

STATE OF IDAHO)
County of KOOTENAI)^{ss}

FILED _____

AT _____ O'clock _____ M
CLERK, DISTRICT COURT

Deputy

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

ANGELA BAKER,

Plaintiff,

vs.

INNERCEPT, LLC,

Defendant.

Case No. **CV 2016 750**

**MEMORANDUM DECISION AND
ORDER GRANTING DEFENDANT'S
REQUEST FOR FEES AND COSTS
AND DENYING PLAINTIFF'S MOTION
TO DISALLOW FEES**

I. PROCEDURAL BACKGROUND

This matter is before the Court on Defendant Innercept, LLC's Memorandum of Costs and Fees/Claim for Attorney's Fees and the Affidavit of Mark A. Ellingsen in Support of Defendant's Memorandum of Costs and Fees/Claim for Attorney's Fees, both filed on June 6, 2016, and on Plaintiff Angela Baker's Motion to Disallow Fees Pursuant to IRCP 54(e) and Memorandum in Opposition to Award of Fees Pursuant to IRCP 54(e), both filed June 17, 2016. On July 25, 2016, this Court heard oral argument on both motions. For the reasons set forth below, the Court grants costs and fees to Defendant and denies Plaintiff's Motion to Disallow Fees.

II. STANDARD OF REVIEW

“In those circumstances where attorney fees can properly be awarded, the award rests in the sound discretion of the court and the burden is on the disputing party to show an abuse of discretion in the award.” *Burns v. County of Boundary*, 120 Idaho 623, 625, 818 P.2d 327, 329 (Ct. App. 1990). The appellate court conducts a three-stage inquiry: 1) whether the lower court rightly perceived the issue as one of discretion; 2) whether the court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and 3) whether the court reached its decision by an exercise of reason. *Id.*

III. ANALYSIS

Defendant claims attorney fees under Idaho Code § 12-120(3) and Idaho Rule of Civil Procedure 54(e). Defendant’s Memorandum of Costs and Fees/Claim for Attorney’s Fees, p. 1. Each of these claims will be discussed below.

A. Entitlement to Attorney Fees Idaho Code § 12-120(3)

Pursuant to Idaho Code § 12-120(3), the prevailing party in an action brought for breach of an employment contract is entitled to fees. Specifically, Idaho Code § 12-120(3) provides in pertinent part:

In any civil action to recover on [a] . . . contract relating to the purchase or sale of . . . services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.

I.C. § 12-120(3). “Actions brought for breach of an employment contract are considered commercial transactions and are subject to the attorney fee provision of I.C. § 12-120(3).” *Willie v. Bd. of Trustees*, 138 Idaho 131, 136, 59 P.3d 302, 307 (2002) (citing *Northwest Bec Corp. v. Home Living Servs.*, 136 Idaho 835, 842, 41 P.3d 263, 270

(2002); *Treasure Valley Gastroenterology Specialists, P.A. v. Woods*, 135 Idaho 485, 492, 20 P.3d 21, 28 (Ct. App. 2001)). There is no dispute that Defendant was the prevailing party. The question is whether the gravamen of this case was an employment contract action or an action based upon a violation of Idaho Code § 44-2701 *et seq.* which implicated public policy.

Defendant claims it is entitled to attorney's fee pursuant to Idaho Code § 12-120(3) because Plaintiff's only cause of action was the wrongful termination of her employment contract by Defendant. Innercept's Reply Memorandum to Plaintiff's Opposition to Innercept's Claim for Attorney's Fees, p. 3. As actions on employment agreements are subject to Idaho Code § 12-120(3), Defendant contends it is entitled to its award of attorney's fees. In response, Plaintiff disputes that Idaho Code § 12-120(3) applies to this action because she argues the issue in the instant action was "whether Defendant's actions violated I.C. § 44-2701 *et seq.* and whether such violation implicated Idaho public policy." Memorandum in Opposition to Award of Fees Pursuant to I.R.C.P. 54(e), p. 5.

Plaintiff initiated the instant action, alleging she was wrongfully terminated in violation of public policy. Complaint, pp. 6–7, ¶¶ 3.1–3.12. Plaintiff argued she was terminated in contravention of public policy for two reasons: 1) because she was engaging in a protected activity by exercising her legal right or privilege in refusing to sign an illegal agreement; and 2) because she was "performing an important public obligation by requesting that her employer not force her or its other employees to sign an agreement which was unlawfully restrictive in light of Idaho statutes on point, specifically Idaho Code Title 44, Chapter 27." Complaint, p. 7, ¶ 3.9. However, this

Court held in its May 19, 2016, Memorandum Decision and Order Granting Defendant's Motion for Summary Judgment that, "as a matter of law, Plaintiff has failed to state a proper claim for wrongful termination under the public policy exception." Memorandum Decision and Order Granting Defendant's Motion for Summary Judgment, p. 17. Plaintiff now attempts to bootstrap her failed public policy and statutory arguments into her objection to Defendant's request for fees and costs.

Relying on *Willie v. Board of Trustees*, 138 Idaho 131, 59 P.3d 302 (2002), Plaintiff contends fees are improper in this case because she alleged that Defendant's conduct implicated public policy, and fees for such claims are specifically exempted from Idaho Code § 12-120(3). Memorandum in Opposition to Award of Fees Pursuant to I.R.C.P. 54(e), pp. 5–6. Plaintiff fails to recognize a key distinction between the instant case and *Willie*. In *Willie*, the plaintiff actually made a claim based upon a legitimate public policy recognized under Idaho law. In part, the plaintiff claimed his employment contract was not renewed because of his union activity. Termination based upon union membership or activities violates public policy under Idaho law. *Watson v. Idaho Falls Consol. Hospitals, Inc.*, 111 Idaho 44, 720 P.2d 632 (1986); *Roberts v. Bd. of Trustees, Pocatello School Dist. No. 25*, 134 Idaho 890, 11 P.3d 1108 (2000). While the court in *Willie* found there was no evidence to support a connection between the plaintiff's union activities and his employment contract not being renewed, because he actually made claims based upon public policy, the defendants were barred from receiving fees on those claims.

Here, Plaintiff failed to actually make a claim based upon public policy. At no time has Plaintiff directed the Court to a specific public policy interest created under

Idaho law. Rather, she directed the Court to a statute that this Court held does not set forth a public policy exception to termination of employment. Specifically, this Court found there is “no public policy exception for terminating an employee who attempts to negotiate.” Memorandum Decision and Order Granting Defendant’s Motion for Summary Judgment, p. 15 (citing *Sorensen v. Comm Tek, Inc.*, 118 Idaho 664, 668, 799 P.2d 70, 74 (1990)). While it is true that attorney’s fees for claims based upon public policy are exempted under Idaho Code § 12-120(3), to bar fees, the public policy must actually exist. Plaintiff has failed to raise a legitimate public policy claim. She never cited the Court to a provision of the Idaho Constitution or Idaho statute that creates a public policy exemption for termination of an at-will employee under the facts set forth in this case. To now claim that Plaintiff does not have to pay attorney fees pursuant to her alleged public policy exception is short sighted because it is a continuation of the same error she raised on summary judgment. As such, Plaintiff cannot shield herself from attorney’s fees simply by baselessly re-alleging her termination implicated public policy.

Plaintiff also claims pursuant to *Scott v. Buhl Joint School Dist. No. 412*, 123 Idaho 779, 852 P.2d 1376 (1993), that because she was seeking relief upon the basis of a non-competition statute, Idaho Code § 44-2701 *et seq.*, and not seeking relief under an employment contract, Defendant is not entitled to fees under Idaho Code § 12-120(3). Memorandum in Opposition to Award of Fees Pursuant to I.R.C.P. 54(e), p. 4–5. In *Scott*, an unsuccessful bidder brought an action alleging, among other things, that the defendant failed to follow a competitive bidding statute when awarding a contract for public school transportation. The Idaho Supreme Court held the relief sought was based upon the competitive bidding statute, not a contractual relationship. As such, it declined to award attorney fees under 12-120(3) because no commercial transaction

was involved.

In this case, Plaintiff attempts to rely upon a statute that does not create a cause of action under these circumstances. Plaintiff never signed the non-competition agreement. Idaho Code § 44-2701 *et seq.* applies to executed non-competition agreements. Had Plaintiff executed the non-competition agreement and Defendant later attempted to enforce it in a lawsuit against her, she could raise the issue of enforceability as an affirmative defense in that lawsuit. In that case, the remedy pursuant to Idaho Code § 44-2703 would simply be that the court would modify the non-competition agreement to make it reasonable. Idaho Code § 44-2701 *et seq.* does not create a cause of action for wrongful termination. It was at all times impossible for Plaintiff to seek relief upon the basis of that statute under these circumstances. Idaho Code § 44-2701 *et seq.* is not triggered until the non-competition agreement is executed and one of the parties subsequently attempts to enforce it. None of those prerequisites happened in this case. Accordingly, Plaintiff cannot rely upon an inapplicable statute to object to attorney's fees.

Finally, Plaintiff argues pursuant to *Atwood v. Western Const., Inc.*, 129 Idaho 234, 923 P.2d 479 (Ct. App. 1996), that since the gravamen of her claim was the alleged violation of a statute, Idaho Code § 44-2701 *et seq.*, and not upon a contract, Idaho Code § 12-120(3) does not apply. Memorandum in Opposition to Award of Fees Pursuant to I.R.C.P. 54(e), p. 4. It is impossible for the gravamen of Plaintiff's claim to be a violation of a statute that governs non-competition agreements when Plaintiff never executed such an agreement. Plaintiff was an at-will employee that was terminated by Defendant. The recovery she sought was for damages. Idaho Code § 44-2701 *et seq.* provides that the remedy is modification of the non-competition agreement to make it

reasonable. The remedy she seeks is not even provided under the statute she erroneously asserts as the basis for her wrongful termination claim. If the remedy sought cannot be provided by the statute one seeks recovery under, how can the cause of action be based upon said statute? If Plaintiff wanted to dispute the enforceability of the non-competition agreement, she needed to execute it once Defendant sought to enforce it against her, and request that this Court modify it pursuant to Idaho Code § 44-2701 *et seq.* The gravamen of Plaintiff's claim is that she should have been allowed to negotiate the non-competition agreement prior to executing it without consequences. There is no statute that sets forth such a cause of action as alleged by Plaintiff. As Plaintiff's claim was that she was wrongfully terminated for attempting to negotiate the terms of the non-competition agreement, and no statute prohibits termination under that theory, her claim was not rooted in a statute. As such, the gravamen of her claim cannot be the alleged violation of a statute.

For the above-stated reasons, Defendant's request for fees and costs are not barred by Idaho Code §12-120(3). Accordingly, Plaintiff Angela Baker's Motion to Disallow Fees Pursuant to IRCP 54(e) must be denied, and Defendant is entitled to reasonable attorney fees.

B. Amount of Attorney Fees Under Idaho Rule of Civil Procedure 54(e)

Idaho Rule of Civil Procedure 54(d) states that costs shall be allowed as a matter of right to the prevailing party or parties unless otherwise ordered by the court. I.R.C.P. 54(d)(1)(A) (emphasis added). Costs include costs actually paid, which are awarded as a matter of right, and discretionary costs, which may be allowed upon a showing that the costs were necessary and reasonably incurred and should be assessed against the

adverse party in the interest of justice. I.R.C.P. 54(d)(1)(C),(D). In ruling upon objections to discretionary costs, the trial court shall make express findings as to why each specific item of discretionary cost should or should not be allowed. I.R.C.P. 54(d)(1)(D). A court may upon its own motion disallow any items of discretionary costs and shall make express findings supporting such disallowance. *Id.* (emphasis added).

In determining who is the prevailing party, the trial court shall in its discretion consider the final judgment or result in an action in relation to the relief sought by the parties. I.R.C.P. 54(d)(1)(B). There can be no dispute that Defendant is the prevailing party in this action. The Court specifically finds Defendant to be the prevailing party.

An award of costs, as stated in the rule itself, is committed to the sound discretion of the court. *Zimmerman v. Volkswagen of America, Inc.*, 128 Idaho 851, 857, 920 P.2d 67, 73 (1996). The grant or denial of discretionary costs is also committed to the discretion of the court. Such an award or denial will only be set aside for an abuse of that discretion. *Fish v. Smith*, 131 Idaho 492, 493, 960 P.2d 175, 176 (1998).

Defendant requests costs in the amount of \$136.00 (filing fee) and attorney fees as costs in the amount of \$25,507.00, for 96.8 hours of time spent on the case by various attorneys within the Witherspoon Kelley firm at various hourly rates, and for 10 hours of time spent by a paralegal at \$100.00 an hour. Defendant's Memorandum of Costs and Fees/Claim for Attorney's Fees, p. 2; Affidavit of Mark A. Ellingsen in Support of Defendant's Memorandum of Costs and Fees/Claim for Attorney Fees, p. 3, ¶ 11. Counsel for Defendant has set forth in his affidavit the facts which are pertinent to an analysis under I.R.C.P. 54(e)(3)(A)-(L). Affidavit of Mark A. Ellingsen in Support of

Defendant's Memorandum of Costs and Fees/Claim for Attorney Fees, pp. 1-4, ¶¶ 2-11.

Plaintiff claims the amount of attorney's fees requested by Defendant are not reasonable. Memorandum in Support of Motion to Disallow Fees, pp. 6-9. Specifically, Plaintiff claims that 22.6 hours spent by defense counsel on the case were unreasonable for reasons such as "interoffice activity", "unnecessary review", "Secretarial/Administrative function", "duplicative", and "not relevant to the case." *Id.*, pp. 7-9. The Court has reviewed each of those objections by Plaintiff and finds them to be without merit. There is nothing in the time sought for the task provided that would convince the Court that the work was "unnecessary", "duplicative" or "not relevant to the case." While docketing may be a secretarial function in some offices, the Court can think of a host of reasons why the attorney would want to be responsible for docketing functions. The objection "interoffice activity" has really no meaning. If more than one attorney is involved on a case, by definition there will need to be "interoffice activity". Counsel for Plaintiff contends in her Memorandum in Support of Motion to Disallow Fees that a February 4, 2016, telephone conference between her and defense counsel did not last twelve minutes. Memorandum in Support of Motion to Disallow Fees, p. 7. However, that contention is not in the form of an affidavit or a declaration, so there is no admissible evidence to support such claim. Additionally, the claim begs the question as to whether the call lasted more than six minutes, as we all know that if it did, the next incremental billing unit will be what is claimed by any attorney. Thus, if the phone call lasted seven minutes, a claim for two six-minute units is fair. The Court specifically finds, with the exception of the item in the paragraph immediately below, that considering all factors in I.R.C.P. 54(e)(3)(A)-(L), in light of the documentation provided

by Defendant and considering the objections voiced by Plaintiff, there is no reason for either an upward or downward departure from the attorney fee amounts sought by Defendant. In other words, this Court finds the attorney fee amounts sought by Defendant are reasonable.

The only item the Court cannot countenance is \$348.00 being requested for attorney travel time for the summary judgment hearing. This is sought at that attorney's full rate of \$290.00 per hour. Had a reduced hourly rate indicative of only the overhead for that attorney's travel time been sought, the Court would have likely granted such. In this Court's opinion, neither that attorney's client nor the opponent should be required to pay the full hourly rate for that attorney travelling to a courthouse. Thus, the Court reduces the amount of attorney fees requested by \$348.00.

The only cost sought by defendant is \$136.00 for the filing fee for Defendant's Answer to the Plaintiff's Complaint. Defendant's Memorandum of Costs and Fees/Claim for Attorney's Fees, p. 2. This is a cost reasonably incurred as a matter of right under I.R.C.P. 54(d)(1)(C)(i), and is allowed.

IV. ORDER

IT IS HEREBY ORDERED Defendant's Memorandum of Costs and Fees/Claim is GRANTED in the amount of \$25,159.00 for reasonable attorney fees, and in the amount of \$136.00 for costs, for a total of \$25,431.00 in costs and fees.

IT IS FURTHER ORDERED that counsel for Defendant prepare a Judgment consistent with this Memorandum Decision and Order.

IT IS FURTHER ORDERED Plaintiff Angela Baker's Motion to Disallow Fees Pursuant to IRCP 54(e) is DENIED.

DATED this 18th day of August, 2016

JOHN T. MITCHELL, District Judge

Certificate of Service

I certify that on the _____ day of August, 2016, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>		<u>Lawyer</u>	<u>Fax #</u>
Kammi Mencke Smith Winston & Cashatt	208 765-2121		Mark A. Ellingsen Witherspoon Kelley	208 667-8470

Jeanne Clausen, Deputy Clerk