

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

Practitioner Comment
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I was lead counsel for the Idaho State Police in the *Eller* matter at trial and throughout the appeal process. I was appointed as trial counsel after the plaintiff sought to amend his complaint to add claims for negligent infliction of emotional distress, several years after the proceedings had been initiated. Over the course of my career I have been involved in numerous employment issues, *Eller* being the most recent.

Frankly, at the time the *Eller* decision was entered it had an enormous impact on whistleblower claims. The most significant impact can be found in the court's observation that the Idaho Protection of Public Employees Act (the "Whistleblower Act") is a remedial statute to be liberally construed, coupled with its holding that "the Whistleblower Act provides. . . claimants with a remedy for *all* actual damages, based on *all* claims, including those otherwise available under common law tort claims" (emphasis added). In light of the court's ruling, tort-based damages could be recovered against governmental entities outside the purview of the Idaho Tort Claims Act ("ITCA"), though its impact was lessened given the subsequent legislative action taken in response.

While there were many issues addressed on appeal in *Eller*, the court also overturned its prior decision in *Wright v. Ada County*, 160 Idaho 491, 376 P.3d 58 (2016). The *Wright* decision was issued just one year prior to the jury trial in *Eller* and formed the basis for many of the legal arguments which we presented. In *Wright*, the court had recognized that tort actions (specifically, negligent infliction of emotional distress) could be brought in conjunction with whistleblower claims. In so doing, the court signaled that non-economic damages, including those for emotional distress, were distinct from those damages obtainable under the Whistleblower Act, which left such damages subject to the cap provided in the ITCA. The practical effect of the *Eller* court's reversal was to gut the ITCA within the context of whistleblower claims, in that allegedly tortious conduct by governmental agents or entities was no longer governed by the ITCA.

The Idaho Legislature, recognizing the impact of *Eller* on tort claims against governmental entities, responded by adding subsection (5) to Idaho Code, § 6-2105. By limiting recovery for non-economic damages under the act to the cap provided under Idaho Code § 6-1603, the legislature not only mitigated the significant impact *Eller* might otherwise have had on whistleblower claims and restored in a way the *status quo* that existed under *Wright*, but also left those non-economic damages subject to an even more stringent limitation. Given the legislative response, it appears that the *Eller* decision—while initially a boon for whistleblower claimants—has not significantly impacted the manner in which whistleblower claims are approached from a defense perspective.