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Arambarri v. Armstrong Respondent's Brief Dckt. 38351

IN THE SUPREME COURT OF THE STATE OF IDAHO

ROBERT NICHOLAS ARAMBARRI,

Plaintiff/Appellant,

vs.

RICHARD ARMSTRONG, DIRECTOR OF IDAHO DEPARTMENT OF HEALTH AND WELFARE,

Defendant/Respondent.

Supreme Court Docket No. 38351-2010

RESPONDENT'S BRIEF

Appeal from the District Court of the Sixth Judicial District for Bannock County

Honorable Peter D. McDermott, District Judge, Presiding

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I. STATEMENT OF CASE

A. NATURE OF THE CASE

Plaintiff, Robert Nicholas Arambarri (hereinafter "Arambarri"), was a non-classified, at-will employee who occupied the position of regional director in Region VI of the Idaho Department of Health and Welfare (IDHW), serving at the pleasure of Defendant, Richard Armstrong, Director of IDHW (hereinafter "Director Armstrong"). In 2009, when Director Armstrong eliminated four of the seven regional director positions, Arambarri's appointment was rescinded and he lost his employment with IDHW. Although the seven regions continue to exist, Director Armstrong consolidated responsibility for heading the seven regions with the three remaining regional directors. Arambarri sued Director Armstrong, seeking reinstatement. The district court granted Director Armstrong's motion for summary judgment, finding that Director Armstrong had the statutory authority to abolish Arambarri's position within the plain meaning of the applicable statute. Arambarri appealed the district court's order.

B. COURSE OF THE PROCEEDINGS

Arambarri received notice on April 24, 2009, that his non-classified, at-will employment with the state of Idaho as regional director would end as of June 12, 2009. (R. Vol. I, p. 24, para. 13; p. 46, para. 6). Arambarri filed a notice of tort claim on June 12, 2009, and this claim was denied on September 18, 2009. (Appellant's Brief, p. 2). Arambarri filed his Complaint in district court on January 27, 2010. (R. Vol. I, pp. 1-5). Director Armstrong filed his Answer on March 12, 2010. (R. Vol. I, pp. 13-15).

Director Armstrong filed a Motion to Dismiss, or in the alternative, Motion for Summary Judgment (hereinafter "Motion for Summary Judgment"), on August 6, 2010. (R. Vol. I, pp. 20-

21). Accompanying the Motion for Summary Judgment were numerous exhibits as well as Director Armstrong's Memorandum in Support of the Motion for Summary Judgment. (R. Vol. I, pp. 22-96). Arambarri filed a Memorandum in Opposition to the Motion for Summary Judgment, and in response, Director Armstrong filed his Reply to Arambarri's Memorandum on September 29, 2010. (R. Vol. I, pp. 126-154).

On September 15, 2010, Arambarri filed a motion to strike the affidavits of Director Armstrong and David Taylor. (R. Vol. I, pp. 97-100). On September 29, 2010, Director Armstrong filed an Objection to Plaintiff's Motion to Strike Defendant's Affidavits (R. Vol. I, pp. 120-125) and a Motion to Strike Affidavit of Carolyn Ruby (R. Vol. I, pp. 155-159), as well as a Motion to Strike Affidavit of Robert Nicholas Arambarri.

A hearing on the Motion for Summary Judgment and ancillary motions occurred on September 30, 2010, during which the district court heard oral arguments from respective counsel. (R. Vol. I, pp. 160-161). The district court issued its Memorandum Decision and Order on November 12, 2010, wherein the district court granted summary judgment in favor of Director Armstrong, denied Arambarri's Motion to Strike Defendant's Affidavits, granted Director Armstrong's Motion to Strike Affidavit of Carolyn Ruby, and partially granted Director Armstrong's Motion to strike the Affidavit of Robert Nicholas Arambarri. (R. Vol. I, pp. 162-174). The district court also issued its Judgment wherein Arambarri's Complaint was dismissed with prejudice. (R. Vol. I, p. 175).

Arambarri filed his Notice of Appeal on December 2, 2010. (R. Vol. I, pp. 176-178). Arambarri filed Appellant's Brief on June 6, 2011. Director Armstrong is now filing

Respondent's Brief in which Director Armstrong respectfully requests that the Supreme Court affirm the district court's order.

C. STATEMENT OF THE FACTS

Arambarri served as a regional director in IDHW's Region VI from January 20, 1991, until he lost his employment with the state of Idaho in June 2009, stemming from his appointment having been rescinded due to the elimination of his position. However, his employment with IDHW began many years earlier.

Arambarri commenced his employment with IDHW in October 1974 as a social worker. (R. Vol. I, p. 51). After working over four years as a social worker, he worked for nearly four years as an adult program supervisor. (R. Vol. I, p. 51). From August 1982 until January 1991, Arambarri served as a developmental disabilities program manager. (R. Vol. I, pp. 51 & 103).

On January 22, 1991, Arambarri received written notice of his appointment as regional director, effective January 20, 1991, expressly stating his position as regional director was a non-classified position. (R. Vol. I, p. 92). In his appointment letter, Arambarri was informed that he would serve "at the pleasure of the director." (R. Vol. I, p. 92). He accepted the position in a letter dated January 24, 1991. (R. Vol. I, p. 93). On February 4, 1991, Arambarri signed a memorandum of understanding in which he acknowledged that he understood that he would be serving as a non-classified employee as regional director. (R. Vol. I, p. 96). The job description for regional director identified the position as non-classified. (R. Vol. I, pp. 48-49).

The district court observed in its order that it is undisputed that Arambarri remained a non-classified, at-will employee throughout his 18 years of service as regional director. (R. Vol. I, p. 171). Furthermore, Arambarri has not disputed in Appellant's Brief or during oral argument

that he was anything but a non-classified, at-will employee. Arambarri's counsel also confirmed that Arambarri agrees that he was a non-classified, at-will employee and that he "serve[d] at the pleasure of the Director." (Tr. Vol. I, p. 22, Ll. 19-20).

Arambarri lost his employment as an at-will employee with the state of Idaho due to reductions stemming from economic pressures. Director Armstrong was required to reduce IDHW's personnel expenses by five percent for the fiscal year beginning on July 1, 2009, and this reduction followed a holdback of 6% that was required during the previous fiscal year. (R. Vol. I, p. 23, para. 6; p. 28, para. 1; & p. 6). Director Armstrong relied on several courses of actions to comply with the reduced appropriation, including staff furloughs, reducing reliance on temporary workers and contractors, holding positions open, reducing the workforce by 23 positions, and eliminating certain positions. (R. Vol. I, p. 23, para. 8; p. 28, para. 4; & p. 58).

Included in this workforce reduction were four of the seven regional directors, who had been serving at the pleasure of Director Armstrong. On May 21, 2009, Director Armstrong appeared before the Idaho Board of Health and Welfare (hereinafter "Board") and presented his decision to cut Arambarri and three other regional directors. The report from Director Armstrong to the Board on May 21, 2009, included the following:

> In an effort to reduce the personnel budget, the decision has been made to hub responsibilities of the Regional Directors. The positions will be cut to three, which will reduce the personnel by $500,000. Community development activities will lessen, but maintaining the three positions will ensure some support at the local level.

(R. Vol. I, p. 24, para. 12; pp. 29-30, para. 8-9; & p. 56). All 11 members of the Board were present for the meeting, including Richard Roberge, M.D. (Chairman), Richard Armstrong (Secretary), Dan Fuchs, Quane Kenyon, Darrell Kerby, Janet Penfold, Tom Stroschein, Stephen

Week, Senator Pattie Anne Lodge, Representative Sharon Block, and Sara Stover. (R. Vol. I, p. 24, para. 12; p. 28, para. 8; & p. 53).

When Director Armstrong presented to the Board his decision to cut four regional directors, the members unanimously concurred with the decision by not objecting and by not calling for a vote. (R. Vol. I, p. 24, para. 12; pp. 29-30, para. 9). To corroborate that they had concurred with Director Armstrong's decision at the meeting of the Board on May 21, 2009, a majority of the voting members of the Board provided sworn affidavits to the district court. (R. Vol. I, pp. 134-148). Richard Roberge, M.D., Dan Fuchs, Darrell Kerby, Janet Penfold, and Tom Stroschein included the following in their affidavits:

> 4. During the [meeting on May 21, 2009], Director Armstrong reported to the members of the Board that the legislature had mandated the Department reduce its annual budget. The Director indicated that, as a part of the Department's effort to accomplish the legislative directive, he had determined that the positions of four of the seven Regional Directors would be cut, [and] this would assist in the effort to reducing the personnel budget by $500,000.00.
> 5. I did not object to the Director's action, nor did any of the other members of the Board object to this action. None of the members of the Board called for a vote on the proposed action. It is the practice of the Board for members to express objections or concerns if they do not concur with an action or plan promulgated by the Director. I did not feel it was necessary to vote on the Director's action in this matter to show my concurrence.
> 6. When the Director reported that he was cutting four Regional Directors to reduce the personnel budget, I agreed with the action. If I had not concurred with the action, I would have voiced my objection for the record and, had it become necessary, would have made a motion to that effect. I continue to concur with the Director's decision to cut four of the seven Regional Directors. Had a members of the Board called for a vote on the action, I would have voted in support of the Director's action.
> 7. It is not unusual for the Board to concur with a recommendation from the Director without formally voting on the item. Our concurrence is evidenced by the fact that we do not choose to take a vote. As Board members, we are at liberty to seek a vote if we determine a vote is necessary.
> 8. I am aware that Idaho Code § 56-1002(3) indicates Regional Directors serve at the pleasure of the Director, with the concurrence of the Board. The Director reported his plan concerning the Regional Directors to the Board and we

> concurred. As a member of the Board, it is my opinion and understanding that a vote by the Board is not necessary to demonstrate concurrence under Idaho Code § 56-1002(3).
> 9. When the Director indicated that he had decided to cut four of the seven Regional Directors in an effort to reduce the personnel budget, my understanding was that he would take whatever action was necessary and appropriate to implement his plan.
> 10. My concurrence with the Director's decision to cut the positions of four Regional Directors occurred during the Board meeting on May 21, 2009, and I continue to concur with that decision.

(R. Vol. I, pp. 134-148).

Director Armstrong provided an affidavit to the district court corroborating that the members of the Board concurred with his decision to cut the positions of four regional directors. (R. Vol. I, p. 24, para. 12). Sara Stover, a non-voting member of the Board, also corroborated the Board's concurrence in her affidavit:

> 5. None of the voting members of the Board objected to [Director Armstrong's action to cut four Regional Directors]. None of the voting members of the Board called for a vote on the proposed action. It is the practice of the Board for members to express objections or concerns if they do not concur with an action or plan promulgated by the Director.
> 6. It is not unusual for the Board to concur with a recommendation from the Director without formally voting on the item.
> 7. I am aware that Idaho Code § 56-1002(3) indicates Regional Directors serve at the pleasure of the Director, with the concurrence of the Board. The Director reported his plan concerning the Regional Directors to the Board and the voting members of the Board concurred. As a non-voting member of the Board, it is my opinion and understanding that a vote by the Board is not necessary to demonstrate concurrence under Idaho Code § 56-1002(3).

(R. Vol. I, pp. 149-151).

Through the Deputy Director for Support Services, David Taylor, on April 24, 2009, Director Armstrong notified Arambarri concerning the termination of his at-will employment as a regional director, and informed Arambarri that his employment would end as of June 12, 2009, due to the elimination of his position. (R. Vol. I, p. 46, para. 6). Arambarri acknowledged that

he had been expecting the loss of his position due to the declining economic conditions. (R. Vol. I, p. 59). He also acknowledged that when he was informed that he was not being retained, he was also reminded that he served at the pleasure of the Director. (R. Vol. I, p. 60).

Arambarri's separation date was extended from June 12, 2009, to June 15, 2009, to allow him to receive additional health insurance benefits for July 2009, a value of approximately $800.00, and to allow his monthly PERSI payment to be enhanced by approximately $10.00 per month. (R. Vol. I, p. 25, para. 19; p. 61; & p. 76;

After Arambarri lost his employment with IDHW, he filed for and was awarded unemployment insurance benefits. (R. Vol. I, pp. 74 & 86). He also began drawing from his PERSI benefits. (R. Vol. I, pp. 69-70, 85, & 87). Several weeks after Arambarri was notified of the loss of his employment with IDHW, he wrote in an email message on May 14, 2009, that he had "very little desire to pursue this legally and [had] even less desire to continue with DHW." (R. Vol. I, p. 60).

The seven administrative regions of IDHW continue to be headed by the three remaining regional directors. (R. Vol. I, p. 35, para. 21; p. 46, para. 5; & p. 173; Tr. Vol. I, p. 32, L. 14 – p. 33, L. 24). The district court determined that the plain meaning of Idaho Code § 56-1002(3) does not require a specific number of regional directors to head the regions as long as the seven regions remain intact. (R. Vol. I, p. 173).

II. ISSUES ON APPEAL

1. Does Arambarri, who was terminated while serving as a non-classified, at-will employee, have standing to pursue a lawsuit challenging whether Director Armstrong complied with Idaho Code § 56-1002(3)?

2. Should Arambarri's appeal be vacated due to mootness and the absence of redressability?

3. Did the district court err in finding that there was no genuine issue as to any material fact and that Director Armstrong was entitled to judgment as a matter of law?

4. Did the district court err in its rulings regarding the parties' affidavits?

5. Is Director Armstrong entitled to an award of attorney fees on appeal?

III. ARGUMENT

A. STANDARD OF REVIEW.

The Idaho Supreme Court reviews a motion for summary judgment using the same standard employed by the district court in deciding the motion. *Stoddart v. Pocatello Sch. Dist. #25*, 149 Idaho 679, 683, 239 P.3d 784, 788 (2010); *Cherry v. Coregis Ins. Co.*, 146 Idaho 882, 884, 204 P.3d 522, 524 (2009); *Lockheed Martin Corp. v. Idaho State Tax Comm'n,* 142 Idaho 790, 793, 134 P.3d 641, 644 (2006) (citing *Infanger v. City of Salmon,* 137 Idaho 45, 44 P.3d 1100 (2002)). Summary judgment is appropriate "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 a judgment as a matter of law." I.R.C.P. 56(c). "Disputed facts should be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party." *Castorena v. General Elec.*, 149 Idaho 609, 613, 238 P.3d 209, 213 (2010). "If the evidence presented shows no disputed issues of material fact, then all that remains are questions of law, over which this Court exercises free review." *State, ex rel. Wasden v. Maybee*, 148 Idaho 520, 527, 224 P.3d 1109, 1116 (2010) (citing *Mendenhall v. Aldous,* 146 Idaho 434, 436, 196 P.3d 352, 354 (2008)); See also *Martin v. Camas County ex rel. Bd. of Comm'rs,* 150 Idaho 508, 511, 248 P.3d 1243, 1246 (2011).

This Court may freely review the application and meaning of Idaho Code § 56-1002(3) since this Court freely reviews questions of law. *Barmore v. Perrone*, 145 Idaho 340, 343, 179 P.3d 303, 306 (2008). Further, "[t]he interpretation of a statute is a question of law over which this Court exercises free review." *Doe v. Boy Scouts of America*, 148 Idaho 427, 430, 224 P.3d 494, 497 (2009).

The standard of review applicable to the district court's ruling pertaining to the parties' motions to strike affidavits is whether the district court abused its discretion. In making this determination, the Court has indicated it determines the following:

> (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason.

Baxter v. Craney, 135 Idaho 166, 169, 16 P.3d 263, 266 (2000) (citing *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.,* 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991)).

B. ARAMBARRI, WHO WAS TERMINATED WHILE SERVING AS A NON-CLASSIFIED, AT-WILL EMPLOYEE, DOES NOT HAVE STANDING TO PURSUE A LAWSUIT CHALLENGING WHETHER DIRECTOR ARMSTRONG COMPLIED WITH IDAHO CODE § 56-1002(3).

Arambarri has asserted in his Complaint and in his brief that Director Armstrong violated Idaho Code § 56-1002 in eliminating Arambarri's position, resulting in Arambarri's termination. (R. Vol. I, p. 2, para. IV; & Appellant's Brief). However, notwithstanding this allegation, Arambarri has agreed with the fact that he was a non-classified, at-will employee, serving at the pleasure of Director Armstrong. (Tr. Vol. I, p. 22, Ll. 19-20). Arambarri has also acknowledged that Director Armstrong had the authority to terminate Arambarri's appointment as regional director with the concurrence of the Board. (Tr. Vol. I, p. 19, Ll. 7-21). Furthermore, Arambarri

conceded, during the hearing in district court, that his Complaint is not a wrongful termination lawsuit. (Tr. Vol. I, p. 22, Ll. 14, 16-17).

This Court summarized the Idaho at-will employee doctrine in *Van v. Portneuf Medical Center* as follows:

> Generally, an employer may discharge an at-will employee at any time for any reason without incurring liability. However, the right to discharge an at-will employee is limited by considerations of public policy, such as when the motivation for the firing contravenes public policy. The determination of what constitutes public policy sufficient to protect an at-will employee from termination is a question of law. The public policy exception to the employment at-will doctrine has been held to protect employees who refuse to commit unlawful acts, who perform important public obligations, or who exercise certain legal rights and privileges. An employer may not discharge an at-will employee without cause when the discharge would violate public policy. Once the court defines the public policy, the question of whether the public policy was violated is one for the jury.

147 Idaho 552, 212 P.3d 982, 991 (Idaho 2009) (citations omitted). In this case, Director Armstrong cannot incur liability because there is no allegation that the termination of Arambarri violated any public policy. Also, Arambarri has corroborated that this case is not a wrongful termination case. (Tr. Vol. I, p. 22, Ll. 14, 16-17).

Ironically, a wrongful termination lawsuit is the only action he may possibly have had standing to bring against Director Armstrong. Since the Complaint does not allege Arambarri was terminated wrongfully and does not challenge Director Armstrong's authority to terminate Arambarri, the Complaint is merely challenging Director Armstrong's authority under Idaho Code § 56-1002(3) to reduce the number of regional directors assigned to the seven regions. In making this allegation, Arambarri has not demonstrated that he has standing to make this argument as an ordinary citizen.

It is unnecessary for this Court to address the substance of Arambarri's allegations in light of the fact that he lacks standing. "Standing is a preliminary question to be determined by this Court before reaching the merits of the case." *Young v. City of Ketchum,* 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). "It is a fundamental tenet of American jurisprudence that a person wishing to invoke a court's jurisdiction must have standing." *Id.*; *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 124, 15 P.3d 1129, 1132 (2000). Standing is a jurisdictional issue involving a question of law over which this Court exercises free review. *State v. Doe*, 148 Idaho 919, 936, 231 P.3d 1016, 1033 (2010); *St. Luke's Reg. Med. Ctr. v. Bd. of Comm'rs,* 146 Idaho 753, 755, 203 P.3d 683, 685 (2009); *Taylor v. Maile,* 146 Idaho 705, 709, 201 P.3d 1282, 1286 (2009).

In determining whether Arambarri had standing, this Court focuses on his status, not on his allegations. "The doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated." *Miles v. Idaho Power Co.,* 116 Idaho 635, 641, 778 P.2d 757, 763 (1989); See also *Young*, 137 Idaho at 104, 44 P.3d at 1159. Virtually the entire focus of Arambarri's brief is on the issue he wishes to have adjudicated, the issue of whether Idaho Code § 56-1002(3) requires a specific number of regional directors, but he does not demonstrate how he would have standing to bring this lawsuit as a terminated non-classified, at-will employee who wishes to challenge Director Armstrong's application of that statute.

Arambarri simply lacks standing in the capacity of a concerned citizen. It is well established that "a concerned citizen who seeks to ensure the government abides by the law does not have standing." *Id.* at 105, 44 P.3d at 1160. Arambarri is clearly in the shoes of a concerned citizen who is seeking to have Director Armstrong interpret Idaho Code § 56-1002(3) a particular

way. Although Director Armstrong disagrees with Arambarri's interpretation and the law supports Director Armstrong's interpretation, it is not necessary for this Court to address the merits of Director Armstrong's interpretation versus Arambarri's desired interpretation. In Arambarri's role as a concerned citizen who is forwarding a particular interpretation of the statute, he clearly does not have standing to require this Court to cause Director Armstrong to interpret the statute differently.

Simply put, Arambarri is not in a position to seek relief since he has not alleged nor demonstrated that he is in a class of individuals harmed by Director Armstrong's action. He has filed his Complaint and pursued this litigation as a member of society. A citizen or taxpayer, by reason of that status alone, does not have standing to challenge governmental action. "An interest, as a concerned citizen, in seeing that the government abides by the law does not confer standing." *Troutner v. Kempthorne,* 142 Idaho 389, 391, 128 P.3d 926, 928 (2006).

In addition to the foregoing, to satisfy the requirement of standing Arambarri was required to satisfy three additional requirements. First, he was required to allege an injury in fact. Second, he was required to demonstrate there was a fairly traceable causal connection between the claimed injury and the challenged conduct. Third, Arambarri was required to prove that there was a substantial likelihood that the judicial relief requested would have prevented or redressed the claimed injury. *Id.*

Arambarri cannot satisfy any of the aforementioned three requirements since he was a non-classified, at-will employee who lost his employment. He thus is not in a position to claim that he was injured as a result of his termination. Second, Arambarri is unable to trace a causal connection between Director Armstrong's application of Idaho Code § 56-1002(3) and any

alleged injury. Third, Arambarri is unable to demonstrate that any alleged injury would be rectified through judicial relief. For instance, even if Director Armstrong were to be required to appoint four additional regional directors, it would be impossible to require Director Armstrong to reappoint any of the four individuals, including Arambarri, who had been at-will employees while serving as regional directors. In short, a ruling in Arambarri's favor would not redress the claimed injury. See *Thompson v. City of Lewiston*, 137 Idaho 473, 477, 50 P.3d 488, 492 (2002).

In light of the undisputed facts in this case, including Arambarri's status prior to termination as a non-classified, at-will employee, and including the fact that this is not a wrongful termination lawsuit, Arambarri should be treated as an ordinary citizen in this lawsuit as opposed to an individual with special standing or unique status. Arambarri is not disputing that he was a non-classified, at-will employee, and he is not disputing that Director Armstrong had the authority to terminate his appointment with the concurrence of the Board. Furthermore, he is not disputing that Director Armstrong terminated his appointment. Arambarri has conceded that he is merely arguing Director Armstrong should have kept seven regional directors in place at all times and the concurrence Director Armstrong received from the Board for the elimination of four of those positions was insufficient. (Tr. Vol. I, p. 19, Ll. 7-10; p. 20, Ll. 9-11; p. 23, Ll. 3-6). As such, in light of Arambarri's basis for this lawsuit, he lacks standing.

C. ARAMBARRI'S APPEAL SHOULD BE VACATED DUE TO MOOTNESS AND THE ABSENCE OF REDRESSABILITY.

Related to Arambarri's lack of standing is mootness and the absence of redressability in this case. "A case is moot if it presents no justiciable controversy and a judicial determination will have no practical effect upon the outcome." *Euclid Ave. Trust v. City of Boise*, 146 Idaho

306, 310, 193 P.3d 853, 857 (2008). "Mootness . . . applies when a favorable judicial decision would not result in any relief. This Court may only review cases in which a judicial determination will have a practical effect on the outcome." *Fenn v. Noah,* 142 Idaho 775, 779, 133 P.3d 1240, 1244 (2006). With respect to redressability, a plaintiff must prove that there is a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury. *Troutner v. Kempthorne,* 142 Idaho 389, 391, 128 P.3d 926, 928 (2006).

As previously indicated, a ruling in Arambarri's favor would not redress the claimed injury. Such a ruling would simply have no practical effect upon the outcome. As a former at-will employee, Arambarri is not in a position to force Director Armstrong to reappoint him as a regional director, regardless of this Court's findings. If judicial action were to require Director Armstrong to re-establish the positions of four additional regional directors, such regional directors would nevertheless be chosen by Director Armstrong and would serve at the pleasure of Director Armstrong, in accordance with Idaho Code § 56-1002(3). Consequently, it would be impossible to force Director Armstrong to reappoint Arambarri, since Arambarri had been at-will employee while serving as regional director, and Arambarri has not alleged that he was terminated wrongfully. See *Thompson v. City of Lewiston*, 137 Idaho 473, 477, 50 P.3d 488, 492 (2002).

The issue of redressability was addressed in *Knox v. State ex rel. Otter*, 148 Idaho 324, 336-37, 223 P.3d 266, 278-79 (2009). In *Knox*, the plaintiffs alleged that if the Idaho statutes permitting video gaming machines at the Fort Hall Indian Reservation were deemed unconstitutional pursuant to their declaratory judgment action, the machines would be removed from the casino and their video gaming addiction would be redressed. *Id.* at 336, 223 P.3d at

278. This Court disagreed and held that a favorable judgment for the plaintiffs would not ensure that the addictive gaming machines would be removed from the casino, and the Court also held that the Court would not be able to ensure that the plaintiffs' harms would be redressed. *Id.* at 336-37, 223 P.3d at 278-79. Similarly, with respect to Arambarri's situation, even if this Court were to interpret Idaho Code § 56-1002(3) as requiring a specific number of distinct regional directors, this Court is not in a position to force Director Armstrong to re-appoint Arambarri as regional director, since Arambarri was a non-classified, at-will employee.

In light of the outcome for Arambarri being unaffected by any judicial determination in this case, this appeal should be vacated in light of mootness and the absence of redressability.

D. THE DISTRICT COURT DID NOT ERR IN FINDING THAT THERE WAS NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND THAT DIRECTOR ARMSTRONG WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

As previously discussed, it is appropriate to uphold the district court's order and dismiss Arambarri's appeal due to his lack of standing, as well as mootness and the lack of redressability. However, if this Court reaches the merits underlying this case concerning whether summary judgment is appropriate, Director Armstrong respectfully requests that this Court uphold the district court's order.

Summary judgment is appropriate in this case because the pleadings and affidavits "show that there is no genuine issue as to any material fact" and that Director Armstrong "is entitled to a judgment as a matter of law." I.R.C.P. 56(c). Furthermore, the lack of material disputed facts case makes this case almost entirely a question of law, making a trial unnecessary and inappropriate.

The district court correctly emphasized that there is no dispute that Arambarri was an at-will employee while serving as regional director and that he served at the pleasure of Director Armstrong with the concurrence of Board, pursuant to Idaho Code § 56-1002(3). (R. Vol. I, p. 171).

The district court was also correct in finding that Director Armstrong complied with this statute when he "presented his decision regarding the abolishment of the positions on May 21, 2009, and obtained the concurrence of the Board." (R. Vol. I, p. 172). As the district court noted, the affidavit of Director Armstrong as well as the affidavits of the members of the Board "indicate the Board concurred with the Director's decision regarding the elimination of the Plaintiff's position." (R. Vol. I, p. 24, para. 12; pp. 134-151; p. 172). The district court also observed that the authority of the Board is merely advisory under Idaho Code § 56-1005(10). (R. Vol. I, p. 171). Although Arambarri disagreed with this finding (Appellant's Brief, pp. 15-16), his argument was not supported by the facts or by the law. Furthermore, Arambarri's disagreement with the district court regarding the advisory role of the Board is not germane to this case.

Notwithstanding all of the undisputed evidence from Board members and from Director Armstrong clearly indicating that concurrence of the Board occurred (R. Vol. I, pp. 134-151 & p. 172), as well as the absence of any objections from Board members in the minutes of the Board's meeting on May 21, 2009 (R. Vol. I, p. 56), Arambarri argues in Appellant's Brief that concurrence did not occur because it did not occur in some specific way. (Appellant's Brief, pp. 17-18). The existence of concurrence in this case cannot be disputed in light of the contents of the aforementioned affidavits from members of the Board and from Director Armstrong, as well

as the discussion in the minutes from the Board's meeting on May 21, 2009. In effect, Arambarri is attempting to redefine the word "concurrence" to a narrow definition requiring such formalities as an official request for permission, a formal discussion, and a formal vote. (Appellant's Brief, p. 18). As indicated in the affidavits from the members of the Board, such formalities are not required by the statute or contemplated by the members of the Board to demonstrate their agreement with a decision by Director Armstrong.

In their affidavits, Richard Roberge, M.D., Dan Fuchs, Darrell Kerby, Janet Penfold, and Tom Stroschein, a majority of the voting members of the Board, leave no room for doubt that they concurred with Director Armstrong's decision when he presented the matter to them. Each of them wrote in their respective affidavits,

> 5. I did not object to the Director's action [in the meeting of the Board on May 21, 2009], nor did any of the other members of the Board object to this action. None of the members of the Board called for a vote on the proposed action. It is the practice of the Board for members to express objections or concerns if they do not concur with an action or plan promulgated by the Director. I did not feel it was necessary to vote on the Director's action in this matter to show my concurrence.
> 6. When the Director reported that he was cutting four Regional Directors to reduce the personnel budget, I agreed with the action. If I had not concurred with the action, I would have voiced my objection for the record and, had it become necessary, would have made a motion to that effect. I continue to concur with the Director's decision to cut four of the seven Regional Directors. Had a members of the Board called for a vote on the action, I would have voted in support of the Director's action.
> 7. It is not unusual for the Board to concur with a recommendation from the Director without formally voting on the item. Our concurrence is evidenced by the fact that we do not choose to take a vote. As Board members, we are at liberty to seek a vote if we determine a vote is necessary.
> 8. I am aware that Idaho Code § 56-1002(3) indicates Regional Directors serve at the pleasure of the Director, with the concurrence of the Board. The Director reported his plan concerning the Regional Directors to the Board and we concurred. As a member of the Board, it is my opinion and understanding that a vote by the Board is not necessary to demonstrate concurrence under Idaho Code § 56-1002(3).

> . . . .
> 10. My concurrence with the Director's decision to cut the positions of four Regional Directors occurred during the Board meeting on May 21, 2009, and I continue to concur with that decision.

(R. Vol. I, pp. 134-148).

Director Armstrong also corroborated in his affidavit the concurrence of the Board,

> 12. As a non-voting member of the Board, I attended the Board meeting on May 21, 2009. All members of the Board were present for the meeting. . . . During that meeting, I presented my decision to the Board to abolish the positions of four of the Regional Directors. When I presented this decision to the Board, the members concurred by not objecting.

(R. Vol. I, p. 24).

After reviewing affidavits and other documents, and after hearing from counsel in the oral argument, the district court found that Director Armstrong complied with the concurrence requirement in Idaho Code § 56-1002(3) by obtaining "actual concurrence of the Board members." (R. Vol. I, p. 172). In light of this concurrence, the district court held "there is no issue of material fact regarding the Board's concurrence." (R. Vol. I, p. 172). This finding by the district court is consistent with the official as well as the generally accepted meaning of concurrence.

In addition to finding that Arambarri was an at-will employee and that Director Armstrong obtained the concurrence of the Board regarding the elimination of Arambarri's position, as required by Idaho Code § 56-1002(3), the district court also found that the "clear meaning and language" of Idaho Code § 56-1002(3) gave Director Armstrong "the statutory authority to abolish the Plaintiff's regional director position." (R. Vol. I, p. 174). The district court wrote,

> Furthermore, there is nothing in the plain language of IC § 56-1002(3) to indicate that each individual substate administrative region must be headed by an *individual* regional director. While that statute does mandate that the number of regions be set by the governor, there is no provision requiring a specific number of regional directors. Although four of the seven regional director positions were eliminated, the seven regions remain intact and are still headed by regional directors, although the positions have been consolidated. It is well-established that the clearly expressed intent of the legislature must be given effect, thus leaving no occasions for construction where the language of a statute is plain and unambiguous. Thus, according to the plain meaning of the statute, the abolishment of the Plaintiff's position as regional director was not in contravention of the law, especially in consideration of the fact that each of the seven required substate administrative regions remain intact, with a regional director heading each region, and in further consideration that the Board of Health and Welfare concurred with the decision to abolish these positions.

(R. Vol. I, p. 173). Of note, if the district court had found otherwise, the Director's authority may have been unduly curtailed, in violation of Idaho Code § 56-1002(3). This statute grants broad authority to the Director with respect to the appointing and terminating of regional directors. Arambarri has sought to reduce this broad authority through judicial action.

Arambarri argued at length in Appellant's Brief against the district court's order, calling the court's findings "clear error" (Appellant's Brief, p. 5), "illogical" (p. 5), "confused" (p. 6), and "contrary to the law" (p. 15), and that the district court "misses the point." (p. 15). Notwithstanding these allegations concerning the district court's opinion, and notwithstanding Arambarri's lengthy discussion of the legislative history of Idaho Code § 56-1002(3), Arambarri is unable to point to any legal authority or legislative history that contradicts the findings of the district court. For example, Arambarri speculates at length in Appellant's Brief that the legislature envisioned seven separate individuals for each of the seven regions established by the Governor, but there is nothing in all of the legislative history or in case law supporting this speculation. Although the legislative history contains lengthy discussions of the benefits of

decentralization through separate regions, the legislative history is completely devoid of any requirement of a separate regional director in each region.

The district court was unwilling to rewrite Idaho Code § 56-1002(3) by inserting Arambarri's interpretation into the existing statute or its legislative history. But rather, the district court found that "there is nothing in the plain language of IC § 56-1002(3) to indicate that each . . . region must be headed by an *individual* regional director." (R. Vol. I, p. 173). The district court noted "it is well-established that the clearly expressed intent of the legislature must be given effect, thus leaving no occasion for construction where the language of a statute is plain and unambiguous." (R. Vol. I, p. 173). Arambarri argues to the contrary, assuming that the creation of seven regions logically requires seven separate individuals to head those regions. (Appellant's Brief, p. 6). This leap of logic is understandable but not supportable, and the district court correctly found that "there is no provision requiring a specific number of regional directors." (R. Vol. I, p. 173).

Arambarri's lawsuit is arguably requesting that this Court violate the separation of powers doctrine by seeking to insert words into Idaho Code § 56-1002(3). Article II, § 1 of the Idaho Constitution provides for the separation of powers:

> Departments of government: The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

Article V, § 2 of the Idaho Constitution provides for the judicial powers:

> Judicial power--where vested. The judicial power of the state shall be vested in a court for the trial of impeachments, a Supreme Court, district courts, and such other courts inferior to the Supreme Court as established by the legislature. The

> courts shall constitute a unified and integrated judicial system for administration and supervision by the Supreme Court. The jurisdiction of such inferior courts shall be as prescribed by the legislature. Until provided by law, no changes shall be made in the jurisdiction or in the manner of the selection of judges of existing inferior courts.

Article V, § 13 of the Idaho Constitution provides for the role of the Legislature as it concerns the courts:

> Power of legislature respecting courts. The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government; but the legislature shall provide a proper system of appeals, and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the courts below the Supreme Court, so far as the same may be done without conflict with this Constitution, provided, however, that the legislature can provide mandatory minimum sentences for any crimes, and any sentence imposed shall be not less than the mandatory minimum sentence so provided. Any mandatory minimum sentence so imposed shall not be reduced.

This Court has clarified that this separation of powers applies to each branch,

> Just as Article II of the Idaho Constitution prohibits the Legislature from usurping powers properly belonging the judicial department, so does that provision prohibit the judiciary from improperly invading the province of the Legislature.

In re SRBA Case No. 39576, 128 Idaho 246, 255, 912 P.2d 614, 623 (1995). Although Arambarri is requesting that this Court invade "the province of the Legislature," this Court may easily avoid this quandary by simply applying the statute as written and upholding the district court's order.

If Arambarri continues to desire to have language inserted into the statute requiring a separate individual regional director in each region, the appropriate avenue for him to pursue this effort is through legislative action rather than judicial action. This Court may interpret the law but not rewrite it. "The courts have the authority to interpret legislation, but if law, so interpreted, is to be changed, that is a legislative, not a judicial function." *Twin Falls County v.*

Cities of Twin Falls and Filer, 143 Idaho 398, 406, 146 P.3d 664, 672 (2006) (citing *Powers v. Canyon County,* 108 Idaho 967, 703 P.2d 1342 (1985); *Idaho Gold Dredging Co. v. Balderston,* 58 Idaho 692, 78 P.2d 105 (1938); *In Re Speer,* 53 Idaho 293, 300, 23 P.2d 239, 241 (1933)).

Fortunately, the language of the statute is sufficiently plain and unambiguous that this Court is able to examine a "statute's literal words" and "give effect to the statute as written, without engaging in statutory construction." *Twin Falls County v. Cities of Twin Falls and Filer,* 147 Idaho 398, 146 P.3d 664, 668 (Idaho 2006) (citing *State v. Rhode,* 133 Idaho 459, 462, 988 P.2d 685, 688 (1999) and *State v. Burnight,* 132 Idaho 654, 659, 978 P.2d 214, 219 (1999)). Since Idaho Code § 56-1002(3) is unambiguous, this Court should apply the plain meaning of the statute as written – that a regional director is an at-will employee who serves at the pleasure of the Director with the concurrence of the Board, that the Governor establishes the regions, that the regions are headed by regional directors, and that the Legislature did not require a specific number of regional directors.

Notwithstanding the absence of ambiguity in the statute, Arambarri seeks to have this Court engage in statutory construction and dissect the legislative history. (Appellant's Brief, pp. 5-6). This Court held in *Twin Falls County v. Cities of Twin Falls and Filer* that it is inappropriate to engage in such an exercise in the absence of ambiguity, finding as follows: "where statute is clear, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the Legislature." 143 Idaho 398, 402, 146 P.3d 664, 668 (2006) (citing *State v. Hart,* 135 Idaho 827, 829, 25 P.3d 850, 852 (2001)). This Court also held, "Where a statute is unambiguous, statutory construction is unnecessary and

courts are free to apply the plain meaning." *Id.* (citing *Martin v. State Farm Mut. Auto. Ins. Co.*, 138 Idaho 244, 246, 61 P.3d 601, 603 (2002)).

This Court has also emphasized the following: "Ambiguity is not established merely because the parties present differing interpretations to the court." *Id.* (citing *Rim View Trout Co. v. Higginson,* 121 Idaho 819, 823, 828 P.2d 848, 852 (1992)). Arambarri is attempting to create ambiguity where none exists. Although Arambarri's desire to promote his interpretation of the statute is understandable based on his having lost his employment, his interpretation is incorrect and incompatible with the plain meaning of the statute, and his request for judicial intervention should be denied. Only in cases involving ambiguous language is it appropriate for this Court to engage in statutory construction and ascertain the legislative intent. *Rhode,* 133 Idaho at 462, 988 P.2d at 688. Since Idaho Code § 56-1002(3) is unambiguous, it is unnecessary and inappropriate to engage in statutory construction.

The district court and Director Armstrong have not resorted to speculating on the level of Director Armstrong's authority found in Idaho Code § 56-1002(3), but rather, Director Armstrong exercised his authority in compliance with the plain meaning of the statute, and the district court found that Director Armstrong had exercised his authority appropriately. (R. Vol. I, p. 173). Also, Director Armstrong and the district court both noted that the three remaining regional directors continue to head the seven regions, in compliance with Idaho Code § 56-1002(3). (R. Vol. I, p. 24, para. 10; p. 173).

In concluding that summary judgment is appropriate in favor of Director Armstrong, the district court demonstrated a clear understanding of the undisputed and undisputable facts, including the fact that Arambarri was an at-will employee, the fact that Director Armstrong

terminated Arambarri when he eliminated his position, the fact that the Board concurred with Director Armstrong's decision, the fact that the seven regions established by the Governor are still in place, and the fact that those seven regions are currently headed by the remaining three regional directors. The district court used sound logic in its decision and accepted the clear meaning of Idaho Code § 56-1002(3). The district court simply rejected Arambarri's argument that Idaho Code § 56-1002(3) requires a certain number of individual regional directors.

Arambarri's focus in his Complaint and in Appellant's Brief is almost entirely on the theory that there must be seven separate regional directors at all times. Director Armstrong and the district court are aware of Arambarri's argument, but they do not accept it or agree with it. In fact, the imposition of Arambarri's theory onto Director Armstrong would actually strip Director Armstrong of his statutory authority over the appointment and termination of regional directors. (Tr. Vol. I, p. 14, L. 2 – p. 15, L. 18). The Legislature would not have had the intent to limit the Director's authority in this fashion.

As counsel for Director Armstrong indicated during oral argument, there are many synonyms describing the authority of Director Armstrong over regional directors under Idaho Code § 56-1002(3), and his choice of any of the synonyms does not lessen his authority or change the outcome. (Tr. Vol. I, p. 36, Ll. 3-36). These synonyms include, but are not limited to, the following: removing a regional director, cutting/eliminating/abolishing a regional director position, rescinding an appointment of a regional director, terminating/laying off a regional director, and requiring a regional director to retire. The Legislature did not require the Director to choose specific language when terminating a regional director. The Legislature merely included in the statute, "Each substate administrative region shall be headed by a regional

director who shall be appointed by and serve at the pleasure of the director with the concurrence of the board." Idaho Code § 56-1002(3). The plain meaning of this statute necessarily grants liberty to Director Armstrong to choose how to appoint and how to terminate regional directors, as long as he obtains the concurrence of the Board, which he did obtain.

Arambarri raises several additional de minimis issues in his brief that are not germane to the district court's determination or to the current issues before this Court. For example, Appellant's Brief argues that the Board is not merely advisory, notwithstanding the plain meaning of Idaho Code § 56-1002(3) and § 56-1005(10). (Appellant's Brief, pp. 15-16). In light of Director Armstrong having obtained the concurrence of the Board, it is unnecessary to delve into the general authority of the Board itself.

Another issue Arambarri raises that is irrelevant to the current case is the difference between a regional director heading a region and a regional director serving a region. (Appellant's Brief, pp. 14-15). Although there may be a technical difference between those two concepts, that discussion does not have any bearing on the issue before this Court at this time. In any event, the district court found, "the seven regions remain intact and are still headed by regional directors." (R. Vol. I, p. 173).

Arambarri raises in his brief an issue regarding the role and duties of a regional director. (Appellant's Brief, pp. 13-14). However, the question as to the nature of the various duties of a regional director is not at issue in this case.

The district court did not err when it found that there is no genuine issue as to any material fact and that Director Armstrong is entitled to a judgment as a matter of law. As previously discussed, the facts in this case are straightforward and virtually undisputed. Even

Arambarri conceded that this case involves "mostly a question of law." (Tr. Vol. I, p. 21, Ll. 4-5). Furthermore, as demonstrated above, the district court properly adhered to the plain meaning of Idaho Code § 56-1002(3) in its ruling.

E. THE DISTRICT COURT DID NOT ERR IN ITS RULINGS REGARDING THE PARTIES' AFFIDAVITS.

The district court recognized that making a ruling on the parties' motions to strike certain affidavits is an issue of discretion when determining whether the affidavits comply with IRCP 56(c). (R. Vol. I, pp. 163-165). Director Armstrong respectfully requests that this Court determine that, when the district court made its ruling on the motions to strike, the district court acted within "the boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it," and that the district court "reached its decision by an exercise of reason." *Baxter v. Craney,* 135 Idaho 166, 169, 16 P.3d 263, 266 (2000) (citing *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.,* 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991)).

The district court appropriately found that paragraph 19 of Arambarri's affidavit (R. Vol. I, pp. 103-106) "is not in compliance with the standards governing supporting and opposing affidavits," and that it "is a legal argument and conclusion and therefore not within the 'personal knowledge' of Mr. Arambarri." (R. Vol. I, p. 165). Paragraph 19 of Arambarri's affidavit clearly pertained to the ultimate legal issue in this case rather than pertaining to any fact. Arambarri did not challenge this ruling. (Appellant's Brief, pp. 19-20).

The district court correctly granted Director Armstrong's request to strike the entirety of the Affidavit of Carolyn Ruby (R. Vol. I, pp. 107-119), pursuant to Director Armstrong's motion

(R. Vol. I, pp. 155-157), "as that affidavit is not admissible due to its irrelevance to the issues before this Court." (R. Vol. I, p. 165). Arambarri did not challenge this finding. (Appellant's Brief, pp. 19-20).

The district court was also correct in denying Arambarri's motions to strike the affidavits of Director Armstrong and David Taylor, finding "there is nothing contained in either affidavit that violates the standards set forth in Rule 56(e)," and that "these affidavits set forth such facts as would be admissible in evidence." (R. Vol. I, p. 165). Furthermore, the district court found that Director Armstrong's affidavit was undisputed. (R. Vol. I, p. 172). Arambarri sets forth his disagreement with the district court's findings, but the basis for the disagreement is unsupported, and he has not alleged or demonstrated that the district court abused its discretion. (Appellant's Brief, pp. 19-20).

With respect to the contents of the affidavits of the members of the Board (R. Vol. I, pp. 134-151), these affidavits are undisputed and were not included in Arambarri's motion to strike. (R. Vol. I, pp. 97-100; Appellant's Brief, pp. 19-20).

In light of all of the pertinent contents of the record, it is clear that the district court did not abuse its discretion in ruling on the parties' motions to strike various affidavits.

F. DIRECTOR ARMSTRONG IS ENTITLED TO AN AWARD OF ATTORNEY FEES ON APPEAL.

Director Armstrong requests attorney fees on appeal pursuant to Idaho Code § 12-121. "Under that statute, attorney fees will be awarded to the prevailing party when this Court is left with the abiding belief that the appeal was brought or pursued frivolously, unreasonably or without foundation." *Hartman v. United Heritage Property and Cas. Co.*, 141 Idaho 193, 200,

108 P.3d 340, 347 (2005). Attorney fees may be awarded to the prevailing party under Idaho Code § 12-121 "when the court, in its discretion, is left with the abiding belief that the case was brought, pursued, or defended frivolously, unreasonably, or without foundation." *Michalk v. Michalk*, 148 Idaho 224, 235, 220 P.3d 580, 591 (2009). As shown, Arambarri's lawsuit is lacking in foundation and his appeal stemming from the district court's ruling is unreasonable.

Director Armstrong also seeks an award of attorney fees under Idaho Code § 12-117. Under that statute, Director Armstrong is entitled to an award of attorney fees if he prevails and if Arambarri acted without a reasonable basis in law or fact in bringing the appeal. As further discussed herein, the law and the facts do not provide Arambarri a reasonable basis to bring this appeal. The facts are essentially undisputed, and Arambarri has no reasonable basis for changing the plain meaning of the law.

There is no dispute in this case that Arambarri was a non-classified, at-will employee while serving as a regional director. There is also no dispute that Arambarri lost his employment when Director Armstrong eliminated his position. Furthermore, Arambarri has acknowledged that this case is not a wrongful termination case, but rather a case seeking to change the plain meaning of Idaho Code § 56-1002(3).

Arambarri, notwithstanding his lack of standing and his inability to retain his position regardless of the findings of this Court, has brought this appeal seeking an unnecessary involvement by this Court, attempting to have this Court rewrite a statute that is already plainly written, a statute that has no need of clarification. As the district court noted, there is nothing in the plain language of Idaho Code § 56-1002(3) supporting Arambarri's contention that "each individual substate administrative region must be headed by an *individual* regional director." (R.

Vol. I, p. 173). The district court correctly found that "the seven regions remain intact and are still headed by regional directors, although the positions have been consolidated." (R. Vol. I, p. 173).

Arambarri has pursued this litigation and appeal in an effort to insert and squeeze language into Idaho Code § 56-1002(3) requiring a certain number of regional directors. Such an effort presents a classic case that is pursued without foundation, a case that has been pursued frivolously, unreasonably, and without a basis in law or fact. As such, an award of attorney fees to Director Armstrong is justified under Idaho Code § 12-121 and Idaho Code § 12-117. At a time when the economy is causing the state budget to shrink each year, pursuing an unreasonable action such as this against Director Armstrong not only wastes the state's and court's resources, but it seeks to cloud the plain meaning of Idaho Code § 56-1002(3) and to overturn the long-established status of a non-classified, at-will employee. Arambarri's effort to divert the focus from his at-will status does not change the fact that he served at the pleasure of Director Armstrong. Also, his disagreement with Director Armstrong's interpretation of Idaho Code § 56-1002(3) does not transform his lack of standing into a special status with standing, and does not cause the statute to be rewritten as he wishes. This existentialist approach to the interpretation of a statute would neuter the plain meaning doctrine and render it useless.

The Affidavit In Support of Award of Attorney Fees is attached hereto as Exhibit A. This affidavit includes a description and itemization of the hours spent by Mark V. Withers, Deputy Attorney General, in defending Director Armstrong in this matter.

IV. CONCLUSION

Director Armstrong respectfully requests that this Court find that Arambarri lacks standing to pursue this case as a former non-classified, at-will employee who was terminated and then sought to force Director Armstrong to adopt a particular interpretation of Idaho Code § 56-1002(3) that is contrary to the plain meaning of the statute. Director Armstrong further requests that this Court uphold the district court's Memorandum Decision and Order wherein the district court granted Director Armstrong's motion for summary judgment. The district court's order is justified because the clear meaning and language of Idaho Code § 56-1002(3) gave Director Armstrong, in his capacity as the Director of the Idaho Department of Health and Welfare, the authority to abolish the regional director position of Robert Nicholas Arambarri. As demonstrated in this brief and in the district court's order, there is no genuine issue as to any material fact in this case and Director Armstrong is entitled to a judgment as a matter of law. Finally, Director Armstrong is seeking an award of attorney fees due to the lack of any basis in law or fact supporting Arambarri's appeal, and in light of the appeal having been pursued frivolously, unreasonably, and without foundation.

DATED this 30th day of June, 2011.

OFFICE OF THE ATTORNEY GENERAL

MARK V. WITHERS
DEPUTY ATTORNEY GENERAL

V. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of June, 2011, I mailed a true and correct copy of the foregoing instrument, Respondent's Brief, to each and every party affected thereby as follows:

DOUGLAS J. BALFOUR
Douglas J. Balfour, Chtd.
P.O. Box 490
230 W. Lewis
Pocatello, ID 83204

- [x] U.S. Mail
- [ ] Hand Delivery, Personal Service
- [ ] Certified Mail, Return Receipt Req'd

RICHARD ARMSTRONG
Director, Department of Health and Welfare
P.O. Box 83720
Boise, ID 83720-0036

- [x] U.S. Mail
- [ ] Hand Delivery
- [ ] Certified Mail, Return Receipt Req'd

Mark V. Withers
Deputy Attorney General

IN THE SUPREME COURT OF THE STATE OF IDAHO

ROBERT NICHOLAS ARAMBARRI, **Plaintiff/Appellant,** **vs.** **RICHARD ARMSTRONG, DIRECTOR OF IDAHO DEPARTMENT OF HEALTH AND WELFARE,** **Defendant/Respondent.**	**Supreme Court Docket No. 38351-2010** **Bannock County Case No. 2010-347-OC**

AFFIDAVIT OF MARK V. WITHERS IN SUPPORT OF AWARD OF ATTORNEY'S FEES

Appeal from the District Court of the Sixth Judicial District of the State of Idaho for Bannock County

Honorable Peter D. McDermott, District Judge, Presiding

Douglas J. Balfour
Attorney at Law
PO Box 490
Pocatello, Idaho 83204
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Attorney for Appellant

Lawrence G. Wasden
Attorney General, State of Idaho

Mark V. Withers
Deputy Attorney General
150 Shoup Ave., Ste. 3
Idaho Falls, Idaho 83402
Telephone: (208) 287-7450

Attorney for Respondent

EXHIBIT NO. A

STATE OF IDAHO)
: ss.
County of Bonneville)

Mark W. Withers, being first duly sworn on oath, does hereby state:

1. I am an attorney licensed to practice before the courts of the State of Idaho. I am a Deputy Attorney General for Lawrence G. Wasden, Attorney General for the State of Idaho.

2. The matters set forth herein are based upon my personal knowledge, except where stated to be upon information and belief.

3. Briefly summarized, my background is as follows: I have been licensed to practice law in Idaho since September 20, 1990. I graduated from law school in April 1990. I clerked for Byron Johnson on the Idaho Supreme Court, worked in private practice eight years, served as a judge advocate general in the Air Force for seven years, and served as a deputy attorney general in Idaho for five years.

4. In my capacity as an attorney in private practice I have become very familiar with the market rate for professional legal services in this state and the amount by which a market rate may vary depending upon the particular attorney's experience and qualifications. This familiarity has been obtained in several ways, including trying numerous cases and observing billable rates being requested and awarded in numerous matters.

5. It is the policy of the Office of the Attorney General (OAG) to seek an award of attorney fees whenever its client is a prevailing party in litigation. Based upon a study of the market rates charged by local firms and fee awards, the OAG established several years ago a reasonable hourly rate of $150.00 for attorneys with more than twenty years experience.

6. The following is an accurate itemization of time spent in the above-entitled matter. This record was made contemporaneously with the work performed. The time is recorded in six-minute increments (or increments of 1/10 of an hour). The first section sets forth the time spent prior to the appeal. The second section sets forth the time spent on responding to the appeal.

2/16/10	Received assignment - discussion with central office	.3
2/17/10	tw other DAG for ideas	.3
2/17/10	Notice of Appearance	.1
2/25/10	Response to requests for admission	.3
3/8/10	Amended response to requests for admission	.8
3/10/10	Reviewed notes	.2
3/11/10	Answered Complaint	.7
3/31/10	Discussion with central office re: strategy	.3
3/31/10	Reviewed notice re: judge assignment	.1
3/31/10	Reviewed copy of "annual report" regarding issues.	.3
4/1/10	Research on issues	.2
4/1/10	Prepared motion and order	.5
4/2/10	Discussion with central office re: hearing	.1
4/5/10	Reviewed motion to determine the sufficiency of answers	.1
4/7/10	Objection to motion/and filing of second amended response	.8
4/15/10	Status conference in Pocatello, and travel	2.4
4/15/10	email re: results of status conference:	.1

4/26/10	Filed motion to correct the minute entry and order	.2
4/30/10	Reviewed status of case	.3
4/30/10	Prepared third amended response to requests for admission	2.1
5/3/10	Worked on drafting discovery response	.7
5/5/10	Prepared discovery response	1.7
5/10/10	Discovery	4.2
5/11/10	Discovery	.3
5/12/10	Worked on discovery	.7
5/13/10	Worked on discovery	1.5
5/14/10	Coordinated discovery with central office	1.0
5/17/10	coordinating mtg w/ Doug Balfour's office to meet with P	.4
5/17/10	Discovery request	1.2
5/18/10	Prepared for meeting with P, drove to Pocatello for mtg travel: meeting: prep.	 2.0 1.2 .6
5/19/10	Finalized discovery request – sent out.	.5
6/16/10	Reviewed discovery request/worked on motion to dismiss/motion for summary judgment	6.0
6/21/10	Reviewed responses from plaintiff to our discovery request; and reviewed plaintiff's discovery request, coordinating through Boise.	.3
6/22/10	Worked on MSJ	2.6
6/24/10	Worked on MSJ	2.1
6/25/10	Worked on MSJ	2.9
6/28/10	Documents for MSJ and discovery	.4

7/1/10	Misc MSJ and discovery	.4
7/7/10	Finalized draft motion (MSJ), memo, exhibits	1.7
7/8/10	Discovery response prep	1.9
7/9/10	Discovery response prep	1.9
7/12/10	Discovery response prep	7.3
7/13/10	Discovery response prep	4.5
7/19/10	Supplemental discovery	.3
7/22/10	MSJ work	5.7
7/23/10	MSJ work	.8
7/30/10	Received via fedex the affidavit from the Director. Checking on David Taylor's	.1
8/2/10	Prepared MSJ paperwork for filing/serving:	.5
8/3/10	Following up on Dave Taylor's affidavit for the MSJ	.2
8/4/10	MSJ finalizing	.3
8/4/10	Letter from Doug Balfour to supplement Request No. 3; forwarded to Jeanne, and prepared letter for D	.3
8/5/10	Finalized the MSJ and sent it	.8
9/3/10	Provided update to client	.5
9/20/10	MSJ response	1.0
9/21/10	MSJ response	5.0
9/22/10	MSJ response	3.2
9/23/10	MSJ response	5.0
9/24/10	MSJ response	.3

9/27/10	MSJ response	7.5
9/28/10	MSJ response	1.7
9/29/10	MSJ response	5.8
9/30/10	MSJ hearing	3.3
11/2/10	Checking on status of MSJ opinion	.1
11/15/10	Received MSJ decision, dismissing case. Forwarded it to client.	.3

Pre-Appeal Total Hours: 100.9 hours

12/3/10	Received, reviewed, and forwarded Plaintiff's Notice of Appeal	.5
12/3/10	Prepared notice of designation of documents on appeal	1.3
12/6/10	Request for additional documents for appeal and motion/order for transcript	.6
1/19/11	Tw clerk re: question of spelling	.3
1/21/11	Reviewed notice that the record or transcript is complete	.1
2/22/11	Received and reviewed transcript on appeal, and record	.2
2/25/11	Tw Doug Balfour re: augmentation of record	.2
2/25/11	Tw clerk, re: augmentation	.3
2/25/11	Reviewed Amended Notice of Appeal	.1
2/27/11	Worked on response to Notice of Appeal	.4
2/27/11	Preparation of Response to Amended Notice of Appeal	.6
5/9/11	Received due date for appellant's brief: June 9, 2011.	.1
6/6/11	Received and reviewed appellate brief	.3
6/6/11	Forwarded brief to client	.2

6/7/11	Worked on Respondent's Brief	.5
6/8/11	Worked on Respondent's Brief	2.7
6/9/11	Worked on Respondent's Brief	2.8
6/10/11	Worked on Respondent's Brief	3.2
6/13/11	Worked on Respondent's Brief	1.5
6/17/11	Worked on Respondent's Brief	.8
6/22/11	Worked on Respondent's Brief	5.4
6/23/11	Worked on Respondent's Brief	4.9
6/25/11	Worked on Respondent's Brief	1.1
6/27/11	Worked on Respondent's Brief	2.7
6/28/11	Worked on Respondent's Brief	3.0

Total Hours on Appeal: 31.8
Attorney Fees for Hours on Appeal: 31.8 hrs x $150/hr = $4,770.00

Overall total attorney hours pre appeal and post appeal: 132.70 (31.8 + 100.9)

7. I declare under penalty of perjury under the laws of the State of Idaho that the foregoing is true and correct.

MARK V. WITHERS

SUBSCRIBED AND SWORN to before me this 30th day of June 2011.

BARBARA J. MORTENSEN NOTARY PUBLIC STATE OF IDAHO

Barbara J. Mortensen
Notary Public for Idaho
My Commission Expires: 11-19-2013

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of June 2011, I mailed a true and correct copy of the foregoing instrument, Respondent's Brief, to each and every party affected thereby as follows:

DOUGLAS J. BALFOUR
PO Box 490
Pocatello ID 83204

- [x] U.S. Mail
- [ ] Hand Delivery, Personal Service
- [ ] Certified Mail, Return Receipt Req'd

RICHARD ARMSTRONG
Department of Health and Welfare
PO Box 83720
Boise ID 83720-0036

- [x] U.S. Mail
- [ ] Hand Delivery
- [ ] Certified Mail, Return Receipt Req'd

MARK V. WITHERS