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John E. Rumel
University of Idaho College of Law, jrumel@uidaho.edu

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HAS THE IDAHO SUPREME COURT WRONGLY LIMITED WRONGFUL DISCHARGE IN CONTRAVENTION OF PUBLIC POLICY CLAIMS?

PROFESSOR JOHN E. RUMEL[1]

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I. INTRODUCTION

On three occasions in the past twenty-five years, the Idaho Supreme Court has issued decisions limiting the rights of former employees to pursue claims for wrongful discharge in contravention of public policy against government employers—a common law theory which the Court recognized over forty-five years ago and has continued to apply to this day. First, in *Cantwell v. City of Boise*, the state Supreme Court held that non-at-will employees could not pursue claims for wrongful discharge in violation of public policy when they also assert contractual dismissal claims based on lack of cause concerning the employer's termination decision.[2] Second, in *Smith v. Meridian Joint School District No. 2*, the Idaho high court held that employees who had not been renewed in their employment for reasons that contravene public policy could not properly bring wrongful discharge claims under those circumstances,[3] although the Court later stated that the question regarding whether wrongful nonrenewal claims are cognizable had not been decided in Idaho.[4] Third, in *Van v. Portneuf Medical Center*, the Court held that Idaho's Whistleblower Act supplants—again, in the government employment context—those same common law claims for wrongful discharge by a former

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1. Professor of Law, University of Idaho College of Law; J.D., University of California Hastings College of Law (now University of California College of Law, San Francisco); B.A., University of California, Santa Cruz. The author thanks the editors and staff of the Idaho Law Review ("ILR") for occasionally granting me a platform during the past seventeen years to address important issues concerning Idaho employment and education law. The author also thanks the students in his Workplace Law classes over that same period of time for often being the initial sounding board for many of the ideas that found their way into ILR articles.

2. Cantwell v. City of Boise, 146 Idaho 127, 134 n.3, 191 P.3d 205, 212 n.3 (2008).

3. Smith v. Meridian Joint School Dist., 128 Idaho 714, 717, 720, 918 P.2d 583, 586, 589 (1996).

4. Willie v. Bd. of Tr., 138 Idaho 131, 134 n.1, 59 P.3d 302, 305 n.1 (2002).

employee against his or her employer,[5] and reiterated that holding in a subsequent decision concerning the abrogation of common law claims for negligent infliction of emotional distress.[6]

As more fully discussed below, the Idaho Supreme Court's decisions on these three questions suffered from various shortcomings, ranging from a failure to (1) apply precedent; to (2) properly analyze and apply compelling reasons for respecting and furthering the purposes underlying common law claims for wrongful discharge in contravention of public policy; and to (3) fully explicate the contours and appropriate limitations underlying its decisions on the third (of the three) questions that were arguably correct on their facts. Thus, in *Cantwell*, the Court failed to apply precedent and properly analyze the compelling underlying reasons for allowing non-at-will employees to pursue wrongful discharge claims against their former employers.[7] In *Smith* (and *Willie*), the Court likewise ignored precedent (this time arguably properly) and failed to analyze, apply, and further, equally compelling reasons for recognizing claims for wrongful nonrenewal in contravention of public policy.[8] And, in *Van* (and *Eller*), the Court, although arguably getting it right concerning the Whistleblower Act's implied abrogation of common law claims for wrongful discharge in contravention of public policy and negligent infliction of emotional distress, respectively, on the facts of those two cases, the Court overstated the governing legal doctrine and failed to properly define or suggest appropriate limitations on the breadth of its decisions.[9]

For these reasons, the Idaho Supreme Court, to bring full and appropriate vitality to common law doctrine—particularly, to claims for wrongful discharge in contravention of public policy—in the employment law setting, should revisit and either reverse and/or clarify its decisions concerning the legal question discussed above and more fully below.

II. DISCUSSION

A. Non-At-Will Employees and Claims for Wrongful Discharge in Contravention of Public Policy

The Idaho Supreme Court has made clear that "the rule in Idaho, as in most states, is that unless an employee is hired pursuant to a contract which specifies the duration of the employment, or limits the reasons for which the employee may be discharged, the employment is at the will of either party, and the employer may terminate the relationship at any time for any reason without incurring liability."[10] The Court, however, in 1977, first established the public policy exception to the employment at will doctrine in Idaho, stating that:

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5. Van v. Portneuf Med. Ctr., 47 Idaho 552, 212 P.3d 982 (2009).

6. Eller v. Idaho State Police, 165 Idaho 147, 155, 443 P.3d 161, 169 (2019).

7. *See* discussion *infra* at notes 10–34 and accompanying text.

8. *See* discussion *infra* at notes 35–76 and accompanying text.

9. *See* discussion *infra* at notes 77–141 and accompanying text.

10. MacNeil v. Minidoka Mem'l Hosp., 108 Idaho 588, 589, 701 P.2d 208, 209 (1985).

> The employment at will rule is not, however, an absolute bar to a claim of wrongful discharge. As a general exception to the rule allowing either the employer or the employee to terminate the employment relationship without cause, an employee may claim damages for wrongful discharge when the motivation for the firing contravenes public policy.[11]

The Idaho high court has delineated the scope of the public policy exception as follows:

> In order for the public policy exception to apply, the discharged employee must: (1) refuse to commit an unlawful act; (2) perform an important public obligation; or (3) exercise certain rights or privileges. *Sorensen v. Comm Tek, Inc.,* 118 Idaho 664, 668, 799 P.2d 70, 74 (1990). The public policy exception has been protected in Idaho on several occasions. *E.g., Watson v. Idaho Falls Consol. Hosps., Inc.,* 111 Idaho 44, 720 P.2d 632 (1986) (protecting participation in union activities); *Ray v. Nampa Sch. Dist. No. 131,* 120 Idaho 117, 814 P.2d 17 (1991) (protecting reports of electrical building code violations); *Hummer v. Evans,* 129 Idaho 274, 923 P.2d 981 (1996) (protecting compliance with a court issued subpoena). This Court has also indicated that the public policy exception would be applicable if an employee were discharged, for example for refusing to date her supervisor, for filing a worker's compensation claim, or for serving on jury duty. *Sorensen,* 118 Idaho at 668, 799 P.2d at 74 (citations omitted). In *Sorensen,* the Court stated that if the reported conduct constituted a statutory violation, it would be more likely fall under the protection of the public policy exception to the at-will doctrine. *Id.*[12]

Less than ten years after first recognizing the public policy exception, the Court, in *Watson v. Idaho Falls Consolidated Hospitals, Inc.*, evaluated the state law claims that could be brought by a hospital employee after being discharged by her employer.[13] The Court first reiterated the employment at will rule and the exception

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11. Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 333, 563 P.2d 54, 57 (1977) (quoted in Hummer v. Evans, 129 Idaho 274, 279, 923 P.2d 981, 986 (1996)). For an early discussion of the development of the public policy exception to the at will rule from an Idaho-based author and practitioner, see William L. Mauk, *Wrongful Discharge: The Erosion of 100 Years of Employer Privilege*, 21 IDAHO L. REV. 201, 226–45 (1985).

12. Thomas v. Med. Ctr. Physicians, P.A., 138 Idaho 200, 208, 557 P.3d 557, 565 (2002).

13. Watson v. Idaho Falls Consol. Hosp., Inc., 111 Idaho 44, 720 P.2d 632 (1986).

under it for an employee who is hired under a contract which limits the reasons for which he could be discharged.[14] It similarly reiterated the public policy exception to the at will rule.[15] The Court then held that a policy and procedures manual and employer handbook distributed by the hospital to the employee constituted a binding contract between the two parties,[16] "that the reasons for which Watson could be terminated were limited by those documents" and that, specifically, "[n]either the handbook nor the manual expressly or by fair inference provide for discharge without cause."[17]

The Court next addressed the issue of whether the district "court erred in instructing the jury on Watson's theory that she had been terminated in violation of public policy."[18] The Court had no problem affirming the district court's decision, discussing and holding, without reference to Watson's contract claim falling outside the at will rule, that:

> Although Watson did not plead a cause of action for a wrongful discharge based upon violation of public policy, Watson advanced the theory that the termination resulted from hospital retaliation for Watson's pro-union activities. . . .
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> We find no abuse of discretion in the trial court submission of that issue to the jury, nor do we find any error in the given instructions. An employee may claim damages for wrongful discharge when the motivation for discharge contravenes public policy.[19]

The Court directly addressed the issue of whether an employee who is not an at will employee may pursue a claim for wrongful discharge in contravention of public policy in *Cantwell v. City of Boise*.[20] In *Cantwell*, plaintiff Cantwell was twice terminated from employment in the City's Public Works Department.[21] Cantwell brought claims against the City for, among other things, breach of contract and wrongful termination in violation of public policy.[22] On the City's motion for summary judgment, the City conceded, for purposes of that motion only, that the provisions of its Policy Handbook and Due Process and Problem Solving Procedures imposed limitations on its right to terminate Cantwell, thereby taking him out of at will employment status.[23] Notwithstanding and without mentioning the court's

14. *Id.* at 47, 720 P.2d at 635.

15. *Id.*

16. *Id.* at 46–48, 720 P.2d at 634–36.

17. *Id.* at 47, 720 P.2d at 635.

18. *Id.* at 47–48, 720 P.2d at 635–36.

19. *Watson*, 111 Idaho at 48–49, 720 P.2d at 636–37.

20. Cantwell v. City of Boise, 146 Idaho 127, 191 P.3d 205 (Idaho 2008).

21. *Id.* at 133, 191 P.3d at 211.

22. *Id.*

23. *Id.* at 134, 191 P.3d at 212.

previous decision in *Watson*, it affirmed the grant of summary judgment in favor of the City on Cantwell's wrongful discharge claim, holding as follows:

> Cantwell also alleges the City terminated him in violation of public policy. "In Idaho, the only general exception to the employment at-will doctrine is that an employer may be liable for wrongful discharge when the motivation for discharge contravenes public policy." . . . In this case, Cantwell does not allege he was an at-will employee, but alleges the City breached his contract of employment. Since the public policy exception applies only to at-will employees, and Cantwell and the City agreed for the sake of the summary judgment motion that Cantwell's employment was not at-will, Cantwell cannot prevail on this claim.[24]

Although *Cantwell* remains the most recent Idaho Supreme Court decision on the "non-at-will employee/public policy exception" issue, the federal District of Idaho took up the issue within the past five years in *Evans v. USF Reddaway, Inc.*[25] In *Evans*, plaintiff Evans alleged he was terminated as an employee for engaging in protected union activity and reporting potential safety security violations at his employer Reddaway's Twin Falls and Boise terminals.[26] Evans agreed that he was not an "at-will" employee but, instead, argued that Idaho's public policy exception can be applied to contract/non-at-will employees.[27] The district court, per Judge Edward Lodge, citing and quoting *Cantwell* and declining to follow *Watson*, rejected Evans' argument.[28] In so holding, the court stated as follows:

> [T]here is Idaho case law controlling whether the claim applies to non-at-will employees . . . .Idaho has not extended the claim for wrongful termination based on public policy outside of the at-will employment context. . . . *Cantwell v. City of Boise*, 191 P.3d 205, 213 n. 3 (Idaho 2008) ("Since the public policy exception applies only to at-will employees, and Cantwell and the City agreed for the sake of the summary judgment motion that Cantwell's employment was not at-will, Cantwell cannot prevail on this claim."). The Court reviewed the case cited by Plaintiff, *Walton [sic] v. Idaho Falls Consolidated Hosp.,*

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24. *Id.*

25. Evans v. USF Reddaway, Inc., Case No. 1:15-CV-00499-EJL-REB, 2017 WL 2837136, *9 (D. Idaho June 30, 2017), *aff'd on other grounds*, 730 Fed. App'x 566 (9th Cir. 2018).

26. *Id.* at *1.

27. *Id.* at *9.

28. Id.

> *Inc.*, 720 P.2d 632, 636 (Idaho 1986), in which the Idaho Supreme Court found no error in the district court instructing the jury to consider the wrongful termination cause of action where the employee was a non-at-will contract employee. . . . The cases cited by *Walton* [sic] in support of that ruling, however, both involved at-will employees. The prevailing case law in Idaho is against Plaintiff's position despite the fact that other states may have concluded the opposite.[29]

As a matter of Idaho precedent, the Idaho Supreme Court's decision in *Watson*, having involved the rights of a non-at-will employee, i.e., an employee who could only be discharged for cause, and having decided that a non-at-will employee may pursue claims for *both* breach of his or her contractual cause rights *and* wrongful discharge in contravention of public policy, should have bound the *Cantwell* court.[30] Moreover, if *Cantwell* had adhered to the *Watson* court's holding, the Idaho high court's decision in *Watson* would have bound the *Evans* court as well.[31] However, none of those Idaho decisions probed the rationale for, and legitimacy of, allowing (or not allowing) a non-at-will employee to simultaneously pursue contractual lack of cause and public policy exception claims against his former employer concerning the same termination. Fortunately, the out-of-Idaho authorities referenced by Judge Lodge in *Evans* shed considerable light on the issue.

In *Steffy v. Board of Hospital Managers*, Michigan Court of Appeals Presiding Judge Jane Beckering correctly pointed out that "the tort of discharge in violation of public policy should be available to all employees, regardless of their contractual status, as it differs in both scope and sanction from a breach of contract action for termination in violation of a just cause employment contract (or a collective bargaining agreement)."[32] Thus, in *Smith v. Bates Technical College*, the state of Washington Supreme Court held that "the tort of wrongful discharge is not designed to protect an employee's purely *private interest* in his or her continued employment; rather, the tort operates to vindicate the *public interest* in prohibiting employers from acting in a manner contrary to fundamental public policy."[33] For

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29. *Id.* (citations omitted).

30. It is axiomatic that judicial decisions are authoritative on the facts on which they are founded. Bashore v. Adolph, 41 Idaho 84, 88, 238 P. 534, 534 (1925). The Idaho Supreme Court also has made clear that the Court must "follow [controlling precedent], unless it is manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice." Reyes v. Kit Mfg. Co., 131 Idaho 239, 240, 953 P.2d 989, 990 (1998) (quoting Houghland Farms, Inc., v. Johnson, 119 Idaho 72, 77, 803 P.2d 978, 983 (1990)).

31. "'When interpreting state law, federal courts are bound by decisions of the state's highest court.'" Mills v. City of Covina, 921 F.3d 1161, 1167 (9th Cir. 2019) (quoting Lewis v. Tel. Emp. Credit Union, 87 F.3d 1537, 1545 (9th Cir. 1996)).

32. Steffy v. Bd. of Hosp. Managers of Hurley Med. Ctr., No. 33945, 2017 WL 5615824, at *5 (Mich. Ct. App. Nov. 21, 2017) (Beckering, P.J., concurring).

33. Smith v. Bates Tech. Coll., 991 P.2d 1135, 1140 (Wash. 2000) (en banc) (emphasis in original); *see also* Retherford v. AT & T Commc'ns of Mountain States, Inc., 844 P.2d 949, 960 (Utah 1992) ("A primary purpose behind giving employees a right to sue for discharges in violation of public policy is to protect the vital state interests embodied in such policies. We cannot fulfill such a purpose if we hinge

this reason, numerous courts and judges outside of Idaho have allowed all employees—not just at will employees—to pursue claims for discharge in violation of public policy (where they otherwise satisfy the requirement of the claim) in addition to claims for breach of contractual cause provisions in individual contracts or collective bargaining agreements.[34]

The Idaho Supreme Court seriously mis-stepped in *Cantwell*—both by ignoring precedent and failing to analyze and adopt the rationale articulated by courts in other states for allowing non-at-will employees to bring claims for breach of contract and wrongful discharge in violation of public policy. Hopefully, the Court will correct these oversights in subsequent case law.

B. Claims for Wrongful Nonrenewal in Contravention of Public Policy

Much like the Idaho Supreme Court's decisions concerning the availability of common law wrongful discharge claims for non-at-will employees, the Court's decisions concerning the availability of common law public policy-based claims when an employee has not been renewed under an employment contract are equally muddled and wrong.

The Idaho high court first addressed the question of whether an employee may state a claim for wrongful nonrenewal in contravention of public policy in *Smith v. Meridian Joint School District No. 2*.[35] In *Smith,* plaintiff Catherine Smith alleged several claims, including a claim for wrongful termination in violation of public policy, against her former employer, defendant Meridian Joint School District, after the School District refused to reemploy Smith after her one-year employment

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this cause of action on employees' contractual status and thus limit its availability to any one class of employees."). In *Smith*, the state of Washington high court pointed out that a refusal to allow a non-at-will employee to pursue a wrongful discharge claim would inappropriately deprive the employee of tort remedies, including noneconomic and punitive damages. 991 P.2d at 1141–42. In Idaho, however, former employees pursing wrongful discharge claims are limited to contract damages. Hummer v. Evans, 129 Idaho 274, 280, 923 P.2d 981, 987 (1996). Although Idaho plaintiffs may not have the incentive or ability to frame a wrongful discharge claim in order to seek damages beyond those available under a breach of contract theory, they nonetheless may still pursue wrongful discharge claims to vindicate important public interests.

34. *See* Keveney v. Mo. Mil. Acad., 304 S.W.3d 98, 102 (Mo. 2010) (en banc); Dunwoody v. Handskill Corp., 60 P.3d 1135, 1141 (Or. Ct. App. 2003); *Smith*, 991 P.2d at 802–07; *Retherford*, 844 P.2d at 959–60; Midgett v. Sackett-Chicago, Inc., 473 N.E.2d 1280, 1283–85 (Ill. 1984); *Steffy*, 2017 WL 5615824 at *5 (Beckering, P.J., concurring).

35. Smith v. Meridian Joint Sch. Dist. No. 2, 128 Idaho 714, 918 P.2d 583 (1996).

contract expired.[36] The district court granted summary judgment in favor of the School District on each of Smith's claims. [37]

On appeal, the Idaho Supreme Court affirmed the district court's grant of summary judgment on Smith's wrongful termination claim, stating as follows:

> Smith argues on appeal that the decision not to re-employ [her] was the equivalent of Smith being terminated in violation of public policy, due to the School District's failure to provide Smith with either a first or second semester evaluation or with a reasonable probationary period.[38]

> Smith was an annual contract employee with a one-year non-renewable contract. At the end of the school year, the Board of Trustees has the authority to decide whether to offer Smith an employment contract for the ensuing year. An annual contract teacher does not have any expectation of continued employment, since the contract is annual and non-renewable in nature. Smith completed her contract term in full, and thus could not have been "terminated." The Board of Trustees decided not to re-employ Smith and did not terminate her. We conclude that there was no violation of public policy when the School District decided not to re-employ Smith.[39]

Thus, in *Smith*, the Idaho high court rejected any equivalency between termination and nonrenewal or failure to re-employ on wrongful discharge in contravention of public policy claim. For that reason, the Court affirmed the trial court's grant of summary judgment in favor of the School District on Smith's wrongful nonrenewal claim.

Six years after *Smith*, the Idaho Supreme Court had the opportunity to reiterate the contours of claims for wrongful discharge in contravention of public policy in the nonrenewal context in *Willie v. Board of Trustees*.[40] In *Willie*, the School Board refused to renew the contract of Tim Willie, an annual contract teacher.[41] Willie filed a law suit against the School Board, alleging among other things, that the Board wrongfully terminated his employment contract in contravention of

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36. *Id.* at 718, 918 P.2d at 587.

37. *Id.*

38. Smith also argued that the School District's decision to not re-employ her was in contravention of public policy because Smith was terminated for complying with Idaho's Child Protective Act by referring students to Child Protective Services (CPS). *Id.* at 717, 720, 918 P.2d at 586, 589. However, because Smith had only raised the CPS-related matter for the first time on appeal, the Court refused to consider the merits of Smith's public policy claim based on her CPS student referrals. *Id.* at 720, 918 P.2d at 589.

39. *Id.* at 720, 918 P.2d at 589 (citations omitted); *accord* White v. Blackfoot Sch. Dist. No. 55, 10 Fed. Appx. 476, 480 (9th Cir. March 27, 2001) ("White was not terminated; his annual contract was not renewed. . . . [T]he Idaho Supreme Court has not yet extended th[e] . . . cause of action [for wrongful termination in violation of public policy] to cases of non-renewal.").

40. Willie v. Bd. Of Trs., 138 Idaho 131, 59 P.3d 302 (2002).

41. *Id.* at 132–33, 59 P.3d at 303–04.

public policy because of his union activities.[42] The Idaho Supreme Court affirmed the district court's grant of summary judgment against Willie and in favor of the School Board on each of Willie's claims.[43] Specifically, as to Willie's wrongful termination claim, the Court, rather than relying on its earlier holding in *Smith* quoted above, stated only that:

> The issue of whether the public policy exception of at will employment extends to an annual contract teacher in the case of non-renewal is undecided in Idaho. However, this Court has determined an annual contract teacher has no expectation of continued employment, his or her contract is annual and there is no right to renewal. The Court need not decide the issue of whether the public policy exception applies to an annual contract teacher in the case of non-renewal of a contract . . . because Willie fails to create a genuine issue of material fact regarding whether his contract was not renewed on the basis of his union activities.[44]

Contrary to its statement in *Willie*, the Idaho Supreme Court decided in *Smith* that the public policy exception does not apply to the nonrenewal, rather than the termination, of an annual contract of employment in the school setting.[45] Although one can take issue with that holding (and, indeed, this Article will do so in the ensuing paragraphs), the Court clearly held in *Smith* that the public policy exception will only be cognizable in the context of termination or discharge, not nonrenewal of a contract that expires under its own terms.[46] As such, the Idaho high court's analysis concerning the viability of wrongful nonrenewal claims mirrors its analysis concerning the viability of wrongful termination claims brought by non-at-will employees, in two respects. First, just as the Court in *Cantwell* failed to acknowledge and abide by its previous decision in *Watson* recognizing wrongful discharge in contravention of public policy claims for employees with just cause protection,[47] the Court failed in *Willie* to abide by its previous decision in *Smith* rejecting wrongful nonrenewal claims when it stated in *Willie* that the question regarding recognizing such claims was "undecided in Idaho."[48] Second, just as the

42. *Id.* at 134, 59 P.3d at 305.

43. *Id.* at 132, 59 P.3d at 303.

44. *Id.* at 134 n.1, 59 P.3d at 305 n.1 (citations omitted).

45. *See supra* notes 35–39 and accompanying text.

46. *Id.*

47. *See supra* notes 20–24 and accompanying text.

48. *Willie*, 138 Idaho at 134 n.1, 59 P.3d at 305 n.1. To be sure, the Court cited to *Smith* in its decision in *Willie*. *Id.* However, that citation was for the unremarkable proposition that an annual

Court in *Cantwell* failed to acknowledge, analyze, or adopt the policy reasons relied upon by courts outside of Idaho which have recognizing the public policy exception to the at-will rule in the non-at-will employee context,[49] the Court in *Smith* (and *Willie*) failed to acknowledge, analyze, or adopt the policy reasons relied upon by non-Idaho courts which have recognized wrongful nonrenewal claims.[50]

In this latter regard, two appellate decisions—one decided fifty years ago[51] and the other decided within the past two years[52]—have shed considerable light on the need to recognize and the appropriateness of recognizing claims for wrongful nonrenewal in contravention of public policy.

In 1972, a Nebraska labor organization filed an application seeking reinstatement of five teachers whose contracts had not been renewed for the next school year by their employer, a technical college.[53] The Nebraska Court of Industrial Relations issued orders of reinstatement and the college appealed.[54] In *Mid-Plains Education Association*, the Nebraska Supreme Court held that the failure of the college to rehire the teachers was motivated by an intent to discourage and retaliate for their labor organization membership and activities, which constituted a violation of Nebraska law, and it ordered the teachers' reinstatement.[55] In so holding, the Nebraska Supreme Court made clear that the teachers need not have been discharged or terminated from their employment to properly assert their claims, stating as follows:

> The college vigorously contends that these teachers were employed on 1-year contracts, and that it was under no obligation to rehire them and acted well within its rights in failing to do so. This does not preclude consideration of the motive of the college. A failure to rehire is a denial of employment and an adverse action against an employee, just as an outright firing would be, and if it is prompted by antiunion motives, it comes within the prohibitions of the Constitution and the statutes. The relevant consideration is the motive of the employer.[56]

More recently, the Maryland Court of Appeals took up the issue of whether claims for wrongful nonrenewal in violation of public policy are cognizable under

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contract teacher has no right to renewal upon the expiration of his or her contract. *Id.* (citing *Smith v. Meridian Joint Sch. Dist.*, 128 Idaho 714, 720, 918 P.2d 583, 589 (1996)). The Court in *Willie* did not cite *Smith* concerning the wrongful nonrenewal in violation of public policy issue, *Willie*, 138 Idaho at 134 n.1, 59 P.3d at 305 n.1, and thereby failed to note that the Court in *Smith* twice emphasized that Smith had not been terminated and, therefore, "there was no violation of public policy when the School District decided not to re-employ Smith." *Smith*, 128 Idaho at 720, 918 P.2d at 589; *see supra* note 44 and accompanying text.

49. *See supra* notes 20–24 and accompanying text.

50. *See supra* notes 38–44 and accompanying text and *infra* notes 51–76 and accompanying text.

51. Mid-Plains Educ. Ass'n v. Mid-Plains Neb. Tech. Coll., N. Platte, 199 N.W.2d 747 (Neb. 1972).

52. Miller-Phoenix v. Baltimore City Bd. Of Sch. Comm'rs, 228 A.3d 809 (Md. App. 2020).

53. *Mid-Plains Educ. Ass'n*, 199 N.W.2d at 748.

54. *Id.*

55. *Id.* at 751.

56. *Id.* at 749.

Maryland law.[57] In *Miller-Phoenix*, a teacher, Miller-Phoenix, brought, among other claims, a claim for common law wrongful termination premised on his assertion that the School Board had not renewed his employment contract him in retaliation for filing his workers' compensation claim.[58] The trial court granted summary judgment in favor of the School Board and against the teacher on each of his claims.[59]

On appeal, the Maryland Court of Special Appeals reversed the trial court's judgment on Miller-Phoenix's wrongful nonrenewal claim, "hold[ing] that the tort of wrongful termination may lie when an employer decides to terminate an employment relationship by declining to renew an employment agreement for which the parties anticipated the reasonable possibility of renewal."[60] The Court first discussed the reasons why the Maryland Court of Appeals recognized wrongful termination in contravention of public policy claims brought by at-will-employees.[61] Thus, the Court in *Miller-Phoenix*, quoting from the Court of Appeals' decision in *Adler*, stated that:

> [There are] two different interests that would be served by permitting employees at will to sue for wrongful termination. One is the interest of the employee. Notwithstanding that an "employer has an important interest in being able to discharge an at will employee whenever it would be beneficial to his business," the Court deemed the employee's interest in job security "deserving of recognition" when that interest is "threatened not by genuine dissatisfaction with job performance," but based on an illegitimate consideration. The second interest served by recognition of the tort is that of the public, because "society as a whole has an interest in ensuring that its laws and important public policies are not contravened."[62]

The *Miller-Phoenix* Court next evaluated the individual and societal interests in recognizing wrongful termination claims in the wrongful nonrenewal context.[63] Turning first to society's interest, the Court stated:

> The societal interest . . . pertains equally to a case of non-renewal of a term contract, as society's "interest in ensuring its laws and important

57. *Miller-Phoenix*, 228 A.3d at 809.

58. *Id.* at 813.

59. *Id.* at 813–14.

60. *Id.* at 814.

61. *Id.* at 815 (citing Adler v. Am. Standard Corp., 432 A.2d 464, 470 (Md. 1981)).

62. *Id.* (citation omitted).

63. *Miller-Phoenix*, 228 A.3d at 816–17.

> public policies are not contravened," is equally strong regardless of *how* an employer terminates an employment relationship. And recognition of the tort's availability "to *all* employees . . . will foster the State's interest in deterring particularly reprehensible conduct." Simply put, society's interest in deterring conduct that contravenes important public policies is no less important at the end of a contract's term than during it.[64]

The Court believed the individual employee's interest in recognizing the claim in the wrongful nonrenewal context was equally strong, stating as follows:

> The individual interest . . . also supports recognition of the tort in this circumstance, because employees who are at the end of the term of a renewable contract are similarly vulnerable to those employed at will. In both circumstances, the employee lacks any contractual rights or other protection against the termination of the employment relationship "for any reason, or no reason at all." That, however, does not render any less odious an employer's decision to terminate the relationship for impermissible reasons such as the employee's sex, refusal to engage in unlawful behavior, or filing of a workers' compensation claim. Thus, "it would be illogical" to deprive an employee whose term contract is up for renewal of "access to the courts equal to that afforded the at will employee."[65]

Just as the Court in *Mid-Plains Education Association* had done nearly fifty years prior, the *Miller-Phoenix* Court emphasized that the motivation of the employer was key to the analysis.[66] Thus, the Maryland Court of Appeals stated as follows:

> The tort permits an employee to bring a cause of action against an employer "when the motivation for the discharge contravenes some clear mandate of public policy."
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> The "wrongful" element of the tort of wrongful termination lies not in the fact of termination but in the motivation for it. In other words, "it is irrelevant whether the right to discharge exists. . . . The issue is whether the employer abused that right." Whether a termination is accomplished passively (by choosing to forgo renewal of a renewable contract) or actively (by firing an employee), if an employer's motivation for ending the employment relationship "contravenes some

64. *Id.* at 816 (citations omitted).

65. *Id.* at 816–17 (citations omitted).

66. *See Mid-Plains Educ. Ass'n*, 199 N.W.2d at 749; *Miller-Phoenix*, 228 A.3d at 814, 817.

> clear mandate of public policy," we can think of no reason why the law should tolerate it.[67]

Toward the end of its analysis, the Maryland Court responded to two, related arguments that had caused other courts to not recognize wrongful nonrenewal in contravention of public policy claims.[68] First, the Court made short shrift of the School Board's argument that "terminations effected through the non-renewal of a term employment contract should not be subject to challenge in tort because, in those circumstances, it is the predetermined termination date of the contract, and not any action by the employer, that causes the employment relationship to end."[69] In this regard, the Court pointed out that "many term employment contracts are entered with the reasonable possibility, if not the mutual expectation, that they will be renewed if the employee's job performance is adequate" and "[w]hen that is the case, it is the employer's decision not to renew the agreement that causes the employment relationship to end."[70] Second, the Court found unpersuasive cases from Ohio and California, which rejected the common law wrongful nonrenewal theory.[71] Thus, in response to the Ohio federal district court's view that recognizing wrongful nonrenewal claims "would contradict the plain meaning of the language [of Ohio law] to equate 'wrongful discharge' with 'nonrenewal,'" the Court stated that the Ohio federal district court's "reasoning accords significance to the term 'discharge' that is not supported by the public policy rationale that underlies the tort."[72] The Court likewise rejected the California cases upon which the Board relied, noting that the decisions had refused to recognize claims for nonrenewal in contravention of public policy, but finding the out-of-state authorities "unconvincing," "unpersuasive," and "inconsistent with the purpose of the tort."[73]

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67. *Miller-Phoenix*, 228 A.3d at 814, 817 (citations omitted).

68. *Id.* at 817–18.

69. *Id.* at 817.

70. *Id.*

71. *Id.* at 818.

72. *Id.* (discussing Cameron v. Bd. Of Educ., 795 F. Supp. 228, 239 (S.D. Ohio 1991)).

73. *Miller-Phoenix*, 228 A.3d at 818 (discussing Touchstone Television Prods. v. Superior Court, 145 Cal. Rptr. 3d 766 (Cal. Ct. App. 2012)); Motevalli v. L.A. Unified Sch. Dist., 145 Cal. Rptr.3d 562 (2004); Daly v. Exxon Corp., 63 Cal. Rptr. 2d 727 (Cal. Ct. App. 1997). Interestingly, California appellate courts have recognized claims for wrongful discharge in contravention of public policy where the adverse employment action is something less than discharge, such as a demotion or the like. *See, e.g.*, Garcia v. Rockwell Int'l Corp., 232 Cal. Rptr. 490 (Cal. Ct. App. 1986), *abrogated on other grounds by* Gantt v. Sentry Ins., 824 P.2d 680 (Cal. 1992), *overruled in part by* Green v. Ralee Eng'r Co., 960 P.2d 1046, 1054 n. 6 (Cal. 1998). Courts across the country are split concerning recognizing this latter claim and the Idaho Supreme Court has not weighed in on the issue. *See* Hurst IHC Health Servs., Inc., 817 F. Supp.2d 1202, 1206–07 (D. Idaho 2011) (collecting out-of-Idaho cases).

The Court of Appeals concluded its analysis by pointing out that, in other areas of law relating to employment rights—including Title VII and constitutional issues involving public sector employees—courts have recognized that nonrenewal is an adverse or retaliatory employment action akin to termination.[74] The Court further reiterated that the failure to recognize claims for wrongful nonrenewal in contravention of public policy would work a discrimination between different classes of employees.[75] In this latter regard, the Court stated as follows:

> Finally, we observe that, as a practical matter, the position urged by the Board "would effectively create a two-tiered system in which fixed-term contract employees are afforded fewer rights than those serving at-will." . . . That is, employers who engage employees under renewable term contracts would be free to terminate those relationships for reasons antithetical to public policy, while employers who engage employees on an at will basis would not. We decline to adopt that result.[76]

The Maryland Court of Appeals' recent opinion in *Miller-Phoenix* constitutes a legal *tour de force* concerning the imperative to recognized claims for wrongful nonrenewal in contravention of public policy. The Idaho Supreme Court should adopt its holding and reasoning in full at the earliest opportunity.

C. The Idaho Whistleblower's Act Abrogation of Wrongful Discharge and Other Common Law Claims

The Idaho Protect Public Employees Act ("IPPEA"), otherwise known as the Whistleblower Act, establishes a remedy for government employees who suffer adverse employment action due to the conduct of government employers, providing, among other things, that:

> 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.[77]

In *Van v. Portneuf Medical Center*, the former director of maintenance for a medical center's helicopter program brought Whistleblower Act and contractually based wrongful discharge in violation of public policy claims, among others, against

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74. *Miller-Phoenix*, 228 A.3d at 819.

75. *Id.*; *see supra* note 65 and accompanying text.

76. *Id.* (citations omitted). Such a two-tiered system could also lead to the height of arbitrariness concerning a single employee hired on a fixed term, since an employer would be liable for firing an employee for reasons that contravene public policy on the last day of his or her contract term, but would escape liability if the employer did not renew that employee's contract a day later for the same reasons.

77. IDAHO CODE § 6-2104(1)(a) (2022).

his former employer.[78] The district court granted summary judgment on Van's wrongful discharge claim in favor of the medical center.[79] On appeal, the Supreme Court, focusing on the overlap in the public policy provisions in the Whistleblower Act and in common law claims for wrongful discharge, as well as the remedies provided by the statutory provision, affirmed as follows:

> Van insists that, in addition to giving rise to his Whistleblower Act claim, termination in violation of the Whistleblower Act also gives rise to a breach of contract claim by way of the public policy exception to the at-will doctrine. However, when 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. *See* I.C. § 6–2105(4) (outlining what constitutes a protected activity); 82 AM.JUR. 2D *Wrongful Discharge* § 62 (2009) (stating that when "the relevant public policy is contained in a statute and the statute provides a remedy, the [common law cause of action] of wrongful discharge is not available."). Idaho's Whistleblower Act provides for specific remedies for violations of the Act, including civil fines and attorney fees. *See* I.C. §§ 6–2106 & 2107. . . .
>
> Clearly, the Act itself authorizes specific remedies, and therefore its provisions cannot also be used to establish the public policy upon which a breach of at-will employment contract claim is based. To hold otherwise would allow plaintiffs to recover twice for the same underlying facts.[80]

After *Van*, the Idaho Supreme Court twice held that the Whistleblower Act constitutes the exclusive state law claim and remedy for government employees aggrieved by employer action, thereby displacing potential common law claims for relief. In *Eller v. Idaho State Police*, a state police officer who had been demoted and eventually resigned brought Whistleblower Act and negligent infliction of emotional distress claims against his former employer.[81] On appeal, the Supreme Court, again focusing on the remedies afforded by the Whistleblower Act, opined as follows:

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78. Van v. Portneuf Med. Ctr., 147 Idaho 552, 555, 212 P.3d 982, 985 (2009).

79. *Id.* at 556, 212 P.3d at 986.

80. *Id.* at 561, 212 P.3d at 991.

81. Eller v. Idaho State Police, 165 Idaho 147, 151–53, 443 P.3d 161, 165–67 (2019).

> In *Van*, we held . . . that the plaintiff's common law claim for wrongful discharge was supplanted by the Whistleblower Act . . . .
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> ***
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> Ultimately, while [the Idaho Tort Claims Act ("ITCA") and the Whistleblower Act] . . . provide avenues for relief for citizens injured at the hands of government actors, the Whistleblower Act provides statutory remedies which supplant, and thus preclude, common law causes of action. The differences are evident on the face of each statute. The ITCA applies to torts; the Whistleblower Act applies to any damages caused by adverse employment actions taken against governmental employees. . . . It is also worthy of mention that the Whistleblower Act is of more-recent adoption, and as noted is the more-specific pronouncement by the Legislature regarding an employee's claims for adverse actions taken against him. Thus, as the newer statute with greater specificity and applicability, the Whistleblower Act and its statutory causes of action control in full. Those causes of action would supplant claims for negligent infliction of emotional distress, as Eller sought below.[82]

Not long thereafter, in *Berrett v. Clark County School Dist.*, the Idaho high court, relying on *Eller*, rejected a wrongful discharge in contravention of public policy claim brought by the spouse of a whistleblower, reasoning that:

> The Whistleblower Act provides a statutory cause of action and remedies to government employees alleging wrongful termination. *See* I.C. § 6-2101. This Court recently explained that the Whistleblower Act is intended to be the exclusive remedy for government employees and that it precludes common law causes of action. There is nothing in the plain language of the Whistleblower Act itself which protects the spouse of a whistleblower. Allowing a common law cause of action outside the Whistleblower Act would undercut the Idaho legislature's attempt to create an exclusive wrongful termination remedy for aggrieved government employees.[83]

Although again focusing on the remedies available under the Whistleblower Act as the Court had done in *Van* and *Eller*, the Court in *Berrett* for the first time expressly referenced the Idaho legislature's intent in determining whether the Whistleblower Act supplants or abrogates common law causes of action. The Court's reference to and prior omissions concerning legislative intent is significant since, for many years, determining the intent of the legislature has been critical in determining whether a statutory enactment is properly viewed as the exclusive remedy when the common law has previously determined the rights and duties of

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82. *Id.* at 155, 443 P.3d at 169 (citations omitted).

83. Berrett v. Clark Cnty. Sch. Dist. No. 161, 165 Idaho 913, 928, 454 P.3d 555, 570 (2019) (citing Eller v. Idaho State Police, 165 Idaho 147, 155, 443 P.3d 161, 169 (2019)).

the parties. In this regard, the Idaho Supreme Court has long held and recently reiterated that:

> It is not to be presumed that the Legislature intended to abrogate or modify a rule of the common law by the enactment of a statute upon the same subject; it is rather to be presumed that no change in the common law was intended, unless the language employed clearly indicates such an intention. It has been said that statutes are not presumed to make any alterations in the common law further than is expressly declared, and that a statute, made in the affirmative without any negative expressed or implied, does not take away the common law. The rules of the common law are not to be changed by doubtful implication, nor overturned, except by clear and unambiguous language.[84]

Thus, the Idaho high court has held that legislative abrogation of common law claims will only occur expressly[85] or by clear implication from statutory language.[86]

In *Van* and *Eller*, the Court focused on remedial displacement or supplantation in deciding that the Whistleblower Act provides the exclusive remedy for public employees who suffered adverse employment action or other harm that might also be actionable under common law causes of action.[87] The Court did so without linking the Legislature's use of statutory language and provision of remedies to the crucial question of legislative intent to abrogate common law claims.[88] The linkage, of course, can be made in the appropriate case, since, as stated previously by the Court, legislative intent to statutorily abrogate common law claims can be implied,

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84. Cox v. St. Anthony Bank & Tr. Co., 41 Idaho 776, 242 P. 785, 785–86 (1925); *see also* Easterling v. Hal Pac. Props., No. 47919, 2023 WL 378542, at *7 (Idaho Jan. 25, 2023) (citing and quoting Thomson v. City of Lewiston, 137 Idaho 473, 478, 50 P.3d 488, 493 (2002)) ("[W]e will presume that the legislature did not intend to modify the common law 'unless the language of the statute clearly indicates the legislature's intent to do so.'"); Pioneer Irrigation Dist. V. City of Caldwell, 153 Idaho 593, 602, 288 P.3d 810, 819 (2012) ("This Court will not interpret a statute as abrogating the common law unless it is evident that was the Legislature's intent."); State v. Lawrence, 98 Idaho 399, 400–01, 565 P.2d 989, 990–91 (1977) (same).

85. Sch. Dist. No. 351 Oneida Cty. v. Oneida Ed. Ass'n, 98 Idaho 486, 489, 567 P.2d 830, 833 (1977) (citing IDAHO CODE § 73-116 (2022) ("The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, in all cases not provided for in these compiled laws, is the rule of decision in all courts of this state.")).

86. *Easterling*, 2023 WL 378542, at *7 (citing Mickelsen v. Broadway Ford, Inc., 153 Idaho 149, 153, 280 P.3d 176, 180 (2012)).

87. *See supra* notes 78–82 and accompanying text.

88. *Id.*

but only when it is evident from clear statutory language.[89] In this regard, several Idaho courts, deciding cases after *Van* and *Eller* and outside the Whistleblower Act context have further refined the analysis, holding that statutory enactments did not supplant or abrogate common law claims, with two of those cases involving common law wrongful discharge claims.

In *Wallace v. Heath,*[90] defendant Wallace argued and the district court determined that plaintiff Heath could not recover contractual damages based on a common law reliance theory, because the Idaho Real Estate Brokerage Representation Act precluded common law causes of action.[91] The Idaho Supreme Court disagreed and allowed a common law remedy, noting the lack of remedy available to plaintiffs under the statutory scheme and stating as follows:

> While it is true that a statutory scheme precludes recovery of common law remedies where its provisions specifically allow for a statutorily prescribed remedy, *see Eller v. Idaho State Police*, 165 Idaho 147, 155, 443 P.3d 161, 169 (2019), the Idaho Real Estate Brokerage Representation Act is silent on the subject of remedies. *See* I.C. §§ 54-2082 to 54-2097. Without some provision addressing the remedies available under the Act, we cannot agree that it conflicts with or proscribes the common law by virtue of its enactment alone. Under the district court's reasoning, there would be no remedies available for any cause of action brought for a breach of the duties imposed by Idaho Code sections 54-2086 and 54-2087. In fact, if this Court were to extend this line of reasoning to its logical conclusion, there would be no remedy under any statutory scheme that did not explicitly provide for one.[92]

Similarly, in *Jones v. Home Federal Savings*, defendant Home Federal, relying on the Idaho Supreme Court's decision in *Van*, argued that plaintiff Jones could not both pursue a claim under the federal Sarbanes-Oxley Act's ("SOX") whistleblower provisions and a common law claim for wrongful discharge in contravention of public policy.[93] United States Chief Magistrate Judge Candy Dale rejected this contention for several reasons.[94]

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89. *See supra* notes 84–86 and accompanying text; *see also Pioneer*, 153 Idaho at 600, 602, 288 P.3d at 817, 819 (Where right-of-way "statutes lack a clear expression of legislative intent to abrogate the common law," "I.C. § 42–1209 does not modify the ditch owner's common law right to self-help."); *Lawrence*, 98 Idaho at 401, 565 P.2d at 991 (holding that, in criminal sentencing matter, where "no evidence in I.C. § 18-308. . . of any legislative intent to abrogate or modify the common law rule with respect to cases not falling within the scope of I.C. § 18-308," the district court is permitted to impose consecutive sentences); *but cf.* Locklear v. Taylor, 69 Idaho 84, 93, 203 P.2d 380, 386 (1949) ("By the enactment of Section 54–111 and cognate sections, . . . we are constrained to hold that Idaho has adopted what is intended to be a complete system governing alienation of real property; and that the common law rule against perpetuities is not in force in this jurisdiction.").

90. Wallace v. Heath, 168 Idaho 40, 479 P.3d 155 (2021).

91. *Id.* at 50–51, 479 P.3d at 165–66.

92. *Id.* at 51, 479 P.3d at 166.

93. Jones v. Home Fed. Sav., No. CV09–336–CWD, 2010 WL 996476 (D. Idaho March 17, 2010).

94. *Id.* at **2–4.

As a threshold matter, Judge Dale, citing the Idaho Supreme Court's decision in *Van*, acknowledged that "where a state statute provides remedies for violation of the same public policy, the state common law cause of action no longer is available;"[95] however, she was quick to state that the case before her involved a federal statute and not Idaho's Whistleblower Act and that the Idaho statutory provision did not provide the public policy upon which Jones relied.[96] The Judge then pointed out that Congress had not attempted to expressly preempt or abrogate state common law causes of action when it enacted SOX, quoting a SOX provision stating "nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement."[97] Related, Judge Dale held that foreclosing Jones's ability to pursue a common law wrongful discharge claim because she had also asserted a claim under SOX "would deny her state constitutional right to a trial by jury" on her state common law claim, "thereby diminishing her 'rights, privileges, or remedies' under state law."[98] Next, because Jones alleged that Home Federal had terminated her in violation Of public policy not only set forth in SOX, but in other federal and state laws, "it would be premature for the Court [to determine], without presentation and consideration of evidence, that SOX is the exclusive articulation of the public policy that supports" Jones's common law wrongful discharge claim.[99] Lastly, Judge Dale responded to Home Savings' argument, based on the *Van* Court's reasoning, that recognition of SOX and common law wrongful discharge claims in the same case would lead to double recovery by plaintiffs on the same facts.[100] Specifically, the Judge determined that it would be premature to rule further on the damages issue, but noted that "jury instructions and other procedures are available to the Court to eliminate any duplicative recovery for Plaintiff if she proceeds to trial on both causes of action."[101]

Most recently, in *Arriwite v. SME Steel Corp.*, plaintiff Arriwite brought several claims against his employer, defendant SME Steel Corporation, after he was terminated from employment, including a claim for wrongful termination in

95. *Id.* at *2 (citing Van v. Portneuf Med. Ctr., 147 Idaho 522, 561, 212 P.3d 982, 991 (2009)).

96. *Id.* at *2.

97. *Id.* at *3 (quoting 18 U.S.C. § 1514A(d)).

98. *Jones*, 2010 WL 996476, at *3.

99. *Id.*

100. *Id.* at *4.

101. *Id.* Other procedures that may be used to protect against double recovery include the use of special verdict forms, *see* Walston v. Monumental Life Ins., Co., 129 Idaho 211, 218, 92 P.2d 456, 463 (1996), and post-trial motions. Gunter v. Murphy's Lounge, *LLC*, 141 Idaho 16, 31, 105 P.3d 676, 691 (2005).

violation of public policy.[102] In his wrongful termination claim, Arriwite alleged that "SME wrongfully terminated him because he refused to work in unsafe working conditions and because he told SME he would report those conditions to OSHA."[103] In response, SME argued that, among other reasons, even if Arriwite had raised public policy issues concerning his termination, Arriwite's remedy was "with OSHA (which, in fact, he already utilized and exhausted), and not with the Federal Court."[104]

Chief District Court Judge David Nye, citing *Van*, *Eller* and *Jones*, among other decisions, had no problem concluding that, where a plaintiff alleges a claim under Idaho's Whistleblower Act and the Act provides a remedy to the plaintiff, a common law wrongful discharge claim "based on the same behavior cannot stand."[105] However, as Judge Dale did in *Jones*, Judge Nye noted that the plaintiff—here, Arriwite—had brought his claim under federal statute—here, OSHA— and not Idaho's Whistleblower Act.[106] Based on this difference, Judge Nye relied on that portion of Judge Dale's decision in *Jones* holding and concluding that one statute's articulation of public policy will not necessarily constitute the entire universe of public policy remediable under plaintiff's common law wrongful discharge in contravention of public policy claim. In so doing, Judge Nye tracked, but did not cite to, the Idaho Supreme Court's above-discussed holding in *Wallace* and concluded "that Arriwite can state a cause of action for wrongful discharge in violation of public policy based on a broad 'safety' policy."[107] Specifically, Judge Nye held as follows:

> Arriwite reiterated at oral argument that his public policy claim was wider than just the OSHA violations at SME and included the public policy that employees should not be forced to work in unsafe situations. Insofar as the Court has already found that such a public policy would likely be recognized in Idaho, it likewise finds that Arriwite's claim *is not* barred despite his filing a claim with OSHA.
>
> The Court is not trying to split a hair too finely here. The overall allegations and concerns in this case are all safety related and OSHA provides a statutory remedy for anyone claiming retaliatory discharge in violation of raising safety concerns. Thus, SME's argument that OSHA already provided a remedy is not wholly without merit. However, as stated, Arriwite's claims in this case are broader than just his "OSHA" claims.

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102. Arriwite v. SME Steel Corp., No. 4:18-CV-00543-DCN, 2021 WL 1218451, *2 (D. Idaho March 31, 2021).

103. *Id.* at *3.

104. *Id.*

105. *Id.* at *6.

106. *Id.*

107. *Id.* at *9. The Idaho Supreme Court decided *Wallace v. Heath*, *supra* notes 90–92 and accompanying text, approximately two and one-half months prior to Judge Nye's decision in *Arriwite*.

> Were the Court to bar Arriwite from proceeding on this "portion" of his claim, it would be swallowed up in the OSHA claim and Arriwite would be without remedy. The Court finds such an outcome inequitable.[108]

In reviewing the above-discussed case law and, in particular, the Idaho Supreme Court's decisions in *Van* and *Eller*, it is not at all clear that the Idaho Legislature, by enacting the Whistleblower Act, intended to abrogate common law claims for wrongful discharge in contravention of public policy and negligent infliction of emotional distress—particularly since the Court has made clear over the years that abrogation of common law claims based on statutory enactments, without more, is doubtful except in the clearest of cases.[109] First, although the Legislature had the ability to do so, nothing in the express language of the Whistleblower Act remotely suggests that the Legislature intended by that enactment to abrogate common law claims for wrongful discharge or negligent infliction of emotional distress.[110] Thus, unlike legislatures in other jurisdictions, the Idaho Legislature did not state in the Whistleblower Act that the statute would be the exclusive remedy for aggrieved government employees.[111] Indeed, in the Whistleblower Act's Legislative Intent provision, the Legislature does not mention any intent to abrogate common law claims, stating only that:

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108. *Arriwite*, 2021 WL 1218451, at *9. Judge Nye had pointed out earlier in his decision that, because OSHA did not afford Arriwite (and other plaintiffs) a private right of action under its provisions, there would be "no recovery, let alone a double recovery" for Arriwite unless he could pursue a common law claim on his own behalf. *Id.* at *8.

109. *See supra* note 84 and accompanying text.

110. As saliently pointed out by an appellate court in another jurisdiction, "[p]resumptively, the legislature was aware of the common law at the time that it enacted the Whistleblower Act, and, had the legislature intended to repeal any common-law rights, it would have been a simple thing for it to do." Callahan v. Edgewater Care & Rehab. Ctr., 872 N.E.2d 551, 554 (Ill. App. Ct. 2007).

111. The Montana Legislature, in enacting its Wrongful Discharge from Employment Act, stated at Section 39-2-913 that "[e]xcept as provided in this part, no claim for discharge may arise from tort or express or implied contract." MONT. CODE § 39-2-913 (2022). More to the point, the Missouri Legislature, in enacting its Whistleblower Protection Act, stated at RSMo Section 285.575.3 that "[t]his section is intended to codify the existing common law exceptions to the at-will employment doctrine and to limit their future expansion by the courts. This section, in addition to [other chapters of Missouri statutory law] ..., shall provide the exclusive remedy for any and all claims of unlawful employment practices." MO. REV. STAT. § 285.575.3 (2022). Conversely, the Hawaii Legislature stated in its whistleblower statute at HRS Section 378-69 that "[t]he rights created herein shall not be construed to limit the development of the common law nor to preempt the common law rights and remedies on the subject matter of discharges which are contrary to public policy." HAW. REV. STAT. § 378-69 (2022).

> The legislature hereby finds, determines and declares that government constitutes a large proportion of the Idaho work force and that it is beneficial to the citizens of this state to protect the integrity of government by providing a legal cause of action for public employees who experience adverse action from their employer as a result of reporting waste and violations of a law, rule or regulation.[112]

Thus, although the Legislature could have removed any doubt about its intentions concerning the abrogation issue by expressly repealing or overriding the common law, it failed to do so when it enacted the Whistleblower Act.

Second, although the Whistleblower Act and common law claims for wrongful discharge in contravention of public policy and (to a lesser extent) negligent infliction of emotional distress each address the rights of aggrieved government employees at a high level of generality, the evidence is decidedly mixed regarding whether the Legislature, by enacting the Whistleblower Act and its remedial provisions, intended to impliedly abrogate common law wrongful discharge and negligent infliction of emotional distress claims by government, i.e., public sector, employees.[113] Subsidiarily, the implied abrogation question becomes a question of whether the Legislature, by enacting the Whistleblower Act (or, for that matter, any other statutory provision), intended to supplant common law claims at all, in some circumstances, or on all occasions where the statute and the common law claims overlap in whole or in part.

As previously discussed in the case law, the Idaho Supreme Court has long held that the implied abrogation question must focus on the intent of the Legislature.[114] Yet, in resolving the question in the Whistleblower Act context in *Van* and *Eller*, the Court focused on applying a rule of construction which assumed that when the Legislature enacted the Whistleblower Act as a form of public policy and provided remedies for its violation, common law causes of action for wrongful discharge in contravention of public policy and negligent infliction of emotional distress were supplanted or displaced.[115] Not until *Berrett* did the Court suggest in passing that this rule of construction is an appropriate surrogate for determining legislative intent.[116]

The answer to the question regarding implied abrogation is less than clear. On the one hand, the fact that the Idaho Legislature, by enacting the Whistleblower Act, has created public policy and remedies in the same subject area as the common law, as enunciated by Idaho courts, cannot, in and of itself, be determinative on the implied abrogation issue.[117] Without a more definitive statement regarding its

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112. IDAHO CODE § 6-2101 (2022).

113. Based on the Whistleblower Act's statutory title, legislative intent and definitional provisions, *see* IDAHO CODE §§ 6-2102, 6-2101 and 6-2103(4) (2022), respectively, "a claim under the [Whistleblower] Act is available only to public employees, not private citizens." Berger v. Madison County, No. 4-12-cv-00535-CWD, 2014 WL 222067, *8 (D. Idaho Jan. 21, 2014); *supra* note 77 and accompanying text.

114. *See supra* note 84 and accompanying text.

115. *See supra* notes 78–82 and accompanying text.

116. *See supra* note 83 and accompanying text.

117. *See supra* note 84 and accompanying text.

intent, the Idaho Legislature may have believed (and intended) that the Whistleblower Act and the above-discussed common law claims and remedies could co-exist. As noted by Judge Dale in *Jones*, given the court's ability to avoid duplicative remedies or double recovery stemming from overlap in coverage of the Whistleblower Act and common law wrongful discharge and infliction of emotional distress claims through jury instructions, forms of verdict, post-trial motions and the like,[118] there was certainly no clear indication from the Legislature that it intended to abrogate common law claims when it enacted and provided remedies under the Whistleblower Act. Under the rigorous standard for divining legislative intent in implied abrogation cases, the rule of construction adopted by the Idaho Supreme Court in *Van* and *Eller* is a relatively thin reed and does not leave the answer to the question free from doubt.[119]

On the other hand, the rule of construction enunciated by the Idaho Supreme Court in *Van* (and *Eller*)—that a statutory Whistleblower Act scheme will preclude recovery of common law remedies, such as claims for wrongful discharge in contravention of public policy and negligent infliction of emotional distress, where the Whistleblower Act's provisions specifically allow for a statutorily prescribed remedy[120]—has been used by courts in a number of jurisdictions, as well as commentators to determine whether Whistleblower Acts (or other statutory schemes) variously preempt, abrogate, or supplant common law remedies for wrongful discharge or other common law claims.[121] Even more important, the Idaho Supreme Court has consistently held that where a statute is ambiguous, i.e., where the legislature has not clearly expressed its intent in the literal words of the statute, rules of statutory construction can and must be used to effectuate legislative intent.[122] Certainly, reliance on and evaluation of express statements by the Idaho

118. *See supra* note 101 and accompanying text.

119. *See supra* note 84 and accompanying text.

120. *See supra* notes 79–82 and accompanying text.

121. Pickering v. Aspen Dental Mgmt., Inc., 919 A.2d 520, 523 (Conn. App. Ct. 2007); Hurst v. Careco Med., Inc., KNLCV2160496845, 2021 WL 4902374, *3 (Conn. Super. Ct. Sept. 29, 2021); Winslow v. TLC East, LLC, Case No. 3:14-cv-167 (RNC), 2017 WL 1234111, *3 (D. Conn. March 31, 2017); Benningfield v. Pettit Env't., Inc., 183 S.W.3d 567, 570-571 (Ky. Ct. App. 2005); Breeden v. Exel, Inc., No. 3:21-CV-416-CHB, 2021 WL 5702422, **3–4 (W.D. Ky. Dec. 1, 2021); Chappel v. S. Med. Hosp., Inc., 578 A. 2d 766, 770–771 (Md. Ct. App. 1990); Porterfield v. Mascari II, Inc., 788 A.2d 242, 245–246 (Md. Ct. Sp. App. 2002); Garner v. Frederick Cnty. Pub. Schs., Civil Case No.: 1:21-cv-3253-JMC, 2022 WL 4290575, *3 (D. Md. Sept. 16, 2022); Terry v. Legato Sys., Inc., 241 F. Supp. 2d 566, 571 (D. Md. 2003); 82 Am. Jur. 2d, Wrongful Discharge, Sec. 61 (August 2022 Update).

122. Stanley v. Indus. Special Indem. Fund, 168 Idaho 183, 186, 481 P.3d 731, 734 (2021); Nelson v. Evans, 166 Idaho 815, 820, 464 P.3d 301, 306 (2020); St. Alphonsus Reg'l Med. Ctr. V. Gooding Cnty.,

legislature concerning its intent (or not) to abrogate common law wrongful discharge and negligent infliction of emotional distress claims based on the enactment of the Whistleblower Act, and its accompanying remedies, would provide the clearest guide to legislative intent. However, judicial application of rules of construction such as the one utilized by the Idaho Supreme Court in *Van* and *Eller* may be appropriately used to glean the legislature's intent to impliedly abrogate common law claims based on the Whistleblower Act's enactment.

But what of the scope of any such implied abrogation? The issue comes down to whether the statutory provision provides an adequate remedy to an aggrieved plaintiff such that he, she, or they will have a source of substantive recovery under the statute. If not, then common law claims can and must co-exist with the statute. Thus, although the Idaho Supreme Court cited to *Eller* in discussing the rights of plaintiffs and the implied abrogation issue in the above-discussed *Wallace* real estate brokerage matter, the Court held that, because the statutory provision did not provide a private right of action to plaintiffs, it could not agree that the statute "conflicts with or proscribes [a] common law [reliance theory] by virtue of its enactment alone."[123] Likewise, judges in the federal district of Idaho, again citing to *Van* and/or *Eller*, adhered to the *Wallace* court's admonition by refusing to conclude that the Idaho legislature's passage of the Whistleblower Act impliedly abrogated other, non–Whistleblower Act federal causes of action.[124] And, numerous courts outside of Idaho have refused to allow statutory enactments, including a Whistleblower Act, to abrogate common law claims for wrongful discharge in contravention of public policy "where an employee's termination contravened a clear mandate of public policy and not to allow the cause of action would leave the employee without a remedy,"[125] or, stated another way, have continued to allow wrongful discharge claims to "provide a remedy for an otherwise unremedied violation of public policy."[126] As cogently pointed out by one appellate court that declined to conclude that a state whistleblower provision preempted

159 Idaho 84, 87, 356 P.3d 377, 380 (2015); In re Adoption of Doe, 156 Idaho 345, 350, 326 P.3d 347 (2014).

123. Wallace v. Heath, 168 Idaho 40, 51, 479 P.3d 155, 166 (2020), cited and discussed at *supra* notes 90–92 and accompanying text.

124. *See* Jones v. Home Fed. Sav., No. CV09–336–CWD, 2010 WL 996476 (D. Idaho March 17, 2010), cited and discussed at *supra* notes 93–101 and accompanying text; *see also* Arriwite v. SME Steel Corp., Case No. 4:18-cv-00543-DCN, 2021 WL 1218451 (D. Idaho March 31, 2021), cited and discussed at *supra* notes 102–108 and accompanying text.

125. Morrison v. Crabs on Deck, LLC, Case No. PWG-17-3347, 2018 WL 5113671, *6 (D. Md. Oct. 19, 2018) (quoting Newell v. Runnels, 967 A.2d 729, 769 (Md. Ct. App 2009)); Molesworth v. Brandon, 672 A.2d 608, 614, 616 (Md. Ct. App. 1996); *see also* Miller v. Alpha Sys., Inc., 13 Conn. L. Rep. 516, 1995 WL 93424, **2–4 (Super. Ct. Conn. Feb. 23, 1995) and Wall v. Wausau Ins. Co., 12 Conn. L. Rep. 335, 1994 WL 463645, *3 (Super. Ct. Conn. Aug. 19, 1994) (both quoting Wehr v. Burroughs Corp., 438 F. Supp. 1052, 1054 (E.D. Pa. 1977) ("The cases which have established a tort or contract remedy for employees discharged for reasons violative of public policy have relied upon the fact that in the context of their case the employee was otherwise without remedy and that permitting the discharge to go unredressed would leave a valuable social policy unvindicated.")) and Burnham v. Karl & Gelb, P.C., 745 A.2d 178, 182 (S. Ct. Conn. 2000) (same).

126. Wholey v. Sears Roebuck, 803 A.2d 482, 490 (Md. Ct. App. 2002).

common law claims for wrongful discharge, "we fail to see how this statutory scheme creates any irreconcilable conflict with the persistence of a common-law remedy in favor of employees not covered by the statute but who, nevertheless, are discharged in retaliation for whistleblowing activities in violation of a clearly mandated public policy."[127]

Applying this standard to the relationship between Idaho Whistleblower Act and common law wrongful discharge claims, it is important to note that the Whistleblower Act prohibits employer adverse action against a public employee and specifies employee remedies when that public 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."[128] In contrast, the Idaho Supreme Court has recognized that common law wrongful discharge claims proscribe and provides employee remedies for a broader range of employer conduct, including taking adverse employment action against any employee—public or private—who "exercise[s] certain rights or privileges," including engaging in lawful union activities and filing a worker's compensation claim.[129]

At the risk of stating the obvious, the Idaho legislature did not intend—and no Idaho court could legitimately hold—that the Idaho Whistleblower Act which, by it terms applies only to public employees,[130] impliedly abrogates common law claims for wrongful discharge in contravention of public policy brought by private sector employees.[131] Likewise, where a public employee alleges that he, she, or they was/were terminated—or, as discussed above, nonrenewed[132]—for engaging in protected union activities or filing a worker's compensation claim, that employee conduct would not be protected under the above-quoted provisions of the Whistleblower Act, but would be protected and remediable under a common law wrongful discharge in contravention of public policy claim. Thus, the Idaho high court was correct in determining on the facts in *Van* that his common law wrongful discharge claim had been impliedly supplanted or abrogated by Idaho's

127. Callahan v. Edgewater Care & Rehab. Ctr., LLC., 872 N.E.2d 551, 554 (Ill. App. Ct. 2007).

128. IDAHO CODE § 6-2104(1)(a) (2022); *see also supra* note 77 and accompanying text.

129. Thomas v. Med. Ctr. Physicians, P.A., 138 Idaho 200, 208, 557 P.3d 557, 565 (2002); *see supra* note 12 and accompanying text.

130. *See supra* note 113.

131. *See Wholey*, 803 A.2d at 492–93 (where "no statutory impediment to the tort cause of action sought by the petitioner exists because the Legislature, quite simply, has declined to provide a statutory remedy for *private* employee-whistleblowers . . . the purpose for recognizing the wrongful discharge tort—i.e. to provide a remedy for an otherwise unremedied violation of public policy—has maintained its vitality").

132. *See supra* notes 35–76 and accompanying text.

Whistleblower Act—after all, Van had alleged "he had been fired in contravention of the Whistleblower Act, which establishes the public policy upon which he base[d] his claim for breach of at-will employment contract;"[133] however, if Van or some other plaintiff alleged a common law wrongful discharge claim for exercising certain rights and privileges beyond those protected and remediable under the Whistleblower Act, he, she, or they would not lose their right to pursue a claim for wrongful discharge in contravention of public policy.

Similarly, evaluating the implied abrogation issue as it pertains to the interplay between the Whistleblower Act and negligent infliction of emotional distress claims, the inquiry must again be whether the public employer conduct that causes the employee's emotional distress is prohibited by, and remediable under, the Whistleblower Act. This time, the Idaho Supreme Court's decision in *Eller* is instructive.[134] There, plaintiff Eller brought claims against his employer, the Idaho State Police ("ISP"), for its violation of his rights under the Whistleblower Act and a common law claim for negligent infliction of emotional distress.[135] Among other significant holdings in the case, the Idaho Supreme Court held that a public employee who proves a Whistleblower Act violation by a public employer may seek and prove non-economic damages, including damages for emotional distress, resulting from that violation.[136] The Court further held that "a whistleblowing plaintiff may only seek the relief afforded under the Whistleblower Act" and "has no claim under [the Idaho Tort Claims Act] for [common law] torts that also arise out of adverse actions under the Act."[137] Or, stated another way, the Court held "the Whistleblower Act and its statutory causes of action control in full" and thereby "supplant claims for negligent infliction of emotional distress, as Eller sought below."[138]

As the Idaho high court did in *Van*, it correctly determined in *Eller* that Eller's common law claim for negligent infliction of emotional distress had been impliedly supplanted or abrogated by Idaho's Whistleblower Act—particularly since Eller alleged that both of his claims stemmed from "alleged unlawful retaliation by the ISP because [Eller] testified against a fellow police officer at a preliminary hearing and for objecting to the ISP's policy requiring [Crash Reconstruction Unit also known as] CRU members to destroy all but the final drafts of their reports."[139] As before, however, if Eller had been a private sector employee or, more important, if Eller's claim for negligent infliction of emotional distress and resulting damages had not been caused by ISP's Whistleblower Act violations, but rather, had been caused by some other unreasonable conduct by ISP in violation of the germane standard of

133. Van v. Portneuf Med. Ctr., 147 Idaho 552, 561, 212 P.3d 982, 991 (2009); *see supra* note 80 and accompanying text.

134. *See supra* notes 81–82 and accompanying text.

135. Eller v. Idaho State Police, 165 Idaho 147, 151 and 153, 443 P.3d 161, 165 and 167 (2019).

136. *Id.* at 155–57, 443 P.3d at 169–71.

137. *Id.* at 157, 443 P.3d at 171.

138. *Id.* at 155, 443 P.3d at 169. In 2020, the Idaho legislature, in response to the Idaho Supreme Court's decision in *Eller* permitting Whistleblower Act plaintiffs to seek and recover non-economic damages under the Act, enacted caps limiting the amount of non-economic damages recoverable under the Act. *See* IDAHO CODE §§ 6-2105(5)(a)–(b) (2022).

139. *Eller*, 165 Idaho at 153, 443 P.3d at 167.

care, then Eller's (and other similarly situated plaintiffs') remedies under the Whistleblower Act would have been inadequate such that they would not lose their common law claims for negligent infliction of emotional distress.[140] Thus, while the Whistleblower Act may have "control[led]" and "supplant[ed]" Eller's common law claim "in full," the Act may not necessarily do so for Eller and other plaintiffs under other, quite plausible, factual circumstances.[141]

In sum, although the Idaho legislature did not expressly signal its intention to abrogate common law claims for wrongful discharge in contravention of public policy (and negligent infliction of emotional distress) for public employees when it enacted the Whistleblower Act, the Idaho Supreme Court's application of well-settled rules of statutory construction indicate that the legislature may have impliedly intended to do so under circumstances when the Whistleblower Act provides an adequate remedy for public employees who prove those (and possibly) other common law claims. The contours and limitations, however, of the scope of that abrogation should not be overstated and must await the crucible of future, materially factually different, cases that come before the Court.

III. CONCLUSION

The Idaho Supreme Court has improperly limited the cognizability of common law claims for wrongful discharge in contravention of public policy in two instances and has overstated and failed to delineate limits concerning the scope of the Whistleblower Act's abrogational effect on common law claims in a third circumstance. Hopefully, the Court will reclaim its common law power in this critical area of employment law going forward.

140. For the elements of a negligent infliction of emotional distress claim in the public employment setting in Idaho, *see* Frogley v. Meridian Joint Sch. Dist. No. 2, 155 Idaho 558, 569–70, 314 P.3d 613, 624–25 (2013).

141. *Eller*, 165 Idaho at 157, 443 P.3d at 171.