

## What's The Deal With All These Whistleblower Cases?

### Intro:

In recent years, we have seen an increase nationwide in the number of high-profile whistleblower cases. Even here in Idaho, whistleblower cases are showing up in the media, and these whistleblower claims have the potential to lead to large verdicts and settlements. In this presentation, we are going to discuss the theories of recovery available to a whistleblower plaintiff, common legal defenses, the whistleblower cases in the media, and recent caselaw updates in Idaho.

- I. What is a Whistleblower?
- II. Whistleblower Actions: Statutory vs. Common Law
- III. State laws protecting whistleblowers
  - a. Statutory State Whistleblower claims are brought under Idaho Protection of Public Employees Act
    - i. Idaho Code §6-2104(4): “An employer may not take action against an employee because the employee, or a person authorized to act on behalf of the employee, communicates in good faith the existence of any waste of public funds, property, manpower, or a violated or suspected violation of a law, rule or regulations adopted under the law of this state, a political subdivision of this state or the United States. Such a communication shall be made at a time and in a manner which gives the employer reasonable opportunity to correct the waste or violation.”
  - b. Public Policy claims in Idaho are a form of whistleblower protection, defined as “the discharged employee: (1) refused to commit an unlawful act; (2) performed an important public obligation; or (3) exercised certain rights or privileges.” *Sorensen v. Comm Tek, Inc.*, 118 Idaho 664, 668, 799 P.2d 70, 74 (1990), citing *Staggie v. Idaho Falls Consol. Hosps., Inc.*, 110 Idaho 349 (Ct. App. 1986). This protects behavior such as challenging or reporting criminal behavior, *Crea v. FMC Corp.*, 135 Idaho 175, 16 P.3d 272 (2000) (refusal to commit unlawful act or performing important public obligation); and reporting building electrical code violations. *Ray v. Nampa Sch. Dist. No. 131*, 120 Idaho 117, 814 P.2d 17 (1991) (refusal to commit unlawful act). However, the Idaho courts have limited this exception so that it does not cover an employee exercising a constitutional right of free speech, political associations or activities, running for public office, alleging violation of law where no specific illegal act was referenced, or refusing to interfere with an administrative investigation. See e.g. *Edmondson v. Shearer Lumber Prod.*, 139 Idaho 172, 177, 75 P.3d 733, 738 (2003); *McKay v. Ireland Bank*, 138 Idaho 185, 59 P.3d 990 (App. 2002); *Venable v. Internet Auto Rent & Sales, Inc.*, 156 Idaho 574, 579, 329 P.3d 356, 361 (2014); *Mallonee v. State*, 139 Idaho 615, 621-22 84 P.3d 551, 557-58 (2004).
  - c. Idaho Human Rights Act includes protection for those who complain about discrimination or participate in an investigation (gender, age, religion, race, national origin, color, disability)
    - i. Idaho Code §67-5911 governs retaliation under employment and public accommodations provisions; governs opposition and participation.

1. "It shall be unlawful for a person or any business entity subject to regulation by this chapter to discriminate against any individual because he or she has opposed any practice made unlawful by this chapter or because such individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter." I.C. §67-5911

IV. Federal protections for whistleblowers

- a. There are various federal statutes available to the whistleblower plaintiff depending on the type of protected activity the employee has engaged in. For example:
  - i. Whistleblower Protection Act of 1989 5 U.S.C. 2302(b): Protects *federal* government employee who reports existence of any activity constituting a violation of laws, rules or regulations, or gross waste of funds.
  - ii. Title II of the Americans with Disabilities Act: 42 U.S.C. § 12203 of the ADA, "no person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted or participated in any manner in an investigation proceeding or hearing under this chapter."
  - iii. Sarbanes-Oxley Act (18 U.S.C. § 1514A(1)(c)): no publicly traded company or any officer or agent of such company may retaliate against an employee for providing information or assisting in an investigation of conduct that the employee reasonably believes is a violation of securities law or SEC's rules where the information or assistance is provided to or the investigation is conducted by a person with supervisory authority over the employee.
  - iv. Dodd-Frank Act (15 U.S.C. § 78u-6(a)(6)): encourages individuals to provide information relating to a violation of U.S. securities laws through provisions that (1) require the SEC to pay significant awards to individuals who provide information to the SEC which leads to a successful enforcement action; and (2) create a private cause of action for certain individuals against employer who retaliate against them for taking specified protected actions.
    1. Dodd-Frank Act's anti-retaliation provision appears to sweep more broadly than Sarbanes-Oxley Act, and a whistleblower need not exhaust any administrative remedies.
- b. Additional federal discrimination anti-retaliation statutes which protect against those who complain about discrimination: Title VII (including pregnancy under PDA, and sexual orientation and gender identity as interpreted by EEOC and some courts), ADEA, Equal Pay Act. Federal agencies are also prohibited from discriminating on the basis of marital status or political affiliation, and thus retaliation provisions protect those types of complaints as well.
- c. Other federal laws also have whistleblower protections embedded, such as OSHA's Whistleblower Protection Program, which covered 20 different whistleblower statutes protecting employees from retaliation, including laws protecting employee safety, environmental protection, consumer products, food safety, motor vehicles, and laws concerning the financial industry, health insurance, and transportation services. See <https://www.whistleblowers.gov/>.

- d. The National Labor Relations Act also protects, by charges of unfair labor practices and/or referral to the OSHA Whistleblowers Protection Program, those employees who complain about unfair labor practices.
- e. In some cases, there may be a constitutional First Amendment protection for federal employees who speak out about matters of public concern, if they are speaking as citizens and not as part of their job duties. *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006). See also *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983).

V. Examination of the IPPEA Claim

a. Prima Facie Case under IPPEA

- i. He was an employee who engaged or intended to engage in protected activity;
- ii. His employer took adverse action against him; and
- iii. The existence of a causal connection between the protected activity and the employer's adverse action. *Van v. Portneuf Med Cntr.*, 156 Idaho 696 (2014).
  - 1. Idaho applies the federal *McDonnell Douglass* burden shifting analysis in deciding summary judgment;
    - a. Plaintiff makes a prima facie case
    - b. Burden shifts to employer to show non-retaliatory reason for the adverse employment action
    - c. Burden shifts back to employee to show that the non-retaliatory reason for the adverse employment action was a pretext

b. What is considered Protected Activity under IPPEA?

i. *Cryer v. IDOL*, 332 F. Supp. 3d 1260 (D. Idaho 2018)

1. Facts

- a. Plaintiff was an employee at IDOL, and was in charge of purchasing. He raised a number of concerns regarding purchases that did not comply with the IDOL rules on purchasing off of a state contract. Plaintiff also refused to purchase certain cables he was directed to purchase because they were outside of the state contract.
  - b. Plaintiff then sent a number of bizarre, anonymous emails to various IDOL employees and other state officials. The emails complained of nepotism in hiring practices. One email to HR was borderline threatening.
  - c. Plaintiff was given a NOCA on the grounds that he engaged in conduct unbecoming a state employee based on the emails.
2. Judge Winmill denied the Department's motion for summary judgment based on the following:
- a. Genuine issue of material fact as to whether Plaintiff engaged in protected activity
    - i. To be protected under the IPPEA, an employee's communications must relate to an existing waste or violation,

- ii. In order for a communication to be protected, it must be made in a manner that allows the employer reasonable opportunity to correct the waste or violations. Judge Winmill held such a requirement to mean that the report must be made up the reporter’s chain of command, or to a person with authority.
  - b. Judge Winmill found some of Plaintiff’s communications related to purchases were not protected because they were not communicated to anyone with authority to remedy them.
  - c. However, Judge Winmill found a question of fact as to whether Plaintiff’s refusal to follow a directive to purchase a cable off contract was protected activity.
  - d. Judge Winmill also found that the emails regarding nepotism could create a question of whether Plaintiff was detailing hiring practices that constitute “waste of public funds, property or manpower” even though there were no nepotism violations laws that the hiring practices would have broken.
    - i. In one email, it could be interpreted that the department was creating and filling unnecessary positions.
      - 1. Email stated: “now they are about to hire Elizabeth Graham a friend of theirs into yet another fabricated position”
  - e. Judge Winmill noted that causation in these cases is almost always a question of fact and almost never appropriate for summary judgment
- ii. *Wright v. Ada County*, 160 Idaho 491 (2016), *overruled by Eller v. Idaho State Police*, 165 Idaho 147 (2019)
  - 1. Facts
    - a. Plaintiff, Wright, was an employee at Ada County. Wright’s employment was terminated in a letter stating that his position was being eliminated due to reorganization. The district court granted summary judgment to Ada County on Wright’s Whistleblower claim when it ruled that Wright did not participate in an investigation for purpose of the Whistleblower Act.
  - 2. Issue on Appeal
    - a. Whether Idaho Code section 6–2104(2) protects employees who participate in *any* investigation, or whether the investigation must relate to waste or a violation of law, rule, or regulation.
      - i. 6-2104(2): An employer may not take adverse action against an employee because an employee in good faith participates or gives information in an investigation, hearing, court proceeding, legislative or other inquiry, or other form of administrative review.

- ii. Court held that under 6-2104(2), there is no requirements that the investigation involve waste or violation of law, rule or regulation.
- c. What damages are available to the IPPEA Whistleblower Plaintiff
  - i. *Eller v. Idaho State Police*, 165 Idaho 147 (2019).

1. Facts

- a. Eller was a crash reconstructionist at ISP who was investigating a fatal crash involving an on-duty Payette County Officer Sloan, and a civilian, Barry Johnson. Johnson died in the crash when he was making a left-hand turn into his driveway, and the Payette County Officer, who was traveling at a high rate of speed, crashed into him on the left. Johnson was found to have a BAC between .053 and .1271, but Eller did not believe that the BAC was a causal factor.
- b. Top Commanders who supervised the investigation believed that the initial report was deficient as it left out exculpatory material: Johnson's BAC. The report was changed to include Johnson's BAC.
- c. Eller testified at a preliminary hearing on behalf of the prosecution for the criminal charge against Sloan that he did not believe the blood alcohol content of Johnson to be a causal factor
- d. One month after Eller testified at the preliminary hearing, he received a downgrade in his performance review.
- e. A year later, ISP issued a directive to destroy all peer review reports. Eller approached his lieutenant to express concerns with the new directive, especially concerns that ISP was destroying evidence in criminal and civil cases and could create Brady issues. Eller refused to follow the policy. Subsequently ISP made several changes that impacted Eller's job duties, and he took on duties, such as working nights, that he had not had to do before.
- f. Jury awarded Eller \$30,529.97 in economic damages and \$1.5 million in non-economic damages for his claim under the IPPEA.

2. Issue on appeal

- a. Whether the ITCA cap of \$500,000 per occurrence applies to whistleblower claims
  - i. The ITCA cap of \$500,000 per occurrence or accident does not apply to the Whistleblower Act.
    - 1. Whistleblower Act supplants the ITCA in retaliation cases. The Whistleblower Act provides statutory remedies which supplant and thus preclude common law causes of action.
- b. Whether non-economic damages are available under the Whistleblower Act

- i. The Whistleblower Act permits an award of non-economic damages
          - 1. Court reasoned that the statute provides a claimant with an actual damages remedy, which would include non-economic damages.
          - 2. The damages available are not limited to those damages specified in the statute.
    - c. What the Court *didn't consider*?
      - i. Whether Idaho's cap on non-economic damages for personal injury under I.C. § 6-1603 would apply to non-economic damages for pain and suffering in a whistleblower action.
    - d. What's odd about this decision?
      - i. On May 27, 2014, Eller resigned as an ISP crash reconstructionist
      - ii. Eller filed his complaint on January 6, 2015.
      - iii. Court noted that "Eller's damages will be limited to those claims arising within the 190-day window before January 6, 2015, when his complaint was originally filed.
      - iv. The court remanded for a new trial to determine Eller's non-economic damages. The court did not comment on the fact that Eller's claim was not filed within the 180 day statute of limitations for whistleblower claims from when he resigned.
- VI. Recent Idaho Verdicts/Settlements for Whistleblower Plaintiffs.
  - a. *Eller v. ISP*: Settlement, \$1.3 Million, August 29, 2019
  - b. *Cryer v. IDOL*: Settlement, \$545,000, April 12, 2019
  - c. *Smith v. Glenns Ferry Highway District*: Jury Verdict, \$250,544, February 6, 2018
    - i. Plaintiff contended that her former employer, Def. Glenns Ferry, retaliated against her after she reported that her co-worker overpaid herself on two payroll checks. Plaintiff was ultimately terminated.
  - d. *Wright v. Ada County*: Jury verdict, \$1,742,397, March 14, 2017
  - e. *Strosnider v. City of Nampa*: Settlement, \$750,000, November 15, 2016
    - i. Plaintiff worked for the Nampa Fire Department for nearly 22 years, the last 17 years of his career as a Deputy Fire Chief. Plaintiff contended he was terminated because he expressed safety concerns regarding two local apartment buildings, and he also raised concerns about possible discrimination against people with disabilities at one of the apartments. Plaintiff claimed he was terminated after issuing a notice and orders, against the mayor's wishes, to the owners of the two apartment buildings in Nampa. Shortly after issuing the notices, he was placed on leave, then terminated.
  - f. Financial whistleblower recovery

- i. In 2018, a whistleblower received \$45 million payout from the Commodities and Futures Trading Commission for sparking the investigation into manipulation of a price-setting mechanism

VII. Whistleblower cases in the Media

- a. <https://www.idahostatesman.com/news/local/community/boise/article234661172.html>  
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- b. <https://www.whistleblowers.org/amicus-curiae-briefs/>
- c. <https://www.nytimes.com/2019/09/19/us/politics/intelligence-whistle-blower-complaint-trump.html>