8-31-2018

Eller v. Idaho State Police Appellant's Brief Dckt. 45698

IN THE SUPREME COURT OF THE STATE OF IDAHO

BRANDON ELLER, Plaintiff-Appellant v. IDAHO STATE POLICE an executive agency of the State of Idaho, Defendant- Respondent	Docket No. 45699-2018 Ada County District Court CVOC-2015-127
BRANDON ELLER, Plaintiff-Respondent v. IDAHO STATE POLICE an executive agency of the State of Idaho, Defendant- Appellant	Docket No. 45698-2018 Ada County District Court CVOC-2015-127

APPELLANT BRANDON ELLER'S OPENING BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT FOR ADA COUNTY.

HONORABLE NANCY BASKIN
District Judge

Erika Birch, ISB No. 7831
T. Guy Hallam, ISB No. 6101
Strindberg & Scholnick, LLC.
1516 W. Hays St.
Boise, ID 83713
Attorneys for Appellant Eller

Andrew Brassey, ISB No. 2128
Jason Murray, ISB No. 7623
Brassey Crawford, PLLC
345 Bobwhite Ct., Suite 215
Boise, ID 83701
Attorneys for Respondent ISP

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Constitutional Provisions

State Cases

Federal Cases

Statutes

Rules

Other Authorities

I. STATEMENT OF THE CASE

A. Nature of the Case

This public employee whistleblower case arises from a series of retaliatory adverse actions the Idaho State Police (ISP) took against its employee, Detective Brandon Eller (Eller), as a result of his protected activity under Idaho law. Specifically, ISP retaliated against Eller for testifying against a Payette County police officer at that officer's preliminary hearing, and for later objecting to ISP's directive requiring members of the Crash Reconstruction Unit (CRU) to destroy all but the final versions of their reconstruction reports. A Jury found in Eller's favor, and Eller now appeals because the District Court erred in making two rulings that precluded Eller from recovering the entirety of the damages awarded by the Jury.

B. Statement of the Case

On January 6, 2015 Eller filed his Complaint and Demand for Jury Trial wherein he alleged ISP unlawfully retaliated against him in violation of Idaho Code section 6-2101 *et seq.*, the Idaho Protection of Public Employee Act (Whistleblower Act). *See* Clerk's Record ("R."),[1] pp. 20-26. Eller later filed an Amended Complaint

[1] Citations to the Clerk's Record ("R.") will be followed by the page numbers: *e.g.*, "R., p. _."
Citations to the Transcripts ("Tr."). The court reporters produced four transcripts identified as follows: Tr.; Tr. 06.30.16; Tr. 12.05.16; and Tr. 08.17.17. These will be followed by the page numbers, and line numbers where appropriate: *e.g.*, "Tr. 08.17.17, p. _, L. _."
Citations to the Exhibits ("Ex.") will be designated as "Pltf. Ex." for Plaintiff's Exhibits, "Def. Ex." for Defendant's Exhibits, and "Ct. Ex." for Court's Exhibits followed by the Exhibit number and/or bates or page numbers where appropriate: *e.g.*, "Pltf. Ex. _, _".

and Demand for Jury Trial adding allegations that ISP subjected him to additional retaliatory adverse actions after the filing of his original Complaint. R., pp. 372-381. Eller also added a second cause of action of negligent infliction of emotional distress. R., pp. 380-81. ISP filed a *Motion for Summary Judgment* seeking dismissal of Eller's claims, which was denied by the District Court on August 2, 2017. R., pp. 571-98, 1592-610. The case was tried to a Jury in August 2017, and below is a summary of pertinent facts presented during trial.

Eller became an ISP patrol trooper in 1997, and in late 2004 was appointed as one of the founding members of the newly-formed ISP Collision Reconstruction Unit. Tr. 08.17.17, pp. 338-41. In 2007, Eller became a POST-certified[2] instructor for crash investigation and started doing trainings and presentations on crash investigation and reconstruction for POST, ISP, and other agencies. Tr. 08.17.17, pp. 209-10, 344-46, 420-22; Pltf. Ex. 23. Eller consistently taught POST's introduction to crash investigation course and ISP's basic and advanced crash investigation trainings. Tr., p. 845; Tr. 08.17.17, pp. 209-10, 421-22. Eller was widely recognized in the field as a "phenomenal reconstructionist" and the trainings he provided were regarded as the "very best instruction possible." Tr., p. 845, L. 6-9; Tr. 08.17.17, p. 344; Pltf. Ex. 16, p.000495; Pltf. Ex. 27.

[2] This meant he was certified by the Police Officer Standards and Training (POST) to instruct other law enforcement officers or trainees.

For many years, one of Eller's primary career goals was to become the ISP statewide Reconstruction Program Manager. Tr. 08.17.17, p. 368. As was documented by ISP, Eller was on track to accomplish this goal. Tr. 08.17.17, p. 369; Pltf. Ex. 19, p. 000517. For example, in 2008, he was assigned to be the District 3 liaison for the Inter-Agency Crash Team, and for portions of 2011 and 2013, Eller filled in as the interim Statewide Program Manager. Tr. 08.17.17, pp. 378-79, 514-15. Eller served as a fulltime reconstructionist in the CRU for 9 years and was the longest-serving member of the CRU. Tr. 08.17.17, p. 382. In short, his future in leading crash reconstruction at ISP was bright. However, in October 2011, a fatal car crash involving a Payette County deputy would end up significantly changing the course of Eller's career at ISP.

1. The Sloan Crash and Investigation

On October 18, 2011, a Payette County Sheriff Deputy, Scott Sloan, was involved in a car crash with civilian Barry Johnson. Tr., pp. 546, 656; Tr. 08.17.17, pp. 20-22. In response to a 911 call, Deputy Sloan was traveling above the speed limit on a two-lane rural highway, where he came upon Johnson's jeep. Tr. 08.17.17, pp. 21, 111. ISP Officers estimated that Deputy Sloan was driving at approximately 114-115 miles per hour just prior to the crash. Tr., pp. 737, 1021; Tr. 08.17.17, pp. 354-55. Deputy Sloan started to pass Johnson on the left when Johnson turned into

his driveway, causing Sloan to crash into the jeep. Johnson died as a result of the crash. Tr. 08.17.17, pp. 699, 716.

ISP assigned Trooper Justin Klitch to investigate the crash and assigned Crash Reconstructionist Corporal Quinn Carmack to perform the crash reconstruction. Tr., pp. 701, 729; Tr. 08.17.17, pp. 13-14. As a part of the investigation, it was discovered that Johnson had a range of Blood Alcohol Concentration (BAC) results at the time of the crash, some of which were above the legal limit. Tr. 08.17.17, pp. 35-36, 47. While Carmack did not believe that Johnson's BAC was a causal factor in the crash, Klitch disagreed and believed that alcohol had to be the cause of the crash. Tr., p. 756; Tr. 08.17.17, pp. 35-37.

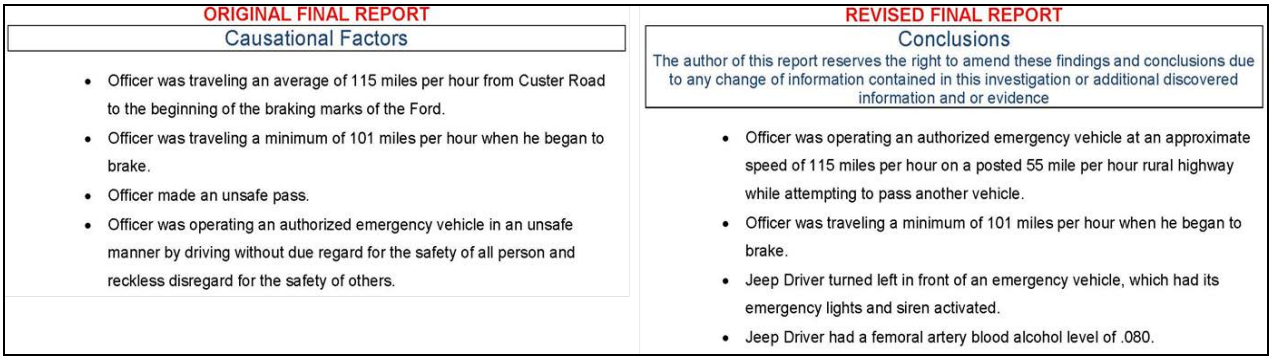
Eller, who was the lead reconstructionist in District 3, was assigned to assist Klitch in interviewing Deputy Sloan on or about November 30, 2011. Tr., p. 745; Tr. 08.17.17, pp. 350-51. Based on this interview and other information Eller learned about the crash, Eller supported Carmack's conclusion that Johnson's BAC was *not* a causal factor in the crash; rather both Carmack and Eller believed that Sloan had been driving too fast and should not have attempted to pass the jeep (*i.e.*, was operating his vehicle in an unsafe or reckless manner). Tr. 08.17.17, pp. 34-37, 348, 358-60, 492, 506; Pltf. Ex. 1.

After Carmack's reconstruction report was peer reviewed by two other reconstructionists, it was sent for final approval by the CRU Statewide Coordinator,

Specialist Fred Rice. The final report approved by Rice identified the following as causational factors: that Sloan was driving too fast, in an "unsafe manner" and in "reckless disregard for the safety of others." Tr. 08.17.17, pp. 14-16, 19-20, 34-35; Pltf. Ex. 1.

Just prior to the final report approval, District 3's top commanders, Captain Steve Richardson and Lieutenant Sheldon Kelley, called Eller into a meeting. Believing that Eller could or would influence Carmack's conclusions, the commanders tried to get Eller to agree that alcohol was a cause of the crash and that it was Johnson who had made an unsafe left turn. Tr. 08.17.17, pp. 355, 359-60. Eller refused to capitulate and the contentious meeting ended. Tr. 08.17.17, pp. 246-47.

The same day that Carmack's report was approved, Cpt. Richardson and Lt. Kelley called Carmack and Rice into a meeting and had a "heated" discussion, wherein they made it clear that they believed that Johnson's BAC caused the crash. Tr. 08.17.17, pp. 24-25, 37-39, 50-51. Lt. Kelley was so angry about the situation that he was yelling, and Carmack felt pressured to change his final report despite the fact that he believed he could not honestly testify that alcohol was a cause of the crash. Tr. 08.17.17, pp. 37-39, 50-51. Carmack made the mandated changes which were ultimately approved by Rice. Tr. 08.17.17, pp. 40-42, 51-52; Pltf. Ex. 130. The difference between the revised report and the original report are telling:



ORIGINAL FINAL REPORT

Causational Factors

- Officer was traveling an average of 115 miles per hour from Custer Road to the beginning of the braking marks of the Ford.
- Officer was traveling a minimum of 101 miles per hour when he began to brake.
- Officer made an unsafe pass.
- Officer was operating an authorized emergency vehicle in an unsafe manner by driving without due regard for the safety of all person and reckless disregard for the safety of others.

REVISED FINAL REPORT

Conclusions

The author of this report reserves the right to amend these findings and conclusions due to any change of information contained in this investigation or additional discovered information and or evidence

- Officer was operating an authorized emergency vehicle at an approximate speed of 115 miles per hour on a posted 55 mile per hour rural highway while attempting to pass another vehicle.
- Officer was traveling a minimum of 101 miles per hour when he began to brake.
- Jeep Driver turned left in front of an emergency vehicle, which had its emergency lights and siren activated.
- Jeep Driver had a femoral artery blood alcohol level of .080.

R., p. 1641; Tr. 08.17.17 pp. 43-48; Pltf. Ex. 1, p. 9, Pltf. Ex. 130, p. Eller000195;.

In short, by late 2011/early 2012, the opinions about this crash were clearly delineated within ISP:

- The crash reconstructionists, including Eller, Carmack, and Rice, believed that Sloan acted recklessly, unsafely, and caused the crash that killed Johnson.

- Cpt. Richardson, Lt. Kelley and Klitch believed that, because Johnson had a BAC above the legal limit, alcohol must have been a cause of the crash.

2. The Sloan Preliminary Hearing and ISP's Immediate Retaliation

After conducting his investigation, Gem County Prosecutor Richard Linville charged Deputy Sloan with felony vehicular manslaughter. Tr., p. 700; Pltf. Ex. 99, p. KELLEY-OPS000332. A preliminary hearing was held on April 13, 2012 and Prosecutor Linville called both Carmack and Eller to testify at the hearing. Tr. 08.17.17, pp. 11, 58-59, 346. Both reconstructionists testified that Johnson's BAC level was not a cause of the crash and that Deputy Sloan was driving recklessly and in an unsafe manner. Tr. 08.17.17, pp. 58-59, 348, 505-06. Additionally, both Eller

and Carmack testified that Carmack had been required by ISP commanders to change the original crash reconstruction report and issue a revised, second report. Tr. 08.17.17, pp. 60, 350. On the other hand, the defense called Klitch to testify. He disagreed with the other reconstructionists' testimony and was definitive in his opinion that alcohol caused the crash because Johnson had a BAC level above the legal limit. Tr., p. 756.

Klitch had asked his supervisor, Sergeant Ketchum, to attend the preliminary hearing. During the hearing, Ketchum sent text messages to Lt. Kelley, who immediately shared the text messages with other commanders including Cpt. Richardson. One of the text messages indicated that Carmack was "throwing you guys under the bus on the stand." Tr., p. 517, L. 5-14, pp. 525, 730; Tr. 08.17.17, pp. 167, 771-72. ISP's response to Carmack's and Eller's testimony was immediate. During a meeting the same day, ISP command staff gathered in Major Kevin Hudgens' office to discuss the preliminary hearing. Tr., p. 519; Tr. 08.17.17, pp. 770-72. Rice was summoned into the meeting where he heard a Major say that Carmack and Eller would **"be lucky to have their jobs patrolling nights and weekends,"** or words to that effect. Tr. 08.17.17, p. 169, L. 20-25, pp. 770, 773, L. 1-3. Lieutenant Colonel Kedrick Wills expressed his dismay at Carmack's and Eller's testimony, stating: **"I cannot believe that the Idaho State Police is going to send a deputy to**

prison." Tr. 08.17.17, p. 773, L. 4-6. Soon thereafter, Eller learned that Ketchum was telling others that Eller lied on the witness stand. Tr. 08.17.17, pp. 366, 503.

The retaliatory motives immediately affected ISP's perception and evaluation of Eller. For example, Eller's 2011 performance review, given to him just prior to Sloan's preliminary hearing, provided an overall rating of "significant accomplishment" (the highest rating possible). Pltf. Ex. 16. Eller also received a very prestigious award (the Samson award) for being the top patrol officer in District 3 for the year. Tr., pp. 646-47; Tr. 08.17.17, p. 343. In contrast, when Eller was evaluated in April 2012 (shortly *after* the preliminary hearing), Eller's performance rating was downgraded a level and he was accused of causing "**dissention within the Region 3 Patrol ranks**." Pltf. Ex. 17, p. RFP001541. He was also instructed to "**soften[] his opinions on confrontational matters and be[] more open to feedback**." Tr. 08.17.17, pp. 360-62; Pltf. Ex. 17, p. RFP0001540. Eller attributed these negative statements to the testimony he gave during the preliminary hearing. Tr. 08.17.17, pp. 361-62, 365. This negative evaluation affected Eller's eligibility for pay raises. Tr. 08.17.17, pp. 367-68.

3. ISP's Directive to Destroy Drafts

As a result of Sloan's preliminary hearing, ISP issued an edict that *all* peer review reports should be destroyed. Specifically, on July 29, 2013, Maj. Hudgens sent an email to all District Captains directing them that "**CRU members will not**

keep draft copies of their [peer review] reports in the official case file. As is current practice within ISP, those reports should be destroyed." Tr. 08.17.17, pp. 78-79, 370-71; Pltf. Ex. 83. When Eller received this email, he was concerned because he knew from his training that everything created during an investigation is potentially discoverable under *Brady v. Maryland.*[3] Tr. 08.17.17, pp. 372-76; Pltf. Ex. 156.

Eller approached two of his commanding officers (Lt. Doty and Cpt. Kelley) and expressed concerns that the directive could cause a *Brady* issue, leaving officers unable to turn over exculpatory evidence. Eller also stated that he thought "legal," (*i.e.* ISP's deputy attorney general) should be asked to render a decision regarding the legality of the directive. Both Lt. Doty and Cpt. Kelley ignored Eller's concerns and made it clear that he was to follow the directive and destroy peer review reports. Tr. 08.17.17, pp. 373-76. Eller refused to follow the directive, yet he was notified that peer review reports had been destroyed in a number of fatal crash files. Tr. 08.17.17, pp. 79-81, 376; Pltf. Ex. 135.

4. ISP's Ongoing Retaliation

Things only got worse for Eller after he questioned the legality of the directive to destroy documents. Specifically, thereafter:

- Lt. Doty told Eller that Command did not believe that he (Eller) supported the CRU and would be removed if he did not change. Cpt. Kelley informed Eller that he was purposely being left out of discussions regarding CRU

[3] In *Brady,* 373 U.S. 83, 87, 83 S. Ct. 1194, 1197 (1963), the U.S. Supreme Court established that a prosecutor has a duty to disclose exculpatory evidence to the accused.

changes. Tr. 08.17.17, p. 383. Additionally, Lt. Doty told other employees that Eller was just a "disgruntled employee." Tr., pp. 813, 927; Tr. 08.17.17, pp. 370, 439.

- In early 2014, Lt. Doty directed Rice to make various edits to Eller's 2013 evaluation, which diminished many of the complimentary statements about Eller. Rice was also directed to change Eller's "significant accomplishment" rating to a "valuable contributor" rating, the next level down. Tr., pp. 929-34; Pltf. Ex. 18.

Additionally, ISP made many retaliatory changes to the CRU that directly and negatively impacted Eller's job duties and benefits. For example:

- In October 2013, the CRU was "restructured" and Eller was placed back on patrol. Tr. 08.17.17, pp. 72-74, 379-81; Pltf. Ex. 39. As a result, Eller (who had historically worked a regular day shift Monday through Friday since becoming a fulltime member of the CRU in 2004) was required to rotate through night and weekend shifts. Tr. 08.17.17, pp. 381-82. Eller testified that these actions were a direct result of his protected activity and had a negative impact on his work and home life. Tr. 08.17.17, pp. 381, 384-87, 405.

- In January 2014, Eller was informed in a group email that "**ISP would no longer have a CRU in any District, therefore we will not have need of a supervisor**." Tr. 08.17.17, pp. 75-77, 387; Pltf. Ex. 40. This email is how ISP notified Eller that he was relieved of his interim statewide CRU coordinator duties, which he had been performing for the prior nine months. Tr. 08.17.17, pp. 387-88. After relieving Eller of these duties, Cpt. Kelley reassigned them to two other ISP reconstructionists. Tr. 08.17.17, pp. 388-90.

- At around this same time, ISP interfered with Eller's reconstruction of a fatal school bus accident. Tr. 08.17.17, pp. 409-13.

- Because of the string of negative actions directed at Eller and the CRU, and given his concerns about the directives to destroy draft reports and make changes to his own reconstruction reports, Eller felt compelled to step away from doing crash reconstruction work, effectively ending his

career in that field. Eller continues to struggle with this significantly difficult decision. Tr. 08.17.17, pp. 413-17.

- In June 2014, ISP rejected Eller's application for a pay increase under ISP's Choice Point Program for instructors without explanation.[4] When Eller filed a problem-solving request on the issue (which was also ultimately denied), he was told that he could no longer teach and that any training should be assigned to a different trooper. Tr. 08.17.17, pp. 418-29. Eller testified that these denials of his pay increase and the restriction of his ability to continue to do trainings were related to his whistleblowing activities. Tr. 08.17.17, p. 429.

- In Spring 2016, Eller applied for a Sergeant promotion. Although his scores were above the required level, ISP halted Eller's scoring during the middle of the process, which effectively kept him from advancing to the next level of review. Thus, ISP never considered Eller as a candidate for the position, or any other Sergeant openings over the next six months. Tr., pp. 778, 781-82, 785-90, 839-42, 1118-20; Tr. 08.17.17, pp. 434-36, 438-44, 457-58.

5. Eller's Emotional Distress

Eller and his wife, Kristi Eller, testified about the emotional impact the above events have had on Eller which included the following evidence: Eller was "very proud to be an Idaho state trooper,"[5] and he loved doing reconstruction work. Tr., pp. 949-50. His goal was to become the manager of the ISP crash reconstruction program. Tr., pp. 949-51. After the retaliation because of Eller's testimony at the Sloan hearing, "he shut down … he lost the skill to communicate about the kids,"[6] he was "grouchy" and all he wanted to do was watch TV. Tr., p. 956, L. 4-9. He

[4] Eller had been instructing since 2007 and had been recognized as the "go-to" trainer on crash reconstructions. Thus, he was eligible for the Choice Point pay increase. Tr. 08.17.17, pp. 418-20.
[5] Tr., p. 948, L. 16; p. 949, L. 8-9.
[6] Tr., p. 955, L. 2-12.

stopped interacting with the kids, stopped cooking for the kids, he lost 15 to 20 pounds, and quit working out. Tr., pp. 955-57.

When he was reassigned out of the CRU and back to regular patrol, he was "devastat[ed]: you have your whole career path, your whole direction you want to go, and all of the sudden it's gone. It's changed." Tr. 08.17.17, p. 386, L. 14-17. He had trouble sleeping, headaches, started getting sick more often and having skin issues. Tr. 08.17.17, pp. 415-16. His wife, Kristi testified that it was "heartbreaking" to watch him pushed out of reconstruction. Tr., p. 961, L.7-17.

6. Jury Trial Proceedings and Disposition

The jury trial began on August 14, 2017 and on August 29th, the Jury returned its Special Verdict in favor of Eller, finding ISP unlawfully retaliated against him in violation of the Whistleblower Act, and that ISP negligently inflicted severe emotional distress on Eller. R., pp. 1827-29.

During the case, Eller sought emotional distress damages pursuant to both the Whistleblower Act and for the negligent infliction of emotional distress (NIED). R., pp. 380-81. However, on August 24, 2017, after briefing and argument by both parties, the District Court ruled that, as a matter of law, the Jury was precluded from awarding Eller emotional distress damages under the Whistleblower Act. Tr., pp. 768-74. The District Court formalized this ruling in a written Memorandum Decision and Order entered on September 1, 2017. R., pp. 1830-36. Because of the

District Court's ruling, the Special Verdict form only permitted the Jury to award non-economic damages under Eller's NIED claim. R., pp. 1827-29.

After the Jury's verdict, ISP moved for a reduction of Eller's emotional distress damages pursuant to Idaho Code § 6-926. R., pp. 1838-46. ISP failed to reference its intent to rely on section 6-926 prior to this motion. section 6-926, part of the Idaho Tort Claims Act (ITCA), states in relevant part:

> The combined, aggregate liability of a governmental entity and its employee for damages, costs and attorney's fees under this chapter . . . as the result of any **one (1) occurrence** or accident regardless of the number of persons injured or the number of claimants, shall not exceed and is limited to five hundred thousand dollars ($500,000).

I.C. § 6-926(1) (emphasis added).

After briefing and argument, the District Court interpreted "occurrences" under section 6-926 to equate to adverse actions in Whistleblower claims, and reduced the Jury's emotional distress verdict from $1,500,000 to $1,000,000, stating that "the Court can easily determine that the jury found at least two adverse actions." R., p. 1993 (emphasis added). The Court entered judgment on December 12, 2017, including the reduced emotional distress compensation and the Jury's verdict for economic damages of $30,528.97 as a result of ISP's violations of the Whistleblower Act. R., p. 1997. On March 26, 2018, the Court entered an Amended Judgment, incorporating its decision awarding Eller attorneys' fees and costs. R., pp. 2069-70.

Both ISP and Eller filed Notices of Appeal on January 23, 2018. R., pp. 1999-2011. The Appeals were consolidated for briefing and oral argument under Appeal No. 45698. *See Order* May 24, 2018.

II. ISSUES PRESENTED

A. Section 6-2105 of the Whistleblower Act sets forth "remedies for employee bringing action," and in subsection (1) defines damages as "damages for injury or loss caused by each violation..." Section 6-2105(2) authorizes an employee to bring an action for "actual damages." In light of the plain language of section 6-2105,

> *Did the District Court err by ruling as a matter of law that the Whistleblower Act precludes an award of compensatory damages for emotional distress injuries?*

B. After the Jury returned its verdict, ISP moved the District Court to reduce the jury's emotional distress award raising section 6-926 for the first time and arguing there was only a single "occurrence" of ISP's retaliatory conduct. The District Court found that there were at least two occurrences, and partially granted ISP's motion reducing the Jury's verdict. Based upon ISP's failure to raise section 6-926 during pre-trial litigation or during trial,

> *Did the District Court err in finding that ISP had not waived its right to raise the cap under section 6-926 by waiting to raise it until after a verdict was returned?*

And, if this Court finds no waiver, should the case be remanded to the District Court with direction to properly apply the governing law by making findings pursuant to Idaho Rule of Civil Procedure 49(a) regarding how many occurrences caused Eller to suffer emotional distress?

C. The Whistleblower Act provides for an award of costs and reasonable attorney fees to a prevailing employee. I.C. §§ 6-2106(5), 6-2105(1). If Eller prevails on appeal,

Is Eller entitled to costs and attorney fees on appeal pursuant to Idaho Appellate Rule 40 and 41 and the Whistleblower Act?

III. ARGUMENT

A. Standard of Review

This Court's review regarding questions of law is *de novo*. *O'Loughlin v. Circle A Constr.*, 112 Idaho 1048, 1051, 739 P.2d 347, 350 (1987). Interpretation of a statute or rule is purely a question of law over which this Court exercises free review. *Ashton Urban Renewal Agency v. Ashton Mem'l, Inc.*, 155 Idaho 309, 311 P.3d 730, 732 (2013). Likewise, questions of compliance with the rules of procedure are questions of law, such that this Court exercises free review. *In Re: SRBA Case No. 39576, Subcase Nos. 65-23531 and 65-23532*, *Black Canyon Irrigation Dist. v. State*, 163 Idaho 144, 149, 408 P.3d 899, 904 (2018)*("Black Canyon Irrigation Dist.")*.

B. Summary of the Argument

"The right of trial by jury shall remain inviolate." IDAHO CONST. Art. I, § 7; *see also* I.R.C.P. 38(a). This constitutional right "should be carefully safeguarded by the courts" and "it is not the trial court's prerogative to disregard or nullify [the jury's findings] by making finding of [its] own." *Ross v. Coleman Co., Inc.*, 114 Idaho 817, 826, 761 P.2d 1169, 1178 (1988)(internal citation and quotation omitted).

In this appeal, Eller seeks to restore the Jury's verdict that he suffered/will continue to suffer emotional distress due to ISP's retaliatory actions against him, by reinstatement of the verdict in full. The District Court improperly reduced that verdict by $500,000 based on ISP's belated post-trial arguments. Ultimately, Eller requests this Court make at least one holding, if not more than one, that would restore the Jury's determination of the full amount of his compensatory damages.

As further set forth below, there are three equally and independently sufficient holdings that would accomplish restoration of the Jury's verdict: (1) reversal of the District Court's Order that compensatory emotional distress damages are not an available remedy under the Whistleblower Act; (2) reversal of the District Court's Order concluding that ISP did not waive its right to assert a reduction of damages pursuant to section 6-926; or (3) vacating the Court's Order regarding the reduction of damages and remanding the case to the District Court to

enter findings of fact pursuant to Idaho Rule of Civil Procedure 49(a) regarding the number of occurrences under section 6-926, consistent with the evidence at trial.[7]

C. Compensatory Emotional Distress Damages are Recoverable under the Plain Meaning of the Whistleblower Act.

The District Court ruled that compensatory emotional distress damages were not an available remedy under the Whistleblower Act. R., p. 1836. As discussed below, this ruling should be reversed based upon the plain and ordinary meaning of the statute and section 6-2105 in particular. As discussed below, section 6-2105's provision of remedies for a whistleblower, and its definition of damages, leaves no doubt that the Legislature provided for compensatory emotional distress damages under the Act. As discussed in sections 2 and 3 below, this interpretation is consistent, not contrary as the District Court found, with section 6-2106 and this Court's holding in *Wright v. Ada County*, 160 Idaho 491, 376 P.3d 58 (2016).

---

[7] Eller recognizes remand on this point does not guarantee restoration of the Jury's compensatory damages verdict. However, the District Court's following statement is noteworthy:

> In light of the totality of the evidence presented at trial, the Court is confident that the jury could have reasonably concluded that Defendant took **more** than two adverse actions against Plaintiff . . . . It is the Court's opinion that the disparity between the two awards indicates that one could rationally conclude that the jury based the NIED award on more than the two adverse actions it found under the IPPEA.

R., p. 1993, n. 5 (emphasis added). As such, if this Court deems it proper to vacate and remand on this issue, Eller requests that this Court instruct the District Court as to the scope of its relevant authority under Rule 49(a) so that the Court can properly apply the governing law.

1. *The ordinary meaning of the Act's remedial provision provides for compensatory emotional distress damages.*

Statutory interpretation "must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole." *Wright*, 160 Idaho at 497, 376 P.3d at 64 (citations omitted) (emphasis added). If the statute lacks ambiguity, "this Court does not construe it, but simply follows the law as written." *Id.*

Resolving this issue requires this Court to interpret the provisions of Idaho Code section 6-2105 to determine whether compensatory emotional distress damages are an available remedy under the Whistleblower Act. Section 6-2105 is unambiguous and allows this remedy. Section 6-2105 reads, in relevant part:

> 6-2105. REMEDIES FOR EMPLOYEE BRINGING ACTION — PROOF REQUIRED.
> (1) As used in this section, "damages" means damages for injury or loss caused by each violation of this chapter, and includes court costs and reasonable attorneys' fees.
> (2) An employee who alleges a violation of this chapter may bring a civil action for appropriate injunctive relief or actual damages, or both, within one hundred eighty (180) days after the occurrence of the alleged violation of this chapter.

I.C. § 6-2105 (emphasis added).

The Legislature clearly provided that employees are entitled to seek "actual damages" for "injury or loss" under the Whistleblower Act. This plainly includes compensatory emotional distress damages. To wit, Merriam-Webster's online Law Dictionary defines actual damages as "damages deemed to

compensate the injured party for losses sustained as a direct result of the injury suffered – called also *compensatory damages*." *See* Merriam-Webster.com, *damages* (Aug. 31, 2018); *accord* Black's Law Dictionary 471 (10th ed. 2014). In turn, this Court has previously recognized that compensatory damages include emotional distress damages. *See, e.g., Kirkland v. Blaine County Med. Ctr.*, 134 Idaho 464, 467, 4 P.3d 1115, 1118 (2000) (Idaho has recognized a jury's right to award general compensatory damages for emotional distress since prior to the adoption of the Idaho Constitution).

Likewise, this Court has already interpreted the words "actual damages" broadly. First, in *O'Dell v. Basabe*, this Court interpreted "actual damages" as used in the Idaho Human Rights Act (IHRA) as "commonly understood as those actual losses caused by the conduct at issue." 119 Idaho 796, 811, 810 P.2d 1082, 1097 (1991). As such, this Court held that actual damages were broad enough to encompass front pay damages even though the statute specifically mentioned only back pay damages. *Id.*

Second, in *Paterson v. State*, this Court upheld plaintiff's recovery for her embarrassment and humiliation as a result of a hostile work environment under the IHRA. 128 Idaho 494, 503, 915 P.2d 724, 733 (1996). By affirming these damages, this Court implicitly concluded that the IHRA's "actual damage" language includes "compensatory [emotional distress] damages." *Id.*; *see also Garcia v. PSI*

Envtl. Sys., 2012 WL 2359496 at *8-9 (D. Idaho June 20, 2012) (Judge Lodge held "actual damages" includes emotional distress damages under the IHRA).[8]

Thus, this Court need do nothing more than give the Legislature's words their plain and ordinary meaning, as previously interpreted by this Court, to hold that the Whistleblower Act provides for emotional distress damages. The Legislature's deliberate drafting decision, here including actual damages for injury as a remedy available to whistleblowers, is dispositive. *In Re: Decision on Joint Motion to Certify Question of Law to the Idaho Supreme Court (Dkt. 31, 32, 45)*, *Pocatello Hosp., LLC v. Corizon LLC*, 2018 WL 472145 at *6, ___ P.3d ___ (2018). No further statutory construction is necessary, because Idaho courts are "reluctant to second-guess the wisdom of a statute and . . . unwilling to insert words into a statute" in deference to the legislature's intent. *Wright*, 160 Idaho at 498, 376 P.3d at 65.

2. *The District Court erred in concluding section 6-2106 trumps section 6-2105 and precludes emotional distress damages.*

The District Court took the position that section 6-2106 restricts a whistleblower's remedies to just the six (6) items listed therein. As support for this holding, the District Court relied on this Court's decision in *Wright*, *supra*.[9]

[8] Non-published cases are attached as an addendum to the Brief.
[9] The import of *Wright*'s holding is discussed below in section 3.

However, this Court need simply look to the plain language of section 6-2106 which reads in total:

> 6-2106. COURT ORDERS FOR VIOLATION OF CHAPTER. A court, in rendering a judgment brought under this chapter, may order any or all of the following:
> (1) An injunction to restrain continued violation of the provisions of this act;
> (2) The reinstatement of the employee to the same position held before the adverse action, or to an equivalent position;
> (3) The reinstatement of full fringe benefits and seniority rights;
> (4) The compensation for lost wages, benefits and other remuneration;
> (5) The payment by the employer of reasonable costs and attorneys' fees;
> (6) An assessment of a civil fine of not more than five hundred dollars ($500), which shall be submitted to the state treasurer for deposit in the general fund.

I.C. § 6-2106 (emphasis added). As explained below, the District Court erred when it ruled that this is an exclusive list of the only remedies allowable under the Act, effectively nullifying the plain language of section 6-2105.

a. This Court must give section 6-2106 its plain meaning without adding words.

This Court "has been unwilling to insert words into a statute that the Court believes the legislature left out, be it intentionally or inadvertently." *Wright,* 160 Idaho at 498, 376 P.3d at 65. There is no language in section 6-2106 that would indicate it is exclusive, such as, for example, "may only." Nor is there any language in section 6-2106 that indicates an intent to supersede the preceding sections of the

Act. Instead, it says that a court "may order any or all of the following." This Court has long held that use of the word "may" in a statute expresses discretion and permissiveness. *Boyd-Davis v. Macomber Law, PLLC*, 157 Idaho 949, 954, 342 P.3d 661, 666 (2015) (quoting *Rife v. Long*, 127 Idaho 841, 848, 908 P.2d 143, 150 (1995)). Use of the word "may" in section 6-2106 is permissive, allowing courts the discretion to enter some, all, or none of the orders listed. That discretion does not operate to limit the availability of other remedies or relief as set forth in other sections of the Act, namely section 6-2105's mandate that "actual damages" are recoverable.

In short, there is nothing in the plain language of section 6-2106 indicative of intent to limit whistleblower's relief to only the discretionary court-ordered items, and/or to the exclusion of the other provisions in the Act.

b. This Court must not read section 6-2106 in isolation.

Statutory interpretation requires this Court to "ascertain and give effect to the purpose and intent of the legislature, based on the whole act and every word therein, lending substance and meaning to the provisions." *Curlee v. Kootenai Cnty. Fire & Rescue*, 148 Idaho 391, 398, 224 P.3d 458, 465 (2008). *See also State v. Dunlap*, 155 Idaho 345, 361, 313 P.3d 1, 17 (2013) (court must consider the statute as a whole and it "must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant") (internal quotations omitted). The District Court's holding below operates to give no meaning or effect to section 6-

2105's provision of remedies including "actual damages" for "injury or loss." I.C. § 6-2105(1) & (2) (emphasis added). Section 6-2105 clearly and plainly allows a whistleblower to recover actual, a/k/a compensatory, damages for emotional injuries.

While section 6-2106 enumerates types of losses that can be compensated via a court order, nothing in that provision provides any enumeration of compensation for injury. In fact, the items listed in section 6-2106 include relief for losses which are typically provided by a court after a jury verdict in favor of the whistleblower (*i.e.*, injunction, civil fine, reinstatement, or attorney fees and costs), as opposed to relief determined by a jury, like compensatory damages for emotional injuries. This interpretation allows this Court to give both sections their plain meaning, while also ensuring that none will be "void, superfluous, or redundant." *Dunlap*, 155 Idaho at 361, 313 P.3d at 17. Such reading is also consistent with the overall intent of the Act to ensure whistleblowers who have suffered retaliation can recover for their injuries and losses.

The above interpretation is also consistent with the holding in *Brown v. City of Caldwell*, that nothing in the Whistleblower Act "restricts plaintiffs from seeking non-economic or other special damages." 2012 WL 4522728 at *1 (D. Idaho Oct. 1, 2012). While not binding, Eller respectfully submits that the analysis in *Brown* is persuasive and instructive.

The defendant in *Brown* made the same argument lodged by ISP in this case (R., pp. 1732-39): that the enumerated items in section 6-2106 prevent the recovery of any other damages and specifically emotional distress damages. After recognizing that all sections of a statute must be considered together and that an interpretation of a statute must not render a part of it a nullity, the *Brown* court looked at the two sections "together, in context," and "ultimately [gave] effect to both – not just section 6-2106." *Id.* at *2. *Brown* found it salient, particularly when comparing Idaho's statute to other states' whistleblower statutes, that Idaho had a "remedy" section (section 6-2105) and a "relief" section (section 6-2106). *Id.* at *3. *Brown* found the relief section expanded what a court could order in addition to traditional remedies available to the injured employee, such as emotional distress damages. *Id.* at *2-3. The court further noted that "if the Idaho legislature wanted to restrict whistleblower plaintiffs to the remedies listed in section 6-2106, it would have said exactly that." *Id.* at *3. By reading the two sections together, the *Brown* court was able to interpret the Act in a manner that did not render section 6-2105 void or superfluous, upholding the Legislature's intent to provide actual damages to whistleblowers. This Court should do the same here, as opposed to applying section 6-2106 as the exclusive relief and remedies available to an employee, which renders the use of "actual damages" and "injury" in section 6-2105 meaningless.

3. <u>This Court's Opinion in Wright does not compel, nor support, the District Court's decision.</u>

The District Court below concluded that in the *Wright* case "the Supreme Court strictly construed the statutory language to mean that judgments under the [Whistleblower Act] may only include damages listed in Idaho Code section 6-2106." R., p. 1833. Eller respectfully disagrees that *Wright* incorporated such a holding, and in fact, submits that this Court in *Wright* rejected the idea that section 6-2106 contains any "limiting language." 160 Idaho at 501, 376 P.3d at 68

In *Wright*, the district court had dismissed the plaintiff's whistleblower and negligent infliction of emotional distress claims against Ada County on summary judgment. 160 Idaho at 494-95, 376 P.3d at 61-62. This Court held, contrary to Ada County's arguments, that section 6-2106 did not preclude a whistleblower from "bringing an independent cause of action for negligent infliction of emotional distress." 160 Idaho at 501, 376 P.3d at 68. In doing so, this Court simply said: "Idaho Code section 6-2106 lists the relief available for *judgments under the chapter*; it does nothing to limit the relief available under other, independent causes of action." 160 Idaho at 501-02, 376 P.3d at 68-69 (emphasis in original). The District Court in this case interpreted this language to mean that section 6-2106 was the exclusive source of relief and remedies for claims under the Whistleblower Act. R., pp. 133-34. Importantly, this Court

explicitly rejected Ada County's position that "the Whistleblower Act was not intended to prevent negligent infliction of emotional distress . . .," 160 Idaho at 501, 376 P.3d at 68, by pointing to section 6-2105(2), which "provides that 'an employee who alleged violation of this chapter may bring a civil action for appropriate *injunctive relief or actual damages*, or both.'" *Id.* (quoting I.C. § 6-2105(2) (emphasis in original)). This Court next quoted section 6-2105's definition of damages "as 'damages for *injury or loss caused by each violation of this chapter*...'" *Id.* (quoting I.C. § 6-2105(1) (emphasis in original)). When turning to section 6-2106, this Court also emphasized its use of the word "may" regarding relief that a "court *may* order." *Id.* (emphasis in original).

Thus, while this Court in *Wright* did not directly address whether a whistleblower is entitled to actual damages for emotional injury under the Act, it clearly relied upon language in both sections 6-2105 and 6-2106 in holding "that a plaintiff may pursue a claim for negligent infliction of emotional distress even if the alleged conduct would also constitute a statutory violation pursuant to the Whistleblower Act." 160 Idaho at 502, 376 P.3d at 69. *Wright* is therefore an example of this Court construing sections 6-2105 and 6-2106 together, and refusing to draft non-existent limiting language into section 6-2106.

D. The District Court Should not have Reduced the Jury's Verdict Awarding Eller Emotional Distress Damages by $500,000.

In its Answer to Eller's Amended Complaint, ISP raised various affirmative defenses including its Thirteenth Defense which read: "Plaintiff's claim for damages, if any, is limited by Idaho Code §§ 6-1603, 6-1604, 6-1606 and/or 6-2105." R., p. 388. Thus, Eller proposed specific jury instructions and a verdict form so that the Jury would be properly instructed to address ISP's affirmative defense of the limitation on noneconomic damages found under section 6-1603 (*i.e.*, whether ISP's actions were "willful or reckless misconduct," I.C. § 6-1603(4)(a)). R., pp. 1708, 1714, 1716. Specifically, the Special Verdict Form asked the Jury if the conduct of ISP was willful or reckless as defined in the instructions. R., p. 1829 (Question No. 5). The Jury's answered that question "yes." ISP did not move for remittitur. *Id.*

Instead, on September 7, 2017, ISP filed a *Motion for Reduction Pursuant to I.C. § 6-926*. R., pp. 1838-46. This was the first time ISP raised this provision or otherwise asserted that its caps were at issue in this case. After briefing and oral argument by the parties, the District Court made several relevant determinations addressed separately below. The ultimate effect of the District Court's ruling, as set forth in a *Memorandum Decision and Order*, was to reduce the Jury's verdict for Eller's emotional injuries by $500,000. R., pp. 1994, 1997. As set forth below, this

decision should either be reversed in favor of restoring the Jury's verdict or, in the alternative, vacated and remanded to the District Court for further consideration.

1. *The District Court correctly interpreted the meaning of "occurrence" in section 6-926 to equate to an adverse action as alleged in Eller's whistleblower case.*

Section 6-926 is part of the Idaho Tort Claims Act (ITCA) and reads in relevant part:

> 6-926. JUDGMENT OR CLAIMS IN EXCESS OF COMPREHENSIVE LIABILITY PLAN — REDUCTION BY COURT — LIMITS OF LIABILITY. (1) The combined, aggregate liability of a governmental entity and its employees for damages, costs and attorney's fees under this chapter, on account of bodily or personal injury, death or property damage, or other loss **as the result of any one (1) occurrence** or accident regardless of the number of persons injured or the number of claimants, shall not exceed and is limited to five hundred thousand dollars ($500,000), unless the governmental entity has purchased applicable, valid, collectible liability insurance coverage in excess of said limit, in which event the controlling limit shall be the remaining available proceeds of such insurance…. If any judgment or judgments, including costs and attorney's fees that may be awarded, are returned or entered, and in the aggregate total more than five hundred thousand dollars ($500,000), or the limits provided by said valid, collectible liability insurance, if any, whether in one (1) or more cases, the court shall reduce the amount of the award or awards, verdict or verdicts, or judgment or judgments in any case or cases within its jurisdiction so as to reduce said aggregate loss to said applicable statutory limit or to the limit or limits provided by said valid, collectible insurance, if any, whichever is greater.

I.C. § 6-926 (emphasis added). No Idaho appellate court has interpreted the meaning of "occurrence" as used in this statute, leaving this Court to engage in

statutory interpretation. This analysis begins with the literal words, giving them "their plain, usual and ordinary meaning." *Wright,* 160 Idaho at 497, 376 P.3d at 64.

The District Court appropriately turned to Black's Law Dictionary for a definition of occurrence, since such definition was absent in the ITCA. R., p. 1990. The definition of occurrence is "[s]omething that happens or takes place; specif[cally], an accident or event, or continuing condition *that results in personal injury* or property damage that is neither expected or intended from the standpoint of an insured." *Id.* (emphasis added by the District Court).

In most cases brought under the ITCA, there will be little confusion about what constitutes an occurrence. Typically, there will unquestionably only be one (*e.g.*, a malpractice action, a car crash, a police shooting). In whistleblower actions, as the District Court correctly determined, an injury occurs only when: (1) the employee engaged/intended to engage in protected activity; (2) the employer took an adverse action against employee; and (3) there is a causal connection between the protected activity and adverse action. R., p. 1990 (citing *Van v. Portneuf Med. Ctr.,* 147 Idaho 552, 558, 212 P.3d 982, 988 (2009)). Thus, in the majority of whistleblower cases, an injury occurs when an employee is fired because s/he engaged in protective activity (*i.e.,* a single occurrence). However, in this particular case, Eller presented evidence about multiple adverse actions taken against him as a result of his protected activity including:

- negatively evaluating his performance
- changing his work duties and hours by disbanding the CRU
- denying him pay increases
- refusing to allow him to continue to perform crash-related trainings
- forcing him out of performing crash reconstruction investigations
- passing him over for a promotion to a Sergeant position, and
- straying from the normal promotional procedures used at ISP.

R., pp. 1990-91.[10]

These retaliatory actions against Eller breached ISP's duties under the Whistleblower Act, and consequently caused him emotional injuries supporting his NIED claim. Thus, as determined by the District Court, in Eller's case there were multiple adverse actions constituting separate "occurrences" for purposes of section 6-926. R., p. 1991-92. The District Court rejected ISP's argument that the adverse actions constituted a single "occurrence" just "because they shared a common catalyst in the Sloan investigation."[11] R., p. 1992. Instead the Court correctly found that "[e]ach alleged adverse action would have required a discrete decision and act, often by different people" within ISP; "there is no evidence that any were inevitable

[10] Tr., pp. 929-34; Tr. 08.17.17, pp. 72-77, 379-82, 387-90, 409-17, 418-29, 434-36, 438-44, 457-58; Pltf. Ex. 18.

[11] The court also pointed out that there were two independent protected activities – the Sloan preliminary hearing testimony (April 2012) and the later objections to the ISP directive to destroy the peer review report drafts (July 2013). R., pp. 1990, 1992, 1994.

simply because the others had preceded them." *Id.* Thus, the District Court concluded that "[e]ach adverse action could have established a separate breach of duty independent from the others." *Id.* The District Court's determination is further supported by the following additional factors.

First, ISP itself proposed a jury instruction (No. 15) wherein it agreed that Eller was asserting at least four (4) separate adverse actions under the Act: denying his pay raise; refusing to use him as a crash instructor; failure to promote to the Sergeant position; and straying from normal promotional procedures. R., p. 1546. Likewise, during closing argument, counsel for ISP again noted these four adverse actions falling within Eller's whistleblower claim. Tr., p. 1505, L. 4-19 ("Those are the only four adverse actions under the Whistleblower claim in this case.")

Second, as recognized by the District Court, the whistleblower adverse actions occurred during different time frames and involved different decision makers. R., p. 1992. For example, the denial of Eller's pay increase occurred in July of 2014 and involved command staff at headquarters such as Maj. Richardson and Cpt. Kelley. Tr. 08.17.17, pp. 208-09. Then, in March of 2016, over a year after Eller filed his lawsuit, he applied for a promotion to a Sergeant position. Although Eller passed the initial testing, passed his panel interview, and got a perfect score during his one-on-one interview, ISP stopped evaluating Eller's candidacy through the remaining steps of the process. He never received a final score/ranking. As such

Eller was not considered for the promotion. Tr., pp. 781-82, 785-90, 842, 1164. Additionally, instead of maintaining a roster of qualified individuals to fill other open positions within the following six (6) month period as represented by ISP in the announcement, ISP used a new announcement to fill a sergeant opening in Eller's district within days of the six (6) month window. Tr., p. 778, 839-40, 1118-20. Decisions during the promotional process were made, at least in part, by different command staff such as William Reese, Lt. Doty and Human Resource personnel. Tr., pp. 1128, 1171-76.

Moreover, there were numerous earlier adverse actions falling within the NIED statute of limitations. These included, but were not limited to:

- In 2013, Eller's supervisor was instructed to downgrade his performance evaluation, and Lt. Doty called Eller a disgruntled employee.
- The December 2013 removal of Eller from his CRU position, which he had held since 2004, to place him back on a patrol team. This adverse action changed his work schedule from a regular dayshift to a rotating shift, where Eller would work swing and night shifts.
- In January 2014, Eller was relieved as the interim statewide crash reconstruction program manager, and his duties in that role were reassigned to two other reconstructionists.

All of the above had an enormous negative impact on Eller's professional reputation and career path at ISP.[12] The District Court correctly determined that it "cannot conclude that each of these actions combined should be considered one 'occurrence.'" R., p. 1992.

2. Under Idaho Rule Of Civil Procedure 8(c), damage caps are waived if not timely raised.

The District Court erred in at least two ways by holding that ISP did not waive the damage caps contained in section 6-926. First, it erred in holding that damages caps are not an avoidance or affirmative defense under Idaho Rule of Civil Procedure 8(c); second, it erred in holding that the limitations in section 6-926 cannot be waived. R., p. 1987. Both of these legal determinations are subject to free review by this Court. *Ashton Urban Renewal Agency,* 155 Idaho at 311, 311 p. 3d at 732.

a. Section 6-926 is an avoidance or affirmative defense under Rule 8(c).

As recognized by the District Court, Rule 8(c) requires a party to set forth any matter "constituting an avoidance or affirmative defense" in its responsive pleading. R., p. 1984. Though damages caps are not specifically mentioned, the rule's list of avoidances and affirmative defenses is not exhaustive, as Rule 8(c) contains a residual clause. *Id.* Respectfully, the misstep the District Court made below was in

[12] Tr., pp. 929-34; Tr. 08.17.17, pp. 72-77, 379-82, 387-90, 409-17, 418-29, 434-36, 438-44, 457-58; Pltf. Ex. 18.

the interpretation of "avoidance." Neither the parties nor the District Court could find Idaho authority interpreting what constitutes an "avoidance" and specifically whether damage caps, like section 6-926, are considered the same. Thus, the District Court used the definition of avoidance in Black's Law Dictionary[13]: "[t]he act of evading or escaping," but then unnecessarily added "liability" to the end of the definition.[14] R., p. 1985. The District Court went on to incorrectly hold that the cap in section 6-926 is not an avoidance because it does not allow a defendant to totally escape liability. *Id.* However, section 6-926, allows defendants to avoid, *i.e.*, evade or escape, the Jury's verdict regarding damages and is certainly a partial avoidance of their full liability. Thus, when giving the term "avoidance' its plain meaning, section 6-926 falls under Rule 8(c)'s residual clause.[15]

Further, the error in the District Court's requirement, that avoidances or affirmative defenses must cut off total liability, is made clear by considering other

[13] Black's Law Dictionary 163 (10th ed. 2014).

[14] Even with the addition of "liability," it should not change the results here. Liability is defined in Black's Law Dictionary as "[t]he quality, state or condition of being legally obligated or accountable." *Id.* 1053 (10th ed. 2014). Thus, section 6-926 is an avoidance keeping ISP from "being legally obligated" to pay the full amount of the Jury's verdict. In other words, "liability" can also mean liability for damages.

[15] The same analysis is equally applicable to the term "affirmative defense" which the District Court held is applicable only to "the *claim* at issue, not to the potential recovery." R., p. 1983 (emphasis in original). The court relied on *Fuhriman v. State Dept. of Transp.,* 143 Idaho 800, 803, 153 P.3d 480, 483 (2007), to support this conclusion. R., pp. 1984-85. Yet, in *Fuhriman,* this Court simply found that an affirmative defense is "a defendant's assertion raising new facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all allegations in the complaint are true." *Id.* at 803, 483 (citing Black's Law Dictionary 186 (2d Pocket ed. 2001)). *Fuhriman* dealt with statutory employer immunity, which this Court found was an affirmative defense. *Fuhriman* did not analyze liability for damages. *Id.*

affirmative defenses such as comparative negligence or statutes of limitations. Comparative negligence is expressly required to be pleaded under Rule 8(c), and like the damage cap in section 6-926, comparative negligence may only be a partial defense that operates to reduce plaintiff's damages under Idaho's "modified" comparative negligence scheme. *See* I.C. § 6-801. Likewise, the statute of limitations is another enumerated affirmative defense/avoidance under the rule and may operate to cut off damages while not totally cutting off liability. Thus, it cannot hold true that to qualify as an appropriate avoidance or defense under Rule 8(c), the same must be a complete bar of all liability.

Finally, while no Idaho appellate court has addressed the issue of whether the damage caps in section 6-926 are an affirmative defense/avoidance, many other jurisdictions have held that damages caps must be pled as affirmative defenses/avoidances. For example, in *Westfarm Assocs. Ltd. P'ship v. International Fabricare Inst.*, the federal district court held that the Maryland Tort Claims Act limiting liability of local governments to "$500,000 per total claims that arise from the same occurrence" constituted an avoidance under Federal Rule of Civil Procedure 8(c).[16] 846 F.Supp. 439, 440-41 (D. Md. 1993)(quoting Maryland Code § 5-

[16] Idaho's Rule 8(c) is nearly identical to the federal rule's language (except for adding "discharge in bankruptcy" as another listed affirmative defense/avoidance). When a state and federal rule are "identical in all material respects . . . [this Court] will look to rulings on the scope of the federal rule for additional [guidance] in interpreting the Idaho rule." *Martin v. Hoblit*, 133 Idaho 372, 376 n.3, 987 P.2d 284, 288 n.3 (1999).

403(a)). The holding in *Westfarm* is particularly compelling because of its factual similarities to this case.

In *Westfarm*, the government defendant did not raise the cap until after the jury returned a $2.5 million verdict. *Id.* at 440. The court determined that the cap was an avoidance and referenced several like holdings from federal circuit courts. *Id.* (*citing Jakobsen v. Massachusetts Port Auth.*, 520 F.2d 810, 813 (1st Cir. 1975)) (Massachusetts port authority tort cap is an affirmative defense because it serves as a "bar to the right of recovery even if the general complaint were more or less admitted to"); *Ingraham v. United States*, 808 F.2d 1075, 1079 (5th Cir. 1987) (Texas statutory cap on medical malpractice recovery must be pled as an affirmative defense in federal tort claims act case because "[c]entral to requiring the pleading of affirmative defenses is the prevention of unfair surprise"); and *Simon v. United States*, 891 F.2d 1154, 1157 (5th Cir. 1990) (Louisiana malpractice cap is "an affirmative defense because it is an 'avoidance' within the meaning of Rule 8(c)" in a federal tort claim act case). The *Westfarm* court also found it compelling that the applicability of the cap at issue in that case "would require the resolution of numerous factual issues related to the damages" including the damage to each of the six separate parcels. 846 F.Supp. at 441.

Here, ISP was clearly on notice that Eller was asserting multiple adverse actions. In fact, ISP itself took the position that there were four adverse actions

under the Whistleblower claim, and at least several more adverse actions as part of Eller' s NIED claim. *See* Tr., p. 1505, L. 4-23 (defense counsel identifying at least seven (7) adverse actions). Because section 6-926's cap applies per occurrence, there were factual issues related to the damages, as in *Westfarm*. While Eller does not contend that he was prohibited from presenting evidence related to the multiple occurrences and his damages arising therefrom, the Jury was not asked to make that specific determination on the number of adverse actions since ISP did not raise the issue until after the Jury returned its verdict in Eller's favor. For all the above reasons, this Court should hold that section 6-926 is an avoidance/defense under Rule 8(c).

As referenced above, the Fifth and First Circuits have held similar damage caps to be waivable affirmative defenses/avoidances. The Tenth Circuit has also followed suit. *See, e.g.*, *Bentley v. Cleveland Cty. Bd. Of Cty. Comm'rs*, 41 F.3d 600, 604-05 (10th Cir. 1994)(holding Oklahoma's governmental tort claim act cap per occurrence was an affirmative defense, not a jurisdictional matter, and hence had been waived); *Racher v. Westlake Nursing Home Ltd. P'ship*, 871 F.3d 1152, 1166 (10th Cir. 2017) (Oklahoma state damage cap "operates as an affirmative defense, placing the burden on defendants to assert it"); *See also, Sanderson-Cruz v. United*

States., 88 F.Supp.2d 388, 390-91 (E.D. Penn. 2000) (finding Pennsylvania's motor vehicle caps an avoidance in a federal tort claim act case).[17]

b. The mandatory language in section 6-926 does not impact its waivability.

The District Court also relied upon what it called "strong mandatory language"[18] in section 6-926 to be indicative of non-waivability. R., p. 1994. This rationale fails for at least two reasons.

First, other seemingly mandatory limitations are waivable. For example, Rule 8(c) lists statute of limitations as an affirmative defense/avoidance. I.R.C.P. 8(c)(1)(Q). Yet, many statutes of limitations contain similar mandatory language. Specifically, the statute of limitations under the ITCA, says, "[e]very claim against a governmental entity . . . shall be forever barred, unless an action is begun within two (2) years after the date the claim arose..." *See* I.C. § 6-911 (emphasis added).

[17] But *see Taylor v. United States*, 821 F.2d 1428, 1433 (9th Cir. 1987), where the Ninth Circuit refused to find that a California damage cap was an affirmative defense (albeit recognizing that its holding was contrary to a California court of appeals case). However, the Ninth Circuit in *Taylor* made its holding with an important caveat – one applicable here. In holding that the cap did not raise waiver concerns, it noted that the application of the cap did not involve any factual issues and that plaintiff had not been prejudiced by the lack of notice. Thus, *Taylor* left open the door for a successful waiver argument when, like here, the cap at issue requires resolution of factual issues or would affect the evidence to be adduced at trial. Here, had ISP raised the damage cap before trial, Eller would have had the opportunity to add an additional question to the Special Verdict form asking about the number of occurrences for which damages were awarded. Instead, however, Eller's substantial rights were prejudiced by ISP's intentional failure to raise the damages cap during any pre-trial or trial litigation. This is exactly the circumstance which would mandate an exception to the holding in *Taylor*.

[18] Although it is not clear what language the District Court was specifically referring to, earlier in the Decision, the court referenced the language under 6-926(4) stating, "*[i]n no case* shall any court enter judgment, *or allow any judgment to stand*, which results in the limited of liability provided in this section to be exceeded *in any manner or respect*." R., p. 1985 (emphasis added by Court).

Second, the ITCA is itself a creature of waiver of the State's sovereign immunity. *See Van,* 147 Idaho at 557, 212 P.3d at 987 ("[t]he Act abrogates sovereign immunity and renders a governmental entity liable for damages arising out of its negligent acts or omissions."). Further, this Court has held that ITCA's notice requirements are "procedural, not jurisdictional." *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 936, 303 P.3d 617, 623 (2013).[19] Given the above, there is no legal support that the damage cap provision under the ITCA is jurisdictional or unwaivable under the circumstances presented in this case. Thus, the District Court erred in determining that the section 6-926 is not waivable.

c. ISP waived the right to assert the caps under section 6-926.

Based on the above, the District Court's misinterpretation that section 6-926's damage cap is not required to be pleaded (or raised prior to the verdict) is plainly in error and should be reversed. Failure to timely raise an affirmative defense or avoidance results in its waiver. *Cole v. State*, 135 Idaho 107, 110, 15 P.3d 820, 823 (2000). "The purpose of the rule requiring these defenses to be pleaded is to alert the parties concerning the issues of fact which will be tried and to afford them an opportunity to present evidence to meet those defenses." *Williams v. Paxton*, 98 Idaho 155, 163 n. 1, 559 P.2d 1123, 1131 n.1 (1976). As such, an avoidance must be

[19] In so holding, this Court relied on Article 5, section 20 of the Idaho Constitution which provided the courts with "original jurisdiction in all cases, both at law and in equity" and this Court's presumption of subject matter jurisdiction absent a showing otherwise. 154 Idaho at 936, 303 P.3d at 623.

raised before trial such that "the opposing party has time to respond in briefing and oral argument." *Krinitt v. Idaho Dep't of Fish and Game*, 162 Idaho 425, 429, 398 P.3d 158, 162 (2017) (quoting *Patterson v. State Dep't of Health and Welfare*, 151 Idaho 310, 316, 256 P.3d 718, 724 (2011)). Here, it is undisputed that ISP failed to raise section 6-926 until after the Jury rendered its verdict and was excused from service. R., pp. 1838-46. Thus, this Court should find that ISP waived its right to assert section 6-926's damage caps in this case, and restore the Jury's verdict.

3. *In the alternative, the case should be remanded to the District Court to make appropriate findings of fact pursuant to Idaho Rule of Civil Procedure 49(a)(3).*

The District Court's Order regarding ISP's request for reduction attempted to avoid disturbing the Jury's findings. The District Court likely did so out of respect for Idaho's long recognition that "a right of a trial by jury shall remain inviolate." IDAHO CONST. Art. I, § 7. This includes the "right of the jury to assess and award general or noneconomic damages to plaintiff in personal injury cases." *Kirkland*, 134 Idaho at 467, 2 P.3d at 1118. Further, this Court has made clear that "it is not the trial court's prerogative to disregard or nullify [the jury's findings] by making finding of [its] own." *Ross*, 114 Idaho at 826, 761 P.2d at 1178. Indeed, a court overruling a jury's verdict may deny a party's right to jury trial. *Id.*

Here, because ISP failed to raise the issue until post-verdict, the District Court faced this question: "how many occurrences the jury found and factored into

its decision to award Plaintiff $1,500,000 in damages on his NIED claim." R., p. 1993. The District Court answered saying, "the Court can easily determine that the jury found at least two adverse actions . . . the loss of the Choice Point pay increase and Sergeant promotion" for which the Jury gave the full amount of economic losses requested by Eller. *Id.* The District Court then went on to say that although it could not determine how many total occurrences the Jury found, the Court believed that "[i]n light of the totality of the evidence present at trial, the Court is confident that the jury could have reasonably concluded that Defendant took more than two adverse actions against Plaintiff." R., p. 1993, n. 5 (emphasis added). In fact, the District Court said that "one could rationally conclude that the jury based the NIED award on more than the two adverse actions" when it awarded economic damages for under the Whistleblower Act (denial of the pay increase and denial of the promotion). *Id.* (emphasis added).

Despite this clear indication of what the Court would find, the District Court said that it "is not aware of any legal basis under which it had the authority to make such finding in order to construe the jury's verdict." R., p. 1993. This then is where the District Court erred. Under Idaho Rule of Civil Procedure 49(a)(3), when the pleadings or evidence in a case raise an issue of fact, but the issue was not submitted to the jury, the judge is empowered to make a finding on the issue. In relevant part, Rule 49(a)(3) provides:

> *Issues Not Submitted.* A party waives the right to a jury trial on any issue of fact raised by the pleading or evidence but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury. If the party does not demand submission, the court may make a finding on the issue.

I.R.C.P. 49(a)(3) (emphasis added). Questions of compliance with the rules of procedure are questions of law, such that this Court exercises free review. *Black Canyon Irrigation District,* 163 Idaho at 149, 408 P.3d at 904.[20]

The authority of a judge to make a finding on an issue of fact not submitted to the jury under Rule 49 applies even when those facts are essential to a party's claim. *Milligan v. Continental Life & Accident Co.*, 91 Idaho 191, 196-97, 418 P.2d 554, 559-60 (1966). In *Milligan*, an insurance company appealed the denial of its motion for j.n.o.v., arguing the respondents had a duty to inform the company of any material change in health during the period after applying for the policy, but before the policy became effective. 91 Idaho at 194, 418 P.2d at 557. Though each party had submitted evidence on whether there was a change in health during the relevant period, the question was not submitted to the jury. 91 Idaho at 196, 418 P.2d at 559. Instead, the jury had only been asked to determine whether misrepresentations were made on the application. *Id.* The trial court, after the jury

[20] Even if this error was reviewed for abuse of discretion, vacating and remanding is appropriate. As recently articulated by this Court in *Lunneborg v. My Fun Life,* 163 Idaho 856, 867, 421 P3d 187, 198 (2018), the first step of discretionary review is that the court "[c]orrectly perceived the issue as one of discretion." Here, the District Court specifically noted that it was "not aware of any legal basis under which it had the authority to make such finding in order to construe the jury's verdict." R., p. 1993. As such, the Court admittedly failed to perceive its discretion.

returned a verdict, determined the issue itself, finding the evidence had not established a change of health. *Id.* The Supreme Court affirmed the trial court's denial of the company's motion because no demand had been made that the issue be submitted to the jury. Therefore, it was within the trial court's discretion to make the finding under Rule 49(a). 91 Idaho at 196-97, 418 P.2d at 559-560.

Here, the District Court was unsure of its authority to make additional findings not submitted to the Jury and thus, although the District Court specified what it would likely find, it ultimately felt compelled to enter a judgment upon a finding of "at least two" occurrences. R., p. 1993. Thus, if this Court determines that ISP did not waive the cap under section 6-926, then the District Court's Decision reducing the jury verdict by $500,000 should be vacated, and the case should be remanded with direction to the District Court to make a finding about the number of occurrences pursuant to Rule 49(a).[21] Permitting the District Court's failure to apply Rule 49(a) under these circumstances, albeit unintentional, would lead to an unconstitutional overruling of the Jury's verdict.

E. Eller is Entitled to Costs and Attorney Fees for this Appeal.

The Whistleblower Act provides that a court may order "payment by the employer of reasonable costs and attorneys' fees" to the employee. I.C. § 6-2106(5).

[21] *See Safaris Unlimited, LLC v. Von Jones*, 163 Idaho 874, 888, 421 P.3d 205, 219 (2018)(because the district court failed to make sufficient findings and thus failed to act consistently with relevant legal standards, the case was vacated and remanded for further proceedings).

Likewise, section 6-2105's remedies include "court costs and reasonable attorneys' fees." I.C. § 6-2105(1). *See also Wright,* 160 Idaho at 502, 376 P.2d at 69 (permitting an award of reasonable costs and fees on appeal if Wright prevailed on his Whistleblower Act claim on remand). As such, Eller should be awarded his costs and attorney fees incurred on appeal.

IV. CONCLUSION

For the reasons set forth above, Appellant/Plaintiff Brandon Eller respectfully requests the following:

1. This Court reverse the District Court's decision that whistleblowers are precluded from seeking emotional distress damages under the Whistleblower Act and remand the case with instruction to reinstate the Jury's full verdict regarding emotional distress damages.

2. This Court reverse the District Court's decision that ISP did not waive section 6-926's cap and remand the case with instruction to reinstate the Jury's full verdict regarding emotional distress damages.

3. In the alternative to the above, this Court remand the case back to the District Court with instruction to consider the evidence presented at trial in order to make a finding regarding the number of adverse actions pursuant to Rule 49(a) and construe the Jury's verdict consistent therewith.

4. Eller be awarded his reasonable fees and costs on appeal.

DATED this 31st day of August, 2018.

By: _____
Erika Birch
T. Guy Hallam
STRINDBERG & SCHOLNICK, LLC
Attorneys for Appellant/Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 31 day of August, 2018, a true and correct copy of the foregoing document was served on the following via the iCourt electronic filing system and electronic mail:

Andrew C. Brassey
Jason Murray
BRASSEY CRAWFORD, PLLC
345 Bobwhite Court
P.O. Box 1009
Boise, Idaho 83701-1009
Facsimile: (208) 344-7077
acb@brassey.net
jm@brassey.net

Mr. Michael J. Kane
MICHAEL KANE & ASSOCIATES, PLLC
4355 West Emerald Street, Suite 190
Boise, ID 83706
Facsimile: (208)342-2323
mkane@ktlaw.net

Dunja Subasic

ADDENDUM

In Re: Decision on Joint Motion to Certify Question of Law to the Idaho Supreme Court (Dkt. 31, 32, 45), *Pocatello Hosp., LLC v. Corizon LLC*, 2018 WL 472145, ___ P.3d ___ (2018)

Brown v. City of Caldwell, 2012 WL 4522728 (D. Idaho Oct. 1, 2012)

Garcia v. PSI Envtl. Sys., 2012 WL 2359496 (D. Idaho June 20, 2012)

2018 WL 472145
Only the Westlaw citation is currently available.
Supreme Court of Idaho,
Boise, December 2017 Term.

IN RE: DECISION ON JOINT MOTION TO CERTIFY QUESTION OF LAW TO the IDAHO SUPREME COURT (DKT. 31, 32, 45) and Order of Certification.
Pocatello Hospital, LLC dba Portneuf Medical Center, Plaintiff-Appellant,
v.
Corizon LLC, Defendant-Respondent.

Docket No. 45187
|
Filed: January 17, 2018

Synopsis

Background: Hospital brought action in federal court against privatized correctional medical provider with whom it had contract to provide medical services, alleging breach of contract, breach of implied contract, unjust enrichment, and declaratory judgment. Parties filed a joint motion to certify a question of law. The United States District Court, District of Idaho, Ronald E. Bush, United States Magistrate Judge, certified question.

[Holding:] The Supreme Court, Burdick, C.J., held that, in statute addressing medical costs of state prisoners, neither "state board of correction" nor "department of correction" includes privatized medical care providers under contract with the Idaho Department of Correction.

Question answered.

Certified question of law from the United States District Court, District of Idaho. Hon. Ronald E. Bush, U.S. Magistrate Judge.

Certified question of law answered in the negative.

Attorneys and Law Firms

Racine, Olson, Nye. Budge & Bailey, Chtd., Pocatello, for appellant. Scott J. Smith argued.

Elam & Burke, Boise, for respondent. John J. Burke argued.

Opinion

BURDICK, Chief Justice.

***1** This case arrives at the Idaho Supreme Court as a certified question of law from the United States District Court for the District of Idaho. The question certified is "[w]hether, for purposes of the dispute in this lawsuit, the terms 'state board of correction' as used in Idaho Code § 20-237B(1) and 'department of correction' as used in Idaho Code § 20-237B(2), include privatized correctional medical providers under contract with the Idaho Department of Correction." We answer the question certified in the negative.

I. FACTUAL AND PROCEDURAL BACKGROUND

[1] When addressing a certified question of law, this Court will consider "only those facts contained in the [certification] order." *Kunz v. Utah Power & Light Co.*, 117 Idaho 901, 902 n.1, 792 P.2d 926, 927 n.1 (1990); *accord White v. Valley Cnty.*, 156 Idaho 77, 78, 320 P.3d 1236, 1237 (2014); *St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani*, 154 Idaho 37, 39, 293 P.3d 661, 663 (2013). Thus, the following facts to which the parties have stipulated "are drawn and recited verbatim from the U.S. District Court's certification order[.]" *White*, 156 Idaho at 78, 320 P.3d at 1237.

> For a number of years, the Idaho Department of Correction [("IDOC" or "department of correction")] has contracted with Corizon, LLC ("Corizon"), a private provider of prison healthcare services, to provide healthcare services to IDOC inmates in custody and to indemnify IDOC from any claims associated with those services. The current contract between IDOC and Corizon began January 1, 2014, and runs through December 31, 2018 (the "Contract").
>
> The Contract resulted from a Request for Proposal ("RFP") issued by IDOC for healthcare contractors. The RFP included language that stated IDOC was pursuing a program that would allow the selected contractor to realize reduced costs for inmates hospitalized for over 24 hours. If implemented, the program was intended to apply Medicaid rates to those

services provided during the hospital stay. Further, the per diem rate to be paid under the Contract would be required to change to a new per diem with Medicaid rates that the State would specify at that time.

As described in more detail below, IDOC and Corizon are in disagreement about how much is owed to Corizon as payment for services that fall under the hospitalization services. The parties identify these provisions of their Contract as relevant to their dispute:

1. IDOC agreed to pay a fixed rate per inmate per day;

2. In exchange for this fixed rate, Corizon agreed to provide comprehensive healthcare to inmates, to assume "full risk" of all comprehensive healthcare for inmates, and to "absorb" any and all associated costs;

3. IDOC will not consider amending the contract to increase IDOC's costs unless Corizon establishes among other things that: (1) the condition requiring amendment was not reasonably foreseeable at the time Corizon submitted its Proposal; and (2) Corizon has made all reasonable efforts to address the problem at no increased cost to IDOC;

***2** 4. Corizon agreed to provide healthcare services on-site at prisons to the greatest extent possible and to develop a network of local medical providers for necessary medical services not available on-site;

5. Corizon agreed to be responsible for payment of all medical claims from medical providers, to have contracts or written agreements with medical providers in place for both inpatient and outpatient services, and to negotiate payment rates with those medical providers;

6. Corizon agreed that its payments to medical providers would be made within 30 days of Corizon's receipt of an invoice from a medical provider; and

7. Corizon agreed to indemnify IDOC from any and all claims associated with the provision of healthcare services to inmates.

Corizon often contracted with local medical providers for discounted and/or reduced rates on healthcare services for inmates, including inmates at the Pocatello Women's Correctional Center ("PWCC"). One such contract for PWCC inmates was a "Hospital Services Agreement" ("HSA") between Corizon and a local hospital, Portneuf Medical Center ("PMC"). [1] In that agreement, PMC was to provide hospitalization and other inpatient and outpatient-related services and supplies to inmates at Corizon's request. PMC agreed to a discounted rate for those healthcare services, with Corizon to pay those charges within 30 days from receipt. PMC was to submit all claims directly to Corizon and not seek payment from IDOC. Claims not timely paid accrued interest.

The HSA between Corizon and PMC began on January 1, 2011, prior to the January 1, 2014 effective date of the current contract between Corizon and IDOC. Corizon paid the full contract rate under the HSA to PMC for healthcare services provided from January 1, 2011, through June 30, 2014. The dispute in this case stems from the fact that the HSA rate is greater than the Medicaid reimbursement rate.

On March 18, 2014, Corizon sent a letter to IDOC which stated the following:

> Corizon is requesting a formal contract amendment consistent with the program outlined in [Corizon's Request for Proposal] and within the scope of Idaho Code § 20-237B. Corizon will provide notification to hospitals that Corizon will pay for inpatient services rendered after July 1, 2014 at the Medicaid reimbursement rate ... [.]
>
> This amendment will reduce the current per diem rate by $0.65 as outlined in [the Cost Proposal Form]. This item is per diem cost per offender per day as Per Diem 1 with Medicaid Rates based on 7100 inmates which includes Idaho Correctional Center (ICC).
>
> This will reduce the per diem of $15.31 to $14.66 starting on July 1, 2014 ... [.]

IDOC accepted Corizon's proposal.

Corizon claims to have sent a letter to PMC in May of 2014, stating that as of July 1, 2014, any contract rate set out in the HSA would be superseded by the statutory reimbursement rate set forth in Idaho Code § 20-237B. PMC says it never received such a letter. Regardless, as of July 1, 2014, Corizon has paid PMC at the Medicaid reimbursement rate identified in the

statute. PMC objected to the reduction in payment, contending that it should be paid at the higher contract rate set out in the HSA.

On September 29, 2015, Corizon gave written notice to PMC exercising its option to terminate the HSA without cause. Since January 1, 2016, there is no contractual agreement between Corizon and PMC as to payment for medical care rendered to prisoners. Prisoners have continued to receive medical care from PMC. However, since January 1, 2016, Corizon has paid PMC at the Idaho Medicaid reimbursement rate provided in I.C. § 20-237B. Corizon contends that this rate is required by the IDOC and state law, and that PMC must accept payment at this rate. PMC contends that payment amounts made by Corizon to PMC for medical care rendered to prisoners are not limited to the Idaho Medicaid reimbursement rate set out in § 20-237B.

***3** ....

As a result of this dispute, PMC sued Corizon. PMC raises four claims for relief: (1) a breach of the IDOC contract;[2] (2) breach of implied contract; (3) unjust enrichment; and (4) declaratory judgment. PMC seeks payment of the "usual and customary fees"[3] for the healthcare services provided to PWCC inmates by PMC beginning on January 1, 2016, after the contract between PMC and Corizon was terminated.[4]

The parties believe that their dispute turns upon the interpretation of Idaho law which has not been previously considered by the Idaho Supreme Court.

(internal citations omitted).

The parties filed a joint motion to certify a question of law to this Court on February 17, 2017, and framed the question as follows:

> Is PMC required to accept an amount no greater than the reimbursement rate applicable based on the Idaho Medicaid reimbursement rate consistent with Idaho Code § 20-237B from Corizon as full and reasonable payment for medical treatment provided by PMC to Idaho Department of Correction inmates within Corizon's care, absent a binding contract?

On June 30, 2017, the United States District Court for the District of Idaho granted the parties' joint certification motion and reframed the question as "[w]hether, for purposes of the dispute in this lawsuit, the terms 'state board of correction' as used in Idaho Code § 20-237B(1) and 'department of correction' as used in Idaho Code § 20-237B(2), include privatized correctional medical providers under contract with the Idaho Department of Correction."[5] On August 10, 2017, this Court accepted the certified question and designated PMC as Appellant and Corizon as Respondent. On November 16, 2017, this Court granted IDOC's application for leave to file a brief as *amicus curiae* in support of Corizon.

II. CERTIFIED QUESTION OF LAW

1. Whether, for purposes of the dispute in this lawsuit, the terms "state board of correction" as used in Idaho Code § 20-237B(1) and "department of correction" as used in Idaho Code § 20-237B(2), include privatized correctional medical providers under contract with the Idaho Department of Correction.

III. ANALYSIS

[2] [3]

Courts of the United States may certify a controlling question of law in a pending action to the Idaho Supreme Court where there is no controlling precedent in Idaho Supreme Court decisions and the determination would materially advance the orderly resolution of the litigation in the United States court. The Court's role "is limited to answering the certified question" when the question presented is narrow.

***4** *Doe v. Boy Scouts of Am.*, 159 Idaho 103, 105, 356 P.3d 1049, 1051 (2015) (citations omitted).

Raised for this Court's interpretation is Idaho Code section 20-237B, which provides:

> (1) The state board of correction shall pay to a provider of a medical service for any and all prisoners, committed

> to the custody of the department of correction, confined in a correctional facility, as defined in section 18-101A(1), Idaho Code, an amount no greater than the reimbursement rate applicable based on the Idaho medicaid reimbursement rate. This limitation applies to all medical care services provided outside the facility, including hospitalizations, professional services, durable and nondurable goods, prescription drugs and medications provided to any and all prisoners confined in a correctional facility, as defined in section 18-101A(1), Idaho Code. For required services that are not included in the Idaho medicaid reimbursement schedule, the state board of correction shall pay the reasonable value of such service.
>
> (2) For the purposes of subsection (1) of this section, the term "provider of a medical service" shall include only companies, professional associations and other health care service entities whose services are billed directly to the department of correction. The term "provider of a medical service" shall exclude:
>
> (a) Privatized correctional medical providers under contract with the department of correction to provide health care to prison inmates;
>
> (b) Private prison companies;
>
> (c) Out-of-state correctional facilities contracting with the department of correction to house prisoners;
>
> (d) County jails; and
>
> (e) Companies, professional associations and other health care service entities whose services are provided within the terms of agreements with privatized correctional medical providers under contract with the department of correction, private prison companies and county jails.

[4] [5] [6] [7] [8] "Because the question is one of law, this Court exercises free review." *Harrigfeld v. Hancock*, 140 Idaho 134, 136, 90 P.3d 884, 886 (2004). Statutory interpretation that turns on "[l]egislative definitions of terms included within a statute" presents a straightforward analysis, as those definitions "control and dictate the meaning of those terms as used in the statute." *State v. Yzaguirre*, 144 Idaho 471, 477, 163 P.3d 1183, 1189 (2007). "Statutory definitions provided in one act do not apply 'for all purposes and in all contexts but generally only establish what they mean where they appear in that same act.' " *Id.* (quoting *Maguire v. Yanke*, 99 Idaho 829, 836, 590 P.2d 85, 92 (1978)). If statutory interpretation involves more than just statutorily-defined terms,

> [t]he statute is viewed as a whole, and the analysis begins with the language of the statute, which is given its plain, usual and ordinary meaning. In determining the ordinary meaning of the statute, effect must be given to all the words of the statute if possible, so that none will be void, superfluous, or redundant. However, if the language of the statute is capable of more than one reasonable construction it is ambiguous, and a statute that is ambiguous must be construed with legislative intent in mind, which is ascertained by examining not only the literal words of the statute, but the reasonableness of the proposed interpretations, the policy behind the statute, and its legislative history.

***5** *Taylor v. AIA Servs. Corp.*, 151 Idaho 552, 561–62, 261 P.3d 829, 838–39 (2011) (quoting *BHC Intermountain Hosp., Inc. v. Ada Cnty.*, 150 Idaho 93, 95, 244 P.3d 237, 239 (2010)).

[9] The question certified here raises two primary inquiries. The first is whether the " 'state board of correction' as used in Idaho Code § 20-237B(1) ... include[s] privatized correctional medical care providers under contract with [IDOC]." As noted, section 20-237B(1) states that "[t]he state board of correction shall pay to a provider of a medical service ... an amount no greater than the reimbursement rate applicable based on the Idaho medicaid reimbursement rate." The "state board of correction" is mandated by article X, section 5 of the Idaho Constitution, which states:

> The state legislature shall establish a nonpartisan board to be known as the state board of correction, and to consist of three members appointed by the governor, one member for two years, one member

> for four years, and one member for six years. After the appointment of the first board the term of each member appointed shall be six years. This board shall have the control, direction and management of the penitentiaries of the state, their employees and properties, and of adult felony probation and parole, with such compensation, powers, and duties as may be prescribed by law.

Under this constitutional command, the Legislature established the state board of correction and defined it by statute as

> a nonpartisan board of three (3) members to be known as the state board of correction, referred to in this chapter as the board, appointed by the governor to exercise the duties imposed by law. The board shall be the constitutional board of correction prescribed by section 5, article X, of the constitution of the state of Idaho. Not more than two (2) members shall belong to the same political party. Any person appointed a member of the board shall hold office for six (6) years. Vacancies in the membership of the board shall be filled in the same manner in which the original appointments are made.

I.C. § 20-201A(1). Neither article X, section 5 of the Idaho Constitution nor section 20-201A(1) say anything of privatized medical care providers under contract with IDOC. We thus conclude the "state board of correction" referenced in section 20-237B(1) does not include privatized medical care providers under contract with IDOC.

[10] The second inquiry raised in the question certified is whether the " 'department of correction' as used in Idaho Code § 20-237B(2) ... include[s] privatized correctional medical care providers under contract with [IDOC]." As noted, section 20-237B(2) clarifies that "the term 'provider of a medical service' shall include only companies, professional associations and other health care service entities whose services are billed directly to the department of correction." The Legislature created the "department of correction" by statute, and it "consist[s] of [1] the board of correction and [2] the commission of pardons and parole. The department of correction shall, for the purposes of section 20, article IV, of the constitution of the state of Idaho, be an executive department of state government." I.C. § 20-201. The state board of correction, as noted previously, is "a nonpartisan board of three (3) members ... appointed by the governor to exercise the duties imposed by law." *Id.* § 20-201A(1); *see also* Idaho Const. art. X, § 5. And the commission of pardons and parole is "composed of seven (7) members" who "serve at the pleasure of the governor ...." I.C. § 20-210. In these statutory provisions, the Legislature said nothing of privatized medical care providers under contract with IDOC. Consequently, we conclude the "department of correction" referenced in section 20-237B(2) does not include privatized medical care providers under contract with IDOC.

***6** Section 20-237B as a whole supports our conclusions. *See Taylor*, 151 Idaho at 561, 261 P.3d at 838 (explaining that, when engaging in statutory interpretation, the "statute is viewed as a whole" (quoting *BHC Intermountain Hosp.*, 150 Idaho at 95, 244 P.3d at 239)). Section 20-237B specifically distinguishes governmental entities—like the "state board of correction" and "the department of correction"—from a "provider of a medical service." By distinguishing among these entities, the statute is clear in that it prohibits the "state board of correction" from paying more than the Idaho Medicaid reimbursement rate to a "provider of a medical service" whose services are "billed directly to the department of correction." I.C. § 20-237B(1)-(2). The ordinary meaning of "directly" is "without anything intervening." *Black's Law Dictionary* 460 (6th ed. 1990). Here, however, PMC's services are not billed directly to IDOC. To the contrary, the certification order provides that "PMC was to submit all claims directly to Corizon and not seek payment from IDOC." Nor does the state board of correction pay PMC for its services, but rather, the certification order provides that PMC seeks payment from Corizon. As stated in the certification order, Corizon is a "private provider of prison healthcare services[.]" While Corizon and IDOC, as *amicus curiae*, contend the fact that PMC's services are billed directly to Corizon is insignificant since Corizon just pays PMC on IDOC's behalf, we decline to

render the plain and unambiguous statutory requirements superfluous. *See, e.g.*, *Taylor*, 151 Idaho at 561, 261 P.3d at 838 ("[E]ffect must be given to all the words of the statute if possible, so that none will be void, superfluous, or redundant." (quoting *BHC Intermountain Hosp.*, 150 Idaho at 95, 244 P.3d at 239)).

[11] Where, as here, the statutory language is plain and unambiguous, we must give effect to the Legislature's deliberate drafting decisions. For instance, in *Safe Air for Everyone v. Idaho State Department of Agriculture*, 145 Idaho 164, 165, 177 P.3d 378, 379 (2008), this Court addressed whether the Idaho State Department of Agriculture (ISDA) violated the Idaho Open Meetings Act (IOMA) when some ISDA employees held a private meeting with representatives of various agencies and Indian tribes. The IOMA statute at issue stated "all meetings of a governing body of a public agency shall be open to the public." *Id.* (quoting I.C. § 67-2342(1) (2008)). The issue, then, was whether the ISDA employees constituted a "governing body of a public agency." *Id.* This Court held that they did not, observing that "it is clear that the legislature distinguished between the 'governing body' and the 'employees' of an entity." *Id.* at 167, 177 P.3d at 381. Under IOMA, "the governing body is defined as *members* of a public agency, not *employees* of a public agency." *Id.* (citing I.C. § 67-2341(5) (2008)). And unlike employees, a "governing body" under IOMA was required to have "the authority to make decisions for or recommendations to a public agency regarding any matter." *Id.* at 168, 177 P.3d at 382 (quoting I.C. § 67-2341(5) (2008)). The ISDA employees lacked that authority, as any "decision they make can be countermanded by a supervisor, and their supervisor can likewise deny them permission to make recommendations." *Id.* Thus, the Legislature's deliberate drafting decision—requiring a "governing body" as opposed to mere employees—was dispositive. *Id.*; *accord Yzaguirre*, 144 Idaho at 477–78, 163 P.3d at 1189–90 (2007) (concluding audio recording of county commissioners' meeting did not satisfy IOMA's requirement for written minutes since the Legislature had "clearly expressed its intent to require written minutes" by expressly stating IOMA required "written minutes").

Corizon's principal counter-argument is that it can "step into the shoes of [IDOC] under the law of agency." In support, Corizon cites to Idaho Code section 20-241A(1)(a) and asserts section 20-241A(1)(a) shows that IDOC "has the power to hire private contractors to provide for the care and subsistence of its prisoners" and "[s]uch a contractor acts solely as an agent of the State[.]" We reject Corizon's assertion. As Corizon conceded at oral argument, section 20-241A(1)(a) is irrelevant here. [6] It is titled "[a]greements for confinement of inmates." I.C. § 20-241A(1)(a). It covers private entities "receiving physical custody for the purpose of incarceration" and provides that those entities "shall be considered as acting solely as an agent of this state." *Id.* Section 20-241A(1)(a) therefore does not address privatized entities who provide medical care to prisoners but do not house or retain physical custody over prisoners. In fact, Corizon's reliance on section 20-241A(1)(a) bolsters our conclusions above. Unlike section 20-241A(1)(a), section 20-237B contains no language addressing an agency relationship. This Court will not graft that language into section 20-237B. *See, e.g.*, *Wright v. Ada Cnty.*, 160 Idaho 491, 498, 376 P.3d 58, 65 (2016); *Saint Alphonsus Reg'l Med. Ctr. v. Gooding Cnty.*, 159 Idaho 84, 89, 356 P.3d 377, 382 (2015); *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 896, 265 P.3d 502, 509 (2011).

***7 [12]** Given the plain, unambiguous terms of section 20-237B, we answer the question certified in the negative. We therefore need not reach the arguments concerning agency deference to IDOC's construction, if any, of section 20-237B in Corizon's favor, as it is settled that "[a]n agency construction will not be followed if it contradicts the clear expression of the legislature." *Hamilton ex rel. Hamilton v. Reeder Flying Serv.*, 135 Idaho 568, 572, 21 P.3d 890, 894 (2001) (citing *Rim View Trout Co. v. Higginson*, 121 Idaho 819, 824, 828 P.2d 848, 853 (1992)).

IV. CONCLUSION

Question certified is answered in the negative.

Justices JONES, HORTON, BRODY and BEVAN concur.

All Citations

--- P.3d ----, 2018 WL 472145

Footnotes

1 As footnoted in the certification order, "Defendant Pocatello Hospital, LLC, does business as Portneuf Medical Center."

2 As footnoted in the certification order, "PMC alleges it [is] a third-party beneficiary of the IDOC Contract."

3 As footnoted in the certification order, "[t]he difference in the 'usual and customary' fees and what Corizon has paid PMC was $373,007.04 as of June 27, 2016."

4 As footnoted in the certification order, "[t]he parties reached an agreement out of court and PMC dismissed its first cause of action seeking damages for services from July 1, 2014, to December 31, 2015, when the HSA was still in place."

5 The parties did not object below, nor do they object here, to the district court's reframing of the certified question.

6 Similarly, in its brief as *amicus curiae*, IDOC erroneously cites to Idaho Code sections 67-9202 and 67-9205. But these two code sections are irrelevant. Title 67, Chapter 92 of the Idaho Code is entitled the "State Procurement Act" and does not address the provision of medical care services to prisoners. Section 67-9202 does not assist IDOC. It declares as public policies of Idaho to (1) "engage in open, competitive acquisitions of property"; and (2) "maximize the value received by the state with attendant benefits to the citizens." I.C. § 67-9202. Neither does section 67-9205 assist IDOC. Section 67-9205 enumerates a litany of powers and duties of the "administrator." The "administrator" is defined as "the administrator of the division of purchasing as created by section 67-9204, Idaho Code." *Id.* § 67-9203(2). In turn, section 67-9204 creates "within the department of administration the division of purchasing." This matter does not involve the department of administration or the division of purchasing.

2012 WL 4522728
Only the Westlaw citation is currently available.
United States District Court, D. Idaho.

Douglas A. BROWN, Plaintiff,
v.
CITY OF CALDWELL, a subdivision of the state of Idaho, Defendant.

No. 1:10–cv–00536–BLW.
|
Oct. 1, 2012.

Attorneys and Law Firms

Jason RN Monteleone, Sam Johnson, Johnson & Monteleone, Boise, ID, for Plaintiff.

Bruce J. Castleton, Eric F. Nelson, Kirtlan G. Naylor, Naylor and Hales, Boise, ID, for Defendant.

MEMORANDUM DECISION AND ORDER

B. LYNN WINMILL, Chief Judge.

INTRODUCTION

***1** The Court has before it Plaintiff Douglas Brown's motion in limine (Dkt.61), as well Defendant City of Caldwell's two motions in limine (Dkts. 63 & 67). [1] The parties have been able to reach an agreement on many of these issues. For those issues that remain the Court will deny both Brown and the City's motions in limine.

ANALYSIS

1. Plaintiff's Motion in Limine

Brown asks the Court to preclude the City "from introducing, referencing, mentioning, or commenting on any alleged reason or basis for terminating Plaintiff's employment other than those identified on the November 18, 2009, Notice of Termination." *Pl.'s Br.* at 2. Brown maintains that the City has identified *all* the reasons for terminating Brown in this termination notice, and therefore evidence of any other reason would be irrelevant under Federal Rule of Evidence 401.

The Court disagrees. As the City correctly notes, it is not required to show that Brown's termination was only for those reasons set forth in the notice. Instead, it only must show that Brown was not terminated for some unlawful reason. If the City now claims that it terminated Brown for reasons not specifically articulated in the notice, it may present evidence to support those alternative reasons. Conversely, Brown may argue to the jury that City officials must be fabricating these new reasons because they did not list them in the termination notice. This does not mean, however, that the new reasons would be inadmissible.

2. Defendant's Motion in Limine

Brown has stipulated regarding two of the City's motions in limine: (1) Brown will not mention his own bankruptcy at trial; and (2) Brown will not refer to the Defendant's insurer (ICRMP) at trial. In addition, the parties have already stipulated to removing the officially named individual parties, and this Court has entered an order effectuating that stipulation. Thus, the only remaining issue raised by the City relates to damages under the Idaho Whistleblower Act.

The City of Caldwell asks the Court to preclude plaintiff Douglas Brown from introducing evidence of "various non-economic damages" and special damages allegedly arising from Brown's whistleblower claim. The City has indicated some specific evidence it is concerned about with regard to the special damages, including evidence of money Brown spent (1) trying to find a job, (2) moving to Georgia, (3) renting a storage unit in Boise, (4) paying a bankruptcy attorney, and (5) buying a car, or more specifically, borrowing money to buy a car. *See Mot. Mem.,* Dkt. 61–1.

The Court will deny this motion.

A. *Idaho's Whistleblower Act*

Under Idaho Code Section 6–2105, employees alleging whistleblower claims may sue for "appropriate injunctive relief or actual damages, or both, ... " I.C. § 6–2105(2). Within this same section, "damages" is defined to include "damages for injury or loss caused by each violation of this chapter." Idaho Code § 6–2105(1). Nothing in this language restricts plaintiffs from seeking non-economic or other special damages.

***2** The City, however, argues that the very next section of the Whistleblower Act—Idaho Code Section 6–2106—prevents plaintiffs from recovering non-economic and other special damages. Section 6–2106 lists specific things a court "may" order in rendering a judgment whistleblower claims, including (1) injunctive relief; (2) reinstatement; (3) compensation for "lost wages, benefits, and other remuneration"; (4) costs and attorneys' fees; and (5) civil fines. [2] The City contends that the types of relief listed here are exclusive and the only types a plaintiff may seek—notwithstanding the broad definition of damages in the previous section. The City attempts to avoid Section 6–2105's broad definition of damages by arguing that Section 6–2106 is a more specific and, therefore, must prevail over the more general definition of damages set out in Section 6–2105.

What the City is really doing, however, is asking the Court to ignore Idaho Code Section 6–2105, while focusing solely on Section 6–2106. This violates two cardinal rules of statutory construction. First, "[t]he Court must construe a statute as a whole, and consider all sections of applicable statutes together to determine the intent of the legislature." *Davaz v. Priest River Glass Co.,* 125 Idaho 333, 870 P.2d 1292, 1295 (Idaho 1994) (internal citation omitted). Second, Courts must "give a statute an interpretation that will not render it a nullity." *State v. Nelson,* 119 Idaho 444, 807 P.2d 1282, 1285 (Idaho Ct.App.1991). By allowing plaintiffs to seek recovery for non-economic and special damages, the Court views Section 6–2105 and Section 6–2106 together, in context, and, ultimately gives effect to both—not just Section 6–2106.

The Court also finds the City's comparison of Idaho's Whistleblower Act to Florida's unpersuasive. The City points out that the Florida Whistleblower Act has the same type of list contained in Section 6–2106—regarding the types of relief courts "may" order. *Compare* I.C. § 6–2106 *with* Fla. Stat. § 448.103(2)(a) to (e). But unlike Idaho's list, which does not say anything about a plaintiff's ability to recover compensatory damages, Florida expressly states that a court may order "[a]ny other compensatory damages allowable at law." Fla. Stat. § 448.103(2)(e). The City thus concludes that "the Florida legislature clearly intended to provide for broader coverage than is contemplated in Idaho, ..." *City Mot. Mem.,* Dkt. 61–1, at 6–7.

The Court, however, believe the City's analysis is flawed. A closer look at the Florida and Idaho Whistleblower Acts shows that both say essentially the same thing about the damages a plaintiff may recover in a whistleblower action —just in different ways.

First, both acts have an "employee-remedy" section and a "relief" section. The remedy section says employees can sue for violations of the whistleblower act, and it also say what they can seek. Idaho's "remedy" section is Section 6–2105, and its "relief" section is Section 6–2106. Florida, however, puts both sections together in one statute with two sub-divisions—Florida Statute § 448.103(1) and (2)—entitled "Employee's remedy; relief."

***3** The difference in the remedy sections of Florida's and Idaho's Whistleblower Acts is mainly structural—not substantive. That is, Idaho's remedy section *itself* states that employees may sue for "injunctive relief or actual damages, or both,...." I.C. § 6–2105, while Florida's remedy section just refers readers to the relief section, indicating that employees may sue "for relief *as set forth in sub-section (2) [the relief section] ....*"(emphasis added). So in the Florida statute, the reader has to jump to the relief section to figure out that employees can sue for compensatory damages. Idaho already said that in its remedy section, so the fact that a plaintiff's ability to seek actual damages for injury or loss is not restated in Idaho's relief section is irrelevant.

The Court ultimately concludes that if the Idaho legislature wanted to restrict whistleblower plaintiffs to the remedies listed in Section 6–2106, it would have said exactly that. In that regard, it is useful to compare Idaho's whistleblower statute to New York's. The New York whistleblower statute has a "relief" section almost identical to Idaho's—and neither lists compensatory damages as part of the relief that may be ordered. *Compare* I.C. § 6–2106(1) to (6) with N.Y. Labor Law § 740(5)(a) to (e) (McKinney). But the two states' "remedy" sections are sharply different. Whereas the Idaho statute broadly states that employees alleging violations "may bring a civil action for appropriate injunctive relief, or damages, or both," the New York statute expressly states that plaintiffs can obtain only those types of relief set out in the "relief" section. *See* N.Y. Labor Law § 740(4)(a). So if the Court were construing a statute similar to New York's, the City's argument would be more persuasive. But

Idaho's Whistleblower Act is simply not susceptible to the meaning the City gives it.

To the contrary, the Court reads Idaho's relief section as *expanding,* rather than restricting, the types of relief available in a whistleblower action. The relief section makes clear that, in addition to traditional remedies, a court may order other remedies above and beyond those generally available to tort plaintiffs. A good example is the language that gives the trial court authority to order reinstatement, including reinstatement of full fringe benefits and seniority rights. Reinstatement is not a remedy commonly available to tort plaintiffs. The Court therefore does not agree that Idaho's legislature intended the relief section to limit the types of traditional compensatory damages available for Whistleblower Act violations.

B. ***Pleading Special Damages***

Alternatively, the City says Brown should be precluded from introducing evidence of the "special damages" itemized above (expenses related to looking for a job, moving, renting a storage unit, filing bankruptcy, and buying a car) because these damages were not specifically listed in the complaint. Again, the Court is not persuaded.

***4** Under federal pleading standards, "[g]eneral damages typically are those elements of injury that are the proximate and foreseeable consequence of defendant's conduct. Special damages are those elements of damages that are the natural, but not the necessary or usual, consequence of defendant's conduct, and typically stem from and depend upon the particular circumstances of the case." 5A Charles Alan Wright, Arthur R. Miller et al. *Federal Practice & Procedure* § 1310 (3d ed.2005) (internal footnote citations omitted). Unless the existence of special damages is an essential ingredient of plaintiff's claim for relief, "the purpose of requiring that special damages be specifically pleaded is to protect the defendant against being surprised at trial by the extent and character of the plaintiff's claim." *Id.; see also Tipton v. Mill Creek Gravel, Inc.,* 373 F.3d 913, 922 n. 10 (8th Cir.2004). Consequently, where the alleged special damages are not an essential element of the underlying claim, "considerable liberality is the appropriate principle of construction" in assessing the sufficiency of these allegations. Wright & Miller, *Federal Practice & Procedure* § 1311.

Here, in the prayer for relief, plaintiff requested "general and special" damages. These minimal allegations arguably put the City on notice that plaintiff would be seeking special damages. But even assuming they did not, the purpose of the pleading rule has been served: it appears discovery was conducted on these specific types of damages and the City is not claiming it will be surprised at trial by introduction of such evidence. The Court will therefore deny the motion in limine based on alleged pleading deficiency.

ORDER

IT IS ORDERED that:

1. Defendant's Motion in Limine (Dkt.61) is DENIED in part, and otherwise MOOT.

2. Plaintiff's Motion in Limine (Dkt.63) is DENIED.

3. Defendant's Motion in Limine re Insurance Coverage (Dkt.67) is MOOT.

All Citations

Not Reported in F.Supp.2d, 2012 WL 4522728

Footnotes

1 Plaintiff has also noted his objections to certain exhibits. The Court has reviewed those objections and will make those determinations as the exhibits are introduced.

2 In full, Idaho Code § 6–2105 provides:

A court, in rendering a judgment brought under this chapter, may order any or all of the following:

(1) An injunction to restrain continued violation of the provisions of this act;

(2) The reinstatement of the employee to the same position held before the adverse action, or to an equivalent position;

(3) The reinstatement of full fringe benefits and seniority rights;

(4) The compensation for lost wages, benefits and other remuneration;

(5) The payment by the employer of reasonable costs and attorneys' fees
(6) An assessment of a civil fine of not more than five hundred dollars ($500), which shall be submitted to the state treasurer for deposit in the general fund.

2012 WL 2359496
Only the Westlaw citation is currently available.
United States District Court, D. Idaho.

Juan GARCIA, Plaintiff,
v.
PSI ENVIRONMENTAL SYSTEMS, a California Corporation, and Waste Connections, Inc., a California Corporation, Defendant.

No. 1:10–cv–00055–EJL.
|
June 20, 2012.

Attorneys and Law Firms

Erika Birch, Strindberg & Scholnick, LLC, Boise, ID, Rachel E. Otto, Strindberg & Scholnick LLC, Salt Lake City, UT, for Plaintiff.

Kurt N. Peterson, Nicolette Lee, Littler Mendelson, P.C., Atlanta, GA, D. John Ashby, Steven W. Berenter, Hawley Troxell Ennis & Hawley LLP, Boise, ID, for Defendant.

MEMORANDUM DECISION AND ORDER ON MOTIONS IN LIMINE

EDWARD J. LODGE, District Judge.

INTRODUCTION

***1** The Court has before it plaintiff's and defendants' motions in limine (Dkt.78, 82). The facts and legal arguments are adequately presented in the briefs and record, and oral argument will not aid the decision-making process. The Court will therefore rule without a hearing.

The parties should be aware, however, that in limine rulings are provisional. The Court might change its mind in the context of the trial, and will therefore entertain objections to individual proffers of evidence during trial, even if those proffers fall within the scope of this order. However, the parties are directed to raise these issues in advance, outside the presence of the jury.

LEGAL STANDARD

Trial judges are afforded wide discretion in determining whether evidence is relevant. *United States v. Alvarez,* 358 F.3d 1194, 1205 (9th Cir.2004) (citing *United States v. Long,* 706 F.2d 1044, 1054 (9th Cir.1983)). Because "[a]n in limine order precluding the admission of evidence or testimony is an evidentiary ruling, ... a district court has discretion in ruling on a motion in limine." *United States v. Ravel,* 930 F.2d 721, 726 (9th Cir.1991) (citations omitted).

As already noted, in limine rulings "are not binding on the trial judge [who] may always change his mind during the course of a trial." *Ohler v. United States,* 529 U.S. 753, 758 n. 3, 120 S.Ct. 1851, 146 L.Ed.2d 826 (2000); *accord Luce v. United States,* 469 U.S. 38, 41, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984). Further, just because the Court denies a motion seeking to exclude evidence "does not necessarily mean that all evidence contemplated by the motion will be admitted to trial. Denial merely means that without the context of trial, the court is unable to determine whether the evidence in question should be excluded." *Indiana Ins. Co. v. General Elec. Co.,* 326 F.Supp.2d 844, 846 (N.D.Ohio 2004).

PLAINTIFF'S MOTIONS IN LIMINE

1. The Probable–Cause Determination

In his first motion in limine, plaintiff seeks an order allowing him to introduce the Idaho Human Rights Commission's probable-cause determination. *See May 2009 Letter and Summary of Investigation ("Probable–Cause Determination"), Ex. A to Plaintiff's Motion,* Dkt. 79–1.

In *Plummer v. Western International Hotels Co.,* 656 F.2d 502, 504 (9th Cir.1981), the Ninth Circuit held that a plaintiff has a "right to introduce an EEOC probable cause determination in a Title VII lawsuit, regardless of what other claims are asserted, or whether the case is tried before a judge or jury." *Id.* at 505. The Ninth Circuit later indicated "the *Plummer* ruling is not restricted solely to EEOC findings of probable cause but extends to similar administrative determinations, ..." *Heyne v. Caruso,* 69 F.3d 1475, 1483 (9th Cir.1995).

Notwithstanding *Plummer,* defendants argue that the Commision's probable-cause determination should be excluded because it (1) bears "little to no relevance to Plaintiff's only [viable] promotion claim"; (2) is "rife with inaccuracies and is incomplete, internally inconsistent, and contradicted by sworn testimony—in other words it is untrustworthy"; and (3) is unduly prejudicial under Federal Rule of Evidence 403. The Court is not persuaded by these arguments.

a) Relevance

***2** As for the first argument—relevance—defendants note that although Garcia was passed over for promotion three times (in June 2006, in January 2007, and again in May 2007), he has just one actionable promotion-denial claim, related to the May 2007 denial. This Court previously ruled that the claims related to the first two promotions are time-barred.

The probable-cause determination, however, discusses all three promotions. Moreover, defendants interpret the determination as implicitly finding that racial bias did *not* motivate the only actionable promotion denial (the May 2007 denial) because (1) the report determined that defendants were not liable "concerning the issue of wages" after May 2007, and (2) elsewhere the report notes that the person who was promoted instead of Garcia in May 2007 had "both mechanical and supervisory experience"—unlike the persons who were previously promoted instead of Garcia. *Probable–Cause Determination,* at 6, 7. Defendants thus argue that the entire report is irrelevant.

The Court disagrees. First, as defendants seem to concede, the report could be read as concluding that Mr. Allen discriminated against Garcia with respect to all three promotion denials—not just the last one. In fact, the report includes a blanket statement that "national origin was a motivating factor in Mr. Allen's decision ... not to promote Complainant ...." Dkt. 79–1, at 7. Second, looking at the issue more broadly, evidence of the time-barred promotion denials is admissible as background evidence to support the timely promotion claim.[1] *See, e.g., Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 113, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2006).

b) Trustworthiness

Defendants next contend that the report is not trustworthy and should therefore be excluded under Rule 803(6) and/or 803(8)(c).

In the Ninth Circuit, the trial court begins with a presumption that the disputed report is trustworthy. *See Montiel v. City of L.A.,* 2 F.3d 335, 341 (9th Cir.1993); *Johnson v. City of Pleasanton,* 982 F.2d 350, 352 (9th Cir.1992). The party opposing introduction of the evidence must present enough negative factors to persuade the court that the report should not be admitted. *Johnson,* 982 F.2d at 352. This is because the court assumes that public officials perform their duties properly without motive or interest other than to submit accurate and fair reports. *Id.* at 352–53. Further, "[t]he role of the court in determining trustworthiness is not to assess the report's credibility, but to evaluate whether the report was compiled or prepared in a way that indicates its reliability." *Hedgepeth v. Kaiser Found. Health Plan of Northwest,* 76 F.3d 386 (9th Cir.1996) (unpublished disposition) (*citing Moss v. Ole S. Real Estate, Inc.,* 933 F.2d 1300, 1305–08 (5th Cir.1991)).

The Court is satisfied that the probable-cause determination meets the level of trustworthiness required. Significantly, the only case authority defendants cite in support of their trustworthiness argument—*Hedgepeth v. Kaiser Foundation Health Plan of Northwest,* 76 F.3d 386, 1996 WL 29252, at *2 (9th Cir.1996) (unpublished table disposition)—is easily distinguishable. In that case, the Ninth Circuit concluded that an administrative finding issued by the Oregon Bureau of Labor and Industries' Civil Rights Division (BOLI) was untrustworthy "on its face" because

> ***3** [t]he report admits the investigator had access to *almost no relevant information* from Kaiser because Kaiser "has not permitted an opportunity for [its nondiscriminatory] reasons to be tested for pretext." The report simply concludes "[i]n the absence of satisfactory evidence to the contrary, it appears that Complainant's age and opposition to unlawful practices were key factors in Respondent's decision to terminate Complainant." Since the author concedes he was unable to fully investigate the claim, the BOLI determination is inadmissible under FRE 803(8)(c).

Id. (emphasis added).

There are no such pervasive problems with the report at issue here. In one instance, the report indicates that defendant PSI "provided *limited* wage data ...." *Probable–Cause Determination* at 6 (emphasis added); *see also Opp.,* Dkt. 91, at 4 (indicating that the report only considered four other employees' salary, when there were actually 11 other employees). But having access to "limited" wage data is a far cry from having "almost no relevant information."

Further, although defendants say the report is "rife" with inaccuracies, many of the listed inaccuracies are minor. *See, e.g., Opp.,* Dkt. 91, at 7 (observing that the report wrongly notes, at one point that the plaintiff was hired on October 12, 2005, but elsewhere correctly notes that plaintiff was hired on November 4, 2005). And while other inaccuracies are more significant, inaccuracies do not pervade the report, nor are they so serious as to convince the Court that the report is not trustworthy.

Defendants also point out that: (1) some witnesses said one thing to the investigator, and then contradicted themselves in their depositions; and (2) other evidence will undermine the report. But the fact that deponents may have changed their story after talking to the investigator, or that other witnesses might have contradictory information, does not mean the report itself was prepared in such a way to indicate it is not trustworthy.

In sum, defendants' attacks on the determination go more to the weight the jury should give to the determination than to its trustworthiness. And as *Plummer* observed:

> The defendant, of course, is free to present evidence refuting the findings of the EEOC and may point out deficiencies in the EEOC determination on remand [back to the trial court.] Such evidence would go to the weight to be given by the trier of fact to the EEOC determination.

656 F.3d at 505 n. 9.

c) Rule 403(b)

Finally, the Court overrules defendants' Rule 403 objection. The Ninth Circuit has "mandate[d]" that probable-cause determinations by the EEOC and other similar determinations be admitted into evidence. *See Heyne,* 69 F.3d at 1483 (referring to "our mandate regarding the admissibility of administrative determinations outlined in *Plummer"*). In issuing that mandate, *Plummer* conclusively found that the prejudicial effect of the probable-cause determination far outweighed the prejudicial effect it may have on a jury. 656 F.3d at 504–05; *see also Bradshaw v. Zoological Society,* 569 F.2d 1066, 1069 (9th Cir.1978). *Plummer* thus controls. Moreover, even in the absence of *Plummer,* the Court is not persuaded that the prejudicial effect of the probable-cause determination outweighs its probative value.

2. The June 2006 and January 2007 Promotion Denials

***4** Garcia's second motion in limine seeks an order allowing him to introduce evidence regarding the two time-barred promotion denials.

The Supreme Court and the Ninth Circuit have held that time-barred conduct may be offered as evidence of discriminatory intent to support timely claims. *See Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 113, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2006); *United Airlines Inc. v. Evans,* 431 U.S. 533, 558 (1977); *Lyons v. England,* 307 F.3d 1092, 1111 (9th Cir.2002) (time-barred acts of employment discrimination "relevant as background and may be considered by the trier of fact in assessing the defendant's liability ....").

Garcia's failure to get promoted in June 2006 and January 2007 involve the same decision-maker who passed over Garcia for promotion in May 2007. Further, the two earlier denials occurred within a year of the later, actionable denial. The Court will therefore allow plaintiff to introduce evidence relating to the earlier promotions as background evidence relevant to his timely promotion-denial claim.[2] *Cf. Morgan,* 536 U.S. at 113 ("relevant background evidence, such as statements by a decisionmaker or earlier decisions typifying the retaliation involved, may be considered to assess liability on the timely alleged action"). The Court has determined that any prejudicial effect of this evidence is outweighed by its probative value. *See* Fed.R.Evid. 403. Nevertheless, to ensure that the jury is not confused as to which claims are actionable in this case, the Court will read, when necessary, an appropriate limiting instruction.

Finally, the Court rejects defendants' argument that this evidence should be barred under Rule 404(b) argument. Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. *It may, however, be admissible for other purposes, such as proof of motive, ... intent, ...*

Fed.R.Evid. 404(b)(2) (emphasis added). As the italicized portion demonstrates, Rule 404(b) actually supports considering the time-barred evidence for purposes of establishing discriminatory intent. *See, e.g. Oest v. Illinois Dept. of Corrections,* 240 F.3d 605, 614 n. 4 (7th Cir.2001); *Pleasants v. Albaugh,* 258 F.Supp.2d 53 (D.D.C.2003).

3. Single Employer

Plaintiff's third motion in limine seeks to introduce evidence showing that defendants PSI and WCI are a "single employer." Here, plaintiffs refer to the Ninth Circuit's four-part single-employer test, which includes these factors: "(1) interrelated operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control." *Morgan v. Safeway Stores, Inc.,* 884 F.2d 1211, 1213 (9th Cir.1989).

Defendants' opposition is not helpful. They concede that "plaintiff can introduce evidence in an attempt to establish defendants' liability," *Opp.* at 14, but then go on to argue that the single-employer standard is irrelevant. What they do not do—at least in their opposition to the motion in limine—is explain what standard applies, and what evidence is relevant to that standard. In their trial brief, however defendants assert that plaintiff must satisfy the joint employer test, and they articulate four relevant factors: "whether the alleged joint employer (1) supervised the employees; (2) had the power to hire and fire; (3) had the power to discipline; and (4) supervised the employees' worksite." *Defendants' Trial Memo.,* Dkt. 92, at 7 (citing *Buttars v. Creekside Home Health, Inc.,* No. 07–0204–E–BLW, 2008 U.S. Dist. LEXIS 75700, at *4, 2008 WL 4411414 (D.Idaho Sept.25, 2008)).

***5** In absence of a more thorough explanation from defendants, it appears that the evidence plaintiff references in his motion is admissible to establish both defendants' liability, and the Court will permit such evidence at trial. However, plaintiff's counsel is instructed to refrain from using the term "single employer" at trial.

4. Employment Records

Lastly, plaintiff asks the Court to exclude his employment records related to other employers, as well as employment records for Tim Bagley and Biff Lee. Plaintiff does not refer to any specific records; he seeks a blanket exclusionary order. Plaintiff argues that these types of records are "irrelevant, will waste time, ... are potentially prejudicial [and] ... are inadmissible character evidence ...." *Mot.,* at 9. Plaintiff also asserts that some of the subpoenas used to get these documents were untimely. The Court will address the timeliness argument first, and then turn to the substantive arguments.

a) Timeliness

The discovery cutoff in this case was March 18, 2011. In late fall 2010, defendants subpoenaed employment records from several of plaintiff's former and subsequent employers. Around the same time, defendants also subpoenaed employment records from other PSI employees who are friendly to plaintiff. *See Ex. H to Plaintiff's Motion in Limine.*

A few subpoenas came down to the wire; they were issued on March 17, 2011—one day before the discovery cutoff—and called for productions in April 2011. Defendants say they did not serve at least one of these subpoenas until so late because they did not know about that particular employer until a March 12, 2011 deposition. Significantly, plaintiff did not promptly complain about these subpoenas or move to quash them. Instead, he waited until the eve of trial to raise the issue. Under these circumstances, the Court will not exclude employment records due to issues surrounding the timeliness of the subpoenas. [3]

b) Garcia's Employment Records

Similarly, the Court will not exclude the employment records (with one specific exception, discussed below) based on plaintiff's substantive arguments.

Dealing first with plaintiff's own records from former employers, the Court finds these records to be relevant to this dispute, to the extent they bear on Garcia's mechanic

or supervisory experience (or lack thereof). Specifically, they are relevant to whether Garcia was qualified for the promotions he did not receive. Garcia asserts he was qualified for those promotions. Defendants are entitled to refute that assertion. The Court will therefore deny Garcia's request for a blanket order excluding all his employment records.

Garcia argues that some of these records should be excluded as inadmissible character evidence under Rule 608. Apparently, Garcia did not list all of his former employers in the appropriate section of his PSI employment application. He argues that defendants are improperly seeking to introduce some of the employment records to show that he is untruthful. *See* Fed.R.Evid. 608. Defendants, however, correctly point out that the documents are admissible for another purpose. Specifically, if plaintiff failed to list mechanic jobs on his PSI application—and he was fired from those jobs—that evidence speaks to his qualifications and, thus, may refute plaintiff's contention that he was discriminated against. The Court will therefore deny plaintiff's motion to the extent it seeks to broadly exclude all employment records.

***6** The Court will, however, exclude records regarding plaintiff's employment with Aslett Electric, Inc. (These are the only employment records plaintiff specifically discussed in his motion.) When Garcia applied for a job with PSI, he did not list Aslett as a former employer, possibly because he only worked for that company for a couple months, total, and he was ultimately fired from Aslett. *See Employment App.,* Ex. K to Opp., Dkt 91–12, at 3.

The Aslett records do not seem relevant to this lawsuit. First, it is unclear what Garcia actually did for Aslett. The job descriptions are cryptic, describing him first as a "laborer" and then as an "operator." He was fired from the "operator" job, and another cryptic explanation is given for that: "safety hazard." If Garcia was a mechanic for Aslett, then the November 2005 firing may be relevant to refute his contention that he was a qualified mechanic. Otherwise, the records are irrelevant.

Defendants do not explain what Garcia did at Aslett, but they contend that the Aslett records are relevant because Garcia earned $13 per hour at that company, which was the exact amount he received when he started working for defendants. This argument is flawed, however, because defendants presumably did not even know about Garcia's employment with Aslett when they decided his starting pay rate.

In sum, the Court will grant plaintiff's motion to exclude the Aslett records because they are not relevant. Otherwise, the Court denies plaintiff's motion to exclude employment records.

c) Bagley's Employment Records

The Court will also deny plaintiff's motion as it relates to Tim Bagley's employment records.[4] Bagley testified in his deposition that he did not feel qualified for the promotion he received instead of Garcia, yet after he left defendants' employ, he sent a letter to another prospective employer. Many letters like this contain some degree of puffery and, apparently, Bagley's was no exception. He expounded upon his qualifications. Defendants say this will undermine the plaintiffs' argument that Garcia should have received the promotion that went to Bagley. The Court finds that this evidence is relevant and will therefore allow it.

DEFENDANTS' MOTIONS IN LIMINE

1. Evidence Relating to Defendants' Hiring and Compensation Decisions After Plaintiff's December 2007 Resignation

In their first motion in limine, defendants ask the Court to exclude evidence regarding pay and hiring decisions after Garcia's December 2007 resignation under Federal Rule of Evidence 402. They also seek to exclude pay and hiring decisions made by David Grantham. The Court will deny this motion.

As noted, Garcia resigned in December 2007. Up until November 2007, Don Allen decided what pay Garcia would receive, as well as whether he would be promoted, with Vice President Eric Merrill having "some input" on those decisions. Allen, however, quit in November 2007 (the month before Garcia quit) and Merrill moved out of his role as VP in October 2007. The upshot was that as of around November 2007, David Grantham decided which mechanics would be hired and what those mechanics would be paid. Ed McCartney worked with Grantham on these decisions.

***7** Defendants first argue that because Grantham did not make any decisions regarding plaintiff, his decisions are entirely irrelevant. The Court rejects this argument because Garcia alleges that in November 2007, Grantham rejected his and McCartney's request that Garcia's pay be increased to the planned rate for new hires.

Next, defendants argue that *any* decisions after plaintiff resigned are irrelevant. Here, defendants argue that because Plaintiff cannot seek wages for the post-December 2007 period, pay and hiring decisions post-December 2007 are irrelevant. The Court rejects this argument as well. Even assuming plaintiff is barred from seeking post-December 2007 wages, this does not convince the Court that pay and hiring decisions after that date are irrelevant to plaintiff's claims that he was paid too little. To give an obvious example—and this is what plaintiff says happened—if defendants hired individuals who were essentially equal to plaintiff shortly after he left, but paid them significantly more, this might tend to prove that plaintiff was in fact discriminated against.

The Court is not persuaded that this evidence would be "extensive and complex." For example, defendants point out that plaintiff wants to introduce evidence of "no less than four separate mechanic hires in 2008" and then have the jury compare those resumes with his own. All things are relative, but that does not seem to be a particularly "extensive or complex" evidentiary task. The Court will deny defendants' motion to exclude this evidence under Rule 403.

2. Evidence of Emotional Distress

In their second motion in limine, defendants seek to exclude emotional-distress evidence. Specifically, Garcia alleges he suffered emotional distress after he was passed over for promotion in May 2007. Defendants argue that this evidence should be excluded because emotional distress damages are not expressly permitted under the Idaho Human Rights Act. *See* Idaho Code § 67–5908 (setting forth a non-exhaustive list of available remedies). The Court will deny this motion.

The remedies provision of the Idaho Human Rights statute does not limit the type of remedies available to plaintiffs. *See* Idaho Code § 67–5908. Rather, before listing specific remedies, it states that "[s]uch remedies may include, but are not limited to: ...." various listed remedies. [5] *Id.* § 67–5908(3). Further, the express purpose of the Idaho Human Rights Act is to execute the policies embodied in the federal Civil Rights Act of 1964, which enacted Title VII. *See* Idaho Code § 67–5901. As originally enacted, Title VII did not allow recovery of compensatory damages, but in 1991 Congress amended Title VII by passing the Civil Rights Act of 1991, which specifically allows plaintiffs to recovery compensatory damages.

Generally speaking, the Idaho Supreme Court has broadly interpreted the remedies provision of the Idaho Human Rights Act. For example, in *O'Dell v. Basabe,* 119 Idaho 796, 810 P.2d 1082, 1097 (Idaho 1991), the court held that front pay is an admissible element of damages under the Act, although the Act does not expressly include the term "front pay." The court reasoned that "actual damages"—which are a specifically listed remedy—are "commonly understood as those actual losses caused by the conduct at issue," which included front pay. *Id.*

***8** And, more to the point here, in *Paterson v. Idaho,* 128 Idaho 494, 915 P.2d 724, 733 (Idaho 1996), the Idaho Supreme Court affirmed emotional distress damages under the Idaho Human Rights Act. The court rejected defendants' arguments that such damages were improper because the trial court had dismissed plaintiff's separate claim for intentional infliction of emotional distress. The Court reasoned that while "Paterson's claim may not have risen to the level necessary to meet the legal elements required for an intentional infliction of emotional distress cause of action," that fact "does not block her recovery for the embarrassment and humiliation she suffered as a result of her work environment." *Id.* at 733.

Defendants correctly point out that in *Paterson,* (1) the parties assumed compensatory damages were available and, (2) the defendants did not challenge an instruction that "directed the jury, upon a finding of liability, to award Paterson compensatory damages for 'mental pain and suffering, including mortification, humiliation, and embarrassment resulting from the hostile working environment.' " *Id.* Nonetheless, this Court finds *Paterson* persuasive for the proposition that emotional distress damages are recoverable under the Idaho Human Rights Act.

That would be the end of the matter, but for the Idaho Supreme Court's decision in *Stout v. Key Training Corp.,* 144 Idaho 195, 158 P.3d 971 (2007). *Stout* does not address

emotional distress damages under the Idaho Human Rights Act. But it does find that attorneys' fees are not recoverable under the Act because attorneys' fees—like emotional distress damages—are not a specifically listed remedy. The court concluded that the Idaho legislature must not have intended plaintiffs to recover attorneys' fees because the Human Rights Act does *not* include attorneys' fees, even though the Civil Rights Act did allow attorneys' fees at that time. As the court put it,

> [T]he federal Civil Rights Act provision allowing for an award of attorney fees had been enacted long before the Idaho Human Rights Act remedy provision. Yet, the Idaho legislature chose not to include attorney fees in its remedy provision.

Id. at 973–74 (internal footnote omitted)

By analogy, the Idaho legislature did not amend the Act to include compensatory damages after Congress so amended Title VII. Defendants thus conclude that the legislature must not intend for plaintiffs to recover emotional distress damages under the act.

This argument is unavailing. First, *Stout* does not directly control here as it does not address emotional distress damages. Second, the Court finds it significant that *Stout* focused on attorneys' fees. Attorneys' fees are not a component of "actual damages" suffered by a plaintiff due to the underlying event; they are a cost of enforcing a legal right. Here, Garcia is not seeking to recover the cost of enforcing the act; he is seeking "actual damages,"—which are permitted under the Act. *See* Idaho Code § 67–5908(3).

***9** In sum, the Court concludes that Garcia may seek emotional distress damages. *Accord Green v. Bannock Reg'l Med. Ctr.,* Case No. 91–0149–LMB (Mar. 15, 1993) (transcript of Judge Boyle's oral decision permitting emotional distress damages under the Act).

3. The Death of Plaintiff's Daughter

Plaintiff was prompted to move to Idaho after his daughter tragically died. The Court will exclude this evidence under Rules 401, 402, and 403. The Court is not persuaded by plaintiff's arguments to the contrary. *See Opp.,* at 10–11.

4. Sexual Harassment

The Court will exclude evidence regarding accusations that Don Allen sexually harassed employees under Rules 401, 402, and 403. In any event, plaintiff indicated that he did not intend to question Allen regarding these allegations "unless Defendants open the door on this line of questioning or it becomes relevant for rebuttal/impeachment purposes." *Opp.,* at 11.

5. Criminal Backgrounds of other WCI or PSI employees

At one point in this litigation, defendants asserted that plaintiff had no claim because they would have fired him anyway if they had known of information that later learned (presumably, that he omitted information on his resume). Defendants no longer need to assert this theory because of the Court's summary judgment ruling. But they are now concerned that plaintiff will seek to show that other employees—who, presumably, have not been fired—omitted information or otherwise lied on their employment applications.

The Court agrees that this evidence is not relevant to plaintiff's remaining claim and will therefore exclude the evidence under Rules 401, 402, and 403. The Court is not persuaded to admit evidence regarding the falsity of other employees' applications simply because plaintiff's applications may be tested within the bounds of this lawsuit.

6. Serrano's Allegations of Discrimination

The fact that another employee, Phillip Serrano, accused Grantham of discriminating against him around the same time Grantham allegedly discriminated against Garcia is admissible for the purpose of allowing Garcia to establish discriminatory intent. *See* Fed.R.Evid. 402 & 404(b); *Heyne v. Caruso,* 69 F.3d 1475 (9th Cir.1995) (citing *Spulak v. K Mart Corp.,* 894 F.2d 1150, 1156 (10th Cir.1990) ("As a general rule, the testimony of other employees about their treatment by the defendant [employer] is relevant to the issue of the employer's discriminatory intent.")).

CONCLUSION

In constructing this Order, the Court has endeavored to provide to the parties as much guidance as possible

regarding the Court's understanding of the law that applies to this case and the evidence as the parties have represented they intend to rely upon it at trial. In doing so, the Court has entered rulings where it can but for the most part the determination as to the admissibility of particular items of evidence will have to be made during the course of the trial when the Court able to view the evidence in the context in which it is being offered. That being the case, the rulings made in this Order are preliminary. If the evidence presented at trial differs, the Court reserves the right to rule on the admissibility of the evidence accordingly at trial. The parties are directed to notify the Court in advance of any evidentiary issues being raised so that the Court can take up such matters outside of the presence of the jury and to eliminate any undue delay during the trial.

ORDER

***10** It is **ORDERED** that:

1. Plaintiff's Motion in Limine (Dkt.78) is **GRANTED in part** and **DENIED** in part, as explained herein.

2. Defendants' Motion in Limine (Dkt.82) is **GRANTED in part** and **DENIED in part,** as explained herein.

All Citations

Not Reported in F.Supp.2d, 2012 WL 2359496

Footnotes

1 This issue is discussed more thoroughly below, in the Court's ruling on plaintiff's Motion in Limine No. 2

2 Given this ruling, the Court need not address plaintiffs' argument that this evidence is independently admissible to support his disparate-treatment claim.

3 Likewise, the Court is not persuaded to exclude records from Aslett Electric, Inc. (one of Garcia's former employers) on the technical grounds plaintiff asserts. The Court will not engage in a detailed discussion here, however, because it has determined that the Aslett records are irrelevant. If, however, the Court changes its mind on relevance, suffice it to say that plaintiff's technical arguments regarding the Aslett documents are not convincing.

4 Defendants focused mainly on their intent to introduce Tim Bagley's employment records. The Court will therefore restrict this ruling to Bagley at this point, although presumably the order related to Bagley will provide the litigants with some general guidance on the question of other employees.

5 In full, Idaho Code § 67–5908(3) states:

> In a civil action filed by the commission or filed directly by the person alleging unlawful discrimination, if the court finds that unlawful discrimination has occurred, its judgment shall specify an appropriate remedy or remedies therefor. Such remedies may include, but are not limited to:
>
> (a) An order to cease and desist from the unlawful practice specified in the order;
>
> (b) An order to employ, reinstate, promote or grant other employment benefits to a victim of unlawful employment discrimination;
>
> (c) An order for actual damages including lost wages and benefits, provided that such back pay liability shall not accrue from a date more than two (2) years prior to the filing of the complaint with the commission or the district court, whichever occurs first;
>
> (d) An order to accept or reinstate such a person in a union;
>
> (e) An order for punitive damages, not to exceed one thousand dollars ($1,000) for each willful violation of this chapter.