11-2-2012

Frogley v. Meridian Joint School Respondent's Brief Dckt. 39945

IN THE SUPREME COURT FOR THE STATE OF IDAHO

WADE FROGLEY, **Plaintiff/Appellant,** **vs.** **MERIDIAN JOINT SCHOOL DISTRICT NO. 2, IDAHO STATE BOARD OF EDUCATION, an Executive Department of the STATE OF IDAHO; LINDA CLARK, an individual; AARON MAYBON, an individual,** **Defendants/Respondents.**	Supreme Court Docket No. 39945-2012 RESPONDENTS' BRIEF

RESPONDENTS' BRIEF

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Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada (Case No. CVOC 2010-08779)

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Honorable Ronald J. Wilper, Presiding

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I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an employment case alleging retaliation for reporting sexual harassment, and alleging a negligent and intentional infliction of emotional distress claims against Respondents. Respondents denied all of Appellant's claims and affirmatively asserted that Appellant was discharged from his employment with the Meridian School District due to poor performance.

On December 19, 2011, Respondents filed a Motion for Summary Judgment seeking dismissal of all of Plaintiff's claims: (1) hostile environment sexual harassment claims brought pursuant to Title VII and the Idaho Human Rights Act (IHRA); (2) retaliation for reporting alleged sexual harassment in violation of Title VII and the IHRA; (3) breach of the implied covenant of good faith and fair dealing; (4) defamation; (5) tortious interference with perspective economic advantage; (6) intentional infliction of emotional distress; and (7) negligent infliction of emotional distress.

Appellants opposed the motion arguing: (1) that Appellant had been subjected to a hostile work environment permeated with sexual innuendos; (2) that he experienced adverse employment actions as a result of his report to the District Superintendent that the building principal was sexually harassing him; and (3) that the conduct of Respondent's defamed him, interfered with his future contractual opportunities with the District and was performed in bad faith. Finally, Appellant also argued that the conduct was extreme and outrageous and caused him emotional distress and/or that the conduct breached a duty of care owed to him and caused him emotional distress.

After reviewing the parties' briefing, and considering the oral argument of counsel, on March 16, 2012, the District Court agreed with Respondents' position and issued its decision granting Defendants' Motion for Summary Judgment and dismissed all of Plaintiff's claims.

Appellant has appealed the District Court's grant for summary judgment alleging primarily that there exist issues of material fact with regard to: (1) that the District's stated reasons for adverse employment action are a pretext for illegal discriminatory conduct; and (2) that the District owed a duty of care not to make demeaning comments about Appellant.

B. STATEMENT OF FACTS

The following facts summarize the key facts relevant to Appellant Wade Frogley's ("Frogley's") appeal and to Respondents' defense that any adverse employment action taken by Respondents regarding Frogley was taken solely as a result of his failure to adequately perform his duties as an Assistant Principal at Mountain View High School, and not for any unlawful or tortious reason.

On May 8, 2008, Human Resources Director Barbara Leeds emailed Frogley informing him that Principal Aaron Maybon ("Principal Maybon") would be contacting him to schedule an interview. (Affidavit of Barbara Leeds ("Leeds Aff"), p. 2, R. 160.) Ms. Leeds informed Frogley that he would be offered a one-year contract (Leeds Aff, p. 2, R. 160; Barbara Leeds email to Wade Frogley, Exhibit "A" to Leeds Aff, R. 164.) Thereafter, a State of Idaho Administrator's Contract was forwarded to Frogley for his review and signature. (Leeds Aff, p. 2, R.160.) Frogley signed and returned the contract

on January 15, 2009. (Leeds Aff, p. 2, R. 160; State of Idaho Administrators Contract, dated January 15, 2009, Exhibit "B" to Leeds Aff, R. 165.)

The Job Description for the Assistant Principal position Frogley was hired to fill clearly identified his overall supervisory responsibilities, including the specific obligation that he identify and assist students having difficulties, which, as will be shown below, Frogley failed to satisfy. (Affidavit of Aaron Maybon (Maybon Aff), pp. 2-20, R. 43-61; Job Description, Assistant Principal, High School, Exhibit "A" to Maybon Aff, R. 64-65.)

As the school year progressed, however, several incidents occurred which caused disruption amongst the administrative staff at Mountain View. (Maybon Aff, pp. 3-4, R. 44-45.) For example, on October 23, 2008, Assistant Principal Shana Hawkins noticed that Frogley had left the building for lunch at 12:00 p.m. and did not return until 2:30 p.m. (Affidavit of Shana Hawkins ("Hawkins Aff"), pp. 2-3, R. 192-193.) Without telling anyone ahead of time, Frogley had departed the building and had also failed to take any steps to ensure his responsibilities were covered by other staff members in his absence. (Maybon Aff, p. 4, R. 45.) Principal Maybon promptly explained to Frogley that communication and coordination were required whenever he left the building to ensure that all staff responsibilities were accomplished. (Maybon Aff, p. 4, R. 45; Shana Hawkins letter, Exhibit "A" to Hawkins Aff, R. 196.)

A similar situation arose at about the same time when counselor Tammy Schneider noted that Frogley had failed to attend a series of meetings regarding Student Individual Education Plans (IEP's) and Student Section 504 meetings which had been scheduled for Frogley's attendance as administrator. (Affidavit of Tammy Schneider ("Schneider Aff), p. 2, R. 180.) Frogley failed to attend several such meetings

between late October and early November 2008. (Schneider Aff, p. 2, R. 2; Emails and notifications to Frogley of parent-teacher-counselor conferences collectively attached at Exhibits "B" and "C" to Schneider Aff, R. 185-188.)

In addition, despite being counseled by Principal Maybon to be more mindful of his duties as an Assistant Principal, on Tuesday, November 4, 2008, Assistant Principal Shana Hawkins was asked to cover an IEP meeting in place of Assistant Principal Frogley because he was absent at the time of the 3:00 p.m. meeting, and had failed to make arrangements to have another administrator cover the meeting. (Maybon Aff, p. 4, R. 45; Hawkins Aff, p. 3, R. 193; Shana Hawkins note, Exhibit "B" to Hawkins Aff, R. 197.)

On Wednesday, November 5, 2008, Principal Maybon met with Frogley and discussed with him his poor job performance. (Maybon Aff, p. 5, R. 46.) The next day, Principal Maybon prepared a four page letter to be placed in Frogley's file memorializing several instances within a five day period beginning on Friday, October 31, 2008, and running through Tuesday, November 4, 2008, wherein Frogley had failed to satisfy his duties as Assistant Principal, including Frogley's continued insistence upon leaving the building during working hours to work on his advanced degree. (Maybon Aff, p. 5, R. 56; Maybon notes dated 11/6/2008, signed by Wade Frogley, Ex. "C" to Maybon Aff, R. 68-71.) During this conversation, Frogley discussed with Principal Maybon his displeasure with the joking amongst the staff about Frogley's "womanizing". (Maybon Aff, p. 6, R. 47.) In response, Principal Maybon assured Frogley that all such joking and innuendo would cease. (Maybon Aff, p. 6, R. 47.) This report was the first time that Frogley had raised any such concerns to Principal Maybon. (Maybon Aff, p. 6, R 47.) During this

meeting with Principal Maybon, Frogley also complained about a faux wedding announcement and photograph which depicted him in a fictitious marriage to a "cheap two-bit tramp," which had occurred in August of 2008. (Maybon Aff, p. 6, R. 47.) These topics were summarized by Principal Maybon's November 6, 2008, letter to the file which was reviewed and signed by Frogley on November 13, 2008, without comment. (Maybon Aff, 6, R. 47; Maybon Notes, Exhibit "C" to Maybon Aff, R. 68-71.)

As a result of the increasing reports of missed work assignments and obligations, Principal Maybon examined Frogley's overall work performance to date and uncovered an alarming pattern of job neglect. (Maybon Aff, p. 6, R. 47.) On November 7, 2008, counselor Tammy Schneider provided Principal Maybon with a list of meetings Frogley had failed to properly attend between October 28, 2008 and November 4, 2008 (Maybon Aff, p. 6, R. 47; Tammy Schneider note, Exhibit "A" to Schneider Aff, R. 184.)

Similarly, Maybon's review of teacher evaluations performed by Frogley revealed that Frogley had failed to conduct timely evaluations for 18 of the 26 teachers over whom he had supervisory responsibility. (Maybon Aff, p. 7, R. 48; Spreadsheet of evaluations, Exhibit "D" to Maybon Aff, R. 72.)

As a result of Frogley's poor work performance, on November 11, 2008, Principal Maybon prepared a Letter of Reprimand identifying five areas needing improvement:

1) Absences from the building and failure to attend scheduled meetings;
2) Failure to observe and prepare evaluations of teachers over whom Frogley had supervisory responsibility;

3) Failure to satisfy professional responsibilities including attendance at meetings with Freshman teams, presence at parent meetings, and presence at Section 504 and IEP meetings;

4) Poor communication with parents resulting in displeasure and agitation by the parents regarding Frogley's handling of situations; and

5) Insubordination.

(Maybon Aff, p. 7, R. 48; Letter of Reprimand to Wade Frogley, Ex. "E" to Maybon Aff, R. 73-74.)

In addition to the prior instances of job failure, on the morning of November 11, 2008, Frogley was scheduled to make a presentation at Special Education Symposium hosted by Mountain View High School. (Maybon Aff, p. 7, R. 48.) Inexplicably, Frogley missed his scheduled speaking assignment at the Symposium; and his only explanation was that he had gone to the District Office, while admitting that he had failed to notify anyone of his absence during his time to speak at the Symposium. (Maybon Aff, p. 7, R. 48.) Frogley's surprise absence from the Symposium caused Principal Maybon and the rest of the administrative staff great embarrassment. (Maybon Aff, pp. 7-8, R. 48-49.)

On November 12, 2008, Principal Maybon met with Frogley and delivered to him the Letter of Reprimand, the notes documenting Principal Maybon's and Frogley's prior conversation, and a performance evaluation addressing Frogley's current short comings. (Maybon Aff, p. 8, R. 49; Meeting Transcript, Exhibit "A" to Affidavit of Janet Brooks ("Brooks Aff), R. 127; Assistant Principal Evaluation, Exhibit "F" to Maybon Aff, R. 73-74.)

The Performance Evaluation, dated November 12, 2008, noted Frogley's job performance to date was deficient in two areas and unsatisfactory in four areas

including leadership, interpersonal relations, professional responsibilities, and the category "other" noted that Frogley had failed to follow directives, was insubordinate, and that the trust between him and his principal had been damaged. (Maybon Aff, p. 8, R. 49; Assistant Principal Evaluation, Exhibit "F" to Maybon Aff, R. 75-77.)

The following event illustrates Frogley's insubordinate, even childish attitude toward his responsibilities as an Assistant Principal: At 3:10 PM, on November 12, 2008, Frogley was informed that Principal Maybon wished to speak with him in the Principal's office at 3:30 PM. (Brooks Aff, p. 2, R. 124.) At 3:35, when Frogley was late, secretary Janet Brooks went to Frogley's office to see if he was busy and determine why Frogley was not at the 3:30 meeting with Principal Maybon. (Brooks Aff, p. 2, R. 124.) Brooks observed Frogley merely sitting at his desk doing nothing. (Brooks Aff, p. 2, R. 124.) At 3:41 PM, Frogley wandered into Principal Maybon's office and never attempted to explain his lateness or offer an apology. (Maybon Aff, p. 8, R. 49.) Principal Maybon considered this yet another example of Frogley's insubordinate attitude, and drafted a second Letter of Reprimand which was given to Frogley and signed by Frogley on November 13, 2008 (Maybon Aff, pp. 8-9, R. 49-50; Letter of Reprimand, Exhibit "G" to Maybon Aff, R. 78.)

That evening, at approximately 8:30 p.m., Frogley appeared at the home of Principal Maybon to discuss the packet containing the Job Evaluation, Letter of Reprimand and supporting documentation. (Maybon Aff, p. 9, R. 50.) Apparently, Frogley hoped to have Principal Maybon drop the whole matter without further action, and went so far as to allude to the fact that both he and Principal Maybon are members of the same church. (Maybon Aff, p. 9, R. 50.) Principal Maybon immediately informed

Frogley that his home was not the appropriate venue to discuss work issues, and when Frogley realized that this private meeting was not going to remedy his situation, he thanked the Principal for his time and left his home. (Maybon Aff, p. 9, R. 50; Principal Maybon note dated November 12, 2008, Exhibit "H" to Maybon Aff, R. 79.)

On November 13, 2008, Principal Maybon called Frogley into his office and informed Frogley that he was being placed on a Level II Improvement Plan; and the second Letter of Reprimand dated November 12, 2008, was delivered to Frogley at that time. (Maybon Aff, p. 9, R. 50; Transcript, dated November 13, 2008, Exhibit "B" to Brooks Aff, R. 128-129.) The intensified Level II Improvement Plan identified eleven areas where Frogley needed improvement and also identified several specific strategies designed to assist Frogley in meeting the improvement objectives. (Maybon Aff, p. 10, R. 51; Expanded Improvement Plan, attached at Exhibit "I" to Maybon Aff, R. 80-85.)

Despite being placed on a Plan of Improvement on November 13th, a mere eight days later, on November 21, 2008, Frogley received his third Letter of Reprimand. (Maybon Aff, p. 10, R. 51.) The third letter noted that on November 14, 2008 (only two days after his placement on a Plan of Improvement) Frogley had again failed to supervise students in the cafeteria as required by his job, and continued to do so until he was directed by Principal Maybon. (Maybon Aff, p. 10, R. 51.) In addition, Frogley had previously failed to conduct a required meeting with his assigned freshman team back in September, and the report discussing the meetings, which had been due in October of 2008, remained unfinished as of November 20, 2008. (Maybon Aff, p. 10, R. 51.) Frogley was informed that these failures were unacceptable. (Maybon Aff, p. 10, R. 51.) Finally, Principal Maybon discovered that Frogley had made only one entry in the

"Power Schools" database system wherein disciplinary activities are entered into a school-wide database. (Maybon Aff, p. 10, R. 51.) Principal Maybon was personally aware of several disciplinary matters which had not been recorded into the system, and Frogley was also reprimanded for this failure. (Maybon Aff, p. 10, R. 51; Letter of Reprimand, attached at Exhibit "J" to Maybon Aff, R. 86.)[1]

When Principal Maybon delivered the November 21, 2008, Letter of Reprimand to Frogley, he again demonstrated his arrogant and insubordinate behavior toward Principal Maybon by ignoring Principal Maybon when he entered Frogley's office and continuing to work on his computer, forcing Principal Maybon to wait in the doorway while Frogley took his time getting to the letter. Frogley finally looked at the letter, signed it, and without comment slid it across his desk to Principal Maybon. (Maybon Aff, p. 11, R. 52; Note dated November 21, 2008, Exhibit "C" to Brooks Aff, R. 130.)

Despite the multiple Letters of Reprimand already in Frogley's file, a mere three days after the latest letter, on November 24, 2008, Frogley was again at least 30 minutes late for his scheduled supervisory post at the cafeteria. (Affidavit of Heath McInerney (McInerney Aff), p. 2, R. 137; Note by Heath McInerney, Exhibit "A" to McInerney Aff, R. 142.)

More importantly, however, on November 24, 2008, a female student named C.D. reported a prior incident wherein Frogley had, without reason, touched, harassed, and mocked Ms. D., leaving her quite shaken and afraid. (Maybon Aff, p. 12, R. 53.) Two other students, M.J. and I.O., had witnessed the incident involving C.D. and provided written statements to Assistant Principal McInerney. (McInerney Aff, pp. 2-3,

[1] Exhibit "K" to the Maybon Aff, shows the Power School log entries referred to into the Letter of Reprimand dated November 21, 2008, and the log entries of other Assistant Principals.

R. 142-143.) Assistant Principal McInerney then prepared a document titled "Sequence of Events," memorializing C.D.'s complaints and the corroborating statements of M.J. and I.O and then provided them to Principal Maybon. (Maybon Aff, p. 12, R. 53; McInerney Aff, p. 3, R. 143; Documents regarding C.D. harassment, Exhibits "C", "D", and "E" to McInerney Aff, R. 144-146.)

Incredibly, and despite the repeated and specific identification of his shortcomings, Frogley continued his pattern of insubordination and failure to supervise the students in the cafeteria, at basketball games when assigned to monitor such events, and in the hallways between class periods. (Maybon Aff, p. 13, R. 54; Letter from Principal Maybon to Wade Frogley, Exhibit "M" to Maybon Aff, R. 95-96.)

Thereafter, additional instances of Frogley's failure to coordinate and communicate with other staff members occurred. On December 11, 2008, Frogley contacted Amy Shumway at 3:23 p.m. to inform her of a teacher's meeting which would occur in seven minutes at 3:30 p.m. (Note dated December 11, 2008, signed by Amy Shumway on December 12, 2008, Exhibit "M1" to Maybon Aff, R. 97.) Frogley's lack of prior notice put Ms. Shumway in a difficult situation as she had a prior commitment scheduled for 4:00 p.m. (Id.) Nonetheless, the parent showed up at 3:35 p.m. and Ms. Shumway attended the meeting. (Id.) Ms. Shumway subsequently reported the event to Principal Maybon. (Maybon Aff, pp. 12-13, R. 53-54.)

At about that same time, an administrator received a report from student M.C. documenting multiple incidents wherein Frogley had apparently reprimanded her and embarrassed her for very little reason. (Maybon Aff, p. 14, R. 55.) This treatment had occurred on multiple occasions from the date of the Homecoming Dance in October of

2008, through December of 2008, at which time M.C. believed she needed to report the problems to the administrative staff. (Maybon Aff, p. 14, R. 55.) Ms. Compton's boyfriend, L.K., provided a corroborating statement documenting Frogley's harassing conduct. (Maybon Aff, p. 14, R. 55.) Finally, on December 15, 2008, M.C.'s mother, Doreen C., sent an email to Principal Maybon expressing her dissatisfaction with Frogley's mistreatment of her daughter. (Maybon Aff, p. 14, R. 55; Student reports and emails discussing M.C., Exhibit "N" to Maybon Aff, R. 98-99.)

And the problems with Frogley continued to mount. On December 15, 2008, Frogley again failed to satisfy his supervisory duties at lunch, and also failed to coordinate or communicate with either Principal Maybon or another staff member to notify them he would not be at the cafeteria on time, nor did he make arrangements to provide supervision in his absence. (Maybon Aff, p. 14, R. 55; Principal Maybon note, Exhibit "O" to Maybon Aff, R. 102.)

On December 16, 2008, an anonymous letter was delivered to Superintendent Clark, Principal Maybon and Mr. Rowe reporting yet another incident of inappropriate harassing conduct on the part of Frogley toward a female student. (Maybon Aff, p. 15, R. 56; Letter dated December 16, 2008, Exhibit "P" to Maybon Aff, R. 103.)

On February 3, 2009, Principal Maybon met with staff member Melynda Mortensen regarding a reported incident wherein Melynda and Frogley were observed sitting in Frogley's office talking during a basketball game which Frogley was assigned to supervise. (Maybon Aff, p. 15, R. 56; Affidavit of Melynda Mortensen ("Mortensen Aff") p.2, R. 199.) During the course of Principal Maybon's discussion with Ms. Mortensen about Frogley's failure to supervise the basketball game, Principal Maybon

learned that Frogley had been manipulating Ms. Mortensen to cause her to believe that the administrative team disliked her. (Maybon Aff, p. 15, R. 56; Summary of meeting between Maybon and Mortensen, Exhibit "Q" to Maybon Aff, R. 104.) Principal Maybon asked Ms. Mortensen to prepare a statement, and she submitted to him a statement dated February 4, 2009, wherein she documented multiple conversations she had had with Frogley from August 2008 through January of 2009, wherein Frogley had complained about some of his circumstances and attempted to either get information from Mortensen, or cause her to feel Frogley was her ally (against the rest of the staff). (Maybon Aff, p. 16, R. 57; Mortensen Aff, pp. 2-3, R. 199-200; Melynda Mortensen Statement, Exhibit "A" to Mortensen Aff, R. 204, Exhibit "R" to Maybon Aff, R. 105-106.) Mortensen's note written in February 2009 does not recall any complaint about "sexual harassment." (Id.)

On February 11, 2009, after Principal Maybon had informed Frogley that he had failed to supervise students at a basketball game, Frogley created a pretext to walk with Ms. Mortensen through the school hallways and proceeded to aggressively question her regarding whether she had "ratted on him" about the basketball game. (Mortensen Aff, p.3, R. 201; Maybon Aff, p. 16-17, R. 57-58.) Ms. Mortensen spoke with Assistant Principal McInerney and also prepared a written statement recounting the incident on February 11, 2009, wherein she described the incident and its effect on her. (Mortensen Aff, p. 3, R. 201; Maybon Aff, pp. 16-17, R. 57-58; Statement dated February 11, 2009, Exhibit "B" to Mortensen Aff, R. 206.) Following her encounter with Frogley, Assistant Principal McInerney noted that Ms. Mortensen appeared visibly shaken. (McInerney Aff, p. 4, 139.) Assistant Principal McInerney also observed that Ms. Mortensen was pale,

and her eyes were watery. (McInerney Aff, pp. 4-5, R. 139-140; Statement Heath McInerney, Exhibit "G" to McInerney Aff, R. 149.) After speaking with Ms. Mortensen, Assistant Principal McInerney approached Frogley about the incident and informed him that he could write a statement if he so desired. (Id.)

Assistant Principal McInerney presented the Frogley/Mortensen matter to Principal Maybon on February 12, 2009. (Maybon Aff, p. 17, R. 58.) Principal Maybon conducted his own investigation and prepared a report summarizing his findings regarding Melynda Mortensen's complaint of harassment against Frogley. (Maybon Aff, p. 17, R. 58; Maybon Investigation Report Exhibit "T" to Maybon Aff, R. 108-109.) During Principal Maybon's investigation, Ms. Mortensen informed Principal Maybon that Frogley had been agitated and aggressive when he had encountered her and he accused her of "ratting him out." (Maybon Aff, p. 17, R. 58.) Ms. Mortensen reported that the entire encounter had been extremely uncomfortable for her, and she had tried on several occasions to separate herself from Frogley. (Maybon Aff, p. 17, R. 58.) In fact, the incident involving Frogley so upset Ms. Mortensen that she became ill and asked to have the rest of the day off. (Maybon Aff, p. 17, R. 58; Mortensen Aff, p. 4, R. 202.) Principal Maybon assured Ms. Mortensen that steps would be taken to ensure that Frogley would not approach her again, and he informed her that if Frogley harassed her again that she was to promptly notify him or another staff member. (Maybon Aff, p. 17, R. 58; Maybon Investigation Report, Exhibit "T" to Maybon Aff, 108-109.)

Principal Maybon met with Frogley to hear his version of the incident involving Ms. Mortensen and asked Frogley to prepare a written response. (Maybon Aff, p. 18, R.

59; W. Frogley – Response to Allegations of M. Mortensen, Exhibit "U" to Maybon Aff, R. 110-113.)

On February 13, 2009, Principal Maybon sent a report to Human Resources Director Barbara Leeds documenting the harassment incident involving Frogley and Ms. Mortensen and stating that his review of the video surveillance tape confirmed Ms. Mortensen's version of events. (Maybon Aff, p. 18, R. 59.) In his report, Principal Maybon further informed HR Director Leeds that Frogley's job performance remained deficient and that Frogley was not in compliance with his Level II Plan. (Maybon Aff, p. 18, R. 59; Principal Maybon Report to Human Resources Director Barbara Leeds, Exhibit "V" to Maybon Aff, R. 114; Copy of video surveillance of Frogley/Mortensen Incident, Exhibit "W" to Maybon Aff, R. 115.)

On February 19, 2009, Principal Maybon prepared a summary of his investigation regarding the Frogley-Mortensen incident of February 11, 2009, describing the video surveillance findings, and his interviews of Ms. Mortensen and Assistant Principal McInerney. (Maybon Aff, pp. 18-19, R. 59-60; Principal Maybon Incident Summary Report, Exhibit "X" to Maybon Aff, R. 116-117.)

In response to Principal Maybon's request for a written statement regarding the incident involving Ms. Mortensen, Frogley prepared a four page document rebutting Ms. Mortensen's claim of harassment, setting forth his version of events, including the history with Ms. Mortensen, and the basketball supervision incident. (See, Frogley' s Statement, Exhibit "U" to Maybon Aff, R. 110-113.)

Following the investigation of Frogley's harassment of Melynda Mortensen, and the reports of student harassment involving Ms. D. and Ms. C., Frogley was placed on

administrative leave pending further investigation of the alleged incidents. (Maybon Aff, p. 19, R. 60; Affidavit of Dr. Linda Clark ("Clark Aff"), pp. 3-4, R. 152-153.) In March 2009, Frogley was transferred from paid administrative leave and reassigned to administrator of special projects at the District Service Center where he would have no duties regarding student supervision or employee evaluation, and would perform administrative duties only. (Clark Aff, pp. 3-4, R. 152-153; Letter from Trish Duncan, attached at Exhibit "A" to Clark Aff, R. 156.)

Frogley completed his employment with the Meridian School District in this capacity (though he never reported to his new administrative position due to "illness"), and on May 12, 2009, Superintendent Linda Clark recommended to the Board of Trustees that the District not offer a new administrative contract to Frogley for the 2009-2010 school year as a result of his poor performance. (Clark Aff, pp. 4-5, R. 153-154; Letter from Linda Clark to the Board of Trustees, Exhibit "B" to Clark Aff, R. 157-158.)

Frogley thereafter filed a timely Charge of Discrimination with the Idaho Human Rights Commission (IHRC) and the U.S. Equal Employment Opportunity Commission (EEOC); and on February 10, 2010, the IHRC issued it Investigator's Report and Commission Determination rendering a finding of "No Probable Cause" to believe unlawful discrimination had occurred and dismissed his claims of discrimination. (Investigator's Report and Commission Determination, dated February 1, 2010, attached at Exhibit "A" to the Affidavit of Counsel, pp.1-4, R. 211-214.)

In summary, the above recitation of events clearly reveals that during the 2008-2009 school year, Appellant Wade Frogley had completely failed to perform his duties as an Assistant Principal at Mountain View High School, thereby requiring Principal

Maybon to take corrective action. This corrective action, however, infuriated Frogley and he fabricated incidents of "harassment" and "requests that the harassment" cease, in an effort to claim that the disciplinary actions taken by Principal Maybon were not legitimate and in retaliation to Frogley's requests that Principal Maybon stop "harassing" him. Frogley's claims of "harassment" and "retaliation" are clearly fabrications intended to deflect responsibility from Frogley for his woeful performance as an Assistant Principal. Given the legitimacy of the District's reasons for disciplining Plaintiff, and the false/pretextual nature of Plaintiff's allegations of harassment, there clearly exists no basis for any of Frogley's claims in this matter, and all of his causes of action should be dismissed for the reason that there exist no genuine issues of material fact for a jury to determine.

C. PROCEDURAL HISTORY

On May 3, 2010, Plaintiff/Appellant filed his Complaint against Defendants/Respondents in the Fourth Judicial District of the State of Idaho, County of Ada.

On October 26, 2010, Plaintiff/Appellant filed his First Amended Complaint and Demand for Jury Trial.

On November 4, 2010, Defendants/Respondents filed their Answer to Amended Complaint and Demand for Jury Trial.

On November 15, 2010, Plaintiff/Appellant filed its Notice of Voluntary Dismissal of Defendant Idaho State Board of Education.

On December 19, 2011, Defendants/Respondents filed their Motion for Summary Judgment seeking dismissal of all Plaintiff's causes of action.

On March 16, 2012, the Court issued its Memorandum Decision and Order Granting and Denying in Part Motion to Strike and Granting Motion for Summary Judgment.

On March 29, 2012, the Court entered Judgment.

On March 30, 2012, Defendants filed their Memorandum of Costs.

On May 21, 2012, Plaintiff/Appellant filed the instant Notice of Appeal.

II. RESTATED AND ADDITIONAL ISSUES ON APPEAL

A. RESTATED ISSUES ON APPEAL

Following are Respondents' restated issues on appeal:

1. When the trial court dismissed Frogley's retaliation claims, did it err in concluding that there was no evidence that Respondents' stated reasons for adverse employment action were actually a pretext for retaliation intended to penalize Frogley for allegedly reporting a claim of sexual harassment?

2. When the trial court dismissed Frogley's negligent infliction of emotional distress claim, did the court err in concluding, as a matter of law, that Respondents did not owe Frogley a duty of care under the circumstances?

B. ADDITIONAL ISSUES ON APPEAL

1. Are Respondents entitled to attorney fees and costs on appeal pursuant to Idaho Code § § 12-117, 12-121 and IAR 41?

In the event Respondents are deemed the prevailing party to this appeal, Respondents hereby claim entitlement to their reasonable attorney fees pursuant to ***Idaho §§ 12-117, 12-121,*** and ***IAR 41***, in addition to its costs of appeal to which it is entitled pursuant to ***IAR 40.***

Respondents are entitled to attorney fees on appeal because the appeal was brought frivolously and without foundation, and Appellant has failed to make a good

faith argument for the extension of existing law. ***Martin v Twin Falls School District,*** 138 Idaho 146, 150 (2002).

Specifically, on the issue whether Respondents' legitimate, nondiscriminatory reasons for its adverse action are unrebutted by any evidence of pretext; Appellant has identified no direct evidence of any retaliatory intent by Respondents, nor has he provided any indirect evidence that the stated, nondiscriminatory reasons are unworthy of credence and that the adverse employment action was motivated by retaliatory animus. *See,* ***Chuang v University of California Davis,*** 225 F. 3d 115 (9th Cir 2000); ***Godwin v Hunt Wesson, Inc.,*** 150 F. 3d 1217 (1998).

Similarly, Appellant has identified absolutely no evidence that Respondent owed a duty of care under the circumstances to refrain from making statements which would cause him to feel bad. To the contrary, the law in Idaho clearly states there is no duty to refrain from making derogatory statements about another person. ***Johnson v. McPhee***, 147 Idaho 455, 468 (Ct. App. 2009) ("in ordinary circumstances... it would not be foreseeable that insulting and demeaning remarks... could inflict serious emotional harm").

There being no reasonable basis in fact or law the appeal, and no reasonable argument for the extension of existing law, an award of attorney fees and costs on appeal are therefore warranted. ***I.C. §§ 12-117, 12-121, IAR 40, 41.***

III. STANDARD OF REVIEW

When reviewing on appeal the granting of a motion for summary judgment, the appellate court applies the same standard used by the trial court in ruling on the motion. ***Sadid v Idaho State University,*** 151 Idaho 932, 936 (2011). The appellate court

construes all disputed facts, and draws all ***reasonable inferences*** from the record, in favor of the non-moving party. ***Id.*** Summary judgment is appropriate only if the evidence in the record and any admissions show that there is no genuine issue of material fact regarding the issues stated in the pleadings and that the moving party is entitled to judgment as a matter of law. ***Id.,*** citing, ***Infanger v City of Salmon,*** 137 Idaho 45, 46-47 (2002) A trial court's determination of whether a legal duty existed under the circumstances is a question of law over which the appellate court exercises free review. ***Freeman v Juker,*** 119 Idaho 555, 556-57 (1991).

On a motion for summary judgment, the moving party bears the burden of proving the absence of a material fact, and all evidence is construed liberally and all ***reasonable inferences*** are made in favor of the non-moving party. ***Sherer v Pocatello School District No. 25,*** 143 Idaho 486, 489 (2006). After the moving party has satisfied its burden, the non-moving party must then come forward with sufficient admissible evidence identifying specific facts demonstrating the existence of a genuine issue for trial. ***Id.*** at 489-90; ***IRCP 56(e).*** Such evidence may consist of affidavits or depositions as well as other material based upon personal knowledge which would have been admissible at trial. ***Id.*** at 490, *citing* ***Harris v State, Department of Health and Welfare,*** 123 Idaho 295, 297-98 (1992). Although circumstantial evidence can create a genuine issue for trial, a mere scintilla of evidence is insufficient to demonstrate the existence of a genuine issue of material fact. ***Sherer,*** 143 Idaho at 490.

IV. ARGUMENT

A. STATEMENTS OF LAW

1. EVIDENCE OF "PRETEXT" IN THE CONTEXT OF RETALIATION CLAIMS BROUGHT PURSUANT TO TITLE VII OF THE CIVIL RIGHTS ACT AND THE IDAHO HUMAN RIGHTS ACT (IHRA).

Appellant argues that the trial court erred in holding that Appellant had failed to identify sufficient, admissible evidence to allow a jury to find that the legitimate, non-retaliatory reasons for Respondents' adverse employment action were actually a pretext for retaliation against Appellant as punishment because he had reported sexual harassment due to the conduct of Principal Maybon and his staff. (App. Br., pp. 11-13.)

Retaliation claims under the IHRA are governed by the same legal standard as for similar federal Title VII claims, and as a result, both causes of action will be discussed together. ***Fowler v. Kootenai County***, 128 Idaho 740, 743-744 (1996); ***De Los Santos v. J.R. Simplot Co.***, 126 Idaho 963, 967 (1995); ***Hoppe v. McDonald***, 103 Idaho 33, 37 (1982).

In Idaho, retaliation claims are analyzed using the familiar ***McDonnell Douglass*** burden shifting analysis:

> We recently set out the peculiar dynamics of a retaliation claim under Title VII in ***Payne v. Norwest Corp.***, 113 F.3d 1079 (9th Cir. 1997)We noted that a plaintiff must show (1) involvement in a protected activity, (2) an adverse employment action and (3) a causal link between the two. See *id.* at 1080. Thereafter, the burden of production shifts to the employer to present legitimate reasons for the adverse employment action. Once the employer carries this burden, plaintiff must demonstrate a genuine issue of material fact as to whether the reason advanced by the employer was a pretext. See *id.* Only then does the case proceed beyond the summary judgment stage.

Brooks v. City of San Mateo, 229 F.3d 917, 928 (9th Cir. 2000).

In the instant matter, the trial court concluded that Appellant had satisfied his *prima facie* case, and also concluded that Respondents had presented legitimate

reasons for the alleged employment action. (Mem. Dec., pp. 22-25, R. 429-432.) The trial court went on to hold that Appellant had thereafter failed to advance evidence sufficient to create an issue of fact showing that the employer's stated reason was actually a pretext for illegal retaliation; and therefore granted summary judgment on Appellant's retaliation claims. (Mem. Dec., pp. 25-26, R. 432-433.) Appellant claims the trial court erred in concluding there was no evidence of pretext; therefore, the legal standard for analyzing the pretext issue is set forth in detail below.

In the case of ***Godwin v. Hunt Wesson, Inc.***, the Ninth Circuit analyzed and described the type and quantum of evidence required to satisfy an employee's burden of production at the summary judgment stage and thereby demonstrate that the employer's stated reasons are actually a pretext for discrimination or retaliation, and thereby stave off summary judgment. See, ***Godwin v. Hunt Wesson, Inc.***, 150 F.3d 1217, 1220-1222 (9th Cir. 1998). Of course, the ultimate burden of persuading the jury that the employer intentionally discriminated against the employee remains at all times with the employee/plaintiff. ***Godwin***, 150 F.3d at 1220.

Generally, at the pretext stage, a plaintiff must "produce evidence in addition to that which was sufficient for [his] *prima facie* case in order to rebut the defendant's showing." ***Godwin***, 150 F.3d at 1220. There are two types of evidence which can be offered on the issue of pretext: (1) direct evidence of discriminatory or retaliatory intent; and (2) indirect or circumstantial evidence of discriminatory or retaliatory intent. ***Chuang v. Univ. of Cal. Davis***, 225 F.3d 1115, 1127 (9th Cir. 2000) (holding that employer's statement that "two chinks" in the department was enough, and colleague's "laughing response" to the remark were direct evidence of racial discrimination).

"Direct evidence" is defined as "evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption." ***Godwin***, 150 F.3d at 1221. Statements such as "dumb Mexican," "little old ladies" and "old warhorse," or statements evidencing clear "sexual stereotyping" are considered "direct evidence" of discriminatory animus. ***Godwin***, 150 F.3d at 1221. Where a plaintiff offers ***direct evidence*** of discriminatory (or retaliatory) motive, a triable issue of as to the employer's actual motivation is created even if the evidence is not substantial. ***Godwin***, 150 F.3d at 1221.

"Indirect evidence" is defined as: "circumstantial evidence that tends to show that the employer's proffered motives were not the actual motives because they are inconsistent or otherwise not believable. Such evidence of 'pretense' must be ***'specific'*** and '***substantial'*** in order to create a triable issue with respect to whether the employer intended to discriminate on the basis of sex." ***Godwin***, 150 F.3d at 1222. Where an employee offers indirect evidence, to survive summary judgment, the employee "must set forth non-speculative evidence of specific facts, not sweeping conclusory allegations." ***Cafasso v. General Dynamics C4 Systems, Inc.***, 637 F.3d 1047, 1061 (9th Cir. 2011) (summary judgment dismissing retaliation claim affirmed – no evidence of pretext). When determining whether the employer's reasons were false and pretextual, "it is not important whether they were *objectively* false... Rather, courts 'only require that an employer honestly believed its reasons for its actions, even if its reason is 'foolish or trivial or even baseless.' (Citation omitted)'." ***Cafasso***, 637 F.3d at 1063 (emphasis in original). Instead, the employee must offer evidence that the employer "did not believe its proffered reasons." ***Id.***

In this case there is no direct evidence of retaliatory intent or animus toward Frogley because he reported a complaint of sexual harassment; nor is there specific, substantial, indirect evidence retaliatory intent, and the court's grant of summary judgment should therefore be affirmed.

2. THE DUTY OF CARE OWED IN THE CONTEXT OF A NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

In Idaho, a negligent infliction of emotional distress claim is governed by the following standard:

> These elements are: (1) a duty recognized by law requiring the defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the conduct and the plaintiff's injury; and (4) actual loss or damage. *Brooks v. Logan*, 127 Idaho 484, 489, 903 P.2d 73, 78 (1995); *Black Canyon Racquetball Club, Inc.*, 119 Idaho at 175-76, 804 P.2d at 904-05; Nation, 144 Idaho at 189, 158 P.3d at 965. In addition to these elements, for a claim of negligent infliction of emotional distress to lie, there must be some physical manifestation of the plaintiff's emotional injury. *Black Canyon Racquetball Club, Inc.*, 119 Idaho at 177, 804 P.2d at 906; *Czaplicki v. Gooding Joint School Dist. No. 231*, 116 Idaho 326, 332, 775 P.2d 640, 646 (1989); but see Brown, 118 Idaho at 837, 801 P.2d at 44 (adopting an exception to physical manifestation requirement in some cases involving mishandling of dead bodies).

Johnson, 147 Idaho at 466.

Appellant alleges the trial court erred when it held at page 20 of its Memorandum Decision that there was: "insufficient evidence of foreseeability to show that Defendants owed Frogley a duty of care." (Appellant's Brief, 18-19.)

On the issue of legal duty, every person generally "has a duty to exercise ordinary care to prevent unreasonable, foreseeable risks of harm to others." ***Johnson***, 147 Idaho at 467. The legal obligation arises, however, only under circumstances where

"it was reasonably foreseeable that [the resulting] harm would flow from the negligent conduct." ***Johnson***, 147 Idaho at 467. As a result, mere insulting or demeaning comments are insufficient to create a duty of care because "in ordinary circumstances of social interaction, it would not be foreseeable that insulting and demeaning remarks like those attributed to [defendant] could inflict serious emotional harm." ***Johnson***, 147 Idaho at 468.[2] This rule arises from public policy which generally precludes liability for hurt feelings:

> The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt.

Johnson, 147 Idaho at 468.

This general rule is, however, subject to an exception where there is evidence that the defendant had knowledge of a plaintiff's particular or idiosyncratic sensitivity to emotional harm, and nonetheless, acted negligently in light of the circumstances. ***Johnson***, 147 Idaho at 468. The Court of Appeals described this exception as follows:

> ***Liability can arise from otherwise unactionable conduct if the conduct caused serious emotional harm to a peculiarly fragile individual and the defendant knew or should have known of the individual's susceptibility.*** As stated in the Restatement (Second) of Torts, § 313 (1965), comment c, "[O]ne who unintentionally but negligently subjects another to such an emotional distress does not take the risk of any exceptional physical sensitiveness to emotion which the other may have *unless the circumstances known to the actor should apprise him of it.*" (emphasis added). A

[2] In the event Appellant argues recovery for emotional distress in connection with a contract claim, this Court has held that damages for emotional distress are not recoverable in a breach of contract claim. ***Thomas v Medical Center Physicians,*** 138 Idaho 200, 211 (2002).

treatise refers to this concept as a "pervading principle of tort law," saying:

> Generally defendant's standard of conduct is measured by the reactions to be expected of normal persons.... Activity may be geared to a workaday world rather than to the hypersensitive. It may be otherwise, however, if defendant has knowledge or notice of the presence of idiosyncrasy in any given case. This, of course, is the application of a pervading principle of tort law. Fowler v. Harper et al., 3 The Law of Torts § 18.4, at 691-92 (2d ed.1986).

Johnson, 147 Idaho at 468 (bold-italics added).

In this case there is no evidence Plaintiff/Appellant had an idiosyncratic sensitivity to insulting or demeaning remarks; nor is there any evidence Defendants/Respondents had any knowledge of such sensitivity if it was present (which Respondents deny), and the trial court's grant of summary judgment should therefore be affirmed.

B. ANALYSIS: APPLICATION OF FACTS TO LAW

1. THE TRIAL COURT DID NOT ERR IN HOLDING PLAINTIFF HAD FAILED TO IDENTIFY SUFFICIENT EVIDENCE OF PRETEXT.

Appellant argues that his conversation with Supt. Linda Clark on November 11th 2008, and the school district's subsequent adverse employment action is "***direct evidence***" that Frogley was illegally retaliated against because he had reported to Supt. Clark instances of alleged sexual harassment. (App. Br., p. 11.)

However, simply calling evidence "direct evidence" does not make it so. The Ninth Circuit has defined "direct evidence" of discriminatory [or retaliatory] intent as: "evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption." ***Godwin***, 150 F.3d at 1221. The 9th Circuit provided some examples of

"direct evidence," comments such as "dumb Mexican," "little old ladies" and "old warhorse," and statements which evidence clear "sexual stereotyping" are considered "direct evidence." ***Godwin***, 150 F.3d at 1221. Only where a plaintiff offers ***direct evidence*** of discriminatory (or retaliatory) motive, will a triable issue as to the employer's actual motivation be created where the evidence is otherwise not substantial. ***Godwin***, 150 F.3d at 1221.

No "direct evidence" of retaliatory intent has been provided in this case. Direct evidence of retaliatory intent would exist if there was a statement attributed to Respondents which clearly indicated that Frogley was going to be punished or retaliated against because he had reported alleged sexual harassment. ***Godwin***, 150 F.3d at 1221. Such a statement would be "evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption." ***Godwin***, 150 F.3d at 1221. Frogley's speculative inference that such had occurred, however, is not sufficient to transform his speculative "indirect evidence" into the category of "direct evidence." Indeed, in his Brief, Appellant argues that a "reasonable inference" from the sequence of events described above is that "Dr. Clark and Mr. Maybon intended to punish Mr. Frogley for his complaining about sexually based harassment." (App. Br., p. 11.) Contrary to Appellant's assertion, "direct evidence" does not, as a matter of law, require any inference to reach the conclusion of discriminatory animus, and his statement regarding a "reasonable inference" is a tacit admission that the so-called "direct evidence" is actually speculative, "indirect evidence." ***Godwin***, 150 F.3d at 1221.[3]

[3] Frogley relies on the 9th Circuit case of ***Chuang v. UC Davis***, to support his argument. However, that case is easily distinguished from the case at bar. For one, in ***Chuang,*** the plaintiff had provided significant evidence of racial harassment – including the referenced "two chinks" comment. ***Chuang***, 225 F.3d at 1128-29. In contrast, Appellant's underlying hostile environment, sexual harassment claims were

Thus, instead of "direct evidence" of retaliatory intent, **Appellant's cited evidence is nothing more than weak, circumstantial evidence which is insufficient as a matter of law to create an issue of fact regarding whether or not Respondent's stated reasons were a pretext for retaliation**. ***Godwin***, 150 F.3d at 1222 (indirect or circumstantial evidence of pretext must be "specific" and "substantial" to create a triable issue of fact of intent to discriminate). Said another way, "[t]o survive summary judgment, a plaintiff must set forth non-speculative evidence of specific facts, not sweeping conclusory allegations." ***Cafasso v. General Dynamics***, 637 F.3d 1047, 1061 (9th Cir. 2011). "Merely denying the credibility of the employer's proffered reasons is insufficient to withstand summary judgment." ***Munoz v. Mabus***, 630 F.3d 856, 865 (9th Cir. 2010). An employer is allowed to be wrong, or to have poor reasons for it actions; the evidence must show that the employer did not believe its stated reasons, and punished the employee for engaging in a protected act. ***Villarimo v. Aloha Island Air, Inc.***, 281 F.3d 1054, 1063 (9th Cir. 2002) ("courts 'only require that an employer honestly believed its reasons for its actions, even if its reason is 'foolish or even baseless'"). Thus, in a retaliation case, where a plaintiff offers nothing more than conjecture on the issue of discriminatory intent, summary judgment is appropriate. ***Clemmons v. Hawaii Medical Services Ass'n***, 836 F.Supp.2d 1126, 1141-42 (D.Hawaii 2011) (granting summary judgment and holding that proximity in time, though sufficient to establish a *prima facie* claim of retaliation, is insufficient to create an issue of pretext where legitimate reasons are provided – absent evidence that discriminatory animus ***motivated*** the adverse employment action).

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dismissed by the trial court and this aspect of the dismissal has not been appealed. Thus, Frogley's evidence of pretext bares no similarity to the evidence in ***Chuang*** which was deemed sufficient to rebut the employer's non-discriminatory reasons and thereby preclude summary judgment. ***Id.***

In the instant case, Supt. Clark identified (Clark Aff, pp. 4-5, R. 153-154; Linda Clark Ltr., Exhibit "B" to Clark Aff, R. 157-158.), and the trial court adopted the following evidence of Respondents' non-retaliatory reasons for not renewing Frogley's contract:

> Frogley "did not appropriately schedule and adhere to an observation schedule and meet the requirements of supervision and evaluation of teaching staff to which he was assigned," that Frogley "did not engage in student supervision and evaluation of teaching staff to which he was assigned," that Frogley "did not engage in student supervision to the level expected," that "[t]here have also been instances where Mr. Frogley's interaction with students has been problematic including at least two allegations of harassment from students," and finally, that Frogley "has not regularly met his requirements for attending IEP and Section 504 meetings under his responsibility." (Aff. of Dr. Clark Ex. B.) ***The evidence of student harassment is enough individually to support the adverse employment action,*** let alone the evidence of failure to perform his job functions adequately.

(Memo. Dec., pp. 24-25; R. 431-32; emphasis added.)

In his Brief, Appellant identifies reasons why he disagrees with Supt. Clark's bases for recommending non-renewal; however he never identifies any evidence sufficient to allow a fact-finder to conclude that Respondents did not believe its reasons for the adverse employment action, and that the reasons were actually a "pretense" for illegal retaliation. ***Villarimo v. Aloha Island Air, Inc.***, 281 F.3d 1054, 1063 (9th Cir. 2002) ("courts 'only require that an employer honestly believed its reasons for its actions, even if its reason is 'foolish or even baseless'").

For example, Appellant claims the student harassment cited by Supt. Clark was "petty" in nature, that the timing of the complaints was suspect, and that failure to question Frogley shows they were not sufficient to warrant "disciplinary action." (App. Br., p. 17.) These reasons, however, fail to show that Respondents' belief that student

harassment had occurred was not honestly held by Respondents. Indeed, ***Frogley admits that the incidents and reports*** (including a parent's complaint; see, Doreen C. email, Exhibit "N" to Maybon Aff, R. 101) ***actually did occur***, and Appellant merely argues that the incidents were petty and that their timing was suspicious. (App. Br., p. 17.) However, the law is clear that it is permissible for an employer to have a "foolish or baseless" reason for its action (non-renewal of employment contract) as long as it honestly believes its reasons for the action. ***Villarimo***, 281 F.3d at 1063. For these reasons, Appellant essentially admits that the incidents actually occurred, and he never submits any evidence that the Respondents did not believe this was a reason for non-renewal. The Court's grant of summary judgment should be affirmed on this basis alone. ***Id***.

Appellants' claim that the student reports were not sufficient to warrant "disciplinary action" is a red herring because the decision to not renew an administrator's employment contract carries a much lower standard than disciplining a certificated employee during the term of his contract. See, ***IC § 33-513(3)*** (employing principals)***;*** see also, ***IC § 33-513(5)*** (setting forth reasons for terminating a contract during its term). Non-renewal of an administrator's one year contract may occur based solely on dissatisfaction with performance, or a personality clash with his or her supervisor. See, ***IC § 33- 513(3)***. Indeed, at best, the reasons cited by Appellant leads to the conclusion that Principal Maybon did not like Frogley, but none of the stated evidence leads to the inescapable conclusion that the stated reasons were a pretext, ***AND*** that the true motivation was ***retaliatory animus***. ***Cafasso***, 637 F.3d at 1061 (evidence which establishes only what "could conceivably have occurred" does not give

rise to a "reasonable inference that [retaliation] did in fact occur"; such evidence requires "undue speculation" and the trial court's dismissal of plaintiff's retaliation claim was therefore affirmed). This rule is necessary to ensure that the inferred conclusion is not speculative regarding whether or not the stated reason is a pretext for ***discrimination*** [or retaliation]. See, ***St. Mary's Honor Center v. Hicks***, 509 U.S. 502, 508 (1993) ("although [plaintiff] has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated"). Quite simply, a principal can search for reasons to terminate an assistant principal he does not like or does not trust. ***Id.*** This application of evidence to Title VII claims is consistent with the Idaho legislature's recent statement of public policy which vests in a school's principal the authority to approve all new personnel working under his supervision. ***IC § 33-523*** ("...no certificated employee shall be transferred to a principal's school without the principal's permission...").

Thus, Appellant's admitted reports of student harassment are certainly sufficient, in and of itself, to support Respondents' decision to not renew Frogley's assistant principal contract, and the trial court's grant of summary judgment on the issue of pretext should be affirmed. (Memo. Dec., p. 24, Cl. Rec., p. 432); ***Munoz***, 630 F.3d at 865 ("Merely denying the credibility of the employer's proffered reasons is insufficient to withstand summary judgment").

In addition, and just as significant of the purposes of summary judgment is the fact that one of the four stated reasons for Frogley's non-renewal: that he "did not engage in student supervision to the level expected," ***remains unrebutted.*** (See, App. Br., pp. 13-17.) The undisputed evidence, therefore remains, showing that, although

student supervision is an essential component of Frogley's job duties, he nonetheless had repeatedly failed to satisfy this important job duty – and this was also a reason for the non-renewal of his contract. (Maybon Aff, pp. 2-4, 10, 12-15; R. 43-45, 51, 53-56.) The trial court's grant of summary judgment can be affirmed on this basis also. ***IRCP 56(c), (e)***.

In summary, ***indirect evidence of pretext must lead to the inevitable conclusion that the reason for the adverse action was retaliatory***. ***Godwin***, 150 F.3d at 1222. If the indirect evidence leads to a contrary conclusion that is also plausible, then the jury is asked to impermissibly speculate as to the cause of the employment decision and summary judgment is appropriate. ***Godwin***, 150 F.3d at 1222. Thus, although there may be an issue of fact as to the existence of certain specific, substantial, circumstantial evidence of pretext which will preclude summary judgment, the law requires that if the proffered evidence is found to exist by the jury – it must lead to only one conclusion – that the employer's stated reason was a pretext for retaliation; and if the evidence leads to more than one conclusion, then the circumstantial evidence calls for speculation and is insufficient to rebut the employer's stated reason summary judgment is appropriate. ***Godwin***, 150 F.3d at 1222; ***St. Mary's Honor Center,*** 509 U.S. at 508.

2. THE TRIAL COURT DID NOT ERR IN HOLDING PLAINTIFF HAD FAILED TO SHOW EVIDENCE OF A DUTY OF CARE OWED UNDER THE CIRCUMSTANCES.

Appellant argues that the trial court misinterpreted ***Johnson v. McPhee*** and failed to give Appellant the benefit of all reasonable inferences. (App. Br., p. 18.) Specifically, Frogley relied on the distinction between a bench trial (in ***Johnson***) and the potential jury trial in the instant matter stating: "Contrary to the facts in Johnson v.

McPhee, the case at bar involves a jury and, thus, the trial court was obligated to give Mr. Frogley the benefit of all reasonable inferences." (App. Br., p. 18.) Appellant then relies on two prernises to support reversal of summary judgment, neither of which apply to the facts in this appeal: (1) that employers in Idaho owe "a greater degree of respect because other (sic) employment relationship" (Appellant's Brief, p. 18; citing, ***Steiner v. Showboat Operating Co.***, 25 F.3d 1459, 1466 (9th Cir. 1994)); and (2) that "the defendant's constant humiliation of Mr. Frogley... constant personal attacks... and imposition of disciplinary actions can foreseeability create sufficient stress and anxiety to cause physical harm." (App. Br., p. 19.) These flawed premises are insufficient as a matter of law to warrant reversal of the trial court's dismissal of this claim.

Specifically, Appellant's analysis errs in several respects. To begin, in Idaho, there is no duty for an employer to treat its employees with a "greater degree of respect" because of the employer relationship. Contrary to Appellant's representation in his Brief, in the ***Steiner*** case the 9th Circuit was interpreting Nevada tort law, and the court had relied on a case applying Oregon law when it discussed the "greater respect" rule. ***Steiner***, 25 F.3d at 1466. This rule, however, is contrary to Idaho law which follows the "at-will" employment doctrine. ***Edmundson v. Shearer***, 139 Idaho 172, 176 (2003). Appellant's interpretation also attempts to create a "civility code" in the employment context which is clearly contrary to the duties employers owe under Title VII (and correspondingly, the IHRA). ***Oncale v. Sundowner Offshore Services***, 523 U.S. 75, 81 (1998) ("[The] standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a 'general civility code'.") Appellant has not appealed the trial court's dismissal of his Title VII "hostile environment" claim, which dismissal is and

was consistent with its dismissal of the negligent infliction claim. (See, Memo. Dec., pp. 20-22, R. 427-429.) Thus, as a matter of law, there is no duty in Idaho for an employer to "be civil" to his or her employees and Appellant's reliance on such a novel rule is clearly contrary to well settled principles of Idaho tort law.

In addition, and perhaps more importantly, Appellant has failed to accurately represent several essential components of the Court's decision in ***Johnson*** which discussed the elements of a negligent infliction of an emotional distress claim allegedly caused by insulting and demeaning statements. Specifically, the court's holding in ***Johnson*** where it stated there ***could be*** a duty to not verbally abuse another, ***only arises where there is admissible evidence of the following circumstances***: (1) that the plaintiff demonstrated a ***significantly increased sensitivity*** to verbal abuse compared to the general population's; AND (2) that the ***defendant was aware of this condition*** and acted negligently under the circumstances. ***Johnson***, 147 Idaho at 468. In this case, Frogley has identified no admissible evidence that: (1) he was an idiosyncratically sensitive person; nor has he (2) offered any evidence that Respondents' agents had knowledge of such sensitivity (which did not exist) and proceeded to act negligently under the circumstances. In the absence of any evidence to support the above exception to the general rule which states "that insulting and demeaning remarks" are insufficient to support a negligent infliction of emotional distress claim, summary judgment is appropriate. ***Johnson***, 147 Idaho at 468.

For the reasons set forth above, the trial court's dismissal of Appellant's negligent infliction of emotional distress claim should also be affirmed. ***Johnson***, 147 Idaho at 468.

V. CONCLUSION

On the issues of pretext and tort duty of care, Appellant has failed to identify sufficient, admissible evidence to allow these issues to go to a jury, and the trial court's grant of summary judgment dismissing all of Appellant's causes of action, including the Title VII (and IHRA) retaliation claims, and the negligent infliction of emotional distress claim which are the subject of this appeal, should be affirmed, ***IRCP 56(c), 56(e); Godwin v. Hunt Wesson, Inc.***, 150 F.3d 1217, 1220-1222 (9th Cir. 1998); ***Johnson v. McPhee***, 147 Idaho 455, 468 (Ct. App. 2009).

Given there exists no reasonable basis in fact or law to support Appellant's appeal, attorney fees and costs to Respondents are appropriate under the circumstances. ***IC §§ 12-117, 12-121***, ***IAP 40, 41***.

RESPECTFULLY SUBMITTED this 2 day of November, 2012.

ANDERSON, JULIAN & HULL LLP

By _____
Brian K. Julian, Of the Firm
Attorneys for Defendants/Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2 day of November, 2012, I served a true and correct copy of the foregoing RESPONDENTS' BRIEF by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

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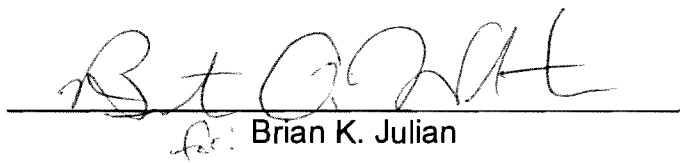

for: Brian K. Julian