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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

JOANIE SMITH,

Plaintiff-Appellant-Cross Respondent,

vs.

GLENNS FERRY HIGHWAY DISTRICT,

Defendant-Respondent-Cross Appellant.

Docket No. 46180-2018

Elmore County District Court

Case No. CV-2016-1257

APPELLANT/CROSS-RESPONDENT'S REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT FOR THE COUNTY OF ELMORE

HONORABLE NANCY BASKIN
District Judge

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I. STATEMENT OF UNDISPUTED FACTS

There are effectively no material facts in dispute on appeal. The only legitimate dispute is the identity of the trier of fact, and how the undisputed facts apply to the remedies available under the Idaho Protection of Public Employees Act ("IPPEA"). Although Smith objects to many of GFHD's attempts to mischaracterize the undisputed facts and events established in this matter, all material facts are substantiated by physical documents in the record, or are subject to the uncontroverted testimony of the witnesses at trial.

It is undisputed that both Smith and GFHD made demands for trial by jury in their respective *Complaint and Demand for Jury Trial*, R. Vol. I, p. 645-49, and *Answer to Plaintiff's Complaint and Demand for Jury Trial*, R. Vol. I, p. 650-54. There is no dispute both parties stipulated to a trial by jury, and that the district court's *Scheduling Order* was entered February 14, 2017, ordering a jury trial pursuant to the parties' stipulation. R. Vol. I, p. *See* R. Vol. I, p. 656-58, 660. There is no dispute that the February 14, 2017 *Scheduling Order* was in effect before trial, during trial, and after the jury trial ended. The district court's *Memorandum Decision and Order*, which was the only order addressing the issue of trial by jury after the initial *Scheduling Order*, was entered more than three months after the jury trial ended. *See* R. Vol. I, p. 738–76.

The facts underlying Smith's employment with GFHD are also undisputed. Joanie Smith was a long-term employee of the Glenns Ferry Highway District ("GFHD") since 2007. Tr. Vol. I, at 306, p.220–221, L. 21–2; Def. Br. at 2. During the regularly scheduled Commissioner Meeting on March 11, 2016, Jensen announced her "semi-retirement" effective at the end of the month.[1]

[1] Smith objects to GFHD's misleading argument that the Commissioners decided in March to advertise for the open position, or that the position posted in July was "Jensen's position." *See* Def. br. at 3, ¶ 2. The meeting minutes unambiguously reflect the Commissioner's decision *not* to advertise for any position, and that Jensen and Smith would continue to share job duties of the Office Manager as Smith continued to train to replace Jensen. *See* Confidential R. Vol. I, p. 10,

See Confidential R. Vol. I, p. 10, EX. 2 at GFHD 138; Def. Br. at 3. Although Smith had started in an entry-level position in 2007, Smith's duties and responsibilities rapidly increased after Jensen announced her "semi-retirement," and Smith began training to replace Jensen. Tr. Vol. I, at 309, p. 32, L. 15–22; Def. Br. at 3. Its undisputed that Jensen stole money from GFHD, and that Smith engaged in a protected activity under the IPPEA when she reported the theft. Tr. Vol. I, at 315, p. 256–57, L. 17–4; Def. Br. at 3–4. Although Jensen was instructed to repay GFHD, Jensen failed to do so, and effectively stole more money. R. Vol. I, p. 108, EX. 39A; Def. Br. at 4. It is undisputed that Jensen was never disciplined, and received a pay raise while continuing to work part-time alongside Smith, while the two employees shared the duties of Office Manager. R. Vol. I, p. 73, EX. 22. The Office Manager position is a full-time responsibility, requiring anywhere from thirty-two to fifty-six hours per week. It is undisputed that the employee that replaced Smith, Lucille Allen, started working full-time immediately upon being hired. Tr. Vol. I, p. 158, at 496, ll. 23–24.

It is undisputed that GFHD illegally retaliated against Smith in violation of the IPPEA when GFHD terminated Smith on August 8, 2016. R. Vol. I, p. 495, Jury Instruction No. 10, ¶ 3; Def. Br. at 2, fn. 1 ("Liability and the award of the civil penalty are thus not at issue in this appeal.") It is particularly significant that both GFHD and the district court acknowledge that the jury was the proper and dispositive trier of fact on the issue of liability:

> Defendant does not dispute that, <u>in light of the jury's finding that the highway district violated the IPPEA</u>, Plaintiff may appropriately be awarded some amount of her lost wages caused by her termination . . . .

EX. 2 at GFHD 138; *see also* Tr. Vol. I, at 178, p. 575, L. 12–25 (Riggs: "So yes, Linda was going to train her more and give her more responsibility.")

R. Vol. I. p. 568 (emphasis added); *see also* Def. Br. at 6 ("The district court ruled that it would try the case with a jury, which would decide the issue of liability . . . .") (emphasis added). At the conclusion of the jury trial, held in Elmore County on February 7–9, 2018, the empaneled jury unambiguously concluded, as a matter of fact, that Smith would have worked full-time (40 hours per week) beginning January 31, 2017 (prior to commencement of trial), until Smith retired in approximately January 31, 2021 at the age of sixty-five. R. Vol. I, p. 529; Def. Br. at 6. Consistent with the jury's findings of fact, the jury awarded Smith "past income lost" in the amount of $63,043.92, and "future income lost" of $187,500.00. *Id.* The only disputed issue on appeal is the number of hours Smith would have worked, but-for GFHD's illegal discrimination, and who the proper trier of fact was. *See* Def. Br. at 22–26. Smith asks this Court to uphold the jury's verdict and order entry of judgment *nunc pro tunc* to February 9, 2018.

II. ATTORNEY'S FEES ON APPEAL

The IPPEA provides that a court may order "payment by the employer of reasonable costs and attorneys' fees" to the employee. *See* I.C. § 6-2106(5). Likewise, "damages" is defined under Idaho Code section 6-2105 as including "court costs and reasonable attorneys' fees." I.C. § 6-2105(1); *see also Wright v. Ada Cty.*, 160 Idaho 491, 499, 376 P.3d 58, 502 (2016) (permitting an award of reasonable costs and fees on appeal if Wright prevailed on his Whistleblower Act claim on remand). Smith seeks an award of attorney's fees under the IPPEA proportional to all issues Smith is determined to be the prevailing party on appeal.

Additionally, with regard to GFHD's cross-appeal on the issue of past lost wages or "back pay" as GFHD refers to it, as well as GFHD's argument that it is not bound by its own stipulation on the record—Smith seeks attorney's fees pursuant to I.C. § 12-121. "An award of attorney fees under Idaho Code § 12–121 is not a matter of right to the prevailing party, but is appropriate only when the court, in its discretion, is left with the abiding belief that the case was brought, pursued,

or defended frivolously, unreasonably, or without foundation." *McGrew v. McGrew*, 139 Idaho 551, 562, 82 P.3d 833, 844 (2003). Here, GFHD has defended its breach of its own stipulation and the district court's *Scheduling Order* in an unreasonable and meritless manner. These issues are dispositive regarding Smith's appeal. Therefore, but-for GFHD's unreasonable defense, Smith would not have incurred the unnecessary costs associated with this appeal. Similarly, there is no reasonable basis to conclude the district court was not bound by the jury's award for past lost wages under the IPPEA statute. Smith respectfully asks for a full award of her attorney's fees on appeal at her attorneys' contractual rate of services.

III. LEGAL RESPONSE

A. GFHD Was Bound by Its Consent and Demand for Jury Trial, and the District Court's Order

1. GFHD May Not Breach Its Legally Binding Consent to Trial by Jury

GFHD cannot escape the fact that GFHD entered into a binding stipulation with Smith for the case to be tried as a jury trial:

> 2. Parties estimate that the case will take **five (5) days** to try.
>
> Case to be tried as: **12 Person Jury Trial**.

R. Vol. I, p. 656–57 (*Stipulation for Scheduling and Planning*). GFHD readily acknowledges that "stipulations as to facts are generally binding upon the parties. . . ." Def. Br. at 23, citing *Firmage v. Snow*, 158 Idaho 343, 348, 347 P.3d 191, 196 (2015). Yet, GFHD nevertheless suggests that despite being generally bound by its own stipulation, it can still contest Smith's asserted right to trial by jury as a "conclusion of law." *Id.* GFHD thereby ignores the fact that the parties did not stipulate to the "right" to have a trial by jury, the parties stipulated to actually *doing* a trial by jury. GFHD was bound by its own stipulation to conduct a trial by jury, which even if not proper as a

matter of right under I.R.C.P. Rule 38, was binding as a matter of consent pursuant to I.R.C.P. Rule 39(c)(2).

GFHD admits that the only motion it filed challenging the jury trial issue was *after* the trial had already concluded. *See* Def. Br. at 6 ("GFHD submitted the requested Motion on the Verdict on March 7, 2018.") GFHD erroneously argues that the fact it mentioned its "equitable relief" arguments in its trial brief somehow remedies the procedural defectiveness of its untimely motion. *See* Def. Br. at 22. However, GFHD's trial brief was clearly not a proper motion under I.R.C.P. Rule 7. "A request for a court order must be made by motion." I.R.C.P. Rule 7(b)(1) (emphasis added). A motion must "state with particularity the grounds for the relief sought including the number of the applicable civil rule, if any," as well as "state the relief sought." I.R.C.P. Rule 7(b)(1)(B)–(C). GFHD never filed a motion for the court to take any specific action before trial, and therefore waived its right to challenge the trial procedure. *See State v. Hansen*, 127 Idaho 675, 678, 904 P.2d 945, 948 (Ct. App. 1995) ("We have previously held that when a challenge to the jury is not raised in a timely fashion, we will not consider it on appeal, unless, the appellant can show that the error constituted fundamental error.")

Similarly, GFHD never requested leave to withdraw its demand for jury trial pursuant to I.R.C.P. Rule 38(d). GFHD also failed to request to amend its *Answer* demanding a jury trial. To the extent that GFHD's *Motion on the Verdict* or Trial Brief *could* be construed as a proper motion to amend its pleadings under Rule 7, GFHD's motion was untimely and a violation of the district court's *Order Governing Proceedings and Setting Trial*. R. Vol. I, p. 660–65. The district court's *Order Governing Proceedings* required a Motion to Amend Pleadings to be filed before June 1, 2017, and dispositive motions to be filed 60 days before trial. *Id.* at 662–63. Non-dispositive "Pretrial Motions" had to be filed 28 days before trial. *Id.* at 663. In contrast, GFHD's Trial Brief was not filed until January 30, 2018, seven days prior to trial, and its *Motion on the Verdict* was

not filed until a month *after* the trial was already completed. *See* Def. Br. at 6; R. Vol. I, p. 364–79. Contrary to GFHD's argument, amendment to GFHD's pleadings is governed by the deadlines set in I.R.C.P. 16(a)(2)(B), and therefore "must not be modified except by leave of the court on a showing of good cause or by stipulation of all the parties and approval of the court." I.R.C.P. 16(a)(3); *see also* Def. Br. at 32.

GFHD makes no showing of "good cause" why Smith's claim should not have been tried by a jury pursuant to the parties' consent. In fact, on the contrary, justice would *require* the jury's verdict to stand for the reasons stated in section A(5) of Smith's Opening Brief. App. Br. at 19–20. The jury is "the single most important guardian of the people's right to be protected from oppressive and overreaching government." *Savage Lateral Ditch Water Users Ass'n v. Pulley*, 125 Idaho 237, 249, 869 P.2d 554, 566 (1993). The decision to uphold Smith's jury verdict is consistent with I.R.C.P. Rule 1 that provides, "[t]hese rules should be construed and administered to secure the just, speedy and inexpensive determination of every action and proceeding." *Id.* (emphasis added). GFHD should not be rewarded for what this Court has previously described as a "retromingent attitude," in attempting to repudiate its binding stipulation on the record. *See Annest v. Conrad-Annest, Inc.*, 107 Idaho 468, 470, 690 P.2d 923, 925 (1984) (*per curiam*).

2. GFHD Is Bound by Its Demand for Trial by Jury Pursuant to I.R.C.P. Rules 38, 39

GFHD also cannot avoid the legal consequences of its own demand for jury trial pursuant to I.R.C.P. 38 and 39. GFHD specifically demanded a trial by jury on all issues, including damages:

> Defendant, pursuant to Rule 38(b) of the Idaho Rules of Civil Procedure, hereby demands a trial by jury of the Plaintiff's action for damages.

R. Vol. I, p. 654 (*Defendant's Answer To Plaintiff's Complaint and Demand For Jury Trial*) (emphasis added); *see also* I.R.C.P. Rule 38(c) ("In its demand, a party may specify the issues that it wishes to have tried by a jury; otherwise, it is considered to have demanded a jury trial on all the

issues so triable.") Smith specifically objects to GFHD's inaccurate statement that it only consented to trial by jury on the issue of liability:

> The case went to trial in February 2018. The parties consented to a jury trial on the issue of liability.

Def. Br. at 1. GFHD's statement is a deliberate mischaracterization of the record and the facts before this Court. Defendant's *Answer* and the parties' *Stipulation* proves that the parties consented to a jury trial on *all* issues, including damages. *See* R. Vol. I, p. 654, 656–57. Such a demand and consent are expressly governed by the Idaho Rules of Civil Procedure.

Idaho's Rules of Civil Procedure contemplate that once a party demands trial by jury, a demand may only be withdrawn by all parties' consent:

> (d) **Waiver; Withdrawal.** A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.

I.R.C.P. Rule 38(d) (emphasis added). GFHD was therefore legally precluded from breaching its own demand for trial by jury without Smith's consent. Federal courts have addressed this specific issue in the context of the identical language in Federal Rules of Civil Procedure 38 and 39:

> Accordingly, we conclude that whatever right a party may have to withdraw a jury demand unilaterally under *Reid Brothers*,[2] that right is extinguished at the onset of trial. Once trial begins, a party may no longer unilaterally withdraw its jury demand; other parties are entitled to rely whether they have waived their rights or not, and withdrawal may occur only in compliance with the language of Rule 39(a).

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[2] *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1304 (9th Cir. 1983) involves a jury demand withdrawal in which only one party demanded trial by jury. *See id.* The *Reid Bros.* court provided a limited exception to the normal rule that all parties must consent to withdraw a demand for jury trial. That exception only applies when 1) a party did not demand a jury trial at the outset, 2) the party actively opposed jury trial demanded by the opposing party, and 3) the party that failed to demand a jury trial then sought to preclude the opposing party from withdrawing the demand after trial. *Id.*

Fuller v. City of Oakland, Cal., 47 F.3d 1522, 1532 (9th Cir. 1995), *as amended* (Apr. 24, 1995) (emphasis added); *see also Wait v. Leavell Cattle, Inc.*, 136 Idaho 792, 796, 41 P.3d 220, 224 (2001) ("[P]reference for interpreting the Idaho Rules of Civil Procedure in conformance with the interpretation placed upon the same language in the federal rules.") The *Fuller* Court affirmed the rationale underlying Rule 38(d) as applied to both jury withdrawal and jury waiver cases, namely that a party should not have "two bites at the procedural apple" if a trial does not end in a party's favor:

> Of relevance is one of the primary rationales behind *White v. McGinnis*, the leading jury waiver case in the circuit. *White* reaffirms a simple principle: a party ought not to have two bites at the procedural apple. In *White*, the plaintiff demanded a jury, then stood silently by as the court proceeded to try his claim from the bench. Only after the court had ruled against him did he object. *White*, 903 F.2d at 700. We concluded that that was too late, for "[t]he appellant chose to argue his case fully before the district judge; it is not unjust to hold him to that commitment." *Id.* at 703; accord *Lovelace v. Dall*, 820 F.2d 223, 228 (7th Cir. 1987) ("Another policy justifying the jury demand waiver rule is the view that it is unfair to permit a party to have a trial, discover that it has lost, and then raise the jury issue because it is unsatisfied with the result at trial.")

Fuller, 47 F.3d at 1531 (emphasis added), citing *White v. McGinnis*, 903 F.2d 699, 703 (9th Cir. 1990), *cert. denied* 498 U.S. 903, 903, 111 S. Ct. 266 (1990). In fact, GFHD expressly admitted in its trial brief that it did not object to a jury trial, specifically so it *could* take a "second bite at the apple":

> Therefore, for purposes of judicial economy, in the event the jury finds liability, GFHD does not object to the Court utilizing the jury in an advisory capacity for purposes of any order under I.C. § 6-2106. (citation omitted). In this way the jury will reach its verdict as to liability and damages as in a typical case. If liability is not found, this issue will be moot. If liability is found, the parties can address this issue further with the Court at that time, if necessary.

R. Vol. I, p. 378 (emphasis added); *see also* Def. Br. at 22. Smith had a right to rely on the parties' mutual demands and consent to trial by jury, and to create a trial strategy in reliance upon the

parties' consent. To allow GFHD a "second bite at the apple" is not in accord with fundamental principles of fairness and justice, Due Process, or judicial economy:

> Those who believe in strict construction of our Constitution recognize that the judiciary's oath to "support and defend the Constitution" requires that we resist the temptation to enhance judicial power through encroachment into the provinces constitutionally delegated to the jury.

David Steed & Assocs., Inc. v. Young, 115 Idaho 247, 249, 766 P.2d 717, 719 (1988).

3. The District Court's Decision to Grant GFHD's Post-Jury Verdict Motion for a Court Trial Was Unjust, Caused Extreme Delay, and Excessive Expense in Violation of I.R.C.P. Rule 1

GFHD argues that the district court was not bound by its own scheduling order. In so doing, GFHD completely ignores this Court's recent holding that "[w]hile counsel truly cannot bind a court by counsel's stipulation as to procedure, it is entirely up to the court whether or not to accept the stipulation . . . Stipulations of counsel do not bind the court, but scheduling *orders* do." *KDN Mgmt., Inc. v. WinCo Foods, LLC*, 164 Idaho 1, 423 P.3d 422, 428 (2018) (emphasis added). By failing to even address this Court's decision in *KDN Mgmt., Inc.*, GFHD waives any objection to its application in this case.

The jury trial concluded February 9, 2018. *See* R. Vol. I. p., 532. Due to GFHD's post-trial motions and the district court's willingness to hear them, a judgment was not entered until May 25, 2018. R. Vol. I, p. 774. After receiving the district court's decision, Smith filed post-trial motions within fourteen days to reconsider the legal conclusion made and to submit proposed findings of fact and conclusions of law, which are customary in court trials. The district court did not hear the motion until August 14, 2018 and did not issue a decision until February 25, 2019, more than one year after the jury verdict. *See* Supp. R. Vol. I, p. 98. The one-year delay in issuing a final decision and excessive expense incurred post-jury verdict demonstrates why granting the

"*Motion on the Verdict*" was an abuse of discretion and legally improper. The rules of procedure were intended to provide for the orderly resolution of disputes:

> [T]he adoption of I.R.C.P. 38(b) was a proper exercise of the inherent rule making power of this court, and merely establishes the orderly procedure to be employed in determining whether a party has waived the right to trial by jury.

City of Pocatello v. Anderton, 106 Idaho 370, 373, 679 P.2d 647, 650 (1984). Ordinarily, trial courts do not look favorably on belated attempts to change how trials are decided.

Smith does not dispute that the district court is afforded substantial authority to "amend and control its process and orders." *See* I.C. § 1-1603(8). However, it is still bound to do so in the interests of "law and justice." *Id.* Changing the rules governing trial *after the trial is completed* is not consistent with either law or justice. Furthermore, whereas Rule 39 does contemplate some discretion on the part of the district court to order a jury by consent or not, Rule 39—read in its entirety—undeniably demonstrates a preference for relying on the consent of the parties as to the procedure utilized at trial. *See* I.R.C.P. Rule 39(a)(1), (c)(2) (i.e. parties may consent to conduct the trial in any procedural manner, regardless of the parties' substantive rights.) This Court has held, "it is to be pointed out that the requirement that the rules of civil procedure be liberally construed to secure just determination of any particular case is equally applicable to the provisions of I.R.C.P. 39." *R. E. W. Const. Co. v. Dist. Court of Third Judicial Dist.*, 88 Idaho 426, 443, 400 P.2d 390, 401 (1965).

Relitigating Smith's claims after the jury trial directly contravened I.R.C.P. Rule 1, and thereby denied Smith a just and speedy determination of her claim. Most importantly of all, when one considers the fundamental role the jury plays in our society and our judicial system, the assumption should *always* be in favor of a jury instead of a bench trial. "If, in the rare case, a tie breaker is needed, let us break the tie in favor of jury trial." *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 580, 110 S. Ct. 1339, 1353 (1990) (J. Brennan, concurring).

The district court's orders should be vacated, and judgment should be entered on the *Jury's Special Verdict*.

B. Smith Has A Constitutional Right to Trial by Jury Under the IPPEA

1. The Scope of Idaho Constitution Art. I, Section 7 Is Governed by the Framers' Intent to Protect Citizens' Inviolable Right to Trial by Jury in Perpetuity

Idaho's Constitution is unambiguous regarding the substantive right of citizens to submit their civil causes of action to be tried by a jury:

> The right of trial by jury shall remain inviolate; but in civil actions, three-fourths of the jury may render a verdict, and the legislature may provide that in all cases of misdemeanors five-sixths of the jury may render a verdict. A trial by jury may be waived in all criminal cases, by the consent of all parties, expressed in open court, and in civil actions by the consent of the parties, signified in such manner as may be prescribed by law.

Idaho Const. art. I, § 7 (emphasis added). The term "inviolate" is among the strongest terms used in Idaho's Constitution, meaning "free from violation, not broken, infringed, or impaired." Black's Law Dictionary (9th Ed. 2009) at 904, "inviolate." In interpreting Idaho's Constitution, this Court recognizes, "Article 1, § 7 preserves the right to jury trial as it existed at the common law and under the territorial statutes when the Idaho Constitution was adopted." *Kirkland v. Blaine Cty. Med. Ctr.*, 134 Idaho 464, 467, 4 P.3d 1115, 1118 (2000) (emphasis added), citing *State v. Bennion*, 112 Idaho 32, 730 P.2d 952 (1986). However, this Court also recognizes that the right to trial by jury, as it existed prior to 1890, is only the *beginning* of the analysis:

> Though we are not bound by historic stereotype, we will endeavor to interpret Article 1, § 7 *consistent with* the right to jury trial as the Framers conceived it. *D.C. v. Clawans*, 300 U.S. 617, 627, 57 S. Ct. 660, 663 (1937) ("We are aware that those standards of action and of policy which find expression in the common and statute law may vary from generation to generation. Such change has led to the abandonment of the lash and the stocks, and we may assume, for present purposes, that commonly accepted views of the severity of punishment by imprisonment may become so modified that a penalty once thought to be mild may come to be regarded as so harsh as to call for the jury trial, which the Constitution prescribes, in some cases which were triable without a jury when the Constitution was adopted."); *Baker v. City of Fairbanks*, 471 P.2d 386, 396 (Alaska 1970) ("We feel that the

> argument from history is not determinative because what was practical historically is not necessarily adequate to the needs of our times. To look only to history would deny a progressive development of our legal institutions.").

State v. Bennion, 112 Idaho 32, 38, 730 P.2d 952, 958 (1986) (emphasis added). Therefore, there is an important distinction between applying Article 1, section 7 consistent with the *intention* of the Framers, rather than being slavishly bound by the law as it existed in 1890.

Smith's claim for monetary damages is exactly the type of claim required to be submitted to a trial by jury under Idaho's territorial statutes, and therefore under the Constitution of the State of Idaho. *See* Idaho Const. art. I, § 7. Idaho's territorial laws and the first laws of the State of Idaho recognized an expansive substantive right to trial by jury when the relief sought was for money damages arising from actual injury or harm, as opposed to other remedies arising in equity:

> **Sec. 4369.** In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered, as provided in this Code. Where, in these cases, there are issues both of law and fact, the issue of law must be first disposed of. In other cases, issues of fact must be tried by the court subject to its power to order an issue to be referred to a referee, as provided in this Code.
>
> . . .
>
> **Sec. 4398.** When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant, when a counter claim for the recovery of money is established, exceeding the amount of the plaintiff's claim as established, the jury must also find the amount of the recovery.

Rev. Stat. of Idaho, §§ 4369, 4398 (1887) (emphasis added). Therefore, early territorial statutes looked *only* to the types of relief sought to determine whether a jury or a court should hear a claim. Idaho's territorial statutes were consistent with the existing common law at the time, which reflects that a lawsuit seeking monetary judgment is always considered an "action at law" entitled to a trial by jury:

> It would be difficult, and perhaps impossible, to state any general rule which would determine in all cases what should be deemed a suit in equity as distinguished from

> an action at law, for particular elements may enter into consideration which would take the matter from one court to the other; but this may be said, that where an action is simply for the recovery and possession of specific, real, or personal property, or for the recovery of a money judgment, the action is one at law. An action for the recovery of real property, including damages for withholding it, has always been of that class. The right which in this case the plaintiff wishes to assert is his title to certain real property; the remedy which he wishes to obtain is its possession and enjoyment; and in a contest over the title both parties have a constitutional right to call for a jury.

Whitehead v. Shattuck, 138 U.S. 146, 151, 11 S. Ct. 276, 277 (1891) (emphasis added); *see also* Black's Law Dictionary (9th Ed. 2009) at 1407, "adequate remedy at law" ("a legal remedy (such as an award of damages) that provides sufficient relief to the petitioning party, thus preventing the party from obtaining equitable relief.") Indeed, among the earliest decisions of this Court, prior even to statehood, it was recognized that the only material distinction that need be set forth (regardless of whether an action arose under law or equity) was the type of relief requested:

> Our answer, therefore, is that the two jurisdictions may be blended in the same complaint, subject only to the condition that the different grounds of relief shall be distinctly and separately stated.

Wa Ching v. Constantine, 1 Idaho 266, 268 (1869) (Supreme Court of the Territory of Idaho). Thereafter, the Framers of Idaho's Constitution prohibited any distinction between suits in equity and actions at law, and expressly provided *any* factual issues must be tried before a jury:

> The distinctions between actions at law and suits in equity, and the forms of all such actions and suits, are hereby prohibited; and there shall be in this state but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action; and every action prosecuted by the people of the state as a party, against a person charged with a public offense, for the punishment of the same, shall be termed a criminal action.
>
> Feigned issues are prohibited, **and the fact at issue shall be tried by order of court before a jury**.

Idaho Const. art. V, § 1 (bold and emphasis added). Smith therefore objects to GFHD's attempt to essentially write Art. I, section 7 and Art. V, section 1 out of Idaho's Constitution.

2. Smith's Future Lost Wages is an Issue of Fact Regarding "Actual Damages"

Smith's claim for damages arising from her actual lost compensation under the IPPEA is a statutory codification of common law claims and actual damages that are reserved for the jury to resolve.

The stated purpose of the IPPEA is to "protect the integrity of government by providing a legal cause of action for public employees . . . .") I.C. § 6-2101 (emphasis added). A plaintiff under the IPPEA "may bring a civil action for appropriate injunctive relief or actual damages, or both. . . ." I.C. § 6–2105 (emphasis added). Smith notes that the term "legal cause of action" directly contradicts GFHD's argument that the IPPEA is effectively a suit in equity. *See* Def. Br. at 19–20. Additionally, Idaho's invocation of the term "civil action" refers directly to Idaho Const. Art. 1, § 7 and Art. V, § 1, which provide that issues of fact must be tried by a jury trial. *Id.* Therefore, the IPPEA expressly provides for a trial by jury.

Consistent with the plain language of the IPPEA, this Court recognizes that the IPPEA is analogous to common law claims for breach of contract and wrongful discharge:

> [W]hen the Legislature enacted the Whistleblower Act, the resulting statutory cause of action displaced the common law cause of action for breach of an at-will employment contract premised on the protected activities outlined in the Act.

Van v. Portneuf Med. Ctr., 147 Idaho 552, 561, 212 P.3d 982, 991 (2009); *see also Eller v. Idaho State Police*, Dkt. Nos. 45698, 45699 (Idaho, May 24, 2019) (Slip Opinion at 7). Contrary to GFHD's arguments that a claim for lost wages would be precluded against a political subdivision at the time the Constitution was passed, *see* Def. Br. at 17, the Idaho Supreme Court expressly affirmed a plaintiff's substantive right to a trial by jury for the recovery of money judgment for lost wages against a Board of County Commissioners, contemporaneously with the adoption of Idaho's Constitution:

> Section 4369, Rev. St. 1887, provides that in certain cases issues of fact must be tried by a jury, unless a jury trial is waived. The case at bar comes within the provisions of said section, and the court did not err in submitting the case to a jury. Section 4396 provides that in a certain class of cases the jury may, in their discretion, render a general or special verdict. The case under consideration comes within that class.

Fisher v. Bd. of Comm'rs of Bannock Cty., 4 Idaho 381, 39 P. 552, 552 (1895); *see also Neal v. Drainage Dist. No. 2 of Ada Cty.*, 42 Idaho 624, 248 P. 22, 24 (1926):

> The agreement herein cannot be construed as a waiver of a jury trial as contemplated by statute, in this a new and independent action brought to recover money or damages either upon the contract or for the breach of it. The court erred in denying the appellant a jury trial, and for this reason the cause must be reversed

Id. Indeed, the jury has long been recognized as the "exclusive judges" on the issue of compensatory damages:

> [W]e are at a loss to know how we are to infer that because the jury found a particular sum under a correct charge as to the law, and the facts of which they were the exclusive judges, therefore they gave more than compensatory damages. The jury have not told us that they intended exemplary damages, and to presume it would be to presume against the long-established rule that a jury are presumed to find according to the law and facts.

Cox v. Nw. Stage Co., 1 Idaho 376, 385 (1871) (Supreme Court of the Territory of Idaho) (emphasis added); *Johansen v. Looney*, 30 Idaho 123, 163 P. 303, 305 (1917) ("We are very clearly of the opinion that the case before us was in its nature one for money had and received, that the plaintiff was entitled to a jury trial, and that the court erred in referring the case."); *see also Kirkland*, 134 Idaho at 467 ("Therefore, it is clear as early as 1871 the Territory of Idaho recognized the right of the jury to assess and award general or noneconomic damages to plaintiffs in personal injury cases.") Smith's claim under the IPPEA falls within the class of issues triable by jury as a matter of right under Idaho's Constitution and traditional common law.

3. Equitable Remedies Available Under the IPPEA Do Not Limit Smith's Award for Actual Damages

GFHD continues to rely on the fictional distinction between "front pay" and "back pay" under the IPPEA, despite the fact that the statute only refers to "lost wages." *See* I.C. § 6-2106(4). However, this Court recently affirmed in *Eller* that "lost wages" refers broadly to the compensatory award for "actual damages," and refers to past and future lost damages "without differentiation." *Eller*, Dkt. Nos. 45698, 45699 (Idaho, May 24, 2019) (Slip Opinion at 10). The jury's award for Smith's past and future lost wages were "actual damages" for which the jury was the proper and exclusive trier of fact.

Interpreting the IPPEA under basic principles of statutory construction, this Court unequivocally held that the equitable remedies (such as injunctive relief and reinstatement) are merely *additional* remedies available under the Court's discretion, but which do not limit a jury's award for compensatory "actual damages":

> Given this conclusion, we clarify that Idaho Code section 6-2106 does not take away Eller's non-economic damages remedy as provided in section 6-2105. Section 6-2106 is an independent and expanded list of remedies *a court may order* when violations of the Act are found to exist, but it is not a restriction on a claimant's ability to seek and receive redress for non-economic damages as part of "actual damages."
>
> The list under Idaho Code section 6-2106 includes injunctive relief and specific performance, economic damages, costs, attorneys' fees, and civil fines. I.C. § 6-2106. This list expands the relief which a claimant may receive to include mainly equitable remedies that a court may order <u>independently of a jury</u>.

Id. at 10–11 (emphasis added); *see also* Black's Law Dictionary (8th Ed. 2004) ("Actual damages" is defined broadly as an "amount awarded to a complainant to compensate for a proven injury or loss," and is synonymous with compensatory damages, tangible damages, and real damages). Implicit in this Court's *Eller* decision was the fact that the issue of actual damages was properly tried before a jury. *Id.*

GFHD also ignores this Court's precedent and the plain language of the IPPEA by arguing federal law under Title VII applies to this Court's interpretation of the IPPEA. In articulating its argument, GFHD ignores key statutory differences between the remedies available under Title VII of the Civil Rights Act and the remedies under the IPPEA. *See* Def. Br. at 19 ("front pay is likewise an equitable remedy.") GFHD cites to *Traxler v. Multnomah County*, 596 F.3d 1007 (9th Cir. 2010), *Pollard v. E.I du Pont de Nemours & Co*, 532 U.S. 843, 853 n.3, 121 S. Ct. 1946, 1952 (2001), and other federal cases. *See id.* However, GFHD entirely ignores the fact that under Title VII's unique definition of "compensatory damages," back pay and other economic damages are not ordinarily available:

> **(2) Exclusions from compensatory damages.** Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964.

42 U.S.C. § 1981a(b)(2), (c). Instead, the United States Congress deliberately chose to make reinstatement the "preferred" remedy under those statutes, rather than money damages. *See* 42 U.S.C. § 2000e-5(g)(1); *see also Gotthardt v. Nat'l R.R. Passenger Corp.*, 191 F.3d 1148, 1156 (9th Cir. 1999). Equitable relief became the preferred remedy under federal civil rights statutes for the practical reason that court-administered equitable relief was the only remedy to combat the fact victims of public discrimination were regularly subjected to continued discrimination in the courtroom from biased juries. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 446–47, 88 S. Ct. 2186, 2207 (1968)[3] (J. Douglas concurring); *see also* Note*, Jones v. Mayer: The Thirteenth*

[3] "In nearly every department of American life they are confronted by this insidious influence. It fills the air. It meets them at the workshop and factory, when they apply for work. It meets them at the church, at the hotel, at the ballot-box, and worst of all, it meets them in the jury-box. Without crime or offense against law or gospel, the colored man is the Jean Valjean of American society. He has escaped from the galleys, and hence all presumptions are against him. The workshop denies him work, and the inn denies him shelter; the ballot-box a fair vote, and the jury-box a fair trial."

Amendment and the Federal Anti-Discrimination Laws, 69 COLUM. L. REV. 1019, 1051, n. 229 (1969). However, unlike the federal statutes cited by GFHD, Idaho's Whistleblower Act has neither an express nor an implied preference for equitable remedies. Rather, Idaho law distinctly prefers legal remedies, and only provides "extraordinary" equitable remedies "where there is not a plain, speedy and adequate remedy in the ordinary course of law." *Westover v. Cundick*, 161 Idaho 933, 936, 393 P.3d 593, 596 (2017) (citing I.C. §§ 7-303, 7-402). Here, Smith merely seeks entry of judgment on the jury's award for her compensatory "actual damages."

C. The Jury's Verdict Was Supported by Substantial and Competent Evidence and GFHD's Cross-Appeal Should Be Denied

GFHD asks this Court to second-guess the jury's factual findings that Smith would have worked full-time for GFHD, but-for her illegal termination. *See* Def. Br. at 25 ("the jury's award of front and back pay were 'based on a set of circumstances that has no basis in the evidence introduced at trial.'") GFHD makes four arguments that Smith would not have worked full-time at GFHD, all of which were argued to the jury and rejected because they are clearly contrary to the evidence and testimony at trial:

1) GFHD would not have hired Smith full-time because in February 2016, Jensen reported to the Commissioners that Smith was not capable of taking over Jensen's position;

2) The Commissioners granted Smith a pay raise in July 2018, at the same time they posted the advertisement for her position;

3) Although Smith submitted an application for the posted position, she also considered resigning;

4) The GFHD Personnel Manual only provides current employees "may" be given preference, it does not *require* existing employees to be hired.

See generally Def. Br. at 25–26.

As discussed below, each argument is contradicted by the clear weight of the evidence and testimony introduced at trial. *See also* Appellant's Opening Br. at 20–31. Furthermore, even if

GFHD's arguments are accepted as true, they do not merit overturning the jury's verdict. "The evidence supporting the jury's verdict may be contradicted, but the verdict will be upheld if it is 'of such sufficient quantity and probative value that reasonable minds could conclude that the verdict of the jury was proper.'" *Mackay v. Four Rivers Packing Co.*, 151 Idaho 388, 391, 257 P.3d 755, 758 (2011) (internal citation omitted).

1. GFHD Provided Smith with Additional Training to Prepare Smith to Replace Jensen

GFHD's entire legal defense was essentially based on testimony that Jensen allegedly told the Commissioners in February 2016 that Smith was not ready to take over as Office Manager yet. Tr. Vol. I. at p. 135, at 405 ll. 5–20 (*Direct Examination of Jim Gluch*). Jensen's comment was not contested by Smith, and Smith addressed the rumors she had heard about Jensen's comment during her own direct examination. *See generally* Tr. Vol. I, p. 48, at 54–55. However, Smith entirely disputes that the evidence is relevant to her ability to replace Jensen at the time she was fired in August 2016, or her ability to replace Jensen in January 2017, when the jury found she would have begun working full-time. *See* R. Vol. I, p. 529.

First, Smith readily admits that in February 2016, there were aspects of the Office Manager position that she had not been exposed to yet. Smith had only just begun taking minutes at the Commissioner Meetings in February 2016, and it was only after Jensen announced her "semi-retirement" that Smith began to learn other aspects of the Office Manager position, like how to do the budget and payroll. Tr. Vol. I, p. 139 at 418, ll. 11–17. Both Superintendent Jim Gluch and Smith's replacement, Lucille Allen, testified that there was an objective learning curve to taking over as full-time Office Manager, and Ms. Allen testified that there were still aspects of the job she was learning at the time of trial. Tr. Vol. I, p. 136 at 408, ll. 1–4 (Gluch) ("Joanie had certain duties as billing, payroll, et cetera. Linda, she did the budget and other items which she was more educated in that than Joanie was."); *see also* Tr. Vol. I, p. 159, at 500, ll. 18–23 (Allen) ("I am not

sure I am still up to speed.") Jensen's subjective opinion about Smith's ability to do the job in February 2016 was not persuasive or relevant to the jury's finding that Smith would have begun working full-time in January 2017.

Second, Jensen had personal incentives to convince the Board of Commissioners Smith was not "ready" to replace her in February 2016. At that time, Jensen was in the process of negotiating a new contract with GFHD, which ultimately paid her the same amount of money she was making prior to her "semi-retirement," while only requiring Jensen to work half as many hours (effective rate of $48.00 per hour). R. Vol. I, p. 73, Ex. 22. Jensen's self-serving comment was only intended to provide herself with job security, and was not indicative of Smith's actual performance in the position. The evidence, taken as a whole at trial, demonstrates that Jensen was a master-manipulator, and likely made the comment to make Smith do all of the Office Manager duties, and thus make Jensen's job easier:

> Q. (By Mr. Hepworth): If somebody told you that you weren't up to the job, how would you respond?
>
> **A. (Chairman Crane): I would probably try to prove them wrong.**
>
> Q. Me too. Me too. And there has been testimony that after Linda told Joanie that, that Joanie took on a whole lot of responsibilities. Can you accept that?
>
> **A. I guess I can, yes.**
>
> Q. And that would be consistent with what you would expect, it would motivate her to work harder, wouldn't it?
>
> **A. I would assume it would.**
>
> Q. Okay. And the harder Joanie works, the less Linda has to do, isn't it?
>
> **A. Yeah, I guess so.**

Tr. Vol. I, p. 186, at 608–609, ll. 22–14. Superintendent Gluch also contradicted Jensen's alleged comment about Smith's performance, and testified that he believed Smith would eventually

replace Jensen, and was qualified to do so:

> Q: (by Mr. Naylor) So at that point in time – prior to that point in time, was it your belief that Ms. Smith was eventually going to replace Ms. Jensen when she retired?
>
> A. (**Mr. Gluch**): **Yes, prior to that time, yes.**
>
> Q. You had no reason not to believe that that might work?
>
> A. **That's correct, I had no reason to believe any different.**
>
> Q. And it made sense because anybody who has been doing any part of the job is better than somebody who has no knowledge about the job?
>
> A. **That is correct.**

Tr. Vol. I. p. 135–136, at 405–406, ll. 21–8. In March 2016, the Board of Commissioners decided *not* to advertise for an open position, because Smith was capable of sharing the job duties and learning on the job. Confidential R. Vol. I, p. 10, EX. 2 at GFHD 138. Commissioner Riggs admitted that the Board of Commissioners intended for Smith to train under Jensen and get more experience and take over more responsibility in preparation for replacing Jensen:

> Q. And that over time —Well, what was the purpose in your mind for her to be trained in Linda's Job?
>
> **A. She needed to learn more about Linda's job. She hadn't done everything involved in the job. So yes, Linda was going to train her more and give her more responsibility. That was my understanding.**

Tr. Vol. I, p. 178, at 575, ll. 18–25.

Jim Gluch testified that at the time of Smith's termination, Smith was completing approximately seventy-percent of the Office Manager duties, and was doing a good job overall. *See* Tr. Vol. I, p. 104–105, at 279–280, ll. 13–6; p. 109, at 299–300, ll. 22–1. Even Commissioner Riggs testified that at the time Smith applied for the posted position in July 2017, he considered her the "front runner" for the position. Tr. Vol. I, p. 170, at 544, ll. 2–13. The district court affirmed that Smith was "capable" of learning how to complete all the Office Manager duties. Supp. R. Vol.

I, at 73 (*Memorandum Decision and Order* ¶ 5). The only thing that prevented Smith from taking the full-time position working forty hours per week, like her successor Lucille Allen, was GFHD's illegal retaliation.

2. Smith's Raise to $18.00 Per Hour Supports Her Claim She Would Have Been Hired Full-Time

GFHD refers to the fact that the Board of Commissioners granted Smith a raise prior to the decision to terminate in support of GFHD's argument that Smith would not have worked full-time—although Smith does not understand *how* GFHD contends that supports its position. *See generally* Def. Br. at 25. In fact, Smith contends this point *proves* the fact she would have worked full-time, but-for GFHD's illegal retaliation. Smith's pay-raise is direct evidence that Smith was doing an excellent job as co-Office Manager, and was therefore ready to take over full-time to replace Jensen in July 2016. This inference is supported by the fact Superintendent Jim Gluch specifically testified he supported Smith earning a raise, and advocated on her behalf:

> Q. (By Mr. Hepworth): I just want to know did you advocate for Joanie?
>
> **A. Yes. I did say that I felt she deserved a raise.**

Tr. Vol. I, p. 107, at 290, ll. 4–7.

If Smith was doing a good enough job to have earned a raise while completing nearly seventy-percent of the Office Manager's duties—Smith was clearly qualified to replace Jensen. The fact that GFHD terminated Smith only a month later at the request of Jensen is direct evidence of its retaliation and illegal motivations.

3. The Fact That Smith Considered Resigning Is Evidence of the Hostility in the Work Environment Caused by GFHD's Illegal Retaliation

GFHD's only other pretextual defense for terminating Smith was that Smith had considered resigning from GFHD due to the retaliation she was experiencing in the workplace. As GFHD admits, "While Smith requested that Gluch remove the resignation letter from her file, Gluch

notified the Commissioners of the letter." Def. Br. at 26. Although GFHD attempted to "spin" this narrative and accuse Smith of being a "disgruntled employee," Smith's draft resignation letter is clear that her displeasure was directly caused by Jensen's workplace retaliation and harassment:

> Dear Jim Gluch,
>
> Please accept this letter as my formal resignation from my position as Office Assistant with Glenns Ferry Highway District. I have expressed many times how the working conditions have changed and have escalated to a point of much discomfort bringing me to the point where I must resign. I feel that it is not only unprofessional but just plain wrong that after 7 years of continuous employment here that my position has been posted! I have never had to be disciplined, counseled or received any written or oral reprimands, nor have I been given an explanation as to why others are being considered for my very position. My last day of work will be August 31, 2016. While I do regret any inconvenience my resignation will cause for Jimmy, as he has been an exemplary manager, I cannot continue under these circumstances. I will do all I can to ensure that my leaving is as smooth a transition as possible.
>
> Over the next few weeks, I will work to ensure that all of my paperwork and duties are made to be current, however, if I receive calls to home or any other harassment as I have received over the last few months, I will tender my resignation immediately.

Ex. on Appeal, Vol. I, p. 69, Ex. 12 GFHD 396 (emphasis added).

Although GFHD attempts to argue that Smith's contemplation of resignation provided a reasonable basis to terminate Smith, it is really evidence to the contrary: Smith's letter should be understood as a formal complaint regarding the working conditions at GFHD, which GFHD not only ignored—but retaliated against her for expressing. *See Hatheway v. Bd. of Regents of Univ. of Idaho*, 155 Idaho 255, 269 310 P.3d 315, 329 (2013) (action materially adverse if "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.") Smith's consideration of resigning is a symptom of the retaliation Smith faced at GFHD, and yet another example of GFHD failing to prevent adverse actions under the IPPEA. If GFHD terminated Joanie for complaining about the working conditions at GFHD, that is *de jure* retaliation—consistent with GFHD's admission of liability in this case under the IPPEA.

4. GFHD's Personnel Manual Supports the Jury's Verdict

Lastly, GFHD relies on the argument that despite GFHD having a codified "Preference For Hiring From Within," that this Court should ignore the policy because the manual provides existing employees "may" be given preference over outside applicants, rather than *requiring* existing employees to be given preference. *See* Def. Br. at 26; *see also* Confidential R. Vol. I, p. 33, GFHD 175. In reality, GFHD's argument is a perfect example of why the district court erred by overturning the jury's verdict.

There is no dispute that GFHD had a preference for hiring from within. However, GFHD appears to argue that the policy should not be given very much consideration. Def. Br. at 26. GFHD's argument is improper on appeal. "While we must review the evidence, we are not in a position to 'weigh' it as the trial court can." *Karlson v. Harris*, 140 Idaho 561, 568, 97 P.3d 428, 435 (2004). Although Smith has never argued that the personnel manual alone is dispositive of Smith's future damages, it is certainly uncontroverted evidence that should have been considered by the jury, and which supports the jury's verdict for purposes of appeal.

On the contrary, this Court recognizes that circumstantial evidence may be properly considered in support of an at-will employee's claim for future damages. "In the context of an employment contract for an indefinite term, a plaintiff might resort to evidence such as employment history to show likelihood of future employment. *Hummer v. Evans*, 129 Idaho 274, 280, 923 P.2d 981, 987 (1996). "[E]vidence is sufficient if it proves the damages with reasonable certainty. 'Reasonable certainty' requires neither absolute assurance nor mathematical exactitude. . . ." *Griffith v. Clear Lakes Trout Co,, Inc.*, 146 Idaho 613, 618, 200 P.3d 1162, 1167 (2009). In this case, GFHD has provided *zero* evidence why GFHD would have hired an outside applicant over Smith. There is no evidence to support the inference that Lucille Allen would have been hired over Smith. In fact, all testimony at trial was that Smith was expected to replace Jensen, up until

the point that Jensen called the special meeting and demanded that Smith get terminated. Therefore, there is substantial and credible evidence to support the jury's verdict, and there is insufficient evidence to overturn the jury's verdict (whether on appeal, or under a I.R.C.P. 59 JNOV standard). GFHD's cross-appeal should be denied, and Smith respectfully asks that this Court reverse the district court's post-verdict *Orders* and enter judgment on the jury's verdict *nunc pro tunc*.

D. The IPPEA and Idaho Code Section 28-22-104 Preclude Application of Sovereign Immunity Regarding Smith's Claim for Post-Judgment Interest

GFHD maintains that sovereign immunity precludes an assessment of post-judgment interest under Idaho Constitution Art. VII, § 13, which provides "No money shall be drawn from the treasury, but in pursuance of appropriations made by law." Def. Br. at 35. However, GFHD entirely ignores the obvious fact that the Idaho Legislature expressly consented to judgment being entered against the State under the IPPEA. I.C. § 6-2106 ("A court, in rendering a judgment brought under this chapter, may order any or all of the following. . . .") Analogously, I.C. § 28-22-104 expressly provides that post-judgment interest applies to "all" judgments:

> The legal rate of interest as announced by the treasurer on July 1 of each year shall operate as the rate applying for the succeeding twelve (12) months to all judgments declared during such succeeding twelve (12) month period.

I.C. § 28-22-104(2) (emphasis added). "All judgments" clearly and unambiguously applies to judgment against the State of Idaho, and any of its political subdivisions, where the State of Idaho has already waived its right to sovereign immunity.

GFHD's reliance on abrogated and inapplicable case law is similarly misplaced. The origin of GFHD's argument begins with *American Oil Co. v. Neill*, 90 Idaho 333, 414 P.2d 206 (1966). *American Oil Co.* involved a dispute over costs and fees for the wrongful collection of taxes. *Id.*

at 335, 414 P.2d at 207. This Court declined to grant the prevailing party interest on judgment, finding that the litigant failed to cite a statute that applied:

> Although certain statutes of this state authorize payment of interest on tax refunds: (i. e., I.C. § 49-1238(e) on refunds under special fuel tax; I.C. § 63-3073 on income tax refunds; I.C. § 63-2202, refunds of sums collected by counties for taxes), no statute has been called to the attention of this court authorizing payment of interest on the funds involved herein; plaintiff in its brief recognized the absence of statutory authority in this regard, when it stated therein: 'In its present form the Act does not contain a provision for payment of interest on taxes illegally or erroneously collected.'
>
> It is our conclusion that plaintiff is not entitled to interest on the sums paid and to which it is entitled to judgment, without interest.

American Oil Co., 90 Idaho at 339, 414 P.2d at 209–10. Importantly, the plaintiffs in *American Oil Co.* did not rely upon I.C. § 28-22-104 in their request for interest on judgment, and therefore the court's holding does not apply to Smith's request for interest on judgment in this case. *Id.* Furthermore, *American Oil Co.* was expressly overruled by *Ada Cty. v. Red Steer Drive-Ins of Nevada, Inc.*, 101 Idaho 94, 609 P.2d 161 (1980), which also involved the recovery of discriminatory tax assessments. *Id.* The plaintiffs in *Red Steer* did cite Idaho Code Section 28-22-104. This Court recognized that Idaho's general statute for interest on judgment was sufficiently clear and equally applicable to all judgments, and expressly overruled *American Oil Co. Id.* at 100, 609 P.2d at 167 ("To the extent that this decision affects a change from our previous position on the issue of interest payments, *American Oil Company v. Neill*, *supra*, is hereby overruled.") The *Red Steer* court's underlying basis for its award of interest on judgment was the same reason Smith is entitled to interest on judgment in this matter:

> Furthermore, the payment of interest on the amount due is necessary to fully compensate Red Steer since the loss of the use of the money from the time of its overassessment until its recovery represents additional costs to it. We therefore reverse the judgment of the district court only as it pertains to the denial of interest and remand this portion to the district court with instructions to enter judgment in favor of Red Steer, entitling it to interest on the judgment.

Ada Cty. v. Red Steer Drive-Ins of Nevada, Inc., 101 Idaho 94, 100, 609 P.2d 161, 167 (1980) (emphasis added). The *Red Steer* Court recognized that loss of use of the plaintiff's money is essentially a "cost" of litigation. Notably, I.C. § 6-2105(1) defines "damages" as including "court costs and reasonable attorneys' fees." *Id.* Additionally, I.C. § 6-2106(5) allows for "the payment by the employer of reasonable costs and attorney's fees." *Id.* Where loss of use of her wages and benefits is clearly a damage Smith suffered because of GFHD's illegal retaliation, interest on judgment is a cost properly awarded under the IPPEA.

Lastly, GFHD also invokes *Univ. of Utah Hosp. & Med. Ctr. v. Twin Falls Cty.*, 122 Idaho 1010, 842 P.2d 689, (1992) and *Sanchez v. State, Dep't of Correction*, 143 Idaho 239, 244, 141 P.3d 1108, 1113 (2006). Def. Br. at 35. *Univ. of Utah Hosp. & Med. Ctr.* involved the waiver of medical bills in a county hospital for a medical indigent under I.C. § 31–3504 and a claim for prejudgment interest. *Id.* at 1012, 842 P.2d at 691. *Sanchez* involved an appeal from the Idaho Personnel Commission for attorney's fees and also a claim for prejudgment interest under I.C. § 12-117 and Former Rule 201. *Id.* at 244, 141 P.3d at 1113. (2006). Both courts carefully reserved their rulings to the issue of prejudgment interest only. In the context of the IPPEA in this particular case, Smith concedes that there is not a basis under I.C. § 28-22-104(1) for prejudgment interest, because money wasn't "due" or "certain" until the jury's verdict was delivered in February 2018. Because Smith does not seek prejudgment interest, the decisions in *Univ. of Utah Hosp. & Med. Ctr.* and *Sanchez* do not apply.

However, the legal rate of interest *post*-judgment is sufficiently clear and applicable under I.C. § 28-22-104(2) and the IPPEA from the date of the jury's *Special Verdict*. The *Red Steer* decision is dispositive, and Smith must be allowed interest on her judgment. Furthermore, because judgment should have been entered "without delay" pursuant to I.R.C.P 58, judgment *nunc pro tunc* to the date of the completion of trial is required. Otherwise, Smith will unfairly suffer the

costs associated with the loss of her use of money during the pendency of GFHD's post-verdict motions and this appeal.

E. Smith's Contractual Rate for Attorney's Fees on a Contingent Fee Are Objectively Reasonable and Necessary As a Component of "Actual Damages" Under the IPPEA

In response to GFHD's argument regarding the award of attorney's fees, it is clear that there is very little in dispute:

- GFHD does not take issue with the district court's conclusion that "Plaintiff is prevailing party, the jury returned a verdict in Plaintiff's favor and awarded substantial damages." R. Vol. I, p. 765; *see also* Def. Br. at 39 ("district court properly exercised its discretion in determining the attorney's fee award.")
- GFHD does not dispute that Smith, as prevailing party, is entitled to reasonable attorney's fees and costs as a component of "actual damages" pursuant to I.C. § 6-2105(1). *See* Def. Br. at 7 ("Finally, the district court awarded Smith attorney's fees pursuant to Idaho Code § 6-2105(1) in the amount of $168,177.00.")
- All parties agree that the bottom line in an award for attorney's fees is "reasonableness." *See* Def. Br. at 39 ("The purpose of an attorney fee award is to provide 'the prevailing party a fund from which to pay a reasonable fee. . . .")
- GFHD does not object to the hours Plaintiff's counsel expended in pursuit of her claim, and the district court found that the number of hours billed are reasonable. R. Vol. I, p. 765–66.

The only dispute is the manner in which the district court analyzed the I.R.C.P. 54(e)(3) factors to supports its conclusion that "it does not agree that $400 is a reasonable hourly rate in this case." R. Vol. I, p. 768 (emphasis added); *see also* R. Vol. I, p. 769; Supp. R. Vol. I, p. 97. It is therefore necessary to evaluate what caused the district court to reduce the rates of Plaintiff's

counsel from $400.00 to $325.00, and $175.00 to $150.00, respectively. Smith asserts that the Court abused its discretion by not awarding all of the hours necessarily incurred and reducing Counsel's hourly rate citing factors that should support *higher* rates. The district court did not reach its decision in accordance with the I.R.C.P. Rule 54(e)(3) factors:

> [I]n the absence of a clear explanation from the trial court, we will find an abuse of discretion when a trial court acknowledges the governing legal standard and arrives at a decision that appears to be incongruent with the application of that standard.

H2O Envtl., Inc. v. Farm Supply Distributors, Inc., 164 Idaho 295, 429 P.3d 183, 188 (2018).

1. Rule 54(e)(3)(A): Time and Labor

GFHD erroneously states that the district court "upheld the number of hours requested by Smith." Def. Br. at 40. However, the Court did not award any attorney's fees for Plaintiff's counsel after February 13, 2018. *See* R. Vol. I, p. 558. The *Jury Verdict* was filed February 9, 2018. R. Vol. I, p. 527. Smith submitted her *Motion for Costs and Attorney's Fees* on February 28, 2018, assuming the *Judgment* would be entered promptly as required by I.R.C.P. Rule 58. The *Memorandum of Costs* requested 410.5 hours for Jeffrey J. Hepworth, 204.23 hours for J. Grady Hepworth, 52.5 hours in administrative and paralegal time. R. Vol. I, p. 544–58 (total 667.23 billable hours). Smith attached an attorney's fee ledger detailing every hour up until February 13, 2018. *Id.* Smith's *Memorandum* estimated an additional $10,000.00 in attorney's fees would be incurred for post-trial motions. R. Vol. I, p. 541, ¶ 7.

Unfortunately, the district court did not enter *Judgment* "without delay" as required under Rule 58, and instead ordered additional briefing to address GFHD's *Motion on the Verdict*. When the district court awarded attorney's fees, it disallowed any attorney's fees after February 13, 2018. The district court's attorney's fees award did not take into account the updated attorney's fees ledger Smith submitted on May 11, 2018, R. Vol. I, p. 706–18. Smith submitted a third attorney's fee ledger on June 7, 2018 in support of Smith's *Motion for Post Judgment Relief*. R. Vol. I, p.

813–826. Due to GFHD's untimely motion and improper procedure, Smith's counsel was required to expend more than 147.8 additional hours of labor on post-trial briefing and oral arguments through June 6, 2018. R. Vol. I. p. 826 ("815.03 total billable hours"). The district court denied Smith's request for additional attorney's fees in the final *Memorandum Decision and Order*. Supp. R. Vol. I, p. 27. Therefore, Smith has not been reimbursed for all hours spent before the district court, notwithstanding the *additional* hours necessary on appeal. In denying Smith's full number of hours spent, the district court abused its discretion.

2. ***Rule 54(e)(3)(B): Novelty and Difficulty of Questions***

GFHD argued and the district court improperly concluded that Smith's claim "did not turn on any particularly novel or difficult issues." *See* Def. Br. at 40; R. Vol. I, p. 766–67. Smith objects, and notes that both the subject-matter of the trial itself—as well as the post-judgment briefing—required substantial legal research and addressed several novel issues of law and fact. In general, claims under the IPPEA require substantial legal knowledge, as the plaintiff's claims must apply cleanly under the statutory definitions of "protected activities" and "adverse actions." *See generally* I.C. §§ 2103, 2104. Plaintiffs face difficult hurdles in order to overcome the burden of the "at-will" employment doctrine in Idaho. For example, Smith defended a lengthy and complex motion for summary judgment that addressed novel legal doctrines, such as the "cat's paw" theory of liability, as well the unresolved standard of causation under the IPPEA. *See generally* R. Vol. I, p. 128–51. At trial, Smith faced difficult strategic decisions, and was required to prove her claim using a majority of witnesses that were still employed by GFHD. Post-trial, Smith faced hotly contested issues, which included the scope of Art. I, § 7 of the Idaho Constitution, the distinction between "actions at law" and "suits in equity," the wrong-doers burden of future damages, as well as a highly nuanced statutory interpretation of the IPPEA. The novelty and difficulty of Smith's

claim required experienced counsel to handle properly, and Smith has had to fight tooth and nail against experienced and skilled defense counsel on every issue.

3. Rule 54(e)(3)(C): Skill Requisite to Perform the Legal Service and Ability of Attorney

Neither GFHD nor the district court appeared to dispute Mr. Jeffrey J. Hepworth's extensive experience, skill, or ability. Jeffrey J. Hepworth has been practicing law in the State of Idaho since 1985. R. Vol. I, p. 540. Mr. Jeffrey Hepworth has extensive trial experience, and has successfully litigated over nine hundred disputes in his career, including several appeals before the Idaho Supreme Court. *Id.* Attorney J. Grady Hepworth was a first-year attorney at the time of trial, however J. Grady Hepworth is the beneficiary of a successful academic career, as well as highly educational intern experiences with the Idaho Supreme Court, Federal District Court for the District of Idaho, and the Ninth Circuit Court of Appeals. *Id.* at 541. Regarding the actual ability of Smith's attorneys, Smith avers that the result of the trial speaks for itself.

4. ***Rule 54(e)(3)(D): Prevailing Charges for Like Work***

Smith maintains that among the most arbitrary aspect of the district court's attorney's fee award was that the court essentially ignored the fact the hourly rates charged were entirely consistent with market rates in the applicable geographic region for similar work:

> Although the Court does not dispute that other Boise attorneys have charged similar fees under a variety of circumstances, it does not agree that $400.00 is a reasonable hourly rate <u>in this case</u>.

R. Vol. I, p. 768 (emphasis added). The district court's acknowledgement that plaintiff's counsel's fee was in line with the prevailing market rate, and therefore reasonable, should have been dispositive. More persuasive still, Smith submitted the earlier decision of the district court, which *concluded* that such rates for less experienced counsel in an IPPEA claim were reasonable as a matter of law. *See* Vol. I, p. 691 (Rate of $425 and $375 "reasonable in light of counsels'

significant experience.") The district court's contradiction is the definition of arbitrary and capricious, and therefore an abuse of discretion.

Equally arbitrary and capricious was the district court's reduction of J. Grady Hepworth's hourly rate from $175.00 to $150.00. The district court provided no analysis whatsoever regarding the justification for reducing J. Grady Hepworth's rate. Notably, the district court in *Eller* approved plaintiffs' rate billed by "paralegals and law clerks" at a rate of $100 to $120 per hour. R. Vol. I, p. 692. Although in his first year of practice, J. Grady Hepworth's services were utilized in order to reduce costs for the litigants, and Mr. Hepworth demonstrated adequate skill drafting the majority of Smith's opposition to Defendant's *Motion for Summary Judgment*, as well as completing opening statements, the direct examination of expert Susan Langley, and the cross-examination of Commissioner Harley Riggs. The district court failed to provide any discussion on the decision to reduce Mr. J. Grady Hepworth's hourly rate, or how the district court arrived at the rate of $150.00 per hour. The district court's award was less than GFHD even asked for, as GFHD provided the conclusory acknowledgement that a first-year associate's rate "is probably closer to the range of $125 to $165." R. Vol. I, p. 583. The term "probably closer" in GFHD's brief infers a lack of personal knowledge, and Smith's counsel later contradicted itself by stating it bills its associates at a rate of $200.00 per hour. *See* R. Vol. I, p. 582. Similarly, the district court in *Eller v. Idaho State Police* awarded $200.00 for attorneys with up to ten years of experience. R. Vol. I, p. 693. J. Grady Hepworth, a junior partner, was therefore charging less than GFHD's counsel charges for the work of its own associates, and what the district court awarded attorneys with similar experience in *Eller*. *Id.* To award less than an otherwise reasonable rate is an abuse of discretion.

5. Rule 54(e)(3)(E): Fixed or Contingent Fee

Smith objects to GFHD's absurd and meritless argument that "the fee agreement between Smith and her attorney is not a typical contingent fee agreement. . . ." Def. Br. at 41. The contract attached as an exhibit is clearly "contingent," and GFHD's argument to the contrary is without any foundation or legal basis:

> 2. This is a contingent fee agreement whereby the client only pays attorney fees if a recovery of money is made by settlement or obtaining a judgment after commencement of a trial. If no recovery is made, no attorney fees are owed.

R. Vol. I, p. 559 (emphasis added). GFHD notes that in paragraph 2(B) of Smith's fee agreement, Smith agrees to pay as attorney's fees "40% of the gross amount of all sums received OR $400.00 per hour for all work done by attorney, whichever is greater." *Id; see also* Def. Br. at 41. However, GFHD dishonestly omits the very next sentence in that paragraph:

> B. COMMENCEMENT OF TRIAL: In the event this dispute is resolved after commencement of a trial, client agrees to pay as attorney fees 40% of the gross amount of all sums received OR $400.00 per hour for all work done by attorney, whichever is greater. If no recovery is made, no attorney fee is owed.

Id. (emphasis added).

Clearly, if defense counsel had been successful, there would have been no recovery and Smith's lawyers would not get paid *anything*. The word "contingent" means winning is a condition of getting paid. Black's Law Dictionary (9th Ed. 2009) at 362 "contingency fee" ("a fee charged for a lawyer's services only if the lawsuit is successful or is favorably settled out of court.") It has nothing to do with the amount paid.

In addition to the requirement of winning, the timing of receiving payment is always delayed. The work is done knowing that if payment is received, it will be far in the future. It could be six months or six years from the time of commencing a lawsuit before recovery is made, if at all. As a result of the very risky nature of "contingent" contracts, it is natural that increased risk

will only be undertaken if there is the prospect of a commensurate reward. The increased rate is commonly referred to as the "risk premium." Insurance defense attorneys routinely charge lower hourly rates because of the lack of risk, volume of work, and predictable cash flow. The opposite is true of plaintiff's lawyers operating under a contingent fee. Plaintiffs lawyers must charge much higher rates because their clients are typically not repeat customers, meaning there is high risk and the volume of business is low. Lawyers operating under a contingent fee don't get paid anything when they lose, and when they *do* get paid, it might be years after the legal representation and work was initiated.

This Court recognizes that attorneys working under a contingent fee agreement is a benefit to our judicial system as a whole. From the client's perspective, hiring an attorney can be a financially devastating event. A contingent fee arrangement allows the client to pursue justice without fear of bankruptcy:

> In whatever clothing, contingent fee arrangements have long and well served the purpose of gaining legal representation for those who might otherwise have no representation.

Anderson v. Gailey, 100 Idaho 796, 807, 606 P.2d 90, 101 (1980). A contingent fee also has the desired result of forcing attorneys to weed out non-meritorious cases, and only accept claims that will result in a plaintiff's verdict. However, the risk is nevertheless on the attorney, who may work without pay in the end. Given these considerations, Smith's counsel's rate is objectively reasonable when considering the risk.

6. Rule 54(e)(3)(F): Time Limitations Imposed by the Client or the Circumstances of the Case

Neither GFHD, nor the district court, addressed the time limitations involved in an IPPEA claim, and this case in particular. Failure to consider the necessary factor amounts to an abuse of discretion.

Under the IPPEA, a plaintiff must file her claim within one-hundred eighty (180) days from the date of the adverse action at issue. I.C. § 6-2105(2). Such a short claim period requires responsive representation, as well as artful initial pleadings and legal skill. Furthermore, in this case, Smith's counsel was required to complete extensive post-trial legal briefing on very important and novel legal issues during a less-than two-week period following GFHD's March 7, 2018 *Motion on the Verdict*. *See* R. Vol. I, p. 585 (*Plaintiff's Memorandum in Opposition* filed March 16, 2018). Smith was thereafter required to submit an entire *Memorandum of Findings of Facts and Conclusions of Law* within the fourteen-day period following *Judgment* pursuant to I.R.C.P. 59, 60. These are factors the district court failed to consider in its decision, and which support Smith's claim for attorney's fees at her contractual rate.

7. ***Rule 54(e)(3)(G): Amount Involved and Results Obtained***

Smith obtained a strong jury verdict reflecting Smith's loss of a good full-time job with benefits. Smith's jury verdict for $250,543.02 is consistent with Smith's pre-trial offer to settle for $275,000.00 plus attorney's fees. R. Vol. I, p. 543. Even the district court's reduced verdict is significantly greater than the $50,000.01 *Offer of Judgment* GFHD made on September 22, 2017. It is undisputed that Smith was the prevailing party, and is entitled to costs as a matter of right under the IPPEA.

8. Rule 54(e)(3)(H): Undesirability of the Case

From a purely business perspective, Smith's case was highly undesirable for plaintiff's counsel. Smith was working as a part-time employee with limited income at the time she was fired, and unemployed at the time she retained counsel. There was no way Smith could afford to pay any attorney by the hour on a monthly basis, regardless of the hourly rate. Clients who can't pay their bills are not desirable. There was never a realistic chance Plaintiff's counsel would ever make

more than $400 per hour in this case. There was a very realistic chance a jury would rule for the defense, and the attorneys would not get paid for 800–1,200 hours of work.

Alternatively, from the perspective of "justice," this was a desirable case for plaintiff's counsel. This was a case in which Smith caught her boss stealing over $6,000.00 and lost her job as a result. It was important that the tax payers of Elmore County be informed about the theft and the elected officials that turned a blind eye. This was a case about principles that are important, and a case that strikes at the very heart of the legislative purpose underlying the IPPEA. *See* I.C. § 6-2101. Plaintiff's counsel takes great pride in representing public employees who have the courage to stand up for what is right, while simultaneously confronting waste, dishonesty, and disregard for the rule of law in local government.

9. Rule 54(e)(3)(I): Nature and Length of Professional Relationship with the Client

The district court erred by failing to consider the length of Smith's relationship with her attorneys. The district court did not provide any analysis to this factor, and by the district court's own admission, stated that it was "either neutral or not applicable in this case, and thus does not warrant specific attention or discussion." R. Vol. I, p. 769. However, the fact that this was the first and only time Smith has hired plaintiff's counsel is directly relevant to whether counsel's fee was reasonable under I.R.C.P. 54(e)(3), and it was an abuse of discretion not to consider.

The nature of Smith's relationship with her attorneys is relevant in two ways. First and foremost, where Smith and her attorneys didn't know each other or have a prior relationship, the inference is that the contract Smith agreed to is reasonable given the attorney's fee compared to the attorneys' skill and representation. Smith chose to enter into a contractual relationship with her counsel as a free consumer in an open marketplace. The fact Smith chose plaintiff's counsel at the contractual rate demonstrates it is reasonable compared to other options on the marketplace, and is consistent with counsel's experience and skill.

Second, Smith's one-time-representation relationship is particularly relevant given the fact the only argument GFHD expressed against Smith's rates was its own attorneys' rates. GFHD argued "in fact, this firm currently bills out its most experienced shareholders at $250.00 per hour, and associates at $200.00. . . ." R. Vol. I, p. 582. Smith primarily notes that GFHD makes this statement without submitting an affidavit, or without actually demonstrating the rates it cites are its actual rates. However, the difference between defense counsel retained by a public entity on a purely hourly basis is that this is not a one-time representation. Defense counsel has a long-standing relationship with Idaho's public entities, and represents the State of Idaho and its political subdivisions in numerous lawsuits across the state, as well as pre-litigation consultation. Defense counsel is paid on a monthly basis, and is essentially guaranteed a high volume of work. The State of Idaho is a highly desirable client, and involves very little risk to represent. Whereas the only comparative rates GFHD submitted were its own unsubstantiated rates, the district court should have considered that it was comparing apples-to-oranges regarding the two rates. Failure to do so was an abuse of discretion.

10. Rule 54(e)(3)(J): Awards in Similar Cases

In support of her claim for attorney's fees, Smith submitted evidence of similar awards in recent IPPEA claims, including an attorney's fee award of **$656,958.90** in *Wright v. Ada County*, CV-OC-2013-2730 (Jan. 5, 2015), and **$422,272.98** in *Eller v. Idaho State Police*, CV-OC-2015-127 (Mar. 24, 2018). *See* R. Vol. I, p. 691–703. Comparatively, Smith sought attorney's fees in the total amount of **$203,131.00** as of Smith's *Motion for Costs and Attorney Fees* on February 28, 2018. R. Vol. I, p. 537. After post-trial briefing was completed, Smith attorney's fees increased to **$244,549.00** as of June 7, 2018. Smith therefore claimed attorney's fees approximately sixty-seven percent (67%) less than the amount actually awarded in *Wright*, and forty-two percent (42%) less than was actually awarded in *Eller*. *Id.* Also notably absent from the record is the actual

amount of fees charged by GFHD's counsel to litigate the same dispute. One would assume that if GFHD's counsel charged *less* than Smith's counsel, such information would be in the record. Smith's considerably lower claim for attorney's fees compared to similar cases strongly supports the reasonableness of her contractual rate, and the abuse of discretion the district court committed by arbitrarily reducing the amount awarded.

11. ***Rule 54(e)(3)(K): Reasonable Cost of Automated Legal Research***

Smith's counsel was required to utilize substantial hours in automated legal research through Westlaw. R. Vol. I, p. 544. However, Smith's counsel does not charge additional fees or special costs for the research, but instead, such services are included in the contractual hourly rate counsel charges Smith. The included costs of automated legal research in plaintiff's counsel's hourly rate also supports Smith's claim that the contractual rate of services is reasonable. This was a factor that the district court did not address directly, and therefore abused its discretion in concluding the factor was "either neutral or not applicable in this case." *See* R. Vol. I, p. 769.

12. Rule 54(e)(3)(L): Any Other Factor Which the Court Deems Appropriate

In support of Smith's *Motion for Costs and Attorney Fees*, Smith requested that the district court consider the remedial nature of the IPPEA, and the legislative purpose to protect whistleblowers and avoid public waste and disregard for the rule of law in government. *See* I.C. § 6-2101; *see also* R. Vol. I, p. 544. The award of attorney's fees under section 6-2105 is consistent with the IPPEA's remedial purpose of making the victim of retaliation whole:

> Weighed against this standard, Idaho's Whistleblower statute is a remedial one. As a result, it must be "'liberally construed to give effect to the intent of the Legislature.'" *Eastman v. Farmers Ins. Co.*, 164 Idaho 10, __, 423 P.3d 431, 435 (2018) (quoting *Hill v. Am. Family Mut. Ins. Co.*, 150 Idaho 619, 625, 249 P.3d 812, 818 (2011)). Viewing the statute liberally, we hold that the Whistleblower Act provides such claimants with a remedy for all actual damages, based on all claims, including those otherwise available under common law tort claims.

Eller v. Idaho State Police, Dkt. Nos. 45698, 45699 (Idaho, May 24, 2019) (Slip Opinion at 10) (emphasis added). The IPPEA's definition of "damages" includes the reasonable court costs and attorney's fees incurred as a result of filing a civil action. I.C. § 6-2105(1). Attorney's fees as a component of "actual damages" infers a legislative purpose of awarding a plaintiff's actual fees, so long as the actual fees charged are reasonable.

GFHD makes the ill-conceived policy argument that the district court properly ignored the terms of Smith's attorney's fees contract. *See* Def. Br. at 39 ("Awarding attorney fees solely on the basis of the attorney-client agreement would impermissibly negate any Rule 54(e)(3) analysis.") GFHD entertains a classic "slippery slope" argument that if the district court considered Smith's contractual agreement, plaintiff's counsel would be improperly incentivized to charge outrageous fees, such as "$5,000 per hour." *Id.* However, GFHD's argument ignores the fact that attorneys are ethically bound to only charge "reasonable" rates under Idaho's Rules of Professional Conduct:

> A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.

Idaho R.P.C. Rule 1.5(a). In drafting a fee agreement, attorneys must consider the factors analogous to the I.R.C.P. 54(e)(3) factors. *See* Idaho R.P.C. Rule 1.5(a)(1)–(8). Absent proof that an attorney's fee agreement *is* unreasonable under the Rule 54(e)(3) factors, justice and fairness would require an award under the attorney's actual fee agreement as a component of "actual damages." *See* I.C. § 6-2105(1).

In this case, there is not a single 54(e)(3) factor that supports GFHD's argument that Smith's actual fee agreement is unreasonable. Smith's counsel is ethically bound to charge reasonable rates, and all evidence in the record supports Smith's argument that the hourly rates charged by Smith's counsel are consistent with the free market rates charged by similarly

experienced plaintiffs attorneys. Similarly, Smith's overall attorney's fee award, irrespective of the underlying lodestar calculation, is significantly less than the amount of attorney's fees actually awarded in other recent IPPEA claims, and presumably less than GFHD spent on its own attorney's fees and litigation costs. For these reasons, Smith asks that this Court vacate the district court's *Memorandum Decision and Order* and remand with instructions to enter *Judgment* on Smith's actual attorney's fees at counsel's reasonable contractual rate.

IV. CONCLUSION

For the foregoing reasons, Smith respectfully asks that this Court vacate the district court's judgment and remand with an order for the district court to enter judgment on the jury verdict, plus reasonable attorney's fees at Smith's counsel's contractual rates, and interest on judgment calculated from the date of the jury's verdict on February 9, 2016.

DATED this 5th day of June, 2019.

HEPWORTH LAW OFFICES

By /s/ *Jeffrey J. Hepworth*
Jeffrey J. Hepworth
J. Grady Hepworth
Attorneys for Plaintiff-Appellant

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, with offices at 2229 W. State Street, Boise, Idaho, certifies that on the 5th day of June, 2019, he caused a true and correct copy of the APPELLANT-CROSS RESPONDENT'S REPLY BRIEF to be forwarded with all required charges prepaid, by the method(s) indicated below, to the following:

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Hand Delivered	_____
U.S. Mail	_____
Fax	_____
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ECF/Email	__X__

/s/ *Jeffrey J. Hepworth*
Jeffrey J. Hepworth