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IN THE SUPREME COURT OF THE STATE OF IDAHO

JEFFRY J. BLACK,

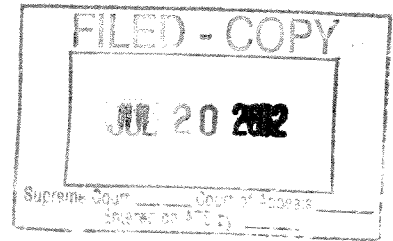
Plaintiff-Appellant,

-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 OPENING 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. STATEMENT OF THE CASE

A. Nature of the case.

This case arises from the termination of Plaintiff Jeffrey J. Black's ("Black") employment with the State of Idaho. On May 3, 2010, Black filed his Complaint and Demand for Jury Trial in which he asserted a violation of the Idaho Protection of Public Employees Act.

B. Course of Trial Court Proceedings and Disposition.

On May 3, 2010, Black filed his Complaint and Demand for Jury Trial ("Complaint") in this matter. Black's Complaint set forth a single cause of action: Violation of the Idaho Protection of Public Employees Act ("Whistleblower Act"). R., pp. 000008-000010 (*Complaint*), ¶¶ 14-22. Plaintiff alleged that Defendant Idaho State Police ("ISP") had violated two provisions of the Whistleblower Act, Idaho Code §§ 6-2104(1) and 6-2104(3). *Id.* at ¶ 18 & 20.

On October 24, 2011, ISP filed a Motion for Summary Judgment ("MSJ") seeking dismissal of Black's claims. The District Court granted the MSJ on December 29, 2011, setting forth its reasoning in its Memorandum Decision and Order Granting Defendants' Motion for Summary Judgment ("Decision"). As set forth in the District Court's Decision, the MSJ was granted because of the District Court's determination that "Black has failed to show he was engaged in protected activity pursuant to the [Whistleblower Act.]" R., p. 000523, ¶ 13.

On January 12, 2012, Black filed a Motion for Reconsideration. *See* R., pp. 000525-000526. Black sought reconsideration of the District Court's opinion that he had not engaged or intended to engage in protected activity under Idaho Code § 6-2104(3). R., pp.

000536-000544. Black also asked the District Court to address Black's claim brought under § 6-2014(1) as its Decision failed to address this claim. R., pp. 000533-000536; Tr., p. 40, LL. 6-13. The District Court denied Black's Motion for Reconsideration on February 21, 2012. Judgment was entered in favor of ISP on February 21, 2012. Black timely filed the Notice of Appeal in this matter on March 28, 2012.

C. Statement of Facts.

1. Creation of the Peace Officer Standards and Training Council

The Idaho Peace Officer Standards and Training Council ("POST Council") was established by act of the Legislature. I.C. § 19-5102. The Legislature also created a Peace Officers Standards and Training Fund ("POST Fund") in the state treasury. I.C. § 19-5116. The POST Council in turn promulgated the Rules of the Idaho Peace Officer Standards and Training Council ("POST Rules"). IDAPA 11.11.01.000 & 11.11.01.001.01. The POST Council also created "in the Idaho State Police a classified position of Executive Director of the Idaho Peace Officer Standards and Training Council[]" and established the duties and reporting structure for this position. IDAPA 11.11.01.031 & 11.11.01.02-04.

2. POST Budget

The POST Fund is a specific fund within the state treasury. I.C. § 19-5116(a). The POST Council has been expressly charged with expending "moneys deposited to the [POST Fund.]" *Id.* The POST Fund is funded by way of filing fees and fees charged to individuals who have been convicted of a felony or misdemeanor or found to have committed minor traffic,

conservation or ordinance violations (except for cars unlawfully left or parked). I.C. §§ 19-5116(b), 31-3201A(15) & 31-3201B.

3. *Hire of Jeffry Black*

On July 14, 2006 Black was provided a conditional offer of employment with ISP as the Executive Director of Idaho Peace Officer Standards and Training Council (“Executive Director”). R., p. 000130 (Exhibit “1” to the *Russell Affid*). By letter dated August 9, 2006, (then) Colonel R. Dan Charboneau of ISP confirmed Black’s appointment as the Executive Director, which was effective as of August 27, 2006. R., p. 000135 (Exhibit “3” to the *Russell Affid*). At the time Col. Charboneau was the Director of the ISP. R., p. 000310 at ¶ 2. In the Appointment Letter, Col. Charboneau stated that he would be Black’s “direct supervisor.” R., p. 000135 (Exhibit “3” to the *Russell Affid*). While Col. Charboneau stated that he would be Black’s “direct supervisor,” the Appointment letter makes clear that this supervision was limited to administrative, not operational, issues:

I will be your direct supervisor. We can discuss how best to keep me informed of your schedule and availability – leave approvals, training on expense reports, training on p-cards, employee appraiser training, current procedures, etc.

Id. During Col. Charboneau’s tenure, Black did *not* report to Col. Charboneau on operational matters pertaining to POST and merely kept Col. Charboneau informed of information that might impact ISP. R., p. 000310 (*Black Affid.*) ¶ 4.

In January 2007 G. Jerry Russell replaced Col. Charboneau as the ISP Director. R., p. 000112, ¶ 1.

4. *Temporary Budget Shortage in Fiscal Year 2008*

The POST Budget approved by the Idaho Legislature and signed by Governor Otter for Fiscal Year (“FY”) 2009 provided that the POST Council could purchase a computer software program known as “Liquid Office.” R., p. 000311, ¶ 11. Shortly after the beginning of FY 2009, POST Council was provided the opportunity to save over \$15,000 if the Liquid Office was purchased within thirty (30) days of September 11, 2008. *Id.* at ¶ 13. Recognizing the importance of reducing operating costs by such a substantial sum, the decision was made to purchase the Liquid Office early to realize this savings. *Id.* at ¶ 14. Unfortunately, due to a drastic short-fall in the fine/fee money to fund the POST Fund, during November, 2009, POST had a temporary short-fall in operating funds.¹ *Id.* at ¶ 10. The temporary short-fall in operating funds was remedied by a “loan” from the ISP Director Fund to the POST Council. *Id.* at ¶¶ 16 & 18.

The source of the funds “loaned” to POST were funds paid by POST Council into the Statewide Cost Allocation Program (“SWCAP”). R., p. 000312 at ¶¶ 16-17. *See also* R., p. 000161. The SWCAP is a program by which POST reimburses ISP for services received. R., p. 000312 at ¶ 17. While termed a “loan,” in reality the POST Fund merely received a return of some of the money which it had pre-paid to ISP. *Id.* At no time did POST expenditures exceed the funds allotted for FY 2009.

¹ The revenue in the POST Fund is “... something over which POST has no control.” R., pp. 000198-000200 and R., p. 000406 (*Russell Depo.*), p. 12, LL. 8-19.

5. *November 24, 2008 Meeting*

On November 24, 2008, a meeting was held to address the temporary budget issue at POST. In attendance at this meeting were Black, Col. Russell, Marsi Woody, Rick Cronin, Lt. Col. Kevin Johnson and Richard Juengling. R., pp. 000178-000186 and R., p. 000313 at ¶¶ 19-20. After being questioned as to the plan of POST to resolve the budget issue, Black, out of respect for Col. Russell, asked that all individuals other than he and Col. Russell be excused from the meeting to allow Black and Col. Russell to address the reporting hierarchy for Black. R., pp. 000178-000186 and R., p. 000313 at ¶ 24. During this meeting Black advised Col. Russell of his belief that he reported to the POST Council on budgetary matters and intended to discuss the budget issue directly with then-POST Chairman Gary Aman. R., p. 000567 (*Black Depo.*), at p. 68, L. 24 to p. 69, L. 14. Col. Russell disagreed with this view of the law and attempted to prohibit Black from speaking with Chairman Aman without Col. Russell being present. R., p. 000117 at ¶ 20 and R., pp. 000179-000181.

Following this meeting Col. Russell provided a memorandum dated November 24, 2008 to Black which advised Black of Col. Russell's position that, *inter alia*, "[c]ontrary to your position that you answer only to POST Council regarding POST'S budget and financial matters, it is actually the Director of the Idaho State Police who has oversight and responsibility for POST'S budget management." R., p. 000592. Black responded by e-mail the following day and reported to Col. Russell his belief that "under Idaho code [sic] 19-5116 the budget for POST is clearly under the direction of the POST Council." R., p. 000594.

One (1) to two (2) days following the November 24, 2008 meeting, Black spoke with Chairman Aman. During this meeting, Chairman Aman “agreed with [Black] that ... the POST Council was in charge of the finances; that the [D]irector [of ISP] cannot order [Black] not to speak with the chairman of the POST Council without him present, that is outside of his purview; and that the staff of POST reports to the [E]xecutive [D]irector of POST.” R., p. 000585 (*Black Depo.*), 141:21 – 141:15.

6. December 17, 2008 POST Council Meeting

On December 17, 2008, Col. Russell raised the issue of the Executive Director supervision at the POST Council Meeting. Black was not present and therefore was unable to present his perspective. R., p. 000314 at ¶ 27. The POST Council passed a motion that directed “POST Council’s Executive Director to cooperate with the Director of the Idaho State Police and answer to the Director of the Idaho State Police with regard to the fiscal matters relating to the operation of the Peace Officer Standards and Training Academy.” R., p. 000193. Despite the fact that the motion called for cooperation, after the meeting, Col. Russell summoned Black and advised Black “that [Black] work[ed] for [Russell] and, by God, that’s the way it’s going to be.” R., p. 000571 (*Black Depo.*), 85:1-3. *See also* R., p. 000314 at ¶ 28. Black reviewed the POST Council meeting minutes and continued to understand that he was to serve at the direction of the POST Council and was to continue to keep Col. Russell informed, just as Black had done with Col. Charboneau. R., p. 000314 at ¶ 29. Additionally, just days after this meeting, Black was advised by Chairman Aman that he was “supposed to slap [Black’s] wrist. You need to play nice with Colonel Russell.” R., p. 000590 (*Black Depo.*), 161:12-17. As a result of Black’s

conversation with Aman, it was Black's "understanding that [he] was to cooperate with ISP concerning fiscal issues and still report to the council concerning POST issues." *Id.* at 161:24 – 162:4.

7. *Lori Guthrie*

During January of 2008, Lori Guthrie ("Guthrie"), POST's Financial Specialist, was moved from ISP financial offices building to the POST building. R., pp. 000199-200. On July 27, 2009, Col. Russell directed Black to relocate Guthrie to the ISP office. R., p. 000224. Black objected to and refused this directive on August 12, 2009. R., p. 000233. Black reported to Col. Russell that the refusal was based upon his belief that "Under IDAPA 11.11.031.03 I am responsible for supervision of POST employees[.]" *Id.* On August 21, 2009, after consulting with the Office of the Attorney General for the Idaho State Police,² Col. Russell acknowledged that Black's objection and refusal was based upon Black's reading of IDAPA Rules but reiterated his directive to relocate Guthrie. R., pp. 000240-241.

8. *Personnel Management Audit Report of POST*

In April of 2009, Col. Russell ordered a personnel management audit of POST staff. R., p. 000202. After completion of a Personnel Management Audit Report of POST on June 12, 2009, Col. Russell asked for Black's response to the Audit Report by June 29, 2009. R., pp. 000212-219. Black responded via written memorandum on July 31, 2009. R., pp. 000226-227. On August 3, 2009 Col. Russell directed Black to provide another response. R., pp. 000229-231.

² R., p. 000235.

9. Black Advises Col. Russell of Separation of Powers Concern

On August 27, 2009 Black again addressed the issues of the Audit Report and the location of Guthrie. In Black's letter to Col. Russell he stated that "[m]y 2 predecessors and I recognize that the IDAPA rules regarding the position of POST Executive Director were put into place to provide a clear separation of powers between POST and its host agency (Idaho Department of Law Enforcement/Idaho State Police)." R., p. 000243. After discussing the Audit Report and providing a response to a concern about POST fiscal issues, Black concluded his letter by stating that "[w]ith all due respect to you and your position as Director of ISP, I am obligated under IDAPA to work within its parameters regarding the operation of POST and it is my decision that it is in the best interest of POST to keep it's [sic] fiscal team located together in the POST administrative offices." R., p. 000244.

10. Termination of Black's Employment

On September 28, 2009 Black was provided with a Notice of Contemplated Disciplinary Action. R., p. 000246-250. After Black responded on October 30, 2009, Black's employment was terminated on November 5, 2009. R., pp. 000258-261, 000266-268.

II. ISSUES PRESENTED

1. Did the District Court err by finding that Black failed to engage or intended to engage in activity protected by the Whistleblower Act?
2. Is Black entitled to costs and attorney fees on appeal under I.A.R. § 41 and I.C. § 6-2106(5).

III. ARGUMENT

A. Standard of Review.

“In an appeal from an order of summary judgment, this Court’s standard of review is the same as the standard used by the trial court in ruling on a motion for summary judgment.” *Lockheed Martin Corp. v. Idaho State Tax Comm.*, 142 Idaho 790, 793, 134 P.3d 641, 644 (2006). Rule 56(c) of the Idaho Rules of Civil Procedure provides, in pertinent part, that summary judgment “shall be rendered forthwith if the pleadings, depositions, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law[.]” “All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party.” *Robert Comstock, LLC v. Keybank Nat’l Assoc.*, 142 Idaho 568, 571, 130 P.3d 1106, 1109 (2006). “This Court freely reviews issues of law.” *Soignier v. Fletcher*, 151 Idaho 322, 324, 256 P.3d 730, 732 (2011) citing *Lattin v. Adams Cnty.*, 149 Idaho 497, 500, 236 P.3d 1257, 1260 (2010).

B. The District Court erred in finding that Black did not engage or intend to engage in activities protected by the Idaho Protection of Public Employees Act.

This Court has held that the public policy of the State of Idaho is found in the Constitution and the statutes promulgated by the Idaho Legislature. *Quiring v. Quiring*, 130 Idaho 560, 566, 944 P.2d 695, 702 (1997) citing *Stearns v. Williams*, 72 Idaho 276, 287, 240 P.2d 833, 842 (1952). The public policy of this State can also be found in the common law developed by Idaho appellate courts. *Id.* However, where a public employee seeks redress for a

retaliatory discharge under the Whistleblower Act, this Court’s jurisprudence does not provide the underlying public policy which supports the discharge: “[W]hen the Legislature enacted the Whistleblower Act, the resulting statutory cause of action displaced the common law cause of action for breach of an at-will employment contract premised on the protected activities outlined in the Act.” *Van v. Portneuf Med. Ctr.*, 147 Idaho 552, 561, 212 P.3d 982, 991 (2009).

In enacting the Whistleblower Act, the Legislature authorized the filing of a civil lawsuit to address violations. I.C. § 6-2105. The cause of action provided under the Whistleblower Act is:

To prevail in an action brought under the authority of this section, the employee shall establish, by a preponderance of the evidence, that the employee has suffered an adverse action because the employee ... *engaged or intended to engage* in an activity protected under section 6-2104, Idaho Code.

I.C. § 6-2105(4) (emphasis added). Thus, an analysis of whether an employee engaged in “protected activity” is determined only by reference to Idaho Code § 6-2104. Idaho Code § 6-2104 is the Legislative proclamation of this State’s public policy as it relates to whistleblower protections for public employees. Given the Legislative pronouncement, it is not for the courts to decide what “public policy” needs to be involved to afford a public employee whistleblower protection. On the contrary, the judiciary’s role is to determine whether a public employee has engaged in, or intended to engage in, one of the enumerated activities of Idaho Code § 6-2104. I.C. § 6-2105(4).

Black's Complaint makes two (2) of the activities set forth in § 6-2104 relevant to the case at bar: § 6-2104(1)(a) and § 6-2104(3) which provide, in part and respectively:

(1)(a) An employer may not take adverse action against an employee because the employee, ..., communicates in good faith ... a violation or *suspected violation* of a law, rule or regulation adopted under the law of this state. ...

and

(3) An employer may not take adverse action against an employee because the employee has objected to or refused to carry out a directive that the employee *reasonably believes* violates a law or a rule or regulation adopted under the authority of the laws of this state[.]

(Emphasis added). R., p. 000009, ¶¶ 17-18 & 19-20.

On several occasions the District Court cited to this Court's decision in *Mallonee v. State*, 139 Idaho 615, 84 P.3d 551 (2004), for the proposition that "[d]etermination of what constitutes public policy sufficient to protect an employee from termination for whistleblowing is a question of law." R., pp. 00515, 00521 & 00523 (citations omitted). Black recognizes that this is a correct statement of law. However, this statement of law is inapplicable to these proceedings given the Legislative enactment of the Whistleblower Act and this Court's pronouncement in *Van*, discussed *supra*. The District Court's reliance and reference to this proposition demonstrates its misunderstanding of both the Whistleblower Act and the *Mallonee* decision.

The plaintiff in *Mallonee* asserted a Whistleblower Act claim, breach of contract/public policy exception to the at-will employment doctrine claim and a First Amendment claim. 139 Idaho at 617, 84 P.3d at 553. In Section I of the Analysis section of the

opinion, this Court addressed the question of whether a state departmental policy, not adopted pursuant to rule or regulation, can be the basis for a Whistleblower Act claim. *Id.* at 619-621, 84 P.3d at 555-557. This is the only section of the opinion that discusses the Whistleblower Act. *See generally* 139 Idaho 615, 84 P.3d 551. In Section II of the Analysis section, this Court addressed the plaintiff's contention that his employment was terminated in violation of the public policy exception to the at-will employment doctrine. *Id.* at 621-622, 84 P.3d at 557-558. It is within this section of the *Mallonee* opinion that the Court noted that a determination of what public policy is sufficient to protect an employee from termination for whistle blowing activity is a question of law. *Id.* at 621, 84 P.3d at 557. The structure of the *Mallonee* opinion makes it clear that the Court was not indicating that a district court needs to determine what constitutes public policy when presented with a Whistleblower Act claim. Instead, all that is required by a district court is a consideration of whether the public employee's activities falls within an activity set forth in Idaho Code § 6-2104. This is confirmed by the Court's subsequent holding in *Van* that the Whistleblower Act has "displaced the common law cause of action for breach of an at-will employment contract premised on the protected activities outlined in the Act." 147 Idaho at 561, 212 P.3d at 991.

As the Legislature has statutorily displaced the common law public policy exception to the at-will employment doctrine for public employees, the District Court erred in attempting to determine if public policy, other than the activities set forth in Idaho Code § 6-2104, protected Black from termination. The correct procedure for the District Court was to

evaluate whether Black had engaged, or intended to engage, in the protected activities set forth in Idaho Code §§ 6-2104(1) and (3).

1. Black engaged or intended to engage in protected activity under Idaho Code § 6-2104(1) by making a good faith communication of a suspected violation of laws, rules or regulations.

Despite Black’s explicit request that the District Court address his Whistleblower Act claim made pursuant to Idaho Code § 6-2104(1)³, the District Court dismissed this claim without any discussion or explanation. R., pp. 000511-524 & 000642-000645. In light of the following, it is clear that Black’s § 6-2104(1) claims should have survived summary judgment.

a. Black communicated a suspected violation of law, rule or regulation.

A public employee is not required to communicate a confirmed violation of law, rule or regulation to be protected under § 6-2104(1). All that the employee must do is communicate a “*suspected* violation of law, rule or regulation[.]” I.C. § 6-2104(1)(a) (emphasis added). As this Court noted in *Van* when addressing a claim brought pursuant to Idaho Code § 6-2104(1)(a):

As to the other communications that Van insists were protected activity, although many of them involve suspected violations rather than confirmed violations, many of them implicate laws, rules and regulations and do qualify as protected activities under the Whistleblower Act.

...

It appears the district court misunderstood the law, and ruled that suspected violations had to be confirmed in order to constitute

³ R., p.000533; Tr. Vol. I, p. 40, LL. 6-13.

protected activity; This interpretation of the law was incorrect[.]

147 Idaho at 559, 212 P.3d at 989. Thus, all that is necessary for whistleblowing protection is communication of a suspected violation that “*implicate[s]* laws, rules [or] regulations[.]” *Id.* (emphasis added).

The undisputed evidence demonstrates that on multiple occasions Black communicated his belief that the directives given to him by Col. Russell were believed to be in violation of either the Idaho Code or IDAPA rules.

During the November 24, 2008 meeting, Black communicated his belief that it was appropriate for Black to discuss the fiscal situation of POST with then-Chairman Aman. R., p. 000567-000568 (*Black Depo.*), p. 68, L. 21 to p. 70, L. 22. Black described the disagreement as:

that Colonel Russell stated that the budget was his, and I said it wasn't; that under Idaho Code, that the budget came – was to be disbursed by the POST Council; that nowhere in the [C]ode did it mention ISP, and that – I also stated that all matters concerning POST are reported to the chair of the POST Council and that I was to meet with him [Aman] before I would come back to him [Russell] with the decision on which way we would go.”

R., p. 000567-000568 (*Black Depo.*), p. 69, L. 1 to p. 70, L. 8. Col. Russell disagreed with Black's assessment and directed Black to not speak to then-Chairman Aman without Russell being present. R., pp. 000118 & 000179-181. The following day, and in response to Col. Russell's insistence that Black must answer to the ISP Director regarding the POST Fund and POST's budget, Black advised Col. Russell that “under Idaho code [sic] 19-5116 the budget for

POST is clearly under the direction of the POST Council.” R., p. 000586 (*Black Depo.*), 145:23 – 146:5 and R., 000594.

Thereafter Black advised Col. Russell of Black’s belief that Col. Russell’s directives regarding supervision and location of POST employees were in violation of IDAPA 11.11.031.03 by letter dated August 12, 2009. *Id.* at 145:23 – 146:5; 146:7 and R., p. 000610. *See also* R., p. 000409 (*Russell Depo.*), 103:16 – 19 and R., p. 000233. The IDAPA cited by Black expressly states that the “Executive Director shall have supervision over the employees and other persons necessary in carrying out the functions of POST.”

In a letter dated August 27, 2009 Black advised Col. Russell, *inter alia*, that “[w]ith all due respect to you and your position as Director of ISP, I am *obligated under IDAPA* to work within its parameters regarding the operation of POST and it is my decision that it is in the best interest of POST to keep it’s [sic] fiscal team located together in the POST administrate [sic] offices.” R., pp. 000586-000587(*Black Depo.*), 145:23 – 146:5; 146:7 and R., p. 000611-000612. *See also* R., pp. 000618-000623.

As such, Black was engaged in, or intended to engage in protected activity as defined by § 6-2104(1).

b. Black’s communications were made in good faith.

To be protected activity under § 6-2104(1) the communication of a violation or suspected violation must be made in “good faith.” Good faith exists were “there is a reasonable basis in fact for the communication.” I.C. § 6-2104(1)(b). Whether an employee has made a report in good faith is a question of fact, and summary judgment is appropriate only if, after

viewing the evidence in the light most favorable to Black, reasonable minds could only conclude that Black's communications were malicious, false or frivolous. *See Curlee v. Kootenai Co. Fire & Rescue*, 148 Idaho 391, 400, 224 P.3d 458, 467 (2008).

The evidence demonstrates that Black had a reasonable basis in fact for his communications. Black developed his understanding that the Executive Director reported to POST Council, not the Director of ISP, in light of over ten (10) years of personal interaction with the Executive Director of POST,⁴ discussions with previous Executive Directors⁵, discussions with previous ISP Directors⁶, and his personal review of Idaho Code Title 19, Chapter 51,⁷ IDAPA 11.11.01⁸ and an organizational chart which placed the Executive Director of POST on an equal level with the Colonel Director of the ISP.⁹ His belief was also based upon discussions with various chairmen of the POST Council. R., p. 000585 (*Black Depo.*), 141:21 – 141:15 (then-POST Council Chairman Gary Aman “agreed with [Black] that it was very much in conflict; that the POST Council was in charge of the finances; that the director cannot order me not to speak with the chairman of the POST Council without him present, that is outside of his purview; and that the staff of POST reports to the [E]xecutive [D]irector of POST.”) and R., p. 000586 (*Black Depo.*), 144:10-16 (discussing that Black spoke with Dan Weaver, POST Council Chairman, and had “long conversations about the reporting structure that was in place. That it

⁴ R., p. 00317, ¶ 36.

⁵ R., p. 00310-311, ¶¶ 6-7.

⁶ R., p. 00310-311, ¶¶ 4-7.

⁷ R., p. 00311, ¶ 8.

⁸ *Id.*

⁹ R., p. 00311, ¶ 9 & p. 00317, ¶ 36.

was a very awkward reporting structure; that it was something that probably should be fixed; that it was – it was – there were areas of conflict concerning the reporting structure.”)

The statutes, Idaho Code Title 19, Chapter 51 and IDAPA 11.11.01, reviewed by Black demonstrate the following:

The POST Council was established by act of the Legislature. I.C. § 19-5102. The Legislature also created a Peace Officers Standards and Training Fund (“POST Fund”) in the state treasury. I.C. § 19-5116. Many of the powers of the POST Council are set forth in Idaho Code § 19-5109. In addition to these powers, the POST Council is directed by statute to expend funds deposited into the POST Fund for enumerated purposes. I.C. § 19-5116. The Legislature mandated that the POST Council “shall promulgate, amend and rescind such rules and regulations in accordance with the provisions of [the Idaho Administrative Procedures Act], it deems necessary to carry out the provisions of this chapter.” I.C. § 19-5107. Pursuant to this Legislative mandate, POST Council promulgated the Rules of the Idaho Peace Officer Standards and Training Council (“POST Rules”). IDAPA 11.11.01.000 & 11.11.01.001.01.

When enacting the POST Rules, the POST Council recognized that it was empowered “[t]o adopt and amend rules and procedures consistent with law for the *internal* management of POST[.]” IDAPA 11.11.01.030.06 (emphasis added). Likewise, the POST Council recognized that it was “[t]o *consult and cooperate* with recognized law enforcement agencies ... concerned with law enforcement training.” IDAPA 11.11.01.09 (emphasis added). ISP is a law enforcement agency with which POST was to consult and cooperate. *See* IDAPA 11.11.010.03.

Pursuant to the directive and authority conferred by the Legislature, the POST Council created “in the Idaho State Police a classified position of Executive Director of the Idaho Peace Officer Standards and Training Council.” IDAPA 11.11.01.031. The POST Council also established the duties and reporting structure for the Executive Director:

02. Under POST Council’s Direction. *The Executive Director will be employed by the Idaho State Police to serve under the direction of the POST Council in carrying out the duties and responsibilities of the Council.* Effective Date (4-2-08)

03. Supervision Over Employees. *The Executive Director shall have supervision over the employees and other persons necessary in carrying out the functions of POST.* Effective Date (4-2-08)

04. Administration. *For administrative purposes, the Executive Director and his staff will be governed by the Policies and Rules of the state of Idaho and the Idaho State Police, concerning but not limited to fiscal, purchasing, and personnel matters.* Effective Date (4-2-08)

IDAPA 11.11.01.02-04 (bold in original; bold and italic added). Nothing in these Rules states that the Executive Director shall report to and/or be accountable to the ISP Director.

The POST Council created the position of Executive Director. IDAPA 11.11.01.031. Thus, it is reasonable to believe that the POST Council is to control and direct that position. This reasonable interpretation of the statutes and regulations of the State of Idaho was the basis for Black’s belief and communications. R., p. 00311, ¶ 8.

As noted, the POST Council set forth by rule that the Executive Director “serve[s] *under the direction of the POST Council* in carrying out the duties and responsibilities of the Council.” IDAPA 11.11.01.031.02 (emphasis added). One duty and responsibility of the POST Council is to oversee spending of the POST Fund. I.C. § 19-5116. When IDAPA

11.11.01.031.02 is read in conjunction with Idaho Code § 19-5116, it is reasonable to believe that when expending funds from the POST Fund, the Executive Director is carrying out a duty and responsibility of the POST Council. As such, when expending money from the POST Fund, the Executive Director serves at the direction of the POST Council per IDAPA 11.11.01.031.02. Thus, when Black advised Col. Russell on November 25, 2008 that the POST Fund was under the direction of the POST Council per Idaho Code § 19-5116, Black was reporting to Col. Russell that Col. Russell's demand for control over the POST Fund was unlawful. At the very least, this communication demonstrates that Black was intending to report a suspected violation.

That Black communicated in good faith is supported by his un-rebutted testimony that “[m]y whole intent of writing [the August 27, 2009] letter to Colonel Russell was to force that issue. Collectively we could sit down with the attorney general, someone outside of ISP's counsel, and get a resolution to this.” R., p. 000585 (*Black Depo.*), 140:22-25 and R., pp. 000611-000612.

In addition to Black's own experiences, minutes from POST Council meetings provide a reasonable basis for Black's beliefs. At a June 7, 2007 meeting, Black raised the issue of separating POST from ISP entirely. R., pp. 000397-000400. The discussion of the POST Council members make it clear that there had been a history of disputes between POST Council and ISP regarding the role of each entity. *Id.*

Also demonstrating the reasonableness of Black's belief is the testimony of Richard Juengling (“Juengling”). Juengling was employed as the Standards, Certifications and Support Manager of POST. R., p. 000425, (*Juengling Depo.*), p. 7, L.12 to p. 9, L. 3. When

deposed, Juengling testified that “there has long been this question of whether the executive director of POST reported to POST Council or to the director of ISP.” R., p. 000438 (*Juengling Depo.*), 58:15-20, 59:12 – 60:24. Juengling also conducted a review of the controlling statutes and rules and came to the conclusion that the POST Executive Director reports to the POST Council. *Id.* at 58:21 – 59:1; 61:24 – 64:18.

The reasonableness of Black’s belief is also demonstrated by Col. Russell’s conduct. On two separate occasions, Col. Russell sought the advice of the Office of the Attorney General for the Idaho State Police (“AG”). In late November/early December of 2008, Col. Russell first requested that the AG address the question of whether “the Director of the Idaho State Police ha[s] supervisory authority over the Executive Director of POST Council involving POST’s budget management and administration?” R., p. 000408 (*Russell Depo.*), PP. 54-55 and R., pp. 000410-000411. If the answer to this question was blatantly obvious, Col. Russell would not have needed to seek the advice of the AG. Despite his need to consult with the AG on this issue, Col. Russell never advised Black that he had sought and received advice from counsel on this issue. R., p. 000408 (*Russell Depo.*), p. 56, LL. 5-10.

Col. Russell again sought the advice of the AG in August, 2009 regarding the location of fiscal staff serving POST. R., p. 000409 (*Russell Depo.*), p. 103, L. 23 to p. 104, L. 3 and R., p. 000412. As before, Col. Russell failed to inform Black that he had sought and received advice from counsel on this issue. R., p. 000409 (*Russell Depo.*), p. 104, LL. 6-16. Again, given that Col. Russell himself needed legal counsel on this issue, clearly Black’s interpretation of who determines the location of POST fiscal staff was reasonable.

In sum, the evidence clearly demonstrates that Black made a good faith communication of a suspected violation of law, rules and regulations and therefore his claim under Idaho Code § 6-2104(1)(a) survives summary judgment. As such, the District Court erred in granting ISP summary judgment on this claim.

2. Black objected to and refused to carry out a directive he reasonably believed to violate laws, rules or regulations.

In granting summary judgment to ISP on Black's claim under Idaho Code § 6-2104(3), the District Court erred in holding that in order to receive protection under § 6-2104(3) the directive provided must have been unlawful. Additionally, the District Court erred when it found that Black admitted that he was not directed to do anything illegal.

a. Black is not required to demonstrate a confirmed violation.

The District Court held that “[t]he action ordered must be a violation of the law for refusal to be protected activity under the Whistleblower Act.” R., p. 000519. *See also* R., p. 000522. This erroneous interpretation of Idaho Code § 6-2104(3) can only be reached by disregarding the plain language of the statute.

When called upon to interpret a statute, the Court begins with an examination of the literal words. *See Dep't of Health & Welfare v. Lisby*, 126 Idaho 776, 779, 890 P.2d 727, 730 (1995). The Court must give the language of a statute its plain, obvious and rational meaning. *See State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999). The Court's primary function is to determine and give effect to legislative intent. *Gillihan v. Gump*, 140 Idaho 264, 266, 92 P.3d 514, 516 (2004). Such intent should be derived from reading the whole

act. *George W. Watkins Family v. Messenger*, 118 Idaho 537, 539-40, 797 P.2d 1385, 1387-88 (1990). A court is to interpret a statute in a manner that gives effect to all of its provisions, as a court does “not presume that the legislature performed an idle act by enacting a meaningless provision.” *Roberts v. Bd. of Trustees*, 134 Idaho 890, 894, 11 P.3d 1108, 1112 (2000) citing *Brown v. Caldwell Sch. Dist. No. 132*, 127 Idaho 112, 117, 898 P.2d 43, 48 (1995).

A statute is ambiguous where reasonable minds might differ or be uncertain as to its meaning. *See State v. Doe*, 140 Idaho 271, 274, 92 P.3d 521, 524 (2004). If a statute is ambiguous, a court may look beyond the plain language of the statute to ascertain the legislative intent. *See Carrier v. Lake Pend Oreille Sch. Dist. No. 84*, 142 Idaho 804, 807, 134 P.3d 655, 659 (2006). “When a statute is ambiguous, ‘it must be construed to mean what the legislature intended it to mean. To determine that intent, [the court] examine[s] not only the literal words of the statute, but also the reasonableness of proposed constructions, the public policy behind the statute, and its legislative history.’” *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 388, 398-99, 111 P.3d 73, 83-84 (2005) quoting *State v. Schwartz*, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003).

The literal words of Idaho Code § 6-2104(3) provide:

An employer may not take adverse action against an employee because the employee has objected to or refused to carry out a directive that the employee ***reasonably believes*** violates a law or a rule or regulation adopted under the authority of the laws of this state, political subdivision of this state or the United States.

(Emphasis added).

After an examination of the literal words of the statute, the plain, obvious and rationale meaning of the statute does not require that the directive in fact be “illegal.” Black’s Law Dictionary defines the phrase “reasonably believe” as “[to] believe (a given fact or combination of facts) under circumstances in which a reasonable person would believe.” BLACK’S LAW DICTIONARY 164 (8th Ed. 2007). “Believe” is defined as “[t]o *feel* certain about the truth of; to accept as true” or “[t]o think or suppose.” *Id.* (emphasis added). A lay dictionary defines the word “believe” as “to have confidence in the truth, the existence, or the reliability of something, although *without absolute proof* that one is right in doing so.” *Dictionary.com Unabridged*. Random House, Inc. Retrieved January 12, 2012, from Dictionary.com website: <http://dictionary.reference.com/browse/believe>. (emphasis added). The plain and literal meaning of the words “reasonably believes” is that an individual has faith that the proposition is true, but does not know with certainty the truth of the proposition. When Idaho Code § 6-2104(3) is read using the plain and literal meaning of the words “reasonably believes”, the statute clearly indicates that a person must only have faith that a violation has occurred. To hold that an illegal directive must be established is to re-write the plain language of § 6-2104(3) and render the words “reasonably believes” meaningless.

If the Legislature intended to protect only objections and refusals to confirmed illegal directives, Idaho Code § 6-2104(3) would read “An employer may not take adverse action against an employee because the employee has objected to or refused to carry out a directive that the employee *knows* violates a law or a rule or regulation” or “An employer may not take adverse action against an employee because the employee has objected to or refused to carry out

a directive *that violates* a law or a rule or regulation.” The Legislature chose not to draft § 6-2104(3) in such a manner, instead it included the phrase “reasonably believes.” The inclusion of this phrase clearly indicates that the existence of an illegal directive is not a prerequisite for protection under § 6-2104(3).

A requirement that a public employee establish the illegality of the directive is contrary to the intent of the Legislature in enacting the Whistleblower Act. *See* I.C. § 6-2101. A requirement that the directive given in fact be illegal would have a chilling effect on an employee’s right to object or refuse a directive because, unless an employee was 100% sure that the directive was illegal, the employee could face retaliation without recourse. That is clearly not the intent behind the Whistleblower Act.

Requiring an illegal directive would render § 6-2104(3) meaningless. If an employee could only object to or refuse a directive that was illegal, the employee would first have to report the existence of the violation or suspected violation to some individual or entity empowered to issue a declaratory ruling on the legality of the directive, await the ruling and then only upon confirmation that the directive was illegal, return to the individual who gave the directive and then object or refuse. Not only is this procedure cumbersome and impracticable, it would eliminate the need for § 6-2104(3) because the employee would have already made a communication protected by § 6-2104(1).

Black does not contend that the Whistleblower Act gives an employee liberty to object or refuse to comply with a directive on a whim or simply because the employee disagrees with the directive. To advance such a position would be asking the Court to ignore the

“reasonably believes” language of the statute. Likewise, such a position ignores this Court’s holding in *Mallonee v. State* that an employee must hold an *objectively* reasonable belief in order to be protected under Idaho Code § 6-2104(3). *See* 139 Idaho 615, 620, 84 P.3d 551, 556 (2004)

In *Mallonee*, this Court stated that a plaintiff’s “*subjective* good faith belief that he was reporting a violation of the law is irrelevant where Idaho’s statute does not include the term ‘suspected violations’ and for which the [Whistleblower Act] offers no protection.” 139 Idaho 615, 620, 84 P.3d 551, 556 (2004) (citation omitted) (emphasis added). Implicit in this holding is that, were a claim is made pursuant to Idaho Code § 6-2104(3), whether a “reasonable belief” exists is judged by an objective, rather than subjective, standard. Such a holding is in accord with reasonable belief requirements in other retaliation cases.

When addressing a retaliation claim brought under the Idaho Human Rights Act, this Court recognized that a “plaintiff’s retaliation claim may proceed to the jury based upon her reasonable belief that she engaged in protected activity.” *Patterson v. State Dep’t of Health & Welfare*, 151 Idaho 310, 320, 256 P.3d 718, 728 (2011) (citation omitted). The Court’s decision then discussed that such a plaintiff must demonstrate that the belief was reasonable under both a subjective and objective standard. *Id.* quoting *Little v. United Technologies*, 103 F.3d 956, 960 (11th Cir. 1997). Whether a belief is subjectively reasonable is based on whether the belief is held in good faith. *Id.* In contrast, whether a belief is objectively reasonable is based upon the facts and record presented. *Id.* As a determination of whether Black’s belief was objectively reasonable calls for a consideration of facts, it is a question for the jury. *See Anderson et al. v. Foster*, 73 Idaho 340, 347, 252 P.2d 199, 203 (1953).

Recognition that § 6-2104(3) only requires an objectively reasonable belief and not a confirmed violation of law is in accord with decisions from jurisdictions whose whistleblower acts have similar statutory language, such as the *Larsh v. Mansfield Mun. Elec. Dept.*, 272 F.3d 63 (1st Cir. 2001). In *Larsh*, the First Circuit was interpreting the Massachusetts Whistleblower Statute which provided that an employee was protected when he “objects to, or refuses to participate in any activity, policy or practice which the employee *reasonably believes* is in violation of a law, or a rule or regulation promulgated pursuant to law[.]” *Id.* at 67 quoting Mass. Gen. Laws ch. 149, § 185(b). In affirming a verdict for the employee, the court noted that “... Larch only had to establish that he reasonably believed that hiring Forbes *would have* violated one of the statutes he cited[.]” *Id.* at 68 (emphasis added). The Court continued on to note, “[s]ince *a reasonable belief* that hiring Forbes upon Colella’s order *is enough to establish a violation of the statute, we do not have to decide whether Colella’s conduct in fact violated [the statute].*” *Id.* at 69 n.5 (emphasis added).

A similar result was reached in *Gerard v. Camden Co. Health Services Ctr.*, 348 N.J. Super. 516 (App. Div. 2002) *judgment aff’d on basis of lower court opinion*, 179 N.J. 81 (2004). In *Gerard*, the New Jersey court was interpreting a statute with very similar language to the Whistleblower Act.¹⁰ *See* 348 N.J. Super. at 520. In reversing a grant of summary judgment in favor of the defendant, the Court noted that “it seems hardly to be questioned that, if these beliefs are *objectively reasonable*, plaintiff was engaged in ... protected activity.” *Id.* at 519

¹⁰ New Jersey Statute 34:19-3 provides, in part: “An employer shall not take any retaliatory action against an employee because the employee does day of the following: ... c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes: (1) is in violation of a law, or a rule or regulation promulgated pursuant to law[.]”

(emphasis added). When holding that a plaintiff was not required to in fact demonstrate an illegal act, the court recognized that “ ‘the object of the CEPA [the New Jersey whistleblower statute] is not to make lawyers out of conscientious employees but rather to prevent retaliation against those employees who object to ... conduct that they reasonably believe to be unlawful[.]’” *Id.* at 522 quoting *Mehlman v. Mobil Oil Corp*, 153 N.J. 163, 193-194 (1998) (ellipsis in original). The same can be said about the Whistleblower Act. The Idaho Legislature did not intend to make lawyers out of all state employees who seek to report conduct believed to be in violation of the law. Instead, the Legislature intended to protect those employees, such as Black, who make reports based upon a reasonable belief that a directive is in violation of a law, rule or regulation.

In sum, the District Court erred by holding that the directive issued must be illegal to trigger the protections of § 6-2104(3). The Whistleblower Act merely requires an objectively reasonable belief that a violation of law, rule or regulation had occurred.

b. Black had an objectively reasonable belief that the directives given were in violation of a law, rule or regulation and/or following such directive would have put Black in violation of a law, rule or regulation.

In its Decision, the District Court declined to address Black’s contention that his belief was reasonable due to an erroneous factual finding that Black admitted he was not directed to do anything illegal. R., pp. 000519-000520. This factual finding was erroneous in light of the entirety of Black’s testimony provided to the Court.

Black testified regarding the Audit Report. After commenting as to the merits of the Audit Report, Black testified that: “The issue was, is whether the director of ISP had the authority to order me to respond back continually when the staff issues that we were dealing with dealt with POST.” R., p. 000584 (*Black Depo.*), 134:24 – 135:3. Black’s testimony continued:

Q. The directive to relocate Ms. Guthrie, what was illegal about that directive?

...

THE WITNESS: *I was responsible for POST personnel according to IDAPA*, because again if the legislature wanted it to be under the control of ISP, they would have put it there. They put it under POST, therefore, *an outside agency ordering me to move her I felt violated that IDAPA rule.*

Q. Okay. And what rule, law or regulation to your understanding is his directive violating?

A. The IDAPA rule that all POST employees report to the director and all their activities are the responsibility of the director and the POST Council.

...

A. Unless there was a policy violation by one of my staff or there was accusations of ISP or State of Idaho policy violations by the staff, which was never articulated within that management study, it’s not the business of ISP’s [sic].

Q. *And again, to the best of your understanding, a violation of which rule or law? It would be the IDAPA rule again?*

A. *That’s correct.*

...

Q. And again it's not that his directive, the act itself of making you respond to that audit report again, is illegal? It's the fact that he didn't have the authority to do it, at least you believe didn't have the authority to do it under the rule?

...

THE WITNESS: I'm going to go back. *I would be in violation of – I would be in violation of IDAPA rules and Idaho Code on all those if I complied with them.*

R., pp. 000584-000585 (*Black Depo.*), at 135:4 – 138:8 (emphasis added).

In addition to this testimony, Black testified to his belief 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. Black testified that it was his belief that Col. Russell's November 24, 2008 letter to him, which required Black to provide a financial course of action to Col. Russell and attempted to prohibit Black from meeting with the Chairman of the POST Council without Col. Russell present, was either a 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., p. 000588 (*Black Depo.*), 153:4-15 and R. pp. 000592-000593. Black testified that Col. Russell's attempt to dictate the financial operations within POST was 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., p. 000589 (*Black Depo.*), at 154:18-24 and R., p. 000595-000596. Col. Russell's attempts to insert ISP into personnel matters at POST also were a 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 according to

Black's testimony. R., p. 000589 (*Black Depo.*), at 155:2 – 157:8 and R., pp. 000597-000609 and R., pp. 000240-000241.

As the foregoing testimony demonstrates, by holding that Black admitted he was not directed to perform an illegal act, the District Court erred by applying the wrong legal standard – it viewed the evidence in the light most favorable to the non-moving party, ISP.

Other evidence also demonstrates that Black's belief was objectively reasonable. Minutes from POST Council meetings also establish a history of disputes between POST Council and ISP regarding the role of each entity. R., pp. 000000397-000400. Juengling's testimony that "there has long been this question of whether the executive director of POST reported to POST Council or to the director of ISP." R., p. 000438 (*Juengling Depo.*), 58:15 – 20, 59:12 – 60:24. The fact that Juengling conducted a review of the controlling statutes and rules and came to the conclusion that the POST Executive Director reports to the POST Council. R., pp. 000438-000439 (*Juengling Depo.*), at 58:21 – 59:1; 61:24 – 64:18. The fact that Col. Russell had to twice seek the advice of counsel to determine the interplay between POST Council and ISP further demonstrates that Black's belief was objectively reasonable. R., pp. 000408-000409 (*Russell Depo.*), 54 – 56, 103 – 104 and R., pp. 000410-000412.

In considering whether Black's actions were objectively reasonable, the unique position held by Black must be taken into consideration. Black's position that was specifically created by way of an administrative rule to carry out the functions of a governmental body created by the Legislature. IDAPA 11.11.01.031. (2008). Black became employed as the Executive Director of POST only after a collaborative decision by the POST Council and the

Director of ISP. IDAPA 11.11.01.031.01.b (2008). As such, Black received his appointment from a governmental body whose members were directly appointed by the Governor of the State of Idaho. I.C. §§ 19-5102 & 67-2901(2). Not only was Black's position and hiring process very unique, the position he held was responsible for carrying out a unique function: policing the police, including the ISP. *See* I.C. § 19-5109.

Moreover, Black's case is unique from that of virtually every other state employee in that he was to be employed within a particular department, ISP, but to serve under the direction of a governmental body, POST Council, that was beyond the control of the department head of the department in which Black was employed. *See* IDAPA 11.11.01.031.02 and I.C. §§ 19-5101 *et seq.* In fact, the department head of the department of which Black was employed, was just one of thirteen voting members of the governmental body at whose direction he served. I.C. § 19-5102 & IDAPA 11.11.01.031.01.b (2008). Finally, Black was the Executive Director for a state entity that had its own designated fund within the state treasury. I.C. § 19-5116. Black's position was a very unique position that was governed by laws, rules and regulations that were applicable to virtually no other public employee.

In sum, there is ample evidence which would allow a reasonable jury to find that Black had an objectively reasonable belief that the directives given were in violation of law, rule or regulation.

C. Black is entitled to costs and attorney fees for this appeal.

The Whistleblower Act provides that a court may order "payment by the employer of reasonable costs and attorneys' fees" to the discharged employee. I.C. § 6-2106.

See also Smith v. Mitton, 140 Idaho 893, 902, 104 P.3d 367, 376 (2004). Upon remand of this matter to the District Court for further proceedings, Black will be the prevailing party on this appeal. As such, Black should be awarded his costs and attorney fees incurred from this appeal.

IV. CONCLUSION

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

DATED this 20th day of July, 2012.

ROSSMAN LAW GROUP, PLLC

By: 

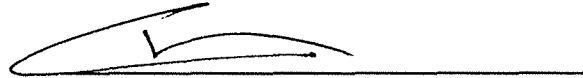
Chad M. Nicholson
Attorneys for Appellant/Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 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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