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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

RHONDA LEDFORD, et al.

Plaintiffs,

v.

IDAHO DEPARTMENT OF JUVENILE CORRECTIONS, et al.,

Defendants.

CASE NO. 1:12-cv-00326-BLW

Hon. B. Lynn Winmill, Presiding

PLAINTIFFS' MEMORANDUM IN RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

[Dkt. 33, filed November 25, 2013]

TO: THE COURT, AND TO THE DEFENDANTS AND THEIR RESPECTIVE ATTORNEYS HEREIN:

The Plaintiffs hereby oppose the Defendants' Motion for Summary Judgment on the grounds set forth herein, and request the Court to deny Defendants' motion in its entirety. Plaintiffs further request that the Court hear oral argument on this matter, and, if necessary, permit the Plaintiffs to obtain and introduce additional evidence, or amend their pleadings, as appropriate to conform to the evidence.

The Court should deny defendant's motion for summary judgment because, as is evident from

the voluminous nature of the Plaintiffs' Separate Statement of Genuine Issues, there are numerous genuine issues of material fact which preclude summary judgment.

I. STATEMENT OF FACTS

Rhonda Ledford "keeps things stirred." This was what IDJC HR officer Cloud to Deputy Attorney General Nancy Bishop, October 19, 2011. Schoppe Dec., Ex. Z, LEDFORD093442. In September 2012, then-Superintendent Betty Grimm wrote to DAG Nancy Bishop that Ledford was Grimm's "worst nightmare," notwithstanding the fact that Julie McCormick had just had sex with a male juvenile under Grimm's own nose just a month beforehand and would, by rights, be an even worse nightmare than Ledford. Schoppe Dec., Ex. Z, LEDFORDSSD062595

The reason for which Ledford-- along with her nine fellow Plaintiffs-- was Grimm's "worst nightmare" is probably because all of these people presumed to publicly speak out about the corruption, cronyism, waste of public resources, illegal conduct, and the serious dangers posed to the juveniles incarcerated at JCC Nampa, the Idaho Department of Juvenile Corrections facility in Nampa, Idaho.

JCC Nampa was becoming an increasingly unsafe place for both juveniles and staff. This situation had been developing since Harrigfeld's appointment as the Director of Juvenile Corrections by Governor Butch Otter in August 2009, but the problems had reached their peak in 2011. In that year, two employees perceived by everyone as favorites were improperly promoted to supervisory positions despite their obvious lack of experience.

This caused an uproar among staff concerning IDJC's hiring and promotions practices. Plaintiff Ray Gregston and later-fired Observation & Assessment Unit head Tom Knoff prepared and circulated a Petition that questioned and challenged these practices. It was signed by many employees, but the names were removed before it was presented to the Idaho Division of Human

Resources out of fear of retaliation.

When IDJC learned of the Petition, tensions rose to an all-time high, and a tumultuous all-staff meeting was held in November 2011 at which a packed room roundly criticized the unfair hirings and promotions. Employees also spoke out about their ever-increasing fear for their safety and for that of the juveniles in their care, as Harrigfeld's room-time policies in particular were reducing disincentives for violent juveniles to avoid violence against other juveniles or staff, assaults went up, and both staff and juveniles became genuinely frightened.

JCC Nampa was routinely tolerating contraband, including items that could be turned into improvised weapons, the wearing of gang colors by juveniles, and other dangerous safety violations that put juveniles and staff at risk.

Employees were promised that their complaints would be heard and that changes would be made. Changes were indeed made, but they were not good ones. Staff who had been vocal in their criticisms began to feel the pressure of retaliation and unfair treatment. Ledford had already been feeling this as a result of her reports to the State concerning likely timecard fraud on the part of many of her coworkers, including Program Manager Dave Rohrbach.

Ledford's efforts were met with close scrutiny, with Grimm, Cloud, and Harrigfeld all monitoring her communications and interactions with other employees, including the Plaintiffs, in 2011. Ledford became so stressed that she had to take medical leave, although even that was improperly handled by HR, where Cloud tried to find ways to push Ledford out of IDJC entirely. Ledford returned to JCC Nampa in December 2011.

After that point, the Plaintiffs and other critics were increasingly subjected to unfair and unreasonable disciplinary actions for innocuous offenses, harsh treatment from supervisors, and erratic scheduling that was very disruptive to critical employees, but which seemed to work out

well for favored employees, among other things. Knoff was terminated due to his ongoing objections to Harrigfeld's dangerous policies. Nine of Knoff's fourteen equally-outspoken staff in O&A were also gone within a few months of the installation of Laura Roters, one of the two employees who had been promoted to a Unit Manager position without the necessary qualifications, was moved into O&A to take over, and was later improperly assigned to a newly-reclassified Unit Manager position in O&A that was offered to no one else. Everyone believed that she had been sent to "clean house" in O&A. Human Resources was just as partial and retaliatory as were Grimm and Harrigfeld.

Also of great concern was JCC Nampa's history of sexual relationships between mostly female staff members and male juveniles, and at least one female suspected of this still works there today. The Plaintiffs expressed concern about this being tolerated in their June 28, 2012 Complaint. Just over a month later, SSO Supervisor Julie McCormick was caught with male juvenile CY, and later admitted to having sex with him. Grimm was warned about McCormick's inappropriate behavior months before this, and she Harrigfeld, and HR officers Julie Cloud and Pat Thomson all literally watched McCormick inappropriately interact with CY and other male juveniles while making feeble efforts to stop her. Finally, she had sex with him in her office in early August 2012. Harrigfeld, Grimm, and Cloud have all expressed their belief that they did all that they could have done, although they all improbably testified that none of them had any reason to suspect a sexual relationship between the two.

At around the same time, Grimm also permitted Dr. Richard Pines to continue to visit his quasi-foster son at JCC Nampa even after her own staff alerted her that charges were pending against Pines before the Board of Medicine concerning alleged child molestation of his minor male patients. Grimm let Pines, whom she called a personal friend, return to JCC Nampa several times

until the filing of this lawsuit. His license was eventually revoked, and CM later told JCC Nampa employees that Pines had sexually abused him. The Plaintiffs have discovered evidence of at least eleven or twelve incidents in which female employees, mostly at JCC Nampa, have sexually abused male juveniles in their care since 1998, and that many incidents may have gone unreported even where discovered.

At minimum, the Plaintiffs have presented with this Response to the Defendants' Motion for Summary Judgment more than enough evidence to permit their claims to be heard by a jury as the trier of fact.

II. STANDARD OF REVIEW ON SUMMARY JUDGMENT

Although summary judgment is proper in a case in which there is no genuine issue of material fact, this is not that sort of case, because there are numerous issues of material fact that should properly be decided by a jury. See Fed. R. Civ. P. 56(c)(2); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

A defendant moving for summary judgment on a plaintiff's claim must demonstrate the absence of a genuine issue of material fact by either (1) submitting summary-judgment evidence that negates the existence of a material element of plaintiff's claim or (2) showing there is no evidence to support an essential element of plaintiff's claim. *J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1251 (1st Cir. 1996); see *Celotex Corp.*, 477 U.S. at 322-23. A defendant cannot rely on conclusory statements to establish that plaintiff has not presented evidence on an essential element of his claim. Rather, a defendant must demonstrate the absence of a genuine factual dispute. See *Celotex Corp.*, 477 U.S. at 324-25. Only if defendant meets its burden is plaintiff required to respond by summary-judgment proof to show a genuine issue of

material fact. Fed. R. Civ. P. 56(e)(2).

In determining whether there is a disputed issue of material fact that prevents summary judgment, the court must consider all evidence in the light most favorable to plaintiff as the nonmovant. *Garcia v. Pueblo Country Club*, 299 F.3d 1233, 1236-37 (10th Cir. 2002). The court must also resolve all reasonable doubts about the facts in favor of plaintiff as the nonmovant. *Cooper Tire & Rubber Co. v. Farese*, 423 F.3d 446, 455-56 (5th Cir. 2005). "The mere existence of a scintilla of evidence … will be insufficient; there must be evidence on which the jury could reasonably find for (the opposing party)." *Anderson v. Liberty Lobby, Inc.* (1986) 477 US 242, 252, 106 S.Ct. 2505, 2512 (parentheses added)].

III. ARGUMENT

A. Defendants Have Waived Their Eleventh Amendment Affirmative Defense by Failing to Raise It Early in the Proceedings as Required by the Law of the Ninth Circuit and by Engaging In This Litigation

In the Ninth Circuit, a party asserting Eleventh Amendment immunity is required to disclose that affirmative defense "early in the proceedings," thereby indicating "whether it objects to having the matter heard in federal court."

> "Timely disclosure provides fair warning to the plaintiff, who can amend the complaint, dismiss the action and refile it in state court, or request a prompt ruling on the Eleventh Amendment defense before the parties and the court have invested substantial resources in the case. Timely disclosure also facilitates discovery, when appropriate, and allows the parties to establish a full record for appellate review. Requiring the prompt assertion of an Eleventh Amendment defense also minimizes the opportunity for improper manipulation of the judicial process. If a state or state agency elects to defend on the merits in federal court, it should be held to that choice the same as any other litigant. [Citation omitted]. To permit a defendant to litigate the case on the merits, and then belatedly claim Eleventh Amendment immunity to avoid an adverse result, would "work a virtual fraud on the federal court and opposing litigants." *Newfield House, Inc. v. Massachusetts Dep't of Pub. Welfare*, 651 F.2d 32, 36 n.3 (1st Cir. 1981). Although the Eleventh Amendment defense arises from the Constitution, even constitutional rights can be waived if not timely asserted. A lack of personal jurisdiction implicates the Due Process Clause, yet that defense is waived if not promptly asserted. See *Insurance Corp. of Ireland,* 456 U.S. at 702-03. Similarly, the Seventh Amendment right to a jury trial is waived unless affirmatively asserted within the narrow time limits established by Federal Rule of Civil Procedure 38(b)." *Hill v. Blind Indus. & Servs.*, 179 F.3d 754, 756-758

(9th Cir. Cal. 1999); see also *ITSI TV Prods. v. Agricultural Ass'ns*, 3 F.3d 1289, 1291 (9th Cir. Cal. 1993); *Demshki v. Monteith*, 255 F.3d 986, 989 (9th Cir. Cal. 2001).

Here, the Defendants had multiple opportunities to either move to dismiss the Plaintiffs' Complaint, First Amended Complaint, and/or Second Amended Complaint, or to engage Plaintiffs' counsel in an effort to resolve their Eleventh Amendment affirmative defense early in the proceedings.

Instead, the Defendants proceeded to engage in these proceedings, in which extensive written discovery has been conducted, and hundreds of thousands of pages of documents produced. The Defendants have proposed two separate, still-pending (since April) protective orders to the Court, and twenty-one depositions have been taken. The Defendants should not be permitted to take advantage of the Plaintiffs by having undertaken to vigorously defend this matter on its merits in federal court, thus driving up the costs of litigation to the Plaintiffs, and then by seeking to dismiss the matter in its entirety.

Even if the Court were inclined toward dismissal, the end result would simply be that the Plaintiffs would re-file their still-timely claims in the Fourth District Court for the State of Idaho and proceed on a parallel track with their declaratory relief claims, which would remain pending before this Court. In fact, the recent termination of Rhonda Ledford for, essentially, collecting evidence solely for use in these proceedings, has given rise to a brand-new claim for both wrongful discharge and for retaliation under the Idaho Protection of Public Employees Act.

Dismissal is also not only remedy for such action, as the Court has the authority to remand the matter to the state court for further proceedings. If all or some of the claims in a lawsuit are barred by the 11th Amendment, the federal court may either dismiss or remand the barred claims. See *Wisconsin Dept. of Corrections v. Schacht* (1998) 524 US 381, 387–392, 118 S.Ct. 2047, 2051–2054; *Estate of Porter v. Illinois*, 36 F.3d 684, 691 (7th Cir. 1994) (remanding, rather than

dismissing, a claim removed to federal court and subsequently barred by the Eleventh Amendment); *Silver v. Baggiano*, 804 F.2d 1211, 1219 (11th Cir. 1986) (vacating and remanding a claim removed to federal court); *Gwinn Area Cmty. Sch. v. Michigan*, 741 F.2d 840, 847 (6th Cir. 1984) (directing the district court to remand claims to state courts).

Under the circumstances, however, the Plaintiffs believe that this Court would be well within its rights to retain jurisdiction over this matter, and to proceed toward trial following denial of summary judgment.

With respect to the Defendants' argument concerning the maintenance of a direct action against the State of Idaho for monetary damages under the Idaho Constitution, the Plaintiffs' Second Amended Complaint removed their plea for money damages after meeting and conferring with opposing counsel on the matter.

B. The Plaintiffs' Declaratory Relief Claims and Section 1983 Claims Are Properly Before this Court

"A state official can be sued in his or her individual capacity for alleged civil rights violations under section 1983 regardless of the Eleventh Amendment." *Hafer v. Melo*, 112 S.Ct. 358, 363 (1991); *Thompson v. Enomoto*, 915 F.2d 1383 (9th. Cir. 1990). Nor does the amendment act as a bar to suits for prospective injunctive relief by a plaintiff against a state official or agency. *Ulaleo v. Paty*, 902 F.2d 1395 (9th Cir. 1990).

Given that the Plaintiffs will and do seek equitable relief in order to protect them and their fellow coworkers—and, in a derivative fashion—the juveniles who are routinely placed at risk by the improper hiring and promotions practices that have put inexperienced and even incompetent, favored employees into important positions of authority.

Former SSO Supervisor McCormick is a prime example of this phenomenon, as are the dangerous changes made by the Defendants in the O&A unit which have reduced juveniles'

disincentives to attack staff or other juveniles. Further, the fact that Director Harrigfeld and IDJC's chief Human Resources officer, Julie Cloud, have both absurdly testified that they believe that they did everything possible to prevent McCormick from sexually exploiting a male juvenile right under their noses should make it clear that something must be done to raise the standards at IDJC in order to ensure that it takes such risks seriously and complies with the law in reporting incidents of child abuse or neglect. The evidence that IDJC has falsified court records, safety data, and incident reports, and that it is even now manipulating incident reporting standards to make JCC Nampa appear to be a safer facility that it really is, is yet another reason for the Court to proceed to issue all necessary equitable relief for the protection of the Plaintiffs and other employees.

Further, as noted above, Plaintiff Ledford was recently fired, and other Plaintiffs remain exposed to retaliation for expressing their views and legitimate criticisms of IDJC and its management as a matter of moral and legal obligation.

Under the Defendants' own authorities, and due to the Defendants' waiver of their Eleventh Amendment defense by failing to raise it in a timely fashion, the Plaintiffs may seek prospective injunctive relief to protect them, others like them, and juvenile inmates against future prospective harm of the type alleged in the Second Amended Complaint because, even under the Defendants' standards, those harms are "real and immediate."

There is a very real threat that the Defendants will continue to violate all of the following laws if they are not ordered to comply with them by the Court:

1. **Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 USCS § 1997e, et seq.:** Under CRIPA, confined juveniles have the right to protection from violent residents, abusive staff, unsanitary living quarters, excessive isolation, and unreasonable restraints.
2. **Prison Rape Elimination Act ("PREA"), 42 USCS § 15609:** PREA was enacted to eliminate rape, sexual assaults, and other forms of sexual exploitation of inmates in corrections facilities. Among other things, PREA requires a zero-tolerance standard for the incidence of inmate sexual assault and rape.
3. **Idaho Juvenile Corrections Act and Rules (Idaho Code 20-501, et seq., IDAPA 05):** The

legislative intent of the Juvenile Corrections Act is to ensure that the juvenile correction system is "based on the following principles: accountability; community protection; and competency development." I.C. 20-501. Under the Act, IDJC is required to maintain secure facilities "for the secure confinement, discipline, education and treatment of the most seriously delinquent juveniles," with programs "designed to help juveniles recognize accountability for delinquent behavior by confronting and eliminating delinquent norma, criminal thinking and antisocial behavior and making restitution to victims through community service or other restitution programs." I.C. 20-501. This statute also requires that IDJC policies "shall be promulgated as rules in compliance with chapter 52, title 67, Idaho Code [which governs the administrative rulemaking process under IDAPA]." Under I.C. 20-531, IDJC is required to "maintain and operate secure facilities for the custody of juvenile offenders who pose a danger of serious bodily harm to others or who have engaged in a pattern of serious criminal offenses, and who cannot be controlled in a less secure setting."

4. **Idaho Administrative Procedure Act ("IDAPA"), I.C. § 67-5201, et seq**.
5. **The Idaho Protection of Public Employees Act ("IPEPA," I.C. § 6-2101**), which prohibits employers from taking 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;
6. **Idaho Code § 67-5301, et seq.,** which establishes a merit-based hiring system which the Defendants have repeatedly violated in hiring and promoting favorites; and, I.C. § 67-5313, which requires that veterans be granted hiring preferences, and I.C. § 67-5315, which requires that employee problem-solving and due process procedures be established and adopted; and,
7. **The First and Fourteenth Amendments to the United States Constitution**, for violating the Plaintiffs' civil rights, including their right to free speech, civil actions for which may be maintained as provided by **42 U.S.C. § 1983;**
8. The free speech guarantees of **Article I of the Idaho Constitution**;
9. **42 U.S.C. § 5101 and Idaho Code § 16-1619**, both of which mandate the reporting of actual or suspected child abuse or neglect, including sexual abuse, of juveniles to the Idaho Department of Health and Welfare and/or to law enforcement agencies;
10. **Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, et seq.;** and,
11. **Family & Medical Leave Act, 29 U.S.C. § 2601, et seq.**

C. A Jury Should Decide Whether the Plaintiffs' Communications Are Protected Or Not

In *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 129 (9th Cir. Idaho 2008), the Ninth Circuit Court of Appeals agreed with the Third, Seventh, and Eighth Circuits to hold that "the determination whether the speech in question was spoken as a public employee or a private citizen presents a mixed question of fact and law."

> "As the present case demonstrates, the scope and content of a plaintiff's job responsibilities can and should be found by a trier of fact through application of these principles. [Citation omitted]. Because the task of determining the scope of a plaintiff's job responsibilities is concrete and practical rather than abstract and formal, we are confident that a factual determination of a plaintiff's job responsibilities will not encroach upon the court's prerogative to interpret and apply the relevant legal rules." *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1129 (9th Cir. Idaho 2008).

The Defendants' claim that "not a single Plaintiff has indicated any threat of discipline or termination for speaking out on workplace issues" is wholly and knowingly false, as both Grimm and Roters testified under oath that Grimm had warned the staff in O&A that, —Betty's thrice-repeated threat to O&A staff members that, if they failed to support Laura Roters, they could find work elsewhere. S.S. at item 7; ¶ 43. Grimm's threat was entirely inappropriate in the context of a classified employment program that is required by the laws to use a progressive disciplinary system, a fair problem-solving system, and due process. HR officer Pat Thomson wrote in an email to the Deputy Attorney General that, "if the petition is still at IDJC or if a new petition is started that IDJC will take action against those involved." S.S., ¶¶ 8, 12. Ledford was also forbidden to speak to her coworkers, and was told even by Harrigfeld herself not to speak out on issues of safety, security, or about any of the other concerns that Ledford had raised. S.S., ¶¶5, 68.

Even the Defendants acknowledge that evidence of "a persistent pattern of retaliation," would entitle the Plaintiffs to injunctive or declaratory relief. In instance after instance, it is shown that the Plaintiffs have been "held to a different standard," as current IDJC employee Rita Fell described Ledford's situation, by being punished or threatened with punishment for the mildest of comments or ambiguously offensive jokes (Ledford and DeKnijf); for not running fast enough to an altercation despite an injured knee (Fordham); for confirming with another JCC facility that a report of sexual abuse had already been made after hearing a juvenile state that the matter was under investigation (Ledford and Reyna); for reporting that IDJC needlessly wastes money and

other public resources (Kim McCormick); for refusing to falsify court records (McKinney); for circulating and supporting a petition about improper hiring practices like "a fox in a henhouse" (Gregston, Fordham, Penrod); for questioning the assignment of a favorite employee to a newly-created position and the reasons for which no other employee was permitted to apply (Littlefield); for questioning safety and security practices that regularly place juveniles and staff in serious danger (Farnworth, Penrod, Ledford, and everyone, really); or for speaking to fellow coworkers or "keeping things stirred" (Ledford, again). S.S., ¶¶3-15; 17-104.

At the same time, other employees have avoided—and, in some cases, still avoid—discipline for being charged with not one, but two DUIs (¶56, 57); for having inappropriate relationships with juveniles, as when former Safety & Security Officer Supervisor Julie McCormick essentially groomed a juvenile for months even while Director Harrigfeld, former Superintendent Grimm, and Human Resource officers Julie Cloud and Pat Thomson watched and did not intervene until after McCormick had already had sex with the boy in her office (¶59, 77-82); for berating juveniles, calling "dumbasses," failing to report sexual assaults on juveniles (¶ 88), or for calling a former employee a "c*nt" at a "team-building" dinner (¶58); or for falsifying incident reports, court records, Performance-based Standards reports, or timecards (¶¶ 73-76).

The evidence submitted herewith demonstrate the need for injunctive and/or declaratory relief in order to protect them from further retaliation and legal violations on the part of the Defendants. The Defendants have persisted in their abusive and retaliatory conduct toward the Plaintiffs, and have continued to harass and retaliate against them in a pattern which just last month resulted in the termination of Plaintiff Rhonda Ledford for violating IDJC policy in recording her own conversations with the Defendants and other employees for the sole purpose of gathering evidence in support of her claims. See Schoppe Dec., Ex. BB, consisting of the disciplinary and

termination-related documents issued to Ledford by Harrigfeld. IDJC's decision to terminate Ledford has created a new cause of action that she can and will assert against the Defendants. For the moment, Ledford intends to seek an order from this Court which will reinstate her in her position at JCC Nampa, and she also intends to file a Notice of Claim for wrongful termination and for further violations of the Idaho Protection of Public Employees Act.

Other Plaintiffs, along with some of their coworkers, have been subjected to unfair disciplinary actions that are grossly excessive in comparison to other, far more serious legal and policy violations with which other, favored employees are able to get by. See Separate Statement, at items 4, 5, 11, 12, and at ¶¶ 17-72.

Further, the Defendants have made sham claims of improvements in safety where they have simply "recalibrated" the system so that incidents which would just a year or two ago have triggered reporting requirements—such as when a juvenile leaves a classroom without authorization— now result in an unreported "staff assist," thus generating no data with which a degradation in JCC Nampa's safety might be shown. S.S., ¶¶2, 90.

The Plaintiffs and their coworkers, as well as the juveniles in their care, are all continually subjected to not only the immediate risk of physical injury and other harm on an everyday basis, but also to the inconsistent and unfair application of grievance, hiring, and promotions processes which the laws of the State of Idaho say must be fair and impartial. Under those circumstances, the Plaintiffs submit that the harm to them and to the juveniles whom they hope to protect by means of this litigation is both "real and immediate" and precisely within the scope of the authorities cited by the Defendants in their moving papers. *Los Angeles v. Lyons*, 461 U.S. 95, 101-102; *Zepeda v. United States Immigration Service*, 753 F.2d 719, 727 (9th Cir. 1985).

D. The Laws Which the Defendants Are Accused of Violating Are Not Mere "Internal Policies"

The Defendants have clearly misrepresented to the Court the nature of the Plaintiffs' claims by arguing that they are merely based upon "internal policies" with which the Plaintiffs disagree and which IDJC routinely violates at the whim of its administrators.

To the contrary, the Plaintiffs' reports concerning the violations of laws, policies, and rules are based upon the substantive and very important laws listed above—CRIPA, PREA, the Juvenile Corrections Act, etc.-- that are designed to guarantee the safety, civil, and employment rights of both inmates and staff.

E. The Ledford FMLA Claim is Properly Before this Court

With respect to Ledford's FMLA claim, in which she alleges that she was improperly denied intermittent leave which was medically justified and consistent with her job duties, she may maintain an action because IDJC violated her rights under the FMLA and its associated regulations by complying with her request for leave in bad faith, by forcing her to take more leave than was medically necessary in the opinion of her healthcare providers.

Further, even though they found themselves unable to force Ledford into a night shift or to resign from IDJC entirely, IDJC Human Resources' conduct as alleged in the Affidavit of Rhonda Ledford (Schoppe Dec., Ex. S) and elsewhere in the Separate Statement provide evidence of its bad faith compliance with the FMLA. The manner in which IDJC handled Ledford's claim was not only disingenuous, but kept Ledford from being paid for three months, forced her to use all of her sick leave, and nearly crushed her spirit. Her claim is one for damages, and is thus actionable.

F. McKinney ADEA Claim

Should the Court determine that it cannot enforce the ADEA against the State, the proper remedy is to remand the matter back to the EEOC, the administrative agency with which it was first filed.

G. The Plaintiffs Made Their Reports in Good Faith, and Their Reports are Substantiated by the Evidence

As should be apparent from the sheer size and density of the Separate Statement and the evidence that accompanies it, the Plaintiffs have demonstrated numerous genuine issues of material fact that are in dispute with respect to the issues of whether the Plaintiffs reported violations of law, safety and security problems, waste of public resources such as timecard fraud, or other misconduct in good faith, and as to whether they suffered retaliation for it.

1. IDJC's Unfair, Improper, and Unlawful Hiring Practices:

As noted above, the Plaintiffs have alleged that IDJC, Harrigfeld, and Grimm violated not only IDJC's internal policies, but also the laws of the State of Idaho—I.C. § 67-5301, *et seq.,* including IDAPA 15-- with respect to hiring and promotions practices; the application of the merit system to job applicants and the posting of positions (67-5301-67-5306); the Rules of the Division of Human Resources and the Idaho Personnel Commission (67-5308 and 67-5309), veterans' preference (67-5313), and for the establishment and adoption of employee problem solving and due process procedures (67-5315). The evidence of favoritism, cronyism, pre-planned promotions of favored employees regardless of the merit or qualifications of other employees, and the unfair application of disciplinary and problem-solving processes to the Plaintiffs and to other employees set forth in the Separate Statement support those claims, and it should be up to a jury to decide whether or not those laws were violated under those facts. I.C. 67-5309(n)(1) prohibits, among other things, the "[u]se of any influence which violates the principles of the merit system in an attempt to secure a promotion or privileges for individual advantage."

Specifically, there is evidence that the Defendants improperly hired and/or promoted several individuals—including Laura Roters and Julie McCormick—who lacked the necessary qualifications for their positions, and that the Defendants manipulated job classifications, job

descriptions, and interview processes in order to obtain their desired outcome, or to "clean house" by getting rid of disfavored or dissenting employees, as with Tom Knoff, whose position was reclassified in an effort to "humiliate" him into quitting, and many of the staff in O&A-- rather than to hire the person best qualified for the position. IDJC also appears to have known when applicants would not be hired, but would sometimes offer interviews solely for "morale." There is also evidence that Grimm and Human Resourcs personnel knowingly permitted McCormick to refuse to consider job applicants on the grounds that they were veterans. S.S., ¶¶ 1-15; 17-38; Schoppe Dec., Ex. Q, Carnell Aff.; Ex. R, Inman Aff.; Ex. U, Velten Aff.

2. JCC Nampa is Unreasonably Unsafe, and It Is Not a "Secure Facility" as Required by State and Federal Law

There is also a substantial body of evidence shows many issues of fact as to whether or not the Defendants' stated reasons for making significant disciplinary changes in O&A were a genuine effort to improve the department, or whether the changes were part of Grimm and Harrigfeld's stated desire to "clean house" in that department in particular, where three of the Plaintiffs—Fordham, Reyna, and Littlefield—work. S.S. ¶¶ 1-15.

The Defendants' proffered undisputed facts vastly understate the concerns about dangerously inadequate safety and security that was, and still is, shared by the Plaintiffs and many other employees of JCC Nampa, where both staff and juveniles have regularly and repeatedly expressed fears for their safety that exceed what is to be expected even in a correctional environment. IDJC routinely allows contraband items inside JCC Nampa, permits unidentified people to visit with juveniles, allows disobedient and aggressive juveniles to roam the facility without restraint (apparently in an attempt to avoid generating bad data for Performance-based Standards reports), and even allows juveniles to wear gang colors in violation not only of policy, bu of basic common sense. S.S. ¶¶ 77-97; Schoppe Dec., Ex. Q, Carnell Aff.; Ex. R, Inman Aff.; Ex. U, Velten Aff.

Further, the fact that neither Harrigfeld nor Cloud feel that there is anything different that they could have done to protect juvenile CY from the sexual predation of former SSO Supervisor Julie McCormick presents a genuine issue as to whether IDJC, Harrigfeld, Cloud, or others will permit such conduct to occur again in violation of the most basic civil rights of juvenile inmates.

The same question applies to the tolerance of IDJC—with the advice of Deputy Attorneys General, no less—of Dr. Richard Pines, whose suspected sexual abuse of minors was clearly made known to Grimm and to the Attorney General's office, who nonetheless permitted him to continue to visit, and continue to victimize, a juvenile in the care of IDJC. S.S. ¶¶ 77-97; Schoppe Dec., Ex. Q, Carnell Aff.; Ex. R, Inman Aff.; Ex. HH (Idaho Board of Medicine disciplinary records concerning Dr. Richard Pines); Ex. JJ (Idaho State Police Investigative Report). As the evidence shows, not only were Harrigfeld, Grimm, supervisors, Human Resources, and even the Governor and the Legislature made aware of these issues, but Harrigfeld, Grimm, and HR actually committed many of the grossest violations themselves.

Further, while none of the Plaintiffs ever personally witnessed sexual misconduct at JCC Nampa, they are all aware—along with virtually every other employee—of IDJC's long history of tolerating, ignoring, and even concealing the sexual abuse of juveniles, primarily males, by female staff members. As set forth in the Plaintifffs' voluminous Supplemental Responses to the Defendants' written discovery (Schoppe Dec., Exs. V and W, Table 18; Ex. CC, Curtis Aff.; Ex. DD, Wilson Aff.) With approximately eleven or twelve additional incidents having been identified, and because IDJC has a statutory mandate to maintain safe and secure facilities under the Juvenile Corrections Act, CRIPA, and PREA, the evidence presented by the Plaintiffs mandates that these issues be resolved by the jury as the trier of fact, and not by the Court.

3. The Plaintiffs' Reports of Waste of Public Resources at IDJC Are Validated by the Evidence

Again, the evidence in the Separate Statement clearly discloses not only that the Plaintiffs reported waste on the part of IDJC and its administrators and other employees, but that their allegations were correct. The Solutions co-occurrent drug and alcohol treatment unit did not operate for two years after it was opened, notwithstanding that it was receiving state and federal funds to do so. As Ledford believed and reported, and as Knoff knew from personal experience, Dave Rohrbach falsified his timecards. Worse, Rohrbach admitted as much in an email to Harrigfeld that went unproduced by the Defendants until December 2013 and which went unmentioned by Harrigfeld at her deposition while discussing the subject.

Grimm personally signed Rohrbach's timecards as his supervisor, and both she and Cloud were aware—as shown in yet another email that went undisclosed until the last minute—that Rohrbach was over-reporting time he purportedly spent on weekend or off-time phone calls. Ledford reported timecard abuse by Rohrbach and other employees to nearly everyone—to the state Division of Human Resources, to members of the Legislature, to the Governor's office, to Harrigfeld, Grimm, and Human Resources- and was met with disdain and retaliation.

Plaintiff Kim McCormick has been cruelly treated at her office, with no help from Harrigfeld for from Human Resources, for questioning frivolous and needless expenses incurred by the State of Idaho for some individuals who are not even in IDCJ's custody, and also for questioning the misuse of P-cards by employees. The validity of McCormick's reports is borne out, among other things, by IDJC financial officer Scott Johnson's admission in an email that IDJC had not only spent over $85,000 on temporary workers over the span of not quite two years from 2011 to 2012, but that it had done so in violation of state law. See S.S., ¶¶ 4, 5, 8, 9, 13; 99-104.

It is abundantly clear, then, that the Plaintiffs' reports were not at all speculative, and that they were offered in good faith and with evidentiary support.

H. There is Ample Evidence of Retaliation Against the Plaintiffs and Other Employees on the Part of IDJC, as Well as by Harrigfeld and Grimm Personally

Rhonda Ledford was "the common denominator in staff being disgruntled, and Rhonda is that. She keeps things stirred," wrote HR officer Cloud in an email on October 19, 2011. LEDFORD093442.

"Do me one last favor," wrote Grimm on her very last day at JCC Nampa, November 9, 2012, On Grimm's last day at JCC Nampa—November 9, 2012—"Stay on top of Mark and Rhonda Ledford… We are being took Pat. I just wish I could have proved that." LEDFORDSSD5766068.

"I spoke to Sharon this evening via phone. The Director has made it clear to me that if I don't hold Mark Freckleton accountable for Rhonda Ledford, I will be held accountable. We (Julie, Pat, Betty and Mark) will be meeting on Tuesday 9/11/12 to discuss further. I would like minutes taken of our meeting." Betty Grimm. LEDFORDSSD089027.

In a February 29, 2012 email to Harrigfeld, Grimm wrote, "[a]nother fight tonight during dinner, involving O&A juveniles. **We need to talk.** [bold in original] Remember my report to you yesterday after my meeting with Steve Sanders, who shared his frustrations regarding how many of the staff in O&A were treating juveniles, **how so many of them were already criticizing the new process**, that is not even one week old (all that work for what?) [emphasis supplied]. RT met with me several times today to share his concerns about how Tom's staff [i.e., Littlefield, Fordham, Reyna, and others] were openly talking and criticizing processes in front of the juveniles. We'll here's the result. I would like nothing better than to be able to clean house down there!" LEDFORDSSD094835. In a subsequent and similar email to JCC Nampa supervisor RT Duke, Grimm wrote that "I would like nothing better than to be able to go in on that unit and clean house, but I must have the Director's understanding and support which I am attempting to get at this time." LEDFORDSSD065850.

In September 2012, Grimm wrote to DAG Nancy Bishop that Ledford was Grimm's "worst nightmare," notwithstanding the fact that Julie McCormick had just had sex with a male juvenile under Grimm's own nose just a month beforehand and would, by rights, be an even worse nightmare than Ledford. LEDFORDSSD062595

Within months, Knoff had been terminated, Roters had been assigned his job, and nine of the fourteen vocal rehab techs who had worked in O&A were gone.

All of these facts, along with the many other facts set forth in ¶¶ 17-76 of the Separate Statement, and especially those which show that Harrigfeld, Grimm, and Cloud were all frequently untruthful in testifying to their roles in handling disciplinary and other matter related to the Plaintiffs, give rise to a genuine issue of material fact as to whether or not Harrigfeld and Grimm personally participated in retaliation and other mistreatment of the Plaintiffs.

I. The Conduct Reflected in the Evidence was Retaliatory and Adverse to the Plaintiffs, Whose Claims Are Timely

The facts set forth throughout the Separate Statement and in the documents to which it cites meet and exceed the legal standards for what constitutes "adverse action" in the context of employment retaliation. Erratic and preferential shift changes by Roters in O&A which somehow seem to land primarily on Reyna, Fordham, and Littlefield, even while Roters-hired rehab techs are given coveted fixed schedules; disciplinary actions that are almost laughable in the manner in which they are inconsistently applied against the Plaintiffs while other more serious conduct is ignored, as with DeKnijf, Ledford, and Fordham; being forced to endure yelling, shaming, and silencing by supervisors, as with Ledford and Kim McCormick; and uniquely-written "expectations" which forbid even basic communications with coworkers (Ledford, again), along with the many other examples of differential and demeaning mistreatment suffered by the Plaintiffs and other disfavored employees, could all be deemed to be "adverse actions" by a jury. See S.S., ¶¶4-16; 39-72. Further, the intent behind those actions—most clearly with respect to Knoff and Ledford—on the part of the Defendants makes it clear that they intended their conduct toward the Plaintiffs to be adverse and as unpleasant as possible. The jury must decide these issues.

Moreover, under Idaho law, a continuing tort is one inflicted over a period of time; it involves

a wrongful conduct that is repeated until desisted, and each day creates a separate cause of action. Only when such tortious conduct ends does the limitations period begin to run. However, the continuing tort doctrine does not throw open the doors to permit filing these actions at any time. Rather, the courts that have adopted this continuing tort theory have generally stated that the statute of limitations is only held in abeyance until the tortious acts cease. At that point the statute begins to run. If at some point after the statute has run the tortious acts begin again, a new cause of action may arise, but only as to those damages that have accrued since the new tortious conduct began. *Johnson v. McPhee*, 147 Idaho 455 (Idaho Ct. App. 2009).

Because the same evidence shows that the misconduct of the Defendants has been continuous over the course of years from the six-month period prior to the filing of this action and all the way up to the present—as where Ledford was just terminated for collecting evidence in support of her claims, an activity which the Idaho Protection of Public Employees Act expressly prohibits employers from unreasonably restricting—and thus that the Plaintiffs' tort claims against the Defendants are "continuous" in nature, have accrued over the past nearly two years of litigation, and that they continue to accrue for each and every day that the Defendants continue to engage in the tortious conduct alleged.

Each of the Plaintiffs' responses to the Defendants' undisputed issues of fact demonstrate not only that the conduct occurred well within the six-month time frame permitted by the Idaho Protection of Public Employees Act, but that the same conduct continued to occur long after December 28, 2011 and right up to the present day in some circumstances.

The already-cited evidence presented in the Separate Statement more than adequately demonstrates the existence of a causal link between the protected conduct—e.g., where the Plaintiffs routinely criticized management policies that are illegal, unfair, or unsafe, and where

many of them and their coworkers did so in a more spectacular fashion by way of Gregston's Petition and at the infamous November 2011 all staff meeting—and the tortious conduct—e.g., "cleaning house," manipulating the classification of job positions, changing shifts and work assignments, and administering discipline unfairly and without regard to due process, and all within months of a tumultuous and tense all staff meeting brought about by Gregston's Petition, among other things.

On summary judgment, the *McDonnell Douglas* burden-shifting analysis on whistleblower claims does not apply. *Curlee v. Kootenai County Fire & Rescue,* 148 Idaho 391 at 396, 224 P.3d 458 at 463. To defeat summary judgment, a plaintiff only has the burden to present "evidence from which a rational inference of retaliatory discharge under the whistleblower act could be drawn." *Id.*

The evidence and testimony set forth in the Separate Statement will absolutely permit a "rational inference of retaliatory discharge" or other adverse actions against each of the Plaintiffs may be drawn.

J. The Plaintiffs' Claims for IIED Should Not Be Dismissed Because the Defendants Had Actual and Sufficient Notice of the Plaintiffs' Claims, and Because the Plaintiffs Have Presented Evidence of Conduct on the Part of the Defendants That is Atrocious and Outrageous

"A claim filed under the provisions of this section shall not be held invalid or insufficient by reason of an inaccuracy in stating the time, place, nature or cause of the claim, **or otherwise**, unless it is shown that the governmental entity was in fact misled to its injury thereby." I.C. 6-907 (Emphasis supplied). See also *Smith v. City of Preston*, 99 Idaho 618, 586 P.2d 1062 (1978) (the contents of a notice of claim were incomplete, but adequate where there was nothing in the record to suggest that the city was "misled to its injury" by any deficiencies in the contents of the letter).

The Defendants were given direct and ample notice of the Plaintiffs' claims in substantial compliance with I.C. § 6-905 where the Notice of Tort Claims submitted by the Plaintiffs were inadvertently sent directly to the Defendants at IDJC's address, where the Defendants received them on June 28, 2012. Schoppe Dec., Ex. Z, LEDFORDSSD436894. A subsequent Notice of Tort Claim was also sent to that address in July 2012, and another went to the Secretary of State's office. The Defendants and the State itself were all perfectly aware of the time, place, nature, and cause of the Plaintiffs' action from the earliest possible moment, and that, if anything, they received notice of those claims even sooner than they would have had the notice been sent to the Secretary of State first. Having made no showing at all that any of the Defendants were "misled to their injury," the Plaintiffs' notice-dependent tort claims should not be dismissed.

Further, the Defendants have presented evidence and testimony in support of the damage and impact of the Defendants' misconduct, but also of the outrageousness of that misconduct. Each of the Plaintiffs have testified or offered evidence in their discovery responses that they suffered extreme distress, anxiety, depression, sleeplessness at the very least, and Plaintiffs DeKnijf, Ledford, Farnworth, Gregston, Littlefield, McCormick, Penrod, and Reyna have all disclosed to the Defendants the identities and qualifications of their treating healthcare providers for conditions which the Plaintiffs contend were either caused or aggravated by the conduct of the Defendants and by the unreasonably unsafe and hazardous work environment which the Defendants have created at IDJC and at JCC Nampa in particular. Among those Plaintiffs' complaints are anxiety, chronic migraines, diabetic complications, depression, insomnia, acute stress reaction, acute stress disorder, psychological distress, panic attacks, exhaustion, hypertension, and one peptic ulcer, and a true and correct copy of those Plaintiffs' expert witness disclosures will be presented upon request, but will not be included here for the sake of the Plaintiffs' privacy interests. Those

Plaintiffs who did not seek medical treatment for the same stress, anxiety, depression, insomnia, and/or impact on their personal lives—Addison Fordham and Jo McKinney—have been no less affected by the misconduct of the Defendants, and their claims should not fail merely because they held back from medical treatment for those conditions. Please see Schoppe Dec., Exs. V and W, Plaintiffs' Supp. Resp., at Table 9, LEDPLF0029_ROGS, *et seq.*

Further, the intentionality, contempt, unfairness, and often very nasty and personal nature of the mistreatment directed at the Plaintiffs by Harrigfeld, Grimm, and Cloud, and which threatened not only the quality of the Plaintiffs' jobs, but even the very existence of those jobs (as Ledford has learned) should make it clear to the Court that the Plaintiffs should be able to recover against the Defendants for that conduct, particularly where it has occurred over the course of years.

K. If Necessary, Plaintiffs Respectfully Seek Leave of the Court to Amend Their Complaint to Address Defects and in Order to Ensure that Their Claims Conform to the Evidence

While the Defendants are correct that the Complaint inadvertently omitted a reference to 42 U.S.C. section 1983 in reference to their First Amendment claims, the Plaintiffs' responses to the Defendants' written discovery (Schoppe Dec., Exs. V and W, Table 9) gave the Defendants ample notice that those claims were rooted in that statute. Plaintiffs requsest leave of Court to amend their pleadings pursuant to F.R.C.P. section 15(b) to state that claim with clarity and according to proof.

L. Neither Harrigfeld Nor Grimm Are Entitled to Qualified Immunity Because They Personally Participated In and Caused the Constitutional and Statutory Violations Alleged by the Plaintiffs, and Because Their Conduct Violated Clearly Established, Statutory, and/or Constitutional Rights of Which a Reasonable Person, and They In Particular, Should Have Known

First, the evidence presented in the Separate Statement makes it clear that both Grimm and Harrigfeld personally participated in retaliating against the Plaintiffs by silencing them, by threatening their jobs, by depriving them of promotional opportunities by promoting under- and unqualified favorites, and by applying unfair and ineffective hiring, promotions, disciplinary, and

problem solving processes to the detriment of the Plaintiffs and to the benefit of the Defendants' favorites. Both Harrigfeld and Grimm—a licensed counselor and a nurse, respectively-- also personally knew, or should have known, that McCormick posed a threat to CY and to other male juveniles.

That misconduct is particularly transparent in the case of Ledford, whose communications, emails, and interactions with the Plaintiffs and others coworkers were relentlessly tracked by Harrigfeld, Grimm, and Cloud for over a year prior to the filing of this action. All three of those people either denied that they had done so in the summer of 2011, or they could not remember why they might have done so long before this action commenced. However, the written correspondence so recently disclosed to the Plaintiffs makes it clear that their conduct toward Ledford, and certainly toward the other Plaintiffs, was deliberate, calculated, and outrageously negligent while they permitted McCormick and Pines ample opportunity to exploit the juveniles for whom the Defendants should have been caring.

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IV. CONCLUSION

Based upon the foregoing points and authorities, upon the many genuine issues of material fact that are presented in the Plaintiffs' Separate Statement of Genuine Issues, upon the evidence presented in the Declaration of Andrew T. Schoppe, upon all of the documents and papers in the Court's file herein, and upon such other and further argument as may be presented at the hearing on this matter, the Plaintiffs respectfully request that the Court deny the Defendants' Motion for Summary Judgment in its entirety, and permit the Plaintiffs to proceed to try their claims before a jury as the trier of fact.

Respectfully submitted,

DATE: February 6, 2014

THE LAW OFFICE OF
ANDREW T. SCHOPPE, PLLC

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2013, I served a true and correct copy of the documents listed hereinbelow upon the parties and/or their respective attorneys of record in this litigation:

PLAINTIFFS' MEMORANDUM IN RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The parties/attorneys upon whom said documents were served are as follows:

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