

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

Practitioner Comment

By John Rumel

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When esteemed employee-side attorney and Plaintiff Brandon Eller’s lawyer Erika Birch asked me if I would be willing to prepare an amicus curiae brief for the National Whistleblower Center supporting Idaho State Police Officer Eller’s appeal to the Idaho Supreme Court, I was delighted to do so. Prior to becoming a full-time law professor, I had worked for many years representing Idaho public employees—specifically, teachers and other educators—in litigation and appeals as General Counsel for the Idaho Education Association, Idaho’s statewide teachers’ union. In addition, I was fortunate to continue to teach and publish in the areas that were germane to Mr. Eller’s appeal—Workplace Law, with a fair amount of focus on public sector employment, and Remedies. Indeed, the issue that the National Whistleblower Center asked me to address—whether a public sector employee who proves liability under the Idaho Protection of Public Employees Act (“Whistleblower Act” or “Act”), Idaho Code Section 6-2101 and following, is entitled to recover non-economic damages, i.e. damages for emotional distress or pain and suffering, from his public employer under the damages provisions of the Act—was at the intersection of two areas of law about which I have an abiding interest.

The above-described issue was simultaneously narrow and broad. The issue was narrow in that it raised a discrete issue of Idaho public sector employment law and represented only one of several major issues posed by Mr. Eller and his former employer, the Idaho State Police, on the appeal. The issue was broad, however, in that, for purposes of the amicus brief, which was designed to complement the fine work done by Mr. Eller’s attorneys in briefing his case, it required a survey and analysis of the law nationally concerning a whistleblower plaintiff’s right to recover non-economic damages, as well as a policy-driven view concerning the reasons why a plaintiff should be entitled to recover emotional distress and pain and suffering damages when proven in a whistleblower case.

As it turned out, Idaho’s Whistleblower Act supported Mr. Eller’s and other plaintiffs’ right to recover non-economic damages from public sector employers upon proof of liability under the Act and proof of non-economic harm caused by the violation. In addition, the case law interpreting whistleblower statutes across the United States almost uniformly views such statutes as remedial provisions, construes those statutes broadly to further their remedial purposes, and awards non-economic damages to plaintiffs as well.

The Idaho Supreme Court’s decisions in *Eller* and *Smith v. Glenns Ferry Highway District* are important for reasons beyond the mere application of the Whistleblower Act itself. Prior to decisions by the United States and Idaho Supreme Courts in the past few years, Idaho public employees pursuing Whistleblower Act claims also could assert claims for violation of freedom of speech rights under First Amendment and claims for wrongful discharge in

contravention of public policy under state law. However, in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the United States Supreme Court held that public employees who speak on matters of public concern are not protected under the First Amendment from retaliation by their employers if the speech is part of their official job duties. In addition, in *Van v. Portneuf Medical Center*, 147 Idaho 552, 212 P.3d 982 (2009), the case relied upon by Idaho Supreme Court in *Eller* to hold that Whistleblower Act claims supplant claims by public employees for negligent infliction of emotional distress, the Idaho high court held that the Whistleblower Act supplants common claims by those same public employees for wrongful discharge in contravention of public policy. As such, given these relatively recent judicial limitations on alternative legal claims by public employees suffering retaliation at the hands of public employers, the Idaho Supreme Court's recognition that the Whistleblower Act provides public employees, like Mr. Eller and Ms. Smith, with the full panoply of remedies was even more imperative.

But what of the Idaho Legislature's decision in House Bill 583 to immediately impose caps on non-economic damages recovery under the Whistleblower Act in the wake of the Idaho Supreme Court's decision in *Eller*? More to the point, is that recent legislative enactment subject to viable constitutional challenge?

Certainly, the Legislature's decision to impose caps on non-economic damages recovery under the Idaho Tort Claims Act ("ITCA") has withstood state constitutional challenges based on right to jury trial, impermissible special legislation, and separation of powers grounds. *Kirkland v. Blaine County Medical Center*, 134 Idaho 464, 4 P.3d 1115 (2000). However, it remains to be seen whether the Legislature's extension of those ITCA caps to limit non-economic damages recovery under the Whistleblower Act, which discriminates against public employee plaintiffs who receive higher, rather than lower, non-economic damages awards, will survive intermediate scrutiny under the state equal protection clause. *See Jones v. State Board of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976) (remanding matter to trial court to apply intermediate scrutiny to equal protection challenge to caps on non-economic damages in medical malpractice actions).

At the very least, though, it is ironic that the Legislature originally enacted the Whistleblower Act for the purpose, among other things, of protecting public employees who report "waste of public funds, property or manpower," Idaho Code § 6-2104(1), but was quick to enact an amendment to the Act which disincentivizes public employees and their attorneys from pursuing Whistleblower Act cases by limiting non-economic damages recoveries on the grounds that capping non-economic damages in those cases "may present a positive fiscal impact." *HB 583, Statement of Purpose/Fiscal Note*.

Thus, although the Idaho Supreme Court laudably concluded in *Eller* that non-economic damages are recoverable by Whistleblower Act plaintiffs, legislative fiat limited the full effect of the court's decision. Time will tell whether the Legislature's questionable policy reaction to the *Eller* decision will be subject to successful constitutional challenge in Idaho courts.