IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 16-1779

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

On Appeal From The Iowa District Court For Linn County
The Honorable Paul D. Miller

DEFENDANTS-APPELLEES ST. LUKE'S WORK WELL SOLUTIONS, ST. LUKE'S HEALTHCARE, AND IOWA HEALTH SYSTEM D/B/A UNITYPOINT HEALTH'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

Karin A. Johnson, AT0007677
Samantha M. Rollins, AT0011968
Mitch G. Nass, AT0012339
FAEGRE BAKER DANIELS LLP
801 Grand Avenue, 33rd Floor
Des Moines, Iowa 50309
Telephone: (515) 248-9000
Facsimile: (515) 248-9010
E-mail: karin.johnson@faegrebd.com
E-mail: samantha.rollins@faegrebd.com
E-mail: mitch.nass@faegrebd.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Rules

Other Authorities

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The District Court Correctly Ruled That This Court's Holding In *Sahai v. Davis* Controls This Case And Requires That Deeds' Claim Against UnityPoint Be Dismissed.

Cases

DeVito v. N.J. Dep't. of Transp., 2009 WL 2066984 (N.J. Super. Ct. App. Div. July 15, 2009)

McCormick v. Nikkel & Assocs., Inc., 819 N.W.2d 368 (Iowa 2012)

Sahai v. Davies, 557 N.W.2d 898 (Iowa 1997)

Statutes and Rules

IOWA CODE § 216.6

IOWA CODE § 216.11(1)

N.J. STAT. ANN. § 10:5-12(e)

II. Deeds Failed To Generate A Genuine Issue Of Material Fact As To Any Of The Elements Of His Aiding And Abetting Claim.

Cases

Carr v. United Parcel Serv., 955 S.W.2d 832 (Tenn. 1997)

Fiol v. Doellstedt, 58 Cal. Rptr. 2d 308 (Cal. Ct. App. 1996)

Graves v. City of Durant, No. C09-0061, 2010 WL 785850, (N.D. Iowa Mar. 5, 2010)

Parker v. Warren Cnty. Utility Dist., 2 S.W.3d 170 (Tenn. 1999)

Sahai v. Davies, 557 N.W.2d 898 (Iowa 1997)

Stoddard v. BE & K, Inc., 993 F. Supp. 2d 991 (S.D. Iowa 2014)

Statutes and Rules

CAL. GOV. CODE § 12940(i)

IOWA CODE § 216.11(1)

TENN. CODE ANN. § 4-21-301(a) (1991)

Authorities

BLACK'S LAW DICTIONARY, 10th Ed. 2014

RESTATEMENT (SECOND) OF TORTS § 876(b)

III. The District Court Correctly Ruled That Deeds Does Not Have An Actionable Discrimination Claim Against The City Of Cedar Rapids.

Cases

Annear v. State, 454 N.W.2d 869 (Iowa 1990)

Casey's Gen. Stores, Inc. v. Blackford, 661 N.W.2d 515 (Iowa 2003)

Hunter v. United Parcel Serv., Inc., 697 F.3d 697 (8th Cir. 2012)

Moritz v. Frontier Airlines, 147 F.3d 784 (8th Cir. 1998)

Stoddard v. BE & K, Inc., 993 F. Supp. 2d 991 (S.D. Iowa 2014)

ROUTING STATEMENT

The District Court's Ruling is based upon settled issues of statutory law. The case presents neither an issue of first impression nor substantial questions of changing legal principles. Because the case presents the application of existing legal principles, it is appropriate for this Court to transfer the case to the Iowa Court of Appeals pursuant to IOWA R. APP. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Plaintiff-Appellant Nolan Deeds ("Deeds" or "Plaintiff-Appellant") filed suit on January 30, 2015, asserting that the City of Cedar Rapids discriminated against him because of his disability in violation of the Iowa Civil Rights Act, Iowa Code Chapter 216 ("ICRA"), when it withdrew its conditional offer of employment. Deeds further alleged that St. Luke's Work Well Solutions, St. Luke's Healthcare, and Iowa Health System d/b/a UnityPoint Health (collectively referred to as "UnityPoint") intentionally aided and abetted the City in its discrimination in violation of Iowa Code § 216.11(1), when the occupational medicine physician who examined Deeds opined that Deeds was not medically qualified for the firefighter position

conditionally offered to him.[1] UnityPoint filed its Answer on June 8, 2015, denying Deeds' claims in their entirety.

The City of Cedar Rapids and UnityPoint each filed a summary judgment motion on June 27, 2016. Deeds resisted both motions. The District Court considered the summary judgment motions without oral argument and, on September 21, 2016, granted summary judgment in favor of both the City of Cedar Rapids and UnityPoint. Deeds now appeals this decision.

STATEMENT OF FACTS

The factual basis for Deeds' claim against UnityPoint stems from the medical opinion offered to the City of Cedar Rapids by a St. Luke's occupational medicine physician, Dr. Jeffrey Westpheling, M.D., that Deeds—who had previously been diagnosed with Multiple Sclerosis ("MS")—was not medically qualified to perform the essential job duties of the firefighter position conditionally offered to him.

Dr. Westpheling graduated from the University of Iowa Medical School in May 1999 and is licensed to practice medicine in the State of

[1] Deeds also alleged a failure to accommodate, but later clarified through his summary judgment resistance filings that he was not pursuing that claim. The District Court properly concluded Deeds abandoned any claim for failure to accommodate his disability. *See* App. 838 (Ruling on Defendants' Motion for Summary Judgment (hereinafter "Ruling"), at p. 4).

Iowa. App. 61 (Tr. 6:8 – 7:16). During his medical training, Dr. Westpheling completed rotations in neurology involving the assessment and treatment of patients with MS. App. 64 (Tr. 18:10-25). He is board certified in the specialty of Occupational Environmental Medicine. App. 61 (Tr. 7:7-16). Prior to attending medical school, Dr. Westpheling served as a City of Des Moines firefighter from January 1990 to August 1995. App. 60-61 (Tr. 5:19 – 6:14).

St. Luke's employed Dr. Westpheling as an occupational medicine physician at its Work Well Solutions clinic ("Work Well") from approximately March of 2002 to July of 2015. App. 62 (Tr. 11:2-10). One of Dr. Westpheling's responsibilities was to perform pre-employment medical screenings of prospective firefighters for the City of Cedar Rapids. App. 62 (Tr. 12:2-5). He performed approximately 50 such screenings while employed at Work Well. App. 62 (Tr. 12:25 – 13:8).

The procedure Dr. Westpheling followed when examining prospective firefighters was dictated in part by the medical protocol promulgated by the Municipal Fire & Police Retirement System of Iowa ("MFPRSI") Board. App. 63 (Tr. 14:15 – 15:22). Dr. Westpheling understood the primary purpose of the MFPRSI medical protocol was to ensure the longevity and solvency of the disability retirement system for police and firefighters. App.

76 (Tr. 66:8-24). He further understood that, consistent with its disability retirement focus, the MFPRSI protocol only established baseline criteria aimed at identifying pre-hire conditions that may later affect an individual's ability to serve as a firefighter. App. 63 (Tr. 14:15-24), 76 (Tr. 66:8 – 67:13). The MFPRSI protocol places emphasis on heart and lung-related conditions. App. 76 (Tr. 66:8-24). Dr. Westpheling testified the MFPRSI "can't possibly address every situation which may present to an examiner when evaluating a firefighter or police candidate." App. 76 (Tr. 67:2-5). He operated with the understanding that the MFPRSI medical protocol did not preclude him from exercising his independent judgment—including his consultation and application of available industry standards—in advising as to whether a patient was medically qualified to work as a firefighter. App. 63 (Tr. 14:15-24), 76 (Tr. 66:8 – 67:13).

Dr. Westpheling therefore regularly relied on the National Fire Protection Association 1582 "Standard on Comprehensive Occupational Medical Program for Fire Departments" ("NFPA 1582")—which provides descriptive medical requirements and guidance for fire departments—in evaluating the medical qualification of firefighter candidates. App. 68 (Tr. 34:14 – 35:6). NFPA 1582 was developed by individuals with a broad array of applicable knowledge, and represents the "consensus opinion of expert

panels including fire chiefs, fire service members, physicians, [and] specialists." App. 68 (Tr. 34:23 – 35:1). Relevant here, the 2013 edition of NFPA 1582 provides "multiple sclerosis with activity or evidence of progression within the previous three years" is a "Category A" medical condition that "preclude[s] a person from performing as a member in a training or emergency operation environment" and presents a "significant risk to the safety and health of the person or others." App. 58.

In addition to the MFPRSI protocol and NFPA 1582 guidelines available to him at the time he examined prospective firefighters, Dr. Westpheling had access to the job description of a City of Cedar Rapids firefighter. App. 65 (Tr. 22:8-24). Dr. Westpheling, who himself served as a City of Des Moines firefighter for more than five years, also was personally familiar with the essential job functions of a firefighter. App. 60-61 (Tr. 5:19 – 6:14), 74-75 (Tr. 61:22 – 62:19).

In July 2013, Deeds interviewed for a firefighter position with the City of Cedar Rapids, and received a job offer contingent on his passing a medical screening. App. 51 (Tr. 219:12 – 220:25), 57. The City's occupational nurse, Jennifer Stefani, performed an initial screening during which Deeds revealed he had been diagnosed with MS. App. 291. The City

then sent Deeds to Work Well for a screening performed by Dr. Westpheling on September 4, 2013. App. 46 (Tr. 177:6-11), 58.

During the examination, Dr. Westpheling discussed Deeds' MS diagnosis with him, identified the dates of Deeds' MS symptoms, and ascertained the nature and magnitude of those symptoms. App. 48 (Tr. 184:5-19). Dr. Westpheling also reviewed occupational and medical history forms completed by Deeds. App. 65 (Tr. 24:2-22). Following the examination, Deeds provided medical records maintained by his treating neurologists at the University of Iowa Hospitals and Clinics, at Dr. Westpheling's request. App. 48 (Tr. 184:20 – 185:12), 64-65 (Tr. 19:8-21, 25:6-11).

The records of Deeds' treating neurologists reviewed by Dr. Westpheling noted that, at the onset of Deeds' MS symptoms in December 2011, Deeds experienced "right hemibody numbness and right lower extremity weakness that lasted for approximately 2-3 months." App. 64 (Tr. 20:5-22), 78-81. Then, in December 2012, Deeds experienced a recurrence that included "right foot numbness" that "spread to involve his right foot as well," then "began to involve both legs and the back of both thighs," and later experienced a "wobble[] when he walk[ed]." (*Id.*).

Based on Dr. Westpheling's knowledge of MS, his own experience working as a firefighter, his review of Deeds' medical records, and the consensus guidance set forth in NFPA 1582, Dr. Westpheling concluded Deeds was not at that time medically qualified to work as a firefighter. App. 71 (Tr. 47:10-24), 74-76 (Tr. 61:22 – 62:19, 67:21-25). Dr. Westpheling believed, based on his personal experience and knowledge of Deeds' condition, that Deeds' history of MS could negatively impact his ability to safely and effectively perform as a firefighter in at least the following ways:

- Carrying the typical 50-100 pounds of equipment necessary to perform the firefighter job could be more difficult and less safe;

- Getting into and out of a hazardous materials suit could take more time and prevent the decontamination process from happening quickly; and

- Being woken up from a deep sleep and discovering an onset of MS symptoms during the night could slow Deeds' response time, and/or could result in Deeds' team being unexpectedly shorthanded.

App. 75 (Tr. 62:6 – 65:4).

Dr. Westpheling also gave the following example during his deposition, highlighting how MS could create a potentially dangerous situation for a firefighter and those he is charged with protecting:

> One example would be when a firefighter is fully in gear, it could be another 50 to 100 pounds of additional equipment that

> makes mobility more difficult. It throws off the center of balance to have an air tank on your back. Your vision is often obscured by water, sweat, a fogged mask, smoke. It could be various weather conditions, rain, snow, those sorts of things so you're already inhibited by the amount of gear and the conditions you're working in.
>
> Any neurological condition that may affect your sense of balance, your sense of feeling, proprioception, those types of senses, it's compounded by the fact that you're already in a difficult situation. So you could imagine standing on an icy rung of a ladder with full gear, an air tank on your back, maybe you've got a tool in your hand and you're having to effect a rescue of somebody from a window and you have numbness and tingling of an extremity or difficulty with balance, you could possibly remove yourself from that situation but it may be the difference of getting down safely and not. Then that compounds the safety of other members of the team because then somebody has to step in for you where you have to step out.

App. 75 (Tr. 62:20 – 63:23).

Dr. Westpheling therefore communicated to the City of Cedar Rapids his medical opinion that Deeds was not at that time medically qualified to perform the job of firefighter. App. 66 (Tr. 27:11-23), 292. He did not volunteer further details concerning Deeds' medical condition. App. 66 (Tr. 28:2-11). His practice was to refrain from providing to prospective employers the specific diagnosis or reasons underlying his medical opinions, as he believed the federal Health Insurance Portability and Accountability Act ("HIPAA") prohibited him from doing so. App. 66-67 (Tr. 28:2-11, 29:8 – 30:8).

Though Dr. Westpheling did not volunteer the details of Deeds' medical condition, nothing would have prevented Deeds himself from sharing information with the City of Cedar Rapids. App. 55-56 (Tr. 245:12 – 246:10), 66-67 (Tr. 29:8 – 30:8). Similarly, nothing would have prevented the City of Cedar Rapids from following up with Dr. Westpheling to request clarification with regard to his opinion. App. 67 (Tr. 31:4-24).

On September 10, 2013, Dr. Westpheling spoke with Deeds by telephone and explained his medical opinion provided to the City of Cedar Rapids. App. 52-53 (Tr. 233:20 – 234:8), 71-72 (Tr. 49:12 – 50:25). Dr. Westpheling suggested Deeds could seek a second medical opinion regarding his medical qualification to work as a firefighter. (*Id.*). But Deeds never did so. App. 49 (Tr. 188:1-10).

Following receipt of Dr. Westpheling's medical opinion, the City of Cedar Rapids withdrew its conditional offer of employment to Deeds. App. 52 (Tr. 230:12-25). City of Cedar Rapids Fire Chief Mark English made the decision to withdraw Deeds' conditional job offer. App. 121, 277 (Tr. 68:4-7). English was aware Deeds had not passed his medical screening, but did not know Deeds had MS. App. 277 (Tr. 66:1 – 67:9), 363 (Tr. 65:4-25). The only City of Cedar Rapids employee who knew Deeds had MS was occupational nurse Jennifer Stefani, who had initially performed a health

screening of Deeds, and who was not involved in the City's decision to withdraw its conditional job offer to Deeds. App. 54 (Tr. 241:14-23), 291-93.

The City of Cedar Rapids held the exclusive authority to revoke Deeds' offer of employment at all times, as Dr. Westpheling did not have the power or authority to disqualify a prospective employee. App. 73 (Tr. 55:15-23), 277 (Tr. 68:4-7), 363 (Tr. 65:11-22), 367 (Tr. 102:4 – 103:12). Dr. Westpheling's role was limited to offering an advisory opinion as to whether a prospective employee met the medical standards of the firefighter position. App. 367 (Tr. 103:1-7).

Deeds testified during his deposition that he does not allege Dr. Westpheling was out to "sabotage" Deeds' job offer because of Deeds' MS. App. 46 (Tr. 177:12-18). Deeds also admitted he had no evidence that Dr. Westpheling harbors any animus toward individuals with MS. App. 46 (Tr. 177:19-22). Finally, in response to counsel's inquiry into whether Deeds believed Dr. Westpheling and the City of Cedar Rapids conspired to exclude him from employment, Deeds answered: "I don't believe they were in cahoots together trying to sabotage anything like that [sic]." App. 46-47 (Tr. 177:23 – 178:5). Consistent with Deeds' beliefs, Dr. Westpheling testified

he wished he had been in a position to recommend Deeds for the firefighter position. App. 74 (Tr. 61:13-21).

STANDARD OF REVIEW

This is an appeal of the District Court's Ruling granting summary judgment to UnityPoint and the City of Cedar Rapids. The appropriate standard of review is for correction of errors at law. *See Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 827 (Iowa 2007).

PRESERVATION OF ERROR

UnityPoint moved for summary judgment on Deeds' aiding and abetting claim, arguing the undisputed facts demonstrated—as a matter of law—it did not intentionally assist the City of Cedar Rapids in committing a discriminatory practice. Deeds timely filed a resistance to UnityPoint's motion for summary judgment, and therefore properly preserved error as to the issues raised in this appeal.

ARGUMENT

I. The District Court Correctly Ruled That This Court's Holding In *Sahai v. Davis* Controls This Case And Requires That Deeds' Claim Against UnityPoint Be Dismissed.

The outcome in this case is directly controlled by *Sahai v. Davies*, 557 N.W.2d 898 (Iowa 1997), which held that a physician's recommendation made on the basis of his independent medical judgment at the request of a

prospective employer cannot constitute discriminatory action under the ICRA. *Id.* at 901–03. The District Court correctly found that *Sahai* requires dismissal of Deeds' claim against UnityPoint for at least two reasons: (1) Dr. Westpheling's medical screening was conducted with the purpose of advising the City of Cedar Rapids; and (2) Dr. Westpheling's medical screening was an independent and individualized assessment of Deeds, the specific candidate at issue. App. 843 (Ruling at p. 9).

A. The Facts And Holding Of *Sahai*.

The employer in *Sahai*, the Nissen Company, offered Stacey Davies a position on its assembly line. *Id.* at 899-900. The offer was contingent on a satisfactory physical examination and drug test. *Id.* Davies went to Dr. Sahai for the required physical and disclosed to Dr. Sahai that she was pregnant. *Id.* at 900.

After completing his examination of Davies, Dr. Sahai marked the box "No" on the applicable medical form, indicating he did not approve Davies as a candidate for the assembly line position. *Id.* Dr. Sahai explained during a telephone conversation with a Nissen representative that Davies' pregnancy was the reason he did not approve her for the job, and stated he did not believe a young woman who was fourteen weeks pregnant should be doing assembly line work. *Id.* at 902. Dr. Sahai's medical

judgment was conclusory in nature and not based on any particular physical limitation of Davies. *Id.* In fact, he admitted he would make the same recommendation with regard to any woman in Davies' stage of pregnancy who had applied for an assembly line job. *Id.* at 901.

The court acknowledged the language of the ICRA extends to "situations in which a person guilty of discriminatory conduct is not the actual employer of the person discriminated against." *Id.* However, the court found that liability could not extend to Dr. Sahai or the clinic that employed him because their actions were advisory in nature: "The advice being sought was an independent medical judgment. Recommendations made in this context that are directly responsive to a prospective employer's request are not in our view discriminatory actions." *Id.*

In reaching its holding, the court discussed the conclusory nature of Dr. Sahai's medical judgment, and noted that Nissen had been "free to ask follow up questions" about whether Dr. Sahai's opinion was based on Davies' ability to perform the job. *Id.* at 902. The court found that Nissen's failure to ask follow-up questions, and any resulting violation of employment discrimination laws, did not transform Dr. Sahai's independent medical judgment into a discriminatory act. *Id.*

B. *Sahai* Controls The Outcome Of This Case.

The facts of Deeds' case are even more favorable to UnityPoint than the facts of *Sahai* were to Dr. Sahai. Dr. Westpheling's medical opinion was not based merely on the fact Deeds had been *diagnosed* with MS. Rather, Dr. Westpheling arrived at his opinion after conducting an individualized assessment of Deeds' condition, which included a full examination of Deeds; review of the occupational and health forms completed by Deeds; a discussion with Deeds regarding the timing and nature of his symptoms; Dr. Westpheling's own medical knowledge about MS; a review of the medical records of Deeds' treating neurologists; Dr. Westpheling's knowledge of the essential functions of the firefighter job; and Dr. Westpheling's own experience working as a firefighter for more than five years. App. 71 (Tr. 47:10-24), 74-76 (Tr. 61:22 – 62:19, 67:21-25). Dr. Westpheling then consulted NFPA 1582 and applied it to the particularized nature and course of Deeds' condition. App. 71 (Tr. 47:10-24). Dr. Westpheling's examination was thus both individualized and independent, as opposed to a

mere application of the NFPA's "blanket exclusion," as Deeds characterizes it.[2] (*See* Deeds' Final Brief, at p. 35).

Deeds has argued that *Sahai* does not control this case because the *Sahai* court was considering whether a party other than the employer can be liable for discrimination under Iowa Code § 216.6, and did not explicitly rule on a claim of aiding and abetting discrimination under Iowa Code § 216.11. (*See* Deeds' Final Brief, at pp. 36-38). This is a distinction without a difference. The *Sahai* court's ruling depended upon its finding that physician recommendations made on the basis of independent medical judgment at the request of a prospective employer "are not . . . discriminatory actions." *Sahai*, 557 N.W.2d at 901. This finding applies equally well to a claim under Iowa Code § 216.11 as it does to a claim under Iowa Code § 216.6. On this point, the District Court astutely noted:

---

[2] Even if Dr. Westpheling had concluded Deeds was ineligible to serve as a firefighter solely by virtue of his MS diagnosis, however, Deeds' aiding and abetting claim would still fail. As noted by the *Sahai* court and cited with favor by the District Court in this case:

> "'We are convinced . . . that physicians regularly issue medical opinions based on typical prognoses for similarly situated clinical settings. *This does not mean that such evaluations are not individualized when rendered with respect to a particular individual in connection with a physical examination of that person.*'"

App. 842 (Ruling, at p. 8 (quoting *Sahai*, 557 N.W.2d at 901-02) (emphasis in original)).

> Viewing the two types of claims side by side, it is clear that both involve inquiries into the reasons or motives underlying the defendant's conduct. Since the twin requirements of *Sahai*—that the medical screening be conducted with the purpose of advising the employer and that the examination must concern the specific candidate at issue—essentially probe a defendant's motive, the Court finds *Sahai* to be equally applicable to an aiding and abetting claim.

App. 843 (Ruling, at p. 9).

Deeds asserts that even if *Sahai* applies, its holding should be distinguished on the basis that Dr. Westpheling somehow controlled the City of Cedar Rapids' hiring decision, and therefore his medical opinion was not advisory in nature. (*See* Deeds' Final Brief, at pp. 30-35). Deeds' argument that Dr. Westpheling had sufficient control over the City's hiring decision to subject UnityPoint to aiding and abetting liability is based on Deeds' misapplication of *Sahai* and mischaracterization of the record evidence.

First, Deeds argues that Dr. Westpheling's decision to omit the details of Deeds' medical diagnosis in advising the City of Cedar Rapids generates an issue of disputed fact as to whether Dr. Westpheling controlled the City's hiring decision. (*See* Deeds' Final Brief, at pp. 33-34). But Dr. Sahai's opinion was held to be advisory despite its conclusory nature and his failure to explain specifically why Davies' pregnancy precluded her from

performing assembly line work. *Sahai*, 557 N.W.2d at 902.[3] Here, Dr. Westpheling declined to offer confidential medical information regarding Deeds' diagnosis to the City of Cedar Rapids because he believed such disclosure would violate HIPAA. App. 66-67 (Tr. 28:2 – 30:8). Dr. Westpheling testified he is "hesitant to release [medical] information unless [he] knows expressly that the prospective employee" has consented to the release, and he was not aware that Deeds had provided any release that would have been sufficient to permit his disclosure of Deeds' medical condition. (*Id.*). However, Dr. Westpheling had a standing practice of explaining to prospective employers that they are free to discuss medical conditions directly with prospective employees, who can then choose to "disclose as much or as little as they would like" to the prospective employer." (*Id.*). Deeds understood that nothing prevented him from

[3] Specifically, the court reasoned as follows:

> It is perhaps unfortunate that the form of Dr. Sahai's written opinion was a conclusory recommendation as to whether Davies' [sic] should be hired. The record indicates, however, that immediately following her physical examination, Dr. Sahai phoned a Nissen personnel representative and informed him that he did not believe a young woman who was fourteen weeks pregnant should be doing assembly line work . . . At this point, Nissen representatives were free to ask follow-up questions concerning whether Dr. Sahai's recommendation was based on his beliefs concerning Davies' ability to perform assembly line work or upon potential physical harm to her from doing that work. The fact that Nissen did not ask these follow-up questions . . . does not make Dr. Sahai's recommendation, based on health considerations, a sexually discriminatory act.

Sahai, 557 N.W.2d at 902. This reasoning directly refutes Deeds' argument.

discussing his medical condition with the City of Cedar Rapids. App. 55-56 (Tr. 245:12 – 246:10). Further, nothing would have prevented the City of Cedar Rapids from asking Dr. Westpheling follow up questions about his opinion, just as nothing prevented Nissen from doing so in the *Sahai* case. App. 67 (Tr. 31:4-24). The fact that Dr. Westpheling did not volunteer confidential details about Deeds' medical condition cannot provide a basis for holding UnityPoint liable under the ICRA. *See Sahai*, 557 N.W.2d at 902.

Second, Deeds claims the record contains sufficient evidence from which to conclude Dr. Westpheling's recommendation dictated whether or not the City would hire Deeds. (*See* Deeds' Final Brief, at pp. 31-33). The undisputed evidence, however, shows that both Dr. Westpheling and the City understood that Dr. Westpheling had no authority with respect to Deeds' employment, and could only offer his independent medical opinion to the City for its consideration.[4] App. 73 (Tr. 55:15-23), 277 (Tr. 68:4-7), 363 (Tr. 65:11-22), 367 (Tr. 102:4 – 103:12). Deeds' assertion that a jury could infer from the City's historical acceptance of Dr. Westpheling's

[4] Dr. Westpheling's inability to dictate whether or not the City would withdraw its conditional job offer supports affirming the District Court's Ruling. As this Court has recognized, control is understood as the ability to prevent a wrong from occurring. *McCormick v. Nikkel & Assocs., Inc.*, 819 N.W.2d 368, 374 (Iowa 2012). Absent such an ability, recognized public policy considerations and principles of law demand that the party in question not be held liable. *Id.*

recommendations that he effectively controlled the City's hiring decision is based on a flawed premise: that because the City accepted Dr. Westpheling's opinion in previous cases, it was *required* to do so in Deeds' case.[5] This is not a reasonable inference. *See* App. 841 (Ruling, at p. 7 (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")). Moreover, Dr. Westpheling recommended to Deeds that he seek a second opinion regarding his ability to work as a firefighter. App. 52-53 (Tr. 233:20 – 234:8), 71-72 (Tr. 49:12 – 50:25). No reasonable jury could conclude that Dr. Westpheling assumed control over the City of Cedar Rapids' hiring decision when he recommended that Deeds seek and provide to the City additional independent medical opinions regarding his ability to work.

Third, Deeds claims the three opinions by other physicians offered during litigation—that are at odds with the recommendation of Dr. Westpheling—serve as evidence that Dr. Westpheling's opinion was something other than advisory. (*See* Deeds' Final Brief, at pp. 34-35).

[5] Similarly, Deeds' reliance on the deposition testimony of the City of Cedar Rapids' former District Chief of Training Michael Fredericks is misplaced, because he had no role in the City's hiring decision, and learned of Deeds' medical disqualification from his supervisors after it had already occurred. App. 121, 277 (Tr. 68:4-7), 613 (Tr. 110:16 – 112:14).

Although other medical professionals have concluded Deeds could work as a firefighter without restrictions—at least when he is not experiencing MS symptoms—their opinions are immaterial to the issue of whether or not Dr. Westpheling was serving as an advisor when he offered *his* opinion. It is undisputed that Dr. Westpheling's authority was limited to offering his medical recommendation for the City's consideration. App. 73 (Tr. 55:15-23), 277 (Tr. 68:4-7), 363 (Tr. 65:11-22), 367 (Tr. 102:4 – 103:12). Dr. Westpheling lacked control over the City's hiring decision, and the fact other physicians have disagreed with his advisory opinion does not suggest otherwise.

Dr. Westpheling had no more control over the City's decision not to hire Deeds than Deeds himself. The District Court therefore correctly held that the analysis in *Sahai* controls the outcome of this case and requires dismissal of UnityPoint.

C. The Holding In *Sahai* Is Based On Sound Principles Of Public Policy.

Holding physicians such as Dr. Westpheling liable under the ICRA's aiding and abetting provision would have a chilling effect on their willingness to offer thorough and accurate medical advice. This danger was highlighted in the factually similar case of *DeVito v. N.J. Dep't. of Transp.*, 2009 WL 2066984 (N.J. Super. Ct. App. Div. July 15, 2009). In *DeVito*, a

physician offered a prospective employer the opinion that the applicant was not medically qualified to perform the essential functions of the physically strenuous position he had applied for. *Id.* at *3-4. The physician opined that the applicant's Hepatitis C rendered him too weak to perform the job. *Id.* at *4.

The applicant sued the physician under New Jersey's aiding and abetting statute, which states it is unlawful "[f]or any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act, or to attempt to do so." N.J. STAT. ANN. § 10:5-12(e). At the trial court level, the judge made the following ruling from the bench:

> Well, the doctor gave his opinion to DOT knowing that DOT would rely on it. There's no question about that. But it's an honest opinion and it's a correct opinion. And it's a correct opinion as affirmed by the plaintiff's own doctor. So he didn't do anything wrong. What's he supposed to do if he finds adverse information about the plaintiff's medical history? Conceal it? Not divulge it?

Id. at *5 (emphasis supplied).

The same questions should give pause here. Would this Court issue a ruling that incentivizes Iowa physicians to ignore or modify their independent medical judgment to avoid the risk of a discrimination lawsuit? Would this Court impose on all Iowa physicians an affirmative obligation to

insert themselves into private employment relationships and force their patients and client-employers to negotiate potential work-arounds whenever a patient cannot, in their medical judgment, safely perform the essential job functions? And, if so, in imposing that affirmative duty, would Iowa physicians be forced to choose between complying with the mandates of federal HIPAA law or divulging the confidential health information of their patients to facilitate the interactive process required when a reasonable accommodation is requested by a prospective or current employee? These outcomes surely are not what the Iowa legislature intended when it made unlawful the intentional aiding and abetting of a discriminatory act. This Court should rule as the *DeVito* court did, and hold that a physician providing independent medical judgment about an employee's fitness for work cannot, as a matter of law, be held liable for aiding and abetting discrimination.

II. Deeds Failed To Generate A Genuine Issue Of Material Fact As To Any Of The Elements Of His Aiding And Abetting Claim.

Even if the District Court had declined to dispose of Deeds' claim against UnityPoint under *Sahai*¸ the clear language of the ICRA's aiding and abetting provision nevertheless requires dismissal of Deeds' claim. The ICRA provides it is an unlawful practice for:

> Any person to intentionally aid, abet, compel, or coerce another person to engage in any of the practices declared unfair or discriminatory by this chapter.

IOWA CODE § 216.11(1). The language of the statute unambiguously requires an **intent** to aid or abet discriminatory conduct. *Id.* (emphasis provided). Moreover, the terms "aiding" and "abetting" are defined as follows: "to assist or facilitate the commission of a crime, or to promote its accomplishment." BLACK'S LAW DICTIONARY, 10th Ed. 2014. Deeds must therefore prove the City of Cedar Rapids discriminated against him because of his disability, and that Dr. Westpheling intentionally assisted the City in its discrimination. *See* IOWA CODE § 216.11(1); BLACK'S LAW DICTIONARY, 10th Ed. 2014.

The requirements of underlying discriminatory conduct and intentional assistance by the alleged aider find further support in the elements of the civil tort of aiding and abetting, requiring proof of:

> (1) A wrong to the primary party;
> (2) Knowledge of the wrong on the part of the aider; and
> (3) Substantial assistance by the aider in the achievement of the primary violation.

Graves v. City of Durant, No. C09-0061, 2010 WL 785850, at *13 (N.D. Iowa Mar. 5, 2010) (emphasis provided) (applying the Iowa test for civil aiding and abetting claims to a claim under Iowa Code § 216.11); *see also Stoddard v. BE & K, Inc.*, 993 F. Supp. 2d 991, 1007 (S.D. Iowa 2014)

(aiding and abetting discrimination claim necessarily fails if underlying discrimination claim is dismissed). In addition, the Restatement provides that a person is subject to liability for harm to a third person if he "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so [as] to conduct himself." RESTATEMENT (SECOND) OF TORTS § 876(b).[6] Like the clear statutory language of Iowa Code § 216.11(1), the common law elements of civil aiding and abetting emphasize that liability cannot be established without proof of underlying, illegal conduct, and intentional assistance by the aider in its achievement.

[6] Several jurisdictions with aiding and abetting statutes worded similarly to Iowa Code § 216.11(1) apply the Restatement's substantial assistance test. The Supreme Court of Tennessee, for example, held a plaintiff must prove "the defendant knew that his companions' conduct constituted a breach of duty, and that he gave **substantial assistance** or **encouragement** to them in their acts." *Carr v. United Parcel Serv.*, 955 S.W.2d 832, 836 (Tenn. 1997) (emphasis provided) (citations omitted), *reversed on other grounds in Parker v. Warren Cnty. Utility Dist.*, 2 S.W.3d 170 (Tenn. 1999). At the time *Carr* was decided, the applicable Tennessee statute provided that "[i]t is a discriminatory practice for a person or for two (2) or more persons to: . . . (2) Aid, abet, incite, compel or command a person to engage in any of the acts or practices declared discriminatory by this chapter." *Id.* (citing TENN. CODE ANN. § 4-21-301(a) (1991)). Similarly, the relevant California statute makes it an unlawful practice "[f]or any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so." CAL. GOV. CODE § 12940(i). The California Court of Appeals construed this statute in a manner consistent with the Restatement's substantial assistance test. *See Fiol v. Doellstedt*, 58 Cal. Rptr. 2d 308, 312-13 (Cal. Ct. App. 1996). This Court should similarly hold an individual seeking relief under Iowa Code § 216.11(1) must establish the alleged aider knew another party's conduct constituted discrimination and provided substantial assistance to that party in committing the discriminatory practice.

Regardless of *Sahai's* applicability, Deeds did not generate a material issue of fact with regard to any of the elements of his aiding and abetting claim. Rather, the only reasonable conclusion supported by the undisputed facts is that Dr. Westpheling's intent was to provide the advisory opinion he had been hired by the City of Cedar Rapids to give, and he had no control over the City's decision to withdraw its offer of employment. App. 73 (Tr. 55:15-23), 277 (Tr. 68:4-7), 363 (Tr. 65:11-22), 367 (Tr. 102:4 – 103:12). Deeds conceded during his deposition he had no evidence of discriminatory intent or assistance on the part of Dr. Westpheling: Deeds testified he did not believe Dr. Westpheling gave his medical opinion in an attempt to "sabotage" his chances for employment with the City; he testified he was not aware of any animus Dr. Westpheling held toward individuals with MS; and he acknowledged he had no reason to believe that Dr. Westpheling and the City had conspired to exclude him from employment because of his MS. App. 46-47 (Tr. 177:12 – 178:5). Moreover, Dr. Westpheling testified he wished he had been in a position to recommend Deeds for the firefighter position. App. 74 (Tr. 61:13-21).

Deeds cannot establish Dr. Westpheling even tacitly approved of any discrimination, let alone that he was actively complicit or provided substantial assistance in its achievement. The District Court's Ruling that

UnityPoint did not—as a matter of law—intentionally aid or abet the City of Cedar Rapids to engage in a discriminatory practice must therefore be affirmed.

III. The District Court Correctly Ruled That Deeds Does Not Have An Actionable Discrimination Claim Against The City Of Cedar Rapids.

The District Court correctly concluded Deeds cannot, as a matter of law, prevail on his failure to hire claim against the City of Cedar Rapids. An aiding and abetting claim necessarily fails if the employee cannot establish an underlying claim of discrimination. *Stoddard*, 993 F. Supp. 2d at 1007. Here, the District Court correctly ruled that Deeds did not offer evidence sufficient to generate a genuine factual dispute concerning whether the City of Cedar Rapids withdrew its job offer "because of" his disability. App. 848-51 (Ruling, at pp. 14-17).

Deeds claims a reasonable jury could infer the existence of a discriminatory motive from Dr. Westpheling's purported failure to perform an individualized assessment of Deeds. (Deeds' Final Brief, at pp. 16-20, 26-28). The undisputed facts do not support this claim. Again, Dr. Westpheling performed an individualized assessment of Deeds because he gave him a full medical examination; reviewed the occupational and health forms completed by Deeds; discussed with Deeds the nature and timing of

his MS symptoms; reviewed the medical records of Deeds' treating neurologists; and gave his independent medical opinion based on his consultation of the relevant NFPA standard, which he deemed prudent to apply given the circumstances of Deeds' medical condition. App. 71 (Tr. 47:10-24), 74-76 (Tr. 61:22 – 62:19, 67:21-25).

Given Dr. Westpheling's intimate knowledge of the essential job functions of a firefighter, his discussions with and examination of Deeds, and his review and application of a consensus standard developed by medical and industry experts to the particular circumstances of Deeds' medical condition, it is difficult to understand what additional "individualized inquiry or assessment" Deeds believes he should have received. The District Court therefore correctly held Dr. Westpheling engaged in an individualized medical assessment of Deeds. *See* App. 848 (Ruling, at p. 14).

Dr. Westpheling's individualized assessment revealed Deeds was not qualified to perform the essential functions of the firefighter position with or without reasonable accommodation. *See Casey's Gen. Stores, Inc. v. Blackford*, 661 N.W.2d 515, 519 (Iowa 2003) (requiring, as part of plaintiff's *prima facie* case of disability discrimination, that he "is qualified to perform his job with or without reasonable accommodation"). Dr.

Westpheling testified the only accommodation he could have recommended the City to adopt was a restriction on any involvement by Deeds in "emergency response activities." App. 70 (Tr. 44:15-24), 73 (Tr. 56:2-9). But, as a matter of law, this is not a reasonable accommodation. If Deeds were employed as a firefighter, but was precluded from involvement in "emergency response activities"—the very purpose of a firefighting job—the City would be left with no choice but to hire another employee to perform Deeds' essential job functions. The law does not require such an accommodation. *See Moritz v. Frontier Airlines*, 147 F.3d 784, 788 (8th Cir. 1998) (employers are not obligated to "hire additional employees or reassign existing workers to assist" disabled employees). The City's belief that Deeds could not perform the essential duties of a firefighter requires that the District Court's Ruling be affirmed. *See Annear v. State*, 454 N.W.2d 869, 875 (Iowa 1990) (holding that if the state did not rehire plaintiff because it believed he was physically unable to do the work and was wrong in that assessment, this error of judgment would not constitute unlawful discrimination).

Finally, no City of Cedar Rapids employee involved in the decision to withdraw Deeds' job offer was aware that Deeds had been diagnosed with MS. "[I]n a disability discrimination case, the employee must prove that the

employer knew of the employee's disability or perceived him or her as disabled." *Hunter v. United Parcel Serv., Inc.*, 697 F.3d 697, 703 (8th Cir. 2012). The only City of Cedar Rapids employee who knew Deeds had MS was the City's occupational health nurse, Jennifer Stefani, who initially performed a health screening of Deeds. App. 54 (Tr. 241:14-23), 291-93. Chief Mark English was the decision-maker concerning Deeds' employment. App. 121, 277 (Tr. 68:4-7). And though English was aware Deeds had not passed the medical screening, he did not know why. App. 277 (Tr. 66:1 – 67:9), 363 (Tr. 65:4-25).

The Court should therefore affirm the decision of the District Court granting summary judgment to UnityPoint on the grounds Deeds' underlying discrimination claim against the City of Cedar Rapids fails as a matter of law.

CONCLUSION

The District Court properly granted summary judgment to UnityPoint. The District Court correctly held Dr. Westpheling offered his independent medical opinion after performing an individualized assessment while serving in an advisory capacity. The District Court also correctly held Deeds failed to generate a jury question with regard to his discrimination claim against

the City of Cedar Rapids. The well-reasoned Ruling of the District Court should therefore be affirmed in its entirety.

REQUEST FOR ORAL ARGUMENT

Counsel for UnityPoint requests to be heard in oral argument. Counsel also directs the Court's attention to the fact that the present appeal involves substantially the same factual and legal issues as the pending appeal in *Nolan Deeds v. City of Marion, Iowa, St. Luke's Work Well Solutions, St. Luke's Healthcare, and Iowa Health System d/b/a UnityPoint Health*, Case No. 16-1666. Due to the substantial overlap between the issues of these two cases, counsel respectfully requests that the Court order oral argument to occur at the same time and location for each case.

Dated: March 6, 2017. Respectfully submitted,

/s/ Karin A. Johnson
Karin A. Johnson, AT0007677
Samantha M. Rollins, AT0011968
Mitch G. Nass, AT0012339
FAEGRE BAKER DANIELS LLP
801 Grand Avenue, 33rd Floor
Des Moines, Iowa 50309
Telephone: (515) 248-9000
Fax: (515) 248-9010

ATTORNEY'S COST CERTIFICATE

I, Mitch G. Nass, certify that there was no cost to reproduce copies of the preceding Appellees' Final Brief because the appeal is being filed exclusively in the Appellate Courts' EDMS system.

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

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: this brief contains 6,594 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: this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, in 14-point Time New Roman type style.

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

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on March 6, 2017, I electronically filed the foregoing brief with the Clerk of The Iowa Supreme Court by using the EDMS system. Participants in the case who are registered EDMS users will be served by the EDMS system.

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