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Black v. Idaho State Police Appellant's Reply Brief Dckt. 39822

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IN THE SUPREME COURT OF THE STATE OF IDAHO

JEFFRY J. BLACK,

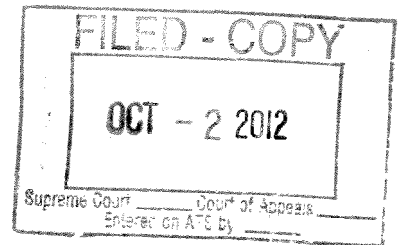
Plaintiff-Appellant,

-vs-

IDAHO STATE POLICE, an executive
department of the State of Idaho; and
COLONEL G. JERRY RUSSELL, Colonel
Director of the Idaho State Police, an
individual,

Defendants-Respondents.

Supreme Court Docket No. 39822



APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, In and For
the County of Ada

The Honorable Lynn G. Norton, Presiding

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I. INTRODUCTION

On July 20, 2012, Plaintiff/Appellant Jeffrey J. Black (“Black”) filed his Opening Brief on Appeal against the Defendant/Appellee, Idaho State Police (“ISP”), arguing that the district court erred in granting ISP summary judgment on Black’s claims made pursuant to the Idaho Protection of Public Employees Act, Idaho Code § 6-2101, *et seq.* (“Whistleblower Act”). ISP filed Respondents’ Brief defending the district court’s grant of summary judgment on September 10, 2012. Black now submits this Reply Brief on Appeal and respectfully requests that the Court reverse the district court’s grant of summary judgment in favor of ISP and for remand to the district court for further proceedings.

II. ARGUMENT

A. *Black has demonstrated that he engaged in activity protected by the Idaho Protection of Public Employees Act.*

1. *The District Court misapplied authority regarding common law public policy claims to Black’s statutory claim under the IPPEA.*

ISP argues that “[t]he district court’s analysis demonstrates it understood that to determine whether Black engaged in protected activity, it had to evaluate whether the undisputed facts constituted a communication in good faith about a violation of law or a refusal to carry out a directive that Black reasonably believed violated the law.” *Response Br., p. 9*. ISP supports this assertion by arguing that Whistleblower claims involve questions of both law and fact. *Id.* at p. 10.

With respect to questions of law, the District Court’s opinion shows that it believed it was obligated to review Idaho law and determine if Black engaged in activity that was

protected. See R., pp. 000519-000523. Operating under this mistaken belief, the District Court categorized Black's activity as "the questioning of authority" and held that it was unprotected activity. R., pp. 000520 and 000522. If Black had asserted a common law claim wrongful termination based upon a retaliatory discharge in violation of public policy, Black would agree the district court had an obligation to determine if the activity engaged in was protected. However, in light of this Court's decision in *Van v. Portneuf Med. Ctr.*, 147 Idaho 552, 212 P.3d, 982 (2009), Black's claims were brought exclusively under the Whistleblower Act. R., 000006-000011. As such, there was no need for the district court to determine whether Black had engaged in activity that was protected. Instead, all that was required of the Court was to determine, after viewing the facts in the light most favorable to Black and drawing all reasonable inferences in his favor, whether Black had engaged in any of the enumerated activities set forth in Idaho Code § 6-2104. 147 Idaho 558, 212 P.3d at 987 (noting that "[p]rotected activities under the Whistleblower Act are described" in Idaho Code § 6-2104).

With respect to questions of fact under the Whistleblower Act, as this Court's prior cases amply demonstrate, factual questions are for the jury to decide. The question of whether an action was taken in good faith is a factual question to be decided by the jury. *Curlee v. Kootenai Co. Fire & Rescue*, 148 Idaho 391, 400, 224 P.3d 458, 467 (2008). The question of whether an action or belief was reasonable is a factual question to be decided by the jury. See *Anderson et al. v. Foster*, 73 Idaho 340, 347, 252 P.2d 199, 203 (1953). Given these clearly established standards, it is clear that a jury, not the district court, was to evaluate whether the

facts demonstrate that Black made his communications in good faith or that Black's refusal was based upon a reasonable belief of a violation of law.

ISP cites to the cases of *Patterson v. Dept. of Health & Welfare*, 151 Idaho 310, 256 P.3d 718 (2011), and *Van v. Portneuf Med. Ctr.*, 147 Idaho 552, 212 P.3d, 982 (2009), in support of its position that a district court may decide whether conduct is protected activity when presented with undisputed facts. Neither of these cases provides the support ISP seeks.

Patterson addressed claims made under the Whistleblower Act as well as the Idaho Human Rights Act ("IHRA"). 151 Idaho at 315, 256 P.3d at 723. The only Whistleblower Act issue addressed by the Court under the claim was timely filed. *Id.* When addressing the IHRA claims, the Court did address the trial court's holding as a matter of law that the facts did not support a claim. *Id.* at 317-321, 256 P.3d 725-729. This Court sustained the trial court's holding given that the facts presented did not demonstrate that members of a protected class were treated differently from members of a non-protected class. *Id.* The Court was able to make this determination by looking at the language of the IHRA itself. This Court further held that the plaintiff could not have had an objectively reasonable belief that she was engaging in protected activity given that the "great weight of case law did not support [her] position." *Id.* at 321, 256 P.3d at 729 (citations omitted). In contrast to *Patterson*, there is no Idaho case law which directly addresses Black's claims, nor does the "great weight of case law" from other jurisdictions indicate that Black's position is erroneous. The lack of case supports allowing this matter to proceed to trial for a jury determination of whether Black acted in good faith and upon a reasonable belief.

In *Van*, this Court did uphold dismissal of Whistleblower Act claims where the claims were based upon “*potential* future waste, rather than past or present waste.” 147 Idaho at 559, 212 P.3d at 989. However, this dismissal was upheld based upon the plain language of the Whistleblower Act which mandates reports of present or past conduct, not potential future conduct. *Id.* Thus, to the extent the plaintiff’s claims were based upon future conduct, the plaintiff’s action was not protected because it was not activity enumerated in the Whistleblower Act. In contrast, Black reported past and present directives believed to be in violation of law. As such, Black’s conduct was an activity enumerated in Idaho Code § 6-2104 and was protected activity.

As the foregoing demonstrates, *Patterson* and *Van* do not stand for the proposition advocated by ISP. However, even if these decisions of the Court allowed a district court to decide as a matter of law whether protected activity exists in the face of undisputed facts, this case does not involve undisputed facts with respect to the good faith and reasonable belief requirements. Black presented facts which he contends show the communication was in good faith and reasonable. ISP contends that Black did not make the communication in good faith and could not have had a reasonable belief of a law violation. Given that there is a factual dispute among the parties as to these issues, this case should be allowed to proceed to trial.

2. *The District Court erred by holding that Black is only entitled to protection if he refused to perform an illegal act.*

In response to Black’s challenging the district court’s holding that Black is only entitled to protection if he refused to perform an act that was, in fact, illegal, ISP claims that

what the district court held was that the “sort of illegality that Black claimed was not the sort protected by the act.” *Response Br.*, p. 10-11 (citation omitted). This contention ignores the plain language of the district court’s opinion: “Thus, whistleblower case law from Idaho and other jurisdictions shows that refusal is a protected activity only when the employee refuses to perform an illegal act.” R., p. 000522. This holding by the Court is in direct contravention of this Court’s holding in *Van*. Furthermore, it is clear from the district court’s decision that this erroneous interpretation of the Whistleblower Act was fundamental to its decision. As such, Black respectfully requests that the district court’s decision be reversed.

B. The facts before the District Court and this Court present genuine issues of material fact to be presented to a jury.

1. Black has demonstrated that genuine issues of material fact exist as to whether he had a good faith belief of a suspected violation of law, rule or regulation and whether he refused to adhere to a directive that he reasonably believed to be in violation of the law.

ISP argues that Black has not demonstrated that the directives provided implicate a suspected violation of law or rule. This issue was addressed at length in Black’s opening brief and will not be repeated in its entirety here. *Opening Br.*, pp. 9-31. However, given ISP’s arguments, it is worth again repeating that Black believed the directives to be in violation of Idaho Code § 19-5116 and IDAPA 11.11.031. R., pp. 000233, 000409 (*Russell Depo.*), 103:16 – 19, 000586-000587 (*Black Depo.*), 145:23 – 146:5, 146:7, 000610-000612, 000618-000623. Likewise, it is worth repeating that Black testified that his beliefs and positions were developed over a years of interaction with POST, POST Council, POST employees and his review of the

statutes and regulations. R., pp., 000310-311, ¶¶ 4-9, 000317, ¶ 36, 000397-000400, 000585 (*Black Depo.*), 141:21 – 141:15, R., and p. 000586 (*Black Depo.*), 144:10-16.

ISP argues that merely questioning and defying authority is not entitled to protection under the Whistleblower Act. *Response Br.*, p. 12. Black would agree that where an employee questions and refuses directives without a good faith and reasonable belief that the directives are violations or suspected violations of law, no protection is afforded. However, where the communication and/or refusal are based upon interpretation of statutes, rules or regulations of the State, an employee is entitled to protection. Given that Black’s actions were directly based upon his interpretation of portions of the Idaho Code as well as IDAPA regulations, ISP’s argument fails.

2. *The entirety of Black’s testimony demonstrates his belief that directives were illegal or, if adhered to, would have required Black to commit an illegal act.*

ISP writes that Black admitted that nothing he was told would have forced him to violate the law or do anything illegal. *Response Br.*, pp. 10 and 12. In support of this contention, ISP cites to a single page in the record. *Id.* What ISP fails to address is Black’s testimony that he believed the order to move Lori Guthrie “violated that IDAPA rule[]” and that he “would be in violation of IDAPA rules and Idaho Code on all of those if I complied with them.” R., pp. 000584-000585 (*Black Depo.*) at 135:21 – 136:1 and 138:5 – 8. Likewise, ISP fails to address Black’s testimony that seven (7) different directives from Col. Russell either

were in violation of a rule, regulation or law or that would have put Black in violation of a rule, regulation or law had Black adhered to the directive. R., pp. 589 (*Black Depo.*) at 154:1 – 157:8.

This testimony of Black cannot be ignored at summary judgment. ISP asked the district court to ignore this testimony and the district court erroneously accepted this invitation and ignored this testimony. ISP now asks this Court to ignore testimony in the record. In accordance with long-established summary judgment standards, Black requests that the Court decline the invitation to ignore evidence and instead consider the evidence in the record in the light most favorable to Black and to draw all reasonable inferences from the evidence in his favor. When summary judgment standards are adhered to and all evidence is considered in the proper light, it is clear that Black communicated in good faith belief a suspected violation of law, rule or regulation. Likewise, it is clear that Black refused a directive based upon a reasonable belief that the directive was in violation of law.

3. *The purpose of the Whistleblower Act is served by allowing this matter to proceed to trial.*

ISP asserts that Black's contention has "sweeping implications" that cannot be reconciled with statutes and rules related to public employment. *Response Br.*, p. 12. This argument fails. Black does not contend that an employee may simply refuse a directive based upon a personal disagreement with a supervisor. On the contrary, Black merely contends, that where an employee complies with the terms of the Whistleblower Act, he or she is entitled to protection. This necessarily requires a finding that the refusal was made upon a reasonable belief of a violation of law. Likewise, where the employee communicates concern about a directive or

action, the communication must be made with a good faith belief that the directive or action is in violation of law.

In *Boelter v. City of Coon Rapids*, the Court recognized that the refusal to follow even a lawful directive is protected provided that there exists a good faith belief in the illegality of the directive. 67 F. Supp. 2d 1040 (D. Minn. 1999). The plaintiff in *Boelter* contended that the City's policy regarding military leave violated both state and federal laws. *Id.* at 1042. Despite the fact that "[i]t [wa]s clear, in the Court's view, that the Military Time – Pay Request form does not violate" the federal or state laws cited by the plaintiff, the Court denied the City's motion for summary judgment. *Id.* at 1050. The Court explained its decision:

This conclusion does not end the inquiry of whether [plaintiff] has made out a claim under the whistleblower statute, contrary to Defendants' suggestions. The relevant question, in establishing the first element of a prima facie case, is whether [plaintiff] engaged in statutorily-protected conduct. *Minn. Stat. § 181.932, subd. 1(a)* speaks to an employee who, "in good faith, reports a violation or suspected violation" of the law. It is irrelevant, for purposes of this subdivision, whether there was an *actual* violation of the law. The "only requirement" is that the report of the violation or suspected violation be "made in good faith." Good faith, moreover, is normally a question of fact for the jury.

Id. (citations omitted). Just as in *Boelter*, the Whistleblower Act does not require that the directive be an actual violation. I.C. § 6-2104 and *Van*, 147 Idaho at 559, 212 P.3d 982. The relevant inquiry and focus is on the good faith belief of the individual making the report and/or refusing the directive. Allowing an employee to communicate a violation or suspected violation, or refuse a directive upon a reasonable belief of a violation of law, even when the conduct complained of ultimately is deemed to be lawful, promotes the "integrity of government" by

fostering an environment where employees feel free to raise their concerns. *See* I.C. § 6-2104. To hold otherwise would stifle the reporting of waste or violations of laws, rules or regulations except in the most extreme circumstances.

III. CONCLUSION

For the reasons set forth above, Plaintiff/Appellant Jeffry J. Black respectfully requests that the Court reverse the District Court's decision granting Defendants' Motion for Summary Judgment and remand this matter to the District Court for further proceedings including but not limited to trial.

DATED this 2nd day of October, 2012.

ROSSMAN LAW GROUP, PLLC

By: 

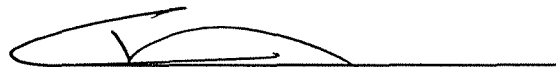
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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of October, 2012, I caused to be served a true and correct copy of the foregoing document by the method indicated below to the following:

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