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Hammer v. City of Sun Valley Appellant's Reply Brief Dckt. 43079

IN THE SUPREME COURT OF IDAHO

SHARON R. HAMMER,
Appellant-Plaintiff,

v.

THE CITY OF SUN VALLEY, IDAHO, an Idaho municipal corporation; NILS RIBI; DeWAYNE BRISCOE,
Respondents-Defendants.

No. 43079

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fifth Judicial District, State Of Idaho,
in and for the County of Blaine
HONORABLE JONATHAN BRODY, Presiding District Judge
Case No. CV-2012-479

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RE-STATEMENT OF THE CASE

Ms. Hammer's claims under the IPPEA are simple. She made numerous harassment complaints against Defendant Ribi, which were both a violation of formally adopted Sun Valley personnel policies and federal discrimination and retaliation laws, and was subject to several retaliatory "adverse actions" for doing so, including being terminated and suffering through a very public "bad faith" criminal referral by the Briscoe Administration. The combination of her termination and the criminal allegations have ruined her once outstanding professional career.

During the extensive litigation before the District Court, numerous issues arose and were decided by the District Court, the most important being that Ms. Hammer's statutory IPPEA claims were dismissed at summary judgment based on a waiver assertion.

Waiver Of Statutory IPPEA Claims

The Respondents have failed to respond to at least three substantial bases for why a finding of waiver of Ms. Hammer's statutory IPPEA claims was improper in this case.

First, substantial federal precedent and other state precedent have come to the conclusion that waiver of statutory rights is against public policy, and thus *per se* prohibited. Likewise, this Court itself has provided precedential guidance in *Lee v. Sun Valley Co.*, 107 Idaho 976, 979, 695 P.2d 361 (Id. Sup.Ct. 1985) that Idaho and this Court recognize the inherent public policy

prohibition against individuals being required to waive their rights under Idaho statutes. The Respondents have failed to even mention *Lee v. Sun Valley Co.* in the Respondents' Brief.

Second, the Respondents have failed to acknowledge the U.S. Supreme Court's findings in *U.S. v. Quality Stores*, 134 S.Ct. 1395 (U.S. Sup.Ct. 2014) which defines "severance", as described in Ms. Hammer's Employment Agreement, as being payment for "service performed", not as settlement of other claims or liquidated damages. Instead, the Respondents have relied on a bastardized interpretation of this Court's ruling in *Parker v. Underwriters Laboratories*, 140 Idaho 517, 96 P.3d 618 (Id. Sup.Ct. 2004) in which this Court actually also defines "severance" as being for "past services rendered", not as settlement of other claims or liquidated damages[1]. The definition of "severance" as being solely for "past service rendered" was confirmed by this Court just recently in *Huber v. Lightforce USA, Inc.*, 2016 WL 824853, 6-8 (Id. Sup.Ct. 2016).

Third, the extensive disputes over the meaning and intent of the Supplemental Release and the Employment Agreement; the Briscoe Administration's conduct in "baiting and switching" whether Ms. Hammer must provide a release releasing "all claims against the City Of Sun Valley" (she didn't); and, the Briscoe Administration's payment of the "severance" funds by direct deposit into Ms. Hammer's bank account without notice - all require this Court to find that this is not one of those situations where there was a "voluntary, intentional relinquishment", or a "clear and unequivocal" waiver, of rights under the IPPEA, as Justice Burdick described in

[1] In *Parker v. Underwriters Laboratories*, the terminated employee received "enhanced" benefits if she signed a release, as opposed to only receiving the standard "severance" package if she did not. It was the "enhanced" benefits that were considered to be liquidated damages in settlement of other non-service related claims. Ms. Hammer did not receive any "enhanced" benefits in excess of the "severance" defined in the Employment Agreement which could be considered as compensation for waiving statutory rights, including rights under the IPPEA.

Knipe Land Co. v. Robertson, 151 Idaho 449, 259 P.3d 595 (Id. Sup.Ct. 2011).

Ms. Hammer's Post Termination Adverse Action Claims

Idaho Code § 6-2103 broadly defines what types of "adverse actions" subject government respondents to claims under the IPPEA beyond just "discharge". Even if Ms. Hammer waived claims related to conduct before her termination, nothing in *Idaho Code § 6-2103* exempts threatening or discriminatory conduct of government actors against a "whistleblower", after a "whistleblower" is terminated or quits, from being subject to liability under the IPPEA.

Judicial Estoppel For Making Pretext Claims

The District Court entered summary judgment against Ms. Hammer, *sue sponte*, based on judicial estoppel, because of Ms. Hammer's claims that she was not really terminated "without cause", but as a pretext for her having made harassment claims against Defendant Ribi, and in retaliation for filing the Original IPPEA Law Suit and a Complaint with the Idaho Human Rights Commission ("IHRC")/EEOC (the "IHRC/EEOC Complaint"). A pretext claim is part of the three prong burden shifting analysis under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (U.S. Sup.Ct. 1973)[2], which this Court has applied to IPPEA cases in *Van v. Portneuf Medical Center*, 147 Idaho 552, 558, 212 P.3d 982 (Id. Sup.Ct. 2009). In essence, the District Court entered summary judgment against Ms. Hammer for raising the same pretext claims that she was required to make under the third prong of the *McDonnell Douglas v. Green* test. The District Court failed to understand "pretext" under the *McDonnell Douglas v. Green* analysis.

[2] (1) The plaintiff must establish a *prima facie* case of retaliatory conduct for protected activity. (2) The burden then shifts to the defendant to produce evidence that there was a non-retaliatory reason for the adverse action. (3) The burden then shifts back to the plaintiff to prove the reason the defendant offers for the adverse action is a pretext for retaliatory conduct. See also *Curlee v. Kootenai County* (@ 396).

IPPEA Related Issues Raised By The Respondents On Appeal

In the Respondents' Brief, the Respondents raise three issues which were also raised before the District Court, but ignored[3]. The District Court, implicitly, denied all three claims.

Two of the issues relate to the second and third prongs of the burden shifting analysis in *McDonnell Douglas v. Green*, namely, the Respondents assert that a) Ms. Hammer's termination was for legitimate, non-retaliatory reasons[4], and, b) Ms. Hammer failed to prove her termination "without cause" was a pretext for terminating her in retaliation for her harassment claims against Defendant Ribi and for filing the Original IPPEA Law Suit and the IHRC/EEOC Complaint. However, this Court has made clear that the analysis of whether there was legitimate reason for the adverse action, and whether there was pretext, under the second and third prong of the *McDonnell Douglas v. Green* test, ***is not a summary judgment issue***, but is solely left for the trier of fact (i.e the jury) at trial (see *Curlee v. Kootenai County Fire & Rescue*, 148 Idaho 391, 396, 224 P.3d 458 (Id. Sup.Ct. 2008)). So, the District Court was correct in ignoring these issues raised by the Respondents at summary judgment, as this Court should do as well. All that Ms.

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[3] It should be noted that these three issues (Respondents' Brief, Pg. 25 and 32-35) were all raised with the District Court by the Respondents in their Motion For Summary Judgment (Rec. 1375-1403), but were not discussed in the Summary Judgment Order (Rec. 1507-1517). Thus, the District Court effectively denied the Respondents' claims related to these three issues. By raising these issue in the Respondents' Brief, the Respondents are effectively seeking that a denial of a summary judgment be appealed, when a denial of summary judgment is not appealable (*Garcia v. Windley*, 144 Idaho 539, 542, 164 P.3d 819 (Id. Sup.Ct. 2007)). In addition, the only IPPEA related issue raised by Ms. Hammer in the Appellant's Brief was whether the District Court erred by entering summary judgment of Ms. Hammer's IPPEA claims based on judicial estoppel. Thus, if these issues were going to be raised on appeal, the Respondents should have done so in a separate section in the Respondents' Brief entitled "Other Issues On Appeal", as is required by *I.A.R. 35*.

[4] The Court can surely understand Ms. Hammer's confusion at what the Briscoe Administration is really claiming as the reason for why she was terminated. The Briscoe Administration seems to be claiming that Ms. Hammer was both terminated "without cause" (they wanted to go in a different direction) and at the same time "for cause" for all of the misconduct claims, including criminal misconduct claims, that were made against her. Either way, Ms. Hammer still asserts that she was terminated by the Briscoe Administration in retaliation for her harassment complaints against Defendant Ribi and for filing the Original IPPEA Law Suit and the IHRC/EEOC Complaint.

Hammer was required to do to avoid summary judgment in an IPPEA case was show that she had a "reasonable belief" that Defendant Ribi's conduct was harassment and that she was being retaliated against for complaining about it or for filing the Original IPPEA Law Suit and the IHRC/EEOC Complaint, *Black v. Idaho State Police*, 155 Idaho 570, 573-574, 314 P.3d 625 (Id. Sup.Ct. 2013), which she has clearly done.

The third claim re-raised by the Respondents, also rejected by the District Court, was that Ms. Hammer's harassment complaints against Defendant Ribi and her filing of the Original IPPEA Law Suit and the IHRC/EEOC Complaint did not rise to the level of a violation "law, rule or regulation" as described in *Idaho Code § 6-2104*. The prohibition against "harassment in any form" was a properly adopted disciplinary rule or regulation by the Sun Valley City Council. In addition, Defendant Ribi's gender based harassment of Ms. Hammer fell within the parameters of *42 U.S.C. § 2000e et. seq.* ("Title VII"), *42 U.S.C. § 1981*, and, *42 U.S.C. § 1983*, and Ms. Hammer's retaliatory termination for filing the Original IPPEA Law Suit and the IHRC/EEOC Complaint fell within the parameters of *42 U.S.C. § 1981* and *42 U.S.C. § 1983.* Thus, Ms. Hammer adequately plead that she complained of violations of "law, rule or regulation" under *Idaho Code § 6-2104* to support her IPPEA claims.

Individual Liability Under The IPPEA

In sponsoring the IPPEA, Rep. Berain described that the IPPEA was intended to apply to the "heads of those agencies" (Rec. 233). Otherwise, malicious public officials (as Ms. Hammer claims Defendant Ribi and Defendant Briscoe were) could purposefully retaliate against Idaho government employees and not face any consequences should they be found to have done so,

leaving future administrations and taxpayers to pay for their sins. That could not have been the intent or purpose of the Idaho Legislature in enacting the IPPEA.

The Implications Of Defense Counsel's Involvement In An Employee Disciplinary Investigation And Actively Participating In The Retaliatory Conduct Of His Client

The Record On Appeal is replete with evidence that upon being appointed as defense counsel to defend Defendant Ribi, Attorney Naylor became an active participant in, what Former Council Member Lamb stated, under oath, was Defendant Ribi's and Defendant Briscoe's "agenda" to find any reason to terminate Ms. Hammer (Lamb Dep., Rec. 1365-1366).

The extent of Attorney Naylor's involvement in the Ball Investigation, whether authorized or not, is a legitimate issue. Ms. Hammer and her legal counsel husband ("Mr. Donoval") had every right to expect that Defendant Ribi's defense counsel would act within the confines of established ethical parameters and not influence what was supposed to have been an "independent" Ball Investigation or participate in Defendant Ribi's efforts to terminate Ms. Hammer. Immediately upon Attorney Naylor's appointment to defend Defendant Ribi, Mr. Donoval requested confirmation of exactly what Attorney Naylor's role and scope of duties were (as well as City Attorney King's role) related to the Ball Investigation and other Sun Valley related matters (Rec. 379-381), but was ignored. The issue of Attorney Naylor's limited role in Sun Valley matters, and his improper involvement in the Ball Investigation, was clearly an issue from the moment of his forced arrival on the scene. There is substantial evidence in the Record On Appeal that there was no clarification of what role, if any, Attorney Naylor was to play in Sun Valley affairs, other than simply defending Defendant Ribi against the claims made by Ms. Hammer in the Original IPPEA Law Suit and the IHRC/EEOC Complaint.

Attorney Naylor's failure to obtain a written retainer agreement (in violation of *I.R.P.C. 1.5(b)*) or written confirmation that he could represent both Defendant Ribi and Sun Valley at the same time (in violation of *I.R.P.C. 1.7(b)(4)*) are significant issues. Attorney Naylor's refusal to respond to those issues in the Respondent's Brief is no small matter. With or without authority, Attorney Naylor held approximately one hundred (100) email or telephone communications with Investigator Ball during the four (4) weeks the Ball Investigation proceeded[5]. At the same time Ms. Hammer was given little opportunity to respond to the allegations against her[6].

Ms. Hammer also asserts that Attorney Naylor was an active participant in the fraudulent scheme to seek criminal charges against her as part of his defense strategy in defending Defendant Ribi against the claims in the Original IPPEA Law Suit and the IHRC/EEOC Complaint (and this law suit). Attorney Naylor's conduct is certainly subject to a *I.R.P.C. 4.4(a)(3) and (4)* analysis of whether he threatened, presented or participated in presenting criminal charges to obtain advantage in a civil matter. Attorney Naylor has refused to discuss or defend his conduct in the Respondents' Brief. However, as was extensively discussed recently in *Lewis v. Delta Air Lines, Inc.*, 2015 WL 9460124 (U.S. Nev. 2015), in a similar pre-textual employee termination situation, any attorney-client protections are lost under the crime fraud exception if the client itself has a "bad faith" purpose. Defendant Ribi's and Defendant Briscoe's false claims of criminal misconduct against Ms. Hammer (in addition to the unwarranted internal

[5] See Ball invoice (Rec. 326-329) and Privilege Log (Rec. 502-517).
[6] Willich IHRC Aff., Para. 16-17, Rec. 670-671; Willich Compel Aff., Para. 46, Rec. 304; Lamb Dep., Rec. 1372.

disciplinary misconduct claims) certainly had an improper purpose[7], requiring the invocation of the crime fraud exception to any attorney-client privilege claims.

Whether Attorney Naylor's conduct rose to violations of the *I.R.P.C.* or not, his judgment in becoming extensively involved in the Ball Investigation is certainly questionable, and has broad attorney-client and work product privilege implications. At a minimum, Attorney Naylor's decision to become extensively involved in the Ball Investigation and to actively pursue criminal charges against Ms. Hammer, while he was defending Defendant Ribi in the Original IPPEA Law Suit and before the IHRC/EEOC, brought his own conduct, rather than just his client's conduct, into focus in this case.

ARGUMENT

ISSUE I) Did the District Court err as a matter of law by entering summary judgment against Ms. Hammer, and in particular in finding that Ms. Hammer had waived any rights to proceed against Sun Valley pursuant to the provisions of the IPPEA, by submitting the Supplemental Release on January 23, 2012 in order to receive contractual "severance" benefits described in the Employment Agreement Ms. Hammer entered into with Sun Valley on or about June 1, 2008?

Waiver In General

In the Appellant's Amended Brief, Ms. Hammer discussed the parameters for whether an "unequivocal" waiver has occurred, as Justice Burdick described in *Knipe Land v. Robertson.*

No Idaho cases discuss a waiver in the context of a "whistleblower" matter or under

[7] It should be noted that *Idaho Code § 50-208* made the Sun Valley Treasurer (i.e. Former Treasurer Frostenson) responsible for all Sun Valley funds and accounting, and *Idaho Code § 50-1017* required Former Treasurer Frostenson to present all expenditures to the Sun Valley City Council (i.e. Defendant Ribi and Defendant Briscoe) for approval, which even the Forensic Auditor confirmed (Rec. 969-970). Nothing in Sun Valley policies or in the Record On Appeal made Ms. Hammer responsible for the legitimacy or approval of Sun Valley payroll or expenditures, including her own. Yet, Ms. Hammer was accused by Defendant Ribi and Defendant Briscoe to have improperly approved Sun Valley payroll and expenditures, including her own, that they had approved themselves.

circumstances such as this. However, in *A.O. Sherman, LLC v. Bokina*, 2011 WL 3930314 (Sup.Ct. Conn. 2011)[8], the Superior Court of Connecticut discussed the issue of waiver in relation to a statutory employment claim (i.e. the Connecticut Fair Employment Practices Act, the "CFEPA"). In denying the employer's request for summary judgment, and discussing whether a waiver was done "knowingly and voluntarily", the Superior Court of Connecticut described six (6) factors which courts must analyze, three (3) of which directly apply in this matter, namely, a) the role of the employee in deciding the terms of the agreement, b) the clarity of the agreement, and, c) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled. It should be noted that in *Sherman v. Bokina*, the employee received the severance payments and thereafter brought claims under the CFEPA, as was the case with Ms. Hammer. In *Sherman v. Bokina*, the Superior Court of Connecticut denied summary judgment because there were genuine issues of material fact as to whether the employee had "knowingly and voluntarily" waived the claims under the CFEPA when she accepted the severance payments. The *Sherman v. Bokina* case is instructive to this Court related to the prohibition of the entry of summary judgment when there are genuine issues of fact related to whether the employee intended to waive any statutory rights in settlement of matters during a termination, as is the case with Ms. Hammer herein.

1A) The Employment Agreement Was Not Incorporated Into The Supplemental Release

[8] *Sherman v. Bokina* is an unpublished opinion. Rule 15(f) of the Internal Rules Of The Idaho Supreme Court prohibits the use of any unpublished ***Idaho*** Supreme Court (and/or ***Idaho*** Appellate Court) opinion as precedent. However, Ms. Hammer can find no prohibition against the use of any federal or non-Idaho state court unpublished opinion as guidance for the Idaho Supreme Court, especially on an issue, or issues, that have not been faced by the Idaho Supreme Court, such as the case herein related to waiver of statutory rights in employment settings.

Attorney Naylor failed to draft a detailed, extensive release, normally expected of a corporate insurance defense counsel in a situation like this. Instead, he quickly drafted the one or two sentence Naylor Drafted Release (Supp. Rec. 71-72) on a Saturday afternoon, which Ms. Hammer rejected. The Briscoe Administration, instead, accepted the Supplemental Release, without the "all claims" language Attorney Naylor demanded, and paid the "severance" anyway.

As explained in the Appellant's Amended Brief, it is the burden of the Respondents to prove that both parties meant to incorporate a secondary document, or language from a secondary document, into the primary document. Ms. Hammer did not intend that the Employment Agreement (or any particular part of the Employment Agreement) was incorporated into the Supplemental Release, and therefore did not include incorporation language of any type in the Supplemental Release. Ms. Hammer also clearly rejected the "release of all claims against the City Of Sun Valley" language that had been demanded by Attorney Naylor. As is described in the Appellant's Amended Brief, a secondary document (i.e. the Employment Agreement) is only incorporated into the primary document (i.e. the Supplemental Release) if there is specific language doing so in the primary document (i.e. the Supplemental Release), which did not occur here. As the entire Employment Agreement, nor any part of it, was specifically incorporated into the Supplemental Release, the Court must reject any assertions of the Respondents that any language of the Employment Agreement, including the "release of all claims against the City Of Sun Valley" language from the Employment Agreement, is incorporated into the Supplemental Release, which is the basis for the Respondents' entire waiver claim.

1B) The Briscoe Administration's Conduct At The Time Of The Submission Of The Supplemental Release And Payment Of The "Severance" Shows That The Briscoe

Administration Acknowledged That Ms. Hammer Had Not Waived Any Non Wage Or Service Related Claims, Including Claims Under The IPPEA.

There are four (4) issues related to the Briscoe Administration's conduct not faced in the Respondents' Brief, which must defeat the assertion that the waiver was "unequivocal".

First, the 2008 Employment Agreement drafted by then Sun Valley City Attorney Rand Peebles, did not describe the situation in which Ms. Hammer would provide a release that did not release "all claims against the City Of Sun Valley", and Sun Valley paid Ms. Hammer the "severance" anyway. Under that circumstance, Ms. Hammer retained her right to bring certain, non "severance" (i.e. wage, time and effort) related claims, such as claims under the IPPEA.

Second, why did Attorney Naylor and Briscoe Administration officials use a "bait and switch" tactic on Ms. Hammer, confirming that she would not be paid the "severance" if she did not provide a release which specifically included the phrase "I release all claims against the City of Sun Valley", and allowing payment of the "severance" anyway when she did not?

Third, the Briscoe Administration did not present Ms. Hammer with a check for the "severance" with an admonition that if she cashed it she was waiving all claims. Instead, the Briscoe Administration surreptitiously direct deposited the "severance" into Ms. Hammer's bank account, without her foreknowledge, only because it had her bank account information because she had received her normal payroll through direct deposit.

Fourth, there is no evidence in the Record On Appeal that Defendant Briscoe or the Sun Valley City Council were made aware of any communications to Attorney Naylor from Mr. Donoval or that the Supplemental Release was ever provided to Defendant Briscoe or the Sun Valley City Council prior to the payment of the "severance". And, there is no evidence in the

Record On Appeal as to who authorized the payment of the "severance" to Ms. Hammer, or why. In fact, the uncontroverted statements of Former Treasurer Frostenson to Mr. Donoval at the time of the submission of the Supplemental Release confirmed just the opposite, namely, that none of the "severance" applied to statutory claims or liquidated damages[9].

The Briscoe Administration had the final move in the card game between Ms. Hammer and the Briscoe Administration, and folded, effectively giving up on its demands that Ms. Hammer provide a release that stated that she was releasing "all claims" in order to be paid the "severance". Under those circumstances, Ms. Hammer did not unequivocally release "all claims", as is required under *Knipe Land v. Robertson*, including IPPEA claims, when she was paid the "severance", to justify the entry of summary judgment related to her IPPEA claims.

1C) The Supplemental Release Is Not Ambiguous. Thus, There Is No Need To Look Outside The Four Corners Of The Supplemental Release To Deny The Briscoe Administration's Request For Summary Judgment.

The Respondents' opening statement (Respondent's Brief, Pg. 1) summarizes the entire nature of the waiver issue, and the Respondents' continued blindness to what the Supplemental Release actually states. The Respondents falsely assert that Ms. Hammer "***executed*** (emphasis added) a 'release of all claims against the City of Sun Valley' ". Ms. Hammer did no such thing, as the Supplemental Release does not actually state that phraseology. Instead the Supplemental Release states "I release the City Of Sun Valley for any claims defined in Section 3.A. of the City Administrator Employment Agreement ***as were intended when the City Administrator Employment was entered into on June 1, 2008*** (emphasis added)". The Supplemental Release

[9] Donoval Supp. SJ Aff., Para. 32, Supp. Rec. 32-39.

carefully does not use the word "all" anywhere, as had been demanded by Attorney Naylor[10]. Instead, the Supplemental Release carefully uses the phrase "any", and does not use that phrase in a vacuum, but attaches it to the remainder of the sentence indicating that Ms. Hammer's intent of what she was prospectively waiving when she signed the Employment Agreement in 2008 was the controlling issue related to what claims were being released, and what claims were not being released, in return for the payment of the "severance".

The Supplemental Release simply confirmed that Ms. Hammer retained the right to continue to bring claims, unrelated to the traditional "severance" related claims (i.e. for past services rendered), which she had not prospectively agreed to waive when she entered into the Employment Agreement three years earlier[11]. Nothing about that is difficult to understand. Ms. Hammer has confirmed that IPPEA claims are one claim she did not intend to prospectively release when she entered into the Employment Agreement. Nothing about that is difficult to understand either. The Supplemental Release is therefore not ambiguous.

1D) Based On The Specific Language Of The Supplemental Release, And Ms. Hammer's Affidavit That She Did Not Intend To Waive Any Potential Future Claims Under The IPPEA When She Signed The Employment Agreement In June Of 2008, Summary Judgment Should Have Been Entered In Ms. Hammer's Favor As To The Waiver Issue.

As, a) the Supplemental Release provided that Ms. Hammer was retaining claims she did not intend to prospectively waive when she signed the Employment Agreement if she was

[10] On Pg. 1 of the Respondents' Brief, the Respondents insinuate that as Ms. Hammer knew that there might be IPPEA claims at issue, she should have mentioned those IPPEA claims in the Supplemental Release. Just the opposite is true. As the party seeking to enforce a waiver, it was the Respondents' burden to ensure that the IPPEA was specifically described in the Supplemental Release.

[11] The Court should recognize that, at the time of the submission of the Supplemental Release, Ms. Hammer had no clue as to what the extent of her non service and non salary types of claims were, such as constitutional, statutory or tort claims, by which she could have detailed exactly what claims she was retaining.

terminated and paid the "severance", and, b) she submitted an Affidavit affirming that she did not intend to prospectively waive claims under the IPPEA if she was terminated and paid the "severance" when she signed the Employment Agreement (Hammer Aff., Para. 7-10, Rec. 1017-1018) – summary judgment should be entered in Ms. Hammer's favor on the waiver issue.

1E) The "Severance" Paid To Ms. Hammer Has Been Defined By The U.S. Supreme Court, And This Court, As Only Being Related To Past Services Rendered Or Performed, Not To Statutory Claims Or Liquidated Damages. Thus, As A Matter Of Law, Payment Of The "Severance" Described In The Employment Agreement Did Not Include Settlement Of Non Salary Related Claims, Including IPPEA Claims.

In the Appellant's Amended Brief, Ms. Hammer describes the U.S. Supreme Court's 2014 findings in *U.S. v. Quality Stores* that the phrase "severance" related to an employment termination means consideration for past "services performed". The Respondents have chosen to ignore responding to *U.S. v. Quality Stores*[12]. Instead, the Respondents have chosen to mangle the discussion of "severance" benefits described by this Court ten (10) years earlier in *Parker v. Underwriters Laboratories* to try to persuade this Court that "severance", under Idaho law, inherently includes liquidated damages or the settlement of statutory claims. Even prior to *Parker v. Underwriters Laboratories* in *Johnson v. Allied Stores Corp.*, 106 Idaho 363, 367, 679 P.2d 640 (Id. Sup.Ct. 1984) this Court described that "severance" is "wages" because "it is a component of the compensation bargained for in the agreement of employment".

In *Parker v. Underwriters Laboratories*, upon termination, the employee was entitled to

[12] It should be noted that in dismissing Ms. Hammer's federal statutory claims based on waiver in the Federal Law Suit (Rec. 913-930), Judge Lodge ignored the U.S. Supreme Court's findings regarding "severance" in *U.S. v. Quality Stores*, as well as the definition of "severance" under Idaho law (i.e. *Parker v. Underwriters Laboratories* and *Johnson v. Allied Stores*). Ms. Hammer has already filed her appeal of those findings (*Hammer v. Sun Valley, et al.*, No. 15-35687, (U.S. App.9th)) (the "Federal Appeal").

basic "severance" of two weeks of salary. However the company offered "enhanced" benefits if the employee signed a "broad release of all claims she might have" against the company, which the employee did. Relying on the findings in *Johnson v. Allied Stores*, this Court found in *Parker v. Underwriters Laboratories* that it was the "enhanced" benefits that were considered to be liquidated damages. In fact, in *Parker v. Underwriters Laboratories,* this Court specifically found that "***after the first two weeks"*** (emphasis added) (i.e. the basic "severance" payment), "the payments were not 'severance' ", leaving the basic two weeks of "severance" as payment for "services", not the release of any other claims (@522). Under Idaho law, as is described in *Parker v. Underwriters Laboratories* and *Johnson v. Allied Stores*, "severance" is still defined as wages and payment for "past services rendered", not for the release of other claims.

As recently as March of 2016, while these briefs were being prepared, in *Huber v. Lightforce USA, Inc.*[13], this Court confirmed the findings of both *Johnson v. Allied Stores* and *Parker v. Underwriters Laboratories* that "severance" is payment for "past service" or "service rendered", and does not include compensation for the release of other claims or for other matters (in that case consideration for a non-compete clause in an employment agreement).

Had the Briscoe Administration paid Ms. Hammer moneys in excess of the "severance" she was entitled to under the Employment Agreement, then, arguably, the additional payment could have been considered as consideration for the release of her statutory claims under the IPPEA. However, Ms. Hammer asks "Where is her 'enhanced' benefits?", which was the basis

[13] Ms. Hammer's Appellant's Amended Brief was filed on January 14, 2016, before *Huber v. Lightforce* was issued by this Court. The Respondents' Brief was filed on March 11, 2016, nine (9) days after *Huber v. Lightforce* was issued by this Court on March 2, 2016, but did not include any mention of *Huber v. Lightforce*.

for this Court's findings in *Parker v. Underwriters Laboratories* that the employee in that case had been paid liquidated damages covering other, non service related claims.

The Employment Agreement uses the phrase "severance" in five separate places. And the Supplemental Release also uses the phrase "severance". No other terminology is used in either the Employment Agreement or the Supplemental Release describing what Ms. Hammer was receiving from the Briscoe Administration based on her termination. As both the U.S. Supreme Court and this Court have defined "severance" strictly as payment for past "service performed" or "past services rendered", it was error for the District Court to conclude that the "severance" payments made to Ms. Hammer included payments for the release of other, non service related claims, including the release of Ms. Hammer's IPPEA claims.

1F) The Court Must Interpret The Employment Agreement Based On The Intent Of The Parties When The Employment Agreement Was Entered Into, And Not Retroactively Allow The Briscoe Administration To Redefine The Terms Of The Employment Agreement.

The Respondents make the disingenuous argument that Sun Valley as an entity made the decisions regarding entering into the Employment Agreement (not Former Mayor Willich) and thus Sun Valley as an entity, now represented by the Briscoe Administration, gets to make the determination of what the 2008 Employment Agreement terms mean, in disregard of what Former Mayor Willich has testified to (Respondent's Brief, Pg. 19). As is described in *Idaho Code § 50-602*, Former Mayor Willich was solely responsible for the "officers and the affairs" of Sun Valley during the Willich Administration. As the legitimate agent for Sun Valley at the time of the signing of the Employment Agreement, it is only Former Mayor Willich's intent as to what the terms of the Employment Agreement mean that matters. Thus, the only intent as to the

interpretation of the terms of the Employment Agreement that matters are Ms. Hammer's and Sun Valley's agent at the time (i.e. Former Mayor Willich's). The Court should confirm that.

1G) Both Ms. Hammer And Former Mayor Willich Have Confirmed That The Employment Agreement Should Have Excluded The Waiver Of Non Service Or Wage Related Claims, Such As Statutory Claims, If Ms. Hammer Was Terminated "Without Cause". Therefore, The Court Should Reform The Contract To Confirm Such.

The Respondent's assert that the issue of whether the Employment Agreement language should be interpreted based on the intent of Ms. Hammer and Former Mayor Willich not the Briscoe Administration, or whether the contract should be reformed, was not raised before the District Court (Respondent's Brief, Pg. 19). The extensive briefings and Affidavits on the issue before the District Court, and in the Record On Appeal[14], nullify that assertion, as it was certainly extensively raised to the District Court (even if not ruled on by the District Court). In *Centers v. Yehezkely*, 109 Idaho 216, 217, 706 P.2d 105 (Id. App.Ct. 1985) the Idaho Appellate Court stated that an issue has been preserved for appeal where the issues "appear to share a common nexus of subject matter." Such is the case here as to whether equity requires the Employment Agreement to be interpreted, or reformed, to reflect Ms. Hammer's and Former Mayor Willich's intent at the time the Employment Agreement was entered into.

Ms. Hammer and Former Mayor Willich asserted, under oath, that the language of the Employment Agreement was not meant to require that Ms. Hammer waive statutory claims such as IPPEA claims if ever terminated and paid the "severance" described in the Employment

[14] Hammer SJ Memo, Rec. 998-1015; SJ Affidavits, Rec. 1016-1374; Hammer SJ Response, Rec. 1412-1445; SJ Response Affidavits, Rec. 1446-1466; Hammer SJ Reply, Rec. 1470-1491; Hammer Reconsider Memo, Supp. Rec. 144-173; Reconsider Facts, Supp. Rec. 126-143; Reconsider Affidavits, Supp. Rec. 30-124; and, Reconsider Reply, Supp. Rec. 186-219.

Agreement[15]. Equity requires that either this Court accept Ms. Hammer's and Former Mayor Willich's interpretation of the Employment Agreement, or reform the Employment Agreement itself to reflect such, or remand the matter back to the District Court with directions to do so.

1H) The Assertion That Ms. Hammer Prospectively Waived Any Statutory Claims, Such As Those Under The IPPEA, When She Entered Into The Employment Agreement In June of 2008, Violates Public Policy Prohibiting The Prospective Waiver Of Statutory Claims.

As was described in the Appellant's Amended Brief, there are several federal and non-Idaho state cases which stand for the principal that an employer forcing an employee to contractually waive statutory rights is an unacceptable violation of public policy. In particular, in 1974, in the seminal case of *Alexander v. Gardner-Denver*, 415 U.S. 36, @ 50, 94 S.Ct. 1011 (U.S. Sup.Ct. 1974), the U.S. Supreme Court defined that, although procedural rights could be prospectively waived, that the prospective waiver of an employee's substantive rights under Title VII through contract or settlement agreement was violative of public policy, and thus "not susceptible of prospective waiver"[16]. A litany of federal cases have applied the *Alexander v. Gardner-Denver* holdings to other federal and state statutes.

In *Lee v. Sun Valley Co*, this Court also discussed the prohibition of waiver of Idaho statutory rights as being against public policy, including in regards to employment settings. In addition to confirming the prohibition of waiver of statutory protections to participants using outfitters and guides, in *Lee v. Sun Valley Co.* this Court acknowledged that several other forms

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[15] See Willich Aff., Para. 7-9, Rec. 1043; WIllich Supp. Aff., Para. 5-9, Supp. Rec. 114-116; and, Hammer Aff., Para. 7-10, Rec. 1017-1018.

[16] It should be noted that in dismissing Ms. Hammer's federal statutory claims in the Federal Law Suit based on waiver (Rec. 913-930), Judge Lodge ignored *Alexander v. Gardner-Denver* and its progeny, including established precedent in the U.S. Ninth Circuit Appellate Court itself (i.e. *E.E.O.C. v. Towley Engineering*, 859 F.2d 610, 616-617 (U.S App.9th 1988)). Ms. Hammer is already appealing that failure in the Federal Appeal.

of statutory rights may not be waived by contract, including minimum wage, property exemptions during collection proceedings, statutes of limitation, unemployment compensation, and rights of redemption (@ 979, citations excluded). In *Lee v. Sun Valley Co.* this Court went on to describe that statutory workmen's compensation rights cannot be waived by employment contract, stating "Even though no express provisions be contained in the [worker's compensation] statute, it would seem that any attempt to nullify or limit the operation of law must be held to be invalid as being against public policy." (@979). If statutory workmen's compensation rights cannot be waived by contract under Idaho law, then neither should statutory rights of an employee under the IPPEA. As stated in *Lee v. Sun Valley Co.*, any attempt to nullify statutory protections are "invalid as being against public policy".

The Supplemental Release does not specifically describe the IPPEA. Nor does the Employment Agreement mention the IPPEA. The Respondents' entire argument is that the "release of all claims against the City Of Sun Valley" language in the separate Employment Agreement is broad enough to include a waiver of IPPEA claims in the Supplemental Release. Ms. Hammer denies that[17]. None-the-less, as this Court has described in *Lee v. Sun Valley* Co., and as federal precedent under *Alexander v. Gardner-Denver* has described, the incorporation of language in the Employment Agreement drafted by Sun Valley's attorney, signed three years prior to Ms. Hammer being terminated, which asserts to prospectively waive her right to bring claims under the IPPEA (or any other Idaho statute) is invalid as being against public policy.

[17] See *Anderson & Nafziger v. G.T. Newcomb*, 100 Idaho 175, 178, 595 P.2d 709 (Id. Sup.Ct. 1979) "Contracts which exclude liability must speak clearly and directly to particular conduct of the defendant which caused the harm at issue". See also *Jesse v. Lindsey*, 149 Idaho 70, 233 P.3d 1, 7-8 (Id. Sup.Ct. 2008).

The Respondents fail to even acknowledge *Lee v. Sun Valley Co.* in the Respondents' Brief. The Respondents brush this important issue off by stating "The Court need not address the issue of whether a prospective waiver of a whistleblower claim is enforceable" (Respondent's Brief, Pg. 14). However, substantial precedent, including in Idaho itself, leads to the conclusion that entering into contracts that purport to waive statutory rights is, *per se*, invalid as against public policy. The Respondents are overwhelmingly on the wrong side of this issue.

Ms. Hammer has made clear that she never considered that she would be waiving any statutory rights when she signed the Employment Agreement in 2008 agreeing to be paid "severance" for her services to Sun Valley if she was ever terminated. In contradiction to that claim, the Briscoe Administration is attempting to force Ms. Hammer to waive statutory rights against her will, and against what public policy is, or should be. Ms. Hammer should not be forced, against her will, to waive statutory rights, whether it be inferred, or, unintentional.

II) As The Employment Agreement Only Refers To Payments Made To Ms. Hammer Upon Termination As Being "Severance", The Briscoe Administration Was Required To Provide Ms. Hammer With Additional Consideration For The Waiver Of Any Non Wage Or Service Related Claims, Such As Any Claims Under The IPPEA.

As is previously described, the Respondents have failed to recognize the difference between basic "severance" described in *Parker v. Underwriters Laboratories* (which Ms. Hammer received) and the "enhanced" benefits which the employee in *Parker v. Underwriters Laboratories* received (which Ms. Hammer did not receive). Sun Valley was required to pay Ms. Hammer additional compensation for her release of IPPEA claims, which did not occur.

In case the Court questions whether Ms. Hammer should have been required to re-pay the "severance" to bring suit, in the previously described case of *Sherman v. Bokina*, the employee

received the severance payments and was still allowed to thereafter bring claims under the CFEPA. The same was true in the *Richardson v. Sugg*, 448 F.3d 1046 (U.S. App.8th 2006) case cited in the Appellant's Amended Brief, where former University Of Arkansas basketball coach Nolan Richardson was paid $500,000 in severance under his employment agreement, and was allowed to proceed on his civil rights claims. And in *Botefur v. City Of Eagle Point*, 7 F.3d 152, 156 (U.S. App.9th 1993), in rejecting the argument that an employee was required to pay back severance payments in order to bring suit under *42 U.S.C. § 1983* in a waiver situation, the U.S. Ninth Circuit Appellate Court stated, "A tender-back requirement is neither indispensable to any scheme of justice nor an indispensable prerequisite to litigation".

ISSUE II) Did the District Court err as a matter of law by failing to recognize that Ms. Hammer had a cause of action under the IPPEA for adverse actions taken by Briscoe Administration officials after Ms. Hammer's termination and after Ms. Hammer supplied the Supplemental Release to Briscoe Administration officials on January 23, 2012?

Under the IPPEA, *Idaho Code § 6-2103* defines an "adverse action" broadly, by stating:

> "(1) "Adverse action" means to discharge, threaten or otherwise discriminate against an employee in any manner that affects the employee's employment, including compensation, terms, conditions, location, rights, immunities, promotions or privileges."

By including the phrase "discharge" in *Idaho Code § 6-2103*, there is no question that the Idaho Legislature intended that Ms. Hammer's termination would be an "adverse action" covered by the IPPEA. However, other than "discharge", the Respondents have failed to provide any indication of what conduct the broad definition of "adverse action" in *Idaho Code § 6-2103* *was not intended to cover*, except, of course, anything related to what Briscoe Administration officials did to Ms. Hammer, including what they did to her after her termination.

Ms. Hammer asserts that the Briscoe Administration's placing of Ms. Hammer on a second administrative leave and re-investigating her conduct, after Former Mayor Willich had a) exonerated her in regards to her portion of the Ball Investigation, b) brought her back to active duty from administrative leave, and, c) provided her with the highest evaluations possible[18], are "adverse actions" as was intended by the IPPEA. Ms. Hammer also asserts that seeking criminal charges with the Blaine County Prosecutor is covered by the "threaten" language in the IPPEA. Ms. Hammer also asserts that seeking a Forensic Audit targeted at Ms. Hammer's actions as the Sun Valley City Administrator after her termination is conduct which "otherwise discriminates" against Ms. Hammer. All of those actions certainly affected Ms. Hammer's ability to retain her "employment" with Sun Valley, or obtain gainful "employment" elsewhere[19].

The Respondents' position that the IPPEA definition of "adverse action" should be read narrowly to limit what types of conduct are actionable in order to protect retaliatory government officials - is untenable. The purpose of the IPPEA was to protect "whistleblowers", not government officials. The types of "adverse actions" which are actionable under the IPPEA should be defined broadly to effectuate the purpose of the IPPEA, including allowing for damages for post-termination conduct which damages the whistleblower's professional career.

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[18] In *Smith v. Mitton*, 140 Idaho 893, 104 P.3d 367 (Id. Sup.Ct. 2005) this Court affirmed a district court's refusal to enter a directed verdict in an IPPEA case where the employee had alleged that the City of Burley was improperly using unlicensed electricians and that the Mayor of Burley had a conflict of interest. In the *Smith v. Mitton* case, one of the reasons for why this Court agreed that there was retaliation was that the employee had been given high employment evaluations, as Ms. Hammer had been given by Former Mayor Willich in this case (Rec. 559-564).

[19] *Idaho Code § 6-2103* does not specifically limit "employee's employment" to that of employment with the government entity causing the "adverse action", and should be interpreted broadly to cover the employee's employment, or potential employment, anywhere.

ISSUE III) Did the District Court err as a matter of law in entering summary judgment against Ms. Hammer by finding that judicial estoppel barred Ms. Hammer from raising any claims against Sun Valley under the provisions of the IPPEA?

3a) Claiming Pretext Is A Pleading Requirement Under The IPPEA. Thus The District Court's Finding Of Judicial Estoppel For Ms. Hammer's Having Done So Was Erroneous.

To properly plead a claim under the IPPEA, the plaintiff must plead that (1) she was an employee who engaged in protected activity, (2) that the employer took an adverse action against her, and, (3) there is a causal connection between the protected activity and the adverse action, *Van v. Portneuf.* This Court has established that, ***at trial***, an IPPEA case proceeds under a *McDonnell Douglas v.Green* analysis, namely, that (1) the plaintiff must establish a *prima facie* case of retaliatory conduct for protected activity, (2) the burden then shifts to the defendant to produce evidence that there was a non-retaliatory reason for the adverse action, and, (3) then the burden shifts back to the plaintiff to prove that the reason the defendant offers for the adverse action is a pretext for retaliatory conduct, *Curlee v. Kootenai County* (@396).

As to the third prong of the *McDonnell Douglas v. Green* test, Ms. Hammer asserts that her termination "without cause", "at will", or because the Briscoe Administration wanted to go in a different direction, were done in pretext for her harassment claims against Defendant Ribi and for her suing Defendant Ribi and Sun Valley over it.

At hearings before the District Court, the District Court, *sua sponte*, raised the issue that, by asserting that Ms. Hammer was contractually terminated "without cause" but that the Briscoe Administration had actually done so in retaliation for her harassment complaints against Defendant Ribi and her suing Sun Valley over them, Ms. Hammer was making contrarian claims and thus judicially estopped from bringing her IPPEA claims (Transcript 12/16/14, 121-180).

The District Court also made this finding in the Summary Judgment Order (Rec. 1507-1517). Even when confronted with this illogical finding on reconsideration[20], the District Court failed to justify its findings in the simple Order denying reconsideration (Supp. Rec. 220).

As the third prong of the *McDonnell Douglas v. Green* analysis specifically provides for (and/or requires) a pre-textual adverse action assertion in IPPEA claims, the findings of the District Court that Ms. Hammer was judicially estopped from making those same pretext allegations as part of her IPPEA claims should be reversed with directions to the District Court.

3b) RESPONDENTS' NEW ISSUE: At Summary Judgment In An IPPEA Matter, The District Court (And This Court) Is Not Entitled To Make Findings Related To Whether The Briscoe Administration Had Legitimate Reasons For Terminating Ms. Hammer.

This Court has recognized that the three prong test under *McDonnell Douglas v. Green* and *Curlee v. Kootenai County* "has little or ***no application at the summary judgment stage*** (emphasis added). The rule explicitly governs the burden of persuasion ***at trial*** (emphasis added)", *Curlee v. Kootenai County*, @396. Instead, to avoid summary judgment in an IPPEA case, all the plaintiff must do is "present evidence from which a rational inference of retaliatory discharge under the whistleblower act could be drawn", *Curlee v. Kootenai County*, @396. In order to satisfy that requirement, all Ms. Hammer was required to do was show that she had a "reasonable belief" that Defendant Ribi's conduct was harassment and that she was being retaliated against for complaining about it, *Black v. Idaho State Police* (@573-574). The Record On Appeal in this case is replete with Ms. Hammer's belief that Defendant Ribi was harassing her and was being hostile to her, as well as that other Sun Valley officials believed that to be true

[20] See Ms. Hammer's Motion (Sup. Rec. 174) and Memorandum Re: Reconsideration (Supp. Rec. 144-173), and Reply Re: Reconsideration (Supp. Rec. 186-219).

as well and were well aware of her numerous complaints. By filing the Original IPPEA Law Suit and the IHRC/EEOC Complaint, the Briscoe Administration was also put on notice of the allegations of misconduct and retaliation against Defendant Ribi.

The issue of whether Sun Valley provided a sufficient, non discriminatory or retaliatory reason for why Ms. Hammer was terminated under the second prong of the *McDonnell Douglas v. Green* test, is simply ***not a summary judgment issue***. In fact, in both *Curlee v. Kootenai County* and *Van v. Portneuf*, in reversing the dismissal of IPPEA claims, this Court chided those district courts for failing to recognize its limited role at summary judgment in IPPEA cases, because those district courts were not "free to accept as true the employer's testimony that she was fired for some other legitimate reason", *Curlee v. Kootenai County* @ 396; *Van v. Portneuf*, @ 560. This Court should do the same here and reject the Respondents' arguments outright.

3c) RESPONDENTS' NEW ISSUE: Not Only Are The Respondents' Arguments Related To Pretext Irrelevant At Summary Judgment, There Is Sufficient Evidence Of Both Direct And Indirect Retaliation Against Ms. Hammer In The Extensive Record On Appeal.

The Respondents have spent a great deal of effort and space discussing whether there is "direct" and "indirect" evidence of pretext in the Record On Appeal or not. However, as is described above, the issue of pretext is the third prong of the *McDonnell Douglas v. Green* test, which is a ***trial analysis, not a summary judgment analysis***. Even this Court in the *Frogley v. Meridian School District*, 155 Idaho 558, 569, 314 P.3d 613 (Id. Sup.Ct. 2013) case extensively relied upon by the Respondents in the Respondents' Brief concluded that summary judgment is not proper in a burden shifting setting. Therefore, Ms. Hammer should not need to respond to the discussion of "pretext", "direct evidence" or "indirect evidence".

If the Court does seek discussion on the issue, the Record On Appeal includes substantial evidence that the Briscoe Administration's termination of Ms. Hammer was anything but "without cause", "at will" or because the Briscoe Administration sought a different direction.

As to direct evidence, Former Mayor Willich readily admitted that Defendant Ribi was seeking the investigation of and termination of Ms. Hammer in retaliation for her making harassment claims against Defendant Ribi (Willich Supp. Comp Aff., Para. 70, Rec. 309-310) and that "something needed to be done to protect Former Administrator Hammer from Council Member Ribi" (Willich. Supp. Comp. Aff., Para. 77, Rec. 311). And, Mr. Donoval's uncontroverted testimony was that Attorney Naylor specifically told Mr. Donoval that Ms. Hammer was going to be terminated because she had filed the Original IPPEA Law Suit against Defendant Ribi and Sun Valley (Donoval Supp. Aff., Para. 14, Supp. Rec. 33; Supp. Rec . 57).

As to indirect evidence of retaliation, Former Council Member Lamb admitted that Defendant Ribi and Defendant Briscoe had an "agenda" to find any reason to terminate Ms. Hammer (Lamb Dep., Rec. 1365). Defendant Ribi, Defendant Briscoe and Former Council Member Youngman all determined that Ms. Hammer should be terminated "for cause" as early as the first executive sessions of November 11, 2011 (Lamb Dep., Rec. 1360), and, City Attorney King was adamant that Ms. Hammer should be terminated immediately for misconduct (Lamb Dep., Rec. 1360). Council Member Suhadolnik readily admitted that Ms. Hammer had made mistakes (Suhadolnik Dep., Rec. 1347) and was guilty of something (Suhadolnik Dep., Rec. 1346) when he voted to terminate her. As Defendant Ribi had done (Ribi Dep., Rec. 1289), Council Member Suhadolnik also admitted that the Briscoe Administration had terminated Ms.

Hammer "without cause" to hide the real reasons for her termination (Suhadolnik Dep., Rec. 1351). And, the day before Ms. Hammer was terminated, the Briscoe Administration issued a press release (Rec. 1154), drafted by Attorney Naylor (Briscoe Dep., Rec. 1254-1255), which was published as a paid-for ad in the *Idaho Mountain Express*, which informed the public that the Briscoe Administration was seeking that Ms. Hammer be criminally investigated. All of these factors indirectly show that Ms. Hammer was not being terminated "without cause", as was claimed by the Briscoe Administration. Ms. Hammer has the right to assert to a jury that the real reason she was terminated was for making harassment claims against Defendant Ribi and filing suit over it, and not have her claims dismissed at summary judgment.

3d) RESPONDENTS' NEW ISSUE: Ms. Hammer's Allegations Of Harassment And Retaliation Are Covered By The Definition Of Violations Of A Law, Rule Or Regulation.

The Record On Appeal confirms that Ms. Hammer made numerous allegations of harassment against Defendant Ribi during the course of her employment. Section 7.5 of the *Sun Valley Personnel Policies* specifically prohibits "harassment in any form" and applies to members of the Sun Valley City Council (Rec. 169). The *Sun Valley Personnel Policies* were adopted and modified by formal resolutions of the Sun Valley City Council (Rec. 137). Former Mayor Willich confirmed that he had made findings that Defendant Ribi had harassed Ms. Hammer under the parameters of Section 7.5 of the *Sun Valley Personnel Policies*[21], as he had the authority to do pursuant to "Section 8: Discipline" of the *Sun Valley Personnel Policies* (Rec. 172-175). However, as Former Mayor Willich described in his deposition, because Defendant

[21] Willich IHRC Aff., Para 17, Rec. 671; Willich Supp. Ribi/Donoval Aff., Para. 7, 12, Rec. 537-539; Willich Compel Aff., Para. 46, Rec. 304.

Ribi was an elected official, Former Mayor Willich had no formal mechanism by which he could take disciplinary measures against Defendant Ribi (Willich Dep., Pg. 146, Ln. 7 to Pg. 147, Ln. 6, Rec. 1207; also Willich IHRC Aff., Para. 13, Rec. 667-668).

As this Court recognized, the policies of the Idaho Department Of Corrections ("IDOC") at issue in *Mallonee v. IDOC*, 139 Idaho 615, 619-620, 84 P.3d 551 (Id. Sup.Ct. 2004), were not formally adopted under the Idaho Administrative Procedures Act, thus falling outside the definition of "law, rule or regulation" under *Idaho Code § 6-2104*. The *Sun Valley Personnel Policies* were formally adopted by the Sun Valley City Council (Rec. 137), and thus are included in the definition of "law, rule or regulation". Thus Ms. Hammer's complaining of harassment by Defendant Ribi was proper reporting of violations of "law, rule or regulation" under the IPPEA.

More notably, Ms. Hammer's complaints of harassment and sex/gender based work place hostility against Defendant Ribi fell within the parameters of Title VII (see *Harris v. Forklift Systems*, 510 U.S. 17 (U.S. Sup.Ct. 1993)), *42 U.S.C. § 1981* (see *CBOCS West v. Humphries*, 553 U.S. 442, 128 S.Ct. 1951 (U.S. Sup.Ct. 2008)), and, *42 U.S.C. § 1983* (see *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134 (U.S. App.2nd 1993)), which Ms. Hammer included in the IHRC/EEOC Complaint well before she was terminated by the Briscoe Administration[22]. In addition, in her IHRC/EEOC Complaint before she was terminated Ms. Hammer asserted she was also being retaliated against by Defendant Ribi and Sun Valley in violation of both *42 U.S.C. § 1981* (see *Bryant v. Jones*, 575 F.3d 1281 (U.S. App.11th 2009)), and, *42 U.S.C. § 1983*

[22] The IHRC/EEOC Complaint filed in December of 2011 (IHRC No. E-0112-241; 38C-2012-00122) (Rec. 1133-1134), eventually turned into the Federal Law Suit, once the IHRC and EEOC eventually issued "right to sue" letters during mid-2013, well after the 180 day statute of limitation for filing claims under the IPPEA had expired, requiring Ms. Hammer to litigate her claims against the Respondents in two separate forums.

(see *Costenbader-Jacobsen v. Pennsylvania*, 227 F.Supp.2d 304 (U.S. M.D. Penn. 2002)). At last check, Title VII, *42 U.S.C. § 1981* and *42 U.S.C. § 1983* were "laws".

As noted in *Van v. Portneuf*, @559, under the IPPEA, Ms. Hammer does not need to prove allegations of misconduct as being valid, she merely needs to show she communicated concerns of misconduct against a government official to support her IPPEA claims, which Ms. Hammer certainly did in regards to Defendant Ribi's harassment and the Respondents' retaliation, in violation of the formally adopted *Sun Valley Personnel Policies* and federal laws.

ISSUE IV) Did the District Court err as a matter of law by finding that personal liability does not attach to Defendant Ribi or Defendant Briscoe under the IPPEA?

The Respondents argue that the Court should not find that the IPPEA applies to the individual officials of Sun Valley because federal cases analyzing Title VII exempt individuals from liability under Title VII. However, individuals have been held not to be liable under Title VII for two reasons. First, *42 U.S.C. § 2000e(b)* of Title VII exempts small businesses (i.e. businesses with less than fifteen (15) employees) from liability under Title VII, therefore federal courts have held that Congress could not have intended that individual officers be held liable under Title VII either (see *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314 (U.S. App.2nd 1995)). In addition, *42 U.S.C. 2000e-5(g)* of Title VII defines what a successful employee is paid under Title VII as "back pay" (which only an employer, not its officers or owners, pay), not "damages" or "other compensation" (which individuals could be liable for) (see *Miller v. Maxwell's Intern Inc.*, 991 F.2d 583, 587 (U.S. App.9th 1993)).

Contrary to the assertion that "nearly all other federal and state jurisdictions surveyed" do

not provide for individual liability (Respondents' Brief, Pg. 36)[23], most courts have differentiated state "whistleblower" statutes from Title VII, by finding individual liability to exist under those state statutes, including under the New York Human Rights Act, *Tomka v. Seiler Corp.*, @1317; the Iowa Human Rights Act, *Blazek v. U.S. Cellular*, 937 F.Supp.2d 1003, 1023-1024 (U.S. N.D.Iowa 2011); the Missouri Human Rights Act, *Cooper v. Albacore Holdings*, 204 S.W.3d 238, 243-244 (Mo. App.East 2006) and *Brady v. Curators of University Of Missouri*, 213 S.W.3d 101, 112-113 (Mo. App.East 2007); and the Ohio Fair Employment Practices Act, *Genero v. Central Transport*, 84 Ohio St.3d 293, 296-297, 703 N.E.2d 782 (Ohio Sup.Ct. 1999).

The Respondents use of *Abbamont v. Piscataway Township Board of Education*, 138 N.J. 405, 650 A.2d 958 (N.J. Sup.Ct. 1994) is curious. In *Abbamont v. Piscataway Township*, the issue was whether the board of education in that case was liable for the conduct of its employees under the New Jersey Conscientious Employee Protection Act (the "NJCEPA"), not the other way around, namely, whether the individual officials were liable under the NJCEPA. In fact, after the 1994 ruling in *Abbamont v. Piscataway Township*, at least three cases (*Palladino v. VNA Of Southern New Jersey*, 68 F.Supp.2d 455 (U.S. N.J. 1999); *Espinosa v. Continental Airlines*, 80 F.Supp.2d 297 (U.S. N.J. 2000); and, *Maw v. Advanced Clinical Communications*, 359 N.J.Super 420, 820 A.2d 105 (N.J. App.Ct. 2003)) have specifically found that the NJCEPA provides for individual liability for officials who participate in conduct in violation of the NJCEPA, because the word "person" is used in the NJCEPA to describe what parties are liable under the NJCEPA, and there is no "small business" exception under the NJCEPA.

[23] Other than *Obst v. Microtron*, which will be discussed herein, the Respondents have failed to cite to any of the cases that were purportedly included in this "survey".

The IPPEA applies only to Idaho governments and their officials (not all businesses), and does not provide for a "small government" exemption. So the "small business" exemption argument that has been used to exempt individuals from liability under Title VII cannot be applied to the IPPEA. In *Cooper v. Albacore Holdings*, @243-244, the Missouri Court Of Appeals specifically rejected a prior federal court holding (*Lenhardt v. Basis Institute Of Technology*, 55 F.3d 277 (U.S. App.8th 1995)) exempting individuals from liability under the Missouri Human Rights Act using Title VII as a guide, specifically because the Missouri Human Rights Act does not have the same "small business" exemption language that Title VII does (later confirmed in *Brady v. Curators Of Univ. Of Missouri*, @113). And in *Tomka v. Seiler Corp.*, @1317, the U.S Second Circuit Court Of Appeals found that although an individual was exempt from personal liability under Title VII because of the "small business" exemption, they could still be held personally liable under the New York Human Rights Act, as long as they participated in the improper conduct, because no "small business" exemption was in that statute.

In addition, the IPPEA does not define payments to be received by a successful plaintiff/employee under the IPPEA to be "back wages", as is defined in Title VII. Instead, *Idaho Code § 6-2105* broadly defines remedies available to the government employee to be "damages for injury or loss caused by each violation", not limiting damages under the IPPEA to wages.

The single state case relied upon by the Respondents to support their "non personal liability" argument, namely *Obst v. Microtron, Inc.*, 588 N.W.2d 550 (Minn. App.Ct. 1999), bases its findings on the U.S Eighth Circuit Appellate Court's rationale in *Lenhardt v. Basis Institute (@554)*, which was later itself rejected by Missouri courts themselves in finding

personal liability did apply under the Missouri Human Rights Act, (see *Cooper v. Albacore Holdings*, @243-244[24], and *Brady v. Curators Of Univ. Of Missouri*, @113)).

Unlike the Minnesota "whistleblower" statute at issue in *Obst v. Microtron* which covers all employers, the IPPEA applies only to government entities. In a situation where a manager of a business is found not to be personally liable under a "whistleblower" statute, the owners of the business ultimately do pay the price for that misconduct by having to pay damages to the injured employee. That provides the owners of a business an incentive to ensure that its managers do not take retaliatory actions against employees of a business.

However, in a government situation, if individual officers and elected officials are not held personally liable, then it is taxpayers that must foot the bill for the sins of their elected and appointed officials. This is especially troublesome where elected officials, such as Defendant Ribi and Defendant Briscoe, cannot be fired for their misconduct (at least until the next election) and a future government administration (and future taxpayers) must pay the price for the prior administration's misconduct (as is the case herein). The insinuation that elected and appointed government officials should be provided *carte blanche* immunity to purposefully act in a retaliatory manner, knowing that even if they are caught doing so it will be generic taxpayers that pay the price – is repugnant. It cannot possibly have been the intent of the Idaho Legislature in enacting the IPPEA to allow elected and appointed officers, such as Defendant Ribi and Defendant Briscoe, to purposefully retaliate against public employees such as Ms. Hammer and

[24] In fact in *Cooper v. Albacore Holdings*, the Missouri Appellate Court, Eastern District rejected the U.S. Eighth Circuit Appellate Court's previous finding of no personal liability under the Missouri Human Rights Act in *Lenhardt v. Basis Institute* by stating that "with all due respect to the Eight Circuit, the Missouri Supreme Court does not blindly follow the 'predictions' of the federal courts" (@243).

suffer no consequences for their actions. That was the intent of Rep. Berain (the sponsor of the IPPEA) when he stated that the "heads of those agencies" are subject to the IPPEA (Rec. 233).

The Respondents assert that there is no indication that the Idaho Legislature intended that any "person" be held liable under the IPPEA (Respondents' Brief, Pg. 36). That assertion flies in the face of the language of *Idaho Code § 2105(3)*, previously described in the Appellants' Amended Brief, which provides that law suits under the IPPEA must be filed in the county where the "person" against whom the civil action is filed resides. It makes no sense that a law suit would be brought where the "person" lives, rather than where the government entity is located, if personal liability was not intended to be required.

As neither Defendant Ribi nor Defendant Briscoe are named in the Supplemental Release or the Employment Agreement, Ms. Hammer did not waive her rights to bring claims against either Defendant Ribi or Defendant Briscoe when she submitted the Supplemental Release to Sun Valley officials and received the "severance" required under her Employment Agreement. Therefore, the Court should find that individual liability does apply to Defendant Ribi and Defendant Briscoe under the IPPEA and remand the matter to the District Court for trial.

ISSUE V) Did the District Court err as a matter of law that Sun Valley, Investigator Ball and Attorney Naylor possessed attorney-client and work product privileges related to the Ball Investigation, and the Unauthorized Ball/Naylor Report, which was released to the public?

Attorney-Client And Work Product Privilege Issues In General

As is described in the Appellant's Amended Brief, this Court reviews the granting of attorney-client and work product privileges *de novo*, meaning, as if the District Court made no rulings on the matter. And, as is described in the Appellant's Amended Brief, the Respondents

bear the burden on appeal to prove they are entitled to the discovery privileges claimed, whether it be based on attorney-client or work product privilege assertions.

Before the District Court, the Respondents extensively argued that global attorney-client and work product protections applied to the conduct of Attorney Naylor and all matters related to the Ball Investigation[25]. The District Court's two rulings related to the request to compel (Supp. Rec. 15-25 and Rec. 809-818), extensively discussed the attorney-client relationship and privilege and the work product privilege. The District Court's rulings make clear that the District Court understood that, first and foremost, there must be an attorney-client relationship that exists, that then provides protections for that attorney's work product prepared in anticipation of litigation under *I.R.C.P. 26(b)(3)*. Absent an attorney-client relationship, there is no work product protection. It was Attorney Naylor himself, not the Briscoe Administration, that enjoys the work product protection, if any exists at all. The Respondents' assertion in Footnote 15 of the Respondents' Brief that any discussion of the attorney-client privilege issues "should be disregarded entirely", ignores that the District Court only allowed the work product protections by first finding that Attorney Naylor held some sort of attorney-client relationship with the Willich Administration. It is that finding by the District Court that Ms. Hammer challenges.

The Briscoe Administration and Attorney Naylor have refused to respond to issues raised in the Appellant's Amended Brief related to attorney-client privilege claims, which were so aggressively litigated before the District Court, and upon which the District Court granted the

[25] Compel Response, Rec. 576-601; Compel Affidavits, Rec. 602-707; Reconsider Response, Rec. 799-808.

Briscoe Administration broad protections related to hundreds of documents and emails[26]. Considering the extensive potential ethical implications, it is not coincidental that the Respondents and Attorney Naylor have refused to confront the attorney-client issues. The only conclusion that the Court should come to is that the Briscoe Administration and Attorney Naylor have now conceded that Attorney Naylor had no legitimate attorney-client relationship with the Willich Administration, for any purpose, including in regards to the Ball Investigation, and make explicit findings of such. Absent a legitimate attorney-client relationship between Attorney Naylor and the Willich Administration, any work product privilege arguments are moot as well.

Ms. Hammer requests that the Court read the extensive, chronological description of events related to the Ball Investigation and Attorney Naylor's conduct during the Willich Administration in the two Affidavits Former Mayor Willich submitted in this case related to Ms. Hammer's request to compel information related to the Ball Investigation[27]. Ms. Hammer also requests that the Court review the entire depositions of both Former Mayor Willich (Rec. 1170-1216) and Former Council Member Lamb (Rec. 1356-1374) regarding the conduct of Defendant Ribi, Defendant Briscoe, Investigator Ball and Attorney Naylor during the remainder of the Willich Administration. Those Affidavits and deposition transcripts explain what occurred during the Willich Administration far better than Ms. Hammer could ever summarize[28].

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[26] Compel Denial Order, Supp. Rec. 15-25; Compel Reconsider Denial Order, Rec. 809-818.

[27] Willich Aff. In Support Of Motion To Compel, Rec. 293-316, and, Willich Supp. Aff. In Support Of Motion To Compel, Rec. 769-776.

[28] The Respondents have resorted to claiming that Former Mayor Willich is not credible in his account of the activities of the Willich Administration, the Ball Investigation and Attorney Naylor's seeking of a criminal investigation of Ms. Hammer (Respondent's Brief, Pg. 42). Unlike Defendant Ribi, Defendant Briscoe and Attorney Naylor who all have a financial interest in this matter, neither Former Mayor Willich nor Former Council Member Lamb have anything to gain by the results of this case. Former Mayor Willich, a former thirty (30) year Boeing Co.

There are two substantial issues related to Attorney Naylor's conduct before the Court at this juncture. First, did Attorney Naylor's failure to obtain a written retainer agreement defining the "scope" of his work during the Willich Administration (violating I.R.P.C. 1.5(b)) [29], and his failure to obtain a written confirmation that the Willich Administration agreed to allow Attorney Naylor to represent both Sun Valley and Defendant Ribi at the same time (violation of I.R.P.C. 1.7(b)(4)), negate any claim that Attorney Naylor had ***any*** valid attorney-client relationship with the Willich Administration - and if it did not, what were the limits of that representation? Second, did Attorney Naylor's active participation in the Ball Investigation (without authority to do so, in violation of I.R.P.C. 1.2(a) and I.R.P.C. 1.4(a)), and by aggressively pursuing a criminal investigation and criminal charges against Ms. Hammer as a retaliatory tactic in defense of Ms. Hammer's claims against Defendant Ribi (in violation of I.R.P.C. 4.4(a)(3) and (4)), negate any attorney-client protections that Attorney Naylor would otherwise be able to claim?

Ms. Hammer requests that the Court review two recent federal cases which extensively discuss attorney involvement in employee disciplinary investigation and termination matters, namely, *Koumoulis v. Independent Financial Marketing Group*, 29 F.Supp.3d 142 (U.S. E.D.N.Y 2014) and *Lewis v. Delta Air Lines*, for guidance.

In *Koumoulis*, the U.S. District Court for the Eastern District Of New York rejected both

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executive, was trying to fairly administer the investigation of the claims against both Ms. Hammer and Defendant Ribi, without the benefit of an independent attorney to assist him. At the same time, City Attorney King and Attorney Naylor, neither of whom were supposed to have had anything to do with the Ball Investigation, were swooping down on Sun Valley City Hall as if they were part of an FBI raid (Willich Dep., Pg. 73, Line 4-15, Rec. 1188) and Attorney Naylor was "manipulating" Former Mayor Willich during his entire term in office (Willich Dep., Pg. 49, Line 22-25, Rec. 1182).

[29] As noted in the Appellant's Amended Brief, shortly after Defendant Briscoe was sworn in as Mayor of Sun Valley, Attorney Naylor did obtain a written retainer agreement with the Briscoe Administration (Rec. 452-455).

attorney-client and work product privilege claims related to an employee investigation, where the employee had also filed claims with the EEOC (comparable to Ms. Hammer's filings). The *Koumoulis* Court (@ 146-149) rejected attorney-client assertions because a majority of the efforts of the attorney in that case related to supervising and directing the investigation, not providing legal advice[30]. The *Koumoulis* Court (@ 149-150) also rejected work product privilege claims because the investigation in that case would have proceeded anyway even though there were threats of litigation, as is the case with Ms. Hammer. Finally, the *Koumoulis* Court found that the work product and attorney-client privilege claims were both waived because the employer raised a defense related to the investigation in that case, as the Respondents have done here in the Fourteenth Defense claiming that Ms. Hammer performed "careless or criminal misconduct" (Rec. 201), bringing the Ball Investigation of those misconduct allegations into play, waiving any privileges associated with the Ball Investigation.

As to *Lewis v. Delta Air Lines*, the U.S. Court for Nevada also extensively discussed the implications of an attorney becoming directly involved in an employee termination situation. The *Lewis v. Delta Air Lines* Court (@ 2-4) found that substantial nationwide precedent concludes that the "fraud" described in the crime fraud exception to the attorney client privilege does not require criminal fraud, but merely requires "knowing or reckless misrepresentation ... likely to injure another." The *Lewis v. Delta Air Lines* Court (@ 4-5) went on to discuss that, in an

[30] Considering that Attorney Naylor had approximately one hundred (100) emails and telephone communications with Investigator Ball during the four (4) weeks of the Ball Investigation (Ball invoice, Rec. 326-329; Privilege Log, Rec. 502-517), there is no question that most, if not all of the communications between the two did not relate to specific legal advice. As was stated in *Koumoulis* (@147) "That a stray sentence or comment within an email chain references litigation strategy or advice does not render the entire communication privileged, nor does it alter the business-related character of the rest of the communication."

employment setting, legal advice obtained for the purpose of concealing the employer's true discriminatory or retaliatory intent against an employee invokes the crime fraud exception to the attorney client privilege[31]. Ms. Hammer asserts that Defendant Ribi and the Briscoe Administration did exactly that, by using Attorney Naylor to assist them in retaliating against Ms. Hammer, which is supported by extensive factual assertions in the Record On Appeal[32].

THE WORK PRODUCT PRIVILEGE ISSUES

There is a vast difference in assertions of what transpired related to the Ball Investigation between Former Mayor Willich and Former Council Member Lamb, verse the Respondents and Attorney Naylor, due to the secretive nature of the Sun Valley City Council meetings during November and December of 2011, the submission of ***unverified*** *in camera* documents to the District Court, and the refusal of the Respondents to disclose communications in the Privilege Log. Those disputes include what authority was given to Investigator Ball to communicate with and report to Attorney Naylor during the Ball Investigation; why the Original Ball/Naylor Report was modified and released when it had been ordered to remain under lock and key at City Attorney King's office[33]; and, whether the Unauthorized Ball/Naylor Report was ever provided

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[31] In their depositions, Defendant Ribi (Ribi Dep., Rec. 1289) and Former Council Member Suhadolnik (Suhadolnik Dep., Rec. 1351) made clear that the Briscoe Administration was receiving legal advice (presumably from Attorney Naylor), that the Briscoe Administration could, and was, hiding its real reason(s) for terminating Ms. Hammer behind the "without cause" clause of her Employment Agreement.

[32] In *Lewis v. Delta Air Lines* (@ 5), citing a U.S. District Court for Maryland case titled *Koch v. Specialized Care Services*, 437 F.Supp.2d. (U.S. Md. 2005), the U.S. Court for Nevada recognized that the actions of the defendants and their attorney in that case "indicate a hostile attitude toward [Koch] and a gathering plan to terminate him in spite of what defendants suggest." Former Mayor Willich (Willich Supp. Comp. Aff., Para. 40, 70-71, Rec. 303, 309-310) and Former Council Member Lamb (Lamb Dep., Rec. 1365) both admitted that this was the case in regards to Defendant Ribi's, Defendant Briscoe's and Attorney Naylor's conduct towards Ms. Hammer.

[33] Willich Comp. Aff., Para. 56-58, Rec. 306-307; Willich Supp. Comp. Aff., Para. 14, Rec. 773; Willich Dep., Rec. 1186; Briscoe Dep., Rec. 1227.

to Former Mayor Willich or the Sun Valley City Council during the remainder of the Willich Administration[34]. As the Briscoe Administration bore the burden of proving facts which support the claim of work product protection, and substantial issues of disputed fact remain related to the Ball Investigation, work product protections related to the Ball Investigation must be denied.

5A) Ball Investigation Communications Are Not Covered By Work Product Protections Because The Ball Investigation Was Not Commenced Primarily In Anticipation Of Litigation.

The Respondents describe the letters of Mr. Donoval threatening to sue Sun Valley and its officials (Rec. 616-626). However, those threats were because Sun Valley officials had already made misconduct claims against Ms. Hammer and had already commenced an investigation against her. A substantial portion of the letters were demanding that if Sun Valley was going to continue the already commenced investigation that it must be done in conformance with proper procedures, including providing Ms. Hammer with detailed allegations and an opportunity to adequately respond. Had that occurred, there would not have been any litigation. However, it was the subsequent placing of Ms. Hammer on administrative leave that was the predicate act which resulted in litigation. But for the combination of misconduct allegations, the commencement of the Ball Investigation, and the placing of Ms. Hammer on administrative leave, there would have been no threat of litigation, or any litigation at all.

Investigator Ball's retainer letter specifically states that she was being hired to perform an

[34] Former Mayor Willich is adamant that he never received a copy of the Unauthorized Ball/Naylor Report, and was only made aware of it when it was published in the *Idaho Mountain Express* a year later (Willich Comp. Aff., Para. 88, Rec. 314). As there was no meetings at City Attorney King's office after December 12, 2011, and no Sun Valley City Council meetings after December 15, 2011, it was also impossible for the Unauthorized Ball/Naylor Report (dated December 20, 2011) to have been provided to the Sun Valley City Council during the Willich Administration prior to Attorney Naylor seeking a criminal investigation of Ms. Hammer in late December of 2011.

internal disciplinary investigation (Rec. 323-324). Nowhere in Investigator Ball's retainer letter is there any mention of her being retained as an attorney or related to litigation. Investigator Ball's Affidavit states that her "role was to act ***solely*** as a fact finding investigator regarding whether there were ***violations of Sun Valley policy***" (Ball Aff., Para. 6, Rec. 628)[35]. Pursuant to *Idaho Statute § 50-602*, Former Mayor Willich controlled all officers and affairs of Sun Valley during the Willich Administration, including directing Investigator Ball as to what she was doing, and why she was doing it. Former Mayor Willich is adamant that Investigator Ball was never retained because of threatened litigation, but because he was ordered to perform a disciplinary investigation of Ms. Hammer[36]. All four (4) members of the Sun Valley City Council testified at their depositions that the Ball Investigation was not commenced because of threatened litigation, and was, first and foremost, an internal Sun Valley fact finding, disciplinary investigation unrelated to litigation[37]. As is described in the Appellant's Amended Brief, the mere threat of litigation does not invoke work product protections of an investigation which might include "subject matter overlap" (see also *Koumoulis* @ 148).

The Ball Investigation was simply an internal, Sun Valley, employee disciplinary proceeding which would have been completed regardless of whether Ms. Hammer filed suit.

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[35] Former Mayor Willich was the only one authorized to make disciplinary "findings" related to the Ball Investigation pursuant to Section 8.7 of the *Sun Valley Personnel Policies* (Rec. 174-175). The Respondents assert that Former Mayor Willich simply disagreed with Investigator Ball's findings, as if Investigator Ball's opinion somehow trumped Former Mayor Willich's right to make disciplinary "findings". Investigator Ball had no authority to make any disciplinary "findings", but was to limit her role to "fact finding" on behalf of Former Mayor Willich. Attorney Naylor's unauthorized influence over Investigator Ball improperly resulted in misconduct "findings", including criminal findings, in the Original Ball/Naylor Report and the Unauthorized Ball/Naylor Report that were never intended to have been part of Investigator Ball's "fact finding" duties.

[36] Willich Comp. Aff., Para. 16-23, Rec. 298-299; Willich Supp. Comp. Aff., Para. 12-14, Rec. 772-773, Willich Dep., Rec. 1180-1185.

[37] Briscoe Dep., Rec. 1235; Ribi Dep., Rec. 1288; Youngman Dep., Rec. 1325; Lamb Dep., Rec. 1363.

Therefore, nothing about the Ball Investigation is entitled to work product protections, even if the results were eventually turned over to Attorney Naylor, Attorney Naylor was involved in it, or that it was somehow related to the disputes between Ms. Hammer and the Respondents.

The Court should note the misapplication of the *In Re: Grand Jury Subpoena Re: Torf*, 357 F.3d 900 (U.S. App.9th 2004) case cited by the Respondents, as in that case the company at issue was already on notice that it was under investigation by the EPA for violating federal waste management laws (@907), which is what then prompted the internal investigation in that case.

The Court should also disavow the argument in the Respondents Brief that Ms. Hammer is ***only*** entitled to work product privileged documents when there is "hardship" of some sort. That argument only applies where the documents sought have already been determined to be work product protected. In this case, as none of Ball Investigation related documents are work product protected, Ms. Hammer need not *also* make the "hardship" argument.

THE ATTORNEY CLIENT ISSUES
Issue 5B Through 5E

This Court must determine what the limits are when an attorney is appointed by an insurance company to represent multiple clients, and one does not accept the appointed attorney to represent it. The Respondents have failed to bear the burden of proving what the parameters were of Attorney Naylor's relationship with the Willich Administration, if any existed at all.

The *Lewis v. Delta Air Lines* Court found that even if the attorney at issue did not know that the conduct of his client was in "bad faith", there is still a loss of attorney client privileges when the client's conduct rises to "bad faith". Even if the Court gives Attorney Naylor the benefit of the doubt and concludes he had a some form valid attorney relationship with Sun

Valley during the Willich Administration, and was only thereafter following the directions of Briscoe Administration officials, the conduct of his client(s) in retaliating against Ms. Hammer, in terminating her for pre-textual reasons, and in seeking a "bad faith" criminal investigation, waives any attorney client protections that may have existed under the crime fraud exception.

However, there is extensive evidence in the Record On Appeal that Attorney Naylor ***knowingly*** became an active participant in the retaliatory Ball Investigation and in the pre-textual termination of Ms. Hammer. There is also substantial questions of whether Attorney Naylor was ever authorized to seek a criminal investigation of Ms. Hammer, with Former Mayor Willich adamantly denying that he ever did so[38] and Former Council Member Lamb confirming that the Sun Valley City Council never did so either (Lamb Dep., Rec. 1371). It is difficult to accept that Attorney Naylor, a former prosecutor, was unaware that the documents he provided to the Blaine County Prosecutor were insufficient to support criminal charges, as was confirmed by the Blaine County Prosecutor (Rec 433-434). It is even more unacceptable that Attorney Naylor sought that Ms. Hammer be criminally charged for conduct that Sun Valley officials, including Defendant Ribi and Defendant Briscoe themselves, approved, as was also confirmed by the Forensic Auditor (Rec. 969-970) and the Blaine County Prosecutor (Rec. 433-434), as well as Former Mayor Willich (Willich Compel Aff., Para. 49, Rec. 305; Willich Dep., Rec 1175, 1197-1201) and Former Council Member Lamb (Lamb Dep., Rec. 1364, 1366, 1372). Attorney Naylor's own "bad faith" conduct requires the waiver of privilege based on the crime fraud exception.

Attorney Naylor's conduct in seeking an unauthorized and ultimately unwarranted

[38] Willich Compel Aff., Para. 28, 29, 79, Rec. 300-301, 312.

referral to the Blaine County Prosecutor seeking a criminal prosecution of Ms. Hammer, on behalf of Defendant Ribi and ICRMP, as a defense strategy against Ms. Hammer's claims in the Original IPPEA Law Suit and the IHRC/EEOC Complaint, is reminiscent of the conduct of attorney Amiel Cueto ("Attorney Cueto") in the matter of *U.S. v. Cueto*, 151 F.3d 620 (U.S. App.7th 1998). In the *U.S. v. Cueto* case, the U.S. 7th Circuit Appellate Court affirmed the conviction of Attorney Cueto for obstruction of justice under *18 U.S.C. § 1503*[39]. In The *U.S. v. Cueto* case, Attorney Cueto pressured the St. Clair County, Illinois, State's Attorney to file criminal charges against an Illinois Liquor Control Commission ("ILCC") agent in an effort to protect his client's, and his own, business ventures (ultimately determined to be criminal ventures), from inspections by the ILCC. The *U.S. v. Cueto* Court found that a private attorney actively seeking that unwarranted criminal charges be brought against someone as a defense of his client's interest, is just as much an obstruction of justice as directly obstructing justice in an already pending criminal case[40]. The *U.S. v. Cueto* Court (@631) stated:

> "Intent may make any otherwise innocent act criminal, if it is a step in a plot. Therefore, it is not the means employed by the defendant that are specifically prohibited by the statute; instead, it is the defendant's corrupt endeavor which motivated the action. Otherwise lawful conduct, even acts undertaken by an attorney in the course of representing a client, can transgress § 1503 if employed with the corrupt intent to accomplish that which the statute forbids ... means, though lawful in themselves, can cross the line of illegality if (i) employed with a corrupt motive, (ii) to hinder the due

[39] The relevant portion of *18 U.S.C. § 1503* states "Whoever ... corruptly or by threats of force, or by any threatening letter or communication, influences, obstructs, or impedes or endeavors to influence, obstruct or impede, the due administration of law, shall be imprisoned."

[40] Mr. Donoval served as the Chief Legal Counsel of the ILCC between 1993 and 1995. In Attorney Cueto's 1997 trial, U.S. District Court Judge Stephen Limbaugh certified Mr. Donoval as an expert in administrative and liquor control law, and Mr. Donoval was allowed to opine on whether Attorney Cueto's conduct in seeking that criminal charges be brought against ILCC agent Bonds Robinson was a violation of Attorney Cueto's ethical duties. Mr. Donoval testified that Attorney Cueto's conduct in acting as a self appointed, private prosecuting attorney, seeking to coerce criminal charges against the ILCC agent, was not acting in "defense" of his client(s).

administration of justice, so long as (iii) the means have the capacity to obstruct."

Attorney Naylor was not defending a criminal organization, as Attorney Cueto was. But Attorney Naylor's conduct, in knowingly seeking a very public and unwarranted "bad faith" criminal investigation of Ms. Hammer, as a non-deputized private attorney, in defending Defendant Ribi, under the veil that he represents "the government", was no less egregious.

THE WAIVER OF ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGES
(Issue 5F Through 5K)

In the Amended Appellant's Brief, Ms. Hammer extensively detailed multiple arguments for why the Respondents waived any attorney-client or work product privileges related to the Ball Investigation or Attorney Naylor's relationship with the Willich Administration.

The two most compelling assertions for finding that there was a waiver of both privileges are based on a) the submission of the Unauthorized Ball/Naylor Report and other documents related to the Ball Investigation to the Blaine County Prosecutor, and, b) the publication of the Unauthorized Ball/Naylor Report in its entirety in the *Idaho Mountain Express.*

The Respondents claim that there was some form of common interest privilege between the Briscoe Administration and the Blaine County Prosecutor (Respondent's Brief, Pg. 47). The District Court bought that argument. However, the Blaine County Prosecutor did not seek the Ball Investigation information - it was submitted to him unsolicited. And, Attorney Naylor submitted the information to the Blaine County Prosecutor after the Ball Investigation was admitted to have been completed[41]. The giving of an already completed investigation report to an

[41] Former Mayor Willich asserts that he ended any matters related to the investigation of Ms. Hammer on or about December 13, 2011 (Willich Compel Aff., Para. 53-60, Rec. 306-307), when he mandated that the Original

agency that did not participate in the investigation cannot possibly be considered to be a "common interest" investigation. And, the written report of the Blaine County Prosecutor makes clear that Attorney Naylor was providing information to the Blaine County Prosecutor ***at the request of ICRMP*** (Rec. 430)***, not Sun Valley***. Therefore, in reality, it was ICRMP and their attorney giving away Sun Valley's purportedly protected documents, not even Sun Valley itself. As is described in the Appellant's Amended Brief, the voluntary providing of attorney-client or work product privileged information to another government agency, waives any privileges.

The Unauthorized Ball/Naylor Report was published in its entirety, for almost a year, in the *Idaho Mountain Express* on-line version. The Respondents' argument is that even if there is a waiver, it does not apply to any other information related to the Ball Investigation. Even the cases cited in Respondents' Brief (Respondents' Brief, Pg. 44-48) stand for the proposition that once there is a waiver of either the work product or attorney-client privilege, it applies to all matters ***related to that subject***. Ms. Hammer asserts that all matters related to the Ball Investigation are waived, without limits, by the publication of the Unauthorized Ball/Naylor Report because ***the Ball Investigation was the subject of the Unauthorized Ball/Naylor Report.***

Ms. Hammer rests her remaining arguments regarding waiver of attorney client and work product privileges on her arguments in the Amended Appellant's Brief, including a)

Ball/Naylor Report be kept locked up at City Attorney King's office in Ketchum (Willich Compel Aff., Para. 56-57, Rec. 306-307; Willich Supp. Compel Aff., Para. 14, Rec. 773; Willich Dep., Rec. 1186), which was confirmed by Defendant Briscoe (Briscoe Dep., Rec. 1227). Attorney Naylor and Investigator Ball may have misunderstood Former Mayor Willich's discussions that there were ***other*** Sun Valley related matters that may need to be further investigated (Willich Compel Aff., Para. 45, 76-77, 81, 85, Rec. 304, 311-314; Willich Supp. Compel Aff., Para. 16-17, Rec. 774-775; Willich Dep., Rec. 1211), to give them *carte blanche* to continue to investigate and issue new reports (i.e. the Unauthorized Ball/Naylor Report) related to Ms. Hammer, with new findings against Ms. Hammer, including that there should be a criminal referral - when no such authority was provided

communications are not protected which refer to the nature of services provided by either Investigator Ball or Attorney Naylor, b) communications to or from Former Mayor Willich which were submitted *in camera* but not verified as being legitimate by Former Mayor Willich himself, are not eligible to be used to prove the attorney-client or work product protections, c) some (if not all) of the communications are not protected because they were not related to legal advice or were not requested, d) the privilege log was insufficient, and, e) the District Court was required to review each email and document and not provide a global exemption.

ISSUE VI) Did the District Court err in entering costs against the Appellant?

Ms. Hammer reiterates that if the Court reverses the matters and remands the case back to the District Court, that the cash deposit provided to the District Court by Ms. Hammer to stay collection proceedings of the cost judgment, be released by order of the Court.

CONCLUSION

Ms. Hammer suffered through three years of repetitive harassment at the hands of Defendant Ribi, which Sun Valley officials did little about, because, as the well intentioned Former Mayor Willich admitted, there was no mechanism for disciplining an elected Sun Valley City Council member (Willich Dep., Pg. 146, Ln. 7 to Pg. 147, Ln. 6, Rec. 1207; Willich IHRC Aff., Para. 13, Rec. 667-668). Immediately after the November of 2011 election, Defendant Ribi continued his hostile and abusive conduct towards Ms. Hammer, in conjunction with Defendant Briscoe, by forcing the Ball Investigation against her during the Willich Administration. Even after Former Mayor Willich made "final and binding" findings exonerating Ms. Hammer of any

misconduct claims prior to the end of the Willich Administration[42], as he was authorized to pursuant to Section 8.7 of the *Sun Valley Personnel Policies* (Rec. 175), Defendant Ribi and Defendant Briscoe continued their retaliatory conduct by placing Ms. Hammer on administrative leave a second time, re-investigating the same conduct she had been exonerated of, terminating her, commencing a targeted Forensic Audit against her, and publicly seeking a "bad faith" criminal investigation of the same conduct that they had themselves approved.

The Respondents mock the assertion that Defendant Ribi "has some grand plan to get her fired, for which he recruited various city officials, employees, and agents to execute". American governmental and political history is filled with men who claimed to be pillars of virtue and instead were subsequently found to have used government resources for improper and abusive purposes (i.e. Joe McCarthy, Richard Nixon, or more recently Rod Blagojevich). A small, exclusive, wealthy ski resort community in Idaho's mountains is not immune from elected officials' misconduct. As Former Council Member Lamb readily admitted in her deposition, immediately after the November of 2011 election, Defendant Ribi and Defendant Briscoe had an "agenda" to find anything they could to justify the termination of Ms. Hammer (Lamb Dep., Rec. 1365). So the answer to the Respondents' inquiry is, Yes! – Ms. Hammer believes Defendant Ribi had a grand plan to find anything that could be used to terminate her, and ruin her professional career, in retaliation for the harassment complaints she had made, and recruited Defendant Briscoe and Attorney Naylor to help, at great expense to Sun Valley taxpayers[43].

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[42] Rec. 565; Willich IHRC Aff., Para. 23-24, Rec. 680; Willich Compel Aff., Para. 49-60, Rec. 305-307.
[43] A December 19, 2012 *Idaho Mountain Express* article was entitled "Price tag for city's inquest at least $717 K".

Contrary to how the Respondents have tried to "spin" the findings of the Forensic Auditor and the Blaine County Prosecutor, both the Forensic Auditor (Rec. 969-970)[44] and the Blaine County Prosecutor (Rec. 433-434)[45] confirmed that the conduct of Ms. Hammer was required to be, and had been, authorized by both Former Mayor Willich and the Sun Valley City Council (of which Defendant Ribi and Defendant Briscoe were members). In reality, Ms. Hammer was investigated and terminated by the same men that had approved everything she had done. If anyone was at fault for Ms. Hammer's actions, it was Former Mayor Willich, Defendant Ribi and Defendant Briscoe for approving Ms. Hammer's use of flex time and a Sun Valley auto, not Ms. Hammer herself. Ms. Hammer was never provided the opportunity to defend herself against the misconduct allegations against her in either the Unauthorized Ball/Naylor Report, the Forensic Audit Report or as part of the Blaine County Prosecutor's investigation. This law suit was intended to provide Ms. Hammer with the name clearing forum she was never provided.

The purpose of the "without cause" clause of the Employment Agreement was to provide Ms. Hammer with "severance" so she could find another job without the stigma that she was terminated "with cause". It happens all the time in government situations. Whether it be "without cause" or "at will", inherent in that right of the employer is the duty to not then publicly trash the

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[44] Although the Respondents assert that the Forensic Auditor found that it was Former Mayor Willich and Ms. Hammer that somehow were at fault for any Sun Valley financial mis-management (Respondents' Brief, Pg. 7), the Forensic Auditor actually confirmed that pursuant *Idaho Code § 50-1017* it was the Sun Valley City Council, not Former Mayor Willich or Ms. Hammer, that was responsible for Sun Valley's financial operation and adherence to policies (Rec. 969-970).

[45] In the Respondents' Brief, the Respondents falsely claim that the Blaine County Prosecutor found that there was "evidence of misconduct by Hammer" (Respondents' Brief, Pg. 8). A careful reading of the report of the Blaine County Prosecutor (Rec. 430-434) finds that he very carefully asserts that the misconduct claims were all "alleged", and never makes any conclusions as to Ms. Hammer's misconduct (whether criminal or not). Instead, the Blaine County Prosecutor makes clear that Former Mayor Willich and the Sun Valley City Council approved everything that Ms. Hammer had done that she had been accused of.

employee. The six (6) months of severance did little to help Ms. Hammer during the year that she was publicly being asserted by Briscoe Administration officials and Attorney Naylor to have committed criminal acts, until the Blaine County Prosecutor finally put an end to that nonsense. Meanwhile, no government entity would seriously consider her for employment. The stench of those false criminal claims have permanently ruined Ms. Hammer's professional career in municipal management, as was intended by Defendant Ribi and Attorney Naylor[46].

In Summary

Ms. Hammer has adequately plead and asserted that the Briscoe Administration took adverse actions against her for making numerous harassment claims against Defendant Ribi and filing the Original IPPEA Law Suit and the IHRC/EEOC Complaint.

Based on a) this Court's prohibition of waiver of statutory claims, b) this Court's definition of "severance" as not being for the release of non service related claims, and, c) Ms. Hammer not having "unequivocally" waived her right to bring claims under the IPPEA - the District Court's entry of summary judgment, based on waiver, should be reversed. Instead, summary judgment should be entered in Ms. Hammer's favor in regards to the waiver issue.

The District Court's finding that Ms. Hammer was judicially estopped from asserting that the Briscoe Administration's reasons for terminating her were pretext under the third prong of the *McDonnell Douglas v. Green* test should be vacated, and the Respondents' arguments related

[46] At a January 11, 2012 hearing in the Original IPPEA Law Suit, a week before Ms. Hammer's termination, Attorney Naylor confirmed that he was going to make sure Ms. Hammer was criminally prosecuted and her career was ruined (Donoval Compel Aff., Para. 6, Rec. 371).

to Ms. Hammer's IPPEA claims should be dismissed as not being ripe at the summary judgment stage based on this Court's findings in *Curlee v. Kootenai County* and *Van v. Portneuf.*

There is sufficient evidence that the Idaho Legislature intended that individual government officials be held personally liable under the IPPEA.

The Respondents have failed in their burden to establish a legitimate basis for either attorney-client or work product protections related to Attorney Naylor or the Ball Investigation, and, based on numerous reasons cited by Ms. Hammer, have waived any attorney-client or work product privileges that may have existed, in particular in regards to the Ball Investigation.

Respectfully Submitted
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Attorney for Appellant, Sharon R. Hammer