

## ***Eller v. ISP and the State of Whistleblower Protections in Idaho***

Issue Summary  
By Dani Grigg  
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### **Introduction**

Idaho whistleblower law is having a moment. Over the last couple years, the Idaho Supreme Court has taken up whistleblower issues twice, and the Idaho legislature has stepped in with new whistleblower legislation.

First, in a 2019 case known as *Eller v. Idaho State Police*, the Idaho Supreme Court held that courts in government whistleblower lawsuits are free to award damages higher than the \$500,000 cap that applies to other tort claims, and that whistleblower plaintiffs in such cases may receive awards for infliction of emotional distress. While the decision opened the door to potentially huge government employer liability, the Idaho legislature acted quickly to shut it. In its 2020 session, the legislature enacted legislation that limits noneconomic damages in such lawsuits to \$370,000.

In 2020, another government whistleblower case made its way to the Idaho Supreme Court. The Court again sided with whistleblowers, holding they can receive front pay as part of their damages.

### **The *Eller* case**

The *Eller* lawsuit had its roots in a 2011 car accident that plaintiff Brandon Eller investigated in his capacity as a member of the Idaho State Police District 3 Crash Reconstruction Unit (CRU).<sup>1</sup> In October of that year, a Payette County deputy sheriff responded to a 911 call.<sup>2</sup> The deputy was driving at a speed well above the speed limit on a two-lane highway when he came upon a civilian driving his Jeep in the same direction.<sup>3</sup> The deputy attempted to pass on the left just as the civilian made a left turn into his driveway.<sup>4</sup> The deputy's vehicle crashed into the Jeep, and the civilian died as a result.<sup>5</sup>

Gem County charged the deputy with vehicular manslaughter in 2012.<sup>6</sup> Going against the wishes of some of his superior officers, Eller testified at a preliminary hearing that the deputy had caused the civilian's death.<sup>7</sup> Later, Eller objected to a new Idaho State Police (ISP) policy

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<sup>1</sup> *Eller v. Idaho State Police*, 443 P.3d 161, 166–67, 165 Idaho 147, 152–53 (2019).

<sup>2</sup> *Id.* at 165, 156 Idaho at 151.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 166, 165 Idaho at 152.

<sup>7</sup> *Eller*, 443 P.3d at 166, 165 Idaho at 152.

requiring employees to destroy drafts of official crash reports.<sup>8</sup> Eller claimed ISP retaliated by changing his schedule and duties and denying a request to take on more responsibility.<sup>9</sup>

Eller sued, seeking economic and emotional distress damages.<sup>10</sup> In 2017, a jury awarded Eller economic damages of just over \$30,000 and emotional distress damages of \$1.5 million.<sup>11</sup> The judge applied the Idaho Tort Claims Act (ITCA) cap and reduced the total tort damages to \$1 million (\$500,000 for each of two instances of retaliation).<sup>12</sup>

Both parties appealed. Eller argued, among other things, that claims under the Whistleblower Act were not subject to the ITCA damages cap.<sup>13</sup> ISP argued, among other points, that the Whistleblower Act did not allow for any non-economic damages.<sup>14</sup>

Before the *Eller* case, the Idaho Supreme Court had not specifically addressed either of these issues. In its *Eller* decision, the court construed the Whistleblower Act broadly—as it does with all remedial acts—and resolved both issues in favor of whistleblowers.<sup>15</sup> The Whistleblower Act permits emotional distress damages, it said, and the ITCA liability cap does not apply.<sup>16</sup>

The court remanded the *Eller* case back to the district court to reevaluate damages.<sup>17</sup> A few months later, Eller and ISP settled the case for \$1.3 million.<sup>18</sup>

## Legislation

The Idaho Legislature reacted quickly. In its 2020 session, a bill amending the Whistleblower Act to impose a strict economic damages cap flew through the body, passing 56–9 in the House of Representatives and 31–1 in the Senate.<sup>19</sup> Supporters iterated a need to protect not just whistleblowers but also taxpayers.<sup>20</sup> Going forward, while economic damages remain limitless, noneconomic damages may not exceed the general personal injury limit imposed by other legislation.<sup>21</sup> If Eller were to bring his 2011 claim today, his noneconomic damages would be capped at \$370,000.<sup>22</sup>

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 165, 154 Idaho at 151.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Appellant Brandon Eller’s Opening Brief at 16, *Eller v. Idaho State Police*, 443 P.3d 161, 165 Idaho 147 (2019) (No. 45698-2018 and 45699-2018).

<sup>14</sup> Brief for Respondent at 9, 17, *Eller v. Idaho State Police*, 443 P.3d 161, 165 Idaho 147 (2019) (No. 45698-2018 and 45699-2018).

<sup>15</sup> *Eller*, 443 P.3d at 170, 165 Idaho at 156.

<sup>16</sup> *Id.* at 169–70, 165 Idaho at 155–56.

<sup>17</sup> *Id.* at 178, 165 Idaho at 164.

<sup>18</sup> ISP Resolves Whistleblower Lawsuit with Trooper, IDAHO PRESS (Aug. 29, 2019), [https://www.idahopress.com/news/local/isp-resolves-whistleblower-lawsuit-with-trooper/article\\_0de18432-5e98-51ce-b0ff-147cc30ee2ba.html](https://www.idahopress.com/news/local/isp-resolves-whistleblower-lawsuit-with-trooper/article_0de18432-5e98-51ce-b0ff-147cc30ee2ba.html).

<sup>19</sup> *House Bill 583*, IDAHO LEGISLATURE, <https://legislature.idaho.gov/sessioninfo/2020/legislation/h0583/> (last visited Apr. 7, 2020); *Governor Signs Bill Limiting Idaho Whistleblower Lawsuits*, AP NEWS (Mar. 25, 2020), <https://apnews.com/6c91d66cb1c64ec4cf058fb7c18fb2fe>.

<sup>20</sup> Keith Ridler, *Bill Limiting Idaho Whistleblower Lawsuits Heads to Governor*, AP NEWS (Mar. 18, 2020), <https://apnews.com/15c3b0bcdd44ea39c797d0fc2ac0c24b>.

<sup>21</sup> H.B. 583, 65th Leg., 2d Sess. (Idaho 2020); Idaho Code § 6-1603(1) (2019).

<sup>22</sup> See Ridler, *supra* note 15.

***Smith v. Glens Ferry***

On April 28, 2020, the Idaho Supreme Court took up another case of first impression concerning the Whistleblower Act.<sup>23</sup> In 2016, Glens Ferry Highway District laid off employee Joanie Smith after she reported her supervisor for overcompensating herself.<sup>24</sup> Smith sued her former employer under the Whistleblower Act and won.<sup>25</sup> It fell to the Court to resolve whether damages in whistleblower cases could include front pay—payment awarded as a substitute for job reinstatement—and whether whistleblower plaintiffs have the right to have front pay damages determined by a jury.<sup>26</sup>

As in *Eller*, the Court resolved both issues in favor of whistleblowers. Front pay, it said, is a subset of the “lost wages” specified in the Whistleblower Act as a potential form of relief.<sup>27</sup> Furthermore, the Court said that despite its role as an alternative to the equitable remedy of reinstatement, front pay is a legal remedy and is therefore subject to jury determination.<sup>28</sup>

The Court reinstated the jury’s front pay award of \$187,500, which was in addition to its back pay award of \$63,044.<sup>29</sup>

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<sup>23</sup> *Smith v. Glens Ferry Highway Dist.*, 462 P.3d 1147, 166 Idaho 683 (2020).

<sup>24</sup> *Id.* at 1151, 166 Idaho at 687.

<sup>25</sup> *Id.* at 1152, 1166, 166 Idaho at 680, 694.

<sup>26</sup> The trial court had held the jury’s award of front pay damages to be merely advisory. *Smith*, 462 P.3d at 1155, 166 Idaho at 683.

<sup>27</sup> *Id.* at 1157, 166 Idaho at 685.

<sup>28</sup> *Id.* at 1159, 166 Idaho at 687.

<sup>29</sup> *Id.* at 1154, 1156, 166 Idaho 683. Back pay is the amount a person would have made if she had been allowed to keep working between her termination and the trial. *Id.* at 1154, 166 Idaho at 683.