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## Idaho Supreme Court Expands the Scope of Whistleblower Claims Against Employers

By J. Kevin West

*In a recent unanimous decision, the Idaho Supreme Court significantly broadened the scope of Idaho's whistleblower statute, making it easier for disgruntled employees to claim that they were protected in engaging in certain types of behavior. At the same time, the court also clarified certain issues regarding the burden of proof in these types of cases.*

On October 16, 2008, the Idaho Supreme Court issued its decision in *Curlee v. Kootenai County Fire and Rescue*. In the case, plaintiff Mary Curlee was an employee of the Kootenai County Fire and Rescue unit (KCFR). She was fired by KCFR after it discovered her personal notes detailing the minute-by-minute activities of two of her co-workers, whom Curlee contended were not properly performing their job duties. Curlee filed suit against KCFR alleging that she was fired in violation of the Idaho Protection of Public Employees Act, commonly referred to as the "whistleblower" statute, and that her notes documented the waste of public funds, property or manpower.

The facts of the case are as follows. Beginning in 1999, Curlee held several office positions with KCFR. In 2002, she was transferred into the administrative offices of KCFR. When Curlee arrived, two co-workers, Jackie Sharpe and Lisa Wheeler, were already working there as a bookkeeper and administrative assistant, respectively. As Curlee observed her two new co-workers, she became upset with what she considered to be an inordinate amount of time they spent on personal conversations during the work day. She thought their behavior was wasteful and Curlee went to the fire chief to complain. When the problem was not resolved to her satisfaction, Curlee became more frustrated and eventually voiced her concerns to two fire commissioners, two lieutenants, and the deputy chief of KCFR. Curlee claimed that some of these individuals told her she should "document" her observations of the behavior of her co-workers that she believed to be "wasteful."

Accordingly, over the next several months, Curlee maintained a detailed, handwritten, minute-by-minute log of the activities engaged in by her two co-workers which she deemed to be wasteful. During the same time period, Curlee expressed her frustrations to the fire chief again. The fire chief promised to try and resolve the matter.

Approximately seven months after Curlee began keeping her log, one of the two co-workers, whom she had been observing, inadvertently discovered the log. This co-worker showed it to the other subject co-worker and they made photocopies of the log and gave it to the fire chief. The two co-workers were angry not only about the fact that Curlee was recording their office activities, but also

that she had referred to them as “Muffy” and “Buffy,” which they considered to be derogatory and insulting.

Following this disclosure, the fire chief met with Curlee and asked what she had meant to accomplish by keeping the log. The fire chief attempted to reason with Curlee and asked her to be more of a team player, telling her that her behavior was increasing tensions in the office. Curlee replied by stating that she could document anything she wanted and that she and the two co-workers would never be a “team.” The fire chief gave Curlee the remainder of the day off as paid leave and asked her to go home and think of how to help ease the workplace tension.

Curlee returned to work the next day and met again with the fire chief. In their discussion about how to resolve office tensions, Curlee adamantly stated that she would not apologize and would never have a good working relationship with her two co-workers. As a result of these and other statements, Curlee’s employment was then terminated.

Curlee filed suit against KCFR alleging that she was wrongfully terminated in violation of the Idaho whistleblower statute for her actions in documenting waste of public funds. As the case progressed, KCFR filed a motion asking the trial court to dismiss the complaint, which the court did. The case was then appealed to the Idaho Supreme Court. The Idaho Supreme Court overturned the decision of the trial judge and sent the case back for trial for two principal reasons.

First, the Idaho Supreme Court said that the trial judge had improperly applied certain burden of proof rules in granting KCFR’s motion to dismiss. In granting the motion to dismiss, the trial judge followed the traditional *McDonnell-Douglas Court v. Green* burden-shifting analysis as set forth by the United States Supreme Court in 1973, which is as follows: (1) once a plaintiff produces evidence that she suffered from an adverse discriminatory employment decision, then (2) the burden shifts to the employer to produce evidence that the employment decision was based on a legitimate reason, and then (3) the burden shifts back to the plaintiff to prove that the legitimate non-discriminatory reason the employer proffers is in fact a pretext.

While the Idaho Supreme Court said that the McDonnell-Douglas burden of proof rules are still valid, these rules are to be used at trial and not for purposes of a motion to dismiss. The Idaho Supreme Court stated that by using this test at the motion to dismiss stage, the trial judge erroneously held Curlee to a higher burden of proof than is normally used at that stage of the case.

As its second basis for sending the case back to the trial judge, the Idaho Supreme Court discussed the Idaho whistleblower statute. The court said that in order to establish a case of retaliatory discharge under the whistleblower statute, an employee must show: (1) she was an employee that engaged or intended to engage in protected activities; (2) her employer took adverse action against her; and (3) the existence of a causal connection between the protected activity and the employer’s adverse action. Reporting waste of public funds or property is a “protected activity” under the whistleblower law, as is participating in an investigation, hearing, or court proceeding. KCFR argued that Curlee’s actions were not protected under the Idaho whistleblower statute because she did not communicate to her supervisors any waste of public funds, property or manpower; further, she did not participate or give information in an investigation, hearing, or court proceeding. The Idaho Supreme Court disagreed with these arguments. First, the court focused on the term “communicate.” In an arguably broad reading of the Idaho whistleblower statute, the court said that it was not necessary that Curlee actually have presented the notes to her employer in order to “communicate” a report about waste of public funds or property. Rather, the whistleblower statute, according to the court, only requires that the

employee intended to engage in an action protected under the statute, such as communicating waste of public property. What appeared to matter most to the Idaho Supreme Court was Curlee's intent to provide the notes, rather than whether she had actually proceeded to report waste.

Second, in rejecting KCFR's other argument, the court focused on the meaning of the term "investigation." The Idaho whistleblower statute provides that an employer cannot take adverse action against an employee for participating in an investigation, hearing, or court proceeding. KCFR argued that there was no investigation or court proceeding and thus Curlee had not engaged in protected activity. Once again, the court gave the term "investigate" a very expansive interpretation. Although the word was not defined in the whistleblower statute, the court said that "investigate" is sufficiently broad to encompass actions involving "close examination or observation." As the court stated: "In view of the evidence that Curlee's note-taking was the product of her superior's direction to document her allegations of waste, we conclude that there is a genuine issue of material fact as to whether she intended to give information in an investigation." Once again, the court focused on the employee's intent rather than what actually happened.

### **Lessons to be Learned**

Government employers, or those who are state and federal contractors, have reason to be concerned about the broad reach of the Curlee decision. The decision greatly expands the reach of the whistleblower statute and seemingly protects virtually any conduct by an employee so long as the employee intends to report waste of public property or funds.

Public employers should always take seriously any complaint made by an employee as to waste of public funds or property. Such complaints should be carefully investigated and documented. Adverse action should never be taken against an employee for making a complaint, even if the complaint turns out to be unfounded.