

ERIKA BIRCH (Bar No. 7831)
LAUREN SCHOLNICK (Bar No. 7579)
STRINDBERG & SCHOLNICK, LLC
671 E. Riverpark Ln., Ste. 130
Boise, Idaho 83706
tele: 208.336.1788
fax: 208.344.7980
Attorneys for Plaintiff

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

PAMELA LOWE

Plaintiff,

vs.

IDAHO TRANSPORTATION
DEPARTMENT, an executive department of
the state of Idaho, and DARRELL
MANNING, Chairman of the Board, R.
JAMES COLEMAN, Board Member,
JERRY WHITEHEAD, Board Member,
GARY BLICK, Board Member, NEIL
MILLER, Board Member, and LEE
GAGNER, Board Member, in their individual
and official capacities,

Defendants.

**SECOND AMENDED
COMPLAINT AND DEMAND
FOR JURY**

Case No.09-CV-00653-REB

Judge Ronald E. Bush

Plaintiff, Pamela Lowe (“Ms. Lowe”), by and through her attorneys, hereby complains
against Defendants as follows:

I. NATURE OF THE CLAIMS

1. This suit is brought by the former director of the Idaho Transportation Department (“ITD”).
2. Plaintiff seeks all available equitable relief, damages, attorney fees, cost and interest, as well as declaratory and injunctive relief.

II. PARTIES

3. Plaintiff Pamela Lowe is an adult individual, competent to bring this action, a citizen of the State of Idaho, and a resident of Ada County, Idaho. At all times relevant to her claims, she was an employee of ITD, until her termination.
4. Defendant Idaho Transportation Department is an executive department of the state of Idaho established pursuant to Idaho law. Idaho Code Annotated (“I.C.A.”) § 40-501.
5. The head of the Department is the Idaho Transportation Board. I.C.A. § 40-501.
6. The Idaho Transportation Board (the “Board”) is established pursuant to Idaho Code § 40-301 and is “vested with authority, control, supervision and administration of the department created and established by this title.”
7. The Board is composed of seven members appointed by the governor. I.C.A. § 40-302.
8. Defendant Darrell V. Manning is, and has been since January 2007, the chairman of the Board. He is a citizen of the State of Idaho and a resident of Ada County.
9. The other members of the Board at the time Ms. Lowe was terminated included: R. James Coleman, Bruce Sweeney, Jerry Whitehead, Gary Blick, Neil Miller and Lee Gagner.

10. Defendant R. James Coleman is a citizen of the State of Idaho and a resident of Kootenai County.

11. Defendant Jerry Whitehead is a citizen of the State of Idaho and a resident of Ada County.

12. Defendant Gary Blick is a citizen of the State of Idaho and a resident of Twin Falls County.

13. Defendant Neil Miller is a citizen of the State of Idaho and a resident of Bingham County.

14. Defendant Lee Gagner is a citizen of the State of Idaho and a resident of Bonneville County.

III. JURISDICTION AND VENUE

15. The Defendant recently removed this case, originally filed in the Fourth Judicial District in Ada County, Idaho, to federal court pursuant to 28 U.S.C. §§ 1441(b) and 1446. This Court has original jurisdiction under the provisions of 28 U.S.C. § 1331 with respect to Plaintiff's claims arising under federal law, and supplemental jurisdiction pursuant to 28 U.S.C. § 1367 with respect to Plaintiff's state law claims.

16. Venue is proper with this Court as ITD's principal place of business is within the jurisdiction of the Court and the conduct that occurred was within the jurisdiction of the Court.

IV. GENERAL ALLEGATIONS

17. Ms. Lowe began working for ITD as a Construction Associate in September 1993.

18. Throughout her career at ITD, Ms. Lowe performed satisfactorily and received many promotions.

19. In 2000 Ms. Lowe was promoted to District Engineer position; in 2004 she became the Administrator of the Division of Motor Vehicles; and in September 2006, she was appointed Deputy Director of ITD.

20. Just a few months later, in December of 2006, Ms. Lowe was promoted to ITD Director, the first female director.

21. Upon information and belief, when her appointment to the Director position was being considered, Board member Gary Blick stated that “no little girl would be able to run this department” or words to that effect. Mr. Blick also questioned Ms. Lowe’s appointment by rhetorically asking, “What are we going to do when she [Ms. Lowe] decides to start a family?”

22. The Director is appointed by the Board pursuant to Idaho Code § 40-503.

23. Further, § 40-503 states that, “The director shall serve at the pleasure of the board and may be removed for inefficiency, neglect of duty, malfeasance or nonfeasance in office”

24. Throughout her tenure as ITD’s Director, Ms. Lowe received satisfactory performance evaluations and was never informed of any deficiencies in her performance.

25. The last review Ms. Lowe received from the Board before she was terminated was in March of 2008 and concluded that she “achieves solid sustained performance.”

26. This review also stated, “[D]uring the first year as Director, Mrs. Lowe has quickly taken charge of the Department. She excelled in reviewing the conditions of the department's functions and making needed changes in personnel, functions, and organization She identified over \$50 million in savings that will be directed to improved highway operations. Mrs. Lowe is an excellent manager and has exceptional ability as a professional engineer. In this rating period she has completed all assignments made by the Transportation Board.”

27. In 2006 URS-Washington Group Division and CH2M HILL company, together known as Connecting Idaho Partners (“CIP”), were selected by the Board to be Program Managers for ITD’s Grant Anticipation Revenue Vehicle bond program (“GARVEE”). The GARVEE program allows ITD to finance projects based on anticipated, future federal aid dollars by selling bonds. The initial state contract to CIP was worth approximately \$50 million dollars.

28. Washington Group, CH2M Hill and members of both company’s board of directors and staff and their families were significant campaign contributors to Governor C. L. “Butch” Otter and Senator John McGee, Chairman of the Senate Transportation Committee.

29. During a February 2007 Joint Finance and Appropriations Committee hearing on ITD’s budget, Ms. Lowe told legislators that she would take a detailed look at CIP’s contract, renegotiating a reduction in it by shifting to ITD as much work as possible .

30. Within a few hours of this presentation, Ms. Lowe and Mr. Manning were called into a meeting with Jeff Malmen, then Governor Otter’s Chief of Staff. Mr. Malmen was extremely upset and told Ms. Lowe that she should not have said she would renegotiate CIP’s contract.

31. After this meeting, Mr. Manning asked Ms. Lowe to provide him with a list of all ITD contractors so he could ask the Governor’s office which ones they wanted to be involved with. Ms. Lowe provided Mr. Manning with a list on February 12, 2007.

32. Sometime after this meeting, Mr. Manning also told Ms. Lowe that she “needed to be careful with CIP,” and that the “Governor could be compromised.”

33. Ms. Lowe was not deterred by these threats. Determined to do what was in the best interest of the state and its citizens, she removed several projects from the contract for ITD to administer in-house during CIP's contract renegotiation.

34. Further, in Summer 2008, Ms. Lowe directed ITD staff to take back program management so as to phase out the CIP contract as quickly as possible.

35. In Fall 2008, Mr. Manning once again cautioned Ms. Lowe that she should not take program management from CIP because the Governor would not like it.

36. In January 2009, during the Board's executive session on stimulus projects, Ms. Lowe and her Deputy Director told the Board that ITD staff could manage, oversee and get all the stimulus projects ready to go out to contractors. Mr. Manning urged Ms. Lowe to contract out the stimulus management/oversight to CIP, but Ms. Lowe declined to do this.

37. CIP contract renegotiations were scheduled to begin shortly after the 2009 legislative session. Ms. Lowe intended to move a significant portion of the work back to ITD during these renegotiations.

38. In March 2009, Senator McGee introduced a bill which would have stripped the Board of its authority to appoint and remove with cause the Director and gave that power to the Governor who would be able to remove the Director "at his pleasure." Senate Bill No. 1160 also would have removed the requirement that the Director have "knowledge and experience in transportation matters."

39. In April 2009, Mr. Manning told Ms. Lowe "we got [the bill] stopped." Mr. Manning did not explain how he was able to convince Senator McGee to hold the bill. Upon

information and belief, Mr. Manning and/or other members of the ITD Board promised Senator McGee that they would get rid of Ms. Lowe if he held his bill in committee.

40. On May 11, 2009, three days after the legislative session ended, Mr. Manning asked Ms. Lowe for her resignation. Although he praised her saying that ITD was performing well, as was she in running it, he intimated that there was some unhappiness with her political relationships.

41. Ms. Lowe subsequently met with the Board and asked why she was being asked to resign.

42. Once again, Mr. Manning and the other Board members stated that although she was performing well, some politicians were concerned with Ms. Lowe's leadership. Although no specifics were provided, certain Board members identified Senator McGee and/or his bill which would have given Governor Otter the authority to remove her as the political motivation.

43. Ms. Lowe explained to the Board that because the reasons it gave for asking her to resign were insufficient and its allegations unsubstantiated she refused to voluntarily resign from her position.

44. On July 16, 2009 without proper grounds for her dismissal, as defined by statute, the Board voted unanimously to terminate Ms. Lowe's employment with ITD effective July 31, 2009.

45. The Board also refused Ms. Lowe a hearing in which to challenge her termination.

46. In November 2009, the Board announced that it had selected Brian W. Ness to serve as ITD's next director beginning January 11, 2010.

47. Upon information and belief, ITD will pay Ness \$165,000 per year.

48. Ms. Lowe's last annual salary at ITD was \$143,000. Thus, Ness will be paid \$22,000 more a year for doing the same job.

V. FIRST CLAIM FOR RELIEF
(Wrongful Termination in Violation of Idaho Code Section 6-2101 *et seq.*
Against Defendant ITD)

49. Plaintiff incorporates the allegations of the above paragraphs herein.

50. Ms. Lowe was an employee who engaged in or intended to engage in protected activity.

51. Specifically, Ms. Lowe communicated in good faith her intent to conserve public funds by further reducing the CIP contract after the legislative session was over. She had previously made statements on this subject and had already reduced CIP's contract by moving projects in-house to ITD. CIP is a significant campaign contributor to both Governor Otter and Senator McGee. Ms. Lowe was repeatedly warned and harassed by the Governor's staff and Mr. Manning about taking work away from CIP. Senator McGee also introduced a bill that would have allowed the Governor to summarily terminate Ms. Lowe to punish her for cutting CIP's contract.

52. ITD took adverse action against her by terminating her employment before she could renegotiate the CIP contract and return work to ITD, a cost-saving measure.

53. There is a causal connection between the protected activity and the employer's adverse action.

54. Ms. Lowe seeks all available injunctive relief including reinstatement, and actual damages including lost wages and benefits, as well as costs and attorneys fees.

VI. SECOND CLAIM FOR RELIEF
**(Deprivation of Plaintiff's Property Interest Without Due Process
in Violation of 42 U.S.C. § 1983 against all Individual Defendants)**

55. Plaintiff incorporates the allegations of the above paragraphs herein.

56. Ms. Lowe had property interest in her employment and a reasonable expectation that her employment would continue.

57. Idaho Code specifically provides that Ms. Lowe can only be removed from her Directorship for cause, specifically for "inefficiency, neglect of duty, malefeasance or nonfeasance in office." I.C.A. § 40-503(1).

58. Defendants' termination of Ms. Lowe violated her rights to due process of law under the United States Constitution by firing her and by denying her a hearing and right to appeal her termination.

59. At all times relevant hereto, Defendants acted under color of state law when committing the acts complained of.

60. The Board had final policymaking authority and exercised that authority in terminating Plaintiff in violation of the U.S. Constitution.

61. Defendants' conduct violated Ms. Lowe's Fourteenth Amendment rights by depriving her of a property interest without due process.

62. Defendants' conduct violated the clearly established constitutional right to due process of which a reasonable person would have known.

63. As a result of the Defendants' actions, Ms. Lowe has suffered and will continue to suffer losses. Ms. Lowe is entitled to injunctive and prospective relief, pursuant to 42 U.S.C. § 1983, *et seq.*, including but not limited to: reinstatement, back pay and lost benefits, and attorneys'

fees and costs as against Defendants Darrell Manning, R. James Coleman, Jerry Whitehead, Gary Blick, Neil Miller and Lee Gagner (“Board-Defendants”) in their official capacity.

64. Additionally, Ms. Lowe is entitled to compensatory damages as against these same Defendants in their individual capacity.

VII. THIRD CLAIM FOR RELIEF
(Deprivation of Property Interest without Due Process
in Violation of Article I, §13 of the Idaho State Constitution against all Defendants)

65. Plaintiff incorporates the allegations of the above paragraphs herein.

66. Ms. Lowe had property interest in her employment and a reasonable expectation that her employment would continue.

67. Idaho Code specifically provides that Ms. Lowe can only be removed from her Directorship for cause, specifically for “inefficiency, neglect of duty, malefeasance or nonfeasance in office.” I.C.A. § 40-503(1).

68. Defendants’ conduct violated Ms. Lowe’s rights under Article I, §13 of the Idaho constitution, by depriving her of a property interest without due process.

69. At all times relevant, Defendants acted under color of state law when committing the acts complained of.

70. The Board had final policymaking authority and exercised that authority in terminating Plaintiff in violation of the Idaho Constitution.

71. Defendants’ conduct violated clearly established constitutional rights of due process of which a reasonable person would have known.

72. As a result of the Defendants' actions, Ms. Lowe has suffered and will continue to suffer losses. Ms. Lowe is entitled to injunctive and prospective relief, reinstatement, back pay and lost benefits, compensatory damages, and attorneys' fees and costs.

VIII. FOURTH CLAIM FOR RELIEF
**(Deprivation of Plaintiff's Liberty Interest Without Due Process
in Violation of 42 U.S.C. § 1983 against All Individual Defendants)**

73. Plaintiff incorporates the allegations of the above paragraphs herein.

74. Plaintiff had property interest in her employment and a reasonable expectation that her employment would continue.

75. Plaintiff also had a liberty interest in both her good name and reputation and in continued and future employment.

76. Defendants infringed upon these liberty interests by impugning the good name, reputation, honor, and integrity of Plaintiff by terminating her employment and making false allegations of unsatisfactory job performance.

77. Defendants' allegations of Plaintiff's unsatisfactory job performance are part of her personnel file and were made known to the public at large and those in her industry. Therefore, these false allegations impose a stigma on her professional reputation.

78. As a result of Defendants' wrongful conduct, Plaintiffs' professional reputation has been adversely impacted and it has foreclosed other employment opportunities.

79. As a further result of the Defendants' actions, Plaintiff has suffered and will continue to suffer losses. Plaintiff is entitled to injunctive relief, pursuant to 42 U.S.C. § 1983, *et seq.*, including but not limited to: reinstatement, back pay and lost benefits, and attorneys' fees and costs against Board-Defendants in their official capacity.

80. Plaintiff is also entitled to the reinstatement, back pay and lost benefits, compensatory damages, and attorneys' fees and costs against the Board-Defendants in their individual capacities.

IX. FIFTH CLAIM FOR RELIEF
**(Deprivation of Plaintiff's Liberty Interest Without Due Process
in Violation of Article I §13 of the Idaho State Constitution against all Defendants)**

81. Plaintiff incorporates the allegations of the above paragraphs herein.

82. Plaintiff had property interest in her employment and a reasonable expectation that her employment would continue.

83. Plaintiff also had a liberty interest in her good name and reputation and in continued and future employment.

84. Defendants infringed upon these liberty interests by impugning the good name, reputation, honor, and integrity of Plaintiff by terminating her employment and making false allegations of unsatisfactory job performance.

85. Defendants' allegations of Plaintiff's unsatisfactory job performance are part of her personnel file and were made known to the public at large and those in her industry. Therefore, these false allegations impose a stigma on her professional reputation.

86. As a result of Defendants' wrongful conduct, Plaintiffs' professional reputation has been adversely impacted and it has foreclosed other employment opportunities.

87. As a further result of the Defendants' actions, Plaintiff has suffered and will continue to suffer non-economic losses. Plaintiff is entitled to injunctive relief, reinstatement, back pay and lost benefits, compensatory damages, and attorneys' fees and costs.

XII. SIXTH CLAIM FOR RELIEF
(Violation of Equal Protection Clause in Violation of 42 U.S.C. § 1983
against All Defendants)

88. Plaintiff incorporates the allegations of the above paragraphs herein.

89. When discussing Ms. Lowe's promotion to the Director position, her gender was specifically referenced as a reason that she should not be promoted and/or that she would not be successful.

90. Upon information and belief, Ms. Lowe's gender was a contributing factor to the Board's decision to terminate her employment in violation of the Equal Protection clause of the United State Constitution.

91. At all times relevant, Defendants acted under color of state law when committing the acts complained of.

92. The Board had final policymaking authority and exercised that authority in terminating Plaintiff in violation of the Constitution.

93. Defendants' conduct violated clearly established constitutional rights of equal protection of which a reasonable person would have known.

94. As a result of the Defendants' actions, Ms. Lowe has suffered and will continue to suffer losses. Ms. Lowe is entitled to injunctive relief, pursuant to 42 U.S.C. § 1983, *et seq.*, including but not limited to: reinstatement, back pay and lost benefits, and attorneys' fees and costs as against Board-Defendants in their official capacity.

95. Additionally, Ms. Lowe is entitled to compensatory damages as against Board-Defendants in their individual capacity.

XII. SEVENTH CLAIM FOR RELIEF
(Violation of Equal Protection Clause
in Violation of Article I § 2 of the Idaho State Constitution against all Defendants)

96. Plaintiff incorporates the allegations of the above paragraphs herein.

97. When discussing Ms. Lowe's promotion to the Director position, her gender was specifically referenced as a reason that she should not be promoted and/or that she would not be successful.

98. Upon information and belief, Ms. Lowe's gender was a contributing factor to the Board's decision to terminate her employment in violation of the Equal Protection clause of the Idaho State Constitution.

99. At all times relevant, Defendants acted under color of state law when committing the acts complained of.

100. The Board had final policymaking authority and exercised that authority in terminating Plaintiff in violation of the Constitution.

101. Defendants' conduct violated clearly established constitutional rights of equal protection of which a reasonable person would have known.

102. As a result of the Defendants' actions, Ms. Lowe has suffered and will continue to suffer losses. Ms. Lowe is entitled to injunctive relief, reinstatement, back pay and lost benefits, compensatory damages, and attorneys' fees and costs.

XIII. EIGHTH CLAIM FOR RELIEF
(Violation of Equal Pay Act against all Defendants)

103. Plaintiff incorporates the allegations of the above paragraphs herein.

104. By paying Plaintiff at a rate less than her male replacement for substantially equal work on a job requiring substantially equal skill, effort and responsibility under similar work conditions, Defendants violated the EPA.

105. Because Defendants paid her less than it paid her male replacement, Ms. Lowe has suffered and will continue to suffer economic losses.

106. As a result of Defendants' violation of the EPA, Ms. Lowe is entitled to recover the amount of wages she would have been paid in the absence of the violation, an equal amount as liquidated damages, and prejudgment interest on those amounts.

107. Ms. Lowe is entitled to recover all attorneys' fees and costs expended in prosecuting this action.

108. Ms. Lowe is entitled to other such relief as this Court deems appropriate.

WHEREFORE, Plaintiff, respectfully requests that the Court enter judgment in her favor and against Defendants, and award the following relief:

- a. Injunctive and/or declaratory relief;
- b. Reinstatement and/or front pay in lieu of reinstatement;
- c. Back pay, in amounts to be determined at trial;
- d. Compensatory damages;
- e. Pre-judgment and post-judgment interest at the highest lawful rate;
- f. Attorneys' fees and costs of this action, including expert witness fees, as appropriate; and
- g. Any such further relief as justice allows.

PLAINTIFF DEMANDS A JURY TRIAL ON ALL ISSUES SO TRIABLE.

Dated this 30th day of December, 2009.

STRINDBERG & SCHOLNICK, LLC

/S/ Erika Birch
Attorneys for Plaintiff

Plaintiff's Address:
Boise, Idaho