firefighter position. (Westpheling Dep. 35:25-36:5) (App. 68).

The NFPA 1582 standard's blanket exclusion regarding individuals with MS symptoms was the only basis for Dr. Westpheling's disqualification of Nolan. (Westpheling Dep. 35:25-36:5) (App. 68). Specifically, Dr. Westpheling based his decision on the fact that Nolan was "less than 3 years from his original diagnosis and did have activity [symptoms] in approximately December 2012," referring to the NFPA 1582 blanket exclusion. (9/5/13 Westpheling Dictation) (App. 737). Dr. Westpheling applied the NFPA standards despite a complete absence of any federal, state, or local law, regulation, or directive permitting the application of NFPA 1582. (Westpheling Dep. 33:9-12, 46:10-22) (App. 67, 71).

The MFPRSI provides a form for physicians to indicate whether a firefighter candidate is medically qualified to perform the essential functions of

a job. (MFPRSI Medical Examination – For Completion by Physician) (App. 399-402). If a physician decides a candidate is not medically qualified to do the essential functions of a job, "the basis for that conclusion should be set out in the 'Comments' section" of the form. (MFPRSI Medical Examination – For Completion by Physician) (App. 399-402). Neither the St. Luke's Work Well Chart nor the City's Employee Safety & Health Services file contain a fully completed version of the MFPRSI Medical Examination forms. (St. Luke's Work Well Chart – Cedar Rapids) (App. 405-498); (Cedar Rapids Employee Safety & Health Services File) (App. 499-531).

Instead, Dr. Westpheling communicated Nolan's medical disqualification on a St. Luke's Work Well Clinic "Confidential Report." (Work Well Clinic Confidential Report) (App. 499). On that report, Dr. Westpheling failed to include the basis for Nolan's medical disqualification. Dr. Westpheling simply indicated Nolan was "disqualified." (Work Well Clinic Confidential Report) (App. 499). Dr. Westpheling testified his decision to disqualify Nolan was based on the "risk of future exacerbations" per NFPA 1582's blanket exclusion, not on Nolan's current ability to perform the essential functions of the firefighter job. (Westpheling Dep. 23:23-24:1; 36:24-37:2) (App. 65, 68).

St. Luke's Work Well sent Dr. Westpheling's "Confidential Report" to the City on September 6, 2013. (Work Well Clinic Confidential Report) (App. 499); (English Dep. 65:4-10) (App. 363); (9/6/13 Email from Fredericks re: Candidate

Change) (App. 403). A fax sent from St. Luke's Work Well to Ms. Stefani the same day indicates Nolan was "disqualified." (Work Well Clinic Confidential Report) (App. 499).

Thereafter, Fire Chief Mark English decided to rescind Nolan's job offer based solely on Dr. Westpheling's medical disqualification. (English Dep. 75:10-76:11, 84:21-24) (App. 364, 365). When it rescinded Nolan's offer, the City was not aware of any essential functions of the firefighter job that Nolan could not perform. (Fredericks Dep. 97:21-98:5) (App. 371). Chief English did not investigate the basis for Dr. Westpheling's claim that Nolan was not medically qualified to do the essential functions of the firefighter job, did not ask for a second opinion, did not ask Nolan for information about his medical condition, and did not otherwise attempt to determine why Dr. Westpheling deemed Nolan not medically qualified for the job. (English Dep. 103:13-105:8) (App. 367).

Assistant Fire Chief Curtis Hopper called Nolan and told him the City decided to rescind the conditional job offer because Dr. Westpheling did not consider Nolan medically eligible for the firefighter position. (Deeds Dep. 230:22-231:12) (App. 52). When Nolan called Stefani to discuss the City's decision, she told Nolan the determination was for Dr. Westpheling to make. (Deeds Dep. 232:1-233:5, 233:15-19) (App. 52).

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 Iowa Civil Rights Act ("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. 11-14) (App. 845-848). The only issue on appeal regarding the City's summary judgment motion is the third element, whether the circumstances of the City's decision to rescind Nolan's job offer raise an inference of illegal discrimination.

The district court held, as a matter of law, that summary judgment should be entered in favor of the City two reasons. The first was that "the City did not withdraw its job offer because of Mr. Deeds' disability; it withdrew the offer because Mr. Deeds, according to the screening physician, was not medically qualified to perform the essential functions of the firefighting duties." (Ruling,

p. 15) (App. 849).[3] The second was that the court believed there was no evidence of discriminatory motive by the City. (Ruling, pp. 16-17) (App. 850-851).

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

---

[3] In their summary judgment brief, the City argued Nolan's disability was not the cause of the City's decision to rescind his offer of employment. The City then used "but-for" language to argue its decision was not based on Nolan's disability. The City claimed the "but-for" cause of Nolan's medical ineligibility was the relapse of his MS symptoms and the "but-for" cause of withdrawing the offer was that medical ineligibility. (Cedar Rapids Br., pp. 9-10) (App. 93-94). The City used this circular logic to argue Nolan is not disabled under the ICRA. While it may be a moot issue at this point (because the district court denied summary judgment on that issue), it bears noting that no defendant in a case under the ICRA should be using "but-for" language and no court should be analyzing any element of a claim under the ICRA using a "but-for" standard. That standard is unquestionably higher than that required by the ICRA as set forth by this Court in *DeBoom v. Raining Rose, Inc.*, 772 N.W.2d 1, 13 (Iowa 2009) and later in *Goodpaster*, 849 N.W.2d at 6.

The district court also disagreed with Nolan's argument that the ICRA does not require plaintiffs like Nolan to prove they were discriminated against "because of" their disability. (Ruling, p. 11, fn. 5) (App. 845). Instead, the district court held that plaintiffs do have to prove that they were discriminated against "because of" their disability, and that the "motivating factor" language is merely a way to prove discrimination when no direct evidence exists. *Id.* Again, it may be a moot issue because the court ultimately employed a "motivating factor" analysis. (Ruling, p. 14) (App. 848).

Despite this Court's clear direction that plaintiffs alleging discrimination under the ICRA are not required to meet a higher "but-for" or "because of" standard, defendants and district courts continue to dance around the issue and use that language. Respectfully, Nolan urges this Court to again remind litigants and district courts of the proper standard and put an end to the use of language that places improper burdens on plaintiffs like Nolan.

Plaintiff's timely resistance to the City's Motion for Summary Judgment. *See* App. 305-306.

A. The City Based its Decision Not to Hire Nolan on his MS and the Symptoms Caused by his MS

The City convinced the district court that the City's reason for rescinding Nolan's employment offer was not Nolan's MS, but the symptoms from which he suffered because of the MS. (Def. CR Br. p. 9) (App. 93). Therefore, the City argued and the district court held, the decision to rescind Nolan's offer of employment could not have been motivated by Nolan's disability. (Ruling, p. 15) (App. 849). This reasoning belies common sense. One cannot have symptoms without an underlying disease or impairment. If Nolan did not have MS, he would not have had symptoms associated with MS. The disease and its symptoms are so inextricably intertwined that a decision based on a disease's symptoms is inherently a decision based on the disease itself.

In reaching its conclusion, the district court relied on *Roberts v. City of Chicago*, 817 F.3d 561 (7th Cir. 2016), a case with no logical application here. In *Roberts*, two firefighter applicants were not hired after they had to go through several medical screenings because of their disabilities (asthma, hernia, kidney stones, bronchitis). *Roberts*, 817 F.3d at 564. The plaintiffs claimed that due to their disabilities, the city subjected them "to a battery of medical tests and record requests that prevented them from being hired" because the hiring system was

essentially first medically qualified, first hired. *Id.* at 565. The "battery of medical tests and record requests" resulted in a delay of the plaintiffs' medical clearance and ultimately "sounded the death knell of their employment prospects" because non-disabled applicants could become medically eligible faster than the plaintiffs. *Id.*

In their lawsuit, the plaintiffs argued the city engaged in disability discrimination by failing to hire the plaintiffs because of the extensive medical requests and tests that were a consequence of the plaintiffs' disabilities. *Id.* at 566. Specifically, the plaintiffs claimed the city's requests were unreasonable and that the medical screening process did not give individuals with disabilities sufficient time to comply. *Id.*

Nolan makes no similar claims. Nolan does not claim the City failed to hire him because he had to go through a series of examinations and provide releases, nor does he claim he did not have enough time to comply with the City's requests for documents and information. Nolan's claim is simply that the City failed to hire him based on his MS.

The City, not Nolan, came up with the theory that it failed to hire him because of a consequence of Nolan's MS (his symptoms). That Nolan's MS symptoms were a consequence of the MS does not make this case analogous to *Roberts* because, as discussed above, the MS and its symptoms are one and the same. Conversely, the *Roberts'* plaintiffs' disabilities and the tests they had to go

through because of those disabilities were not one and the same. For these reasons, *Roberts* does not support the district court's decision.

The only reason Nolan was deemed medically ineligible for the firefighter position was that Nolan was not symptom free for the three years prior to his physical examination and had a "risk of future exacerbations" of his MS that disqualified him under NFPA standards. (Westpheling Dep. 36:24-37:2) (App. 68). Dr. Westpheling admitted Nolan "likely would have been able to perform" all the essential functions of the firefighter job. (Westpheling Dep. 22-24) (App. 65). Dr. Westpheling also testified he had no concerns about Nolan's health or ability to perform the essential functions of the firefighter job, other than the fact that Nolan had MS. (Westpheling Dep. 24:16-19) (App. 65).

There is no dispute that if Nolan did not have MS, or symptoms associated with the disease, he would have been hired. (Fredericks Dep. 110:9-15) (App. 613). In other words, Nolan was qualified for the firefighter job in spite of 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. Westpheling 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. Westpheling was free to

make decisions based on the NFPA guidelines, because the City cannot be imputed with knowledge of Nolan's disability, and because the MFPRSI does not provide the sole standard to assess firefighter qualification so the use of another standard does not indicate discriminatory intent. (Ruling, pp. 16-17) (App. 850-851). The district court erred in reaching each of these conclusions.

1. Dr. Westpheling'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.

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 is 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. 543-544) (emphasis added).

Dr. Westpheling's fitness for duty examination was not an individualized assessment. After he identified Nolan's disability and determined the disability fell within the NFPA 1582's list of blanket exclusions, he immediately determined Nolan was disqualified without considering whether Nolan could perform the essential functions of the Cedar Rapids firefighter position. Dr. Westpheling admitted the NFPA 1582 protocol is standardized—in other words, not individualized. (Westpheling Dep. 46:2-6) (App. 71). Based on that standardized assessment, Dr. Westpheling *never* evaluated whether Nolan could actually perform the essential job functions for a Cedar Rapids firefighter. (Westpheling Dep. 23:8-15) (App. 65).

Instead, Dr. Westpheling applied the blanket exclusion created by the NFPA standards. During his deposition, Dr. Westpheling testified he could not think of any situation in which he would medically qualify a firefighter candidate who had MS and experienced symptoms in the past three years. (Westpheling Dep. 39:11-15) (App. 69). 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 firefighter position, the district court held Dr. Westpheling's use of the NFPA standards did not support an inference of disability discrimination. (Ruling, p. 16) (App. 850). In arriving at that conclusion, the district court cited Dr. Westpheling's testimony that he relied on the NFPA because there was a question about Nolan's ability to perform the essential functions of the job and the MFPRSI guidelines were not instructive. (Ruling, p. 16) (App. 850).

Regardless of his reasoning, Dr. Westpheling, 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, *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. Westpheling's use of the NFPA standards, rather than the MFPRSI guidelines, coupled with Dr. Westpheling'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. Knowledge of Nolan's disability should be imputed to the City

In its summary judgment motion, the City argued it had no knowledge of Nolan's disability and therefore the City cannot be held liable for discrimination. (Cedar Rapids Br. pp. 8-10) (App. 92-94). The district court agreed, without any analysis, holding "[k]nowledge of Mr. Deeds' MS does not automatically lead to the conclusion that the City was motivated by animus towards MS" and "[n]o evidence indicates the existence of any discriminatory intent on the City's part." (Ruling, p. 16) (App. 850) (emphasis in original).[4] The district court's conclusion

[4] The law distinguishes between motive and intent. "Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is done or omitted." *Black's Law Dictionary* at 727 (5th ed. 1979); *Burlew v. Eaton Corp.,* 869 F.2d 1063, 1066 (7th Cir. 1989). The requirement that Plaintiff prove that his disability was "a motivating factor" does not require a finding as to Defendants' state of mind. "[Disability] discrimination may be 'subtle and even unconscious,' and . . . [a] plaintiff can establish. . . liability without presenting any evidence as to the employer's state of mind.'" *Brown v. M&M/Mars*, 883 F.2d 505, 513-14 (7th Cir. 1989).

Here, the district court presumed that to find discrimination, there must be some evidence of discernable intent to discriminate. Such applications of discrimination law have been categorically rejected by both the United States Supreme Court and federal district courts. *See, e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) ("it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise."); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610-11 (1993) (employer decisions based in large part on stereotypes unsupported by objective fact, are 'the essence of what Congress sought to prohibit in the ADEA); *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 42 (1st Cir. 1999) (prohibition against discriminatory conduct "extends both to employer acts based on conscious racial animus and to employer decisions that are based on stereotyped thinking or other forms of less conscious bias"); *Rizzo v. Children's World Learning Ctrs., Inc.*, 173 F.3d 254, 268 (5th Cir. 1999) (ADA forbids an

assumes the only evidence of discriminatory motive is the City's knowledge of Nolan's MS. That is an incorrect assumption.

The City admitted that one of its own employees, occupational health nurse Jenifer Stefani, knew about Nolan's MS. (Def. CR Br., p. 9) (App. 93). On September 6, 2013, St. Luke's Work Well (a Unity Point defendant) sent a fax to Ms. Stefani indicating Nolan was "disqualified" from the firefighter position. (Work Well Clinic Confidential Report) (App. 499). A reasonable jury could certainly infer that Ms. Stefani connected the dots and figured out Nolan was deemed medically ineligible because of his MS diagnosis.

Fire Chief Mark English testified he decided to rescind Nolan's job offer based solely on the medical disqualification. (English Dep. 75:10-76:11, 84:21-24) (App. 364, 365). His understanding of 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). Without more, this is enough evidence for a reasonable jury to conclude the City knew Nolan had a disability under the ICRA.

However, additional evidence suggests that the City knew about Nolan's MS and based its decision not to hire him on that disability. There is no question

---

employer from taking action against "a disabled employee based on uneducated generalizations and stereotypes.").

the City's agent, St. Luke's Work Well, had actual knowledge of Nolan's disability. (9/4/13 Patient Demographic Information) (App. 648); (9/5/13 Westpheling Dictation) (App. 737); (Deeds Dep. 184:5-185:12) (App. 48); (St. Luke's Work Well Chart – Cedar Rapids) (App. 405-498). That disability was the sole basis for Dr. Westpheling's conclusion that Nolan could not perform the essential functions of the firefighter job. (Westpheling Dep. 36:24-37:2) (App. 68). Dr. Westpheling is an agent of the Unity Point defendants. Dr. Westpheling's opinion was the sole basis for the City's decision to rescind Nolan's job offer. (English Dep. 75:10-76:11, 84:21-24) (App. 364, 365).

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 into 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).

Nor can an employer 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). Dr. Westpheling's admission that Nolan "likely would have been able to" perform all the essential functions of the firefighter job belies any claim by the City that the examination was an individualized assessment related to the essential functions of a Cedar Rapids firefighter. (Westpheling Dep. 22:25-24:1) (App. 65).

Likewise, Dr. Westpheling's admission that he disqualified Nolan only because of his MS diagnosis repudiates any argument that Dr. Westpheling based the medical disqualification on an assessment of Nolan's ability to do the job. (Westpheling Dep. 24:16-19, 47:25-48:5) (App. 65, 71). Finally, Dr. Westpheling's testimony that he would <u>never</u> medically qualify a person with MS if the person experienced symptoms three years prior to their examination disproves any claim that he performed an individualized assessment of Nolan. (Westpheling Dep. 39:11-15) (App. 69).

The City admits it was "not mere happenstance" that its decision-makers were kept in the dark. (Def. CR Br. p. 10) (App. 94). Courts should not incentivize such purposeful ignorance. *See Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 876 (9th Cir. 1989) ("There are significant issues raised by mandating actual

knowledge in order to sustain a *prima facie* case of disability discrimination, including, among others, the incentives created if an employer has no duty to communicate knowledge about employee disability to management-level decision-making executives."). To allow an employer to break the law so long as it uses non-employee agents to do so contradicts the legislature's command to broadly construe the ICRA.

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). Under simple agency theory, the City knew everything that St. Luke's Work Well and Dr. Westpheling 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 based on the City's agent's representation that Nolan could not perform the essential functions of a Cedar Rapids 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.

3. The City is required to rely on the MFPRSI standards, not NFPA standards

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. 16-17) (App. 850-851). 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. 17) (App. 851).

Iowa Code § 400.8A is titled "Guidelines for Ongoing Fitness for Police Officers and Fire Fighters." That code section does not apply to this case. Rather, it addresses protocols and guidelines "for **ongoing** wellness and fitness for police officers and fire fighters **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. 543-544). While the district court may have been correct that 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. 543-544). 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. 543-544) ("any automatic disqualifiers in the above-referenced protocol standards must be disregarded.").

That did not happen here. From Dr. Westpheling's application of discriminatory NFPA 1582 standards and failure to conduct an individualized assessment of Nolan Deeds' 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.

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.

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. Westpheling 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. 7-8) (App. 841-842). 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. 841-842).

1. Dr. Westpheling 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. 841). 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 employer chooses to place on the medical opinion." (Ruling, p. 7) (App. 841) (emphases in original). The district court held Dr. Westpheling'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. 9-10) (App. 843-844). To the contrary, the record reveals Dr. Westpheling's opinion was far more than advisory and he had a significant amount of control over the City's hiring decision.

Fire Chief Mark English testified, repeatedly, that he relied entirely on Dr. Westpheling's opinion regarding whether Nolan was medically qualified for the firefighter position. (English Dep. 67:7-68:3, 76:7-11, 83:10-23) (App. 602, 604, 605). Having no medical background of his own, Chief English did not question Dr. Westpheling's opinion and the City made the decision to rescind Nolan's job offer based entirely on Dr. Westpheling's opinion. (English Dep. 76:3-6, 84:13-24, 85:10-16, 90:19-21) (App. 604, 605, 606); (Fredericks Dep. 125:1-5) (App. 614).

While Chief English may have had final decision-making authority in theory, Dr. Westpheling's opinion dictated Chief English's decision. Chief English has never used his discretion to override a physician's opinion that a candidate is not medically qualified for a job with the City's fire department. (English Dep. 84:25-85:9) (App. 605). Likewise, in the few cases Dr. Westpheling has disqualified a potential firefighter candidate, no one from the City has ever contacted him to obtain additional information about the reason for the medical disqualification. (Westpheling Dep. 31:4-9) (App. 67). Here, as it has done in the past, the City simply adopted Dr. Westpheling's opinion as its own.

Retired District Chief of Training Michael Fredericks testified that the City is mostly, if not entirely deferential to St. Luke's Work Well's conclusions regarding medical eligibility. (Fredericks Dep. 111:12-23, 112:5-14, 112:20-

113:2) (App. 613). Fredericks agreed with Chief English that the fire department lacks discretion to override St. Luke's Work Well's opinions regarding medical qualification. (Fredericks Dep. 113:20-23) (App. 613). If St. Luke's Work Well says a person is not medically qualified, the City must "move on" to the next candidate. (Fredericks Dep. 113:15-19) (App. 613). The City's heavy reliance on Dr. Westpheling negates any finding that Dr. Westpheling'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. Westpheling informed the City in writing that Nolan was disqualified from the firefighter position. (Work Well Clinic Confidential Report) (App. 499). 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. 11) (App. 845). 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. Westpheling 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 in spite of her medical condition. Dr. Westpheling, on the other hand, provided the City with nothing more than a stark disqualification. This disqualification ended the hiring process for Nolan because Dr. Westpheling's opinion controlled the City's hiring decision in its entirety.

Finally, there is evidence from which a reasonable jury could infer Dr. Westpheling was not merely acting "in furtherance of an independent duty," but that he personally sought to keep Nolan from serving as a firefighter because of Nolan's MS diagnosis. At least three neurologists disagreed with Dr. Westpheling'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. 44:14-45:8) (App. 617). Dr. Shivapour, agreed. (Shivapour Physician's Report) (App. 525). 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. 786-787).

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). A jury weighing this evidence, and Dr. Westpheling's credibility, could reasonably determine Dr. Westpheling'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 and the district court's decision should be reversed.

2. Dr. Westpheling 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. Westpheling rendered an independent medical judgment. (Ruling, p. 11) (App. 845). In reaching that conclusion, the district court believed Dr. Westpheling's use of the NFPA standards was representative of the medical consensus at the time. (Ruling, p. 11) (App. 845). The district court further held it is not "reasonable to expect a physician to conduct assessment[s] in a vacuum." (Ruling, p. 11) (App. 845).

Nolan never asked that Dr. Westpheling conduct medical examinations in a vacuum. Nolan asked that Dr. Westpheling conduct medical examinations in the manner prescribed by Iowa law; something Dr. Westpheling failed to do when he failed to conduct an individualized assessment and instead applied the NFPA's blanket exclusion for those with MS. Further argument regarding why

a reasonable jury could find Dr. Westpheling 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. 9) (App. 843).

While the Plaintiff cannot find an 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 appellate 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, *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.

/s/ Katie Ervin Carlson
FIEDLER & TIMMER, P.L.L.C.
Brooke Timmer AT0002496
brooke@employmentlawiowa.com
Katie Ervin Carlson AT0008958
katie@employmentlawiowa.com
Nathan Borland AT0011802
nate@employmentlawiowa.com
FIEDLER & TIMMER, P.L.L.C.
8831 Windsor Parkway
Johnston, IA 50131
Telephone: (515) 254-1999
Fax: (515) 254-9923

ATTORNEY'S COST CERTIFICATE

I, Katie Ervin Carlson, certify that there was no cost to reproduce copies of the preceding Appellant's Final Brief because the appeal is being filed exclusively in the Appellate Courts' EDMS system.

Certified by: */s/Katie Ervin Carlson*

CERTIFICATE OF COMPLIANCE

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

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

[_X_] this brief contains 8,600 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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

[_X_] this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point font size in Garamond type style.

Certified by: _____*/s/ Katie Ervin Carlson*_____

CERTIFICATE OF SERVICE AND FILING

I, Summer Heeren, hereby certify that on the 3rd day of March, 2017, I electronically filed the foregoing Final Brief with the Clerk of the Iowa Supreme Court by using the EDMS system. Service on all parties will be accomplished through EDMS.

Certified by: _____*/s/ Summer Heeren*_____