STATE OF IDAHO )
County of KOOTENAI )ss

FILED 04.14.2021

AT 1651 O'Clock ____M
CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

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| **BRETT RENNISON and JENNIFER RENNISON, husband and wife,** , *Plaintiffs,* vs. **TIMBERLAKE FIRE PROTECTION DISTRICT,** *Defendant.* | Case No. **CV28-20-1251** **MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION TO STRIKE PLAINTIFFS' EXPERT DECLARATIONS** |

## I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on the Motion for Summary Judgment filed on February 2, 2021, by defendant Timberlake Fire Protection District (Timberlake) against plaintiffs Brett Rennison (Mr. Rennison) and Jennifer Rennison, husband and wife (collectively the Rennisons). This litigation involves a claim by the Rennisons that Timberlake violated the Idaho Protection of Public Employees Act (IPPEA). Compl. 2-3, ¶ 8-9. Mr. Rennison was, "employed as a Lieutenant Firefighter/EMT with Timberlake." *Id.* at 2, ¶ 4. A female firefighter, Brittany Baeumel (Baeumel) had come forward to Mr. Rennison regarding sexual harassment she had received from the Fire Chief, Bill Steele (Steele), and she informed Mr. Rennison that another woman had been sexually harassed by the Fire Chief as well. *Id.* at ¶ 7. [The Court notes that Baeumel is never mentioned in the pleadings; she is first mentioned in Timberlake's Memorandum in Support of Motion for Summary Judgment. Mem. in Supp. of Mot. for Summ. J. 3, citing Rudebaugh Decl. ¶¶ 3-4. The Court also notes that both parties

spell Baeumel various ways, and that includes within the same declaration or the same memorandu. This Court will use the spelling given by Baeumel in her "Declaration of Brittany Baeumel", filed February 16, 2021, even when quoting material where it was misspelled in a declaration or a memorandum.] Mr. Rennison encouraged Baeumel to file a formal sexual harassment complaint against Steele, and eventually, "with the assistance of Mr. Rennison, a formal sexual harassment complaint was filed against the Fire Chief." *Id.* The Rennisons claim that, "Immediately after assisting in the filing of the sexual harassment, on June 5, 2019, Mr. Rennison began experiencing retaliation and intimidation from his superior and other firefighters." *Id.* at 3, ¶ 9. Upon conclusion of the investigation into the sexual harassment complaint, Steele was given the choice to retire or be terminated. *Id.* at ¶ 11. Steele chose to retire. *Id.* The new acting Fire Chief, Brandon Hermenet (Hermenet) wished to retain Steele as a consultant and fire inspector. *Id.* Mr. Rennison questioned the liability posed to Timberlake if Steele was allowed to continue to work on the premises. *Id.* at ¶12. Mr. Rennison claims that the retaliation continued, and the retaliation was in the form of him being left out of important communications, hostility and intimidation from fellow employees, filing of false complaints against Mr. Rennison and a discriminatory investigation into these claims. *Id.* at 3-4, ¶ 12-14. Mr. Rennison claims that nothing was done about the false complaints filed, and no action was taken regarding Mr. Rennison's complaints of retaliation. *Id.* at 4, ¶ 14. Mr. Rennison claims he was threatened by Hermenet during a one-on-one meeting. *Id.* at ¶ 15. This threat took the form of Hermenet telling him that, "you know we're in a profession where we have to trust that if you have an emergency in a burning building that the other guys will come get you out." Decl. of Brett Rennison Ex. A, p. 4. In the context of this meeting, Mr.

Rennison, "took this statement as a threat to mean, if I didn't let this go, and that if I had an emergency in a burning building, none of these individuals would assist me." *Id.* Mr. Rennison filled a formal complaint of retaliation with the Timberlake Board of Commissioners and Mr. Rennison claims this was met with more retaliation in the form of him being placed on leave. Compl. at 4, ¶ 16. Approximately one month later, Mr. Rennison was told that he was to report back to duty, but nothing was communicated to him as to any action taken regarding his complaint of retaliation and the threats against him. *Id.* Mr. Rennison asserts that he, "was constructively discharged from his employment, as no reasonable person would be expected to work in a malicious and unsafe environment where their very life was threatened". *Id.* The Rennisons claim:

> Because of Timberlake's violation of the Idaho Protection of Public Employees Act, Mr. Rennison has suffered damages, including but not limited to, lost wages and benefits, emotional distress, and court costs and attorney's fees in bringing this action. Mrs. Rennison has also suffered emotional distress, loss of companionship, and loss of community assets.
>
> In the alternative, if it is determined that Mr. Rennison is not an employee intended to be protected by the Idaho Protection of Public Employees Act, then Mr. Rennison was constructively discharged, wrongfully in violation of Public Policy.

*Id.* at 5, ¶ 20-21.

On February 13, 2020, the Rennisons filed a Complaint and Demand for Jury Trial. On March 10, 2020, Timberlake filed an Answer to Complaint and Demand for Jury Trial. On February 2, 2021, Timberlake filed Defendant's Motion for Summary Judgment, a Memorandum in Support of Defendant's Motion for Summary Judgment, Declaration of Jennifer Fegert, declaration of Brandon Hermenet, Declaration of "David" Rudy Rudebaugh, Declaration of Mike Moore, Declaration of Samuel Bauer, Declaration of Jack Duclos, Declaration of Morgan Hongslo, Declaration of Thomas Parquette, Declaration of Joel Long, Declaration of Shay Carlock, Declaration of Craig

Taylor, and Declaration of Ryan Shuck. On February 16, 2021, the Rennisons filed Plaintiff's Memorandum in Response to Defendant's Motion for Summary Judgment, Declaration of Brett Rennison, Declaration of April M. Linscott, Declaration of Brittany Baeumel, Declaration of John Ward, and a Declaration of Richard L. Hughes. On February 23, 2021, Timberlake filed a Reply Memorandum in Support of Motion for Summary Judgment, a Motion to Exclude Declarations of Plaintiffs' Experts, a Memorandum in Support of Motion to Exclude Declarations of Plaintiffs' Expert Witnesses, and a Declaration of Jennifer Fegert In Support of Motion to Exclude Declarations of Plaintiffs' Experts. The Rennisons filed a Response to Motion to Exclude the Declaration of Plaintiff's Expert on February 24, 2021.

Oral arguments on Timberlake's Motion to Exclude Declarations and Timberlake's Motion for Summary Judgment were scheduled to be held on March 2, 2021. That hearing took place on that date, but at that hearing, the Court informed the attorneys for the parties that due to the backlog in the clerk's office processing filings, the Court did not have the ability to read the briefing submitted by the parties regarding Timberlake's Motion to Exclude Declarations, and had not read such briefing prior to that hearing. Because the determination of Timberlake's Motion to Exclude Declarations would impact what the Court would consider on Timberlake's Motion for Summary Judgment, the Court rescheduled the hearings on both motions for March 30, 2021.

Oral argument on Timberlake's Motion to Exclude Declarations and Timberlake's Motion for Summary Judgment occurred on March 30, 2021. The Court first heard argument on Timberlake's Motion to Exclude Declarations, and then the Court announced its decision granting Timberlake's Motion to Exclude Declarations. The Court then heard argument on Timberlake's Motion for Summary Judgment. At the

conclusion of argument, the Court announced that it was granting Timberlake's Motion for Summary Judgment, but rather than state is reason on the record, the Court stated it would be issuing a written decision as soon as possible. The Court announced its ultimate conclusion on the record so as to provide the parties and their attorneys with the Court's decision as soon as possible, given the rapidly approaching trial date. At the end of the March 30, 2021, hearing, the Court also vacated the trial scheduled to begin on April 12, 2021.

**II. STANDARD OF REVIEW.**

At this summary judgment juncture, as to Timberlake's Motion to Exclude Declarations, the standard of review was most recently set forth by the Idaho Supreme Court in *Eldridge v. West*, 166 Idaho 303, 308, 458 P.3d 172, 177 (2020):

> When reviewing the trial court's evidentiary rulings, this Court reviews those decisions for an abuse of discretion. *Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho 160, 163-64, 45 P.3d 816, 819-20 (2002) (citation omitted). When reviewing a lower court's decision for an abuse of discretion, this Court must analyze "whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason." *Lunneborg v. My Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018) (citing *Hull v. Giesler,* 163 Idaho 247, 250, 409 P.3d 827, 830 (2018)).

"The admissibility of expert testimony is a matter committed to the discretion of the trial court, and the court's ruling will not be overturned absent an abuse of that discretion." *Howard v. Oregon Mutual Insurance Co.*, 137 Idaho 214, 219, 46 P.2d 510, 515 (2002).

Idaho Rule of Civil Procedure 56 governs motions for summary judgment. Summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). A party asserting that there is no genuine dispute as to any

material fact, or a party asserting that a genuine dispute exists, must support that assertion by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." I.R.C.P. 56(c).

> If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:
>
> (1) give an opportunity to properly support or address the fact;
> (2) consider the fact undisputed for purposes of the motion;
> (3) grant summary judgment if the motion and supporting materials, including the facts considered undisputed, show that the movant is entitled to it; or
> (4) issue any other appropriate order.

I.R.C.P. 56(e). The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Fin. Corp.*, 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)). "Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party" to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)). To do so, the non-moving party "must come forward with evidence by way of affidavit or otherwise that contradicts the evidence submitted by the moving party, and that establishes the existence of a material issue of disputed fact." *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009) (citing *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 865 (2007)). "Circumstantial evidence can create a genuine issue of material fact... However, the non-moving party may not rest on a mere scintilla of evidence." *Shea v. Kevic Corp.*, 156 Idaho 540, 545, 328 P.3d 520, 525 (2014)

(quoting *Park West Homes, LLC v. Bamson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013)).

> In determining whether material issues of fact exist, all allegations of fact in the record and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion. *City of Kellogg v. Mission Mountain Interests Ltd., Co.*, 135 Idaho 239, 240, 16 P.3d 915, 919 (2000). When a jury is to be the finder of fact, summary judgment is not proper if conflicting inferences could be drawn from the record and reasonable people might reach different conclusions. *State Dep't of Fin. v. Res. Serv. Co., Inc.*, 130 Idaho 877, 880, 950 P.2d 249, 252 (1997).

*Edmondson v. Shearer Lumber Prod.*, 139 Idaho 172, 176, 75 P.3d 733, 737 (2003). The moving party may also meet "the 'genuine issue of material fact' burden...by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial." *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994). "Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking." *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000) (citing *Dunnick* at 311, 882 P.2d at 478).

> Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial, or to offer a valid justification for the failure to do so under [I.R.C.P. 56(d)]. *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994) (alteration added).

*Dunnick* at 311, 882 P.2d at 478; *see also Heath* at 712, 8 P.3d at 1255.

## III. ANALYSIS.

### A. Timberlake's Motion to Strike Declarations of Plaintiffs' Experts.

Timberlake moved to strike the expert testimony of John Ward and Richard L. Hughes. The purpose of the motion was not to strike their testimony at trial, but for the

purpose of the Court not considering their expert testimony on summary judgment. Idaho Rule of Evidence Rule 702 Reads:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

This Court grants Timberlake's Motion to Strike the declarations of John Ward and Richard L. Hughes because the testimony found in these declarations does not rise to the level of an expert's scientific, technical, or other specialized knowledge that would help the trier of fact to understand the evidence or to determine a fact in issue.

John Ward's testimony largely consists of a recitation of the facts asserted by Mr. Rennison, with Ward presenting his opinion that firefighting is a dangerous job that requires trust of your fellow firefighters. Decl. of John Ward Ex. A, p. 3-4. Ward goes on to assert that this trust is more acutely necessary because of the large amount of time that may be required for backup to arrive in this particular rural fire district. *Id.* at 4. Additionally, Ward provides his opinion that the investigation into Mr. Rennison's concerns for safety was not handled appropriately, and he states that "[i]n my opinion many of the complaints filed against Lt. Rennison were the result of a concerted effort to 'punish' him for their mentor's untimely separation from the district." *Id.* at 5. Ward expresses his opinion that Lt. Rennison was in a "hostile environment" (*Id.* at 4, ¶ 1) and retaliated against. *Id.* at 4, ¶ 4, 5, ¶ 7. Finally, Ward states his opinion that, "[t]here is no other statement that can be made by a fellow firefighter, let alone a fire chief [Ward attributes this to Hermanet], that is more threatening than one that questions whether brother firefighters will have your back in an emergency situation. Any firefighter that was to receive that kind of threat would be reasonable in his or her actions in resigning their position upon receiving that kind of threat." *Id.*

This Court finds that such opinions espoused above are not based upon specialized knowledge of Ward that would be helpful to the trier of fact to understand the evidence or to determine a fact in issue. These opinions of Ward do not require specialized knowledge to understand the reliance firefighters require from their compatriots in a dangerous situation. Ultimately, Ward's opinions in his declaration do not provide insight into the technical or specialized aspects of rural firefighting, but instead simply state commonly known platitudes about firefighting, following which Ward provided a legal conclusion that Mr. Rennison had been placed in a hostile work environment and retaliated against due to the alleged threat by Hermenet, the asserted failure by Timberlake to properly investigate and address Mr. Rennison's concerns regarding Hermenet's alleged threat, as well as the alleged actions taken by Mr. Rennison's coworkers. *Id.* at 3-5. A statement is conclusory if it does not contain supporting evidence for its assertion. *Eldridge*, 166 Idaho at 311, 458 P.3d at 180. Ward's opinion not only fails to state how and why Mr. Rennison was placed in a hostile work environment and retaliated against due to this combination of Hermanet's threat, Timberlake's failure to investigate and the actions of Mr. Rennison's coworkers, but Ward's opinion also fails to state how any why such sub-opinions are supported by evidence. Ward fails to state how and why Hermanet's statement that "firefighters will have your back in an emergency situation" can only be construed one way, that being as a direct threat against Mr. Rennison, and not simply construed as a true statement about firefighting which has no negative connotation. Ward fails to state how and why Timberlake failed to investigate, when there is uncontradicted evidence that Timberlake conducted an investigation. Finally, because Ward reaches conclusions such as hostile work environment (Decl. of John Ward Ex. A, p. 4, ¶ 1) and retaliation (*Id.* at 4, ¶ 4, 5, ¶ 7), Ward's opinion must be stricken. Timberlake correctly notes the law pertaining to

this issue:

> A properly qualified expert is allowed to render an opinion, otherwise admissible, which embraces an ultimate issue to be decided by the trier of fact. I.R.E. 704. However, Rule 704 has not opened the door to all opinions on every subject. *State v. Walters*, 120 Idaho 46, 55 (1991). Thus, a qualified expert may only give testimony in the form of an opinion or otherwise evidence which is "beyond the common experiences of most jurors" and will assist them in understanding the evidence or in determining a fact in issue. I.R.E. 702, *State v. Hester*, 114 Idaho 688, 694 (1988). Expert testimony is admissible up to, but excluding the point at which the expert weighs the evidence, in essence evaluating the circumstances and rendering the same conclusion which the jury is asked to render by its verdict. *Id.* at 696. When the expert is asked to weigh the evidence, the opinion testimony impermissibly transcends the "test of jury enlightenment and enter[s] the realm of fact finding." *Id.* at 695.

Mem. in Supp. of Def.'s Mot. to Exclude the Decl. of Pls.' Experts John Ward and Richard H. Hughes on Summ. J. 4. At the very least, Ward's conclusory opinions as to hostile work environment (Decl. of John Ward Ex. A, p. 4, ¶ 1) and retaliation (*Id.* at 4, ¶ 4, 5, ¶ 7) is weighing the evidence on the same issue the jury will be asked to decide. Additionally, Ward's conclusory opinions as to a hostile work environment and retaliation must be stricken as they are matters of law. *Howard*, 137 Idaho at 219, 46 P.2d at 515, *citing Perry v. Magic Valley Reg'l Med. Ctr.*, 132 Idaho 46, 50, 995 P.2d 816, 820 (2000). In *Howard*, the Idaho Supreme Court upheld the district judge who struck the "linguistics expert" who had "opined that the language of the Howards' [insurance] policy was ambiguous." *Id.* Just as "the identification and resolution of ambiguity in an insurance policy are matters of law" (*Id.*), so is whether actions create a hostile work environment or constitute retaliation at the workplace. For the reasons described above, Timberlake's Motion to Strike the Declaration of John Ward is granted.

Next, this Court finds that Richard Hughes' Declaration is inadmissible as expert testimony. Hughes' Declaration largely consists of a recitation of facts asserted by Mr.

Rennison, as well as legal conclusions that: (1) "Lt. Rennison was required to report complaints of sexual harassment once he learned of them and his reporting was brought in good faith"; (2) "[a]dverse employment actions or retaliation directed at Lt. Rennison occurred after he assisted Ms. Baeumel in lodging her complaint for sexual harassment against former Chief Steele"; and (3) "[a]dverse employment actions or retaliation directed at Lt. Rennison occurred after the District decided to employ Chief Steele as a consultant or fire inspector following Steele's termination from employment." Decl. of Richard Hughes Ex. A, p. 4-8.

Again, this Court is aware that I.R.E. 704 states "[a]n opinion or inference is not objectionable just because it embraces an ultimate issue", but expert testimony must also conform to I.R.E. 702, providing that "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Hughes' testimony is related to his experience and specialized knowledge in employment law (Decl. of Richard Hughes Ex. A, p. 1), but this Court finds that Hughes' Declaration does not help the trier of fact to understand the evidence or determine whether adverse action was taken by Timberlake against Mr. Rennison. While Hughes recited the complaints made by coworkers against Mr. Rennison, and Timberlake's decision to place him on leave while investigating Mr. Rennison's concerns, Hughes does not make clear how these events are relevant to the conclusion reached by Hughes that Timberlake took adverse action against Mr. Rennison. Hughes also concludes that Timberlake's investigation was "shoddy". It is unclear how this opinion is relevant because Mr. Rennison was asked to come back to active duty after the conclusion of the investigation. Ultimately, Hughes' opinions presented in his declaration are question begging, and based upon the premise that adverse action had been taken against Mr. Rennison. This is the very premise at

contention in this case. While that fact is not disqualifying under I.R.E. 704 (above regarding the ultimate issue for the trier of fact), Hughes' specialized knowledge in employment law does not provide the trier of fact with new *factual* information that is relevant to answering the question of fact regarding whether adverse action had been taken by Timberlake Fire District against Mr. Rennison. To the extent Hughes renders *legal* conclusions, he invades the province of the Court at summary judgment, as set forth above in this Court's analysis of Ward's opinions. For the reasons described above, Timberlake's Motion to Strike the declaration of Hughes is also granted.

**B. Timberlake's Motion for Summary Judgment.**

The Idaho Supreme Court has found that a *prima facie* case for retaliatory discharge under Idaho's whistleblower act requires three elements: (1) the plaintiff was an "employee" that engaged or intended to engage in protected activity; (2) the "employer" took adverse action against the employee; and (3) the existence of a causal connection between the protected activity and the employer's adverse action. *Curlee v. Kootenai County Fire & Rescue*, 148 Idaho 391, 397, 224 P.3d 458, 464 (2008). This Court will analyze these three elements in that order as they apply to the Rennisons' claims that Timblerlake violated Idaho's Protection of Public Employee's Act (IPPEA). Following that analysis, the Court will address the Rennisons' alternative public policy claim.

**1. Protected Activity.**

Timberlake argues:

> Brett did not engage in a protected activity because his only involvement in Brittany's complaint of sexual harassment was when he "facilitated the interaction so that complaint could be verbalized to the proper people, which then resulted in [Brittany] being able to put pen to paper and produce that formal complaint." (Rennison Deposition, pg. 87). Brett did not "report" Bill Steele's conduct to anyone. Brett did not discuss

> Brittany's complaint with the Commissioners or Ms. Jovick, nor did he break Brittany's confidence after the commissioner's meeting and talk about her complaint to anyone at the Fire District. (Rennison Deposition, pg. 83). Brett testified in his deposition that he didn't report Brittany's complaints to anyone because he "needed to give her ample time to be able to do it on her own." (Rennison Deposition, pg. 69). When Brittany did come forward with her complaint, Brett was not involved or included in the conversation in any way. Brett cannot prove a prima facia case under Idaho Code§ 6-2104 because he did not engage in a protected activity and therefore this action must be summarily dismissed.

Mem. in Supp. of Mot. for Summ. J. 13-14 (underlining in original).

The Rennisons argue:

> Mr. Rennison's actions fall under the IPPEA. In Idaho, it is illegal for a public employer to discriminate against an employee based on sex. *I.C. § 67-5909A*. When Mr. Rennison took Ms. Baeumel's complaint, he believed that the Fire District may be in violation of the law and that the matter needed to be looked into. He intended to convince Ms. Baeumel to raise her complaint to the Commissioners so that it could be further investigated. *Linscott Decl. Ex. A* (Rennison Depo. Tr., p. 68, ll. 17-20; p. 74, ll. 6-12; & p. 62, ll. 7-19). Ultimately, Mr. Rennison assisted Ms. Baeumel in her ability to speak with Commissioner Rudebaugh. This was done in the presence of other firefighters, including Mr. Hermenet, and at a time when Ms. Baeumel was openly and obviously being retaliated against by Chief Steele. In taking these actions, Mr. Rennison was not only intending to initiate an investigation, but participating in the communication of the existence of a suspected violation of Idaho's Human Rights laws.
>
> It is not necessary that Mr. Rennison be the one to speak the words to Commissioner Rudebaugh. It is enough that he assisted Ms. Baeumel in making the communication and that he intended to have communication to start the investigation process if Ms. Baeumel did not. *See, Curlee v. Kootenai Cty. Fire & Rescue*, 148 Idaho 391, 399, 224 P.3d 458, 466 (2008)(It was not necessary that Curlee actually have presented the notes to her employer in order to constitute a report. Idaho's whistleblower act only requires that the employee "intended to engage in an action protected under the act." I.C. § 6-2105(4) (emphasis added). Mr. Rennison intended to report a violation of the sexual harassment laws and he intended to communicate information in an investigation.

Pls'. Mem. in Resp. to Def's. Mot. for Summ. J. 12-13. As will be discussed shortly below, there is a lot of "intention" claimed by Mr. Rennison, and no admissible evidence of any "action" taken by Mr. Rennison.

The following statutes in the Idaho Protection of Public Employee's Act (IPPEA) are applicable to this case. Idaho Code § 6-2104(1)(a) reads:

> An employer may not take adverse 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 or manpower, or a violation or suspected violation of a law, rule or regulation adopted under the law of this state, a political subdivision of this state or the United States.

Idaho Code § 6-2105 (4) states:

> To prevail in an action brought under the authority of this section, the employee shall establish, by a preponderance of the evidence, that the employee has suffered an adverse action because the employee, or a person acting on his behalf, engaged or intended to engage in an activity protected under section 6-2104, Idaho Code.

Idaho Code § 6-2104(2)(a) reads:

> An employer may not take adverse action against an employee because an employee in good faith participates or communicates information in good faith in an investigation, hearing, court proceeding, legislative or other inquiry, or other form of administrative review concerning the existence of any waste of public funds, property, or manpower, or a violation or suspected violation of a law, rule, or regulation adopted under the law of this state, a political subdivision of this state, or the United States.

Idaho Code § 6-2103(1) and (2) state:

> (1) "Adverse action" means to discharge, threaten or otherwise discriminate against an employee in any manner that affects the employee's employment, including compensation, terms, conditions, location, rights, immunities, promotions or privileges.
> (2) "Communicate" means a verbal or written report.

Contrary to the Rennisons' argument set forth in the first paragraph block quoted above, it is quite difficult for this Court to see that he actually **engaged** in any sort of "**activity**", let alone any "protected activity". As set forth above, Rennisons claim, "When Mr. Rennison took Ms. Baeumel's complaint, he believed that the Fire District may be in violation of the law and that the matter needed to be looked into." Pls'. Mem. in Resp. to Def's. Mot. for Summ. J. 12. "Belief" is not an "activity". A person may hold

a belief, but believing something does nothing to turn that belief into an activity. The Rennisons claim, "Mr. Rennison took Ms. Baeumel's complaint." *Id.* Where exactly did Mr. Rennison "take" Ms. Baeumel's complaint? He did not "take" her complaint down on paper. He did not "take" her complaint to another person. He did not "take" her complaint anywhere. Mr. Rennison *listened* to her complaint and he "assisted Ms. Baeumel in her ability to speak with Commissioner Rudebaugh." *Id.* That is all he did. Making an introduction could be considered an "activity", but this Court finds it is without any doubt in the world not a "protected activity". If instead of a simple introduction, Mr. Rennison had said, "Commissioner Rudebaugh, this is Brittany Baeumel, **and she has something to tell you about Bill Steele sexually harassing her**", then the Rennisons would likely survive summary judgment on the issue of a protected activity. However, those are not the facts of this case; that is not what happened here.

The Rennisons then claim, "He intended to convince Ms. Baeumel to raise her complaint to the Commissioners so that it could be further investigated." *Id.* "Intended" is no more an "activity" than is "belief". Next, the Rennisons claim, "In taking these actions, Mr. Rennison was not only intending to initiate an investigation, but participating in the communication of the existence of a suspected violation of Idaho's Human Rights laws." *Id.* at 13. Again, the only "action" was encouraging Baeumel to talk to Rudebaugh, and then taking her over to him, and then he left. Introducing two people does not amount to "intending to initiate an investigation." Mr. Rennison may have "intended" there to be an investigation, but he himself took no action to initiate an investigation, he took no action to cause an investigation, and he took no action in furtherance of an investigation. It was Baeumel who took the "action", not Mr. Rennison. Baeumel's "action" was to talk to Rudebaugh. And Mr. Rennison clearly

was not, "participating in the communication of the existence of a suspected violation of Idaho's Human Rights laws." *Id.*

In the second paragraph of Rennisons' argument block quoted above, the Rennisons conclude, "Mr. Rennison intended to report a violation of the sexual harassment laws and he intended to communicate information in an investigation." *Id.* Again, this Court specifically finds that "intended to report" and "intended to communicate" are not enough to prove a violation of Idaho's Protection of Public Employee's Act. To hold otherwise would result in this Court allowing lawsuits under IPPEA based on an inchoate act. To hold otherwise would result in this Court allowing lawsuits under IPPEA when any public employee simply "intended to report" or "intended to communicate" something someone else said about what happened to them which may have been sexual harassment. This is what the Rennisons are arguing. To arrive at this conclusion, as quoted above, Rennisons cite to *Curlee*, and argue: "It is not necessary that Mr. Rennison be the one to speak the words to Commissioner Rudebaugh. It is enough that he assisted Ms. Baeumel in making the communication and that he intended to have communication to start the investigation process if Ms. Baeumel did not." *Id.* The problem is *Curlee* does not stand for or even remotely support that proposition. This Court is quite aware of what the Idaho Supreme Court held in *Curlee* as this Court presided over that case prior to and after the appeal. While the Idaho Supreme Court in *Curlee* held, citing I.C. § 6-2105(4), "Idaho's whistleblower act only requires that the employee '***intended*** to engage in an action protected under the act'" (148 Idaho at 399, 224 P.3d at 466 (bold italics in original), such holding must be considered in context. The Rennisons choose to ignore that context.

First, to understand *Curlee* in the context of the instant case, we need to understand what the Rennisons **claim** Mr. Rennison **did** in the Rennisons' Complaint. The Rennisons claim that, "Immediately after assisting in the filing of the sexual harassment, on June 5, 2019, Mr. Rennison began experiencing retaliation and intimidation from his superior and other firefighters." Compl. 3, ¶ 9. Even that is a misstatement. Mr. Rennison did not "assist in the filing of the sexual harassment." Mr. Rennison introduced Baeumel to Rudebaugh, and that is it. There was no "filing" of anything by Mr. Rennison. There was no discussion of "sexual harassment" by Mr. Rennison. Thus, the Rennisons really claim, or essentially they admit, that no **action** was taken by Mr. Rennison. In the portion of *Curlee* upon which Rennisons inappropriately rely, **action is required**. The Idaho Supreme Court held: "Idaho's whistleblower act only requires that the employee '***intended*** to engage in an action protected under the act.'" 148 Idaho at 399, 224 P.3d at 466 (bold italics in original, underlining added). This Court finds that Mr. Rennison's introduction of Baeumel to Rudebaugh is not enough to survive summary judgment. Mr. Rennison took no "action" protected under IPPEA.

Second, *Curlee* dealt with actions the plaintiff Curlee took, not actions someone else took on behalf of Curlee. The Idaho Supreme Court case of *Curlee v. Kootenai County Fire & Rescue* involved an employee (Curlee) at Kootenai County Fire and Rescue (KCFR) that had voiced her concerns regarding two employees who were engaging in wasteful behavior during the work day. 148 Idaho 391, 393, 224 P.3d 458, 460 (2008). Curlee claimed she was told by two of her lieutenants (her superiors) that she keep a log of the wasteful behavior, which she did. *Id.* Seven months later, one of the two employees whom Curlee had been recording their activities, discovered

Curlee's minute-by-minute handwritten log and turned it over to the Fire Chief. 148 Idaho at 394, 224 P.3d at 461. Curlee's two coworkers were upset by Curlee's log and what they perceived to be derogatory terms used to describe them in such log. *Id.* The Chief asked Curlee to find a way to work with the two employees as a team. *Id.* When asked again by the Chief to find a way to work together, Curlee stated that, "she would not apologize and would never be able to have a good working relationship with her two coworkers. Her employment was then terminated." *Id.* The Idaho Supreme Court in *Curlee* found that:

> It was not necessary that Curlee actually have presented the notes to her employer in order to constitute a report. Idaho's whistleblower act only requires that the employee "***intended*** to engage in an action protected under the act." I.C. § 6–2105(4) (emphasis added). Curlee presented evidence that her supervisors instructed her to document the waste. By way of affidavit, she testified she "began documenting the things in the office to support the fact that there was waste of manpower and mismanagement in the office" and that her "notes were part of the communication of such wastefulness of manpower and public funds in the office." A reasonable inference may be drawn that she intended to deliver the report to her supervisors at some future time, but that action was preempted by the inadvertent discovery of her notes by Sharp. Indeed, it appears that the district judge drew this inference, as he stated that "it seems to me from my reading of what is admissible the Plaintiff was assembling information that she felt reported waste...." We conclude that KCFR is not entitled to summary judgment in its favor on this ground

_____, 148 Idaho at 399, 224 P.3d at 466. (bold in original). Thus, the only inference that this Court was allowed to make under the *Curlee* decision was the inference that although Curlee did not take her notes to her superiors (because those notes were inadvertently discovered by others before she could do so), the trial court (this Court) could **infer** that Curlee intended to take the information she created to her superiors. *Curlee* allows a reasonable inference based on what actually happened. What actually happened was Curlee kept notes that were focused on other employees' waste. She was told by her superiors to keep such notes. It is a reasonable inference that she

would have presented those notes to her superiors. This Court did not make that inference on summary judgment in *Curlee*, and the Idaho Supreme Court set this Court straight in that regard when Curlee appealed. In *Curlee*, the notes Curlee kept actually existed, they were actually discovered and that actually led to adverse actions being taken against Curlee at work. Curlee did not take the action of turning her notes over to her supervisors, but it was clear she was taking the notes in the first place, in order to do just that, to turn those notes over to her supervisors. But *Curlee* does not allow a reasonable (really it would be an unreasonable) inference based *on what never happened*. This is exactly what the Rennisons want this Court to do so that they can survive summary judgment. Rennisons want this Court to find that because Mr. Rennison "intended" Baeumel to report Steele's sexual misconduct to Rudebaugh, and since Mr. Rennison took Baeumel to Rudebaugh so that those two could talk about that subject, a reasonable inference would be Mr. Rennison would have filed a complaint with Rudebaugh about what Steele had done to Baeumel, if Baeumel chose to say nothing to Rudebaugh. That is not what happened (because Baeumel **did** talk to Rudebaugh), accordingly, such is not a reasonable inference. Such is not an inference the Idaho Supreme Court would allow this Court to make under *Curlee*. No reasonable reading of *Curlee* would allow this Court to make that inference. This Court simply cannot infer that Mr. Rennison would in fact do something (file a complaint), if someone else (Baeumel) did not do that same something (file a complaint), when that same someone else (Baeumel) did the very same something (file a complaint). No inference follows because when Baeumel filed her complaint, Mr. Rennison no longer had to file a complaint. This Court finds that there is no question of fact that Mr. Rennison did not engage in a protected activity under I.C. §§ 6-2103 and 6-2104 in regards to Mr.

Rennison's actions. Said actions were only Mr. Rennison's encouragement to Baeumel. No statements were made by Mr. Rennison to Rudebaugh. It is illegal for a public employer to discriminate against an employee based on sex. Idaho Code § 67-5909A. But it was not Mr. Rennison who was sexually harassed. While Mr. Rennison intended Baeumel (who was sexually harassed) to make a complaint, he in fact did not make such a complaint. Timberlake argues Mr. Rennison at most "facilitated the interaction so that complaint could be verbalized to the proper people, which then resulted in [Brittany] being able to put pen to paper and produce that formal complaint." Mem. in Supp. of Mot. for Summ. J. 13-14 (*Citing*, Rennison Deposition, pg. 87). Idaho Code §§ 6-2103 and 6-2104 both speak exclusively in terms of "action". "Facilitating interaction" between Baeumel and Rudebaugh is not enough to show that Mr. Rennison engaged in a protected **activity** under I.C. §§ 6-2103 and/or 6-2104.

As a side note, even if Mr. Rennison's "facilitation" could be an "activity" that is "protected" (it is not, but making all those assumptions for the moment), because the only "activity" is "facilitation", **who is going to notice this act of "facilitation"**? This is discussed more fully in this Court's analysis of the third *Curlee* element of "causation." But the reader should keep in mind that this Court finds Rennisons have provided no evidence that any of Mr. Rennison's crew members had any specific knowledge of Mr. Rennison's "facilitation" of getting Baeumel to take her sexual harassment claim to Rudebaugh. Aside from Mr. Rennison's mere speculation, no crew member would have such knowledge because it was a conversation between Mr. Rennison and Baeumel.

In *Curlee*, the complaining party actually communicated, in writing, and did so at the recommendation of her supervisors. In doing so, Curlee engaged in an activity, a protected activity. Mr. Rennison engaged in no activity, let alone a protected activity.

Mr. Rennison never verbally communicated any information to Timberlake. Baeumel is the person who engaged in an "activity." Because "intent" is only known to the person who claims that "intent", it is undisputed that Mr. Rennison intended to communicate. Again, that "intent" is not "action" or "activity." Timberlake argues that, "Brett asks this court to stretch the *Curlee* Court's meaning of 'intended,' arguing that it was not necessary that he actually say the words to anyone, only that he thought about saying the words should the need arise. Such reasoning is illogical." Def.'s Reply Mem. in Supp. of Summ. J. 5. Timberlake continues, "The intent of the statute is to protect public employees who experience adverse action from their employer as a result of reporting waste and violations of law. I.C. § 6-2101. Brett did not suffer an adverse employment action because he simply intended to report a violation of the law, and therefore the IPPEA does not apply." *Id.* This Court agrees that Rennisons' stretch of *Curlee* is "illogical", but specifically finds Rennisons' stretch is illogical due to a lack of any activity or action on the part of Mr. Rennison.

Rennisons' claim that Mr. Rennison's "intent" can be "inferred" under *Curlee* falls apart in light of the facts of the two cases. In *Curlee,* it was Curlee who actually communicated, and communication is an action, communication is an activity. Curlee intended to communicate, she intended to take action, and she took action. The action she took, the activity she engaged in, was her writing down her observations and saving those notes, and that action. She performed that action, that activity, due to her superiors' recommendation. The only thing Curlee did not "intend" was that those notes were discovered at the time and by whom they were discovered, but it was clear that she was keeping notes to give those notes to her superiors. That is what could be inferred by this Court according to the Idaho Supreme Court. The inference could be

made as to Curlee's intent to give those notes to her superiors in the future. That inference is reasonable because her superiors told her to do that very thing. In the present case, Mr. Rennison engaged in no protected communication, he engaged in no no protected activity. They only activity Mr. Rennison took was to, 1) encourage Baeumel to talk to Rudebaugh about what Baeumel had told Mr. Rennison, and 2) make the introduction of Baeumel to Rudebaugh. Based on those two bits of information, the "inferences" (plural) that Mr. Rennison now wants this Court to make (in the hopes that the Court would allow a jury to make), are these:

> In taking these actions, Mr. Rennison was not only intending to initiate an investigation, but participating in the communication of the existence of a suspected violation of Idaho's Human Rights laws.
>
> It is not necessary that Mr. Rennison be the one to speak the words to Commissioner Rudebaugh. It is enough that he assisted Ms. Baeumel in making the communication and that he intended to have communication to start the investigation process if Ms. Baeumel did not. *See, Curlee v. Kootenai Cty. Fire & Rescue*, 148 Idaho 391, 399, 224 P.3d 458, 466 (2008)(It was not necessary that Curlee actually have presented the notes to her employer in order to constitute a report. Idaho's whistleblower act only requires that the employee "intended to engage in an action protected under the act." I.C. § 6-2105(4) (emphasis added). Mr. Rennison intended to report a violation of the sexual harassment laws and he intended to communicate information in an investigation.

Pls'. Mem. in Resp. to Def's. Mot. for Summ. J. 12-13. The singular inference in *Curlee* was directly supported by the evidence...her supervisors told her to take the notes, she did, it is reasonable to infer they would be discovered. That is a reasonable inference. The multiple inferences Rennisons ask this Court to make (Mr. Rennison intending to initiate an investigation, Mr. Rennison intending to communicate information in an investigation), are not even inferences, they are pure speculation. Speculation which is not only not supported by the evidence, but speculation about something which could not have ever happened...Mr. Rennison could not intend to initiate an investigate an investigation because Baeumel did; Mr. Rennison could not intend to communicate

information in an investigation because Baeumel did.

The Rennisons also argue that Mr. Rennison has participated in at least two other protected activities. Pls.' Mem. in Resp. to Def.'s Mot. for Summ. J. 13-15. The second protected activity occurred, "after...Baeumel's claim [of sexual harassment] was substantiated and Chief Steele was removed from his position" (*Id.* at 13), Mr. Rennison objected to Timberlake's (the new Chief Hermanet's) decision to use Steele would act as a consultant and fire inspector. Rennisons claim:

> Mr. Rennison questioned the logic of using Chief Steele. He spoke out against the use of Chief Steele, questioning the potential liability to the Fire District should it continue to use Chief Steel. *Linscott Decl. Ex. A* (Rennison Depo. Tr., pp. 104-105); & *Linscott Decl. Ex. D* (Wright Depo. Tr., p. 38, ll. 8-11). Sexual harassment is not legal in Idaho, and the Fire District's continued public support of Chief Steel, was not only potentially illegal but could be seen as a waste of public assets.

*Id.* at 14. Timberlake argues that:

> Brett's questioning of the District's use of Bill Steele does not create a protected activity simply because Brett *believed* the District would have some liability for using its former fire chief as a consultant. There is absolutely no proof that the use of Chief Steele, in an independent consulting capacity, created any form of liability for the District and Brett's questioning of such does not rise to the level of a "protected activity" under I.C. § 6-2104(1)(a).

Def.'s Reply Mem. in Supp. of Motion for Summ. J. 6. Idaho Code 6-2104 reads:

> (1) (a) An employer may not take adverse 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 or manpower, or a violation or suspected violation of a law, rule or regulation adopted under the law of this state, a political subdivision of this state or the United States. Such communication shall be made at a time and in a manner that gives the employer reasonable opportunity to correct the waste or violation.
> (b) For purposes of paragraph (a) of this subsection, an employee communicates in good faith if there is a reasonable basis in fact for the communication. Good faith is lacking where the employee knew or reasonably ought to have known that the report is malicious, false or frivolous.

This Court finds that there is no reasonable basis in fact that Timberlake's proposed employment of Steele as a consultant and fire inspector is illegal or a waste of public assets. Steele resigned following the sexual harassment investigation involving Baeumel. As mentioned above, Mr. Rennison was not a party to that or a part of that. Bill Wright testified at his December 1, 2020, deposition that during a Timberlake Fire District meeting the possibility of utilizing Mr. Steele as a consultant or fire inspector was discussed. Deposition of Bill Wright (see, Linscott Decl. Ex. B. p. 37-38). Pertaining to the notion of using Steele as a consultant/fire inspector, Wright testified states in his deposition, "[t]here was some concerns about that", regarding "a liability issue for him doing that, because he couldn't come to the station. So anything that had to be done Brandon would have to meet him off District property to talk to him." *Id.* Linscott Decl. Ex. B. p. 38. When Wright was asked how the issue was resolved, he stated that "the solution was to have Chief Steele do building inspections as needed or mentor Brandon to do building inspections as needed." *Id.* This Court finds that Rennisons have submitted no evidence that Timberlake's proposed utilization of Steele's expertise in the manner described above rises to the level of illegality or waste of public assets. The entire proposal of Steele's work for Timberlake in no way involved interacting with Baeumel, and at most, Steele would provide off site consultations regarding building inspections. For those reasons, this Court finds that Mr. Rennison's action in speaking out against the utilization of Steele as a consultant/fire inspector is not a protected activity under the Idaho Protection of Public Employees Act. Mr. Rennison was free to speak out about such a decision by Timblerlake, but because Rennisons have provided no proof of illegality or of waste of such a decision, whatever Mr. Rennison said about that decision is not a protected activity.

The third and final protected activity proffered by the Rennisons is as follows:

> Mr. Rennison's attempt to continue to hold the Fire District to the law didn't stop there [with Mr. Rennison questioning Timberlake using Steele after he resigned, discussed immediately above]. Mr. Rennison also opposed the retaliation he felt after taking a stance against sexual harassment. Mr. Rennison complained about the retaliation to his supervisor, Chief Hermenet. Mr. Rennison felt the retaliation was a violation of law. *Rennison Decl.* In fact, Idaho Code § 67-5911 makes it unlawful for an employer to discriminate against an individual because he has made a charge, or participated in any manner in an investigation or proceeding under the Idaho Human Rights Commission statutes. Mr. Rennison communicated to Mr. Hermenet, and later to Mr. Rudebaugh, that he felt he was discriminated against for supporting Ms. Baeumel in raising the sexual harassment issues. *Rennison Decl. Ex. A.*

Pls.' Mem. in Resp. to Def.'s Mot. for Summ. J. 14. As mentioned above, how Mr. Rennison "felt" is not relevant. Facts matter. At summary judgment, claims that are questioned by the moving party have to be supported by admissible evidence presented by the defending party, sufficient at least to create a genuine issue of material fact. I.R.C.P. 56(a) and (c)(1)-(4). Rennisons have failed to produce such evidence. Timberlake argues:

> Brett asserts he participated in a third protected activity when communicated to Chief Hermenet and Commissioner Rudebaugh that he was discriminated against, and retaliated against, "after taking a stance on sexual harassment." However, Brett has failed to provide any evidence that he was retaliated against for "supporting Ms. Baeumel in raising the sexual harassment issues." (Plaintiff's Response Memorandum, pg. 14). As presented to this Court through the declarations and deposition testimony of the crew members, the complaints made against Brett were made because of the frustrations and concerns of the crew members with regard to Brett's leadership abilities and lack of experience. Brett has submitted no admissible evidence that the crew members knew of his support, and then retaliated against him because of that support. Presumptions and hurt feelings are not enough to show that Brett was retaliated against for engaging in a protected activity and therefore summary dismissal is appropriate.

Def.'s Reply Mem. in Supp. of Motion for Summ. J. 6. This Court agrees with this argument. Additionally, Rennisons' argument regarding this proposed protected activity of supporting Baeumel is based on the premise that Mr. Rennnison engaged in a

protected activity by supporting Baeumel when she lodged her sexual harassment complaint against Steele. As found by this Court above, Mr. Rennison's activity in regards to Baeumel's sexual harassment complaint does not amount to a protected activity under *Curlee*. Therefore, this Court finds that Mr. Rennison's subsequent activity, in the form of his lodging a complaint of being retaliated against for his of support of Baeumel's sexual harassment complaint, is likewise not a protected activity under the Idaho Protection of Public Employees Act.

This Court finds Mr. Rennison was an "employee" of Timberlake, the "employer"; however, this Court finds that the Rennisons have not submitted admissible evidence to show a genuine issue of material fact on the issue of Mr. Rennison engaging in or intending to engage a protected **activity**, the first *prima facie* element enumerated by the Idaho Supreme Court in *Curlee*. Next, the Court looks at the second element, whether the employer took adverse action against the employee.

**2. Adverse Employment Actions**

Timberlake argues that, "There is insufficient evidence in this case of any aggravating factors or discriminatory or retaliatory treatment by the Fire District, from which a rational trier of fact could conclude that Brett's working conditions were so 'difficult or unpleasant' or 'intolerable' that a reasonable person would have been compelled to quit." Mem. in Supp. of Def.'s Mot. for Summ. J 17.

The Rennisons argue that Mr. Rennison did face "adverse action" as defined in I.C. § 6-2103. Pls.' Mem. in Supp. of Mot. for Summ. J. 15-19. The Rennisons argue:

> In the case at bar, Mr. Rennison felt his very life was threatened by his supervisor, the fire chief. *Linscott Decl. Ex. A* (Rennison Depo. Tr., p. 110, ll. 20-25; pp. 111-112)...
>
> After Mr. Rennison made the Fire District aware of his fears, the Fire District ultimately determined that Mr. Rennison should report back to work immediately. There was no communication to Mr. Rennison that any

> protections were to be in place when he returned. *Rennison Decl.* ...
> .... A jury could also conclude that it was reasonable for Mr. Rennison to resign in lieu of injury or death. Even if the jury does not concluded that Mr. Rennison was constructively discharged, it could concluded that Mr. Rennison was threatened. Summary judgment is not appropriate as to whether the adverse action of threat or discharge was taken against Mr. Rennison.

Pls'. Mem. In Resp. to Def's. Mot. for Summ. J. 15-16. Following his claims of constructive firing, Mr. Rennison next argues that he suffered adverse action in the form of actions that were, "reasonably likely to deter employees from engaging in protected activity." *Id.* at 17 (citing *Wigent v. Sci. Applications Int'l Corp.*, 19 F. supp. 3d 1012, 1031 (D. Haw. 2014). To this end, Mr. Rennison argues that he suffered adverse action in the form of discriminatory treatment in the form of a coordinated campaign of complaints, and a discriminatory process during the investigation of these complaints. *Id.* Mr. Rennison argues that "[t]he complaints were solicited by the Fire District's agent and Mr. Rennison's Supervisor, Chief Brandon Hermenet." *Id.* (citing Linscott Decl. Ex. C (Shuck Depo. Tr., p. 64, 11. 12-22)). Mr. Rennison argues that he was "investigated for complaints that are not the type that a public agency would spend limited resources on, and no witnesses that might have a different perspective other than the complaints were interviewed." *Id.* Mr. Rennison was ultimately reprimanded at the end of this, "sham investigation for what, at most, amounted to performance issues." *Id.*

Additionally, Mr. Rennison argues that after he "submitted his formal complaint to Commissioner Rudebaugh, he was placed on administrative leave, even though he was the complainant. *Id.* at 18. This is contrary to usual practice and constituted another adverse action." *Id.* Mr. Rennison argues that a myriad of other actions could have been taken to address his concerns for his safety, "[i]nstead, the Fire District chose to interfere with Mr. Rennison's ability to work, which is another adverse action. Mr.

Rennison also argues that he was also left out of important meetings and communications," and "[h]is supervision and training responsibilities were diminished." *Id.* at 18-19.

Timberlake argues that the actions described above were either false or not connected to any protected activity undertaken by Mr. Rennison. Mem. in Supp. of Mot. for Summ. J. 17-18. Timberlake goes on to argue that Mr. Rennison was placed on leave due to advice of counsel to investigate his concerns of safety, and these concerns and the investigation were taken seriously. *Id.* at 18. In its reply brief, Timberlake argues:

> Brett has presented no evidence that he would suffer a demotion, disadvantageous transfer, reduction in pay, negative job evaluations, or toleration of harassment by other employees should he return to work. The crux of the plaintiffs' response appears to be that the District was tolerating harassment by the crew members because Brett was instructed to return to work even though he disagreed with the outcome of the investigation and continued to "feel" threatened because of the crew members' "coordinated complaints." Brett's suspicion of the crew members' behavior toward him and the unsubstantiated inferences he drew from their body language, indifference and statements he believed held an underlying, hostile meaning, do not rise to the level of adverse employment action. Soliciting written complaints about personality conflicts do not constitute a negative employment actions under I.C. § 6-2103. "Humiliation" that Brett Rennison felt when being placed on administrative leave is not an adverse employment action. Being "left out of important meetings and communications" is not an adverse employment action. And, recording officer meetings so that the Chief can follow up on issues discussed is not a negative employment action. (See Hermenet Deposition, pg. 85-86).

Reply Mem. in Supp. of Mot. for Summ. J. 8.

The Idaho Supreme Court has found that:

> "Under the constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes. The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" *Poland v. Chertoff,* 494 F.3d 1174, 1184 (9th Cir.2007) (*quoting Penn. State Police v. Suders,* 542 U.S. 129, 141, 124 S.Ct. 2342, 2351, 159

L.Ed.2d 204, 216 (2004)).

*Waterman v. Nationwide Mut. Ins. Co.*, 146 Idaho 667, 672, 201 P.3d 640, 645 (2009). In the instant case, this Court grants Timberlake's Motion for Summary Judgement because no genuine issue of material fact exists regarding Mr. Rennison's assertion that Timberlake took adverse employment action against him regarding his protected activities under I.C. §§ 6-2103 and 6-2104. This Court finds that what is relevant are the actions taken by the Timberlake Fire District. It is not relevant that Mr. Rennison perceived that he was given the cold shoulder by coworkers and subordinates. It is not relevant that coworkers submitted complaints against Mr. Rennison which he now believes were the result of his support for Baeumel in filing her sexual harassment complaint against Steele. Finally, it is not relevant that Mr. Rennison felt he was being humiliated and punished by being put on paid leave during the investigation of his complaints. The Ninth Circuit Court of Appeals has held that:

> An adverse employment action is an action "reasonably likely to deter employees from engaging in protected activity." *Coszalter v. City of Salem,* 320 F.3d 968, 976 (9th Cir.2003) (quoting *Ray v. Henderson,* 217 F.3d 1234, 1243 (9th Cir.2000)). Mere harsh words or threats are insufficient to constitute an actionable adverse employment action. *Nunez v. City of Los Angeles,* 147 F.3d 867, 875 (9th Cir.1998).

*Bollinger v. Thawley*, 304 F. App'x 612, 614 (9th Cir. 2008)

Timberlake took action to investigate Mr. Rennison's complaint, put him on paid leave during the investigation, and after the conclusion of the investigation Timberlake asked Mr. Rennison to return to duty. These actions by Timberlake cannot be construed as "adverse employment actions" under *Bollinger*, and more importantly under I.C. §§ 6-2103 and 6-2104. "'Adverse action' means to discharge, threaten or otherwise discriminate against an employee in any manner that affects the employee's employment, including compensation, terms, conditions, location, rights, immunities,

promotions or privileges." I.C. § 6-2103(1). Timberlake did not demote Mr. Rennison or change his employment status in any way. Additionally, there has been no evidence presented by Mr. Rennison that Timberlake perpetrated an adverse employment action against him, other than Mr. Rennison's assertion that Timberlake did not properly address his concerns regarding his coworker's attitudes and complaints leveled against him, as well as Mr. Rennison's assertion that he felt threatened by Hermenet's statement that, "you know we're in a profession where we have to trust that if you have an emergency in a burning building that the other guys will come get you out." Decl. of Brett Rennison Ex. A p. 4. None of these assertions rise to the level of an adverse employment action under I.C. §§ 6-2103 or 6-2104. At most, these assertions rise to the level of "mere harsh words" as set forth in *Bollinger.* There has been no competent admissible evidence (again, "feelings" do not carry the day on summary judgment) presented by Rennisons to this Court, that Mr. Rennison was subjected to anything approaching serious threats upon on his safety and life based upon the evidence presented to this Court. For the reasons stated above, this Court finds that no genuine issue of material fact exists regarding Mr. Rennison's claims that Timberlake took an adverse employment action against him.

This Court finds the second element enumerated under *Curlee,* whether the employer took adverse action against the employee, has not been established by the Rennisons via admissible evidence. The Court will now address the final element under *Curlee*, causation.

**3. Causation**

This Court has already found that the Rennisons have failed to meet the first prong of a prima facia case for retaliatory discharge under Idaho's whistleblower act under *Curlee* (by failing to provide proof that Mr. Rennison was an employee that

engaged or intended to engage in protected **activity**), and has found the Rennisons failed to meet the second prong (by failing to provide proof that that the employer took adverse action against the employee) under *Curlee*. Failing to provide admissible evidence to create a general issue of material fact on just one of these elements results in the Rennisons being unable to provide a *prima facie* case under Idaho's whistleblower act. Accordingly, the final prong regarding causation need not be addressed by this Court. However, this Court will address the element of causation because it is an additional reason to grant Timberlake summary judgment (Rennisons need to establish all three *Curlee* elements, and the following analysis on causation shows they have none of the *Curlee* elements), but also, this Court's analysis of "causation" highlights the inescapable fact that the Rennison's have failed to provide any evidence that any of Mr. Rennison's co-worker's knew of his encouragement of Baeumel to make a complaint about Steele, or his introduction of Baeumel to Rudebaugh. Timberlake's argument in reply on this final element of *Curlee* is absolutely correct, is adopted in its entirety, with bold for emphasis:

> Plaintiffs ask this court to reserve the issue of causation for the jury because causation can be inferred where adverse actions occur in close proximity to the filing of a complaint or protected action. The focus on the third element, causation, is on the "motive" for the adverse employment action, not the timing of the complaint. *Woodbury v. City of Seattle*, 2017 Wash.App. LEXIS 1090 (Ct.App.Div. 1 2017); *citing Scrivener v. Clark Coll.*, 181 Wn. 2d 439 (2014). While causation is generally an issue of fact for the jury, if there is no evidence of a causal link, summary judgment must be granted. *See Curlee v. Kootenai County Fire & Rescue*, 148 Idaho 391, 396 (2008).
>
> Plaintiffs argue that the Fire District cannot refute causation because the District relies solely on the declarations of the Fire District's employees, who "are not impartial witnesses." Instead of submitting admissible evidence to show that the District retaliated against Brett because he supported Brittany, the plaintiffs ask this court to weigh the evidence and credibility of the witnesses in order to survive summary judgment. That is not appropriate. It is not the place of the trial judge to assess the credibility of the parties and then to rule based on that

determination. *Land O'Lakes , Inc., v. Bray*, 138 Idaho 817, 819 (Ct. Appl. 2003). Instead, the Court must look to the undisputed facts of the case and draw reasonable inferences favorable to the movant party based only on the face of the undisputed facts. *Id.* at 820.

**It is undisputed that none of the crew members had any specific information or knowledge of Brett's limited involvement in Brittany's complaint and, aside from Brett's mere speculation, plaintiffs have failed to provide evidence to the contrary.** (Declaration of Craig Taylor, ¶ 9; Declaration of Ryan Shuck, ¶ 5; Declaration of Samuel Bauer; ¶ 10; Declaration of Jack Duclos, ¶¶ 10-11; Declaration of Joel Long, ¶ 9). Many complaints predated Brett's knowledge of Brittany's complaint and therefore cannot be a factor in determining causation. (Declaration of Craig Taylor, ¶ 5; Declaration of Ryan Shuck, ¶ 9; Declaration of Shay Carlock, ¶ 9; Declaration of Joel Long, ¶¶ 4-5). Any "conspiracy" to get Brett fired was not premised on his support or friendship with Brittany, but a clash of personality and attitude. (Wright Deposition, pg. 41, 47, 50). This is not a Title VII hostile work environment claim, but a Whistleblower claim that requires the plaintiffs to prove that any adverse employment action was taken "as a result of reporting waste and violations of the law." I.C. § 6-2101. The plaintiffs have failed to meet that burden.

**Plaintiffs attempt to pull this Court's focus away from the material issues in this case by bringing up conspiracy theories behind the crew members' complaints and asserting that the testimony of the declarants is biased and therefore unreliable. The plaintiffs ask this court to read into the evidence that, because the crew members were conspiring to get Brett fired after Chief Steele retired, the members in some way "knew" of Brett's very limited involvement in Brittany's complaint. The plaintiffs further ask this court to find that the crew members had "motive" to get Brett fired because Brandon Hermenet and the crew members were close with Chief Steele and angered by his retirement (even though all declarants dispute this). The plaintiffs seek these determinations by the Court, but point to no evidence that prove it was "motive" for the District's action of placing Brett Rennison on paid administrative leave and conducting an investigation into his complaint. The focus must be on the District's motive in subjecting Brett to an adverse employment action. There simply is none, other than to protect Brett while the District investigated his claims. (Rudebaugh Declaration, ¶¶ 12-13). Even if this Court finds that placing Brett on paid leave was an "adverse action," the plaintiffs cannot show it was done in retaliation for Brett's encouragement of Brittany or "as a result of reporting waste or violations of the law." I.C. § 6-2101.**

As argued above, Brett Rennison was not subjected to an adverse action. But, even if this Court finds that Brett was subjected to an adverse action, **the plaintiffs have presented absolutely no evidence that the District's motive for subjecting him to that action was because he encouraged Brittany to move forward with a complaint of sexual harassment.** As such, this Court can rule on summary judgment with

regard to causation.

Def.'s Reply Mem. in Supp. of Mot. for Summ. J. 8-11. This Court finds Rennisons have presented no admissible evidence on causation, the third element of *Curlee*.

**4. Termination in Violation of Public Policy.**

The Rennisons claim "in the alternative, if it is determined that Mr. Rennison was not an employee intended to be protected by the Idaho Protection of Public Employees Act, then Mr. Rennison was constructively discharged, wrongfully in violation of public policy." Compl. 5, ¶ 21.

The Idaho Supreme Court has found that "[t]he right to discharge an at-will employee may be limited by considerations of public policy, such as when the motivation for the firing contravenes public policy... Public policy of the state is found in the constitution and statutes." *Mallonee v. State*, 139 Idaho 615, 621, 84 P.3d 551, 557 (2004). Timberlake correctly notes that, "The whistleblower act and wrongful termination in violation of public policy claims both require that the plaintiff engage in protected activity and that the protected activity be causally related to the plaintiff' s termination. *Barrett v. Clark Cty. Sch. Dist. No.* I61, 454 P.3d 555, 565 (Idaho. 2019); *Citing Van v. PartneaufMedical Center*, 147 Idaho 552, 558 (2009)." Mem. in Supp. of Def.'s Mot for Summ. J. 20. As set forth above, this Court has found that Mr. Rennison did not engage in any protected activity and found that there was no causal relationship to Mr. Rennison's termination.

The Rennison's discharge in public policy argument shows that is it merely a repackaging or rebranding of their IPPEA claim:

> The right to discharge an employee may be limited by considerations of public policy, when the motivation for the firing contravenes public policy. *Mallonee v. State*, 139 Idaho 615, 621, 84 P.3d 551, 557 (2004). Public policy has been held to protect employees

who refuse to commit unlawful acts, who perform important public obligations, or who exercise certain legal rights or privileges. *Id.* In the case at bar, Mr. Rennison performed an important public obligation. He complained to his supervisor, in the presence of Ryan Shuck and Bill Wright that the Fire District should be concerned about the implications of the public, and continued using of a fire chief who was forced into retirement because he sexually harassed his female employees. Further, Mr. Rennison witnessed the use of the retired fire chief on at least one occasion and thought that Steele's services were still being used. After Mr. Rennison objected to the use of Chief Steele and made allegations of retaliation, the current fire chief threatened his life, thereby, constructively discharging him. The actions that Mr. Rennison complained about were unlawful (sexual harassment is unlawful in Idaho) and they involved the welfare of the public, in that the Fire District was potentially exposing members of the public to sexually harassing behavior. This action is enough to at least create a question of fact to survive summary judgment. *See, Thomas v. Medical Center Physicians, P.A.*, 138 Idaho 200, 208-9, 61 P.3d 557, 565-66 (2002) (Accusations of falsified medical records is unlawful and involves the welfare of the public; therefore, once the court defines the public policy, whether the public policy was violated is a question for the jury.)

Further, Mr. Rennison submitted his November 13, 2019 complaint alleging conduct in violation of Idaho Code § 67-5911. In response to this complaint, the Fire District doubled down on its consequences to Mr. Rennison. It suspended him, and then brought him back to work without making any provisions to insure his safety.

There are at least questions of fact as to whether Mr. Rennison's alternate claim that he was terminated in violation of public policy can be proven. The Defendant's motion for summary judgment on this claim should be denied.

Pls.' Mem. in Resp. to Def.'s Mot. for Summ. J. 23-24. Aside from the many factual inaccuracies in this argument, the inescapable fact is the Rennisons have failed to provide any evidence to support a claim of a protected activity.

## IV. CONCLUSION AND ORDER.

For the reasons described above, Timberlake's Motion to Strike the Declaration of John Ward and Richard L. Hughes is granted. Additionally, for the reasons described above, Timberlake's Motion for Summary Judgment is granted.

IT IS HEREBY ORDERED Timberlake's Motion to Strike the Declarations of John Ward, and Richard L. Hughes is **GRANTED**

IT IS FURTHER ORDERED that Timberlake's Motion for Summary Judgment is **GRANTED.**

Entered this 14th day of April, 2021.

John T. Mitchell, District Judge

**Certificate of Service**

I certify that on the 14 day of April, 2021, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail, email or facsimile to each of the following:

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