

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

**UNITYPOINT'S RESISTANCE TO DEEDS' APPLICATION FOR
FURTHER REVIEW**

IOWA COURT OF APPEALS DECISION OF OCTOBER 11, 2017

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BACKGROUND AND PROCEDURAL HISTORY

Deeds' aiding and abetting claim against UnityPoint stems from the medical opinion offered to the City of Cedar Rapids by a UnityPoint 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 worked at UnityPoint as an occupational medicine physician. 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). 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 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, as recently as December 2012, Deeds experienced MS symptoms that included "right foot numbness" that "spread to involve his right foot as well," then "began to involve both legs and the back of both thighs," and later experienced a "wobble[] when he walk[ed]." App. 64 (Tr. 20:5-22), 78-81. 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. App. 75 (Tr. 62:6 – 65:4).

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).

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).

On September 21, 2016, the District Court granted summary judgment in favor of both the City of Cedar Rapids and UnityPoint. App. 835-53. The Court held Deeds had failed to generate a material issue of disputed fact as to whether the City of Cedar Rapids declined to hire Deeds because of his disability. App. 848-51. As to UnityPoint, the Court—relying on this Court’s decision in *Sahai v. Davies*, 557 N.W.2d 898 (Iowa 1997)—held Deeds could not prevail on his aiding and abetting claim because Dr. Westpheling had rendered an advisory opinion based on his own independent medical judgment. App. 843-45.

Deeds appealed, and in a ruling dated October 11, 2017, the Iowa Court of Appeals affirmed the District Court’s ruling. Opinion, p. 9. The Court of Appeals held the District Court correctly concluded that Deeds’ had failed to establish the City of Cedar Rapids withdrew its conditional job

offer because of his MS diagnosis. *Id.* at p. 7. The Court of Appeals also held the absence of a direct claim of discrimination against the City barred Deeds’ aiding and abetting claim pursuant to Iowa Code § 216.11 against UnityPoint.

ARGUMENT

I. Introductory Statement in Resistance of Further Review.

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

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

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

As an initial matter, and as set forth more fully in the City of Cedar

Rapids’ Resistance to Deeds’ Application for Further Review, the District Court appropriately granted summary judgment to the City of Cedar Rapids on Deeds’ discrimination claim based on a settled application of the Iowa Civil Rights Act. Specifically, the Court accurately concluded Deeds had not generated a disputed issue of material fact as to whether the City declined to hire Deeds “because of” his disability. App. 849. The Court further concluded the City’s decision was based on the individualized medical examination performed by Dr. Westpheling revealing Deeds was not medically qualified to perform the essential functions of the firefighter position. App. 848-49. Moreover, Fire Chief Mark English—who made the decision not to hire Deeds—was aware only that Deeds had not passed the medical examination, and did not know Deeds had been diagnosed with MS. App. 277 (Tr. 66:1 – 67:9), 363 (Tr. 65:4-25).

The Court of Appeals therefore properly affirmed the decision of the District Court as to the City of Cedar Rapids, and did so based on the application of settled principles of Iowa law. *See* Opinion, p. 7; *see also Casey’s Gen. Stores, Inc. v. Blackford*, 661 N.W.2d 515, 519 (Iowa 2003) (setting forth the *prima facie* elements of a disability discrimination claim). And, as the Court of Appeals further held, this finding bars Deeds from prevailing on an aiding and abetting claim pursuant to Iowa Code § 216.11

against UnityPoint. *See* Opinion, pp. 8-9.

The premise on which the Court of Appeals relied to reach its decision—that Deeds’ failure to establish a claim of discrimination against the City of Cedar Rapids precludes him from prevailing on an aiding and abetting claim—is compelled by the plain wording of the statute. *See* Iowa Code § 216.11(1) (it is “an unfair or discriminatory practice for . . . [a]ny person to intentionally aid, abet, compel, or coerce another person *to engage in any of the practices declared unfair or discriminatory by this chapter.*” (emphasis added)).¹

Importantly, Deeds has never disputed the premise that an underlying discriminatory practice must exist to establish an aiding and abetting claim.²

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

² In Deeds’ opening brief, he challenged the District Court’s findings related to the “viability of Nolan’s disability discrimination claim against the City,” but not the independent premise that an aiding and abetting claim depends upon the establishment of an underlying discrimination claim. *See* Deeds’ Final Brief and Request for Oral Argument, p. 29.

And Deeds does not now advance the view that the Court of Appeals' recognition of this premise is inconsistent with Iowa Code § 216.11. *See generally* Deeds' Application for Further Review. The present appeal was therefore appropriately transferred to and decided by the Court of Appeals as one "presenting the application of existing legal principles." Iowa R. App. P. 6.1101(3)(a).

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

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

But irrespective of whether the Court concludes further review is necessary as to the viability of Deeds' claim against the City of Cedar Rapids or whether the absence of a viable, underlying discrimination claim alone bars an aiding and abetting claim, denial of Deeds' Application is

warranted as to the judgment in favor of UnityPoint. The District Court's reasoning as to Deeds' aiding and abetting claim flowed directly from this Court's decision in *Sahai*, and therefore is not in conflict with previous court precedent. *See* Iowa R. App. P. 6.1103(1)(b)(1). And to the extent issues of broad public importance are raised in this appeal, they are issues that have already been resolved by that very precedent established by this Court. *See* Iowa R. App. P. 6.1103(1)(b)(4).

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

Deeds' continued reliance on the mere fact that Chief English chose to follow Dr. Westpheling's advice as evidence that UnityPoint exercised control over the City's hiring decision stretches the concept of control

beyond its legal meaning. Conversely, the dictates of *Sahai* and *Vivian*—that proffering an advisory opinion that the employer may accept or reject does not result in liability—is consistent with the control principle. This Court, for example, has previously construed control as the ability to prevent a wrong from occurring. *See McCormick v. Nikkel & Assocs., Inc.*, 819 N.W.2d 368, 374 (Iowa 2012). Control is similarly viewed as the ability to direct the manner and method of another’s activity. *See generally Iowa Mut. Ins. Co. v. McCarthy*, 572 N.W.2d 537, 543 (Iowa 1997); *Downs v. A & H Const., Ltd.*, 481 N.W.2d 520, 525 (Iowa 1992).

Here, the only conclusion supported by the record is that Dr. Westpheling lacked control over the City of Cedar Rapids’ hiring decision. Indeed, the undisputed testimony is that the City of Cedar Rapids alone held the authority to revoke Deeds’ offer of employment, and that Dr. Westpheling lacked both the power and authority to disqualify prospective employees. App. 73 (Tr. 55:15-23), 277 (Tr. 68:4-7), 363 (Tr. 65:11-22), 367 (Tr. 102:4 – 103:12). In other words, Dr. Westpheling could not direct the outcome of the City of Cedar Rapids’ hiring decision; to the contrary, even after Dr. Westpheling provided his advisory opinion, the City remained free to hire Deeds for any position it desired.

Moreover, 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).

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

Two final points raised in Deeds’ Application require response. *First*, Deeds misconstrues Dr. Westpheling’s testimony as to the ability of Deeds to perform the essential functions of the firefighter position. Deeds contends Dr. Westpheling “admitted” Deeds could perform the essential functions of the firefighter position and that this fact is “undisputed.” Deeds’ Application

for Further Review, pp. 8-9, 13-14. To the contrary, Dr. Westpheling testified he had numerous concerns as to Deeds' ability to perform the firefighter position, including with respect to his ability to get into a hazardous materials suit or to quickly get out of bed to respond to an emergency, and safely climb up and down a ladder. App. 75 (Tr. 62:6 – 65:4). These considerations formed the basis for his opinion that Deeds *was not* medically qualified to perform as a firefighter. App. 66 (Tr. 27:11-23), 292.

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

CONCLUSION

The reasoning of the Court of Appeals' decision that an aiding and abetting claim is not actionable absent an underlying finding of discrimination, and the reasoning of the District Court finding an advisory opinion based on independent medical judgment does not result in liability

under Iowa Code § 216.11, both flow directly from and are consistent with the principles of Iowa law that this Court has previously recognized. Accordingly, the circumstances do not warrant granting Deeds' Application for Further Review.

Dated: November 16, 2017.

Respectfully submitted,

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ATTORNEY'S COST CERTIFICATE

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

Certified by: /s/ Mitch G. Nass

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) and 6.1103(4) because: this brief contains 3,275 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.

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CERTIFICATE OF SERVICE AND FILING

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

Certified by: /s/ Mitch G. Nass