11-2-2018

Berrett v. Clark County School District No. 161 Clerk's Record Dckt. 46354

IN THE SUPREME COURT OF THE STATE OF IDAHO

Ronald Ryan Berrett, Lanie Berrett vs. Clark County School District No. 161	Supreme Court Case No. 46354-2018

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Seventh Judicial District,
in and for the County of Jefferson

HONORABLE BRUCE L. PICKETT

Jacob Scott Wessel	Blake G Hall
Attorney for Appellant Boise, Idaho	Attorney for Respondent Boise, Idaho

JEFFERSON COUNTY DISTRICT COURT

CASE SUMMARY

CASE NO. CV-2017-328

Ronald Ryan Berrett, Lanie Berrett	§	Location:	**Jefferson County District Court**
vs.	§		
Clark County School District No. 161	§	Judicial Officer:	**Pickett, Bruce L.**
	§	Filed on:	**05/10/2017**
		Case Number History:	

CASE INFORMATION

Statistical Closures
08/02/2018 Closed

Case Type: **AA- All Initial District Court Filings (Not E, F, and H1)**

Case Status: **08/02/2018 Closed**

DATE — CASE ASSIGNMENT

Current Case Assignment

Case Number	CV-2017-328
Court	Jefferson County District Court
Date Assigned	06/28/2017
Judicial Officer	Pickett, Bruce L.

PARTY INFORMATION

		Lead Attorneys
Plaintiff	**Berrett, Lanie**	**Wessel, Jacob Scott** *Retained* 208-522-1230(W)
	Berrett, Ronald Ryan	**Wessel, Jacob Scott** *Retained* 208-522-1230(W)
Defendant	**Clark County School District No. 161**	**Hall, Blake G.** *Retained* 208-522-3003(W)

DATE	EVENTS & ORDERS OF THE COURT	INDEX
05/09/2017	Complaint Filed (Judicial Officer: Stephens, Alan C.) *Complaint Filed*	
05/10/2017	New Case Filed Other Claims (Judicial Officer: Stephens, Alan C.) *New Case Filed - Other Claims*	
05/10/2017	Attorney Retained (Judicial Officer: Stephens, Alan C.) *Plaintiff: Berrett, Ronald Attorney Retained Jacob S Wessel*	
05/10/2017	Notice of Appearance (Judicial Officer: Stephens, Alan C.) *Notice Of Appearance*	
05/10/2017	Attorney Retained (Judicial Officer: Stephens, Alan C.) *Plaintiff: Berrett, Lanie Attorney Retained Jacob S Wessel*	
05/10/2017	Notice of Appearance (Judicial Officer: Stephens, Alan C.) *Notice Of Appearance*	
05/10/2017	ROA - Converted Event (Judicial Officer: Stephens, Alan C.) *Filing: AA- All initial civil case filings in District Court of any type not listed in categories E, F and H(1) Paid by: Wessel, Jacob S (attorney for Berrett, Ronald Ryan) Receipt number:*	

	0002362 Dated: 5/10/2017 Amount: $221.00 (Check) For: Berrett, Ronald Ryan (plaintiff)
05/10/2017	Summons Issued (Judicial Officer: Stephens, Alan C.) *Summons Issued*
05/24/2017	Affidavit of Service (Judicial Officer: Stephens, Alan C.) *Affidavit of Service-D. Lantis served*
05/25/2017	Notice (Judicial Officer: Stephens, Alan C.) *Notice of Non Opposition to Defendant's Motion to Diqualify*
06/02/2017	Motion (Judicial Officer: Stephens, Alan C.) *Motion for Disqualification*
06/02/2017	Affidavit (Judicial Officer: Stephens, Alan C.) *Affidavit of Counsel in Support of Motion for Disqualificaiton*
06/12/2017	Attorney Retained (Judicial Officer: Stephens, Alan C.) *Defendant: Clark County School District No. 161 Attorney Retained Blake G. Hall*
06/12/2017	Notice of Appearance (Judicial Officer: Stephens, Alan C.) *Notice Of Appearance*
06/12/2017	ROA - Converted Event (Judicial Officer: Stephens, Alan C.) *Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Hall, Blake G. (attorney for Clark County School District No. 161) Receipt number: 0002937 Dated: 6/12/2017 Amount: $136.00 (Check) For: Clark County School District No. 161 (defendant)*
06/12/2017	ROA - Converted Event (Judicial Officer: Stephens, Alan C.) *Order of Disqualification*
06/12/2017	Order (Judicial Officer: Stephens, Alan C.) *Order of Assignment*
06/12/2017	Change Assigned Judge (Judicial Officer: Moeller, Gregory) *Change Assigned Judge*
06/16/2017	Notice (Judicial Officer: Moeller, Gregory) *Plaintiff's Notice of Intent to Take Default*
06/19/2017	Motion (Judicial Officer: Moeller, Gregory) *Motion for Disqualification*
06/19/2017	ROA - Converted Event (Judicial Officer: Moeller, Gregory) *Defendant's Answer to Complaint*
06/20/2017	ROA - Converted Event (Judicial Officer: Moeller, Gregory) *Order of Disqualification*
06/22/2017	Order (Judicial Officer: Moeller, Gregory) *Order of Assignment*
06/22/2017	Change Assigned Judge (Judicial Officer: Pickett, Bruce L.) *Change Assigned Judge*
06/28/2017	Hearing Scheduled (Judicial Officer: Pickett, Bruce L.) *Hearing Scheduled (Status Conference 07/12/2017 02:00 PM)*
06/28/2017	ROA - Converted Event (Judicial Officer: Pickett, Bruce L.) *Notice Of Hearing - Status Conference*

07/10/2017	Hearing Scheduled (Judicial Officer: Pickett, Bruce L.) *Hearing Scheduled (Motions 08/09/2017 02:00 PM) Motion for partial summary judgment*
07/12/2017	Motion (Judicial Officer: Pickett, Bruce L.) *Motion for Change of Venue*
07/12/2017	ROA - Converted Event (Judicial Officer: Pickett, Bruce L.) *Memorandum in Support of Motion for Change of Venue*
07/12/2017	Affidavit (Judicial Officer: Pickett, Bruce L.) *Affidavit of Blake G. Hall in Support of Motion for Change of Venue*
07/12/2017	Minute Entry (Judicial Officer: Pickett, Bruce L.) *Minute Entry* *Hearing type: Status Conference* *Hearing date: 7/12/2017* *Time: 2:33 pm* *Courtroom:* *Court reporter:* *Minutes Clerk: Kylee Wetherell* *Tape Number:*
07/12/2017	Hearing Held (Judicial Officer: Pickett, Bruce L.) *Hearing result for Status Conference scheduled on 07/12/2017 02:00 PM: Hearing Held*
07/12/2017	**Status Conference** (2:00 PM) (Judicial Officer: Pickett, Bruce L.) *Hearing result for Status Conference scheduled on 07/12/2017 02:00 PM: Hearing Held*
07/13/2017	Motion (Judicial Officer: Pickett, Bruce L.) *Motion for Change of Venue*
07/13/2017	ROA - Converted Event (Judicial Officer: Pickett, Bruce L.) *Memorandum in Support of Motion for Change of Venue*
07/13/2017	Affidavit (Judicial Officer: Pickett, Bruce L.) *Affidavit of Blake G Hall in support of Motion for Change of Venue*
07/13/2017	Hearing Scheduled (Judicial Officer: Pickett, Bruce L.) *Hearing Scheduled (Motions 08/09/2017 02:00 PM) Motion for change of Venue*
07/14/2017	Hearing Vacated (Judicial Officer: Pickett, Bruce L.) *Hearing result for Motions scheduled on 08/09/2017 02:00 PM: Hearing Vacated Motion for change of Venue*
07/14/2017	Hearing Vacated (Judicial Officer: Pickett, Bruce L.) *Hearing result for Motions scheduled on 08/09/2017 02:00 PM: Hearing Vacated Motion for partial summary judgment*
07/14/2017	Hearing Scheduled (Judicial Officer: Pickett, Bruce L.) *Hearing Scheduled (Motions 09/29/2017 01:30 PM) Motion for Summary Judgment*
07/14/2017	ROA - Converted Event (Judicial Officer: Pickett, Bruce L.) *Notice Of Hearing - Motion for Summary Judgment*
07/14/2017	Hearing Scheduled (Judicial Officer: Pickett, Bruce L.) *Hearing Scheduled (Pre-Trial Conference 01/29/2018 01:30 PM)*
07/14/2017	Hearing Scheduled (Judicial Officer: Pickett, Bruce L.) *Hearing Scheduled (Jury Trial 02/26/2018 09:00 AM)*

08/09/2017	*CANCELED* **Motion Hearing** (2:00 PM) (Judicial Officer: Pickett, Bruce L.) *Vacated* *Motion for partial summary judgment Hearing result for Motions scheduled on 08/09/2017 02:00 PM: Hearing Vacated*
08/09/2017	*CANCELED* **Motion Hearing** (2:00 PM) (Judicial Officer: Pickett, Bruce L.) *Vacated* *Motion for change of Venue Hearing result for Motions scheduled on 08/09/2017 02:00 PM: Hearing Vacated*
08/31/2017	Notice of Hearing (Judicial Officer: Pickett, Bruce L.) *Defendant's Notice of Hearing*
08/31/2017	Motion (Judicial Officer: Pickett, Bruce L.) *Defendant's Motion for Summary Judgment*
08/31/2017	ROA - Converted Event (Judicial Officer: Pickett, Bruce L.) *Defendant's memorandum in Support of Motion for Summary Judgment*
08/31/2017	Affidavit (Judicial Officer: Pickett, Bruce L.) *Affidavit of Blake G. Hall*
08/31/2017	Affidavit (Judicial Officer: Pickett, Bruce L.) *Affidavit of David Kress*
08/31/2017	Affidavit (Judicial Officer: Pickett, Bruce L.) *Affidavit of Erin Haight-Mortensen*
08/31/2017	Affidavit (Judicial Officer: Pickett, Bruce L.) *Affidavit of Gayle Woods*
09/01/2017	Notice of Hearing (Judicial Officer: Pickett, Bruce L.) *Plaintiff's Notice of Hearing*
09/01/2017	Motion (Judicial Officer: Pickett, Bruce L.) *Plaintiff's Motion for Partial Summary Judgment*
09/01/2017	Affidavit (Judicial Officer: Pickett, Bruce L.) *Affidavit of Ronald Ryan Berrett in Support of Motion for Partial Summary Judgment*
09/01/2017	ROA - Converted Event (Judicial Officer: Pickett, Bruce L.) *Plaintiff's Memorandum in Support of Motion for Partial Summary Judgment Striking Defendant's Fourteenth Affirmative Defense (Rules 12(f) and 56)*
09/01/2017	Affidavit (Judicial Officer: Pickett, Bruce L.) *Affidavit of Jacob S. Wessel in Support of Plaintiff's Motion for Partial Summary Judgment*
09/14/2017	ROA - Converted Event (Judicial Officer: Pickett, Bruce L.) *Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment*
09/14/2017	Affidavit (Judicial Officer: Pickett, Bruce L.) *Affidavit in Support of Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment*
09/15/2017	ROA - Converted Event (Judicial Officer: Pickett, Bruce L.) *Plaintiff's Response to: Defendant's Motion for Summary Judgment*
09/15/2017	Affidavit (Judicial Officer: Pickett, Bruce L.) *Affidavit of Jacob S. Wessel in Response to Defendant's Motion for Summary Judgment*
09/19/2017	Hearing Vacated (Judicial Officer: Pickett, Bruce L.)

	Hearing result for Motions scheduled on 09/29/2017 01:30 PM: Hearing Vacated Motion for Summary Judgment
09/19/2017	Hearing Scheduled (Judicial Officer: Pickett, Bruce L.) *Hearing Scheduled (Motions 10/06/2017 09:00 AM) Motions for Summary Judgment*
09/19/2017	ROA - Converted Event (Judicial Officer: Pickett, Bruce L.) *Notice Of Hearing - Motions for Summary Judgment*
09/22/2017	Reply (Judicial Officer: Pickett, Bruce L.) *Plaintiff's Reply to Defendant's Response to Motion for Partial Summary Judgment*
09/25/2017	Reply (Judicial Officer: Pickett, Bruce L.) *Reply in Support of Defendant's Motion for Summary Judgment*
09/29/2017	*CANCELED* **Motion Hearing** (1:30 PM) (Judicial Officer: Pickett, Bruce L.) *Vacated* *Motion for Summary Judgment Hearing result for Motions scheduled on 09/29/2017 01:30 PM: Hearing Vacated*
10/06/2017	Minute Entry (Judicial Officer: Pickett, Bruce L.) *Minute Entry* *Hearing type: Motions* *Hearing date: 10/6/2017* *Time: 8:56 am* *Courtroom:* *Court reporter:* *Minutes Clerk: Kylee Wetherell* *Tape Number:* *Jacob S. Wessell* *Blake G. Hall* *Mary Fox*
10/06/2017	Hearing Held (Judicial Officer: Pickett, Bruce L.) *Hearing result for Motions scheduled on 10/06/2017 09:00 AM: Hearing Held Motions for Summary Judgment*
10/06/2017	**Motion Hearing** (9:00 AM) (Judicial Officer: Pickett, Bruce L.) *Motions for Summary Judgment Hearing result for Motions scheduled on 10/06/2017 09:00 AM: Hearing Held*
11/22/2017	Order (Judicial Officer: Pickett, Bruce L.) *Opinion and Order on Parties Cross-Motion for Summary Judgment*
11/22/2017	Judgment (Judicial Officer: Pickett, Bruce L.) *Judgment of Dismissal*
11/22/2017	Status Changed (Judicial Officer: Pickett, Bruce L.) *Case Status changed: Closed pending clerk action*
11/22/2017	Civil Disposition Entered (Judicial Officer: Pickett, Bruce L.) *Civil Disposition Entered entered for: Clark County School District No. 161, Defendant; Berrett, Lanie, Plaintiff; Berrett, Ronald Ryan, Plaintiff. Filing date: 11/22/2017*
11/22/2017	**Dismissed With Prejudice** Party (Berrett, Ronald Ryan) Party (Berrett, Lanie) Party (Clark County School District No. 161)
12/04/2017	Hearing Scheduled (Judicial Officer: Pickett, Bruce L.) *Hearing Scheduled (Motions 01/12/2018 10:00 AM) Motion to Reconsider*

01/04/2018	ROA - Converted Event (Judicial Officer: Pickett, Bruce L.) *Response Memorandum in Opposition to Plaintiff's Motion to Reconsider*
01/04/2018	Affidavit (Judicial Officer: Pickett, Bruce L.) *Affidavit of Blake G Hall*
01/09/2018	Miscellaneous (Judicial Officer: Pickett, Bruce L.) *Plaintiff's Reply RE:Motion to Reconsider*
01/12/2018	Minute Entry (Judicial Officer: Pickett, Bruce L.) *Minute Entry* *Hearing type: Motions* *Hearing date: 1/12/2018* *Time: 10:00 am* *Courtroom: Large Courtroom #3* *Court reporter:* *Minutes Clerk: Denise Criddle* *Tape Number:* *Party: Clark County School District No. 161, Attorney: Blake Hall* *Party: Lanie Berrett, Attorney: Jacob Wessel* *Party: Ronald Berrett, Attorney: Jacob Wessel*
01/12/2018	Minute Entry (Judicial Officer: Pickett, Bruce L.) *Minute Entry RE: Motion to Reconsider*
01/12/2018	Hearing Held (Judicial Officer: Pickett, Bruce L.) *Hearing result for Motions scheduled on 01/12/2018 10:00 AM: Hearing Held Motion to Reconsider*
01/12/2018	**Motion Hearing** (10:00 AM) (Judicial Officer: Pickett, Bruce L.) *Motion to Reconsider Hearing result for Motions scheduled on 01/12/2018 10:00 AM: Hearing Held*
01/29/2018	Hearing Vacated (Judicial Officer: Pickett, Bruce L.) *Hearing result for Pre-Trial Conference scheduled on 01/29/2018 01:30 PM: Hearing Vacated*
01/29/2018	Hearing Vacated (Judicial Officer: Pickett, Bruce L.) *Hearing result for Jury Trial scheduled on 02/26/2018 09:00 AM: Hearing Vacated*
01/29/2018	*CANCELED* **Pre-trial Conference** (1:30 PM) (Judicial Officer: Pickett, Bruce L.) *Vacated* *Hearing result for Pre-Trial Conference scheduled on 01/29/2018 01:30 PM: Hearing Vacated*
02/14/2018	ROA - Converted Event (Judicial Officer: Pickett, Bruce L.) *Memorandum Decision on Plaintiff's Motion to Reconsider*
02/26/2018	**Jury Trial** (9:00 AM) (Judicial Officer: Pickett, Bruce L.) **02/27/2018-03/02/2018** *Hearing result for Jury Trial scheduled on 02/26/2018 09:00 AM: Hearing Vacated*
03/07/2018	Motion (Judicial Officer: Pickett, Bruce L.) *Motion for Summary Judgment RE: Federal Claims*
03/07/2018	ROA - Converted Event (Judicial Officer: Pickett, Bruce L.) *Memorandum in Support of Motion for Summary Judgment RE: Federal Claims*
03/07/2018	Affidavit (Judicial Officer: Pickett, Bruce L.) *Affidavit of Blake G Hall in Support of Motion for Summary Judgment RE: Federal Claims*
03/12/2018	Hearing Scheduled (Judicial Officer: Pickett, Bruce L.)

	Hearing Scheduled (Motions 05/03/2018 01:30 PM) Motion for Summary Judgment
03/16/2018	Notice of Hearing (Judicial Officer: Pickett, Bruce L.) *Notice of Hearing: 05/03/2018 @ 01:30 PM*
04/23/2018	ROA - Converted Event (Judicial Officer: Pickett, Bruce L.) *Plaintiff's Response to Defendant's 2nd Motion for Summary Judgment*
04/23/2018	Affidavit (Judicial Officer: Pickett, Bruce L.) *Affidavit of Counsel in Opposition to Defendant's 2nd Motion for Summary Judgment*
04/24/2018	Reply to Memorandum (Judicial Officer: Pickett, Bruce L.) *Reply Memorandum in Support of Motion for Summary Judgment RE: Federal Claims*
05/03/2018	Minute Entry (Judicial Officer: Pickett, Bruce L.) *Minute Entry* *Hearing type: Motions* *Hearing date: 5/3/2018* *Time: 10:48 am* *Courtroom:* *Court reporter:* *Minutes Clerk: Denise Criddle* *Tape Number:* *Party: Clark County School District No. 161, Attorney: Blake Hall* *Party: Lanie Berrett, Attorney: Jacob Wessel* *Party: Ronald Berrett, Attorney: Jacob Wessel*
05/03/2018	Hearing Held (Judicial Officer: Pickett, Bruce L.) *Hearing result for Motions scheduled on 05/03/2018 01:30 PM: Hearing Held Motion for Summary Judgment*
05/03/2018	**Motion Hearing** (1:30 PM) (Judicial Officer: Pickett, Bruce L.) *Motion for Summary Judgment Hearing result for Motions scheduled on 05/03/2018 01:30 PM: Hearing Held*
06/04/2018	ROA - Converted Event (Judicial Officer: Pickett, Bruce L.) *Memorandum Decision on Defendant's Motion for Summary Judgment*
06/18/2018	Motion (Judicial Officer: Pickett, Bruce L.) *Motion for Reconsideration RE: Attorney Fees*
06/18/2018	ROA - Converted Event (Judicial Officer: Pickett, Bruce L.) *Memorandum in Support of Motion for Reconsideration RE: Attorney Fees*
06/21/2018	Hearing Scheduled (Judicial Officer: Pickett, Bruce L.) *Hearing Scheduled (Motions 08/01/2018 02:00 PM)*
06/22/2018	Notice of Hearing (Judicial Officer: Pickett, Bruce L.) *Notice of Hearing: 08/01/2018 @ 02:00 PM*
07/25/2018	Miscellaneous (Judicial Officer: Pickett, Bruce L.) *Plaintiff's Response to Defendant's Motion to Reconsider*
07/27/2018	Reply (Judicial Officer: Pickett, Bruce L.) *Reply Memorandum in Support of Motion for Reconsideration RE: Attorney Fees*
08/01/2018	Minute Entry (Judicial Officer: Pickett, Bruce L.) *Minute Entry* *Hearing type: Motions* *Hearing date: 8/1/2018* *Time: 1:46 pm* *Courtroom: Large Courtroom #3*

	Court reporter: *Minutes Clerk: Denise Criddle* *Tape Number:* *Party: Clark County School District No. 161, Attorney: Blake Hall* *Party: Lanie Berrett, Attorney: Jacob Wessel* *Party: Ronald Berrett, Attorney: Jacob Wessel*
08/01/2018	Hearing Held (Judicial Officer: Pickett, Bruce L.) *Hearing result for Motions scheduled on 08/01/2018 02:00 PM: Hearing Held Motion for Reconsideration Re: Attorney Fees*
08/01/2018	**Motion Hearing** (2:00 PM) (Judicial Officer: Pickett, Bruce L.) *Motion for Reconsideration Re: Attorney Fees Hearing result for Motions scheduled on 08/01/2018 02:00 PM: Hearing Held*
08/02/2018	Order (Judicial Officer: Pickett, Bruce L.) *Order on Defendant's Motion to Reconsider*
08/02/2018	Judgment (Judicial Officer: Pickett, Bruce L.) *Final Judgment*
08/02/2018	Status Changed (Judicial Officer: Pickett, Bruce L.) *Case Status changed: Closed*
09/10/2018	Notice (Judicial Officer: Pickett, Bruce L.) *Notice of Appeal*
09/12/2018	ROA - Converted Event (Judicial Officer: Pickett, Bruce L.) *Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Wessel, Jacob S (attorney for Berrett, Lanie) Receipt number: 0004520 Dated: 9/12/2018 Amount: $129.00 (Check) For: Berrett, Lanie (plaintiff) and Berrett, Ronald Ryan (plaintiff)*
09/12/2018	ROA - Converted Event (Judicial Officer: Pickett, Bruce L.) *Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Jacob Wessel Receipt number: 0004536 Dated: 9/12/2018 Amount: $100.00 (Check)*
09/12/2018	Miscellaneous (Judicial Officer: Pickett, Bruce L.) *Clerk's Certificate of Appeal*
09/19/2018	Miscellaneous (Judicial Officer: Pickett, Bruce L.) *Clerk's Resord and Reporter's Transcript Due Dates Set*
10/29/2018	Reporter's Notice of Transcript(s) Lodged
10/29/2018	Transcript Filed

DATE	FINANCIAL INFORMATION	
	Defendant Clark County School District No. 161	
	Total Charges	136.00
	Total Payments and Credits	136.00
	Balance Due as of 11/2/2018	**0.00**
	Plaintiff Berrett, Lanie	
	Total Charges	129.00
	Total Payments and Credits	129.00
	Balance Due as of 11/2/2018	**0.00**
	Plaintiff Berrett, Ronald Ryan	
	Total Charges	321.00
	Total Payments and Credits	321.00
	Balance Due as of 11/2/2018	**0.00**

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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF JEFFERSON

RONALD RYAN BERRETT AND LANIE BERRETT, husband and wife, Plaintiffs, v. CLARK COUNTY SCHOOL DISTRICT NO. 161, Defendant.	Case No. CV-17-0328 COMPLAINT AND DEMAND FOR JURY TRIAL Fee Category: A Fee: $221.00

COME NOW plaintiffs Ronald Ryan Berrett and Lanie Berrett, and for cause of action against defendant, allege as follows:

INTRODUCTION

1. This matter was originally filed in the United States District Court for the District of Idaho in Case 4:12-cv-00626-EJL-CWD Berrett v. Clark County School District No. 161 asserting claims under federal law and claims under state law, over which that court had jurisdiction based upon that court's supplemental jurisdiction pursuant to 28 USC § 1367.

2. On September 30, 2014, the United States District Court for the District of Idaho granted summary judgment to Defendant Clark County School District No. 161 on all claims.

3. Plaintiffs appealed this decision to the Ninth Circuit Court of Appeals; the Ninth Circuit reversed and remanded as to Plaintiffs' state law claims, but upheld the granting of summary judgment as to Plaintiffs' federal claims. A courtesy copy of this decision is attached hereto as Exhibit A.

4. On April 18, 2017, in its Memorandum Decision and Order of Dismissal, the United States District Court declined federal jurisdiction and dismissed plaintiffs' federal complaint without prejudice pursuant to 28 USC § 1367 (c) for filing in state court. A courtesy copy of this decision is attached hereto as Exhibit B.

JURISDICTION AND VENUE

5. Plaintiffs timely bring this Complaint and Demand for Jury Trial pursuant to 28 USC § 1367 (d); Pursuant to 28 U.S.C. § 1367(d), the period of limitations is tolled for a period of thirty (30) days after the federal claims are dismissed in order to provide adequate time to refile in state court.

6. Plaintiffs are residents and citizens of the State of Idaho and are residents of the County of Jefferson.

7. Defendant Clark County School District #161 is a school district operating in the State of Idaho, County of Clark.

8. Venue is proper in Jefferson County, State of Idaho pursuant to Idaho Code § 6-2105(3) and the District Court properly has jurisdiction as the amount in controversy is in excess of $10,000.00.

ALLEGATIONS

9. Plaintiffs' allegations are contained in the federal Complaint and Demand for Jury

Trial attached hereto as Exhibit C, and incorporated as if fully set forth herein.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs request this Court:

1. To assume jurisdiction over each of the causes set forth herein.
2. To declare Clark's conduct as alleged herein to be in violation of the relevant statutes and public policy.
3. For plaintiffs' lost wages, benefits, and remuneration from the date of termination until reinstatement in amounts to be proven at trial;
4. For reinstatement with full fringe benefits and seniority rights, but if reinstatement is not an option as an equitable remedy in lieu of reinstatement, plaintiffs are entitled to an award of lost wages, benefits, and remuneration in amounts to be proven at trial;
5. For assessment of a civil fine;
6. For pre-judgment interest at the highest applicable rate on all amounts found due and owing;
7. For an award of plaintiffs' attorney fees, expert witness fees, and court costs incurred in bringing this action; and
8. For such other and further relief as the court deems just and equitable.

DATED May 4, 2017.

THOMSEN STEPHENS LAW OFFICES, PLLC

By: _____
Jacob S. Wessel, Esq.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands trial by jury.

DATED May 4, 2017.

THOMSEN STEPHENS LAW OFFICES, PLLC

By: _____
Jacob S. Wessel, Esq.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RONALD RYAN BERRETT; LANIE BERRETT, Plaintiffs-Appellants, v. CLARK COUNTY SCHOOL DISTRICT NO. 161, Defendant-Appellee.	No. 14-35894 D.C. No. 4:12-cv-00626-EJL-CWD MEMORANDUM*

Appeal from the United States District Court
for the District of Idaho
Edward J. Lodge, District Judge, Presiding

Argued and Submitted March 9, 2017
Seattle, Washington

Before: GRABER, IKUTA, and HURWITZ, Circuit Judges.

Plaintiffs Ronald Ryan and Lanie Berrett appeal the district court's order granting summary judgment in favor of defendant Clark County School District (Clark County). We have jurisdiction under 28 U.S.C. § 1291.

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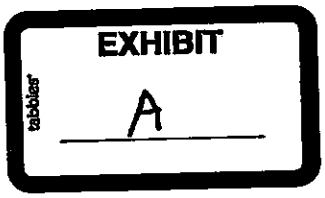
* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.



The district court erred in granting Clark County's motion for summary judgment on Mr. Berrett's claim for retaliatory discharge under the Idaho Protection of Public Employees Act (Idaho Whistleblower Act). Mr. Berrett established a prima facie case of retaliatory conduct by presenting evidence that: he engaged in protected activity by reporting "a violation or suspected violation of a law," Idaho Code § 6-2104(1)(a); he suffered an "adverse action" when he was terminated, *id.* § 6-2103(1); and the "close relation in time" between them, among other factors, suggests he may have been fired for reporting the propane issue. *Curlee v. Kootenai Cty. Fire & Rescue*, 148 Idaho 391, 397 (2008). This is sufficient to create a genuine issue of material fact to survive summary judgment. *Id.* at 396 (holding that the *McDonnell Douglas* burden-shifting framework does not apply to claims under the Idaho Whistleblower Act at the summary judgment stage).

The district court correctly held that Ms. Berrett did not engage in any protected activity and therefore cannot bring a claim under the Idaho Whistleblower Act. However, the court failed to address Ms. Berrett's common law claim for termination in violation of public policy—that is, firing her in retaliation for her husband's statutorily protected whistleblower activity—and should consider on remand whether this claim also survives summary judgment.

The district court did not err in granting Clark County's motion for summary judgment on the Berretts' claims under the Americans with Disabilities Act of 1990 (ADA), because the Berretts failed to raise a genuine issue of material fact as to whether they were terminated "because of [Mr. Berrett's] disability." *Allen v. Pacific Bell*, 348 F.3d 1113, 1114 (9th Cir. 2003) (per curiam). The Berretts also argue that they were terminated for Mr. Berrett's reasonable accommodation requests but failed to produce evidence supporting this theory.

Nor did the district court err in granting Clark County's motion for summary judgment on the Berretts' claims under the Fair Housing Act. Clark County provided evidence that the Berretts were evicted because they were no longer employees, and the Berretts do not offer any direct or circumstantial evidence that they were evicted because of Mr. Berrett's disability. Nor is there a genuine issue of material fact as to whether Clark County raised the Berretts' rent or altered the Berretts' payment policy because of Mr. Berrett's disability. Although Clark County asserted that it changed the Berretts' payment policy to avoid raising Mr. Berrett's income to the point where he would lose his disability benefits, such economic considerations do not constitute discrimination based on disability.

Finally, the district court did not err by declining to rule on evidentiary objections that were not "material to its ruling." *Norse v. City of Santa Cruz*, 629 F.3d 966, 973 (9th Cir. 2010) (en banc).

The parties shall bear their own costs on appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

RONALD RYAN BERRETT and LANIE BERRETT, husband and wife, Plaintiffs, v. CLARK COUNTY SCHOOL DISTRICT NO. 161, Defendant.	Case No. 4:12-CV-0626-EJL **MEMORANDUM DECISION AND ORDER OF DISMISSAL**

Currently pending before the Court is Defendant's Motion for Court to Decline Jurisdiction. (Dkt. 46). The parties have filed their responsive briefing and the matter is now ripe for the Court's consideration.

Having fully reviewed the record, the Court finds that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, the Motions shall be decided on the record before this Court without oral argument.

BACKGROUND

On September 30, 2014, this Court issued a decision dismissing all of Plaintiffs' claims. (Dkt. 38.) These included claims brought under the Americans with Disabilities Act, 42 U.S.C. § 12117(a), ("ADA"); the Fair Housing Act, 42 U.S.C. §§ 3604(f), 3613;

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and Idaho law, including termination in violation of public policy, specifically the Idaho Whistleblower Act, I.C. §§ 6-2101-2109. (Dkt. 1.) Plaintiffs alleged that the employment practices described in the Complaint occurred in Clark County, Idaho. (*Id.*, ¶ 6).

Plaintiffs appealed the Court's decision to the Ninth Circuit Court of Appeals. (Dkt. 41.) On March 17, 2017, the Ninth Circuit issued a decision affirming in part and reversing in part the Court's decision. (Dkt. 45.) The Ninth Circuit affirmed the Court's decision dismissing the federal claims, reversed the Court's decision dismissing the state law claims, and remanded the case back to the Court for further proceedings.

Three days after the case was remanded, Defendant moved to effectively dismiss the remaining state law claims. (Dkt. 46.) Defendant argues that the Court should decline jurisdiction over the state law claims pursuant to 28 U.S.C. §1367(c).

DISCUSSION

Federal courts are courts of limited jurisdiction. The Plaintiffs' Complaint initially raised claims based on federal laws over which the Court has original jurisdiction. *See* 28 U.S.C. § 1331 ("The district court shall have original jurisdiction of all civil actions arising under the constitution, laws, or treaties of the United States.") The Complaint also raised state law claims over which the Court exercised supplemental jurisdiction. *See* 28 U.S.C. § 1367(a) ("[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United states constitution.")

In its original decision dismissing Plaintiffs' state law claims, the Court opted to exercise its supplemental jurisdiction over the state law claims after dismissing the federal law claims. (Dkt. 38.) However, at this point and after the Ninth Circuit's decision, all of Plaintiffs' federal claims have been dismissed and the Court is left to decide whether to exercise supplemental jurisdiction over Plaintiffs' only remaining claim: wrongful discharge in violation of the Idaho Whistleblower Act.

Pursuant to 28 U.S.C. §1367(c)(3), the Court has discretion to decide whether to decline, or exercise, supplemental jurisdiction over the remaining state law claims. "To decline jurisdiction under §1367(c)(3), the district court must first identify the dismissal that triggers the exercise of discretion and then explain how declining jurisdiction serves the objectives of economy, convenience and fairness to the parties, and comity." *Trustees of Constr. Indus. & Laborers Health & Welfare Trust v. Desert Valley Landscape & Maintenance, Inc.*, 333 F.3d 923, 925 (9th Cir. 2003).

In this case, after the appeal to the Ninth Circuit, the Court is left to decide the state claim exclusively. Thus, the Ninth Circuit remand essentially triggered the Court to conduct a 28 U.S.C. §1367(c)(3) analysis to determine whether it should exercise jurisdiction over Plaintiffs' state claims exclusively for the purpose of trial.

The Court finds that the interests of economy, convenience, fairness, and comity weigh heavily in favor of dismissing the case without prejudice in order that the case may be tried in the Idaho state courts. First and foremost, the state courts are in the best position to determine claims, such as those remaining here, that hinge on state policy considerations. Second, the state courts are likely in a better position to have this case set for trial before

this Court can set the case for trial. Third, nearly two and a half years have passed since the Court issued a decision dismissing Plaintiffs' claims. Thus, the parties and the Court will have to reacquaint themselves with the facts of this case and prepare for trial essentially anew whether this case is tried in state or federal court.

Plaintiffs raise three basic arguments in favor of the Court retaining jurisdiction over these state law claims. First, Plaintiffs are concerned about further delays, especially in light of the fact the harm alleged in the complaint occurred almost five years ago. (Dkt. 47, p. 3.) Plaintiffs argue that, because of the timing of vacating the jury trial, they are ready to try the case as soon as schedules allow and believe they will be able to go to trial sooner if the Court retains jurisdiction over the state law claims. *Id.*, p. 4. Second, Plaintiffs argue that this Court has already considered Plaintiff state claims and is, therefore familiar with them. *Id.*, p. 4. Third, Plaintiffs argue that there are expenses associated with starting over in state court, including the costs of filing fees as well as the costs necessary to prepare pretrial filings under state law. *Id.*

The Court has considered Plaintiffs' concerns but is, nevertheless, convinced that the state court is in a better position to try these claims for the reasons outlined above. Moreover, while the Court is mindful of the Plaintiffs' expressed cost concerns, the Defendant expressed a countervailing argument that costs will be reduced if the case is tried in Clark County, where the alleged conduct occurred and witnesses are located. Thus, the economic factors, on balance, like the convenience and fairness factors, do not sway the Court in favor of exercising its jurisdiction over the remaining state court claims.

ORDER

In light of the foregoing, the Court hereby GRANTS Defendant's Motion for Court to Decline Jurisdiction. (Dkt. 46.) Plaintiffs' state law claims are dismissed without prejudice.

DATED: April 18, 2017

Edward J. Lodge
United States District Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

RONALD RYAN BERRETT and LANIE BERRETT, husband and wife Plaintiffs. v. CLARK COUNTY SCHOOL DISTRICT NO. 161, Defendant.	Docket No. CV-12-____ COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiffs Ronald Ryan and Lanie Berrett, for cause of action against Clark County School District No. 161 (hereinafter "Clark"), state and allege as follows:

NATURE OF THE ACTION

1. This is a claim under Title I of the Americans with Disabilities Act of 1990 to correct unlawful employment practices on the basis of disability and/or age, to vindicate plaintiff's rights and the rights of other qualified people with disabilities to fair treatment and equal opportunity, and

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to make plaintiffs whole. Plaintiff Ronald R. Berrett is a qualified individual with a physical impairment, which substantially limits him in one or more major life activities. Clark discriminated against Plaintiffs Ronald R. Berrett and Lanie Berrett in the terms and conditions of their employment by firing them for Mr. Berrett's disability.

2. Plaintiffs also allege an action under and Titles I and VII (Fair Housing Act) of the Civil Rights Act of 1968 and 1991 and the Fair Housing Amendments Act of 1988 because Clark evicted them from their home following the termination.

3. Plaintiffs also allege an action under Idaho Code § 6-2101, *et seq.* and Idaho common law because Clark terminated them both for reporting a violation of law to Clark.

JURISDICTION AND VENUE

4. This Court has jurisdiction over the subject matter of this complaint pursuant to 28 U.S.C. § 1331. This action is authorized and instituted pursuant to Section 107(a) of the Americans with Disabilities Act of 1990 as amended ("ADA"), 42 U.S.C. § 12117(a), pursuant to Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981(a), and pursuant to Title VII of the Civil Rights Act of 1968 as amended in 1988 also known as the Fair Housing Act, 42 U.S.C. §§ 3604(f), 3613.

5. The court has jurisdiction over plaintiffs' state law claims set forth in this complaint pursuant to its supplemental jurisdiction to hear related state law claims under 28 U.S.C. § 1367(a). Both the federal and state law claims alleged herein arose from a common nucleus of operative fact, the state action is so related to the federal claim that they form part of the same case or controversy, and the actions would ordinarily be expected to be tried in one judicial proceeding.

6. The employment practices alleged herein were committed in the District of Idaho, County of Clark.

PARTIES

7. Plaintiffs are residents and citizens of the State of Idaho and at all times relevant hereto were residents of the County of Clark.

8. Defendant Clark County School District #161 (hereinafter "Clark") is a school district operating in the State of Idaho, County of Clark.

9 Clark employs and has employed during the relevant periods more than 15 employees and was engaged in an industry affecting commerce. At all material times, Clark was and is an employer within the meaning of 42 U.S.C. § 12111(5)(A).

10. Plaintiff Ronald R. Berrett is a qualified individual with a disability for purposes of 42 U.S.C. § 12112(a), in that he has a physical impairment which substantially affects one or more major life activities, including, but not limited to, his ability to walk and to use his hands.

11. Clark leased a dwelling in Clark County, Idaho to Plaintiffs and then evicted them for the disability; thus Plaintiffs are aggrieved persons within the meaning of 42 U.S.C. § 3613.

12. Clark regarded and treated plaintiff Ronald R. Berrett as a person with an impairment that substantially limited one or more major life activities. Plaintiff's ability to perform the essential functions of his position with Clark was limited as a result of the attitude of Clark toward his impairments.

13. Despite his disability, at all relevant times plaintiff was able to work and qualified for the positions he held with Clark. He was experienced in maintenance work, and with or without reasonable accommodation was fully able to perform the essential functions of the positions he held with Clark.

14. Plaintiff Lanie Berrett was employed by Clark, a government agency, as a lunch room supervisor until Clark terminated her employment on June 30, 2012.

PROCEDURAL REQUIREMENTS

15. Plaintiff Ronald R. Berrett has filed charges of unlawful employment practices with the Idaho Human Rights Commission, and with the Equal Employment Opportunity Commission ("EEOC") raising the issues complained of herein.

16. Plaintiff received a Notice of Right to Sue from the Equal Employment Opportunity Commission ("EEOC") authorizing him to commence a civil action. Plaintiff has filed this complaint within 90 days from the date he received his notice authorizing him to bring actions.

CLAIMS OF RELIEF
(DISABILITY DISCRIMINATION)
(TITLE I OF THE AMERICANS WITH DISABILITIES ACT)

17. Plaintiff incorporates by reference the allegations of paragraphs 1 through 16 as if fully set forth herein.

18. Plaintiff Ronald Ryan Berrett began working for Clark in July of 2010 and was employed by Clark part time as the maintenance supervisor, working in Dubois, Clark County Idaho until he was terminated in violation of the ADA on June 30, 2012.

19. At the time of his hiring, Clark was aware that Plaintiff Ronald Ryan Berrett was disabled, thus Clark promised that his duties would include calling contractors and light duties, but not strenuous physical duties; Clark promised to accommodate his disability by hiring someone to help with the physical duties.

20. Despite the request by Plaintiff Ronald Ryan Berrett for an accommodation, Clark failed to accommodate Plaintiff's disability.

21. Plaintiff Ronald Ryan Berrett was qualified for his position as maintenance supervisor and was able to perform the essential functions of such positions.

22. Plaintiff Ronald Ryan Berrett was at all times relevant hereto and is a disabled individual within the meaning of the Americans in that he has a disability that affects one or more major life activities including, but not limited to his ability to walk and to use his hands and do other manual labor.

23. Plaintiff Lanie Berrett worked for Clark full time as a lunchroom Supervisor in Dubois, Clark County Idaho until she was terminated in violation of the ADA on June 30, 2012.

24. Dated June 27, 2012, Clark's Superintendent at the time, Dave Kerns, sent both Plaintiffs Lanie Berrett and Ronald Ryan Berrett letters terminating their employment effective June 30, 2012.

25. The reasons Clark stated in the termination letters for the terminations are pretext. The true reason and a motivating factor that both Plaintiffs were terminated was because of Plaintiff Ronald Ryan Berrett's disability and Clark's unwillingness to accommodate his disability.

26. Clark engaged in unlawful intentional discrimination against plaintiffs on the basis of disability in the terms and conditions of plaintiffs' employment and in their termination.

27. As a result of Clark's intentional acts alleged herein, plaintiffs suffered severe emotional distress, mental pain and anguish, embarrassment, loss of dignity and self-esteem, humiliation, loss of enjoyment of life, and eviction from their home resulting in damages in such amount as may be available under applicable law.

28. Clark's acts were done intentionally with an improper, abusive, discriminatory motive, and with reckless indifference to plaintiffs' federally protected rights. Such conduct should not be tolerated by this society, and punitive damages in the amount of $300,000.00,or as otherwise fixed by a jury and available under applicable law, should be awarded to punish Clark and deter such conduct in the future.

29. Plaintiff is entitled to attorney fees, expert witness fees, and costs incurred herein, pursuant to one or more of the following: 42 U.S.C. § 1988, 42 U.S.C. § 12205, Idaho Code § 12-120, and any other applicable federal and/or state statute.

SECOND CLAIM FOR RELIEF

(HOUSING DISCRIMINATION)
(TITLE VII OF THE CIVIL RIGHTS ACT OF 1968)

30. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 29 as if fully set forth herein.

31. When Clark terminated Plaintiffs for Plaintiff Ronald Ryan Berrett's disability, Plaintiffs were living in housing owned by Clark.

32. In the termination letters dated June 27, 2012, Clark's superintendent at the time, Dave Kerns, also informed Plaintiffs that since they were using District Housing, that they must vacate that dwelling by Monday, July 9th, 2012.

33. Clark evicted Plaintiffs from their home because of Plaintiff Ronald Ryan Berrett's disability, making their dwelling unavailable to them on the basis of Mr. Berrett's disability in violation of the Fair Housing Act, 42 U.S.C. § 3604(f).

34. Plaintiffs are entitled to all remedies available under the Fair Housing Act, 42 U.S.C.

§ 3613.

35. Plaintiffs are entitled to actual damages pursuant to 42 U.S.C. § 3613(c) in an amount fixed by a jury.

36. Clark's acts were done intentionally with an improper, abusive, discriminatory motive, and with reckless indifference to plaintiff's federally protected rights. Such conduct should not be tolerated by this society, and punitive damages in an amount fixed by a jury and available under applicable law, should be awarded to punish Clark and deter such conduct in the future.

37. Plaintiff's are entitled to an award of costs and attorney fees pursuant to 42 U.S.C. § 3613(c).

THIRD CLAIM FOR RELIEF

(RETALIATION/WHISTLE-BLOWER)
(IDAHO CODE § 6-2101 *et. seq.*)

38. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 37 as if fully set forth herein.

39. This is a claim under Idaho Code, Title 6 Chapter 21, protection of Public Employees (hereinafter "Whistle-blower Act").

40. This court has jurisdiction pursuant to its supplemental jurisdiction to hear related state law claims under 28 U.S.C. § 1367(a).

41. Clark is subject to the Whistle-blower Act and meets the definition of an employer under the Act pursuant to Idaho Code § 6-2103(4).

42. Plaintiffs are within the protected class of the Whistle-blower Act because they were employees of an Idaho government entity.

43. In January, 2012, as maintenance supervisor, Plaintiff Ronald Ryan Berrett began receiving calls about the strong odor of propane emanating from a propane tank located in an old gymnasium owned by Clark.

44. Plaintiff had Mike Holden at Sermon Service and Electric come to check on the tank.

45. Mr.Holden determined that the since July 1, 2011, the tank had not been safe or legal and was not up to the code of the State of Idaho; Mr. Holden gave the Clark a quote to fix the problem.

46. Plaintiff Ronald Ryan Berrett reported the problem and showed the quote to then Superintendent Dave Kerns.

47. Mr. Kerns told Mr. Berrett to keep quiet about the problem because of the cost.

48. Mr. Berrett responded that he could not keep quiet because the situation was unsafe and was affected the school children.

49. Mr. Berrett then reported the problem and gave the quote to the Chairman of the District's Board of Trustees, Erin Mortensen; he also wrote a letter to the Board entitled "Propane Issue and Best Way to Remedy Situation."

50. Nothing was done, and in April, 2012 Mr. Kern wanted to continue to use the gymnasium and the propane tank, but Mr. Berrett advised him against it because of the safety risk.

51. The disagreement between Mr. Kerns and Mr. Berrett regarding the safety of the propane tank and the need to fix it continued with no results until May, 2012 when the Board terminated Mr. Kerns' employment as superintendent.

52. Mr. Kerns terminated both Plaintiff Ronald Ryan Berrett and his wife Plaintiff Lanie Berrett before his termination was effective.

53. On June 30, 2012, Clark terminated Plaintiffs' employment. The reason which Clark gave for plaintiffs' termination was a pretext. The true reason and a motivating reason for plaintiffs' terminations was that Plaintiff Ronald Ryan Berrett communicated to the District, in good faith, a violation of a law, rule or regulation which had been adopted under the law of the state of Idaho.

54. Plaintiffs' terminations from employment were a violation of the Whistle-blower Act, entitling plaintiff to all remedies under the Act, Idaho Code § 6-2106.

55. Plaintiffs' terminations from employment were also a common law action that is contrary to the public policy of the State of Idaho.

56. Plaintiffs are entitled to lost wages, benefits, and remuneration from the date of termination until reinstatement in amounts to be proven at trial.

57. Plaintiffs are entitled to reinstatement with full fringe benefits and seniority rights, but if reinstatement is not an option as an equitable remedy in lieu of reinstatement, plaintiffs are entitled to an award of lost wages, benefits, and remuneration in amounts to be proven at trial.

58. Clark should be assessed a civil fine pursuant to Idaho Code § 6-2106(6).

59. Plaintiffs are entitled to prejudgment interest on all amounts found due and owing.

60. Plaintiffs are entitled to an award of attorney fees and costs incurred in bringing this action.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs request this Court:

1. To assume jurisdiction over each of the causes set forth herein.

2. To declare Clark's conduct as alleged herein to be in violation of the relevant statutes and public policy.

COUNT I (DISABILITY DISCRIMINATION)

3. For back pay and benefits from the date of termination to date of trial, in an amount to be proven at trial;

4. For front pay and benefits from date of trial in an amount to be proven at trial as an equitable remedy in lieu of reinstatement;

5. For a permanent injunction enjoining Clark, its owners, officers, management personnel, employees and all persons in active concert or participation with Clark from engaging in any employment practice which discriminates on the basis of disability;

6. For general damages for plaintiffs' emotional distress in an amount to be proven at trial;

7. For punitive damages in an amount to be proven at trial;

8. For pre-judgment interest at the highest applicable rate upon all amounts found due and owing;

9. For plaintiffs' attorney fees, expert witness fees and court costs incurred in bringing this action; and

10. For such other and further relief as the court deems just and equitable.

COUNT II (FAIR HOUSING ACT)

11. For Plaintiffs' actual damages in an amount to be proven at trial;

12. For an award of punitive damages in an amount to be proven at trial;

13. For pre-judgment interest at the highest applicable rate on all amounts found due and owing;

14. For plaintiffs' attorney fees, expert witness fees and court costs incurred in bringing this action; and

15. For such other and further relief as the court deems just and equitable.

COUNT III (WHISTLE BLOWER/RETALIATION)

16. For plaintiffs' lost wages, benefits, and remuneration from the date of termination until reinstatement in amounts to be proven at trial;

17. For reinstatement with full fringe benefits and seniority rights, but if reinstatement is not an option as an equitable remedy in lieu of reinstatement, plaintiffs are entitled to an award of lost wages, benefits, and remuneration in amounts to be proven at trial;

18. For assessment of a civil fine;

19. For pre-judgment interest at the highest applicable rate on all amounts found due and owing;

20. For plaintiffs' attorney fees and court costs incurred in bringing this action; and

21. For such other and further relief as the court deems just and equitable.

DATED December 20, 2012.

THOMSEN STEPHENS LAW OFFICES, PLLC

By: /s/
Jacob S. Wessel, Esq.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands trial by jury.

DATED December 20, 2012.

THOMSEN STEPHENS LAW OFFICES, PLLC

By: /s/
Jacob S. Wessel, Esq.

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Attorneys for Defendant

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF JEFFERSON

RONALD RYAN BERRETT and LANIE BERRETT, husband and wife, Plaintiffs, v. CLARK COUNTY SCHOOL DISTRICT NO. 161, Defendant.	Case No. CV-17-328 **ANSWER TO COMPLAINT AND DEMAND FOR JURY TRIAL**

COMES NOW Defendant, Clark County School District No. 161, and by and through counsel of record, Hall Angell & Associates, LLP, submits the following as an Answer to Plaintiffs' Complaint and Demand for Jury Trial, dated May 4, 2017, (hereinafter "Complaint").

In answering this Complaint, Defendant expressly reserves, in addition to the defenses set forth below, all defenses provided for or authorized by Idaho Rules of Civil Procedure, Rule 12 and all other defenses provided by law. Moreover, Defendant states that its investigation of this matter is continuing and as such, certain averments, statements and defenses may change in the future in light of additional or newly discovered information.

ANSWER

Defendant denies any and all allegations in Plaintiffs' Complaint not expressly admitted herein.

INTRODUCTION

1. With regard to paragraph 1, Defendant admits the same.

2. With regard to paragraph 2, Defendant admits the same.

3. With regard to paragraph 3, Defendant admits the same.

4. With regard to paragraph 4, Defendant admits the same.

JURISDICTION AND VENUE

5. With regard to paragraph 5, Defendant admits the same.

6. With regard to paragraph 6, Defendant is without sufficient information to either admit or deny the allegations of this paragraph, and therefore, denies the same.

7. With regard to paragraph 7, Defendant admits the same.

8. With regard to paragraph 8, Defendant is without sufficient information to either admit or deny the allegations of this paragraph, and therefore, denies the same.

ALLEGATIONS

9. With regard to paragraph 9, Defendant admits that Plaintiffs' allegations are contained in their federal Complaint and Demand for Jury Trial, but Defendant denies Plaintiffs' allegations and further states as follows:

   a. Plaintiffs' first claim for relief contained in their federal Complaint and Demand for Jury Trial, ¶¶ 17–29, due to alleged disability discrimination was dismissed in federal court, case no. 4:12-cv-00626-EJL and is not a claim in this present action.

b. Plaintiffs' second claim for relief contained in their federal Complaint and Demand for Jury Trial, ¶¶ 30–37, due to alleged housing discrimination was dismissed in federal court, case no. 4:12-cv-00626-EJL and is not a claim in this present action.

c. Plaintiffs' third claim for relief contained in their federal Complaint and Demand for Jury Trial, ¶¶ 38–60, due to alleged violation of Idaho's Whistleblower Act is Plaintiffs' only claim in this present action.

d. Defendant responds to the allegations contained in Plaintiffs' federal Complaint and Demand for Jury Trial, which are applicable to this present action, as set forth in its Answer to Complaint, filed January 30, 2013 in federal court, case no. 4:12-cv-00626-EJL, attached hereto as Exhibit A, and incorporated as if fully set forth herein.

AFFIRMATIVE DEFENSES

1. Plaintiffs' Complaint, and each and every allegation contained therein, fails to state a claim against Defendant upon which relief can be granted.

2. Plaintiffs have failed to comply with requirements of the Idaho Tort Claims Act.

3. Defendant is entitled to immunity as set forth in the Idaho Tort Claims Act.

4. Plaintiffs are barred from maintaining this action against Defendant under the doctrine of absolute immunity or qualified immunity.

5. All relevant decisions regarding or affecting Plaintiffs made by Defendant were based on legitimate business reasons.

6. Plaintiffs have failed to exhaust administrative remedies with regard to some or all of the claims asserted for which exhaustion is required under applicable law.

7. Plaintiffs' damages, if any, are solely attributable to the conduct of Plaintiffs and/or were proximately caused in whole or in part by unforeseeable, independent, intervening, and/or superseding events and by the unforeseeable, acts and/or omissions of persons or entities other than Defendant.

8. Plaintiffs' claims are precluded by the doctrines of Waiver, Estoppel and/or Laches.

9. Plaintiffs' claims are precluded by the applicable Statutes of Limitation.

10. Plaintiffs have failed to mitigate damages, if any.

11. The acts or omissions of Plaintiffs and/or others constitute comparative negligence which, pursuant to Idaho Code § 6-801 et seq, or other applicable laws, bars or reduces Plaintiffs' recovery, if any, against Defendant.

12. The actions of Defendant were at all times carried out in good faith. Defendant had objectively reasonable belief that all conduct was lawful at all times stated in Plaintiffs' Complaint.

13. Equitable remedies are not appropriate.

14. Defendant has not engaged in any conduct that would violate or be contrary to public policy.

15. Defendant alleges Plaintiffs did not engage in any activity protected by the Idaho Whistleblower Act.

16. Plaintiffs' Complaint and the averments contained therein fail sufficiently to allege the times and places at which certain material events described in the complaint allegedly occurred, and such claims therefore are barred and/or subject to dismissal pursuant to Rule 9 of the Idaho Rules of Civil Procedure.

17. Plaintiffs' damages, if any, are limited to the extent provided for by Idaho Code §§ 6-1603, 6-1604 and 6-1606, and/or applicable Idaho law.

18. The foregoing defenses are applicable, where appropriate, to any and all of Plaintiffs' claims for relief. In asserting these defenses, Defendant does not admit the burden of proving the allegations or denials contained in the defenses, but, to the contrary, assert that by reasons of the denials and/or by reason of relevant statutory and judicial authority, the burden of proving the facts relevant to many of the defenses and/or the burden of proving the inverse to the allegations contained in many of the defenses is upon the Plaintiffs. Defendant does not admit, in asserting any defense, any responsibility or liability, but, to the contrary, specifically den any and all allegations of responsibility and liability in Plaintiffs' Complaint.

19. Defendant may have additional defenses to Plaintiffs' Complaint, but cannot at this time, state with specificity those defenses. Accordingly, Defendant reserves the right to supplement this Answer and add additional defenses as discovery in the case progresses.

REQUEST FOR ATTORNEY FEES

Defendant has been required to retain counsel to defend this action, and is entitled to recover reasonable attorney fees and costs incurred in the defense of this action from Plaintiff, pursuant to Idaho Code §§ 6-918A, 12-117, 12-120, 12-121, Rule 54 of the Idaho Rules of Civil Procedure and all other applicable laws allowing for the recovery of costs or attorney fees in this action.

PRAYER FOR RELIEF

WHEREFORE, Defendant prays for judgment as follows:

1. That Plaintiffs' Complaint be dismissed with prejudice, with Plaintiffs taking nothing thereunder;

2. Defendant be awarded costs and attorney fees necessarily incurred in defending this action;

3. For such other relief as the Court may deem just and proper.

Dated this 16 day of June, 2017.

BLAKE G. HALL

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 16 day of June, 2017, by the method indicated below:

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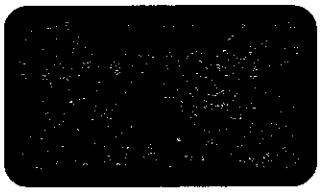
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

RONALD RYAN BERRETT and LANIE BERRETT, husband and wife, Plaintiffs, v. CLARK COUNTY SCHOOL DISTRICT NO. 161, Defendant.	Case No. 4:12-cv-00626-EJL **ANSWER TO COMPLAINT**

By and through counsel of record, Defendant submits the following as an Answer to Plaintiff's Complaint, filed December 21, 2012, (hereinafter "Complaint").

In answering this Complaint, Defendant expressly reserves, in addition to the defenses set forth below, all defenses provided for or authorized by Fed. R. Civ. P. 12 and all other defenses provided by law. Moreover, Defendant states that its investigation of this matter is continuing and as such, certain averments, statements and defenses may change in the future in light of additional or newly discovered information.



ANSWER

Defendant denies any and all allegations in Plaintiff's Complaint not expressly admitted herein.

NATURE OF THE ACTION

1. With regard to paragraph 1, Defendant denies the same.

2. With regard to paragraph 2, Defendant denies the same.

3. With regard to paragraph 3, Defendant denies the same.

JURISDICTION AND VENUE

4. With regard to paragraph 4, Defendant denies the same.

5. With regard to paragraph 5, Defendant denies the same.

6. With regard to paragraph 6, Defendant admits the same.

PARTIES

7. With regard to paragraph 7, Defendant is without sufficient information to either admit or deny the allegations of this paragraph, and therefore, denies the same.

8. With regard to paragraph 8, Defendant admits the same.

9. With regard to paragraph 9, Defendant admits that it employs more than 15 employees, but denies the remainder of this paragraph.

10. With regard to paragraph 10, Defendant denies the same.

11. With regard to paragraph 11, Defendant admits that it leased a dwelling in Clark County to Plaintiffs, but denies the remainder of this paragraph.

12. With regard to paragraph 12, Defendant denies the same.

13. With regard to paragraph 13, Defendant admits that Plaintiff was employed by Defendant, but denies the remainder of this paragraph.

14. With regard to paragraph 14, Defendant admits the same.

PROCEDURAL REQUIREMENTS

15. With regard to paragraph 15, Defendant is without sufficient information to either admit or deny the allegations of this paragraph, and therefore, denies the same.

16. With regard to paragraph 16, Defendant is without sufficient information to either admit or deny the allegations of this paragraph, and therefore, denies the same.

CLAIMS OF RELIEF
(DISABILITY DISCRIMINATION)
(TITLE I OF THE AMERICANS WITH DISABILITIES ACT)

17. With regard to paragraph 17, there are no factual allegations in this paragraph, and therefore, Defendant denies the same.

18. With regard to paragraph 18, Defendant admits that Ronald Berrett was employed by Clark County and his employment ended on June 30, 2012, but denies the remainder of this paragraph.

19. With regard to paragraph 19, Defendant denies the same.

20. With regard to paragraph 20, Defendant denies the same.

21. With regard to paragraph 21, Defendant denies the same.

22. With regard to paragraph 22, Defendant denies the same.

23. With regard to paragraph 23, Defendant admits that Lanie Berrett was employed by Clark County and terminated on June 30, 2012, but denies the remainder of this paragraph.

24. With regard to paragraph 24, Defendant objects to this paragraph. The letter is the best evidence and speaks for itself.

25. With regard to paragraph 25, Defendant denies the same.

26. With regard to paragraph 26, Defendant denies the same.

27. With regard to paragraph 27, Defendant denies the same.

28. With regard to paragraph 28, Defendant denies the same.

29. With regard to paragraph 29, Defendant denies the same.

SECOND CLAIM FOR RELIEF

(HOUSING DISCRIMINATION)
(TITLE VII OF THE CIVIL RIGHTS ACT OF 1968)

30. With regard to paragraph 30, there are no factual allegations in this paragraph, and therefore, Defendant denies the same.

31. With regard to paragraph 31, Defendant denies the same.

32. With regard to paragraph 32, Defendant objects to this paragraph. The letter is the best evidence and speaks for itself.

33. With regard to paragraph 33, Defendant denies the same.

34. With regard to paragraph 34, Defendant denies the same.

35. With regard to paragraph 35, Defendant denies the same.

36. With regard to paragraph 36, Defendant denies the same.

37. With regard to paragraph 37, Defendant denies the same.

THIRD CLAIM FOR RELIEF

(RETALIATION/WHISTLE-BLOWER)
(IDAHO CODE § 6-2101 *et seq.*)

38. With regard to paragraph 38, there are no factual allegations in this paragraph, and therefore, Defendant denies the same.

39. With regard to paragraph 39, there are no factual allegations in this paragraph, and therefore, Defendant denies the same.

40. With regard to paragraph 40, Defendant denies the same.

41. With regard to paragraph 41, Defendant admits the same.

42. With regard to paragraph 42, Defendant admits the same.

43. With regard to paragraph 43, Defendant is without sufficient information to either admit or deny the allegations of this paragraph, and therefore, denies the same.

44. With regard to paragraph 44, Defendant is without sufficient information to either admit or deny the allegations of this paragraph, and therefore, denies the same.

45. With regard to paragraph 45, Defendant denies the same.

46. With regard to paragraph 46, Defendant admits only that Mr. Berrett suggested a need to address a propane problem and presented a quote to the District's Board of Trustees, Defendant denies remainder of paragraph.

47. With regard to paragraph 47, Defendant denies the same.

48. With regard to paragraph 48, Defendant denies the same.

49. With regard to paragraph 49, Defendant admits only that Mr. Berrett suggested a need to address a propane problem and presented a quote to the District's Board of Trustees, Defendant denies remainder of paragraph.

50. With regard to paragraph 50, Defendant denies the same.

51. With regard to paragraph 51, Defendant denies the same.

52. With regard to paragraph 52, Defendant admits only that Plaintiffs were terminated from their employment with Defendant, and denies the remainder of the paragraph.

53. With regard to paragraph 53, Defendant denies the same.

54. With regard to paragraph 54, Defendant denies the same.

55. With regard to paragraph 55, Defendant denies the same.

56. With regard to paragraph 56, Defendant denies the same.

57. With regard to paragraph 57, Defendant denies the same.

58. With regard to paragraph 58, Defendant denies the same.

59. With regard to paragraph 59, Defendant denies the same.

60. With regard to paragraph 60, Defendant denies the same.

AFFIRMATIVE DEFENSES

1. Plaintiffs' Complaint, and each and every allegation contained therein, fails to state a claim against Defendant upon which relief can be granted.

2. Plaintiffs have failed to comply with requirements of the Idaho Tort Claims Act.

3. Defendant is entitled to immunity as set forth in the Idaho Tort Claims Act.

4. Plaintiffs are barred from maintaining this action against Defendant under the doctrine of absolute immunity or qualified immunity.

5. All relevant decisions regarding or affecting Plaintiffs made by Defendant were based on legitimate business reasons.

6. Plaintiffs have failed to exhaust administrative remedies with regard to some or all of the claims asserted for which exhaustion is required under applicable law.

7. Plaintiffs' damages, if any, are solely attributable to the conduct of Plaintiffs and/or were proximately caused in whole or in part by unforeseeable, independent, intervening, and/or superseding events and by the unforeseeable, acts and/or omissions of persons or entities other than Defendant.

8. Plaintiffs' claims are precluded by the doctrines of Waiver, Estoppel and/or Laches.

9. Plaintiffs' claims are precluded by the applicable Statutes of Limitation.

10. Plaintiffs have failed to mitigate damages, if any.

11. The acts or omissions of Plaintiffs and/or others constitute comparative negligence which, pursuant to Idaho Code § 6-801 et seq, or other applicable laws, bars or reduces Plaintiffs' recovery, if any, against Defendant.

12. The actions of Defendant were at all times carried out in good faith. Defendant had objectively reasonable belief that all conduct was lawful at all times stated in Plaintiffs' Complaint.

13. Equitable remedies are not appropriate.

14. Defendant has not engaged in any conduct that would violate or be contrary to public policy.

15. Defendant allege that some or all of the injuries claimed by Plaintiffs pre-existed the incident alleged in the Complaint, or were the progression thereof, and were the result of medical factors and conditions not proximately caused by any action of Defendant.

16. Plaintiffs' Complaint and the averments contained therein fail sufficiently to allege the times and places at which certain material events described in the complaint allegedly occurred, and such claims therefore are barred and/or subject to dismissal pursuant to Rule 9 of the Federal Rules of Civil Procedure.

17. Plaintiffs' damages, if any, are limited to the extent provided for by Idaho Code §§ 6-1603, 6-1604 and 6-1606, and/or applicable Idaho law.

18. The foregoing defenses are applicable, where appropriate, to any and all of

Plaintiffs' claims for relief. In asserting these defenses, Defendant does not admit the burden of proving the allegations or denials contained in the defenses, but, to the contrary, assert that by reasons of the denials and/or by reason of relevant statutory and judicial authority, the burden of proving the facts relevant to many of the defenses and/or the burden of proving the inverse to the allegations contained in many of the defenses is upon the Plaintiffs. Defendant does not admit, in asserting any defense, any responsibility or liability, but, to the contrary, specifically den any and all allegations of responsibility and liability in Plaintiffs' Complaint.

19. Defendant may have additional defenses to Plaintiffs' Complaint, but cannot at this time, state with specificity those defenses. Accordingly, Defendant reserves the right to supplement this Answer and add additional defenses as discovery in the case progresses.

REQUEST FOR ATTORNEY FEES

Defendant has been required to retain counsel to defend this action, and is entitled to recover reasonable attorney fees and costs incurred in the defense of this action from Plaintiff, pursuant to Idaho Code §§ 6-918A, 12-117, 12-120, 12-121, Rules 54 and 58 of the Federal Rules of Civil Procedure and all other applicable laws allowing for the recovery of costs or attorney fees in this action.

PRAYER FOR RELIEF

WHEREFORE, Defendant prays for judgment as follows:

1. That Plaintiffs' Complaint be dismissed with prejudice, with Plaintiffs taking nothing thereunder;

2. Defendant be awarded costs and attorney fees necessarily incurred in defending this action;

3. For such other relief as the Court may deem just and proper.

Dated this 30th day of January, 2013.

/S/
BLAKE G. HALL

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 30th day of January, 2013, by the method indicated below:

James S. Wessel	[ ] Mailing
THOMSEN STEPHENS LAW OFFICES	[ ] Hand Delivery
2635 Channing Way	[ ] Fax
Idaho Falls, ID 83404	[ ] Overnight Mail
Fax: 522-1277	[X] ECF
email: jweseel@ts-lawoffice.com	

/S/
BLAKE G. HALL

FILED IN CHAMBERS
at Idaho Falls
Bonneville County
Hon Bruce L. Pickett
Date November 15, 2017
Time 2:40 p.m.
Deputy Clerk A Boeru

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

MAGISTRATE/DISTRICT COURT
JEFFERSON COUNTY
2017 NOV 22 PM 12:16

RONALD RYAN BERRETT AND LANIE BERRETT, husband and wife, Plaintiffs, v. CLARK COUNTY SCHOOL DISTRICT NO. 161, Defendant.	Case No. CV-2017-328 JUDGMENT OF DISMISSAL

JUDGMENT IS ENTERED AS FOLLOWS: The Plaintiff's claims against the Defendant are hereby dismissed with prejudice.

IT IS SO ORDERED.

Dated this 15 day of November 2017.

Bruce L. Pickett
District Judge

DISTRICT COURT
JEFFERSON COUNTY
IDAHO
SEVENTH JUDICIAL DISTRICT

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November 2017 the JUDGMENT OF DISMISSAL was entered and a true and correct copy was served upon the parties listed below by mailing, with the correct postage thereon, or by causing the same to be delivered to their courthouse boxes.

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Colleen Poole
Clerk of the District Court
Jefferson County, Idaho

by _____
Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

RONALD RYAN BERRETT AND LANIE BERRETT, husband and wife,

Plaintiffs,

v.

CLARK COUNTY SCHOOL DISTRICT NO. 161,

Defendant.

Case No. CV-2017-328

OPINION AND ORDER ON PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

This Opinion and Order is in response to the parties' cross-motions for summary judgment.

I. STATEMENT OF FACTS

For purposes of summary judgment, the Court finds the following facts:

The plaintiffs, Ronald Ryan Berrett and Lanie Berrett ("Ryan" or "Mr. Berrett", and "Lanie" or "Ms. Berrett", and collectively as "the Berretts"), were both employed by the Clark County School District (the "School District"). Ryan was employed as the district's maintenance supervisor, Lanie as the lunchroom supervisor. During the relevant time period, Erin Haight-Mortensen ("Ms. Haight-Mortensen") was chairwoman of the Clark County School Board,

David Kerns ("Mr. Kerns") was the district superintendent, and Gayle Woods ("Ms. Woods") was the district business manager.

1. Ryan

As the School District's maintenance supervisor, Ryan's responsibilities included the School District's heating and furnace systems. Including the propane tank and corresponding system that supplied propane gas to heat the School District's various buildings. In January 2012, Ms. Woods began receiving reports that the old gymnasium smelled of propane. She then informed Mr. Kerns, and Mr. Kerns informed Ms. Haight-Mortensen there was a leak in the propane system. Ms. Woods, Mr. Kerns, and Ms. Haight-Mortensen were all aware that the propane system leak was a building code violation.[1]

The task of finding and fixing the leak fell to Ryan. As a result, Ryan began reporting on the problem in his monthly letters to the Clark County School Board ("the School Board") in February 2012. He wrote, "We do have a propane pressure issue that has been ongoing for several years. I have been working with a Sermon technician and think a lot of the problems are at the bulk tank. I will bet [sic] the problem resolved."[2]

In March, Ryan provided another update to the School Board. In his letter, he described the work he had done over the past month and his diagnosis of the problem. He then concluded, "I am waiting for a bid from sermon [sic] to correct this problem, when I receive it I will give it to MR. KERNS [sic] and we will go from there."[3] There is a dispute about what happened after Ryan received the quote from Sermon Electric, Ryan claims that he showed it to Mr. Kerns and was told to "keep quiet." Mr. Kerns disputes that he never instructed Ryan to "keep quiet."

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[1] Woods Aff. 3; Kerns Aff. 2; Haight-Mortensen Aff. 3.
[2] Woods Aff. Ex. A. February 2, 2012 letter.
[3] Woods Aff. Ex. A. March 12, 2012 letter.

Also in March, the School District received an inspection report. In the report, the School District was cited for multiple maintenance violations. Some of the violations cited were repeat offenses, for which the School District had been cited in prior inspections. As the maintenance supervisor, Ryan was responsible for these violations.

During the months of February, March, and April, Ryan worked with technicians from both Sermon Electric and High Planes Propane and their involvement is mentioned in his monthly letters. Over the course of this three month period, both companies visited the school on numerous occasions and attempted to identify and the leak in the propane system. The School Board approved payment for these service calls.[4] After several months of investigation, it was discovered that the propane system contained micro-leaks throughout and plans were made to repair it after school let out for the summer.

In May 2012 the propane leak still remained unfixed. The School Board minutes indicate Ryan appeared and told the School Board that "the propane issues are still a problem."[5] Later on, near the end of May or first of June, Ryan posted a derogatory message on Facebook. The message was critical of the Clark County School District and Administration and violated the established policies outlined in the employee manual. The message also appears to have contained a cryptic reference to the School District's propane leak. After it was posted, several members of the community saw and commented on the message. Ms. Haight-Mortensen was among those who saw the message. After viewing the message, Ms. Haight-Mortensen provided a copy of it to Mr. Kerns and requested that he speak Ryan about it.

At Ms. Haight-Mortensen's request, Mr. Kerns approached Ryan about the Facebook post and asked that it be removed. When confronted, Ryan became belligerent and called Mr.

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[4] Woods Aff. 3.
[5] Woods Aff. Ex. A.

Kerns a "fucking asshole."[6] Mr. Kerns then explained why the post was inappropriate and requested that Ryan remove it, a second time. Ryan agreed to remove it, and did so.

Mr. Kerns discussed then the Facebook post and his encounter with Ryan at the School Board's next meeting. During the meeting it was decided that Mr. Berrett was an at-will employee and discharge was the appropriate sanction for his conduct. A termination letter was then drafted and delivered to Ryan. The letter, signed by Mr. Kerns, states in relevant part:

> You have been insubordinate and verbally abusive to the District administration and have ridiculed personnel through social media on the internet. Your performance in some duties has been declining as well with building maintenance and keeping lights replaced and in working order. Due to your status as an "at-will", or non-contractual employee, the District administration has decided to terminate your employment effective June 30th, 2012.[7]

As per the terms of the letter, Ryan's employment was terminated on June 30, 2012.

2. Lanie

As the lunchroom supervisor, Ms. Berrett was responsible for proper management of the kitchen. Among other things, this required that she prepare (and adhere to) an annual budget and submit state-required paperwork. However, for at least three consecutive years, Lanie exceeded her approved budget. Despite being admonished and informed of hardship placed on the School District when she exceeded her budget, she continued to exceed it. In addition to exceeding the budget, it was also discovered that Lanie repeatedly failed to submit several forms required by the State of Idaho. These were grounds for her termination, as stated in the letter.

On June 30, 2012, Lanie's employment was terminated. Her termination letter, which was signed by Mr. Kerns, states, "You have consistently overspent the Food Service budget each year, with the amount increasing each time. You also are not performing satisfactorily in your supervisory duties and you have not followed the direction from your own supervisor when

[6] Kerns Aff. 7.
[7] Kerns Aff. Ex. B.

called upon to make sure District policies and procedures are followed."[8] Lanie's employment was terminated per the terms of the letter.

After they were discharged, the Berretts filed their in the Federal District Court of Idaho. The Federal court granted summary judgment in favor of the School District on all claims and the Berretts appealed to Ninth Circuit Court of Appeals. The Ninth Circuit Court of Appeals affirmed the Federal District Court's ruling as to the federal law claims, but remanded the decision back on to the state law claims. The Ninth Circuit Court of Appeals concluded that the Berretts had established a prime facie case under the Act and were entitled to a trial. Upon the remand, the Federal District Court declined to exercise jurisdiction and dismissed the case without prejudice. The Berretts then filed their state law claims in state district court.

II.
PLEADINGS

The parties have filed cross-motions for summary judgment. Ryan Berrett claims that his employment was terminated because he reported on a leak in the Clark County School District's propane system. He claims that this amounted to a retaliatory discharge because he engaged in protected activity under the Idaho Whistleblower Act. He further claims his termination violated the Idaho Whistleblower Act.

Lanie Berrett claims that she was terminated in retaliation for her husband's protected activity. She claims that public policy entitles her to protection under the Idaho Whistleblower Act, as the spouse of a whistleblower. Based on these assertions, she claims that she was wrongfully terminated.

[8] Kerns Aff. Ex. D.

Both of the Berretts claim the "law of the case" applies to the Ninth Circuit Court decision, binding this Court to act in accordance with that decision. They claim that by virtue of that decision, they are entitled to survive summary judgment and proceed to trial.

In opposition to the Berretts' claims, the Defendant claims that summary judgment should be granted in its favor. The School District claims that the Ryan is not entitled to protection under the Act, his termination was not the result of any protected activity, Lanie's termination was unrelated to her husband's activities, and public policy does not protect Ms. Berrett from termination.

III.
APPLICABLE LAW

1. Standard of Review – Motion for Summary Judgment

Summary judgment is proper if, based upon "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[9] In evaluating a party's Motion for Summary Judgment, "[The Court] liberally construes all disputed facts" and draws "all reasonable inferences and conclusions supported by the record in favor of the party opposing the motion."[10] Where there is no "issue of material fact, only a question of law remains."[11] When only a question of law remains, the Court "exercises free review."[12]

Additionally, the nonmoving party must provide more than a "mere scintilla of evidence," creating a genuine issue of material fact.[13] In other words, "[T]he nonmoving party

[9] *Kiebert v. Goss*, 144 Idaho 225, 227, 159 P.3d 862, 864 (2007); I.R.C.P. 56(c).
[10] *Kiebert,* 144 Idaho at 227, 159 P.3d at 864.
[11] *Id.*
[12] *Id.*
[13] *Van v. Portneuf Med. Ctr.,* 147 Idaho 552, 556 212 P.3d 982, 986 (2009).

must respond to the summary judgment motion with specific facts showing there is a genuine issue for trial."[14]

2. Law of the Case

The law of the case is similar to *stare decisis*. Like *stare decisis,* it seeks to eliminate "relitigation of settled issues . . . ."[15] Specifically, the Idaho Court of Appeals has stated:

> [W]here an appellate court states a principle of law in deciding a case, that rule becomes the law of the case and is controlling both in the lower court and on subsequent appeals as long as the facts are substantially the same. The decision on an issue of law made at one stage of a proceeding becomes precedent to be followed in successive stages of that same litigation.[16]

However, notwithstanding this precedent, established by the Idaho Court of Appeals, state district courts are not required to treat Federal district or circuit court decisions or interpretations of Idaho law as binding.[17] This applies "even on issues of federal law."[18] Certainly, they may treat Federal district and circuit court decisions as persuasive, but they are not required to do so.[19]

3. The Idaho Whistleblower Act - § 6-2101 *et seq.*

The Idaho Whistleblower Act ("the Act") affords "a legal cause of action for public employees who experience adverse action from their employer as a result of reporting waste and violations of a law, rule or regulation."[20] Protection under the Act is afforded to employees who communicate, "in good faith the existence of any waste of public funds, property or manpower,

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[14] *Id.*
[15] *Sun Valley Ranches, Inc. v. Prairie Power Co-op., Inc.,* 124 Idaho 125, 129, 856 P.2d 1292, 1297 (Idaho Ct. App. 1993).
[16] *Id.* (*quoting Frazier v. Neilsen,* 118 Idaho 104, 106, 794 P.2d 1160, 1162 (Idaho Ct. App. 1990)) (internal citations omitted).
[17] *See State v. McNeely,* 162 Idaho 413, 413, 398 P.3d 146, 149 (Idaho 2017) (finding error where state district court felt compelled to follow a directive or pronouncement of the Ninth Circuit).
[18] *Id.* (*quoting Dan Wiebold Ford, Inc. v. Universal Computer Services, Inc.,* 142 Idaho 235, 240, 127 P.3d 138, 143 (2005)).
[19] *McNeely,* 162 Idaho at 413, 398 P.3d at 149 (Idaho 2017).
[20] IDAHO CODE ANN. § 6-2101 (1994).

or *a violation or suspected violation of a law* . . . under the law of this state or the United States."[21] However, a good faith communication must also "be made at a time and in a manner which gives the employer a reasonable opportunity to correct the waste or violation."[22]

IV.
ANALYSIS

These are the issues before the Court on Summary Judgment. (1) Does the "law of the case" apply to the Ninth Circuit Court's decision, binding this Court and entitling the Berretts to a trial on their claims for relief? (2) Is Ryan Berrett entitled to protection under the Idaho Whistleblower Act as outlined by Idaho Code section 6-2101 *et seq.*? (3) Is Lanie Berrett entitled to protection under the Idaho Whistleblower Act, as a matter of public policy, because she is the spouse of an asserted whistleblower? Each of these issues will be addressed in turn.

1. **The "law of the case" doctrine does not apply and the Court may make an independent evaluation of the facts before it.**

The Court must first decide whether the "law of the case" applies to the Ninth Circuit Court's decision, binding this Court and entitling the Berretts to trial on their claims for relief. Based on the Court's reasoning and analysis, the "law of the case" does not apply to the Ninth Circuit Court's decision and the Court is not bound to follow it.

As the Court has stated, the Berretts previously filed their claim in the Federal District Court for the District of Idaho. In that case, the Berretts asserted both federal and state law claims for relief. The School District moved for summary judgment and the Federal District Court granted the motion. The Berretts appealed the decision to the Ninth Circuit Court of Appeals.

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[21] IDAHO CODE ANN. § 6-2104(1) (1994) (emphasis added).
[22] IDAHO CODE ANN. § 6-2104(1) (1994).

The Ninth Circuit Court affirmed the district court's rulings on the Berretts' federal law claims but remanded the remaining state law claims back to the Federal District Court. In doing so, the Ninth Circuit stated:

> Mr. Berrett established a prima facie case of retaliatory conduct by presenting evidence that: he engaged in protected activity by reporting "a violation or suspected violation of a law" . . . he suffered an "adverse action" when he was terminated . . . and the "close relation in time" between them, among other factors, suggests he may have been fired for reporting the propane issue. This is sufficient to create a genuine issue of material fact to survive summary judgment.[23]

Upon remand, the Federal District Court declined to exercise jurisdiction over the case and dismissed it without prejudice. The Berretts then filed their claims in state district court. They argue the Ninth Circuit's decision is binding upon the Court and entitles them to a trial on the merits of their claims. In this assertion, the Berretts specifically rely on the "law of the case" doctrine.

The "law of the case" doctrine is similar to *stare decisis*. Like *stare decisis,* it seeks to eliminate "relitigation of settled issues . . . ."[24] On the issue, the Idaho Court of Appeals has stated:

> [W]here an appellate court states a principle of law in deciding a case, that rule becomes the law of the case and is controlling both in the lower court and on subsequent appeals as long as the facts are substantially the same. The decision on an issue of law made at one stage of a proceeding becomes precedent to be followed in successive stages of that same litigation.[25]

However, notwithstanding the precedent established by the Idaho Court of Appeal, state district courts are not required to treat Federal district or circuit court decisions as controlling.[26] This rule

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[23] Wessel Aff. Ex. A, at 2.
[24] *Sun Valley Ranches, Inc.,* 124 Idaho at 129, 856 P.2d at 1297.
[25] *Id. (quoting Frazier v. Neilsen,* 118 Idaho 104, 106, 794 P.2d 1160, 1162 (Idaho Ct. App. 1990) (internal citations omitted).
[26] *McNeely,* 162 Idaho at 413, 398 P.3d at 149 (finding error where state district court felt compelled to follow a directive or pronouncement of the Ninth Circuit).

applies "even on issues of federal law."[27] The Court notes that the issues in this case arise under state, not federal, law.

In short, the "law of the case" does not apply here. Certainly, the Court may still treat the Federal district and circuit court decisions as persuasive, but it is not required to do so.[28] Because the Court is not bound by the Ninth Circuit's decision and the issues of the case arise under state law, it will look at the facts presently before it and make an independent evaluation and decision.

2. Ryan Berrett is not entitled to protection under the Idaho Whistleblower Act.

Next, the Court turns its attention to the second issue before it on summary judgment: Is Ryan Berrett entitled to protection under the Idaho Whistleblower Act as outlined by Idaho Code section 6-2101 *et seq.*? Based on the following analysis, the Court concludes he is not.

The Act affords "a legal cause of action for public employees who experience adverse action from their employer as a result of reporting waste and violations of a law, rule or regulation."[29] Protection under the Act is afforded to any employee that "communicates in good faith the existence of any waste of public funds, property or manpower, or a violation or suspected violation of a law . . . under the law of this state or the United States."[30] Therefore, more narrowly stated, the issue is whether Ryan reported a violation or suspected violation of a law, entitling him to protection under the Act.

Ryan claims that he reported a violation of the law because he reported on the School District's problem(s) with the propane system. He claims he was discharged in retaliation for making these reports. In response to Ryan's claims, the School District argues the discharge was not retaliatory and has motioned for summary judgment. In order to survive summary judgment,

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[27] *McNeely,* 162 Idaho at 413, 398 P.3d at 149 (*quoting Dan Wiebold Ford, Inc. v. Universal Computer Services, Inc.,* 142 Idaho 235, 240, 127 P.3d 138, 143 (2005)).
[28] *McNeely,* 162 Idaho at 398 P.3d at 149 (Idaho 2017).
[29] IDAHO CODE ANN. § 6-2101 (1994).
[30] IDAHO CODE ANN. § 6-2104(1) (1994) (emphasis added).

the Berretts carry "the burden of presenting evidence from which a rational inference of retaliatory discharge under the whistleblower act [can] be drawn."[31] In other words, they must present "a prima facie case of retaliatory discharge . . . ."[32]

A prima facie case for retaliatory discharge consists of three elements. To survive summary judgment the Berretts must establish: (1) Ryan was an employee of the District and "engaged or intended to engage in protected activity;" (2) the School District "took adverse action against" him; and (3) there is "a causal connection between the protected activity" and the adverse action taken by the District.[33] These three elements will be discussed in sequence below.

a. Ryan Berrett did not engage, or intend to engage, in protected activity.

It is not disputed that Ryan was an employee of the School District. Therefore, in order to satisfy this first element, Ryan only needs to establish that he engaged in, or intended to engage in, a protected activity.[34] Based on the Court's analysis, Ryan has not established that he engaged in a protected activity.

There is very little precedent that may be used to define the scope of "protected activities" contemplated under Idaho law. However, one case, *Black v. Idaho State Police,* has provided some guidance in the form of examples.[35] The *Black* court stated:

> Examples of protected activity include (1) reporting safety violations that potentially violate federal regulations . . . (2) documenting a waste of public funds and manpower . . . and (3) communicating a mayor's potential conflict of interest with an employee health plan that could potentially waste public resources.[36]

Of the three examples listed above, the first is most relevant here. Ryan claims the safety violation he reported was the leak in the propane system, and that the reports he made became

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[31] *Curlee v. Kootenai County Fire & Rescue,* 148 Idaho 391, 396, 224 P.3d 458, 463 (Idaho 2008).
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Black v. Idaho State Police,* 155 Idaho 570, 573, 314 P.3d 625, 628 (Idaho 2013).
[36] *Id.* fn.3.

the catalyst for his discharge. However, as the following analysis illustrates, the reports Ryan made do not fall within the range of "protected activities" contemplated by the Act.

Ample evidence indicates the propane odor in the old gymnasium was well known throughout the School District in January 2012. It was reported to Ms. Woods, the School District's business manager, by several staff members.[37] In turn, Ms. Woods reported the issue to Mr. Kerns, the School District's superintendent.[38] Mr. Kerns then reported the issue to the School Board's chairwoman, Ms. Haight-Mortensen.[39]

As the School District's maintenance supervisor, responsibility fell to Ryan to identify the problem and fix it. After becoming aware of the problem, Mr. Berrett made his first report on the problem in in February, in his monthly letter to the School Board. Here, the Court again points out that the issue had already been reported to the School Board by Mr. Kerns and was well known throughout the School District and the Administration.

In his March letter, Ryan reported on the issue again. This time he described the work he had done to identify the problem and fix it. He also informed the School District, "I am waiting for a bid from sermon [sic] to correct this problem, when I receive it I will give it to MR. KERNS [sic] and we will go from there."[40] Ryan claims he later received the bid from Sermon Electric, showed it to Mr. Kerns, and was told to "keep quiet." Mr. Kerns disputes that he ever told Ryan to "keep quiet."

Although this allegation is suspicious, it is of little consequence. Even if Ryan was told to "keep quiet," the Court wonders: What was there to keep quiet about? The School Board was already aware of the propane leak. Mr. Kerns, himself, informed the School Board's

[37] Woods Aff. 3
[38] Kerns Aff. 2.
[39] Haight-Mortensen Aff. 2.
[40] Woods Aff. Ex. A. March 12, 2012 letter.

chairwoman, Erin Haight-Mortensen, and Ryan began reporting the problem a month later in his letters to the School Board. The School Board was already aware of the problem and already knew it was a building code violation, months before this particular conversation between Ryan and Mr. Kerns occurred.

Additionally, there is other evidence that suggests the propane leak was already known to the School Board, even before Ryan was allegedly told to "keep quiet" by Mr. Kerns. As early as February, a technician from Sermon Electric began making service calls to the school and was assisting Ryan in resolving the propane leak. Ryan reported this in his February letter to the School Board. Eventually, Ryan also enlisted the aid of High Planes Propane. It is apparent the School Board knew of this involvement because "it approved payment for each of the service calls."[41] This is important because it evidences that the School Board had separate knowledge of the propane problem; apart from Ryan's, Ms. Woods', or Mr. Kerns' reports of the issue.

It is beyond believable that an employee could be charged with solving a problem (even a building code or safety violation), provide regular progress reports to his employer, discuss the viability of proposed solutions with superiors, and then, after being fired, use those same activities to substantiate claim of retaliatory discharge. This is especially true when the employee was charged with fixing a problem already known to the employer. Certainly, the statute offers protection to employees who *report "a violation or suspected violation of a law."* And it is undisputed that the propane leak was a violation of law; however, there was nothing to report for purposes of the Act because the School District already knew about the problem and was trying to fix it. Therefore, Ryan has failed to establish that these discussed actions constituted protected activity.

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[41] Woods Aff. 3.

The Court now looks to Ryan's other actions to determine whether any of these reasonably constituted protected activity. First, Ryan claims he appeared at the May 17 school board meeting to testify against Mr. Kerns.[42] The meeting notes shed a different light on his participation in that meeting; instead, these merely indicate Ryan reported "the propane issues are still a problem."[43] As with his other reports, this was nothing more than a progress report on the problem Ryan had already been tasked with solving.

Just as before, the Court finds it difficult to conclude this participation in the School Board meeting constitutes protected activity, even after drawing reasonable inferences in his favor. The School Board already knew of the propane leak, Mr. Kerns had personally informed the School Board of the issue approximately four months prior, Ryan had been providing the School Board with monthly reports on the issue, and the School Board had approved payments for service calls made by Sermon Electric and High Planes Propane long before this meeting occurred. Again, the Court is left to ponder, what else was there to report that might have constituted a protected activity?

Finally, the Court addresses the message Ryan posted to Facebook near the end of May or beginning of June. The posted was message was critical of the Clark County School District and Administration. Although the message may have contained a cryptic reference to the propane problem, it more closely resembles an unfettered rant by a disgruntled employee. It offers nothing that resembles a good faith report of "a violation or suspected violation of a law . . . ."[44] Therefore, the Court cannot deem it protected activity.

Because Mr. Berrett has not established that he engaged in any protected activity, summary judgment in favor of the School District is appropriate. Nevertheless, for the sake of

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[42] Berrett Aff. 5.
[43] Woods Aff. Ex. A.
[44] IDAHO CODE ANN. § 6-2104(1) (1994) (emphasis added).

inquiry, the Court continues its analysis of the two remaining elements: (1) adverse action against the employee, and (2) a causal connection between the protected activity and the adverse action.

b. The District took an adverse action against Ryan Berrett by terminating his employment.

The second element of a retaliatory discharge claim requires the employee to establish the employer took an adverse action against them. Based on the following analysis, the Court concludes that the Clark County School District took adverse action against Ryan. The evidence before the Court is that Mr. Berrett's employment was terminated. This is undisputed.

After Ryan aired his discontent via social media, Ms. Haight-Mortensen notified Mr. Kerns about the post and requested that he speak to Ryan about it. Mr. Kerns approached Ryan about the Facebook post and asked that it be removed. Ryan became belligerent and called Mr. Kerns a "fucking asshole."[45] Mr. Kerns then explained why the post was inappropriate and requested that Ryan remove it, for the second time. Ryan agreed to remove it, and did so.

Mr. Kerns discussed then the Facebook post and his encounter with Ryan at the School Board's next meeting. During the meeting it was decided that Mr. Berrett was an at-will employee and discharge was the appropriate sanction for his conduct. A termination letter was then drafted and delivered to Ryan. The letter, signed by Mr. Kerns, states in relevant part:

> You have been insubordinate and verbally abusive to the District administration and have ridiculed personnel through social media on the internet. Your performance in some duties has been declining as well with building maintenance and keeping lights replaced and in working order. Due to your status as an "at-will", or non-contractual employee, the District administration has decided to terminate your employment effective June 30th, 2012.[46]

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[45] Kerns Aff. 7.
[46] Kerns Aff. Ex. B.

The School District does not dispute that this letter was delivered, nor that Ryan's employment was terminated. Because it is undisputed his employment terminated, Ryan has established that the School District took adverse action against him. However summary judgment in favor of the School District is still appropriate based on the Court's analysis of the other two elements.

c. There is no causal connection between Ryan Berretts alleged, protected activity and the adverse action taken by the District.

To survive summary judgment on a retaliatory discharge claim, Ryan must also establish a causal connection between his alleged, protected activity and the adverse action taken by the School District. Because Ryan failed to establish that he engaged in a protected activity, there can be no causal connection to the adverse action taken by the District. Nevertheless, the Court continues its analysis of the final element for the sake of inquiry. Relevant to this inquiry is the "Proximity in time between the protected activity and the adverse employment action . . . ."[47]

As stated, several the School District's other employees and administrators received reports of a propane odor in the gymnasium as early as January 2012. Over a period of several months, Ryan worked to resolve the issues and provided regular reports to Mr. Kerns and the School Board. Multiple affidavits and their corresponding exhibits support these facts. It was not until approximately five months later, after multiple written and verbal reports were provided that Ryan's employment was terminated. This is a significant amount of time, and the Court concludes that the adverse action taken against Ryan and the alleged protected activity are not causally connected.

Instead, another cause for Ryan's discharge is more likely. As the Court discussed above, Ryan posted a derogatory message on Facebook in late May or early June. The posted message

[47] *See Curlee,* 148 Idaho at 397, 224 P.3d at 464 (*quoting Heng v. Rotech Med.Corp.,* 688 N.W.2d 389, 401, (N.D. 2004)).

was critical of the School District and the Administration and violated the School District's established policies. Ryan further compounded this behavior when he was confronted by Mr. Kerns. When he was confronted Ryan was belligerent, calling Mr. Kerns a "fucking asshole." As a result of this conduct, Ryan was deemed "insubordinate and verbally abusive to the District administration and have ridiculed personnel through social media on the internet" and his employment was terminated.[48]

In addition to this belligerent conduct, the letter provided another reason for Ryan's discharge: he had been doing a poor job in his maintenance duties.[49] The evidence before the Court supports this. Only a few months before his discharge, the School District's facilities were inspected and numerous maintenance violations were discovered. In fact, some of these violations had been noted in the previous two or three inspections and still remained unresolved.[50]

Based upon the undisputed evidence and drawing reasonable inferences in favor of the nonmoving party, Ryan's "termination had nothing to do with the propane issue" or any other protected activity.[51] Therefore, the Court concludes there is no causal connection between the adverse action taken by the School District (i.e. Ryan's discharge) and any activity Ryan claims. Because Ryan has failed to establish that he engaged in any protected activity or that the adverse action taken against him was related to such activity was causally related, summary judgment in favor of the School District is appropriate.

3. As a matter of public policy, Lanie Berrett does not qualify for protection under the act as the spouse of a whistleblower.

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[48] Kerns Aff. Ex. A.
[49] Kens Aff. Ex. A.
[50] Woods Aff. Ex. A.
[51] Haight-Mortensen Aff. 5.

As a matter of public policy, Lanie Berrett claims that she qualifies for protection under the Act as the spouse of a whistleblower. However, based on the Court's prior analysis, Ryan Berrett failed to establish that he was a whistleblower under the Act or was the subject of a retaliatory discharge. Because Ryan does not qualify for protected status under the Act, Lanie cannot claim it as his spouse either.

However, even if Ryan had established a prima facie case retaliatory discharge, Lanie would still not be entitled to protection for two reasons. First, under established law, spouses of employees are unprotected by the Act. Second, her termination is not causally connected to any protected activity.

a. Spouses of Employees are Unprotected

Spouses of employees who engage in protected activity are not protected under the Act or any related Idaho law. The Idaho Whistleblower Act provides a "cause of action for public *employees* who experience adverse action from their employer as a result of reporting waste and violations of a law, rule or regulation."[52] Lanie Berrett asserts that as a matter of public policy, she is entitled to protection. However, the Court cannot adopt this conclusion.\

The language of the Act specifically allows relief for "employees." It makes no reference to, or allowance, for *spouses* of employees.[53] The Court is unwilling to read words into the statute that were not included by the legislature, nor is the Court willing to extend protection that is not expressly provided by the Act. Therefore, the Court cannot conclude that spouses of employees engaging in protected activity are entitled to protection under the Act. Because Lanie Berrett is not entitled to protection as the spouse of an employee claiming protection under the Act, summary judgment in favor of the School District should be granted.

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[52] IDAHO CODE ANN. § 6-2101 (1994) (emphasis added).
[53] *See* IDAHO CODE ANN. § 6-2101 (1994).

b. Lanie's Termination is not Causally Connected

Even if Lanie were entitled to protection as the spouse of an employee engaging in protected activity, summary judgment is still appropriate because she has not established that her termination was causally connected to any (even the activity asserted by her husband). As discussed above, the Berretts must a establish a prima facie case of retaliatory discharge to survive summary judgment.[54] Such a claim requires three elements: (1) the employee engaged in a protected activity, (2) the employer took adverse action against the employee, and (3) the adverse action was causally connected to the protected activity.[55]

Lanie does not assert that she engaged in protected activity; rather, she relies on her husband's claim that he engaged in protected activity. As the Court previously concluded, Ryan did not engage in protected activity. Even if he had, the Act does not extend protection to spouses of employees engaging in protected activity.

The second element requires an adverse action against the employee. If the Act made allowance for spouses of employees, Lanie could establish this element. Her employement was terminated and this is not disputed by the School District. Therefore, adverse action was taken against her.

However, Lanie would not qualify for protection under the Act because her termination is not causally connected to any protected activity. In the termination letter, signed by David Kerns, and delivered to Lanie, the reasoning for her termination is stated. The letter states, "You have consistently overspent the Food Service budget each year, with the amount increasing each time. You also are not performing satisfactorily in your supervisory duties and you have not followed the direction from your own supervisor when called upon to make sure District policies and

[54] *Curlee,* 148 Idaho at 397, 224 P.3d at 464.
[55] *Id.*

procedures are followed."[56] This reasoning for her termination is further supported by the affidavits.

The multiple affidavits submitted to the Court indicate that Ms. Berrett consistently overspent the food service budget. Notwithstanding, Lanie continued to exceed her budget. Then, after all this, it was discovered that Lanie had failed, repeatedly, to submit paperwork required by the State of Idaho.

These are the offenses cited in her termination letter. They are entirely separate and apart from her husband's activities and the propane leak. The termination letter does not mention or even allude that her termination is in any way related to her husband or his actions. As a result, the Court cannot conclude that the termination of Lanie's employment was in retaliation for any protected activity and summary judgment in favor of the School District is appropriate.

V.
CONCLUSION

Therefore, the Court concludes, based on its prior analysis, that it is not bound by the Ninth Circuit Court of Appeals decision on the Berretts' claims and may conduct an independent evaluation of the facts before it. Additionally, having conducted an independent evaluation of the facts before it, the Court cannot conclude that either of the Berretts' engaged in a protected activity or that their terminations are causally connected to any protected activity. Because the Berretts have failed to establish these two elements, even drawing reasonable inferences in their favor, the Court cannot conclude there is a genuine issue of material fact left to be resolved at trial. Lastly, based Court's prior analysis, the School District's Fourteenth Defense should be denied. Therefore, summary judgment in favor of the School District is appropriate.

[56] Kerns Aff. Ex.D.

Based on the foregoing, the Court orders as follows:

1- Plaintiff's Partial Motion for Summary Judgment is DENIED.

2- Defendant's Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.

Dated this 15th day of November 2017.

Bruce L. Pickett
District Judge

DISTRICT COURT
JEFFERSON COUNTY
IDAHO
SEVENTH JUDICIAL DISTRICT

CERTIFICATE OF SERVICE

I hereby certify that on this 15 day of November 2017 the OPINION AND ORDER ON PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT was entered and a true and correct copy was served upon the parties listed below by mailing, with the correct postage thereon, or by causing the same to be delivered to their courthouse boxes.

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Colleen Poole
Clerk of the District Court
Jefferson County, Idaho

by A Barnes
Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

RONALD RYAN BERRETT AND LANIE BERRETT, husband and wife, Plaintiffs, v. CLARK COUNTY SCHOOL DISTRICT NO. 161, Defendant.	Case No. CV-2017-0328 MEMORDANDUM DECISION ON PLAINTIFFS' MOTION TO RECONSIDER

This Memorandum Decision is in response to the Plaintiffs' Motion to Reconsider.

I. STATEMENT OF FACTS

For purposes of this Motion to Reconsider the Court adopts the following facts, acknowledging there were inadvertent facts in the Court's prior opinion at summary judgment:

The plaintiffs, Ronald Ryan Berrett and Lanie Berrett ("Ryan" or "Mr. Berrett", and "Lanie" or "Ms. Berrett", and collectively as "the Berretts"), were both employed by the Clark County School District (the 'District"). Ryan was employed as the District's maintenance supervisor and Lanie as the lunchroom supervisor. During the relevant time period, Erin Haight-Mortensen ("Ms. Haight-Mortensen") was chairwoman of the Clark County School Board,

David Kerns ("Mr. Kerns") was the district superintendent, and Gayle Woods ("Ms. Woods") was the district business manager.

1. Ryan

As the District's maintenance supervisor, Ryan Berrett maintained and fixed the District's furnace system.[1] As discussed below, this also included the propane tank and corresponding system that supplied propane gas to the furnaces. In January 2012, Ms. Woods began receiving reports that the old gymnasium smelled of propane.[2] Ms. Woods informed Ryan of the reported odor.[3] Ms. Woods also informed Mr. Kerns, and Mr. Kerns informed Ms. Haight-Mortensen.[4] Ms. Woods, Mr. Kerns, and Ms. Haight-Mortensen were all aware that the propane system leak was a building code violation.[5]

Ryan began working to solve the problem and enlisted the help of Sermon Electric.[6] Ryan also began reporting on the problem in his monthly letters to the District's school board ("the Board").[7] In February, he wrote, "We do have a propane pressure issue that has been ongoing for several years. I have been working with a Sermon technician and think a lot of the problems are at the bulk tank. I will bet [*sic*] the problem resolved."[8] Although Ryan does not mention this letter (or any of the others he sent) in his affidavit, he has not disputed the authenticity of the letters provided by the District.

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[1] Affidavit of Jacob S. Wessel in Response to Defendant's Motion for Summary Judgment, *Ronald Ryan Berrett and Lanie Berrett v. Clark County School District No. 161,* Jefferson County case no. CV-17-0328 (filed September 15, 2017) (hereinafter "Wessel Affidavit), at attachment p.311.
[2] Affidavit of Gayle Woods, *Ronald Ryan Berrett and Lanie Berrett v. Clark County School District No. 161,* Jefferson County case no. CV-17-0328 (filed August 31, 2017) (hereinafter "Woods Affidavit), at p.3
[3] Wessel Affidavit, at attachment p.311.
[4] Woods Affidavit, at p.3; Affidavit of David Kerns, *Ronald Ryan Berrett and Lanie Berrett v. Clark County School District No. 161,* Jefferson County case no. CV-17-0328 (filed August 31, 2017) (hereinafter "Kerns Affidavit), at p.2.
[5] Woods Affidavit, at p.3; Kerns Affidavit, at p.2; Affidavit of Erin Haight-Mortensen, *Ronald Ryan Berrett and Lanie Berrett v. Clark County School District No. 161,* Jefferson County case no. CV-17-0328 (filed August 31, 2017) (hereinafter "Haight-Mortensen Affidavit), at p.3.
[6] Wessel Affidavit, at attachment p.311-12.
[7] Woods Affidavit, at Ex. A, p.27-29.
[8] Woods Affidavit, at Ex. A, p.27.

In March, he provided another update to the Board.[9] This time he described the work he had done on the propane system over the past month and his diagnosis of the problem.[10] He concluded by writing, "I am waiting for a bid from sermon [sic] to correct this problem, when I receive it I will give it to MR. KERNS [sic] and we will go from there."[11] Later, Ryan received the bid and showed it to Mr. Kerns and Ms. Haight-Mortensen.[12] There is a dispute about what happened after Ryan received the quote from Sermon Electric and showed it to Mr. Kerns. Ryan claims that Mr. Kerns told him to "keep quiet."[13] Mr. Kerns disputes that he instructed Ryan to "keep quiet."[14]

During the months of February, March, and April, Ryan worked with technicians from both Sermon Electric and High Planes Propane.[15] Ryan mentioned the involvement of Sermon Electric and High Planes Propane in his monthly letters to the school board.[16] Over the course of this three month period, both companies visited the school on numerous occasions and attempted to help Ryan isolate and repair the leak in the propane system.[17] During this time frame, the Board was aware of these visits and approved payment for the service calls.[18] After several months of work, it was discovered that the propane system contained micro-leaks throughout and plans were made to repair it.[19]

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[9] Woods Affidavit, at Ex. A, p.28.
[10] Woods Affidavit, at Ex. A, p.28.
[11] Woods Affidavit, at Ex. A, p.28.
[12] Wessel Affidavit, at attachment p.312-13.
[13] Wessel Affidavit, at attachment p.313.
[14] Kerns Affidavit, at p.2.
[15] Wessel Affidavit, at attachment p.311-13.
[16] Woods Affidavit, at Ex. A, p.27-29.
[17] Wessel Affidavit, at attachment p.311-13.
[18] Woods Affidavit, at p.3.
[19] Wessel Affidavit, at attachment p.312-13; Woods Affidavit, at p.4; Kerns Affidavit, at p.3-4; Haight-Mortensen Affidavit, at p.3-4.

In May 2012 the propane issue was still unresolved.[20] Ryan attended the Board meeting to discuss the ongoing propane issue that month.[21] The Board minutes indicate Ryan appeared and told the School Board that "the propane issues are still a problem."[22] Ryan characterizes his participation in this meeting, by stating that he "testified against Mr. Kerns . . . ."[23]

In June, Ryan posted a derogatory message on Facebook.[24] The following is an image of the message Ryan posted, as included in his affidavit:[25]

Ryan Berrett

June 18.Just curious why I have ran the maintenence Department for Clark county school district for 2 years by myself, without any help even though I have ask for it every year and was told by Dave Kerns that someone would be hired for sure. My wife and I have always tried to do the best we could to contribute as much free time as possible to help save the school distrik moneys, I have also gone 2 yrs wi...thout seeing an actual budget on paper I feel this is very unprofesional so now I think a state audit needs to be strongly considered according to the GASB. And also certain state officials I have spoken to agree, Also several people i have talk to have told me that the business manager has always been a part time position in the past and now I guess it is a 40 + thousand dollar a year job, more then the maintenence supervisor and school nutrition supervisor make in a year. I am very disabled and I have done this job by myself for 800.00 a month and feel I should not have to take a 300.00 dollar decrease in pay , When I know how much I have saved the school about 30,000 dollars in fixing things bye myself, I strongly feel this is out of retaliation because our Administration did not want to address an issue that could have endangered the lives of children. And every since then me and my wife have had nothing but grief from certin people, and they know who they are. My wife has been accused of fraudulent accusations and even though she was totally cleared she is still has never gotten even an apelagy, I feel this is wrong, If you agree hit like .This has all been documented, thinking what should I do humm !!!!

After it was posted, several members of the community saw and commented on the message.[26] Ms. Haight-Mortensen was among those who it message.[27] After viewing the message, Ms. Haight-Mortensen provided a copy of it to Mr. Kerns.[28]

Mr. Kerns discussed Ryan's Facebook post Ryan at the Board's next meeting.[29] Mr. Kerns and Ms. Haight Mortensen were both present and involved in the meeting.[30] During the

[20] Woods Affidavit, at Ex. A, p.34.
[21] Wessel Affidavit, at attachment p.314; Haight-Mortensen Affidavit, at p.4.
[22] Woods Affidavit, at Ex. A, p.34.
[23] Wessel Affidavit, at attachment p.314.
[24] Wessel Affidavit, at attachment p.315, 323-24.
[25] Wessel Affidavit, at attachment p.324.
[26] Haight-Mortensen Affidavit, at p.5, Ex.A.
[27] Haight-Mortensen Affidavit, at p.5.
[28] Haight-Mortensen Affidavit, at p.5.

meeting, the District determined that because Mr. Berrett was an at-will employee, termination was the appropriate sanction for his conduct.[31] A termination letter was then drafted and delivered to Ryan.[32] The letter, signed by Mr. Kerns, states in relevant part:

> You have been insubordinate and verbally abusive to the District administration and have ridiculed personnel through social media on the internet. Your performance in some duties has been declining as well with building maintenance and keeping lights replaced and in working order. Due to your status as an "at-will", or non-contractual employee, the District administration has decided to terminate your employment effective June 30th, 2012.[33]

Accordingly, Ryan's employment was terminated on June 30, 2012.[34] Ryan disputes that the Board was aware of, or approved, his termination but has not provided any evidence to support this conclusion.

2. Lanie

Lanie Berrett was the District's lunchroom supervisor from spring 2009 through June 2012.[35] As the lunchroom supervisor, Ms. Berrett was responsible for proper management of the kitchen.[36] This required that she prepare (and adhere to) an annual budget and submit state-required paperwork.[37] The District asserts that Lanie failed to remain within her allotted budget for at least three consecutive years and submit the state-required paperwork.[38] Furthermore, the District asserts that Lanie's job performance was unsatisfactory.[39]

Her termination letter, which was signed by Mr. Kerns, states, "You have consistently overspent the Food Service budget each year, with the amount increasing each time. You also are

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[29] Kerns Affidavit, at p.5; Haight-Mortensen Affidavit, at p.5-6
[30] Kerns Affidavit, at p.5; Haight-Mortensen Affidavit, at p.5.
[31] Haight-Mortensen Affidavit, at p.5-6.
[32] Kerns Affidavit, at p.5; Haight-Mortensen Affidavit, at p.5-6.
[33] Kerns Affidavit, at Ex. B.
[34] Wessel Affidavit, at attachment p.315.
[35] Wessel Affidavit, at attachment p.329; Woods Affidavit, at p.5; Haight-Mortensen Affidavit, at p.6.
[36] Woods Affidavit, at p.5; Haight-Mortensen Affidavit, at p.6;
[37] Woods Affidavit, at p.5; Haight-Mortensen Affidavit, at p.6;
[38] Woods Affidavit, at p.5; Haight-Mortensen Affidavit, at p.6;
[39] Haight-Mortensen Affidavit, at p.6;

not performing satisfactorily in your supervisory duties and you have not followed the direction from your own supervisor when called upon to make sure District policies and procedures are followed."[40] Accordingly, Lanie's employment was terminated.[41] Lanie disputes the reasons for her termination.[42] Therefore, for purposes of summary judgment, the Court assumes Lanie performed satisfactorily, did not exceed the budget, and submitted the state-required paperwork.

After they were discharged, the Berretts filed an action in the Federal District Court of Idaho. The Federal court granted summary judgment in favor of the District on all claims and the Berretts appealed to Ninth Circuit Court of Appeals. The Ninth Circuit Court of Appeals affirmed the Federal District Court's ruling as to the federal law claims, but remanded the decision back to the Federal District Court on the state law claims. The Ninth Circuit Court of Appeals concluded that the Berretts had established a prime facie case under the Idaho Whistleblower Act and were entitled to a trial. Upon the remand, the Federal District Court declined to exercise jurisdiction and dismissed the case without prejudice. The Berretts then filed their claims in state district court.

II.
APPLICABLE LAW

1. Standard - Motion to Reconsider

"On a motion for reconsideration, the court must consider any new admissible evidence or authority bearing on the correctness of an interlocutory order." [43] However, it is not required that the motion "be supported by new evidence or authority." [44] "When deciding [a] motion for reconsideration, the district court must apply the same standard of review that the court applied

[40] Kerns Affidavit, at Ex. D.
[41] Wessel Affidavit, at attachment p.330.
[42] Wessel Affidavit, at attachment p.329-30.
[43] *Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012).
[44] *Id.*

when deciding the original order that is being reconsidered."[45] Therefore, when deciding a motion to reconsider a grant of summary judgment, the Court must apply the summary judgment standard.[46]

2. Standard - Summary Judgment

Summary judgment is proper if, based upon "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[47] In evaluating a party's Motion for Summary Judgment, "[The Court] liberally construes all disputed facts" and draws "all reasonable inferences and conclusions supported by the record in favor of the party opposing the motion."[48] Where there is no "issue of material fact, only a question of law remains."[49] When only a question of law remains, the Court "exercises free review."[50]

Additionally, the nonmoving party must provide more than a "mere scintilla of evidence," creating a genuine issue of material fact.[51] In other words, "[T]he nonmoving party must respond to the summary judgment motion with specific facts showing there is a genuine issue for trial."[52] "Bare assertions that an issue of fact exists, in the face of particular facts alleged by the movant, are not sufficient to create a genuine issue of fact."[53]

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[45] *Id.*
[46] *Id.*
[47] *Kiebert v. Goss*, 144 Idaho 225, 227, 159 P.3d 862, 864 (2007); I.R.C.P. 56(c).
[48] *Kiebert*, 144 Idaho at 227, 159 P.3d at 864.
[49] *Id.*
[50] *Id.*
[51] *Van v. Portneuf Med. Ctr.*, 147 Idaho 552, 556 212 P.3d 982, 986 (2009).
[52] *Id.*
[53] *Cates v. Albertson's Inc.*, 126 Idaho 1030, 1033, 895 P.2d 1223, 1226 (1994).

3. Law of the Case

The law of the case is similar to *stare decisis*. Like *stare decisis,* it seeks to eliminate "relitigation of settled issues . . . ."[54] Specifically, the Idaho Court of Appeals has stated:

> [W]here an appellate court states a principle of law in deciding a case, that rule becomes the law of the case and is controlling both in the lower court and on subsequent appeals as long as the facts are substantially the same. The decision on an issue of law made at one stage of a proceeding becomes precedent to be followed in successive stages of that same litigation.[55]

However, notwithstanding this precedent, established by the Idaho Court of Appeals, state district courts are not required to treat Federal district or circuit court decisions or interpretations of Idaho law as binding.[56] This applies "even on issues of federal law."[57] Certainly, they may treat Federal district and circuit court decisions as persuasive, but they are not required to do so.[58]

4. Idaho Whistleblower Act - § 6-2101 *et seq.*

The Idaho Whistleblower Act ("the Act") affords "a legal cause of action for public employees who experience adverse action from their employer as a result of reporting waste and violations of a law, rule or regulation."[59] Protection under the Act is afforded to employees who communicate, "in good faith the existence of any waste of public funds, property or manpower, or *a violation or suspected violation of a law* . . . under the law of this state or the United

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[54] *Sun Valley Ranches, Inc. v. Prairie Power Co-op., Inc.,* 124 Idaho 125, 129, 856 P.2d 1292, 1297 (Idaho Ct. App. 1993).
[55] *Id. (quoting Frazier v. Neilsen,* 118 Idaho 104, 106, 794 P.2d 1160, 1162 (Idaho Ct. App. 1990)) (internal citations omitted).
[56] *See State v. McNeely,* 162 Idaho 413, 413, 398 P.3d 146, 149 (Idaho 2017) (finding error where state district court felt compelled to follow a directive or pronouncement of the Ninth Circuit).
[57] *Id. (quoting Dan Wiebold Ford, Inc. v. Universal Computer Services, Inc.,* 142 Idaho 235, 240, 127 P.3d 138, 143 (2005)).
[58] *McNeely,* 162 Idaho at 413, 398 P.3d at 149 (Idaho 2017).
[59] Idaho Code § 6-2101 (1994).

States."[60] However, a good faith communication must also "be made at a time and in a manner which gives the employer a reasonable opportunity to correct the waste or violation."[61]

III.
ANALYSIS

These are the issues before the Court on Plaintiffs' Motion to Reconsider. (1) Does the "law of the case" apply to the Ninth Circuit Court's decision, thereby binding this Court and entitling the Berretts' to a trial their claims? (2) Did the Court properly construe the facts in favor of the plaintiffs in its decision at summary judgment? (3) Did the Court properly grant summary judgment in favor of the Defendant, thereby dismissing Ryan Berrett's whistleblower claim? (4) Did the Court properly grant summary judgment in favor of the Defendant on Lanie's public policy claim? (5) Was summary judgment properly granted on Plaintiffs remaining federal law claims?

1. The Law of the Case

The law of the case does not apply and the Court may make an independent evaluation of the facts and evidence before it (i.e. it is not bound by the prior decision of the Ninth Circuit Court's decision). As stated in the Court's earlier decision, the Berretts previously filed their claims in federal court. The District moved for summary judgment and the Federal District Court granted summary judgment for the District. This decision was appealed to the Ninth Circuit Court of Appeals.

On appeal, the Ninth Circuit affirmed the district court's ruling on the Berretts' federal law claims but remanded the case back on the remaining state law claims. In doing so, the Ninth Circuit stated:

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[60] Idaho Code § 6-2104(1) (emphasis added).
[61] *Id.*

> Mr. Berrett established a prima facie case of retaliatory conduct by presenting evidence that: he engaged in protected activity by reporting "a violation or suspected violation of a law" . . . he suffered an "adverse action" when he was terminated . . . and the "close relation in time" between them, among other factors, suggests he may have been fired for reporting the propane issue. This is sufficient to create a genuine issue of material fact to survive summary judgment.[62]

Upon remand the Federal District Court declined jurisdiction because there were no more federal law claims and the case was dismissed without prejudice. Subsequently, the Berretts refiled their claims in state district court. The Defendants then moved for summary judgment. At summary judgment the Berretts argued that the Ninth Circuit's decision on appeal constitutes the law of the case, entitling them to proceed to trial on the merits of their claims.

After careful analysis, the Court granted summary judgment in favor of the Defendants. The Berretts have filed a motion requesting the Court reconsider its prior decision. After the following analysis, the Court remains convinced that its prior decision, granting summary judgment in favor of the Defendants, was proper.

Like *stare decisis,* the "law of the case" seeks to eliminate "relitigation of settled issues . . . ."[63] The Idaho Court of Appeals has stated:

> [W]here an appellate court states a principle of law in deciding a case, that rule becomes the law of the case and is controlling both in the lower court and on subsequent appeals *as long as the facts are substantially the same.* The decision on an issue of law made at one stage of a proceeding becomes precedent to be followed in successive stages of that same litigation.[64]

In *Swanson v. Swanson,* the Idaho Supreme Court described the law of the case as follows:

> [U]pon appeal, the Supreme Court in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement

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[62] Complaint and Demand for Jury Trial, *Ronald Ryan and Lanie Berrett v. Clark County School District No. 161*, Jefferson County case no. CV-17-0328 (filed May 9, 2017) (hereinafter "Complaint"), at Ex. A.
[63] *Sun Valley Ranches, Inc.*, 124 Idaho at 129, 856 P.2d at 1297.
[64] *Id. (quoting Frazier v. Nellsen,* 118 Idaho 104, 106, 794 P.2d 1160, 1162 (Idaho Ct. App. 1990) (internal citations omitted) (emphasis added).

> becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal . . . .[65]

The Idaho Supreme Court has pointed out other language in *Creem v. Northwestern Mut. Fire Ass'n. of Seattle, Wash.* which describes the law of the case doctrine this way:

> Where a judgment is reversed and the case is remanded to the trial court "for a new trial," the case comes on for the same, in all respects, as if it had never been tried, subject to this condition, however, that it must be tried in light of and in consonance with the rules of law as announced by the appellate court in *that particular case.*[66]

This case is substantially different from the one filed in federal court and does not meet the standards relied upon by the Idaho Supreme Court in *Swanson* or *Creem.* The original Complaint and Demand for Jury Trial was filed in the United States District Court for the District of Idaho in December 2012 and assigned case number 4:12-CV-0626-EJL. The Federal District Court then granted summary judgment for the Defendants on all claims. Plaintiffs appealed the case to the Ninth Circuit Court of Appeals, which affirmed the district court in part but remanded the case back on Ryan's "whistleblower claim" and on Lanie's "public policy claim." Upon remand, the Federal District Court granted the Defendant's Motion for the Court to Decline Jurisdiction and dismissed Plaintiffs' state law claims without prejudice.[67]

Plaintiffs' then filed their claims *anew*, incorporating their same federal Complaint and Demand for Jury Trial when they filed their case in Jefferson County. This new case was filed in a separate jurisdiction from Plaintiffs' earlier case, and was assigned a new case number (Jefferson County case no. CV-2017-0328). Although Plaintiffs assert that the case filed in Jefferson County is the *same case*, it is not. As quoted above, the Idaho Supreme Court has

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[65] 134 Idaho 512, 515, 5 P.3d 973, 976 (2000) (quoting *Suitts v. First Sec. Bank of Idaho,* 110 Idaho 15, 21, 713 P.2d 1374, 1380 (1985)).
[66] *Creem v. Northwestern Mut. Fire Ass'n of Seattle, Wash.*, 58 Idaho 349, __, 74 P.2d 702, 703 (1937).
[67] Complaint, at Ex. B.

previously announced that the law of the case only applies "in that particular case."[68] Based on the Court's reasoning and analysis the two cases are different and separate. Therefore, the law of the case does not apply.

Despite Plaintiffs' arguments to the contrary, there are additional reasons why the law of the case does not apply. First, state district courts are not required to treat federal district or federal circuit court decisions or interpretations of Idaho law as binding.[69] Second, the facts in the case before the Court are not the same as those in the federal case.

As stated, state district courts are not required to treat federal district or federal circuit court decisions or interpretations of Idaho law as binding.[70] This even applies to "issues of federal law."[71] Certainly, Idaho courts may treat Federal district and circuit court decisions as persuasive, but they are not required to do so.[72]

In its Order and Opinion on Cross Motions for Summary Judgment the Court relied on this holding as announced by *State v. McNeely,* 162 Idaho 413, 398 P.3d 146 (2017). In Plaintiffs' Motion to Reconsider, Plaintiffs attacked the Court's reliance on *McNeely* by arguing that the question before this Court, in this case, is entirely different from the question presented in McNeely (i.e. "must this Court follow decisions by the Ninth Circuit in this exact case").[73] The fatal flaw in Plaintiffs argument is, as reasoned above, the case now pending is not the exact case that was before the Ninth Circuit Court of Appeals. Even if this were the *exact same case,* the Court still believes the holding in *McNeely* is relevant and dispositive.

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[68] *Creem v. Northwestern Mut. Fire Ass'n of Seattle, Wash.,* 58 Idaho 349, __, 74 P.2d 702, 703 (1937).
[69] *See State v. McNeely,* 162 Idaho at __, 398 P.3d at 149 (finding error where state district court felt compelled to follow a directive or pronouncement of the Ninth Circuit).
[70] *Id.*
[71] *Id. (quoting Dan Wiebold Ford, Inc. v. Universal Computer Services, Inc.,* 142 Idaho 235, 240, 127 P.3d 138, 143 (2005)).
[72] *McNeely,* 162 Idaho at __, 398 P.3d at 149 (Idaho 2017).
[73] Motion to Reconsider, *Ronald Ryan Berrett and Lanie Berrett v. Clark County School District No. 161,* Jefferson County case no. CV-17-0328 (filed November 28, 2017) (Hereinafter "Motion"), at p.4.

Notwithstanding, the Court wishes to supplements it prior reasoning and analysis by relying on the Idaho Supreme Court's decision in *English v. Taylor,* 160 Idaho 737, 742, 378 P.3d 1036, 1041 (2016). In *English,* the plaintiffs filed their complaint in the Bonneville County district court.[74] The case was then removed to federal court based diversity of citizenship.[75] Later, the Englishes "filed a motion for leave to file a second amended complaint . . ." on December 10, 2013, and sought to add two new defendants, Eastern Idaho Regional Medical Center and Dr. James Taylor.[76] The Englishes did not serve copies of their motion or the second amended complaint on either of the new defendants at that time.[77] The motion was granted and the Second Amended Complaint was filed on January 16, 2014.[78] "[T]he filing of the Second Amended Complaint destroyed diversity and deprived the federal district court of subject matter jurisdiction."[79] After the Englishes filed their Second Amended Complaint in federal court, the parties stipulated to remand the case back to state district court.[80]

On January 24, 2014, after the case was remanded back to the state district court, the plaintiffs filed their second amended complaint in the Bonneville County district court, and served the two new defendants.[81]

> On March 4, 2014, the Englishes filed an ex parte Rule 60 Motion to Clarify Docket entry order with the federal district court, seeking clarification that the order granting their motion to file the second amended complaint related back to the date on which the Englishes filed their motion for leave to file the Second Amended Complaint. The motion stated that the purpose would be to clarify "that the Complaint was filed on December 10, 2013, instead of some other date."[82]

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[74] *English v. Taylor,* 160 Idaho 737, 739, 378 P.3d 1036, 1038 (2016).
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*

The federal district court entered a clarifying order on the Englishes motion to amend, stating, "The Court hereby clarifies that Plaintiffs' Second Amended Complaint was effectively filed on December 10, 2013 . . . ."[83]

Subsequently, the new defendants filed motions for "summary judgment on grounds that the statute of limitations had expired" and the district court granted the motions, concluding "the Englishes did not commence the actions against Respondents until after the statute of limitations had expired."[84] The Englishes appealed. On appeal before the Idaho Supreme Court the Englishes argued that the federal district court's clarifying order (i.e. the second amended complaint was effectively filed December 10, 2013) was dispositive. The Idaho Supreme Court noted that this argument had waived on appeal but addressed the claim anyways by stating, "Even if the Englishes had not waived the argument, it is well established that 'the decisions of lower federal courts are not binding on state courts, even on issues of federal law.' Therefore, the federal district court's order of clarification is not binding on this Court."[85]

As stated, the Court also recognizes that the facts in the federal case and the state case are not *substantially the same.* Although Plaintiffs' filed the exact same affidavits that were filed in federal court, along with copies of the Defendant's affidavits from federal court, the Defendant has filed new affidavits. These affidavits offer facts not before the federal district court or the Ninth Circuit Court of Appeals. Specifically, these affidavits state that the District was aware of the propane leak in January and recognized it was a building code violation; even though it was

[83] *Id.*
[84] *Id.*
[85] *Id.* (internal citations omitted). Although it was a decision made by the federal district court and not the Ninth Circuit that was at issue in ***English***, this was not the case in *McNeely.* At issue in *McNeely* was a pronouncement by the Ninth Circuit Court of Appeals. The Idaho Supreme Court concluded that decisions of the Ninth Circuit Court of Appeals may be treated as persuasive but are not binding on Idaho's state courts. *McNeely,* 162 Idaho at __, 398 P.3d at 148-49.

unable to isolate the cause or source of the leak.[86] Therefore, based on the prior reasoning and analysis, the Ninth Circuit's decision in the Berrett's former case is not binding on this court, in this new case.

2. Disputed and Undisputed Facts

Plaintiffs have asserted multiple errors in the Court's findings of fact in its Opinion and Order on the Parties' Cross Motion for Summary Judgment. Specifically, Plaintiffs' assert the Court failed to recognize facts that support their position and that the Court did not *liberally construe* the facts in the light most favorable to them. Examples of the asserted errors are provided below:

> First, Ryan's [*sic*] was hired as a person on disability. When he was hired, he told Kerns that he could not do the physical work required, but that he would call professionals to do the work. He was not responsible for the propane, heating and furnace system. Due to the smell, he called propane companies to check the system. Second, all of the affidavits state that until March, [*sic*] 2012, no one could find a leak in the propane system. No one knew there was a leak in the propane system. They only knew of a smell. Third, at the May, [*sic*] 2012 meeting Ryan testified against Kerns along with two propane professionals, and Kerns was a [*sic*] fired as a result. Fourth, Ryan never swore at Kerns and never called him a "fucking asshole", [*sic*] but Kerns used foul language towards Ryan and Lanie on multiple occasions. Fifth, Kerns fired the Berretts without the school board's knowledge. Only after they were fired, did the Berretts and Kerns go before the school board to discuss the termination. Sixth, Ryan Berrett always received positive performance reviews. The first time anyone complained about his performance was the statement in his termination letter that he was a doing a poor job in his maintenance duties.[87]

Further, Ryan asserts that he engaged in a protected activity under the Idaho Whistleblower Act and the evidence shows the propane issue was not known to the District. Meanwhile, Lanie asserts that the Court erred because she "never exceeded her lunch room budget in any year" and that her employment evaluations were positive and she did not fail to

[86] Woods Affidavit, at p. 3; Kerns Affidavit, at p.2; Haight-Mortensen Affidavit, at p.3.
[87] Motion, at p.7.

submit the state-required forms mentioned above. Each of these is discussed in greater detail below.

a. Ryan's Job Responsibilities

In his Motion to Reconsider Ryan asserts that he was hired as a person on disability. The issue of Ryan's disability was not before the Court at summary judgment. Because it was not before the Court at summary judgment, it is immaterial to the Court's analysis of Plaintiffs' Motion to Reconsider.

In addition to claiming he was hired as a person on disability, Ryan asserts, for the first time in his Motion to Reconsider, he was not responsible for the propane, heating, or furnace systems. However, based on the following analysis, the Court cannot reasonably infer that Ryan's responsibilities as maintenance supervisor did not include the furnace and propane systems; or that he was not tasked with resolving the propane issue.

The Court's conclusion is supported by various statements from Ryan's own affidavit. First, Ryan writes, "I had been doing the best I could with my disability to maintain and fix furnaces, water heaters, and plumbing issues by myself."[88] Whether these were part of his job duties upon hiring or whether he acquired these duties later by assignment or his own initiative, it was asserted by Plaintiffs that Ryan undertook to fix these systems.[89]

Ryan also described how he became of aware of the propane problem in his own affidavit, indicating that in January 2012 he began "getting calls every other day about [*sic*] strong odor of propane in the old gymnasium from [the District's] business manager (Gayle Woods) . . . ."[90] He also wrote that he "Had High Planes Propane come over to check for propane smell [*sic*]." He told Dave Kerns, "[He] was going to have Sermon Service and Electric come out

[88] Wessel Affidavit, at attachment p.311.
[89] Wessel Affidavit, at attachment p.311.
[90] Wessel Affidavit, at attachment p.311.

and [he] was going to lock the old gym up."[91] Over a period of several months Ryan continued, with the assistance of Sermon Electric, to work on solving the problem(s) with the propane system. Once Sermon Electric had prepared a price quote for the needed repairs, Ryan was the person who received this quote and shared it with Dave Kerns.[92] Ryan also provided regular reports on the work he was doing with the propane and heating systems in District meetings and in letters written to the school board.[93] Later, Ryan also reported on the problem(s) with the propane system at Board meeting in May.[94]

All of these facts support the Court's conclusion because in the absence of some responsibility for the furnace, heating, and propane systems, it is difficult for the Court to understand why Ryan would have been involved in fixing the problem the way he was. There is no evidence before the Court that Ryan ever disputed or objected to his responsibility for the propane and heating systems prior to the objection in Plaintiffs' Motion to Reconsider. Therefore, based on the prior reasoning and analysis, the Court cannot reasonably infer that Ryan was not the person responsible for maintaining and fixing the furnace and propane systems.

b. Affidavits

Ryan has argued that the Court erred in granting summary judgment for the District because "[A]ll the affidavits state that until March, [*sic*] 2012, no one could find a leak in the propane system. No one knew there was a leak in the propane system. They only knew of a smell." Even drawing reasonable inferences in Ryan's favor, and assuming the actual source, location, or cause of the propane leak was undiscovered until March 2012, the Court disagrees with Ryan's assertions.

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[91] Wessel Affidavit, at attachment p.311.
[92] Wessel Affidavit, at attachment p.312.
[93] Woods Affidavit, at Ex. A.
[94] Wessel Affidavit, at attachment p.314.

As mentioned above, Ryan began getting regular calls about a propane odor in the old gymnasium as early as January 2012. The Court cannot reasonably infer that the odor of propane in a room or building does not indicate the existence of a leak. Furthermore, when the Plaintiffs filed their claims in state court, the District provided affidavits from Gayle Woods, Dave Kerns, and Erin Haight-Mortensen. These affidavits each contain a similar statement which indicates the District was "aware that the leak in the propane system was a building code violation."[95] As the affidavits point out, the exact cause of the odor or the leak was unknown but it is evident everyone involved knew it was a problem and they were actively working to solve it. Solving the problem was difficult because the source or cause of the propane smell, or leak, could not be isolated.

Plaintiffs dispute these affidavits by arguing they contradict the affidavits filed by the District in the federal case. However, the Court cannot reasonably infer that the new affidavits contradict the earlier affidavits that were filed in federal court. The new affidavits emphasize the difficulty in isolating the problem and indicate that Gayle Woods, Dave Kerns, and Erin Haight-Mortensen recognized the smell represented a building code violation that needed to be located and corrected. Information that was not provided within the affidavits filed in the federal case.

Plaintiffs also rely upon deposition testimony in which Dave Kerns admits that he was unaware that the propane leak was a safety issue or that the propane tanks were not in compliance with building code or that he was unconcerned that the leak posed a safety threat. Neither of these are material. As stated in the affidavits, the District was already aware that a building code violation existed somewhere in the system and it was working to isolate it. Because the District already knew about the violation and was working to isolate it, the mere fact

[95] Woods Affidavit, at p.3; Kerns Affidavit, at p.2; Haight-Mortensen Affidavit, at p.3.

that Ryan (with help from Sermon Electric) may have been the person who isolated the source of the problem and reported it does not qualify him for protection under the Act.

As to the safety concerns regarding the propane leaks, which were pointed out by Plaintiffs in their motion to reconsider, this claim is immaterial. The Idaho Whistleblower Act affords protection to employees who "[communicate] in good faith the existence of any waste of public funds, property or manpower, or a violation or suspected violation of a law, rule or regulation adopted under the law of this state, a political subdivision of this state or the United States."[96] Although the Court recognizes that a "safety" issue may be a result or concern of the reported "violation of a law, rule or regulation", the statute's focus is on violations of law, rules, or regulations. Protection under the act is triggered when an employee reports a "violation of a law, rule or regulation" not a "safety" issue.[97] Therefore, it is immaterial whether Mr. Kerns recognized the propane problem as a safety concern for purposes of the Act.

c. May 2012 School Board Meeting

As the Court discussed above, Ryan was called upon to discuss the propane issue at the May 2012 school board meeting. Ryan asserts that "According to school board member Sherri Mead . . . the school board terminated Kerns based upon [Ryan's] testimony."[98] Ryan points this out his affidavit and has provided a note written his calendar (attached to his affidavit as Exhibit B). However, as presented, this assertion is hearsay. It is an out-of-court statement that does not fall within any of the recognized exceptions pursuant to the Idaho Rules of Evidence.

Plaintiffs argue that Ms. Mead's statement is not hearsay under Idaho Rule of Evidence 801(d)(2) because it is an admission of a party opponent. This is incorrect. Idaho Rule of Evidence 801(d)(2) requires more than just a statement, the statement must be

[96] Idaho Code § 6-2103(1)(a).
[97] *Id.*
[98] Motion, at p.10.

> [T]he party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by a party to make a statement concerning the subject, or (D) a statement by a party's agent or servant concerning a matter within the scope of the agency or employment of the servant or agent, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.[99]

Plaintiffs have proffered nothing that indicates Sherri Mead was speaking as the District's representative, that the District manifested agreeance or adopted her statement as truth; or that Ms. Mead was authorized to make the statement, was acting within the scope of her agency or employment, or was a co-conspirator. Therefore, the Court cannot conclude that Ms. Mead's statement regarding Dave Kern's termination is anything but inadmissible hearsay.

The Court has previously stated that Plaintiffs must provide more than a mere scintilla of evidence to make an issue of fact, on the issue of Mr. Kerns' departure or termination they have not done so.[100] Even if the statement proffered by Plaintiffs was not hearsay, or Plaintiffs had obtained an affidavit from Sherri Mead or taken her deposition these would have little bearing on the issues presented in this case. Ryan has never asserted that he was fired because Mr. Kerns was fired. In his complaint, Ryan did not assert that it was Mr. Kerns who fired him, wrongfully or otherwise. Plaintiffs' complaint states, in relevant part:

> On June 30, 2012, [the District] terminated Plaintiffs' employment. The reason which [the District] gave for plaintiffs' termination was a pretext. The true reason and a motivating reason for plaintiffs' terminations was that Plaintiff Ronald Ryan Berrett communicated to the District, in good faith, a violation of a law, rule or regulation which had been adopted under the law of the state of Idaho.[101]

Therefore, whether Sherri Mead told Ryan that Mr. Kerns was terminated based on something Ryan stated at the Board meeting is immaterial to the Court's analysis.

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[99] Idaho Rules of Evidence 801(d)(2).
[100] *Van*, 147 Idaho at 556, 212 P.3d at 986.
[101] Complaint, at Ex. C.

d. Foul Language

In its Opinion and Order on the Parties' Cross-Motions for Summary Judgment the Court found that Ryan Berrett referred to Dave Kerns as a "fucking asshole" when confronted regarding the Facebook post. Upon reconsideration, this finding was in error; however, it is immaterial to the Court's analysis and does not change the outcome of the Court's decision at summary judgment or upon reconsideration.

e. School Board's Knowledge of Ryan and Lanie's Termination

Plaintiffs have asserted that Dave Kerns terminated their employment without the school board's knowledge. This is a conclusory assertion raised by the plaintiffs in their Motion to Reconsider. Beyond the conclusory statements made in their Motion to Reconsider, Plaintiffs have not pointed to any place in the record or their affidavits or anywhere else that supports their conclusions. In other words, they have not provided a scintilla of evidence that makes this a disputed fact.[102]

Meanwhile, the District has supplied the affidavits of Dave Kerns and Erin Haight-Mortensen. Mr. Kerns' affidavit states, in relevant part:

> Mr. Berrett's termination had nothing to do with the propane issue. The Distict decided to terminate Mr. Berrett following his insubordination and verbal abuse directed toward me. In approximately late May or early June, 2012, I was contacted by Erin Haight-Mortensen who had seen a derogatory Facebook post about me. Ms. Haight-Mortensen provided me with a copy of the Facebook post and I placed it in Mr. Berrett's personnel file. It is my understanding that students and parents saw the post and that some students had commented on the post. The Facebook post was inappropriate and a violation of District Policy.
> . . .
> At the next meeting with the School Board, I discussed the Facebook post with board members and it was determined that because Mr. Berrett was an at-will employee that termination was appropriate.[103]

[102] *Van*, 147 Idaho at 556, 212 P.3d at 986.
[103] Kerns Affidavit, at p.5.

With regard to Lanie's termination, Mr. Kerns wrote, Because of the repeated inability to efficiently run the kitchen, *the District* made the decision to terminate Ms. Berrett." [104]

Regarding the Berretts' termination, Ms. Haight-Mortensen stated, "I was involved in the decision to terminate Mr. Berrett's employment and can attest that his termination had nothing to do with the propane issue. The District decided to terminate Mr. Berrett following Mr. Barrett's insubordination and verbal abuse directed towards Mr. Kerns."[105] Ms. Haight-Mortensen also wrote Lanie's employment was terminated because of her inability to manage the kitchen and remain within her budget.[106]

Even if Mr. Kerns had terminated Lanie and Ryan without the school board's approval, he had the authority to do so. Ms. Haight-Mortensen indicated that, "Because Mr. Kerns was the interim Superintendent, he had authority to terminate Mr. Berrett. He likewise had authority to terminate Ms. Berrett."[107] The Court notes that being fired or terminated without the approval of the school board is not the basis for the Berretts' claims. Nor have Plaintiffs cited a proposition of law that would support such a position.

Instead, Plaintiffs claim they were fired in retaliation for Ryan "blowing the whistle" on the problems with the District's propane system, and that their terminations violated Idaho law and public policy. However, based on the Court's reasoning and analysis in other sections of this opinion, the Court cannot reasonably infer either of the Berretts qualify for protection under the Act. Because the Berretts do not qualify for protection under the Act, the Court cannot reasonably infer their terminations with, or without, the Board's approval were wrongful. Even if the Board's approval was required, Ryan and Lanie have not provided any evidence to support

[104] Kerns Affidavit, at p.6.
[105] Haight-Mortensen Affidavit, at p.5.
[106] Haight-Mortensen Affidavit, at p.6-7.
[107] Haight-Mortensen Affidavit, at p.6.

an inference that the Board lacked knowledge of the terminations. Therefore, the Court may not reasonably infer that their terminations were done without the Board's knowledge. In the absence of disputed facts, the Court concludes that its decision at summary judgment was appropriate.

f. Performance Reviews

Plaintiffs assert the Court's error by arguing "Ryan always received positive performance reviews. The first time anyone complained about his performance was the statement in his termination letter that he was doing a poor job in his maintenance duties."[108] In his affidavit he wrote, "Despite my experience and my always stellar performance evaluations, they denied me requested reasonable accommodations and eventually fired me."[109] These statements are conclusory and are insufficient to create an issue of material fact. Rather, this statement is commentary on the evidence but it is not evidence. The court assumes the fact that he received stellar performance reviews for purposes of summary judgment, notwithstanding the facts presented by the record.

The Court notes the inspection reports provided by the District which mention the discovery of numerous maintenance violations. At summary judgment the Court recognized these stating, "Only a few months before [Ryan's] discharge, the School District's facilities were inspected and numerous maintenance violations were discovered. In fact, some of these violations had been noted in the previous two or three inspections and still remained unresolved."[110] Plaintiffs did not dispute that these violations occurred at summary judgment and has not done so in their Motion to Reconsider. They only assert a lack of complaints regarding his job performance prior to his termination.

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[108] Motion, at p.7.
[109] Wessel Affidavit, at attachment p.315.
[110] Woods Affidavit, at Ex. A.

Nonetheless, the Court sets aside the maintenance violations previously relied upon and assumes, for purposes of summary judgment, that Ryan "always" received superb performance reviews. In light of this assumption, the Court's conclusion remains unchanged. As stated in the termination letter provided to Ryan, his employment was terminated because he was "insubordinate and verbally abusive to the District administration and . . . ridiculed personnel through social media on the internet."[111] Ryan does not dispute that he did so and has provided a copy of the message he posted as an exhibit to his affidavit.[112] This reasoning for his termination is independent of the propane issue and independent of his job performance. The Court recognizes that even if Ryan always received stellar performance reviews and had never posted his grievances or frustrations on social media, this would not preclude his termination because he was an at-will employee.[113] Ryan has not disputed this.

Idaho law is very clear regarding at-will employees: "Unless an employee is hired pursuant to a contract which specifies the duration of the employment or limits the reasons why an employee may be discharged, *the employee is at-will and can be terminated for any reason or no reason at all.*"[114] Absent the application of an exception to this general rule, the District did not need to provide a reason for Ryan's termination. As the Court found at summary judgment, and reiterates below, the Court cannot reasonably infer that Ryan qualified for protection under the Idaho Whistleblower Act. Therefore, as an at-will employee his termination was not wrongful.

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[111] Kerns Affidavit, at Ex. A.
[112] Wessel Affidavit, at attachment p.315, 323-24.
[113] Haight-Mortensen Affidavit, at p.5-6.
[114] *Edmondson v. Shearer Lumber Products,* 139 Idaho 172, 179, 75 P.3d 733, 740 (2003) (emphasis added).

g. Lanie's Lunchroom Budget

Plaintiffs dispute that Lanie ever exceeded her budget; meanwhile, the District asserts that Lanie exceeded her budget in multiple years. Plaintiffs point to Lanie's affidavit and attached exhibits to support her assertion. In her affidavit Lanie wrote, "In 2009, when I took over as lunchroom supervisor, I stayed within budget."[115] She also wrote, "[A]though we may have overspent the budget in a given month, I did not overspend the Food Service budget in any given year."[116]

Additionally, Lanie has provided to the "Child Nutrition Financial Report" as "Exhibit A" to her affidavit. Although the Child Nutrition Financial Report shows a balanced food services budget for the 2009 fiscal year, the data is inconclusive. First, Lanie did not become the Food Service Supervisor until May 2009 and it is unclear what time period this report covers.[117] Second, she has not provided the reports for the remaining years of her tenure as Food Service Supervisor. Lanie was the Food Service Supervisor from May 2009 until June 2012.[118] Despite asserting that she never exceeded her allotted budget, she has failed to provide evidence for 2010, 2011, and 2012.[119]

In direct contradiction of the assertions in her affidavit, Lanie admitted to overspending her budget when Defendant's counsel asked about it during her deposition:

> **Q.** In the second line it says that you have consistently overspent the food service budget each year, with the amount increasing each time. That's a true statement?
> **A.** Yes, sir, it is.
> . . .
> **Q.** You don't dispute that you overspent the food service budget each year, correct?

[115] Wessel Affidavit, at attachment p.329.
[116] Wessel Affidavit, at attachment p.330.
[117] Wessel Affidavit, at attachment p.330.
[118] Wessel Affidavit, at attachment p.330.
[119] The Court also notes that the District has failed to produce reports for these years, although overage figures were provided in the Affidavit of Gayle Woods.

A. No, I don't.[120]

Plaintiffs have not attempted to reconcile the conflicting statements in Lanie's affidavit with her deposition testimony. Nor have they done so in their Motion to Reconsider and did not do so when asked by the Court at oral argument. However, this is immaterial to the Court's analysis.

Even assuming Lanie never exceeded her budget, she was an at-will employee.[121] Plaintiffs have not disputed this fact. As the Court recognized above, "Unless an employee is hired pursuant to a contract which specifies the duration of the employment or limits the reasons why an employee may be discharged, *the employee is at-will and can be terminated for any reason or no reason at all.*"[122] Because Lanie was an at-will employee the District could fire Lanie for "any reason or no reason at all." Plaintiffs do not assert that Lanie engaged in any activity that would protect her from termination or limit the District's ability to terminate her employment. Instead, she asserts protection as a matter of public policy because of her husband's activities. However, as the Court found at summary judgment, and reiterates below, Ryan, did not qualify for protection under the Idaho Whistleblower Act. Therefore, even if the Act, or *Idaho public policy*, provided an exception for the spouse of a whistleblower, the Court cannot reasonably infer that Lanie's termination was wrongful because she was an at-will employee and because her husband did not engage in protected activity.

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[120] Affidavit of Blake G. Hall, *Ronald Ryan Berrett and Lanie Berrett v. Clark County School District No. 161*, Jefferson County case no. CV-17-0328 (filed August 31, 2017) (hereinafter "Hall Affidavit"), at Ex. B, p.70:13 – p.71:20.
[121] Kerns Affidavity, at Ex. B.
[122] *Edmondson*, 139 Idaho at 179, 75 P.3d at 740 (emphasis added).

h. Lanie's Performance Evaluations

Like Ryan, Lanie asserts that she "always received positive performance evaluations" and only a few weeks before her termination "had received a positive performance evaluation and an offer of a raise."[123] As discussed above, it is undisputed that Lanie was an at-will employee.

"Unless an employee is hired pursuant to a contract which specifies the duration of the employment or limits the reasons why an employee may be discharged, *the employee is at-will and can be terminated for any reason or no reason at all.*"[124] Therefore, the District could fire Lanie for "any reason or no reason at all." Based on the Court's analysis at summary judgment and in other sections of this opinion, Lanie does not qualify for protection from this rule. Therefore, the Court cannot reasonably infer that Lanie's termination was wrongful.

i. Required Forms

At summary judgment the Court recognized that Lanie failed to submit several state-required forms during her tenure as lunch room supervisor. The Court reasoned that this was part the District's reasoning for firing her. Despite asserting her always positive performance evaluations, Lanie never directly disputes her failure to submit these forms. However, even if Lanie did not properly submit the forms, it is immaterial to the Court's additional analysis.

As stated, Lanie was an at-will employee. Under Idaho law, an at-will employee may "be terminated for any reason or no reason at all" absent some exception.[125] The Court has previously determined that Lanie did not qualify for protected status. Therefore, as an at-will employee, her termination was not wrongful.

[123] Wessel Affidavit, at attachment p.330.
[124] *Edmondson,* 139 Idaho at 179, 75 P.3d at 740 (emphasis added).
[125] *Id.* (emphasis added).

3. The Berretts are not entitled to protection under the Idaho Whistleblower Act, or Idaho Public Policy.

In light of the Court's additional reasoning and analysis regarding the disputed and undisputed facts in this case, the Court reevaluates the Berretts' claims for protection under the Idaho Whistleblower Act and Idaho public policy. After additional analysis, the Court concludes that its decision to grant summary judgment in favor of the District was appropriate. The Court will evaluate each plaintiff's claims for protection individually, beginning with Ryan's.

a. Ryan

The Act affords "a legal cause of action for public employees who experience adverse action from their employer as a result of reporting waste and violations of a law, rule or regulation."[126] Protection under the Act is afforded to any employee that "communicates in good faith the existence of any waste of public funds, property or manpower, or a violation or suspected violation of a law . . . under the law of this state or the United States."[127] Therefore, more narrowly stated, the issue is whether Ryan reported a violation or suspected violation of a law, entitling him to protection under the Act.

Ryan claims that he reported a violation of the law because he reported on the District's problem(s) with the propane system. He claims he was discharged in retaliation for making these reports. In response to Ryan's claims, the District argues the discharge was not retaliatory and has motioned for summary judgment. In order to survive summary judgment, the Berretts carry "the burden of presenting evidence from which a rational inference of retaliatory discharge under

[126] Idaho Code § 6-2101.
[127] Idaho Code § 6-2104(1).

the whistleblower act [can] be drawn."[128] In other words, they must present "a prima facie case of retaliatory discharge . . . ."[129]

A prima facie case for retaliatory discharge consists of three elements. To survive summary judgment the Berretts must establish: (1) Ryan was an employee of the District and "engaged or intended to engage in protected activity;" (2) the District "took adverse action against" him; and (3) there is "a causal connection between the protected activity" and the adverse action taken by the District.[130] These three elements will be discussed in sequence below.

i. Ryan Berrett did not engage, or intend to engage, in protected activity.

It is undisputed that Ryan was an employee of the District. Therefore, in order to satisfy this first element, Ryan only needs to establish that he engaged in, or intended to engage in, a protected activity.[131] Based on the Court's analysis, it cannot reasonably infer that Ryan engaged in any protected activity.

There is very little precedent that may be used to define the scope of "protected activities" contemplated under Idaho law. However, as the Act states, it applies to good faith communications of "the existence of any waste of public funds, property or manpower, or a *violation or suspected violation of a law, rule or regulation adopted under the law of this state, a political subdivision of this state* or the United States."[132]

In this case, Ryan claims that he reported a building code violation and that the report(s) he made became the catalyst for his termination. As the following analysis illustrates, the alleged

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[128] *Curlee v. Kootenai County Fire & Rescue,* 148 Idaho 391, 396, 224 P.3d 458, 463 (Idaho 2008).
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] Idaho Code § 6-2103(1)(a).

reports Ryan made do not fall within the range of "protected activities" contemplated by the Act. Ample evidence indicates the propane odor in the old gymnasium was well known to the District in January 2012. It was reported to Ms. Woods, the District's business manager by several staff members.[133] In turn, Ms. Woods called Ryan to inform him of the problem.[134] Ms. Woods also reported the issue to Mr. Kerns, the District's superintendent.[135] Mr. Kerns reported the issue to the chairwoman of the Board, Ms. Haight-Mortensen.[136]

As the District's maintenance supervisor, responsibility fell to Ryan, or he was assigned, to identify the problem and fix it.[137] The Court cannot reasonably infer otherwise. In February, after becoming aware of the problem, Mr. Berrett made his first report in his monthly letter to the Board. Here, the Court again points out it cannot reasonably infer the issue had not already been reported to the Board by Mr. Kerns and was not already well known throughout the District and the administration.[138]

In his March letter, Ryan reported on the issue again. This time he described the work he had done to identify and fix the problem. He also informed the Board, "I am waiting for a bid from sermon [*sic*] to correct this problem, when I receive it I will give it to MR. KERNS [*sic*] and we will go from there."[139] Ryan claims he later received the bid from Sermon Electric, showed it to Mr. Kerns, and was told to "keep quiet." Mr. Kerns disputes that he ever told Ryan to "keep quiet."

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[133] Woods Affidavit, at p.3
[134] Wessel Affidavit, at attachment p.311.
[135] Kerns Affidavit, at p.2.
[136] Haight-Mortensen Affidavit, at p.2.
[137] In Plaintiffs' Motion to Reconsider, Ryan disputed his responsibility for the propane system but as the Court's earlier analysis shows: there is no genuine dispute of fact. It is clear that Ryan was tasked with solving the problem the propane system.
[138] Woods Affidavit, at p. 3; Kerns Affidavit, at p.2; Haight-Mortensen Affidavit, at p.3.
[139] Woods Affidavit, at Ex. A, p.28.

Although this allegation is suspicious, it is of little consequence. Even if Ryan was told to "keep quiet," the Court cannot reasonably infer there was anything to keep quiet about. The school board was already aware of the propane leak. Mr. Kerns had already informed the school board's chairwoman, Erin Haight-Mortensen, and Ryan had already begun reporting the problem in his letters to the Board. He had already told the Board that Sermon Electric was preparing a price quote for the needed repairs.[140] Based on the affidavits and other evidence supplied, the Court cannot reasonably infer that the propane issue was not already known to the District. Nor can the Court reasonably infer that the leak was not known to be a building code violation *before* this particular conversation between Ryan and Mr. Kerns occurred.

This is also supported by additional evidence. As early as February, a technician from Sermon Electric began making service calls to the school and was assisting Ryan in resolving the propane leak.[141] Ryan reported this in his February letter to the Board. Ryan also enlisted the aid of High Planes Propane.[142] It is apparent the School Board knew of this involvement because "it approved payment for each of the service calls."[143]

It is beyond believable that an employee could be charged with solving a problem (even a building code or safety violation), provide regular progress reports to his employer, discuss the viability of proposed solutions with superiors, and then, after being fired, use those same activities to substantiate claim of retaliatory discharge. This is especially true when the employee was charged with fixing a problem already known to the employer.

Certainly, the statute offers protection to employees who report "*a violation or suspected violation of a law*" and it is undisputed that the propane leak was a violation of law; however,

[140] Woods Affidavit, at Ex. A, p.28
[141] Wessel Affidavit, at attachment p.311-12.
[142] Wessel Affidavit, at attachment p.311.
[143] Woods Affidavit, at p.3.

there was nothing to report for purposes of the Act because the District already knew about the problem and was working to fix it. Therefore, Ryan has failed to establish that any of the actions described above constituted protected activity.

The Court now looks to Ryan's other actions to determine whether any of these reasonably constituted protected activity. First, Ryan claims he appeared at the May 17 school board meeting to testify against Mr. Kerns.[144] The notes from the meeting shed a different light on his participation. The notes indicate Ryan reported that "the propane issues are still a problem."[145] From the District's perspective Ryan's participation appears to have been nothing more than another progress report on the problem he had been tasked with resolving.

Ryan asserts that he and two others "were called before the Board and asked one at a time if [they] thought that the Superintendent knew that the propane problem could possibly cause injury to human life." The court for Summary Judgment assumes this to be true. Regardless, this statement supports the conclusion the District already knew about the propane problem and acknowledged it. Why else would the school board have "called" upon Ryan to discuss the issue at all?

All things considered and drawing reasonable inferences in favor of the Plaintiffs (the nonmoving party), the Court cannot reasonably infer that Ryan's participation in the school board meeting was protected activity. The District already knew about of the propane leak, Mr. Kerns had personally informed the Board of the issue four months before. Ryan had also been providing the Board with monthly reports on the issue. The Board had also approved payments for service calls made by Sermon Electric and High Planes Propane. Again, the Court is left to ponder, what else was there to report that might have constituted a protected activity? Even if

[144] Wessel Affidavit, at attachment p.314.
[145] Woods Affidavit, at Ex. A.

Ryan's assertions are true, even if he was called to testify about or against Mr. Kern at the school board meeting, what could he have said to qualify him for protection? Ryan does not claim he was terminated for testifying against Mr. Kerns. He claims he was fired for reporting on the propane issue, which was a violation of law.[146]

Lastly, the Court discusses the message Ryan posted to Facebook on or about June 18, 2012.[147] The posted message was critical of the District and its administration.[148] Although the message may have contained a cryptic reference to the propane problem, it more closely resembles an unfettered rant by a disgruntled employee.[149] It offers nothing that resembles a good faith report of "a violation or suspected violation of a law . . . ."[150] Therefore, the Court cannot reasonably infer that it constitutes protected activity.

Because the Court cannot reasonably infer that Ryan engaged in any protected activity, summary judgment in favor of the District was appropriate. Nevertheless, for the sake of inquiry, the Court continues its analysis of the two remaining elements: (1) adverse action against the employee, and (2) a causal connection between the protected activity and the adverse action.

b. The District took an adverse action against Ryan Berrett by terminating his employment.

The second element of a retaliatory discharge claim requires the employee to establish the employer took an adverse action against them. Based on the following analysis, the Court may reasonably infer the District took adverse action against Ryan. The evidence before the Court is that Mr. Berrett's employment was terminated. This fact is undisputed.

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[146] Complaint, Ex. C, at p.7-9.
[147] Wessel Affidavit, at attachment p.323-24.
[148] Wessel Affidavit, at attachment p.323-24.
[149] Wessel Affidavit, at attachment p.323-24.
[150] Idaho Code § 6-2104(1).

After Ryan posted the aforementioned rant on Facebook, Ms. Haight-Mortensen notified Mr. Kerns about the post and requested that he speak to Ryan about it. Mr. Kerns then discussed the Facebook post at the Board's next meeting. During the meeting it was decided that Mr. Berrett was an at-will employee and discharge was the appropriate sanction for his conduct. A termination letter was then drafted and delivered to Ryan. The letter, signed by Mr. Kerns, states in relevant part:

> You have been insubordinate and verbally abusive to the District administration and have ridiculed personnel through social media on the internet. Your performance in some duties has been declining as well with building maintenance and keeping lights replaced and in working order. Due to your status as an "at-will", or non-contractual employee, the District administration has decided to terminate your employment effective June 30th, 2012.[151]

The District does not dispute that this letter was delivered, or that Ryan's employment was terminated. Because it is undisputed his employment terminated, Ryan has established that the District took adverse action against him.

The Court notes that, for the first time at oral argument, on Plaintiffs' Motion to Reconsider, Plaintiffs asserted that the District took additional adverse action against them. Plaintiffs asserted that the District raised their rent and eventually evicted them from their District owned residence. The Court recognizes these as additional adverse actions and assumes them to be true, but the Court has already recognized that, for purposes of summary judgment, the District took adverse action against the Plaintiffs. Therefore, the prior related analysis and conclusion of the Court is unchanged by these new assertions and summary judgment in favor of the School District was still appropriate based on the Court's analysis of the two remaining elements.

[151] Kerns Affidavit, at Ex. B.

c. There is no causal connection between Ryan Berrett's alleged, protected activity and the adverse action taken by the District.

To survive summary judgment on a retaliatory discharge claim, Ryan must also establish a causal connection between his alleged, protected activity and the adverse action taken by the District. Because Ryan failed to establish that he engaged in a protected activity, there can be no causal connection to the adverse action taken by the District. Nevertheless, the Court continues its analysis of the final element for the sake of inquiry. Relevant to this inquiry is the 'Proximity in time between the protected activity and the adverse employment action . . . ."[152]

As stated, several of the District's other employees and administrators received reports of a propane odor in the gymnasium as early as January 2012. Over a period of several months, Ryan worked to resolve the issues and provided regular reports to Mr. Kerns and the Board. Multiple affidavits and their corresponding exhibits support these facts. It was not until approximately four or five months later, after multiple written and verbal reports were provided, that Ryan's employment was terminated. This is a significant amount of time, and the Court cannot reasonably infer that the adverse action taken against Ryan and the alleged protected activity are causally connected.

Beyond this, Ryan asserts that he attended the May 17 Board meeting and testified against Mr. Kerns. Then his employment was terminated roughly six weeks later. Although these two events occurred close in time, the temporal relation is immaterial because a claim that Ryan was terminated for testifying against Mr. Kerns is not before the Court. Therefore, the Court cannot reasonably infer that there a causal connection between the adverse action taken by the District and the activities Ryan claims were protected. This is especially true because the District

[152] *See Curlee,* 148 Idaho at 397, 224 P.3d at 464 (*quoting Heng v. Rotech Med.Corp.*, 688 N.W.2d 389, 401, (N.D. 2004)).

was already aware of the propane issue as early as January and Ryan had been providing regular reports on the problem months before his termination.

The Court notes that the Ninth Circuit Court concluded that Ryan's termination was sufficiently close in time to the alleged, protected activity to survive summary judgment. However, the facts now before the Court are different from the facts in the case heard by the Ninth Circuit Court of Appeals. The affidavits filed in this case make it clear the District was aware of the building code violation caused by the propane issue as early as January 2012. As the Court discussed above, many months passed since Ryan began working on and reporting on the propane issue and his termination. Based on this analysis, the Court cannot reasonably infer that the two events were close in time or causally connected. Therefore, In other words, the Court properly granted summary judgment in favor of the District and Plaintiffs' Motion to Reconsider should be denied as to the wrongful termination claim.

4. **As a matter of public policy, Lanie Berrett does not qualify for protection under the Act as the spouse of a whistleblower.**

As a matter of public policy, Lanie Berrett claims that she qualifies for protection from a retaliatory discharge as the spouse of a whistleblower. However, based on the Court's prior analysis, it cannot reasonably infer that Ryan Berrett failed to establish that he was a whistleblower under the Act or was the subject of a retaliatory discharge. Because Ryan does not qualify for protected status under the Act, Lanie cannot claim protection as his spouse. Even if Ryan had established a case retaliatory discharge, Lanie would still not be entitled to protection for two reasons. First, under established law, spouses of employees are unprotected by both the Act and public policy. Second, the Court cannot reasonably infer that her termination is causally connected to any protected activity.

a. Spouses of Employees are Unprotected

Spouses of employees who engage in protected activity are not protected under the Act or any related Idaho law or policy. The Idaho Whistleblower Act provides a "cause of action for public *employees* who experience adverse action from their employer as a result of reporting waste and violations of a law, rule or regulation."[153] Lanie Berrett asserts that as a matter of public policy, she is entitled to protection. However, the Court will not adopt this conclusion.

The language of the Act specifically allows relief for "employees." It makes no reference to, or allowance for, *spouses* of employees.[154] The Court is unwilling to read words into the statute that were not included by the legislature. Additionally, the Idaho Supreme Court has not previously extended protection to an employee's spouse as a matter of public policy and the Court is unwilling to do so now. "Even if a cause of action for damages should exist as relief for alleged retaliatory discharge in contravention of public policy based upon conduct of the employee's spouse . . . the dearth of evidence in this case fails . . ." to support a reasonable inference that Lanie's spouse was entitled to protection under the act, or that her termination was causally connected to any of his allegedly protected activities.[155]

Plaintiffs have argued that this Court should extend whistleblower protection to spouses of eligible employers. Plaintiffs have made valid arguments as to why this would be appropriate; however, in considering these arguments the Court notes that the whistleblower statute's latest version was enacted by the legislature in 1994. It is not a statute that is over fifty, or even one hundred, years old with a changing and evolving population. The court also notes the specific language of the statute says, "employee."

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[153] Idaho Code § 6-2101 (emphasis added).
[154] *See id.*
[155] *Edmondson,* 139 Idaho at 179, 75 P.3d at 740 (emphasis added).

This Court consistently applies statutes as written and it is not persuaded that this is a situation where an exception or an addition to the statute is appropriate as a matter of public policy. If the Idaho legislature desires to extend protection to spouses of employees under the whistleblower statute it may do so. This court is not persuaded that it should enlarge the protection already made available by the legislature. The Idaho legislature may do so if it believes such protection is appropriate.

b. Lanie's Termination is not Causally Connected

Even if relief were available based upon the conduct of an employee's spouse as a matter of public policy, summary judgment is still appropriate because Lanie has not established that her termination is causally connected to any protected activity (even the activity asserted by her husband). As discussed, the Berretts must establish a prima facie case of retaliatory discharge to survive summary judgment. [156] Such a claim requires three elements: (1) the employee engaged in a protected activity, (2) the employer took adverse action against the employee, and (3) the adverse action was causally connected to the protected activity.[157]

Lanie does not assert that she engaged in protected activity; rather, she relies on her husband's claim that he engaged in protected activity. The Court previously decided that it could not reasonably infer Ryan had engaged in protected activity. The Court emphasizes that even if he had, neither the act nor Idaho public policy extends protection to spouses of employees who engaged in protected activity.

The second element requires an adverse action against the employee. If the Act made allowance for spouses of employees, Lanie could establish this element. Her rent was increased, her employment was terminated, and she was evicted from her residence. Therefore, for purposes

[156] *Curlee*, 148 Idaho at 397, 224 P.3d at 464.
[157] *Id.*

of summary judgment, the Court may reasonably infer that adverse action was taken against Lanie.

However, the Court cannot reasonably infer Lanie qualifies for protection under the Act because her termination is causally connected to any protected activity. Lanie has not asserted that she engaged in any protected activity. Instead, she asserts that her termination is causally connected to her husband's activities.

As stated, "Proximity in time between the protected activity and the adverse employment action . . ." is relevant to determining whether the two are causally connected.[158] As discussed above, months passed between Lanie's termination and Ryan's allegedly protected activity. During this period, Ryan was constantly updating the school board on his progress. The Board also called on Ryan to discuss the propane issue at the May 17 Board meeting.[159] Based on this and the Court's analysis in other sections of this opinion, the Court cannot reasonably infer that Lanie's termination was causally connected to any protected activity. As a result, the Court cannot reasonably infer that Lanie's termination was in retaliation for any protected activity (either her own or her spouses). As a result, the Court properly granted summary judgment in favor of the District on Plaintiffs' claim for retaliatory discharge. Plaintiffs' Motion to Reconsider should be denied.

5. Remaining Claims

As to the remaining federal law claims, listed in the complaint, which were not addressed by the parties in the original Summary Judgment Motion and in the Courts prior Opinion and Order on Parties' Cross-Motion for Summary Judgment, the Court grants the Plaintiffs' Motion

[158] *See id.* (*quoting Heng v. Rotech Med.Corp.*, 688 N.W.2d 389, 401, (N.D. 2004)).
[159] This provides additional evidence that the District knew about and acknowledged the propane problem.

to Reconsider. As the Plaintiffs correctly point out, they should be allowed to address those issues through pleading and argument.

IV.
CONCLUSION

Based on the foregoing, the Court orders as follows:

1- Plaintiffs' Motion to Reconsider the decision on Plaintiffs' Whistleblower/Retaliation Claims is DENIED.

2- Plaintiffs' Motion to Reconsider the decision on Plaintiffs' Disability Discrimination claims is GRANTED.

3- Plaintiffs' Motion to Reconsider the decision on Plaintiffs' Fair Housing Act claims is GRANTED.

IT IS SO ORDERED.

Dated this 12 day of February 2018.

Bruce L. Pickett
District Judge

SEVENTH JUDICIAL DISTRICT COURT
MAGISTRATE / DISTRICT
JEFFERSON COUNTY
IDAHO

CERTIFICATE OF SERVICE

I hereby certify that on this 12 day of February 2018 the MEMORDANDUM DECISION ON PLAINTIFFS' MOTION TO RECONSIDER was entered and a true and correct copy was served upon the parties listed below by mailing, with the correct postage thereon, or by causing the same to be delivered to their courthouse boxes.

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Clerk of the District Court
Jefferson County, Idaho

by D Barnes
Deputy Clerk

FILED
4:41pm
AUG - 2 2018
JEFFERSON CO. MAGISTRATE
AND DISTRICT COURT

FILED IN CHAMBERS
at Idaho Falls
Bonneville County
Hon Bruce L. Pickett
Date August 1, 2018
Time 4:30 p.m.
Deputy Clerk A Barrett

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

RONALD RYAN BERRETT AND LANIE BERRETT, husband and wife,

Plaintiffs,

v.

CLARK COUNTY SCHOOL DISTRICT NO. 161,

Defendant.

Case No. CV-2017-328

FINAL JUDGMENT

JUDGMENT IS ENTERED AS FOLLOWS: The Plaintiff's claims against the Defendant are hereby dismissed with prejudice.

IT IS SO ORDERED.

Dated this 1st day of August 2018.

Bruce L. Pickett
District Judge

MAGISTRATE / DISTRICT COURT
JEFFERSON COUNTY IDAHO
SEVENTH JUDICIAL DISTRICT

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August 2018 the FINAL JUDGMENT was entered and a true and correct copy was served upon the parties listed below by mailing, with the correct postage thereon, or by causing the same to be delivered to their courthouse boxes.

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Colleen Poole
Clerk of the District Court
Jefferson County, Idaho

by D. Barney
Deputy Clerk

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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF JEFFERSON

RONALD RYAN BERRETT AND LANIE BERRETT, husband and wife, Plaitiffs/Appellant,	Case No. CV-17-0328
v.	NOTICE OF APPEAL
CLARK COUNTY SCHOOL DISTRICT NO. 161, Defendant/Respondent.	

TO: THE ABOVE NAMED DEFENDANT, CLARK COUNTY SCHOOL DISTRICT NO. 161, AND THE PARTY'S ATTORNEYS BLAKE HALL AT HALL ANGELL & ASSOCIATES, 1075 S UTAH, STE 150, 83402, AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellants appeal against the above named respondent to the Idaho Supreme Court from the Opinion and Order on Parties' Cross-Motions for Summary Judgment entered November 15, 2017, Memorandum Decision on Plaintiffs' Motion to Reconsider entered February 12, 2018, and Final Judgment entered August 1, 2018. Honorable Judge Bruce Pickett

presiding. A copy of the judgment and orders being appealed is attached to this notice, as well as a copy of the final judgment.

2. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders describe in paragraph 1 above are appealable orders pursuant to I.A.R. Rule 11(a)(1).

3. A preliminary statement of the issues on appeal which the appellant then intends to assert in the appeal; provided, any such list of issues on appeal shall not prevent the appellant from asserting other issues on appeal: Whether the District Court erred in granting summary judgment to the Defendant and denying summary judgment to the Plaintiffs.

4 Has an order been entered been entered sealing all or any portion of the record? If so, what portion? No.

5. (a) Is a reporter's transcript requested? Yes.

(b) The appellant requests the preparation of the following portions of the reporter's transcript in both electronic and hard copy as defined in Rule 25 (c), I.A.R. for the hearing on Cross Motions for Summary Judgment on October 6, 2017 at 9:00 a.m. and the hearing on Plaintiffs' Motion to Reconsider on January 12, 2018 at 10:00 a.m. The court reporter is Mary Fox. The estimated number of pages is 110.

6. The appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.: Standard Record

7. The appellate requests the following documents, charts, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court. N/A

8. I certify:

(a) That a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

Mary Fox
605 N. Capital Avenue
Idaho Falls, Idaho 83402

(b) That the clerk of the district court or administrative agency has been paid the estimated fee for preparation of the reporter's transcript.

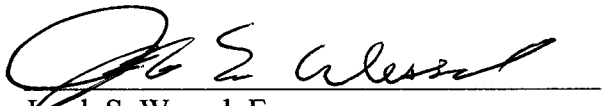
(c) That the estimated fee for preparation of the clerk's or agency's record has been paid.

(d) That the appellate filing fee has been paid.

(e) That service has been made upon all parties required to be served pursuant to Rule 20 (and the attorney general of Idaho pursuant to Section 67-1404(1), Idaho Code).

DATED this 10 day of September, 2018.

THOMSEN HOLMAN WHEILER, PLLC



Jacob S. Wessel, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 10th day of September, 2018, I caused a true and correct copy of the foregoing **NOTICE OF APPEAL** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

BLAKE G. HALL	[X] Mail
SAM L. ANGELL	[ ] Hand Delivery
HALL ANGELL & ASSOCIATES, LLP	[ ] Facsimile 208-621-3008
1075 S UTAH AVE, STE 150	[ ] Email
IDAHO FALLS, ID 83402	

THOMSEN HOLMAN WHEILER, P.L.L.C.

By: _____
Jacob S. Wessel, Esq.

jsw\9500
027 Notice of Appeal

2018 SEP 10 PM 5:03

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

RONALD RYAN BERRETT AND LANIE BERRETT, husband and wife, Plaintiffs, v. CLARK COUNTY SCHOOL DISTRICT NO. 161, Defendant.	Case No. CV-2017-328 OPINION AND ORDER ON PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

This Opinion and Order is in response to the parties' cross-motions for summary judgment.

I. STATEMENT OF FACTS

For purposes of summary judgment, the Court finds the following facts:

The plaintiffs, Ronald Ryan Berrett and Lanie Berrett ("Ryan" or "Mr. Berrett", and "Lanie" or "Ms. Berrett", and collectively as "the Berretts"), were both employed by the Clark County School District (the "School District"). Ryan was employed as the district's maintenance supervisor, Lanie as the lunchroom supervisor. During the relevant time period, Erin Haight-Mortensen ("Ms. Haight-Mortensen") was chairwoman of the Clark County School Board,

David Kerns ("Mr. Kerns") was the district superintendent, and Gayle Woods ("Ms. Woods") was the district business manager.

1. Ryan

As the School District's maintenance supervisor, Ryan's responsibilities included the School District's heating and furnace systems. Including the propane tank and corresponding system that supplied propane gas to heat the School District's various buildings. In January 2012, Ms. Woods began receiving reports that the old gymnasium smelled of propane. She then informed Mr. Kerns, and Mr. Kerns informed Ms. Haight-Mortensen there was a leak in the propane system. Ms. Woods, Mr. Kerns, and Ms. Haight-Mortensen were all aware that the propane system leak was a building code violation.[1]

The task of finding and fixing the leak fell to Ryan. As a result, Ryan began reporting on the problem in his monthly letters to the Clark County School Board ("the School Board") in February 2012. He wrote, "We do have a propane pressure issue that has been ongoing for several years. I have been working with a Sermon technician and think a lot of the problems are at the bulk tank. I will bet [sic] the problem resolved."[2]

In March, Ryan provided another update to the School Board. In his letter, he described the work he had done over the past month and his diagnosis of the problem. He then concluded, "I am waiting for a bid from sermon [sic] to correct this problem, when I receive it I will give it to MR. KERNS [sic] and we will go from there."[3] There is a dispute about what happened after Ryan received the quote from Sermon Electric, Ryan claims that he showed it to Mr. Kerns and was told to "keep quiet." Mr. Kerns disputes that he never instructed Ryan to "keep quiet."

[1] Woods Aff. 3; Kerns Aff. 2; Haight-Mortensen Aff. 3.
[2] Woods Aff. Ex. A. February 2, 2012 letter.
[3] Woods Aff. Ex. A. March 12, 2012 letter.

Also in March, the School District received an inspection report. In the report, the School District was cited for multiple maintenance violations. Some of the violations cited were repeat offenses, for which the School District had been cited in prior inspections. As the maintenance supervisor, Ryan was responsible for these violations.

During the months of February, March, and April, Ryan worked with technicians from both Sermon Electric and High Planes Propane and their involvement is mentioned in his monthly letters. Over the course of this three month period, both companies visited the school on numerous occasions and attempted to identify and the leak in the propane system. The School Board approved payment for these service calls.[4] After several months of investigation, it was discovered that the propane system contained micro-leaks throughout and plans were made to repair it after school let out for the summer.

In May 2012 the propane leak still remained unfixed. The School Board minutes indicate Ryan appeared and told the School Board that "the propane issues are still a problem."[5] Later on, near the end of May or first of June, Ryan posted a derogatory message on Facebook. The message was critical of the Clark County School District and Administration and violated the established policies outlined in the employee manual. The message also appears to have contained a cryptic reference to the School District's propane leak. After it was posted, several members of the community saw and commented on the message. Ms. Haight-Mortensen was among those who saw the message. After viewing the message, Ms. Haight-Mortensen provided a copy of it to Mr. Kerns and requested that he speak Ryan about it.

At Ms. Haight-Mortensen's request, Mr. Kerns approached Ryan about the Facebook post and asked that it be removed. When confronted, Ryan became belligerent and called Mr.

[4] Woods Aff. 3.
[5] Woods Aff. Ex. A.

Kerns a "fucking asshole."[6] Mr. Kerns then explained why the post was inappropriate and requested that Ryan remove it, a second time. Ryan agreed to remove it, and did so.

Mr. Kerns discussed then the Facebook post and his encounter with Ryan at the School Board's next meeting. During the meeting it was decided that Mr. Berrett was an at-will employee and discharge was the appropriate sanction for his conduct. A termination letter was then drafted and delivered to Ryan. The letter, signed by Mr. Kerns, states in relevant part:

> You have been insubordinate and verbally abusive to the District administration and have ridiculed personnel through social media on the internet. Your performance in some duties has been declining as well with building maintenance and keeping lights replaced and in working order. Due to your status as an "at-will", or non-contractual employee, the District administration has decided to terminate your employment effective June 30th, 2012.[7]

As per the terms of the letter, Ryan's employment was terminated on June 30, 2012.

2. Lanie

As the lunchroom supervisor, Ms. Berrett was responsible for proper management of the kitchen. Among other things, this required that she prepare (and adhere to) an annual budget and submit state-required paperwork. However, for at least three consecutive years, Lanie exceeded her approved budget. Despite being admonished and informed of hardship placed on the School District when she exceeded her budget, she continued to exceed it. In addition to exceeding the budget, it was also discovered that Lanie repeatedly failed to submit several forms required by the State of Idaho. These were grounds for her termination, as stated in the letter.

On June 30, 2012, Lanie's employment was terminated. Her termination letter, which was signed by Mr. Kerns, states, "You have consistently overspent the Food Service budget each year, with the amount increasing each time. You also are not performing satisfactorily in your supervisory duties and you have not followed the direction from your own supervisor when

[6] Kerns Aff. 7.
[7] Kerns Aff. Ex. B.

called upon to make sure District policies and procedures are followed."[8] Lanie's employment was terminated per the terms of the letter.

After they were discharged, the Berretts filed their in the Federal District Court of Idaho. The Federal court granted summary judgment in favor of the School District on all claims and the Berretts appealed to Ninth Circuit Court of Appeals. The Ninth Circuit Court of Appeals affirmed the Federal District Court's ruling as to the federal law claims, but remanded the decision back on to the state law claims. The Ninth Circuit Court of Appeals concluded that the Berretts had established a prime facie case under the Act and were entitled to a trial. Upon the remand, the Federal District Court declined to exercise jurisdiction and dismissed the case without prejudice. The Berretts then filed their state law claims in state district court.

II.
PLEADINGS

The parties have filed cross-motions for summary judgment. Ryan Berrett claims that his employment was terminated because he reported on a leak in the Clark County School District's propane system. He claims that this amounted to a retaliatory discharge because he engaged in protected activity under the Idaho Whistleblower Act. He further claims his termination violated the Idaho Whistleblower Act.

Lanie Berrett claims that she was terminated in retaliation for her husband's protected activity. She claims that public policy entitles her to protection under the Idaho Whistleblower Act, as the spouse of a whistleblower. Based on these assertions, she claims that she was wrongfully terminated.

[8] Kerns Aff. Ex. D.

Both of the Berretts claim the "law of the case" applies to the Ninth Circuit Court decision, binding this Court to act in accordance with that decision. They claim that by virtue of that decision, they are entitled to survive summary judgment and proceed to trial.

In opposition to the Berretts' claims, the Defendant claims that summary judgment should be granted in its favor. The School District claims that the Ryan is not entitled to protection under the Act, his termination was not the result of any protected activity, Lanie's termination was unrelated to her husband's activities, and public policy does not protect Ms. Berrett from termination.

III.
APPLICABLE LAW

1. Standard of Review – Motion for Summary Judgment

Summary judgment is proper if, based upon "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[9] In evaluating a party's Motion for Summary Judgment, "[The Court] liberally construes all disputed facts" and draws "all reasonable inferences and conclusions supported by the record in favor of the party opposing the motion."[10] Where there is no "issue of material fact, only a question of law remains."[11] When only a question of law remains, the Court "exercises free review."[12]

Additionally, the nonmoving party must provide more than a "mere scintilla of evidence," creating a genuine issue of material fact.[13] In other words, "[T]he nonmoving party

[9] *Kiebert v. Goss*, 144 Idaho 225, 227, 159 P.3d 862, 864 (2007); I.R.C.P. 56(c).
[10] *Kiebert*, 144 Idaho at 227, 159 P.3d at 864.
[11] *Id.*
[12] *Id.*
[13] *Van v. Portneuf Med. Ctr.*, 147 Idaho 552, 556 212 P.3d 982, 986 (2009).

must respond to the summary judgment motion with specific facts showing there is a genuine issue for trial."[14]

2. Law of the Case

The law of the case is similar to *stare decisis*. Like *stare decisis*, it seeks to eliminate "relitigation of settled issues . . . ."[15] Specifically, the Idaho Court of Appeals has stated:

> [W]here an appellate court states a principle of law in deciding a case, that rule becomes the law of the case and is controlling both in the lower court and on subsequent appeals as long as the facts are substantially the same. The decision on an issue of law made at one stage of a proceeding becomes precedent to be followed in successive stages of that same litigation.[16]

However, notwithstanding this precedent, established by the Idaho Court of Appeals, state district courts are not required to treat Federal district or circuit court decisions or interpretations of Idaho law as binding.[17] This applies "even on issues of federal law."[18] Certainly, they may treat Federal district and circuit court decisions as persuasive, but they are not required to do so.[19]

3. The Idaho Whistleblower Act - § 6-2101 *et seq.*

The Idaho Whistleblower Act ("the Act") affords "a legal cause of action for public employees who experience adverse action from their employer as a result of reporting waste and violations of a law, rule or regulation."[20] Protection under the Act is afforded to employees who communicate, "in good faith the existence of any waste of public funds, property or manpower,

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[14] *Id.*
[15] *Sun Valley Ranches, Inc. v. Prairie Power Co-op., Inc.*, 124 Idaho 125, 129, 856 P.2d 1292, 1297 (Idaho Ct. App. 1993).
[16] *Id.* (*quoting Frazier v. Nellsen*, 118 Idaho 104, 106, 794 P.2d 1160, 1162 (Idaho Ct. App. 1990)) (internal citations omitted).
[17] *See State v. McNeely*, 162 Idaho 413, 413, 398 P.3d 146, 149 (Idaho 2017) (finding error where state district court felt compelled to follow a directive or pronouncement of the Ninth Circuit).
[18] *Id.* (*quoting Dan Wiebold Ford, Inc. v. Universal Computer Services, Inc.*, 142 Idaho 235, 240, 127 P.3d 138, 143 (2005)).
[19] *McNeely*, 162 Idaho at 413, 398 P.3d at 149 (Idaho 2017).
[20] IDAHO CODE ANN. § 6-2101 (1994).

or *a violation or suspected violation of a law . . .* under the law of this state or the United States."[21] However, a good faith communication must also "be made at a time and in a manner which gives the employer a reasonable opportunity to correct the waste or violation."[22]

IV.
ANALYSIS

These are the issues before the Court on Summary Judgment. (1) Does the "law of the case" apply to the Ninth Circuit Court's decision, binding this Court and entitling the Berretts to a trial on their claims for relief? (2) Is Ryan Berrett entitled to protection under the Idaho Whistleblower Act as outlined by Idaho Code section 6-2101 *et seq.*? (3) Is Lanie Berrett entitled to protection under the Idaho Whistleblower Act, as a matter of public policy, because she is the spouse of an asserted whistleblower? Each of these issues will be addressed in turn.

1. **The "law of the case" doctrine does not apply and the Court may make an independent evaluation of the facts before it.**

The Court must first decide whether the "law of the case" applies to the Ninth Circuit Court's decision, binding this Court and entitling the Berretts to trial on their claims for relief. Based on the Court's reasoning and analysis, the "law of the case" does not apply to the Ninth Circuit Court's decision and the Court is not bound to follow it.

As the Court has stated, the Berretts previously filed their claim in the Federal District Court for the District of Idaho. In that case, the Berretts asserted both federal and state law claims for relief. The School District moved for summary judgment and the Federal District Court granted the motion. The Berretts appealed the decision to the Ninth Circuit Court of Appeals.

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[21] IDAHO CODE ANN. § 6-2104(1) (1994) (emphasis added).
[22] IDAHO CODE ANN. § 6-2104(1) (1994).

The Ninth Circuit Court affirmed the district court's rulings on the Berretts' federal law claims but remanded the remaining state law claims back to the Federal District Court. In doing so, the Ninth Circuit stated:

> Mr. Berrett established a prima facie case of retaliatory conduct by presenting evidence that: he engaged in protected activity by reporting "a violation or suspected violation of a law" . . . he suffered an "adverse action" when he was terminated . . . and the "close relation in time" between them, among other factors, suggests he may have been fired for reporting the propane issue. This is sufficient to create a genuine issue of material fact to survive summary judgment.[23]

Upon remand, the Federal District Court declined to exercise jurisdiction over the case and dismissed it without prejudice. The Berretts then filed their claims in state district court. They argue the Ninth Circuit's decision is binding upon the Court and entitles them to a trial on the merits of their claims. In this assertion, the Berretts specifically rely on the "law of the case" doctrine.

The "law of the case" doctrine is similar to *stare decisis*. Like *stare decisis*, it seeks to eliminate "relitigation of settled issues . . . ."[24] On the issue, the Idaho Court of Appeals has stated:

> [W]here an appellate court states a principle of law in deciding a case, that rule becomes the law of the case and is controlling both in the lower court and on subsequent appeals as long as the facts are substantially the same. The decision on an issue of law made at one stage of a proceeding becomes precedent to be followed in successive stages of that same litigation.[25]

However, notwithstanding the precedent established by the Idaho Court of Appeal, state district courts are not required to treat Federal district or circuit court decisions as controlling.[26] This rule

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[23] Wessel Aff. Ex. A, at 2.
[24] *Sun Valley Ranches, Inc.*, 124 Idaho at 129, 856 P.2d at 1297.
[25] *Id.* (*quoting Frazier v. Neilsen*, 118 Idaho 104, 106, 794 P.2d 1160, 1162 (Idaho Ct. App. 1990) (internal citations omitted).
[26] *McNeely*, 162 Idaho at 413, 398 P.3d at 149 (finding error where state district court felt compelled to follow a directive or pronouncement of the Ninth Circuit).

applies "even on issues of federal law."[27] The Court notes that the issues in this case arise under state, not federal, law.

In short, the "law of the case" does not apply here. Certainly, the Court may still treat the Federal district and circuit court decisions as persuasive, but it is not required to do so.[28] Because the Court is not bound by the Ninth Circuit's decision and the issues of the case arise under state law, it will look at the facts presently before it and make an independent evaluation and decision.

2. Ryan Berrett is not entitled to protection under the Idaho Whistleblower Act.

Next, the Court turns its attention to the second issue before it on summary judgment: Is Ryan Berrett entitled to protection under the Idaho Whistleblower Act as outlined by Idaho Code section 6-2101 *et seq.*? Based on the following analysis, the Court concludes he is not.

The Act affords "a legal cause of action for public employees who experience adverse action from their employer as a result of reporting waste and violations of a law, rule or regulation."[29] Protection under the Act is afforded to any employee that "communicates in good faith the existence of any waste of public funds, property or manpower, or a violation or suspected violation of a law . . . under the law of this state or the United States."[30] Therefore, more narrowly stated, the issue is whether Ryan reported a violation or suspected violation of a law, entitling him to protection under the Act.

Ryan claims that he reported a violation of the law because he reported on the School District's problem(s) with the propane system. He claims he was discharged in retaliation for making these reports. In response to Ryan's claims, the School District argues the discharge was not retaliatory and has motioned for summary judgment. In order to survive summary judgment,

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[27] *McNeely*, 162 Idaho at 413, 398 P.3d at 149 (*quoting Dan Wiebold Ford, Inc. v. Universal Computer Services, Inc.*, 142 Idaho 235, 240, 127 P.3d 138, 143 (2005)).
[28] *McNeely*, 162 Idaho at 398 P.3d at 149 (Idaho 2017).
[29] IDAHO CODE ANN. § 6-2101 (1994).
[30] IDAHO CODE ANN. § 6-2104(1) (1994) (emphasis added).

the Berretts carry "the burden of presenting evidence from which a rational inference of retaliatory discharge under the whistleblower act [can] be drawn."[31] In other words, they must present "a prima facie case of retaliatory discharge . . . ."[32]

A prima facie case for retaliatory discharge consists of three elements. To survive summary judgment the Berretts must establish: (1) Ryan was an employee of the District and "engaged or intended to engage in protected activity;" (2) the School District "took adverse action against" him; and (3) there is "a causal connection between the protected activity" and the adverse action taken by the District.[33] These three elements will be discussed in sequence below.

a. Ryan Berrett did not engage, or intend to engage, in protected activity.

It is not disputed that Ryan was an employee of the School District. Therefore, in order to satisfy this first element, Ryan only needs to establish that he engaged in, or intended to engage in, a protected activity.[34] Based on the Court's analysis, Ryan has not established that he engaged in a protected activity.

There is very little precedent that may be used to define the scope of "protected activities" contemplated under Idaho law. However, one case, *Black v. Idaho State Police,* has provided some guidance in the form of examples.[35] The *Black* court stated:

> Examples of protected activity include (1) reporting safety violations that potentially violate federal regulations . . . (2) documenting a waste of public funds and manpower . . . and (3) communicating a mayor's potential conflict of interest with an employee health plan that could potentially waste public resources.[36]

Of the three examples listed above, the first is most relevant here. Ryan claims the safety violation he reported was the leak in the propane system, and that the reports he made became

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[31] *Curlee v. Kootenai County Fire & Rescue,* 148 Idaho 391, 396, 224 P.3d 458, 463 (Idaho 2008).
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Black v. Idaho State Police,* 155 Idaho 570, 573, 314 P.3d 625, 628 (Idaho 2013).
[36] *Id.* fn.3.

the catalyst for his discharge. However, as the following analysis illustrates, the reports Ryan made do not fall within the range of "protected activities" contemplated by the Act.

Ample evidence indicates the propane odor in the old gymnasium was well known throughout the School District in January 2012. It was reported to Ms. Woods, the School District's business manager, by several staff members.[37] In turn, Ms. Woods reported the issue to Mr. Kerns, the School District's superintendent.[38] Mr. Kerns then reported the issue to the School Board's chairwoman, Ms. Haight-Mortensen.[39]

As the School District's maintenance supervisor, responsibility fell to Ryan to identify the problem and fix it. After becoming aware of the problem, Mr. Berrett made his first report on the problem in in February, in his monthly letter to the School Board. Here, the Court again points out that the issue had already been reported to the School Board by Mr. Kerns and was well known throughout the School District and the Administration.

In his March letter, Ryan reported on the issue again. This time he described the work he had done to identify the problem and fix it. He also informed the School District, "I am waiting for a bid from sermon [sic] to correct this problem, when I receive it I will give it to MR. KERNS [sic] and we will go from there."[40] Ryan claims he later received the bid from Sermon Electric, showed it to Mr. Kerns, and was told to "keep quiet." Mr. Kerns disputes that he ever told Ryan to "keep quiet."

Although this allegation is suspicious, it is of little consequence. Even if Ryan was told to "keep quiet," the Court wonders: What was there to keep quiet about? The School Board was already aware of the propane leak. Mr. Kerns, himself, informed the School Board's

[37] Woods Aff. 3
[38] Kerns Aff. 2.
[39] Haight-Mortensen Aff. 2.
[40] Woods Aff. Ex. A. March 12, 2012 letter.

chairwoman, Erin Haight-Mortensen, and Ryan began reporting the problem a month later in his letters to the School Board. The School Board was already aware of the problem and already knew it was a building code violation, months before this particular conversation between Ryan and Mr. Kerns occurred.

Additionally, there is other evidence that suggests the propane leak was already known to the School Board, even before Ryan was allegedly told to "keep quiet" by Mr. Kerns. As early as February, a technician from Sermon Electric began making service calls to the school and was assisting Ryan in resolving the propane leak. Ryan reported this in his February letter to the School Board. Eventually, Ryan also enlisted the aid of High Planes Propane. It is apparent the School Board knew of this involvement because "it approved payment for each of the service calls."[41] This is important because it evidences that the School Board had separate knowledge of the propane problem; apart from Ryan's, Ms. Woods', or Mr. Kerns' reports of the issue.

It is beyond believable that an employee could be charged with solving a problem (even a building code or safety violation), provide regular progress reports to his employer, discuss the viability of proposed solutions with superiors, and then, after being fired, use those same activities to substantiate claim of retaliatory discharge. This is especially true when the employee was charged with fixing a problem already known to the employer. Certainly, the statute offers protection to employees who *report "a violation or suspected violation of a law."* And it is undisputed that the propane leak was a violation of law; however, there was nothing to report for purposes of the Act because the School District already knew about the problem and was trying to fix it. Therefore, Ryan has failed to establish that these discussed actions constituted protected activity.

[41] Woods Aff. 3.

The Court now looks to Ryan's other actions to determine whether any of these reasonably constituted protected activity. First, Ryan claims he appeared at the May 17 school board meeting to testify against Mr. Kerns.[42] The meeting notes shed a different light on his participation in that meeting; instead, these merely indicate Ryan reported "the propane issues are still a problem."[43] As with his other reports, this was nothing more than a progress report on the problem Ryan had already been tasked with solving.

Just as before, the Court finds it difficult to conclude this participation in the School Board meeting constitutes protected activity, even after drawing reasonable inferences in his favor. The School Board already knew of the propane leak, Mr. Kerns had personally informed the School Board of the issue approximately four months prior, Ryan had been providing the School Board with monthly reports on the issue, and the School Board had approved payments for service calls made by Sermon Electric and High Planes Propane long before this meeting occurred. Again, the Court is left to ponder, what else was there to report that might have constituted a protected activity?

Finally, the Court addresses the message Ryan posted to Facebook near the end of May or beginning of June. The posted was message was critical of the Clark County School District and Administration. Although the message may have contained a cryptic reference to the propane problem, it more closely resembles an unfettered rant by a disgruntled employee. It offers nothing that resembles a good faith report of "a violation or suspected violation of a law . . . ."[44] Therefore, the Court cannot deem it protected activity.

Because Mr. Berrett has not established that he engaged in any protected activity, summary judgment in favor of the School District is appropriate. Nevertheless, for the sake of

[42] Berrett Aff. 5.
[43] Woods Aff. Ex. A.
[44] IDAHO CODE ANN. § 6-2104(1) (1994) (emphasis added).

inquiry, the Court continues its analysis of the two remaining elements: (1) adverse action against the employee, and (2) a causal connection between the protected activity and the adverse action.

b. The District took an adverse action against Ryan Berrett by terminating his employment.

The second element of a retaliatory discharge claim requires the employee to establish the employer took an adverse action against them. Based on the following analysis, the Court concludes that the Clark County School District took adverse action against Ryan. The evidence before the Court is that Mr. Berrett's employment was terminated. This is undisputed.

After Ryan aired his discontent via social media, Ms. Haight-Mortensen notified Mr. Kerns about the post and requested that he speak to Ryan about it. Mr. Kerns approached Ryan about the Facebook post and asked that it be removed. Ryan became belligerent and called Mr. Kerns a "fucking asshole."[45] Mr. Kerns then explained why the post was inappropriate and requested that Ryan remove it, for the second time. Ryan agreed to remove it, and did so.

Mr. Kerns discussed then the Facebook post and his encounter with Ryan at the School Board's next meeting. During the meeting it was decided that Mr. Berrett was an at-will employee and discharge was the appropriate sanction for his conduct. A termination letter was then drafted and delivered to Ryan. The letter, signed by Mr. Kerns, states in relevant part:

> You have been insubordinate and verbally abusive to the District administration and have ridiculed personnel through social media on the internet. Your performance in some duties has been declining as well with building maintenance and keeping lights replaced and in working order. Due to your status as an "at-will", or non-contractual employee, the District administration has decided to terminate your employment effective June 30th, 2012.[46]

[45] Kerns Aff. 7.
[46] Kerns Aff. Ex. B.

The School District does not dispute that this letter was delivered, nor that Ryan's employment was terminated. Because it is undisputed his employment terminated, Ryan has established that the School District took adverse action against him. However summary judgment in favor of the School District is still appropriate based on the Court's analysis of the other two elements.

c. There is no causal connection between Ryan Berretts alleged, protected activity and the adverse action taken by the District.

To survive summary judgment on a retaliatory discharge claim, Ryan must also establish a causal connection between his alleged, protected activity and the adverse action taken by the School District. Because Ryan failed to establish that he engaged in a protected activity, there can be no causal connection to the adverse action taken by the District. Nevertheless, the Court continues its analysis of the final element for the sake of inquiry. Relevant to this inquiry is the "Proximity in time between the protected activity and the adverse employment action . . . ."[47]

As stated, several the School District's other employees and administrators received reports of a propane odor in the gymnasium as early as January 2012. Over a period of several months, Ryan worked to resolve the issues and provided regular reports to Mr. Kerns and the School Board. Multiple affidavits and their corresponding exhibits support these facts. It was not until approximately five months later, after multiple written and verbal reports were provided that Ryan's employment was terminated. This is a significant amount of time, and the Court concludes that the adverse action taken against Ryan and the alleged protected activity are not causally connected.

Instead, another cause for Ryan's discharge is more likely. As the Court discussed above, Ryan posted a derogatory message on Facebook in late May or early June. The posted message

[47] *See Curlee*, 148 Idaho at 397, 224 P.3d at 464 (*quoting Heng v. Rotech Med.Corp.*, 688 N.W.2d 389, 401, (N.D. 2004)).

was critical of the School District and the Administration and violated the School District's established policies. Ryan further compounded this behavior when he was confronted by Mr. Kerns. When he was confronted Ryan was belligerent, calling Mr. Kerns a "fucking asshole." As a result of this conduct, Ryan was deemed "insubordinate and verbally abusive to the District administration and have ridiculed personnel through social media on the internet" and his employment was terminated.[48]

In addition to this belligerent conduct, the letter provided another reason for Ryan's discharge: he had been doing a poor job in his maintenance duties.[49] The evidence before the Court supports this. Only a few months before his discharge, the School District's facilities were inspected and numerous maintenance violations were discovered. In fact, some of these violations had been noted in the previous two or three inspections and still remained unresolved.[50]

Based upon the undisputed evidence and drawing reasonable inferences in favor of the nonmoving party, Ryan's "termination had nothing to do with the propane issue" or any other protected activity.[51] Therefore, the Court concludes there is no causal connection between the adverse action taken by the School District (i.e. Ryan's discharge) and any activity Ryan claims. Because Ryan has failed to establish that he engaged in any protected activity or that the adverse action taken against him was related to such activity was causally related, summary judgment in favor of the School District is appropriate.

3. **As a matter of public policy, Lanie Berrett does not qualify for protection under the act as the spouse of a whistleblower.**

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[48] Kerns Aff. Ex. A.
[49] Kens Aff. Ex. A.
[50] Woods Aff. Ex. A.
[51] Haight-Mortensen Aff. 5.

As a matter of public policy, Lanie Berrett claims that she qualifies for protection under the Act as the spouse of a whistleblower. However, based on the Court's prior analysis, Ryan Berrett failed to establish that he was a whistleblower under the Act or was the subject of a retaliatory discharge. Because Ryan does not qualify for protected status under the Act, Lanie cannot claim it as his spouse either.

However, even if Ryan had established a prima facie case retaliatory discharge, Lanie would still not be entitled to protection for two reasons. First, under established law, spouses of employees are unprotected by the Act. Second, her termination is not causally connected to any protected activity.

a. Spouses of Employees are Unprotected

Spouses of employees who engage in protected activity are not protected under the Act or any related Idaho law. The Idaho Whistleblower Act provides a "cause of action for public *employees* who experience adverse action from their employer as a result of reporting waste and violations of a law, rule or regulation."[52] Lanie Berrett asserts that as a matter of public policy, she is entitled to protection. However, the Court cannot adopt this conclusion.\

The language of the Act specifically allows relief for "employees." It makes no reference to, or allowance, for *spouses* of employees.[53] The Court is unwilling to read words into the statute that were not included by the legislature, nor is the Court willing to extend protection that is not expressly provided by the Act. Therefore, the Court cannot conclude that spouses of employees engaging in protected activity are entitled to protection under the Act. Because Lanie Berrett is not entitled to protection as the spouse of an employee claiming protection under the Act, summary judgment in favor of the School District should be granted.

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[52] IDAHO CODE ANN. § 6-2101 (1994) (emphasis added).
[53] *See* IDAHO CODE ANN. § 6-2101 (1994).

b. Lanie's Termination is not Causally Connected

Even if Lanie were entitled to protection as the spouse of an employee engaging in protected activity, summary judgment is still appropriate because she has not established that her termination was causally connected to any (even the activity asserted by her husband). As discussed above, the Berretts must a establish a prima facie case of retaliatory discharge to survive summary judgment. [54] Such a claim requires three elements: (1) the employee engaged in a protected activity, (2) the employer took adverse action against the employee, and (3) the adverse action was causally connected to the protected activity.[55]

Lanie does not assert that she engaged in protected activity; rather, she relies on her husband's claim that he engaged in protected activity. As the Court previously concluded, Ryan did not engage in protected activity. Even if he had, the Act does not extend protection to spouses of employees engaging in protected activity.

The second element requires an adverse action against the employee. If the Act made allowance for spouses of employees, Lanie could establish this element. Her employement was terminated and this is not disputed by the School District. Therefore, adverse action was taken against her.

However, Lanie would not qualify for protection under the Act because her termination is not causally connected to any protected activity. In the termination letter, signed by David Kerns, and delivered to Lanie, the reasoning for her termination is stated. The letter states, "You have consistently overspent the Food Service budget each year, with the amount increasing each time. You also are not performing satisfactorily in your supervisory duties and you have not followed the direction from your own supervisor when called upon to make sure District policies and

[54] *Curlee*, 148 Idaho at 397, 224 P.3d at 464.
[55] *Id.*

procedures are followed."[56] This reasoning for her termination is further supported by the affidavits.

The multiple affidavits submitted to the Court indicate that Ms. Berrett consistently overspent the food service budget. Notwithstanding, Lanie continued to exceed her budget. Then, after all this, it was discovered that Lanie had failed, repeatedly, to submit paperwork required by the State of Idaho.

These are the offenses cited in her termination letter. They are entirely separate and apart from her husband's activities and the propane leak. The termination letter does not mention or even allude that her termination is in any way related to her husband or his actions. As a result, the Court cannot conclude that the termination of Lanie's employment was in retaliation for any protected activity and summary judgment in favor of the School District is appropriate.

V.
CONCLUSION

Therefore, the Court concludes, based on its prior analysis, that it is not bound by the Ninth Circuit Court of Appeals decision on the Berretts' claims and may conduct an independent evaluation of the facts before it. Additionally, having conducted an independent evaluation of the facts before it, the Court cannot conclude that either of the Berretts' engaged in a protected activity or that their terminations are causally connected to any protected activity. Because the Berretts have failed to establish these two elements, even drawing reasonable inferences in their favor, the Court cannot conclude there is a genuine issue of material fact left to be resolved at trial. Lastly, based Court's prior analysis, the School District's Fourteenth Defense should be denied. Therefore, summary judgment in favor of the School District is appropriate.

[56] Kems Aff. Ex.D.

Based on the foregoing, the Court orders as follows:

1- Plaintiff's Partial Motion for Summary Judgment is DENIED.

2- Defendant's Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.

Dated this 15th day of November 2017.

Bruce L. Pickett
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 15 day of November 2017 the OPINION AND ORDER ON PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT was entered and a true and correct copy was served upon the parties listed below by mailing, with the correct postage thereon, or by causing the same to be delivered to their courthouse boxes.

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Colleen Poole
Clerk of the District Court
Jefferson County, Idaho

by A Barnes
Deputy Clerk

Wessel

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

RONALD RYAN BERRETT AND LANIE BERRETT, husband and wife,

Plaintiffs,

v.

CLARK COUNTY SCHOOL DISTRICT NO. 161,

Defendant.

Case No. CV-2017-0328

MEMORDANDUM DECISION ON PLAINTIFFS' MOTION TO RECONSIDER

This Memorandum Decision is in response to the Plaintiffs' Motion to Reconsider.

I. STATEMENT OF FACTS

For purposes of this Motion to Reconsider the Court adopts the following facts, acknowledging there were inadvertent facts in the Court's prior opinion at summary judgment:

The plaintiffs, Ronald Ryan Berrett and Lanie Berrett ("Ryan" or "Mr. Berrett", and "Lanie" or "Ms. Berrett", and collectively as "the Berretts"), were both employed by the Clark County School District (the "District"). Ryan was employed as the District's maintenance supervisor and Lanie as the lunchroom supervisor. During the relevant time period, Erin Haight-Mortensen ("Ms. Haight-Mortensen") was chairwoman of the Clark County School Board,

David Kerns ("Mr. Kerns") was the district superintendent, and Gayle Woods ("Ms. Woods") was the district business manager.

1. Ryan

As the District's maintenance supervisor, Ryan Berrett maintained and fixed the District's furnace system.[1] As discussed below, this also included the propane tank and corresponding system that supplied propane gas to the furnaces. In January 2012, Ms. Woods began receiving reports that the old gymnasium smelled of propane.[2] Ms. Woods informed Ryan of the reported odor.[3] Ms. Woods also informed Mr. Kerns, and Mr. Kerns informed Ms. Haight-Mortensen.[4] Ms. Woods, Mr. Kerns, and Ms. Haight-Mortensen were all aware that the propane system leak was a building code violation.[5]

Ryan began working to solve the problem and enlisted the help of Sermon Electric.[6] Ryan also began reporting on the problem in his monthly letters to the District's school board ("the Board").[7] In February, he wrote, "We do have a propane pressure issue that has been ongoing for several years. I have been working with a Sermon technician and think a lot of the problems are at the bulk tank. I will bet [*sic*] the problem resolved."[8] Although Ryan does not mention this letter (or any of the others he sent) in his affidavit, he has not disputed the authenticity of the letters provided by the District.

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[1] Affidavit of Jacob S. Wessel in Response to Defendant's Motion for Summary Judgment, *Ronald Ryan Berrett and Lanie Berrett v. Clark County School District No. 161,* Jefferson County case no. CV-17-0328 (filed September 15, 2017) (hereinafter "Wessel Affidavit), at attachment p.311.
[2] Affidavit of Gayle Woods, *Ronald Ryan Berrett and Lanie Berrett v. Clark County School District No. 161,* Jefferson County case no. CV-17-0328 (filed August 31, 2017) (hereinafter "Woods Affidavit), at p.3
[3] Wessel Affidavit, at attachment p.311.
[4] Woods Affidavit, at p.3; Affidavit of David Kerns, *Ronald Ryan Berrett and Lanie Berrett v. Clark County School District No. 161,* Jefferson County case no. CV-17-0328 (filed August 31, 2017) (hereinafter "Kerns Affidavit), at p.2.
[5] Woods Affidavit, at p.3; Kerns Affidavit, at p.2; Affidavit of Erin Haight-Mortensen, *Ronald Ryan Berrett and Lanie Berrett v. Clark County School District No. 161,* Jefferson County case no. CV-17-0328 (filed August 31, 2017) (hereinafter "Haight-Mortensen Affidavit), at p.3.
[6] Wessel Affidavit, at attachment p.311-12.
[7] Woods Affidavit, at Ex. A, p.27-29.
[8] Woods Affidavit, at Ex. A, p.27.

In March, he provided another update to the Board.[9] This time he described the work he had done on the propane system over the past month and his diagnosis of the problem.[10] He concluded by writing, "I am waiting for a bid from sermon [sic] to correct this problem, when I receive it I will give it to MR. KERNS [sic] and we will go from there."[11] Later, Ryan received the bid and showed it to Mr. Kerns and Ms. Haight-Mortensen.[12] There is a dispute about what happened after Ryan received the quote from Sermon Electric and showed it to Mr. Kerns. Ryan claims that Mr. Kerns told him to "keep quiet."[13] Mr. Kerns disputes that he instructed Ryan to "keep quiet."[14]

During the months of February, March, and April, Ryan worked with technicians from both Sermon Electric and High Planes Propane.[15] Ryan mentioned the involvement of Sermon Electric and High Planes Propane in his monthly letters to the school board.[16] Over the course of this three month period, both companies visited the school on numerous occasions and attempted to help Ryan isolate and repair the leak in the propane system.[17] During this time frame, the Board was aware of these visits and approved payment for the service calls.[18] After several months of work, it was discovered that the propane system contained micro-leaks throughout and plans were made to repair it.[19]

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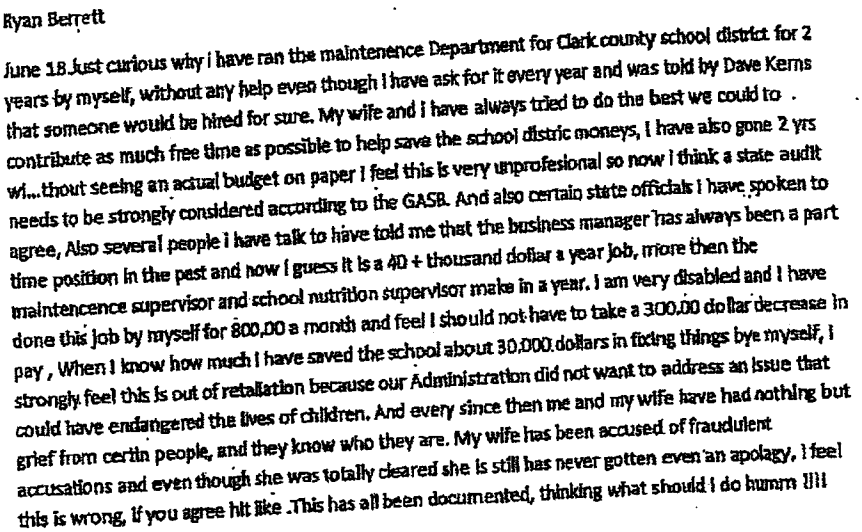
[9] Woods Affidavit, at Ex. A, p.28.
[10] Woods Affidavit, at Ex. A, p.28.
[11] Woods Affidavit, at Ex. A, p.28.
[12] Wessel Affidavit, at attachment p.312-13.
[13] Wessel Affidavit, at attachment p.313.
[14] Kerns Affidavit, at p.2.
[15] Wessel Affidavit, at attachment p.311-13.
[16] Woods Affidavit, at Ex. A, p.27-29.
[17] Wessel Affidavit, at attachment p.311-13.
[18] Woods Affidavit, at p.3.
[19] Wessel Affidavit, at attachment p.312-13; Woods Affidavit, at p.4; Kerns Affidavit, at p.3-4; Haight-Mortensen Affidavit, at p.3-4.

In May 2012 the propane issue was still unresolved.[20] Ryan attended the Board meeting to discuss the ongoing propane issue that month.[21] The Board minutes indicate Ryan appeared and told the School Board that "the propane issues are still a problem."[22] Ryan characterizes his participation in this meeting, by stating that he "testified against Mr. Kerns . . . ."[23]

In June, Ryan posted a derogatory message on Facebook.[24] The following is an image of the message Ryan posted, as included in his affidavit:[25]



Ryan Berrett

June 18 Just curious why I have ran the maintenence Department for Clark county school district for 2 years by myself, without any help even though I have ask for it every year and was told by Dave Kerns that someone would be hired for sure. My wife and I have always tried to do the best we could to contribute as much free time as possible to help save the school distric moneys, I have also gone 2 yrs wi...thout seeing an actual budget on paper I feel this is very unprofesional so now I think a state audit needs to be strongly considered according to the GASB. And also certain state officials I have spoken to agree, Also several people I have talk to have told me that the business manager has always been a part time position in the past and now I guess it is a 40 + thousand dollar a year job, more then the maintencence supervisor and school nutrition supervisor make in a year. I am very disabled and I have done this job by myself for 800.00 a month and feel I should not have to take a 300.00 dollar decrease in pay , When I know how much I have saved the school about 30,000 dollars in fixing things bye myself, I strongly feel this is out of retaliation because our Administration did not want to address an issue that could have endangered the lives of children. And every since then me and my wife have had nothing but grief from certin people, and they know who they are. My wife has been accused of fraudulent accusations and even though she was totally cleared she is still has never gotten even an apology. I feel this is wrong, if you agree hit like .This has all been documented, thinking what should I do humm !!!!

After it was posted, several members of the community saw and commented on the message.[26] Ms. Haight-Mortensen was among those who it message.[27] After viewing the message, Ms. Haight-Mortensen provided a copy of it to Mr. Kerns.[28]

Mr. Kerns discussed Ryan's Facebook post Ryan at the Board's next meeting.[29] Mr. Kerns and Ms. Haight Mortensen were both present and involved in the meeting.[30] During the

[20] Woods Affidavit, at Ex. A, p.34.
[21] Wessel Affidavit, at attachment p.314; Haight-Mortensen Affidavit, at p.4.
[22] Woods Affidavit, at Ex. A, p.34.
[23] Wessel Affidavit, at attachment p.314.
[24] Wessel Affidavit, at attachment p.315, 323-24.
[25] Wessel Affidavit, at attachment p.324.
[26] Haight-Mortensen Affidavit, at p.5, Ex.A.
[27] Haight-Mortensen Affidavit, at p.5.
[28] Haight-Mortensen Affidavit, at p.5.

meeting, the District determined that because Mr. Berrett was an at-will employee, termination was the appropriate sanction for his conduct.[31] A termination letter was then drafted and delivered to Ryan.[32] The letter, signed by Mr. Kerns, states in relevant part:

> You have been insubordinate and verbally abusive to the District administration and have ridiculed personnel through social media on the internet. Your performance in some duties has been declining as well with building maintenance and keeping lights replaced and in working order. Due to your status as an "at-will", or non-contractual employee, the District administration has decided to terminate your employment effective June 30th, 2012.[33]

Accordingly, Ryan's employment was terminated on June 30, 2012.[34] Ryan disputes that the Board was aware of, or approved, his termination but has not provided any evidence to support this conclusion.

2. Lanie

Lanie Berrett was the District's lunchroom supervisor from spring 2009 through June 2012.[35] As the lunchroom supervisor, Ms. Berrett was responsible for proper management of the kitchen.[36] This required that she prepare (and adhere to) an annual budget and submit state-required paperwork.[37] The District asserts that Lanie failed to remain within her allotted budget for at least three consecutive years and submit the state-required paperwork.[38] Furthermore, the District asserts that Lanie's job performance was unsatisfactory.[39]

Her termination letter, which was signed by Mr. Kerns, states, "You have consistently overspent the Food Service budget each year, with the amount increasing each time. You also are

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[29] Kerns Affidavit, at p.5; Haight-Mortensen Affidavit, at p.5-6.
[30] Kerns Affidavit, at p.5; Haight-Mortensen Affidavit, at p.5.
[31] Haight-Mortensen Affidavit, at p.5-6.
[32] Kerns Affidavit, at p.5; Haight-Mortensen Affidavit, at p.5-6.
[33] Kerns Affidavit, at Ex. B.
[34] Wessel Affidavit, at attachment p.315.
[35] Wessel Affidavit, at attachment p.329; Woods Affidavit, at p.5; Haight-Mortensen Affidavit, at p.6.
[36] Woods Affidavit, at p.5; Haight-Mortensen Affidavit, at p.6;
[37] Woods Affidavit, at p.5; Haight-Mortensen Affidavit, at p.6;
[38] Woods Affidavit, at p.5; Haight-Mortensen Affidavit, at p.6;
[39] Haight-Mortensen Affidavit, at p.6;

not performing satisfactorily in your supervisory duties and you have not followed the direction from your own supervisor when called upon to make sure District policies and procedures are followed."[40] Accordingly, Lanie's employment was terminated.[41] Lanie disputes the reasons for her termination.[42] Therefore, for purposes of summary judgment, the Court assumes Lanie performed satisfactorily, did not exceed the budget, and submitted the state-required paperwork.

After they were discharged, the Berretts filed an action in the Federal District Court of Idaho. The Federal court granted summary judgment in favor of the District on all claims and the Berretts appealed to Ninth Circuit Court of Appeals. The Ninth Circuit Court of Appeals affirmed the Federal District Court's ruling as to the federal law claims, but remanded the decision back to the Federal District Court on the state law claims. The Ninth Circuit Court of Appeals concluded that the Berretts had established a prime facie case under the Idaho Whistleblower Act and were entitled to a trial. Upon the remand, the Federal District Court declined to exercise jurisdiction and dismissed the case without prejudice. The Berretts then filed their claims in state district court.

II.
APPLICABLE LAW

1. Standard - Motion to Reconsider

"On a motion for reconsideration, the court must consider any new admissible evidence or authority bearing on the correctness of an interlocutory order." [43] However, it is not required that the motion "be supported by new evidence or authority." [44] "When deciding [a] motion for reconsideration, the district court must apply the same standard of review that the court applied

[40] Kerns Affidavit, at Ex. D.
[41] Wessel Affidavit, at attachment p.330.
[42] Wessel Affidavit, at attachment p.329-30.
[43] *Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012).
[44] *Id.*

when deciding the original order that is being reconsidered."[45] Therefore, when deciding a motion to reconsider a grant of summary judgment, the Court must apply the summary judgment standard.[46]

2. Standard - Summary Judgment

Summary judgment is proper if, based upon "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[47] In evaluating a party's Motion for Summary Judgment, "[The Court] liberally construes all disputed facts" and draws "all reasonable inferences and conclusions supported by the record in favor of the party opposing the motion."[48] Where there is no "issue of material fact, only a question of law remains."[49] When only a question of law remains, the Court "exercises free review."[50]

Additionally, the nonmoving party must provide more than a "mere scintilla of evidence," creating a genuine issue of material fact.[51] In other words, "[T]he nonmoving party must respond to the summary judgment motion with specific facts showing there is a genuine issue for trial."[52] "Bare assertions that an issue of fact exists, in the face of particular facts alleged by the movant, are not sufficient to create a genuine issue of fact."[53]

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[45] *Id.*
[46] *Id.*
[47] *Kiebert v. Goss*, 144 Idaho 225, 227, 159 P.3d 862, 864 (2007); I.R.C.P. 56(c).
[48] *Kiebert*, 144 Idaho at 227, 159 P.3d at 864.
[49] *Id.*
[50] *Id.*
[51] *Van v. Portneuf Med. Ctr.*, 147 Idaho 552, 556 212 P.3d 982, 986 (2009).
[52] *Id.*
[53] *Cates v. Albertson's Inc.*, 126 Idaho 1030, 1033, 895 P.2d 1223, 1226 (1994).

3. Law of the Case

The law of the case is similar to *stare decisis*. Like *stare decisis*, it seeks to eliminate "relitigation of settled issues . . . ."[54] Specifically, the Idaho Court of Appeals has stated:

> [W]here an appellate court states a principle of law in deciding a case, that rule becomes the law of the case and is controlling both in the lower court and on subsequent appeals as long as the facts are substantially the same. The decision on an issue of law made at one stage of a proceeding becomes precedent to be followed in successive stages of that same litigation.[55]

However, notwithstanding this precedent, established by the Idaho Court of Appeals, state district courts are not required to treat Federal district or circuit court decisions or interpretations of Idaho law as binding.[56] This applies "even on issues of federal law."[57] Certainly, they may treat Federal district and circuit court decisions as persuasive, but they are not required to do so.[58]

4. Idaho Whistleblower Act - § 6-2101 *et seq.*

The Idaho Whistleblower Act ("the Act") affords "a legal cause of action for public employees who experience adverse action from their employer as a result of reporting waste and violations of a law, rule or regulation."[59] Protection under the Act is afforded to employees who communicate, "in good faith the existence of any waste of public funds, property or manpower, or *a violation or suspected violation of a law* . . . under the law of this state or the United

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[54] *Sun Valley Ranches, Inc. v. Prairie Power Co-op., Inc.*, 124 Idaho 125, 129, 856 P.2d 1292, 1297 (Idaho Ct. App. 1993).
[55] *Id.* (*quoting Frazier v. Neilsen*, 118 Idaho 104, 106, 794 P.2d 1160, 1162 (Idaho Ct. App. 1990)) (internal citations omitted).
[56] *See State v. McNeely*, 162 Idaho 413, 413, 398 P.3d 146, 149 (Idaho 2017) (finding error where state district court felt compelled to follow a directive or pronouncement of the Ninth Circuit).
[57] *Id.* (*quoting Dan Wiebold Ford, Inc. v. Universal Computer Services, Inc.*, 142 Idaho 235, 240, 127 P.3d 138, 143 (2005)).
[58] *McNeely*, 162 Idaho at 413, 398 P.3d at 149 (Idaho 2017).
[59] Idaho Code § 6-2101 (1994).

States."[60] However, a good faith communication must also "be made at a time and in a manner which gives the employer a reasonable opportunity to correct the waste or violation."[61]

III.
ANALYSIS

These are the issues before the Court on Plaintiffs' Motion to Reconsider. (1) Does the "law of the case" apply to the Ninth Circuit Court's decision, thereby binding this Court and entitling the Berretts' to a trial their claims? (2) Did the Court properly construe the facts in favor of the plaintiffs in its decision at summary judgment? (3) Did the Court properly grant summary judgment in favor of the Defendant, thereby dismissing Ryan Berrett's whistleblower claim? (4) Did the Court properly grant summary judgment in favor of the Defendant on Lanie's public policy claim? (5) Was summary judgment properly granted on Plaintiffs remaining federal law claims?

1. The Law of the Case

The law of the case does not apply and the Court may make an independent evaluation of the facts and evidence before it (i.e. it is not bound by the prior decision of the Ninth Circuit Court's decision). As stated in the Court's earlier decision, the Berretts previously filed their claims in federal court. The District moved for summary judgment and the Federal District Court granted summary judgment for the District. This decision was appealed to the Ninth Circuit Court of Appeals.

On appeal, the Ninth Circuit affirmed the district court's ruling on the Berretts' federal law claims but remanded the case back on the remaining state law claims. In doing so, the Ninth Circuit stated:

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[60] Idaho Code § 6-2104(1) (emphasis added).
[61] *Id.*

> Mr. Berrett established a prima facie case of retaliatory conduct by presenting evidence that: he engaged in protected activity by reporting "a violation or suspected violation of a law" . . . he suffered an "adverse action" when he was terminated . . . and the "close relation in time" between them, among other factors, suggests he may have been fired for reporting the propane issue. This is sufficient to create a genuine issue of material fact to survive summary judgment.[62]

Upon remand the Federal District Court declined jurisdiction because there were no more federal law claims and the case was dismissed without prejudice. Subsequently, the Berretts refiled their claims in state district court. The Defendants then moved for summary judgment. At summary judgment the Berretts argued that the Ninth Circuit's decision on appeal constitutes the law of the case, entitling them to proceed to trial on the merits of their claims.

After careful analysis, the Court granted summary judgment in favor of the Defendants. The Berretts have filed a motion requesting the Court reconsider its prior decision. After the following analysis, the Court remains convinced that its prior decision, granting summary judgment in favor of the Defendants, was proper.

Like *stare decisis,* the "law of the case" seeks to eliminate "relitigation of settled issues . . . ."[63] The Idaho Court of Appeals has stated:

> [W]here an appellate court states a principle of law in deciding a case, that rule becomes the law of the case and is controlling both in the lower court and on subsequent appeals *as long as the facts are substantially the same.* The decision on an issue of law made at one stage of a proceeding becomes precedent to be followed in successive stages of that same litigation.[64]

In *Swanson v. Swanson,* the Idaho Supreme Court described the law of the case as follows:

> [U]pon appeal, the Supreme Court in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement

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[62] Complaint and Demand for Jury Trial, *Ronald Ryan and Lanie Berrett v. Clark County School District No. 161*, Jefferson County case no. CV-17-0328 (filed May 9, 2017) (hereinafter "Complaint"), at Ex. A.
[63] *Sun Valley Ranches, Inc.*, 124 Idaho at 129, 856 P.2d at 1297.
[64] *Id. (quoting Frazier v. Neilsen,* 118 Idaho 104, 106, 794 P.2d 1160, 1162 (Idaho Ct. App. 1990) (internal citations omitted) (emphasis added).

> becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal . . . .[65]

The Idaho Supreme Court has pointed out other language in *Creem v. Northwestern Mut. Fire Ass'n. of Seattle, Wash.* which describes the law of the case doctrine this way:

> Where a judgment is reversed and the case is remanded to the trial court "for a new trial," the case comes on for the same, in all respects, as if it had never been tried, subject to this condition, however, that it must be tried in light of and in consonance with the rules of law as announced by the appellate court in *that particular case.*[66]

This case is substantially different from the one filed in federal court and does not meet the standards relied upon by the Idaho Supreme Court in *Swanson* or *Creem.* The original Complaint and Demand for Jury Trial was filed in the United States District Court for the District of Idaho in December 2012 and assigned case number 4:12-CV-0626-EJL. The Federal District Court then granted summary judgment for the Defendants on all claims. Plaintiffs appealed the case to the Ninth Circuit Court of Appeals, which affirmed the district court in part but remanded the case back on Ryan's "whistleblower claim" and on Lanie's "public policy claim." Upon remand, the Federal District Court granted the Defendant's Motion for the Court to Decline Jurisdiction and dismissed Plaintiffs' state law claims without prejudice.[67]

Plaintiffs' then filed their claims *anew*, incorporating their same federal Complaint and Demand for Jury Trial when they filed their case in Jefferson County. This new case was filed in a separate jurisdiction from Plaintiffs' earlier case, and was assigned a new case number (Jefferson County case no. CV-2017-0328). Although Plaintiffs assert that the case filed in Jefferson County is the *same case*, it is not. As quoted above, the Idaho Supreme Court has

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[65] 134 Idaho 512, 515, 5 P.3d 973, 976 (2000) (quoting *Suitts v. First Sec. Bank of Idaho,* 110 Idaho 15, 21, 713 P.2d 1374, 1380 (1985)).
[66] *Creem v. Northwestern Mut. Fire Ass'n of Seattle, Wash.*, 58 Idaho 349, __, 74 P.2d 702, 703 (1937).
[67] Complaint, at Ex. B.

previously announced that the law of the case only applies "in that particular case."[68] Based on the Court's reasoning and analysis the two cases are different and separate. Therefore, the law of the case does not apply.

Despite Plaintiffs' arguments to the contrary, there are additional reasons why the law of the case does not apply. First, state district courts are not required to treat federal district or federal circuit court decisions or interpretations of Idaho law as binding.[69] Second, the facts in the case before the Court are not the same as those in the federal case.

As stated, state district courts are not required to treat federal district or federal circuit court decisions or interpretations of Idaho law as binding.[70] This even applies to "issues of federal law."[71] Certainly, Idaho courts may treat Federal district and circuit court decisions as persuasive, but they are not required to do so.[72]

In its Order and Opinion on Cross Motions for Summary Judgment the Court relied on this holding as announced by *State v. McNeely,* 162 Idaho 413, 398 P.3d 146 (2017). In Plaintiffs' Motion to Reconsider, Plaintiffs attacked the Court's reliance on *McNeely* by arguing that the question before this Court, in this case, is entirely different from the question presented in McNeely (i.e. "must this Court follow decisions by the Ninth Circuit in this exact case").[73] The fatal flaw in Plaintiffs argument is, as reasoned above, the case now pending is not the exact case that was before the Ninth Circuit Court of Appeals. Even if this were the *exact same case,* the Court still believes the holding in *McNeely* is relevant and dispositive.

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[68] *Creem v. Northwestern Mut. Fire Ass'n of Seattle, Wash.,* 58 Idaho 349, __, 74 P.2d 702, 703 (1937).
[69] *See State v. McNeely,* 162 Idaho at __, 398 P.3d at 149 (finding error where state district court felt compelled to follow a directive or pronouncement of the Ninth Circuit).
[70] *Id.*
[71] *Id. (quoting Dan Wiebold Ford, Inc. v. Universal Computer Services, Inc.,* 142 Idaho 235, 240, 127 P.3d 138, 143 (2005)).
[72] *McNeely,* 162 Idaho at __, 398 P.3d at 149 (Idaho 2017).
[73] Motion to Reconsider, *Ronald Ryan Berrett and Lanie Berrett v. Clark County School District No. 161,* Jefferson County case no. CV-17-0328 (filed November 28, 2017) (Hereinafter "Motion"), at p.4.

Notwithstanding, the Court wishes to supplements it prior reasoning and analysis by relying on the Idaho Supreme Court's decision in *English v. Taylor,* 160 Idaho 737, 742, 378 P.3d 1036, 1041 (2016). In *English,* the plaintiffs filed their complaint in the Bonneville County district court.[74] The case was then removed to federal court based diversity of citizenship.[75] Later, the Englishes "filed a motion for leave to file a second amended complaint . . ." on December 10, 2013, and sought to add two new defendants, Eastern Idaho Regional Medical Center and Dr. James Taylor.[76] The Englishes did not serve copies of their motion or the second amended complaint on either of the new defendants at that time.[77] The motion was granted and the Second Amended Complaint was filed on January 16, 2014.[78] "[T]he filing of the Second Amended Complaint destroyed diversity and deprived the federal district court of subject matter jurisdiction."[79] After the Englishes filed their Second Amended Complaint in federal court, the parties stipulated to remand the case back to state district court.[80]

On January 24, 2014, after the case was remanded back to the state district court, the plaintiffs filed their second amended complaint in the Bonneville County district court, and served the two new defendants.[81]

> On March 4, 2014, the Englishes filed an ex parte Rule 60 Motion to Clarify Docket entry order with the federal district court, seeking clarification that the order granting their motion to file the second amended complaint related back to the date on which the Englishes filed their motion for leave to file the Second Amended Complaint. The motion stated that the purpose would be to clarify "that the Complaint was filed on December 10, 2013, instead of some other date."[82]

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[74] *English v. Taylor,* 160 Idaho 737, 739, 378 P.3d 1036, 1038 (2016).
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*

The federal district court entered a clarifying order on the Englishes motion to amend, stating, "The Court hereby clarifies that Plaintiffs' Second Amended Complaint was effectively filed on December 10, 2013 . . . ."[83]

Subsequently, the new defendants filed motions for "summary judgment on grounds that the statute of limitations had expired" and the district court granted the motions, concluding "the Englishes did not commence the actions against Respondents until after the statute of limitations had expired."[84] The Englishes appealed. On appeal before the Idaho Supreme Court the Englishes argued that the federal district court's clarifying order (i.e. the second amended complaint was effectively filed December 10, 2013) was dispositive. The Idaho Supreme Court noted that this argument had waived on appeal but addressed the claim anyways by stating, "Even if the Englishes had not waived the argument, it is well established that 'the decisions of lower federal courts are not binding on state courts, even on issues of federal law.' Therefore, the federal district court's order of clarification is not binding on this Court."[85]

As stated, the Court also recognizes that the facts in the federal case and the state case are not *substantially the same.* Although Plaintiffs' filed the exact same affidavits that were filed in federal court, along with copies of the Defendant's affidavits from federal court, the Defendant has filed new affidavits. These affidavits offer facts not before the federal district court or the Ninth Circuit Court of Appeals. Specifically, these affidavits state that the District was aware of the propane leak in January and recognized it was a building code violation; even though it was

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[83] *Id.*
[84] *Id.*
[85] *Id.* (internal citations omitted). Although it was a decision made by the federal district court and not the Ninth Circuit that was at issue in *English*, this was not the case in *McNeely*. At issue in *McNeely* was a pronouncement by the Ninth Circuit Court of Appeals. The Idaho Supreme Court concluded that decisions of the Ninth Circuit Court of Appeals may be treated as persuasive but are not binding on Idaho's state courts. *McNeely*, 162 Idaho at __, 398 P.3d at 148-49.

unable to isolate the cause or source of the leak.[86] Therefore, based on the prior reasoning and analysis, the Ninth Circuit's decision in the Berrett's former case is not binding on this court, in this new case.

2. Disputed and Undisputed Facts

Plaintiffs have asserted multiple errors in the Court's findings of fact in its Opinion and Order on the Parties' Cross Motion for Summary Judgment. Specifically, Plaintiffs' assert the Court failed to recognize facts that support their position and that the Court did not *liberally construe* the facts in the light most favorable to them. Examples of the asserted errors are provided below:

> First, Ryan's [*sic*] was hired as a person on disability. When he was hired, he told Kerns that he could not do the physical work required, but that he would call professionals to do the work. He was not responsible for the propane, heating and furnace system. Due to the smell, he called propane companies to check the system. Second, all of the affidavits state that until March, [*sic*] 2012, no one could find a leak in the propane system. No one knew there was a leak in the propane system. They only knew of a smell. Third, at the May, [*sic*] 2012 meeting Ryan testified against Kerns along with two propane professionals, and Kerns was a [*sic*] fired as a result. Fourth, Ryan never swore at Kerns and never called him a "fucking asshole", [*sic*] but Kerns used foul language towards Ryan and Lanie on multiple occasions. Fifth, Kerns fired the Berretts without the school board's knowledge. Only after they were fired, did the Berretts and Kerns go before the school board to discuss the termination. Sixth, Ryan Berrett always received positive performance reviews. The first time anyone complained about his performance was the statement in his termination letter that he was a doing a poor job in his maintenance duties.[87]

Further, Ryan asserts that he engaged in a protected activity under the Idaho Whistleblower Act and the evidence shows the propane issue was not known to the District. Meanwhile, Lanie asserts that the Court erred because she "never exceeded her lunch room budget in any year" and that her employment evaluations were positive and she did not fail to

[86] Woods Affidavit, at p. 3; Kerns Affidavit, at p.2; Haight-Mortensen Affidavit, at p.3.
[87] Motion, at p.7.

submit the state-required forms mentioned above. Each of these is discussed in greater detail below.

a. Ryan's Job Responsibilities

In his Motion to Reconsider Ryan asserts that he was hired as a person on disability. The issue of Ryan's disability was not before the Court at summary judgment. Because it was not before the Court at summary judgment, it is immaterial to the Court's analysis of Plaintiffs' Motion to Reconsider.

In addition to claiming he was hired as a person on disability, Ryan asserts, for the first time in his Motion to Reconsider, he was not responsible for the propane, heating, or furnace systems. However, based on the following analysis, the Court cannot reasonably infer that Ryan's responsibilities as maintenance supervisor did not include the furnace and propane systems; or that he was not tasked with resolving the propane issue.

The Court's conclusion is supported by various statements from Ryan's own affidavit. First, Ryan writes, "I had been doing the best I could with my disability to maintain and fix furnaces, water heaters, and plumbing issues by myself."[88] Whether these were part of his job duties upon hiring or whether he acquired these duties later by assignment or his own initiative, it was asserted by Plaintiffs that Ryan undertook to fix these systems.[89]

Ryan also described how he became of aware of the propane problem in his own affidavit, indicating that in January 2012 he began "getting calls every other day about [*sic*] strong odor of propane in the old gymnasium from [the District's] business manager (Gayle Woods) . . . ."[90] He also wrote that he "Had High Planes Propane come over to check for propane smell [*sic*]." He told Dave Kerns, "[He] was going to have Sermon Service and Electric come out

[88] Wessel Affidavit, at attachment p.311.
[89] Wessel Affidavit, at attachment p.311.
[90] Wessel Affidavit, at attachment p.311.

and [he] was going to lock the old gym up."[91] Over a period of several months Ryan continued, with the assistance of Sermon Electric, to work on solving the problem(s) with the propane system. Once Sermon Electric had prepared a price quote for the needed repairs, Ryan was the person who received this quote and shared it with Dave Kerns.[92] Ryan also provided regular reports on the work he was doing with the propane and heating systems in District meetings and in letters written to the school board.[93] Later, Ryan also reported on the problem(s) with the propane system at Board meeting in May.[94]

All of these facts support the Court's conclusion because in the absence of some responsibility for the furnace, heating, and propane systems, it is difficult for the Court to understand why Ryan would have been involved in fixing the problem the way he was. There is no evidence before the Court that Ryan ever disputed or objected to his responsibility for the propane and heating systems prior to the objection in Plaintiffs' Motion to Reconsider. Therefore, based on the prior reasoning and analysis, the Court cannot reasonably infer that Ryan was not the person responsible for maintaining and fixing the furnace and propane systems.

b. Affidavits

Ryan has argued that the Court erred in granting summary judgment for the District because "[A]ll the affidavits state that until March, [*sic*] 2012, no one could find a leak in the propane system. No one knew there was a leak in the propane system. They only knew of a smell." Even drawing reasonable inferences in Ryan's favor, and assuming the actual source, location, or cause of the propane leak was undiscovered until March 2012, the Court disagrees with Ryan's assertions.

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[91] Wessel Affidavit, at attachment p.311.
[92] Wessel Affidavit, at attachment p.312.
[93] Woods Affidavit, at Ex. A.
[94] Wessel Affidavit, at attachment p.314.

As mentioned above, Ryan began getting regular calls about a propane odor in the old gymnasium as early as January 2012. The Court cannot reasonably infer that the odor of propane in a room or building does not indicate the existence of a leak. Furthermore, when the Plaintiffs filed their claims in state court, the District provided affidavits from Gayle Woods, Dave Kerns, and Erin Haight-Mortensen. These affidavits each contain a similar statement which indicates the District was "aware that the leak in the propane system was a building code violation."[95] As the affidavits point out, the exact cause of the odor or the leak was unknown but it is evident everyone involved knew it was a problem and they were actively working to solve it. Solving the problem was difficult because the source or cause of the propane smell, or leak, could not be isolated.

Plaintiffs dispute these affidavits by arguing they contradict the affidavits filed by the District in the federal case. However, the Court cannot reasonably infer that the new affidavits contradict the earlier affidavits that were filed in federal court. The new affidavits emphasize the difficulty in isolating the problem and indicate that Gayle Woods, Dave Kerns, and Erin Haight-Mortensen recognized the smell represented a building code violation that needed to be located and corrected. Information that was not provided within the affidavits filed in the federal case.

Plaintiffs also rely upon deposition testimony in which Dave Kerns admits that he was unaware that the propane leak was a safety issue or that the propane tanks were not in compliance with building code or that he was unconcerned that the leak posed a safety threat. Neither of these are material. As stated in the affidavits, the District was already aware that a building code violation existed somewhere in the system and it was working to isolate it. Because the District already knew about the violation and was working to isolate it, the mere fact

[95] Woods Affidavit, at p.3; Kerns Affidavit, at p.2; Haight-Mortensen Affidavit, at p.3.

that Ryan (with help from Sermon Electric) may have been the person who isolated the source of the problem and reported it does not qualify him for protection under the Act.

As to the safety concerns regarding the propane leaks, which were pointed out by Plaintiffs in their motion to reconsider, this claim is immaterial. The Idaho Whistleblower Act affords protection to employees who "[communicate] in good faith the existence of any waste of public funds, property or manpower, or a violation or suspected violation of a law, rule or regulation adopted under the law of this state, a political subdivision of this state or the United States."[96] Although the Court recognizes that a "safety" issue may be a result or concern of the reported "violation of a law, rule or regulation", the statute's focus is on violations of law, rules, or regulations. Protection under the act is triggered when an employee reports a "violation of a law, rule or regulation" not a "safety" issue.[97] Therefore, it is immaterial whether Mr. Kerns recognized the propane problem as a safety concern for purposes of the Act.

c. May 2012 School Board Meeting

As the Court discussed above, Ryan was called upon to discuss the propane issue at the May 2012 school board meeting. Ryan asserts that "According to school board member Sherri Mead . . . the school board terminated Kerns based upon [Ryan's] testimony."[98] Ryan points this out his affidavit and has provided a note written his calendar (attached to his affidavit as Exhibit B). However, as presented, this assertion is hearsay. It is an out-of-court statement that does not fall within any of the recognized exceptions pursuant to the Idaho Rules of Evidence.

Plaintiffs argue that Ms. Mead's statement is not hearsay under Idaho Rule of Evidence 801(d)(2) because it is an admission of a party opponent. This is incorrect. Idaho Rule of Evidence 801(d)(2) requires more than just a statement, the statement must be

[96] Idaho Code § 6-2103(1)(a).
[97] *Id.*
[98] Motion, at p.10.

> [T]he party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by a party to make a statement concerning the subject, or (D) a statement by a party's agent or servant concerning a matter within the scope of the agency or employment of the servant or agent, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.[99]

Plaintiffs have proffered nothing that indicates Sherri Mead was speaking as the District's representative, that the District manifested agreeance or adopted her statement as truth; or that Ms. Mead was authorized to make the statement, was acting within the scope of her agency or employment, or was a co-conspirator. Therefore, the Court cannot conclude that Ms. Mead's statement regarding Dave Kern's termination is anything but inadmissible hearsay.

The Court has previously stated that Plaintiffs must provide more than a mere scintilla of evidence to make an issue of fact, on the issue of Mr. Kerns' departure or termination they have not done so.[100] Even if the statement proffered by Plaintiffs was not hearsay, or Plaintiffs had obtained an affidavit from Sherri Mead or taken her deposition these would have little bearing on the issues presented in this case. Ryan has never asserted that he was fired because Mr. Kerns was fired. In his complaint, Ryan did not assert that it was Mr. Kerns who fired him, wrongfully or otherwise. Plaintiffs' complaint states, in relevant part:

> On June 30, 2012, [the District] terminated Plaintiffs' employment. The reason which [the District] gave for plaintiffs' termination was a pretext. The true reason and a motivating reason for plaintiffs' terminations was that Plaintiff Ronald Ryan Berrett communicated to the District, in good faith, a violation of a law, rule or regulation which had been adopted under the law of the state of Idaho.[101]

Therefore, whether Sherri Mead told Ryan that Mr. Kerns was terminated based on something Ryan stated at the Board meeting is immaterial to the Court's analysis.

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[99] Idaho Rules of Evidence 801(d)(2).
[100] *Van*, 147 Idaho at 556, 212 P.3d at 986.
[101] Complaint, at Ex. C.

d. Foul Language

In its Opinion and Order on the Parties' Cross-Motions for Summary Judgment the Court found that Ryan Berrett referred to Dave Kerns as a "fucking asshole" when confronted regarding the Facebook post. Upon reconsideration, this finding was in error; however, it is immaterial to the Court's analysis and does not change the outcome of the Court's decision at summary judgment or upon reconsideration.

e. School Board's Knowledge of Ryan and Lanie's Termination

Plaintiffs have asserted that Dave Kerns terminated their employment without the school board's knowledge. This is a conclusory assertion raised by the plaintiffs in their Motion to Reconsider. Beyond the conclusory statements made in their Motion to Reconsider, Plaintiffs have not pointed to any place in the record or their affidavits or anywhere else that supports their conclusions. In other words, they have not provided a scintilla of evidence that makes this a disputed fact.[102]

Meanwhile, the District has supplied the affidavits of Dave Kerns and Erin Haight-Mortensen. Mr. Kerns' affidavit states, in relevant part:

> Mr. Berrett's termination had nothing to do with the propane issue. The Distict decided to terminate Mr. Berrett following his insubordination and verbal abuse directed toward me. In approximately late May or early June, 2012, I was contacted by Erin Haight-Mortensen who had seen a derogatory Facebook post about me. Ms. Haight-Mortensen provided me with a copy of the Facebook post and I placed it in Mr. Berrett's personnel file. It is my understanding that students and parents saw the post and that some students had commented on the post. The Facebook post was inappropriate and a violation of District Policy.
>
> . . .
>
> At the next meeting with the School Board, I discussed the Facebook post with board members and it was determined that because Mr. Berrett was an at-will employee that termination was appropriate.[103]

[102] *Van*, 147 Idaho at 556, 212 P.3d at 986.
[103] Kerns Affidavit, at p.5.

With regard to Lanie's termination, Mr. Kerns wrote, Because of the repeated inability to efficiently run the kitchen, *the District* made the decision to terminate Ms. Berrett." [104]

Regarding the Berretts' termination, Ms. Haight-Mortensen stated, "I was involved in the decision to terminate Mr. Berrett's employment and can attest that his termination had nothing to do with the propane issue. The District decided to terminate Mr. Berrett following Mr. Barrett's insubordination and verbal abuse directed towards Mr. Kerns."[105] Ms. Haight-Mortensen also wrote Lanie's employment was terminated because of her inability to manage the kitchen and remain within her budget.[106]

Even if Mr. Kerns had terminated Lanie and Ryan without the school board's approval, he had the authority to do so. Ms. Haight-Mortensen indicated that, "Because Mr. Kerns was the interim Superintendent, he had authority to terminate Mr. Berrett. He likewise had authority to terminate Ms. Berrett."[107] The Court notes that being fired or terminated without the approval of the school board is not the basis for the Berretts' claims. Nor have Plaintiffs cited a proposition of law that would support such a position.

Instead, Plaintiffs claim they were fired in retaliation for Ryan "blowing the whistle" on the problems with the District's propane system, and that their terminations violated Idaho law and public policy. However, based on the Court's reasoning and analysis in other sections of this opinion, the Court cannot reasonably infer either of the Berretts qualify for protection under the Act. Because the Berretts do not qualify for protection under the Act, the Court cannot reasonably infer their terminations with, or without, the Board's approval were wrongful. Even if the Board's approval was required, Ryan and Lanie have not provided any evidence to support

[104] Kerns Affidavit, at p.6.
[105] Haight-Mortensen Affidavit, at p.5.
[106] Haight-Mortensen Affidavit, at p.6-7.
[107] Haight-Mortensen Affidavit, at p.6.

an inference that the Board lacked knowledge of the terminations. Therefore, the Court may not reasonably infer that their terminations were done without the Board's knowledge. In the absence of disputed facts, the Court concludes that its decision at summary judgment was appropriate.

f. Performance Reviews

Plaintiffs assert the Court's error by arguing "Ryan always received positive performance reviews. The first time anyone complained about his performance was the statement in his termination letter that he was doing a poor job in his maintenance duties."[108] In his affidavit he wrote, "Despite my experience and my always stellar performance evaluations, they denied me requested reasonable accommodations and eventually fired me."[109] These statements are conclusory and are insufficient to create an issue of material fact. Rather, this statement is commentary on the evidence but it is not evidence. The court assumes the fact that he received stellar performance reviews for purposes of summary judgment, notwithstanding the facts presented by the record.

The Court notes the inspection reports provided by the District which mention the discovery of numerous maintenance violations. At summary judgment the Court recognized these stating, "Only a few months before [Ryan's] discharge, the School District's facilities were inspected and numerous maintenance violations were discovered. In fact, some of these violations had been noted in the previous two or three inspections and still remained unresolved."[110] Plaintiffs did not dispute that these violations occurred at summary judgment and has not done so in their Motion to Reconsider. They only assert a lack of complaints regarding his job performance prior to his termination.

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[108] Motion, at p.7.
[109] Wessel Affidavit, at attachment p.315.
[110] Woods Affidavit, at Ex. A.

Nonetheless, the Court sets aside the maintenance violations previously relied upon and assumes, for purposes of summary judgment, that Ryan "always" received superb performance reviews. In light of this assumption, the Court's conclusion remains unchanged. As stated in the termination letter provided to Ryan, his employment was terminated because he was "insubordinate and verbally abusive to the District administration and . . . ridiculed personnel through social media on the internet."[111] Ryan does not dispute that he did so and has provided a copy of the message he posted as an exhibit to his affidavit.[112] This reasoning for his termination is independent of the propane issue and independent of his job performance. The Court recognizes that even if Ryan always received stellar performance reviews and had never posted his grievances or frustrations on social media, this would not preclude his termination because he was an at-will employee.[113] Ryan has not disputed this.

Idaho law is very clear regarding at-will employees: "Unless an employee is hired pursuant to a contract which specifies the duration of the employment or limits the reasons why an employee may be discharged, *the employee is at-will and can be terminated for any reason or no reason at all.*"[114] Absent the application of an exception to this general rule, the District did not need to provide a reason for Ryan's termination. As the Court found at summary judgment, and reiterates below, the Court cannot reasonably infer that Ryan qualified for protection under the Idaho Whistleblower Act. Therefore, as an at-will employee his termination was not wrongful.

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[111] Kerns Affidavit, at Ex. A.
[112] Wessel Affidavit, at attachment p.315, 323-24.
[113] Haight-Mortensen Affidavit, at p.5-6.
[114] *Edmondson v. Shearer Lumber Products,* 139 Idaho 172, 179, 75 P.3d 733, 740 (2003) (emphasis added).

g. Lanie's Lunchroom Budget

Plaintiffs dispute that Lanie ever exceeded her budget; meanwhile, the District asserts that Lanie exceeded her budget in multiple years. Plaintiffs point to Lanie's affidavit and attached exhibits to support her assertion. In her affidavit Lanie wrote, "In 2009, when I took over as lunchroom supervisor, I stayed within budget."[115] She also wrote, "[A]though we may have overspent the budget in a given month, I did not overspend the Food Service budget in any given year."[116]

Additionally, Lanie has provided to the "Child Nutrition Financial Report" as "Exhibit A" to her affidavit. Although the Child Nutrition Financial Report shows a balanced food services budget for the 2009 fiscal year, the data is inconclusive. First, Lanie did not become the Food Service Supervisor until May 2009 and it is unclear what time period this report covers.[117] Second, she has not provided the reports for the remaining years of her tenure as Food Service Supervisor. Lanie was the Food Service Supervisor from May 2009 until June 2012.[118] Despite asserting that she never exceeded her allotted budget, she has failed to provide evidence for 2010, 2011, and 2012.[119]

In direct contradiction of the assertions in her affidavit, Lanie admitted to overspending her budget when Defendant's counsel asked about it during her deposition:

> **Q.** In the second line it says that you have consistently overspent the food service budget each year, with the amount increasing each time. That's a true statement?
> **A.** Yes, sir, it is.
> . . .
> **Q.** You don't dispute that you overspent the food service budget each year, correct?

[115] Wessel Affidavit, at attachment p.329.
[116] Wessel Affidavit, at attachment p.330.
[117] Wessel Affidavit, at attachment p.330.
[118] Wessel Affidavit, at attachment p.330.
[119] The Court also notes that the District has failed to produce reports for these years, although overage figures were provided in the Affidavit of Gayle Woods.

A. No, I don't. [120]

Plaintiffs have not attempted to reconcile the conflicting statements in Lanie's affidavit with her deposition testimony. Nor have they done so in their Motion to Reconsider and did not do so when asked by the Court at oral argument. However, this is immaterial to the Court's analysis.

Even assuming Lanie never exceeded her budget, she was an at-will employee.[121] Plaintiffs have not disputed this fact. As the Court recognized above, "Unless an employee is hired pursuant to a contract which specifies the duration of the employment or limits the reasons why an employee may be discharged, *the employee is at-will and can be terminated for any reason or no reason at all.*"[122] Because Lanie was an at-will employee the District could fire Lanie for "any reason or no reason at all." Plaintiffs do not assert that Lanie engaged in any activity that would protect her from termination or limit the District's ability to terminate her employment. Instead, she asserts protection as a matter of public policy because of her husband's activities. However, as the Court found at summary judgment, and reiterates below, Ryan, did not qualify for protection under the Idaho Whistleblower Act. Therefore, even if the Act, or *Idaho public policy*, provided an exception for the spouse of a whistleblower, the Court cannot reasonably infer that Lanie's termination was wrongful because she was an at-will employee and because her husband did not engage in protected activity.

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[120] Affidavit of Blake G. Hall, *Ronald Ryan Berrett and Lanie Berrett v. Clark County School District No. 161*, Jefferson County case no. CV-17-0328 (filed August 31, 2017) (hereinafter "Hall Affidavit"), at Ex. B, p.70:13 – p.71:20.
[121] Kerns Affidavity, at Ex. B.
[122] *Edmondson*, 139 Idaho at 179, 75 P.3d at 740 (emphasis added).

h. Lanie's Performance Evaluations

Like Ryan, Lanie asserts that she "always received positive performance evaluations" and only a few weeks before her termination "had received a positive performance evaluation and an offer of a raise."[123] As discussed above, it is undisputed that Lanie was an at-will employee.

"Unless an employee is hired pursuant to a contract which specifies the duration of the employment or limits the reasons why an employee may be discharged, *the employee is at-will and can be terminated for any reason or no reason at all.*"[124] Therefore, the District could fire Lanie for "any reason or no reason at all." Based on the Court's analysis at summary judgment and in other sections of this opinion, Lanie does not qualify for protection from this rule. Therefore, the Court cannot reasonably infer that Lanie's termination was wrongful.

i. Required Forms

At summary judgment the Court recognized that Lanie failed to submit several state-required forms during her tenure as lunch room supervisor. The Court reasoned that this was part the District's reasoning for firing her. Despite asserting her always positive performance evaluations, Lanie never directly disputes her failure to submit these forms. However, even if Lanie did not properly submit the forms, it is immaterial to the Court's additional analysis.

As stated, Lanie was an at-will employee. Under Idaho law, an at-will employee may "be terminated for any reason or no reason at all" absent some exception.[125] The Court has previously determined that Lanie did not qualify for protected status. Therefore, as an at-will employee, her termination was not wrongful.

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[123] Wessel Affidavit, at attachment p.330.
[124] *Edmondson*, 139 Idaho at 179, 75 P.3d at 740 (emphasis added).
[125] *Id.* (emphasis added).

3. The Berretts are not entitled to protection under the Idaho Whistleblower Act, or Idaho Public Policy.

In light of the Court's additional reasoning and analysis regarding the disputed and undisputed facts in this case, the Court reevaluates the Berretts' claims for protection under the Idaho Whistleblower Act and Idaho public policy. After additional analysis, the Court concludes that its decision to grant summary judgment in favor of the District was appropriate. The Court will evaluate each plaintiff's claims for protection individually, beginning with Ryan's.

a. Ryan

The Act affords "a legal cause of action for public employees who experience adverse action from their employer as a result of reporting waste and violations of a law, rule or regulation."[126] Protection under the Act is afforded to any employee that "communicates in good faith the existence of any waste of public funds, property or manpower, or a violation or suspected violation of a law . . . under the law of this state or the United States."[127] Therefore, more narrowly stated, the issue is whether Ryan reported a violation or suspected violation of a law, entitling him to protection under the Act.

Ryan claims that he reported a violation of the law because he reported on the District's problem(s) with the propane system. He claims he was discharged in retaliation for making these reports. In response to Ryan's claims, the District argues the discharge was not retaliatory and has motioned for summary judgment. In order to survive summary judgment, the Berretts carry "the burden of presenting evidence from which a rational inference of retaliatory discharge under

[126] Idaho Code § 6-2101.
[127] Idaho Code § 6-2104(1).

the whistleblower act [can] be drawn."[128] In other words, they must present "a prima facie case of retaliatory discharge . . . ."[129]

A prima facie case for retaliatory discharge consists of three elements. To survive summary judgment the Berretts must establish: (1) Ryan was an employee of the District and "engaged or intended to engage in protected activity;" (2) the District "took adverse action against" him; and (3) there is "a causal connection between the protected activity" and the adverse action taken by the District.[130] These three elements will be discussed in sequence below.

i. Ryan Berrett did not engage, or intend to engage, in protected activity.

It is undisputed that Ryan was an employee of the District. Therefore, in order to satisfy this first element, Ryan only needs to establish that he engaged in, or intended to engage in, a protected activity.[131] Based on the Court's analysis, it cannot reasonably infer that Ryan engaged in any protected activity.

There is very little precedent that may be used to define the scope of "protected activities" contemplated under Idaho law. However, as the Act states, it applies to good faith communications of "the existence of any waste of public funds, property or manpower, or a *violation or suspected violation of a law, rule or regulation adopted under the law of this state, a political subdivision of this state* or the United States."[132]

In this case, Ryan claims that he reported a building code violation and that the report(s) he made became the catalyst for his termination. As the following analysis illustrates, the alleged

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[128] *Curlee v. Kootenai County Fire & Rescue*, 148 Idaho 391, 396, 224 P.3d 458, 463 (Idaho 2008).
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] Idaho Code § 6-2103(1)(a).

reports Ryan made do not fall within the range of "protected activities" contemplated by the Act. Ample evidence indicates the propane odor in the old gymnasium was well known to the District in January 2012. It was reported to Ms. Woods, the District's business manager by several staff members.[133] In turn, Ms. Woods called Ryan to inform him of the problem.[134] Ms. Woods also reported the issue to Mr. Kerns, the District's superintendent.[135] Mr. Kerns reported the issue to the chairwoman of the Board, Ms. Haight-Mortensen.[136]

As the District's maintenance supervisor, responsibility fell to Ryan, or he was assigned, to identify the problem and fix it.[137] The Court cannot reasonably infer otherwise. In February, after becoming aware of the problem, Mr. Berrett made his first report in his monthly letter to the Board. Here, the Court again points out it cannot reasonably infer the issue had not already been reported to the Board by Mr. Kerns and was not already well known throughout the District and the administration.[138]

In his March letter, Ryan reported on the issue again. This time he described the work he had done to identify and fix the problem. He also informed the Board, "I am waiting for a bid from sermon [*sic*] to correct this problem, when I receive it I will give it to MR. KERNS [*sic*] and we will go from there."[139] Ryan claims he later received the bid from Sermon Electric, showed it to Mr. Kerns, and was told to "keep quiet." Mr. Kerns disputes that he ever told Ryan to "keep quiet."

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[133] Woods Affidavit, at p.3
[134] Wessel Affidavit, at attachment p.311.
[135] Kerns Affidavit, at p.2.
[136] Haight-Mortensen Affidavit, at p.2.
[137] In Plaintiffs' Motion to Reconsider, Ryan disputed his responsibility for the propane system but as the Court's earlier analysis shows: there is no genuine dispute of fact. It is clear that Ryan was tasked with solving the problem the propane system.
[138] Woods Affidavit, at p. 3; Kerns Affidavit, at p.2; Haight-Mortensen Affidavit, at p.3.
[139] Woods Affidavit, at Ex. A, p.28.

Although this allegation is suspicious, it is of little consequence. Even if Ryan was told to "keep quiet," the Court cannot reasonably infer there was anything to keep quiet about. The school board was already aware of the propane leak. Mr. Kerns had already informed the school board's chairwoman, Erin Haight-Mortensen, and Ryan had already begun reporting the problem in his letters to the Board. He had already told the Board that Sermon Electric was preparing a price quote for the needed repairs.[140] Based on the affidavits and other evidence supplied, the Court cannot reasonably infer that the propane issue was not already known to the District. Nor can the Court reasonably infer that the leak was not known to be a building code violation *before* this particular conversation between Ryan and Mr. Kerns occurred.

This is also supported by additional evidence. As early as February, a technician from Sermon Electric began making service calls to the school and was assisting Ryan in resolving the propane leak.[141] Ryan reported this in his February letter to the Board. Ryan also enlisted the aid of High Planes Propane.[142] It is apparent the School Board knew of this involvement because "it approved payment for each of the service calls."[143]

It is beyond believable that an employee could be charged with solving a problem (even a building code or safety violation), provide regular progress reports to his employer, discuss the viability of proposed solutions with superiors, and then, after being fired, use those same activities to substantiate claim of retaliatory discharge. This is especially true when the employee was charged with fixing a problem already known to the employer.

Certainly, the statute offers protection to employees who report "*a violation or suspected violation of a law*" and it is undisputed that the propane leak was a violation of law; however,

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[140] Woods Affidavit, at Ex. A, p.28
[141] Wessel Affidavit, at attachment p.311-12.
[142] Wessel Affidavit, at attachment p.311.
[143] Woods Affidavit, at p.3.

there was nothing to report for purposes of the Act because the District already knew about the problem and was working to fix it. Therefore, Ryan has failed to establish that any of the actions described above constituted protected activity.

The Court now looks to Ryan's other actions to determine whether any of these reasonably constituted protected activity. First, Ryan claims he appeared at the May 17 school board meeting to testify against Mr. Kerns.[144] The notes from the meeting shed a different light on his participation. The notes indicate Ryan reported that "the propane issues are still a problem."[145] From the District's perspective Ryan's participation appears to have been nothing more than another progress report on the problem he had been tasked with resolving.

Ryan asserts that he and two others "were called before the Board and asked one at a time if [they] thought that the Superintendent knew that the propane problem could possibly cause injury to human life." The court for Summary Judgment assumes this to be true. Regardless, this statement supports the conclusion the District already knew about the propane problem and acknowledged it. Why else would the school board have "called" upon Ryan to discuss the issue at all?

All things considered and drawing reasonable inferences in favor of the Plaintiffs (the nonmoving party), the Court cannot reasonably infer that Ryan's participation in the school board meeting was protected activity. The District already knew about of the propane leak, Mr. Kerns had personally informed the Board of the issue four months before. Ryan had also been providing the Board with monthly reports on the issue. The Board had also approved payments for service calls made by Sermon Electric and High Planes Propane. Again, the Court is left to ponder, what else was there to report that might have constituted a protected activity? Even if

[144] Wessel Affidavit, at attachment p.314.
[145] Woods Affidavit, at Ex. A.

Ryan's assertions are true, even if he was called to testify about or against Mr. Kern at the school board meeting, what could he have said to qualify him for protection? Ryan does not claim he was terminated for testifying against Mr. Kerns. He claims he was fired for reporting on the propane issue, which was a violation of law.[146]

Lastly, the Court discusses the message Ryan posted to Facebook on or about June 18, 2012.[147] The posted message was critical of the District and its administration. [148] Although the message may have contained a cryptic reference to the propane problem, it more closely resembles an unfettered rant by a disgruntled employee.[149] It offers nothing that resembles a good faith report of "a violation or suspected violation of a law . . . ." [150] Therefore, the Court cannot reasonably infer that it constitutes protected activity.

Because the Court cannot reasonably infer that Ryan engaged in any protected activity, summary judgment in favor of the District was appropriate. Nevertheless, for the sake of inquiry, the Court continues its analysis of the two remaining elements: (1) adverse action against the employee, and (2) a causal connection between the protected activity and the adverse action.

b. The District took an adverse action against Ryan Berrett by terminating his employment.

The second element of a retaliatory discharge claim requires the employee to establish the employer took an adverse action against them. Based on the following analysis, the Court may reasonably infer the District took adverse action against Ryan. The evidence before the Court is that Mr. Berrett's employment was terminated. This fact is undisputed.

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[146] Complaint, Ex. C, at p.7-9.
[147] Wessel Affidavit, at attachment p.323-24.
[148] Wessel Affidavit, at attachment p.323-24.
[149] Wessel Affidavit, at attachment p.323-24.
[150] Idaho Code § 6-2104(1).

After Ryan posted the aforementioned rant on Facebook, Ms. Haight-Mortensen notified Mr. Kerns about the post and requested that he speak to Ryan about it. Mr. Kerns then discussed the Facebook post at the Board's next meeting. During the meeting it was decided that Mr. Berrett was an at-will employee and discharge was the appropriate sanction for his conduct. A termination letter was then drafted and delivered to Ryan. The letter, signed by Mr. Kerns, states in relevant part:

> You have been insubordinate and verbally abusive to the District administration and have ridiculed personnel through social media on the internet. Your performance in some duties has been declining as well with building maintenance and keeping lights replaced and in working order. Due to your status as an "at-will", or non-contractual employee, the District administration has decided to terminate your employment effective June 30th, 2012.[151]

The District does not dispute that this letter was delivered, or that Ryan's employment was terminated. Because it is undisputed his employment terminated, Ryan has established that the District took adverse action against him.

The Court notes that, for the first time at oral argument, on Plaintiffs' Motion to Reconsider, Plaintiffs asserted that the District took additional adverse action against them. Plaintiffs asserted that the District raised their rent and eventually evicted them from their District owned residence. The Court recognizes these as additional adverse actions and assumes them to be true, but the Court has already recognized that, for purposes of summary judgment, the District took adverse action against the Plaintiffs. Therefore, the prior related analysis and conclusion of the Court is unchanged by these new assertions and summary judgment in favor of the School District was still appropriate based on the Court's analysis of the two remaining elements.

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[151] Kerns Affidavit, at Ex. B.

c. There is no causal connection between Ryan Berrett's alleged, protected activity and the adverse action taken by the District.

To survive summary judgment on a retaliatory discharge claim, Ryan must also establish a causal connection between his alleged, protected activity and the adverse action taken by the District. Because Ryan failed to establish that he engaged in a protected activity, there can be no causal connection to the adverse action taken by the District. Nevertheless, the Court continues its analysis of the final element for the sake of inquiry. Relevant to this inquiry is the "Proximity in time between the protected activity and the adverse employment action . . . ."[152]

As stated, several of the District's other employees and administrators received reports of a propane odor in the gymnasium as early as January 2012. Over a period of several months, Ryan worked to resolve the issues and provided regular reports to Mr. Kerns and the Board. Multiple affidavits and their corresponding exhibits support these facts. It was not until approximately four or five months later, after multiple written and verbal reports were provided, that Ryan's employment was terminated. This is a significant amount of time, and the Court cannot reasonably infer that the adverse action taken against Ryan and the alleged protected activity are causally connected.

Beyond this, Ryan asserts that he attended the May 17 Board meeting and testified against Mr. Kerns. Then his employment was terminated roughly six weeks later. Although these two events occurred close in time, the temporal relation is immaterial because a claim that Ryan was terminated for testifying against Mr. Kerns is not before the Court. Therefore, the Court cannot reasonably infer that there a causal connection between the adverse action taken by the District and the activities Ryan claims were protected. This is especially true because the District

[152] *See Curlee,* 148 Idaho at 397, 224 P.3d at 464 (*quoting Heng v. Rotech Med.Corp.*, 688 N.W.2d 389, 401, (N.D. 2004)).

was already aware of the propane issue as early as January and Ryan had been providing regular reports on the problem months before his termination.

The Court notes that the Ninth Circuit Court concluded that Ryan's termination was sufficiently close in time to the alleged, protected activity to survive summary judgment. However, the facts now before the Court are different from the facts in the case heard by the Ninth Circuit Court of Appeals. The affidavits filed in this case make it clear the District was aware of the building code violation caused by the propane issue as early as January 2012. As the Court discussed above, many months passed since Ryan began working on and reporting on the propane issue and his termination. Based on this analysis, the Court cannot reasonably infer that the two events were close in time or causally connected. Therefore, In other words, the Court properly granted summary judgment in favor of the District and Plaintiffs' Motion to Reconsider should be denied as to the wrongful termination claim.

4. **As a matter of public policy, Lanie Berrett does not qualify for protection under the Act as the spouse of a whistleblower.**

As a matter of public policy, Lanie Berrett claims that she qualifies for protection from a retaliatory discharge as the spouse of a whistleblower. However, based on the Court's prior analysis, it cannot reasonably infer that Ryan Berrett failed to establish that he was a whistleblower under the Act or was the subject of a retaliatory discharge. Because Ryan does not qualify for protected status under the Act, Lanie cannot claim protection as his spouse. Even if Ryan had established a case retaliatory discharge, Lanie would still not be entitled to protection for two reasons. First, under established law, spouses of employees are unprotected by both the Act and public policy. Second, the Court cannot reasonably infer that her termination is causally connected to any protected activity.

a. Spouses of Employees are Unprotected

Spouses of employees who engage in protected activity are not protected under the Act or any related Idaho law or policy. The Idaho Whistleblower Act provides a "cause of action for public *employees* who experience adverse action from their employer as a result of reporting waste and violations of a law, rule or regulation."[153] Lanie Berrett asserts that as a matter of public policy, she is entitled to protection. However, the Court will not adopt this conclusion.

The language of the Act specifically allows relief for "employees." It makes no reference to, or allowance for, *spouses* of employees.[154] The Court is unwilling to read words into the statute that were not included by the legislature. Additionally, the Idaho Supreme Court has not previously extended protection to an employee's spouse as a matter of public policy and the Court is unwilling to do so now. "Even if a cause of action for damages should exist as relief for alleged retaliatory discharge in contravention of public policy based upon conduct of the employee's spouse . . . the dearth of evidence in this case fails . . ." to support a reasonable inference that Lanie's spouse was entitled to protection under the act, or that her termination was causally connected to any of his allegedly protected activities.[155]

Plaintiffs have argued that this Court should extend whistleblower protection to spouses of eligible employers. Plaintiffs have made valid arguments as to why this would be appropriate; however, in considering these arguments the Court notes that the whistleblower statute's latest version was enacted by the legislature in 1994. It is not a statute that is over fifty, or even one hundred, years old with a changing and evolving population. The court also notes the specific language of the statute says, "employee."

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[153] Idaho Code § 6-2101 (emphasis added).
[154] *See id.*
[155] *Edmondson*, 139 Idaho at 179, 75 P.3d at 740 (emphasis added).

This Court consistently applies statutes as written and it is not persuaded that this is a situation where an exception or an addition to the statute is appropriate as a matter of public policy. If the Idaho legislature desires to extend protection to spouses of employees under the whistleblower statute it may do so. This court is not persuaded that it should enlarge the protection already made available by the legislature. The Idaho legislature may do so if it believes such protection is appropriate.

b. Lanie's Termination is not Causally Connected

Even if relief were available based upon the conduct of an employee's spouse as a matter of public policy, summary judgment is still appropriate because Lanie has not established that her termination is causally connected to any protected activity (even the activity asserted by her husband). As discussed, the Berretts must establish a prima facie case of retaliatory discharge to survive summary judgment.[156] Such a claim requires three elements: (1) the employee engaged in a protected activity, (2) the employer took adverse action against the employee, and (3) the adverse action was causally connected to the protected activity.[157]

Lanie does not assert that she engaged in protected activity; rather, she relies on her husband's claim that he engaged in protected activity. The Court previously decided that it could not reasonably infer Ryan had engaged in protected activity. The Court emphasizes that even if he had, neither the act nor Idaho public policy extends protection to spouses of employees who engaged in protected activity.

The second element requires an adverse action against the employee. If the Act made allowance for spouses of employees, Lanie could establish this element. Her rent was increased, her employment was terminated, and she was evicted from her residence. Therefore, for purposes

[156] *Curlee,* 148 Idaho at 397, 224 P.3d at 464.
[157] *Id.*

of summary judgment, the Court may reasonably infer that adverse action was taken against Lanie.

However, the Court cannot reasonably infer Lanie qualifies for protection under the Act because her termination is causally connected to any protected activity. Lanie has not asserted that she engaged in any protected activity. Instead, she asserts that her termination is causally connected to her husband's activities.

As stated, "Proximity in time between the protected activity and the adverse employment action . . ." is relevant to determining whether the two are causally connected.[158] As discussed above, months passed between Lanie's termination and Ryan's allegedly protected activity. During this period, Ryan was constantly updating the school board on his progress. The Board also called on Ryan to discuss the propane issue at the May 17 Board meeting.[159] Based on this and the Court's analysis in other sections of this opinion, the Court cannot reasonably infer that Lanie's termination was causally connected to any protected activity. As a result, the Court cannot reasonably infer that Lanie's termination was in retaliation for any protected activity (either her own or her spouses). As a result, the Court properly granted summary judgment in favor of the District on Plaintiffs' claim for retaliatory discharge. Plaintiffs' Motion to Reconsider should be denied.

5. Remaining Claims

As to the remaining federal law claims, listed in the complaint, which were not addressed by the parties in the original Summary Judgment Motion and in the Courts prior Opinion and Order on Parties' Cross-Motion for Summary Judgment, the Court grants the Plaintiffs' Motion

[158] *See id.* (*quoting Heng v. Rotech Med.Corp.*, 688 N.W.2d 389, 401, (N.D. 2004)).
[159] This provides additional evidence that the District knew about and acknowledged the propane problem.

to Reconsider. As the Plaintiffs correctly point out, they should be allowed to address those issues through pleading and argument.

IV.
CONCLUSION

Based on the foregoing, the Court orders as follows:

1- Plaintiffs' Motion to Reconsider the decision on Plaintiffs' Whistleblower/Retaliation Claims is DENIED.

2- Plaintiffs' Motion to Reconsider the decision on Plaintiffs' Disability Discrimination claims is GRANTED.

3- Plaintiffs' Motion to Reconsider the decision on Plaintiffs' Fair Housing Act claims is GRANTED.

IT IS SO ORDERED.

Dated this 12th day of February 2018.

Bruce L. Pickett
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 22 day of February 2018 the MEMORDANDUM DECISION ON PLAINTIFFS' MOTION TO RECONSIDER was entered and a true and correct copy was served upon the parties listed below by mailing, with the correct postage thereon, or by causing the same to be delivered to their courthouse boxes.

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Clerk of the District Court
Jefferson County, Idaho

by D Barnes
Deputy Clerk

MAGISTRATE/DISTRICT COURT
JEFFERSON COUNTY COURT

2018 SEP 10 PM 5:03

Thomsen

FILED IN CHAMBERS
at Idaho Falls
Bonneville County
Hon Bruce L. Pickett
Date August 1, 2018
Time 4:30 p.m.
Deputy Clerk A Barnett

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

RONALD RYAN BERRETT AND LANIE BERRETT, husband and wife,

Plaintiffs,

v.

CLARK COUNTY SCHOOL DISTRICT NO. 161,

Defendant.

Case No. CV-2017-328

FINAL JUDGMENT

JUDGMENT IS ENTERED AS FOLLOWS: The Plaintiff's claims against the Defendant are hereby dismissed with prejudice.

IT IS SO ORDERED.

Dated this 1st day of August 2018.

Bruce L. Pickett
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August 2018 the FINAL JUDGMENT was entered and a true and correct copy was served upon the parties listed below by mailing, with the correct postage thereon, or by causing the same to be delivered to their courthouse boxes.

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Colleen Poole
Clerk of the District Court
Jefferson County, Idaho

by D. Barney
Deputy Clerk

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Idaho Falls, Idaho 83402
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NOTICE OF TRANSCRIPT LODGED

DATE: 10/29/2018

TO: Stephen W. Kenyon, Clerk of the Court
Supreme Court / Court of Appeals
P.O. Box 83720
Boise, ID 83720-0101

SUPREME COURT DOCKET NO: 46354

DISTRICT COURT CASE NO: CV-2017-328

CAPTION OF CASE:

BERRETT V CLARK CO SCHOOL DISTRICT NO 161

You are hereby notified that a reporter's appellate transcript in the above-entitled and numbered case has been lodged with the District Court Clerk of the County of Bonneville in the Seventh Judicial District. Said transcript consists of the following proceedings, totaling 114 pages:

1. Motions hearing, October 6, 2017

2. Motion to reconsider, January 12, 2018

Respectfully,

_____

Mary Fox, CSR 1008, RPR

cc: District Court Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

Ronald Ryan Berrett, Lanie Berrett vs. Clark County School District No. 161	Supreme Court No. 4637-2018 CERTIFICATE OF EXHIBITS

I, Denise Criddle, Deputy Clerk of the District Court of the Seventh Judicial District of the State of Idaho in and for the County of Jefferson, do hereby certify that the following documents will be submitted as exhibits to the Record:

Court Exhibits

1.

Plaintiff's Trial Exhibits

1.

Defendant's Trial Exhibits

1.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court on this the 2nd day of November, 2018.

COLLEEN POOLE
Clerk of the Court

Seal

By:_____
Deputy Clerk

CERTIFICATE OF SERVICE

I certify that on this date, I served a copy of the attached to:

Jacob Scott Wessel	wessel@thwlaw.com	[X] By E-mail
Blake G. Hall	bgh@hasattorneys.com	[X] By E-mail

Ronald Ryan Berrett
No Known Address

[ ] By E-mail [ ] By mail
[ ] By fax (number)
[ ] By overnight delivery / FedEx
[ ] By personal delivery

Lanie Berrett
No Known Address

[ ] By E-mail [ ] By mail
[ ] By fax (number)
[ ] By overnight delivery / FedEx
[ ] By personal delivery

Clark County School District No 161
No Known Address

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Colleen Poole
Clerk of the Court

Dated: 11/02/2018

By: *Denise Criddle*
Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

Ronald Ryan Berrett, Lanie Berrett vs. Clark County School District No. 161	Case No. CV-2017-328 Clerk's Certificate of Service

I, Denise Criddle, Deputy Clerk of the District Court of the Seventh Judicial District, of the State of Idaho, in and for the County of Jefferson, do hereby certify that the above and foregoing Record in the above entitled cause was electronically compiled at my direction, and is a true, full and correct Record of the pleadings and documents as requested by the parties.

I further certify that I have caused to be served the Clerk's Record and Reporter's Transcript (if requested), along with copies of ☐ all Exhibits offered or admitted; ☐ No Exhibits submitted; ☐ Pre-sentence Investigation, or ☐ Other Confidential Documents; or ☐ Confidential Exhibits (if applicable) to each of the Attorneys of Record or Parties in this case as follows:

CERTIFICATE OF SERVICE

I certify that on _____, 2018, I served a copy of the attached to:

Jacob Scott Wessel	wessel@thwlaw.com	[X] By E-mail
Blake G. Hall	bgh@hasattorneys.com	[X] By E-mail

Ronald Ryan Berrett No Known Address	[ ] By E-mail [ ] By mail [ ] By fax (number) [ ] By overnight delivery / FedEx [ ] By personal delivery
Lanie Berrett No Known Address	[ ] By E-mail [ ] By mail [ ] By fax (number) [ ] By overnight delivery / FedEx [ ] By personal delivery
Clark County School District No 161 No Known Address	[ ] By E-mail [ ] By mail [ ] By fax (number) [ ] By overnight delivery / FedEx [ ] By personal delivery

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Dated: _____

Colleen Poole
Clerk of the Court

By: *Denise Criddle*
Deputy Clerk