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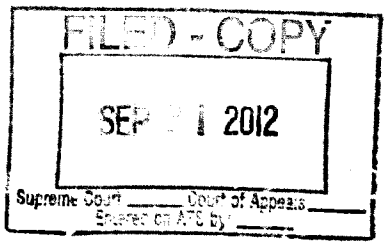
Frogley v. Meridian Joint School Appellant's Brief Dckt. 39945

IN THE SUPREME COURT OF 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 **APPELLANT'S OPENING BRIEF**



APPELLANT'S OPENING 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. CV OC 2010-08779)

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Honorable Ronald J. Wilper, Presiding

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STATEMENT OF THE CASE

Nature of the Case

This case involves an employment case by which Mr. Frogley claims his employer retaliated against him for complaining of sexual harassment in violation of Title VII of the Civil Rights Act and the Idaho Human Rights Act.

Statement of Facts

Plaintiff, Wade Frogley, was hired by the Meridian School District to work as the Assistant Principal of Mountain View High School (MVHS) on July 31, 2008. (Aff. Frogley ¶1- 2 at R. p. 307). Prior to working for the Meridian School District, Mr. Frogley had worked as a teacher for approximately seven years with five of those years being at the Boise School District. Then, from 2004 through part of 2006, he was employed by the Nampa School District as principal for Centennial Elementary School. He then worked as the Building Administrator for West Middle School in Nampa, Idaho from 2006 until he commenced working for MVHS. (Aff. Frogley ¶3 at R. p. 307).

Mr. Frogley had an excellent reputation as an administrator at the time he transferred to the Meridian School District. His reputation is evidenced by the letters of recommendation he received which touted him as having excellent rapport with teachers, parents, and students. (Aff. Frogley, R. p. 307). During Mr. Frogley's tenure as a school administrator for the Nampa School District, he was not disciplined nor did he receive any write-ups for misconduct or for deficiencies in his job performance. *Id.*

Within two weeks after starting work at MVHS, the lengthy and continuous barrage of

sexually-related, offensive conduct by his employer started. (Aff. Frogley ¶6, R. p. 308). On his second week of work, Mr. Frogley was attending an administrator's meeting at MVHS with principal Maybon and the other three vice principals. During the meeting, an envelope was slid underneath the door and Mr. Maybon picked it up and notified Mr. Frogley that he had received some district mail. The envelope contained a fake wedding announcement which announced that Mr. Frogley was about to marry a "Cheap Two-Bit Tramp." Part of the fake announcement was a picture of a groom and a scantily dressed bride in which a picture of his face was imposed on the picture of the groom. (Aff. Frogley ¶6, R. p. 308). Principal Maybon admitted that he had his secretary, Janet Brooks, prepare the invitation and then deliver it during the meeting. (Aff. Frogley ¶6, R. p. 308).

During the first week of lunch meetings, Principal Aaron Maybon stated that Mr. Frogley was having sex with lunch servers in exchange for food. The other administrators laughed at the demeaning and improper comment. After that time, the allegations of Mr. Frogley exchanging sexual favors for food were directed at him by Mr. Maybon and the other administrators on a nearly daily basis. Mr. Frogley objected to the sexual comments, but his objections were to no avail and resulted only in an escalation of demeaning taunts, all of a sexual nature. (Aff. Frogley ¶10, R. p. 310).

The sexually charged statements directed at Mr. Frogley were pervasive. In addition to the near daily claims that Mr. Frogley was having sex with cafeteria staff in exchange for food, Mr. Maybon and the other administrators would routinely make other sexual comments directed at Mr. Frogley including the following:

(a) Comments were made about how many women Mr. Frogley was dating and how often he was having sex and how many different women he had sex with; (b) how many women he was

having sex with at the same time; (c) whether his sexual preference was for women or men; that he was leaving the school ground during lunch to have sex (referred to by Mr. Maybon as "afternoon delight"); and (d) that he had a nest of whores that stood outside his office. In addition to comments made directly to him, the administrators would make sexually explicit comments about Mr. Frogley even when he was not present.(Aff. Frogley ¶11, R. p. 311).

On or about October 23, 2008, Mr. Frogley left campus to have lunch with a female principal who was visiting from another school district. Upon his return, Mr. Maybon alleged that Mr. Frogley was having sex with the visiting principal, referring to Mr. Frogley as getting some "afternoon delight." At other times when Mr. Frogley would leave the school campus for lunch, upon his return, Principal Maybon would state, in front of Mr. Frogley and other administrators, that Mr. Frogley was leaving to have sex during the lunch hour. (Aff. Frogley ¶12, R. p. 311).

In October of 2008, during a meeting in which Mr. Frogley and the other administrators were present, Mr. Maybon stated that people were noticing that some female teachers were spending an inordinate amount of time around Mr. Frogley's office and then referred to the women as Mr. Frogley's "nest of whores." (Aff. Frogley ¶13, R. p. 312).

At the end of October of 2008, during an administrator's lunch, Mr. Frogley was asked by an administrator as to why he would not be able to supervise a football game. When Mr. Frogley stated that he couldn't supervise the Halloween day game because he was taking his daughter trick-or-treating, some of the administrators present challenged the comment stating that Mr. Frogley was probably just going on a date. (Aff. Frogley ¶14, R. p. 312). One of the administrators commented that he may be going out with more than one woman at the same time. Then Mr. Maybon suggested

that Mr. Frogley was homosexual, stating, "Maybe it's not women he's interested in." As with the other incidents, Mr. Frogley denied the allegations and stated that they were inappropriate. (Aff. Frogley ¶14, R. p. 3102).

Melynda Mortenson, the dean of school security, informed Mr. Frogley that the school administrators were continually making sexually-related comments about Mr. Frogley even when he was not present. (Aff. Frogley ¶15, R. p. 312).

The sexually-related comments and innuendos embarrassed Mr. Frogley. He would routinely respond that the statements were unwanted and inappropriate. Despite his repeated protests, Principal Maybon and the other administrators continued harassing Mr. Frogley by subjecting him to the sexually-laced statements. This continued during the entire time he was employed by the Meridian School District. (Aff. Frogley ¶16, R. p. 313).

On November 5, 2008, Mr. Frogley met with Principal Maybon and made a more emphatic demand that the sexually-laced comments end. Mr. Maybon became very upset at the demand and Mr. Frogley called Dr. Linda Clark and relayed to her what had happened and the need for the sexually-related comments to stop and told her that he needed to meet with her to discuss the situation.(Aff. Frogley ¶18, 19; R. p. 313-14).

On November 11, 2008, Mr. Frogley met with Dr. Linda Clark at the district office as a follow up to his November 5th phone call discussed above. Again, Mr. Frogley discussed the sexual harassment that was taking place and even provided Dr. Clark with a document which outlined some of the inappropriate, sexually-related comments that Mr. Maybon and the other administrators had

made to him. Dr. Clark told him that he needed to work things out with Mr. Maybon. (Aff. Frogley ¶21, R. p. 315).

After the early morning meeting, Mr. Frogley returned to MVHS and attended a Special Education Symposium. While he was supposed to be one of three speakers, the hosts did not call on him to speak like the other two administrators who gave short talks.(Aff. Frogley ¶21, R. p. 315).

On November 12, 2008, Mr. Maybon, for the first time, notified Mr. Frogley that he thought his work was deficient. (Aff. Frogley, ¶22, R. p. 315) Specifically, Mr. Maybon alleged that Mr. Frogley had missed 504 and IEP meetings meetings and was not completing his required teacher evaluations in a timely manner. (R. p. 73) He specifically reprimanded Mr. Frogley for failing to attend the Special Education Symposium. (Aff. Frogley ¶22, R. p. 315). On November 13, 2008, at MVHS, Mr. Maybon met with Mr. Frogley and informed him that he was being reprimanded again and placed on a Level II Improvement Plan. At this meeting, Mr. Frogley reiterated that Dr. Linda Clark had directed the two to work things out. Mr. Maybon then told Mr. Frogley that he had no friends or support in the district and that he should just resign and that if he challenged the disciplinary action that a team of lawyers would make his life hell. Principal Maybon further stated that after Mr. Frogley had left Dr. Linda Clark's office on November 11, 2008, she called Mr. Maybon and directed him to initiate disciplinary action. (Aff. Frogley ¶24, R. p 316).

From November 12, 2008 through Mr. Frogley's last day working at MVHS, Mr. Maybon continued to berate Mr. Frogley and make false assertions that he was not performing his job duties and then filed reprimands or improvement plans. (Aff. Frogley ¶26-29; R.p. 316-320).

As a result of the continual sexual harassment and retaliatory treatment Mr. Frogley suffered

for having complained about the illegal conduct, he began suffering from severe anxiety and stress. He had difficultly sleeping and had a loss of appetite due to the stresses and anxiety he suffered from the improper treatment. He sought medical attention from his primary physician, Dr. Raymond Hooft and was treated for depression and anxiety. Dr. Hooft then referred him for counseling. Based upon Dr. Hooft's referral, Mr. Frogley obtained counseling from Paula Brown, LCPC, LMFT, CPC of Alare' Counseling and Coaching PLLC. As a result of the physical ailments he suffered as a result of the stress from the harassment and retaliation, the school district placed Mr. Frogley on disability. (Aff. Frogley ¶31, R.p. 321).

By the time Mr. Frogley completed disability, Dr. Clark recommended to the School Board to not renew Mr. Frogley's administrative contract. The recommendation included the false accusations concerning Mr. Frogley's work performance. The School Board adopted the recommendations and chose not to rehire Mr. Frogley.

Course of Proceedings

Mr. Frogley filed his *Complaint and Demand for Jury Trial* on May 3, 2010. ®. p. 6). A *First Amended Complaint and Demand for Jury Trial* was filed on October 26, 2010. ®. p. 17). On November 15, 2010 Mr. Frogley filed a *Notice of Voluntary Dismissal* of Defendant Idaho State of Board of Education (R. P. 2). The remaining Defendants, including the Meridian Joint School District No. 2, Linda Clark and Aaron Maybon filed *Defendants' Answer to First Amended Complaint and Demand for Jury Trial* on November 4, 2010.

The Defendants filed a *Motion for Summary Judgment* on December 19, 2011. Mr. Frogley filed his responsive briefing with supporting affidavit. In addition to filing a reply brief, Defendants

filed a *Motion to Strike Excerpts from Affidavit of Wade Frogley in Opposition to Defendants Motion for Summary Judgement.*

Oral argument was heard on the Defendants' Motion to Strike and Motion for Summary Judgment on February 17, 2012 before the Honorable District Judge Ronald Wilper. District Judge Wilper issued his *Memorandum Decision and Order Granting and Denying in Part Motion to Strike and Granting Motion for Summary Judgment.* Judgment was entered on March 29, 2012. Mr. Frogley timely filed his appeal on May 9, 2011.

ISSUES PRESENTED ON APPEAL

1. Did the District Court Commit Error in Granting Summary Judgment on Mr. Frogley's Retaliation Claim When a Material Issue of Fact Existed as to Whether or Not the Employer's Stated Reasons for Discipline Were Pretextual?

2. Did the District Court Commit Error in Granting Summary Judgment on Mr. Frogley's Claim for Negligent Infliction of Emotional Distress?

STANDARD OF REVIEW

A motion for summary judgment shall be rendered forthwith if the pleadings, depositions, and admissions 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 judgment as a matter of law. I.R.C.P. 56; *Olson v. Freeman,* 117 Idaho 706, 791 P.2d 1285 (1990). Upon a motion for summary judgment, all controverted facts are liberally construed in favor of the non-moving party. *Tusch Enters. v. Coffin,* 113 Idaho 37, 740 P.2d 1022 (1987). The non-moving party is entitled to the benefit of every reasonable inference that can be drawn from the evidentiary facts or which can be made from the record. *Anderson v. Ethington,* 103 Idaho 658, 651 P.2d 923 (1982). The burden at all times is upon the moving party to prove the absence of a genuine issue of material fact. *Petricevich v. Salmon River Canal Company,* 92 Idaho 865, 452 P.2d 362 (1969)."The burden of the plaintiff when faced with a motion for summary judgment, is not to persuade the judge that an issue will be decided in his favor at trial. Rather, he simply must present sufficient materials to show that there is a *triable* issue." *Earl v. Cryovac, a Div. of W.R. Grace,* 115 Idaho 1087, 1093, 772 P.2d 725, 731 (Ct.App.1989). "A triable issue exists whenever reasonable minds could disagree as to the material facts or the inferences to be drawn from those facts." *Earl v. Cryovac, a Div. of W.R. Grace*, 115 Idaho 1087, 772 P.2d 725 (Ct. App. 1989).

All doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom, and if reasonable people might reach different conclusions. *G & M Farms v. Funk Irr. Co.*, 119 Idaho 514, 516-17, 808 P.2d 851, 853-54 (1991).

In an appeal from a grant of summary judgment, the appellate court's standard of review is the same as the district court's standard in ruling on the motion. *Karr v. Bermeosolo,* 142 Idaho 444, 447-48, 129 P.3d 88, 91-92 (2005). This Court reviews the record before the district court to determine de novo whether there exists any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Id.* If the evidence shows no disputed issues of material fact, what remains is a question of law over which the appellate court exercises free review. *Id.*

ARGUMENT

I. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT ON PLAINTIFF'S RETALIATION CLAIM SINCE PLAINTIFF ESTABLISHED THE EXISTENCE OF A MATERIAL ISSUE OF FACT AS TO WHETHER THE REASONS ADVANCED BY THE EMPLOYER FOR ITS ADVERSE EMPLOYMENT ACTION WAS PRETEXT

A cornerstone of any summary judgment analysis is the requirement that "all doubts are to be resolved against the moving party; that all controverted facts are liberally construed in favor of the non-moving party; and, that the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom or if reasonable people might reach different conclusions. *G.M. Farms v. Funk Irr. Co.*, 199 Idaho 514, 516-17, 808 P.2d 851, 853-54 (1991). The District Court violated this maxim in finding that no material fact existed as to the question of whether or not the reasons advanced by the school district for its adverse actions were pretext. As a result, the Trial Court's decision should be reversed.

The District Court properly outlined the law regarding a retaliation claim under Title VII which is as follows:

> [A] plaintiff must show (1) involvement in a protected activity, (2) an adverse employment action, and (3) a causal link between the two. 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. Only then does the case proceed beyond summary judgment stage.

P. 22 of Memorandum Decision and Order, R. p 429, *citing,* Brooks v. City of San Mateo, 229 F.3d 917, 928 (9th Cir. 2000). The District Court then correctly determined that Mr. Frogley had demonstrated a prima facie case of retaliation by demonstrating that he held a good faith, reasonable belief that the underlying challenged actions of his employer violated the law (R.p 430); that an adverse employment action had occurred (R.p. 430); and, that Mr. Frogley had demonstrated a causal link between the adverse actions and his complaint about the harassment. (R.p. 431).

The Court then concluded that the Defendants met their burden of presenting legitimate reasons for the adverse employment action which shifted the burden back to Mr. Frogley to establish that a material issue of fact existed as to whether or not the reasons proffered by his employer were pretextual. (R.p. 431) A plaintiff can prove pretext in two ways: (1) indirectly, by showing that the employer's proffered explanation is "unworthy of credence" because it is internally inconsistent or otherwise not believable, or (2) directly, by showing that unlawful discrimination more likely motivated the employer. Chuang v. Univ. of California Davis, Bd. Of Trustees, 225 F.3d 1115, 1126 (9th Cir. 2000). The two approaches are not exclusive. Moreover, the plaintiff does not have to introduce "additional, independent evidence of discrimination" at the pretext stage. *Id.* at 128.

In Chuang, the 9th Circuit Court held that the university dean's laughing at a racist remark was adequate, direct evidence of discriminatory intent sufficient for the plaintiff to survive summary judgment. In discussing the relevance of the evidence, the court noted that an employer's "reaction"

to a plaintiff's legitimate civil rights activities might be relevant to the showing of pretext. *Id.* at 1128. The same evidence may be used at various stages of the court's analysis. At the summary judgment stage any form of discriminatory treatment that is otherwise admissible may be used to support any allegation of discrimination whether or not there is a direct relationship between the various claims involved. *Id.* at 1128.

In the case at bar, direct evidence of the defendant's actual motivation of the employer was exposed by Dr. Clark and Mr. Maybon's responses to Mr. Frogley's complaints of improper treatment. Immediately after Mr. Frogley met Dr. Clark at her office on November 11, 2008 to discuss his claims of sexual harassment, Dr. Clark called Mr. Maybon and directed him to start disciplinary action. (Aff. Frogley, ¶24 at R. p. 316). Mr. Maybon told Mr. Frogley that he had not gotten out of the parking lot before Dr. Clark called Mr. Maybon and directed him to initiate disciplinary action. (Aff. Frogley, ¶24 at R. p. 316). Mr. Maybon added to the aggressive, retaliatory stance by telling Mr. Frogley that he had no friends in the district and that Mr. Frogley should just resign and that if he challenged the disciplinary action that a tem of layers would make his life hell. (*Id.*)

A reasonable inference of the aggressive, confrontational behavior is that Dr. Clark and Mr. Maybon intended to punish Mr. Frogley for his complaining about the sexually based harassment he had been subjected. This direct evidence of motive is similar to the direct evidence of the discriminatory motive the court gleaned from the Dean's laughing at a racially based joke in *Chuang*. The court in *Chuang* deemed that the laugh created an inference of racial motivation which the court found to be sufficient direct evidence of pretext to overcome summary judgment. Chuang, 225 F.3d at 1128. The same result should occur here.

In *Chuang*, the court rejected the trial court's holding that direct evidence of pretext had to be specific and substantial. *Id.* Instead, the 9th Circuit court held that with direct evidence, a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial. *Id.* The court specifically noted that the "Plaintiff is required to produce 'very little' direct evidence of the employer's discriminatory intent to move past summary judgment. *Id.* See also, *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998); *Lindahl v. Air France*, 930 F.2d 1434, 1438 (9th Cir. 1991).

The inference extracted from both Dr. Clark and Mr. Maybon's reactions is that the two administrators intended on punishing Mr. Frogley for his complaints of the misconduct and that the reasons advanced by the district for its adverse employment action were pretextual. Accordingly, the District Court's granting of summary judgment as to the claim of retaliation was erroneous and should be reversed.

Further establishing the existence of a material issue of fact is Mr. Frogley's testimony which proves the falsity of the claims the school district alleged as a basis for their disciplinary actions. The reasoning provided by the school district to justify its adverse action against Mr. Frogley was set forth in a letter Dr. Clark forwarded to the Board of Trustees of the School District in recommending that they not re-hire Mr. Frogley. The letter asserted that (1) Mr. 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;" (2) that Mr. Frogley did not engage in student supervision at the level expected; (3) 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, (4) that Mr. Frogley "has not regularly met his requirements for

attending all IEP and Section 504 meetings under his responsibility."

Mr. Frogley's testimony establishes that the claims against him were false and that they were being used as pretext for the true, retaliatory purpose behind the school district's adverse action. Accordingly the trial court's granting of summary judgment was improper.

A. Mr. Frogley Clearly Established That the School District's Claims That He Failed to Observe Teachers Was Inaccurate.

The claim that Mr. Frogley failed to timely complete his teaching observation duties was first made on November 12, 2008 after Mr. Frogley complained to Mr. Maybon. As an administrator, Mr. Frogley was required to observe teachers in the classroom and prepare evaluations. The school policy specifically requires administrators to conduct both an informal and formal visit followed by the completion of a written review. (Aff. Frogley ¶ 26, R.p. 317) However, contrary to the allegations of not being timely, the district policy only required that the observations and written reviews be completed by the end of the school year. (Aff. Frogley ¶ 26, R. p. 335). As required, Mr. Frogley completed all his evaluations by the end of the school year and, thus, he complied with the district policy. (Aff. Frogley ¶, R. p. 317-318)

Moreover, Mr. Maybon knew the allegations were false when he made them and that Mr. Frogley had actually completed more observations than any other administrator, including Mr. Maybon, even though he had a valid excuse not to even have performed a single evaluation. Mr. Frogley was selected to be part of a new pilot program in which the observers were to be given handheld devices with special software which the observers could use to complete reviews while observing a teacher within the classroom by entering information electronically into the system. Dr. Linda Clark specifically requested Mr. Frogley hold off performing his evaluations until he could complete the training and use the new device. (Aff. Frogley ¶ 26, R.p. 317) By the first part of

November 2008, however, Mr. Frogley had not yet received training on the device. *Id.* Nevertheless, Mr. Frogley took initiative and commenced his informal classroom observations of his assigned teachers. Despite the hindrance created by Mr. Frogley being placed in a pilot program and not receiving training, by the first of November 2008 Mr. Frogley had completed the most teacher observations of any administrator. This fact came to light during a meeting of the administrators in early November 2008 wherein Mr. Maybon questioned the administrators on their progress in completing evaluations. (R.p. 317) Mr. Maybon and another administrator, Heath McInlery, admitted they had not completed a single observation.

A reasonable inference for the false accusation is that the school district was manufacturing excuses to justify reprimanding Mr. Frogley for his complaining of illegal sexual harassment.

B. The School District's Allegations of Mr. Frogley Failing to Attend Meetings Was Misleading.

While it is true that Mr. Frogley did miss some IEP and Section 504 meetings, all the other administrators had also missed such meetings and, yet, Mr. Frogley was the only administrator who was disciplined for the missed meetings. (Aff. Frogley ¶ 27, R.p. 317-18) Clearly, a reasonable inference for the school district's singling out of Mr. Frogley is that the district's cited rationale for punishment was only a pretext.

Further exposing the pretextual nature of the grounds for punishment is the fact that Mr. Frogley's failure to attend such meetings was beyond his control as he was not responsible for scheduling his meetings and the person who did so would schedule Mr. Frogley to be in more than one meeting at the same time. (Aff. Frogley ¶ 27, R.p. 318) Obviously, Mr. Frogley cannot be in more than one place at a time. Thus, the school's disciplining of Mr. Frogley for something he has no control over and which was precipitated by the poor scheduling system created by the school

district would be grossly improper. It is inconceivable that the school district would discipline Mr. Frogley for something he had no control. Accordingly, a reasonable inference from the district's claimed basis for disciplinary action is that it was a pretext to the true reason for the discipline which was to punish Mr. Frogley for complaining of sexual harassment.

The reasonable inferences from the school district's singling out and disciplining Mr. Frogley for missing meetings when all the other administrators had done the same thing was that it was pretextual. Likewise, the failure of the district to mention the problem until after Mr. Frogley lodged his complaint also suggests that it was not the true reason for the disciplinary action. Accordingly, Mr. Frogley has established a material issue of fact for which the granting of summary judgment was improper.

C. Mr. Frogley Established That the Alleged Harassment of Students Was Pretext.

A key basis for the District Court's finding that Mr. Frogley had failed to establish his burden of proof to avoid summary judgment was the allegation that he had harassed students. The District Court stated that "the evidence of student harassment is enough individually to support the adverse employment action..." (P. 25 of Memorandum at R.p. 432) The Court's statement reveals that it had not properly considered Mr. Frogley's testimony and thus did not properly analyze the evidence with proper rules of construction applicable to summary judgment motions.

Mr. Frogley denied harassing any students and established that he had never been notified of or questioned by the district about the student's allegations. (Aff. Frogley ¶ 29, R.p. 319-320) Moreover, Mr. Frogley proved that the complaints lacked merit. As such, Mr. Frogley created a genuine issue of fact as to whether the his employer's use of the student complaints as a reason for disciplinary action was pretext.

The students complaints of harassment consisted of statements made by Courtney Drasher and Ms. Compton. Remarkably, in both cases, the girls happened to lodge their complaints months after the alleged misconduct and, coincidently, they lodged their complaints within a few weeks of each other. Courtney Drasher made her complaint on November 24, 2008 (R. p. 143) while Mikayla Compton's complaint was received on December 12, 2008. (R. p. 99)

Despite the existence of the two student complaints, Mr. Frogley was never contacted nor questioned about the allegations set forth in the complaints. This alone renders the existence of the complaints as being the basis of Mr. Frogley's disciplinary action as highly suspect.

Mr. Frogley contact with Ms. Drashner was a result of suspicious activity. Mr. Frogley had been notified that there was an increased concern of students having drugs on campus so that administrators were to be on heightened alert during class breaks. (R. p. 320.) On one occasion, Mr. Frogley observed a group of students, which included Ms. Drashner, and saw one student passing something to Ms. Drashner. Troubling was the fact that the students became very nervous when they realized they were being watched and acted as if they were hiding something. *Id.* When Mr. Frogley made contact, Ms. Drashner challenged his authority; certainly an act that belies the timid and easily frightened person she portrays herself to be in her complaint. Mr. Frogley explained his position at the school and confirmed he indeed had authority to make his inquiry. Nothing further happened. (R.p 320)

Ms. Compton complained that Mr. Frogley confronted her and her boyfriend at the homecoming dance due to their inappropriate dancing. Ms. Compton then complained of being told to stop kissing her boyfriend while at school despite the fact that personal displays of affection (PDA's) were against school rules. In both situations, the complaints were based upon the

enforcement of school rules. *Id.*

Strangely, Ms. Compton mentions that Mr. Frogley looked at her v-neck shirt and made her uncomfortable. She clarified her concern by stating that his looking at the shirt "was not in a way that I felt he was violating me, but in a way that he disapproved of my shirt." (R. p. 98. A possible explanation for any display of disapproval of her shirt could simply be the fact that Mr. Frogley's job required him to enforce the dress code. (R.p 320) Regardless, the complaint is petty and fails to set forth any improper conduct. This fact would explain why the school district never questioned Mr. Frogley about the complaints.

Giving Mr. Frogley all benefits of reasonable inferences, the petty nature of Ms. Compton's complaint, the suspect nature of the timing of the complaints and the fact that the school failed to notify or question Mr. Frogley about the complaints all suggests that the school never considered the complaints sufficient to warrant disciplinary action. As such, there exists a genuine issue of material fact as to whether or not the girl's complaints were the true reason for the school's adverse action against Mr. Frogley.

Liberally construing all controverted facts in favor of Mr. Frogley and giving him the benefit of all reasonable inferences, it is clear that a genuine issue of material fact exists such that the Court's granting of summary judgement on the Plaintiff's retaliation claim was done in error and should be reversed.

II. The District Court Erred in Granting Summary Judgment on Mr. Frogley's Claim of Negligent Infliction of Emotional Distress since There Exited Genuine Issues of Material Fact.

A genuine issue of material fact existed concerning the validity of Mr. Frogley's claim of negligent infliction of emotional distress claim and, thus, summary judgment was improper.

To successfully prosecute a negligent infliction of emotional distress claim, Mr. Frogley was required to prove the following elements; (1) a duty recognized by law requiring the defendant to conform to a certain standard of construction; (2) a breach of that duty; (3) a causal connection between the conduct and the plaintiff's injury; and (4) actual loss or damage. In addition, there must be some physical manifestation of the plaintiffs' emotional injury. *Johnson v. McPhee*, 147 Idaho 455, 466, 210 P.3d 563, 574 (Ct. App. 2009). In the case at bar, Mr. Frogley satisfied all of the prescribed elements. Nevertheless, the district court granted summary judgment on the ground that the risk of harm was not foreseeable. In reaching this conclusion, the district court relied upon the holding in Johnson. *Id.* Such reliance was misplaced. Contrary to the District Court's analysis, the court in *Johnson* determined that the negligent infliction of emotional distress claim was viable; stating, "if all reasonable inferences are drawn in [Johnson's] favor, Johnson provide sufficient evidence from which a tier of fact could find that his burden of proof is satisfied on all of the elements of his negligent infliction of emotional distress." *Johnson*, 147 Idaho at 469, 210 P.3d at 577. The Court in *Johnson*, granted summary judgment only because the trial was bench trial such that the court was not obligated to draw reasonable inferences in Johnson's favor.

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. Every person has a duty to exercise ordinary care to prevent unreasonable, foreseeable risks of harm to others. Johnson, 147 Idaho at 467, 210 P.3d at 575. An employer, however owes his or her employees a greater degree of respect because other employment relationship. *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1466 (9th Cir. 1994). Liberally construing all

controverted facts in Mr. Frogley's favor and giving him the benefit of every reasonable inference, it is clear that he has presented sufficient proof for a viable negligent infliction of emotional distress claim. Without question, the defendants constant humiliation of Mr. Frogley; their continual personal attacks upon Mr. Frogley's professional abilities; and imposition of disciplinary actions can foreseeably create sufficient stress and anxiety to cause physical harm. In the case at bar, Mr. Frogley suffered stress and anxiety which manifested itself in loss of sleep and appetite. (Aff. Frogley ¶ 31, R.p. 321). As a result of the stress and anxiety, Mr. Frogley sought medical care and was treated for depression and anxiety and obtained counseling. As a result of the physical ailments he suffered, the school district placed Mr. Frogley on disability. (Aff. Frogley ¶ 31, R.p. 321).

Given the above, there is no doubt that Mr. Frogley provided sufficient proof to satisfy every element of a claim. Accordingly, the trial court improperly granted the plaintiff's motion for summary judgment as to the claim for negligent infliction of emotional distress.

CONCLUSION

Based upon the foregoing, the Appellant respectfully requests this Court reverse the District Court's granting of summary judgment.

CLARK and FEENEY, LLP

By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17 day of September, 2012, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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