

1 **13-2307A. Race, gender, and other discrimination under the New Mexico Human Rights Act.**

2 To establish that _____ (*the defendant*) discriminated against
3 _____ (*the plaintiff*) based on ~~[[his][her]]~~ _____ (*the plaintiff's*)
4 [race] [age] [religion] [color] [national origin] [ancestry] [sex] [serious medical condition]
5 [physical or mental handicap] [sexual orientation][gender identity] [spousal affiliation],
6 _____ (*the plaintiff*) has the burden of proving the following:

7 (1) that _____ (*the plaintiff*) was "otherwise qualified" for
8 _____ (*the position in question*);¹

9 (2) that _____ (*the defendant*) _____ (*insert adverse*
10 *action, i.e., refused to hire, fired, failed to promote, demoted, or discriminated in matters of*
11 *compensation terms, conditions, or privileges of employment against*) _____ (*the*
12 *plaintiff*);

13 (3) that _____ (*the plaintiff's*) _____ [race] [age]
14 [religion] [color] [national origin] [ancestry] [sex] [serious medical condition] [physical or mental
15 handicap] [sexual orientation] [gender identity] [spousal affiliation] was a motivating factor in
16 _____ (*the defendant's*) _____ (*insert adverse action,*
17 *i.e., refusing to hire, firing, failing to promote, demoting, or discriminating in matters of*
18 *compensation terms, conditions, or privileges of employment against*) _____ (*the*
19 *plaintiff*).

20 [If you disbelieve the reason(s) _____ (*the defendant*) has given for
21 _____ (*insert adverse action*), you may infer that _____ (*the*
22 *defendant*) took this action because of _____ (*the plaintiff's*) [race] [age] [religion]

1 [color] [national origin] [ancestry] [sex] [serious medical condition] [physical or mental handicap]
2 [sexual orientation] [gender identification] [spousal affiliation].]

3 USE NOTES

4 1. The term "otherwise qualified" is defined in UJI 13-2307J NMRA.

5 [Approved by Supreme Court Order No. 10-8300-024, effective September 27, 2010; as amended
6 by Supreme Court Order No. S-1-RCR-2025-00126, effective for all cases pending or filed on or
7 after December 31, 2025.]

8 **Committee commentary.** — This is the basic instruction to be used in cases in which the plaintiff
9 alleges discrimination based on race, gender, or any other trait enumerated in NMSA 1978, § 28-
10 1-7(A) (2004), of the New Mexico Human Rights Act (other than physical or mental handicap or
11 serious medical condition, which are addressed in other instructions in this chapter). New Mexico
12 recognizes pregnancy as a protected status. *See Behrman v. Phototron*, [~~110 N.M. 373, 795 P.2d~~
13 ~~1055 (1990)~~] 1990-NMSC-073, 110 N.M. 323, 795 P.2d 1015. In *Nava v. City of Santa Fe*, 2004-
14 NMSC-039, ¶ 8, 136 N.M. 647, 103 P.3d 571, the New Mexico Supreme Court held that the test
15 for causation in a sexual harassment claim brought under the Human Rights Act was whether the
16 plaintiff's protected status was a motivating factor for the employment practice, and the Court
17 rejected the argument that the plaintiff must prove that but for the protected status (the plaintiff's
18 sex), the employment practice (sexual harassment) would not have occurred.

19 In the context of summary judgment, the New Mexico Supreme Court has considered helpful the
20 federal burden-shifting methodology used under Title VII of the Civil Rights Act of 1964. *See,*
21 *e.g., Juneau v. Intel Corp.*, 2006-NMSC-002, ¶ 9, 139 N.M. 12, 127 P.3d 548 (citing *Smith v. FDC*
22 *Corp.*, [~~109 N.M. 514, 517, 787 P.2d 433, 436 (1990)~~] 1990-NMSC-020, 109 N.M. 514, 787 P.2d
23 433). Specifically, for a claim of unlawful discrimination, our Supreme Court has used the

1 methodology from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). *See Juneau*,
2 2006-NMSC-002, ¶ 9 (citing *Gonzales v. N.M. Dep't of Health*, [2000-NMSC-029, ¶¶ 20-22]
3 2000-NMSC-029, ¶¶ 20-22, 129 N.M. 586, 11 P.3d 550). Under the *McDonnell Douglas*
4 framework, an employee bears the initial burden of demonstrating a prima facie case of
5 discrimination, which then shifts the burden to the employer to provide a legitimate, non-
6 discriminatory reason for the adverse employment action. *Id.* The employee then has the
7 opportunity to rebut the employer's proffered reason as pretextual or otherwise inadequate. *Id.*
8 However, the national trend is that this burden-shifting analysis is only for the purpose of summary
9 judgment, and not to be used by the fact-finder at trial. *See, e.g.,* [~~*Bovee v. State Hwy. and Transp.*~~
10 ~~*Dep't*~~] *Bovee v. State Highway & Transp. Dep't*, 2003-NMCA-025, ¶ 14, 133 N.M. 519, 65 P.3d
11 254; *see also Sonntag v. Shaw*, 2001-NMSC-015, ¶¶ 48-50, 130 N.M. 238, 22 P.3d 1188 (Serna,
12 [J.] C.J., concurring). In *Bovee*, the New Mexico Court of Appeals, in the context of discussing a
13 bench trial, stated that
14 once a plaintiff has made a prima facie case creating a presumption of discrimination, and a
15 defendant has provided a legitimate, non-discriminatory reason in response, the presumption raised
16 by the prima facie case is rebutted and "drops from the case" . . . Thus, the question before a district
17 court in a bench trial on the merits is "the ultimate question of discrimination," not the question of
18 whether a plaintiff has made a prima facie case. Accordingly, although the parties discuss the
19 application of the *McDonnell Douglas* test, because the case was tried on the merits, our focus is
20 whether Plaintiff met [her] the "ultimate burden of persuading the court that [she] [Plaintiff] has
21 been the victim of intentional discrimination." *Bovee*, 2003-NMCA-025, ¶ 14 ([internal citations
22 omitted] internal quotation marks and citation omitted). *See also U.S. Postal [Service] Serv. Bd. of*
23 *Governors v. Aikens*, 460 U.S. 711, 715 (1983).

1 The instruction includes the defendant’s assertion of its reasons for taking the adverse employment
2 action against the plaintiff. The jury is permitted, but not required, to infer that the true reason for
3 the defendant’s action was the plaintiff’s race, gender, or other protected status. *See Sonntag*, 2001-
4 NMSC-015, ¶ 27 (citing *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993)). In instructing
5 the jury on these issues, the trial court must keep in mind that the ultimate burden of persuading
6 the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all
7 times with the plaintiff and should not instruct the jury in a way that implies to the jury any other
8 burden. *Garcia-Montoya v. State Treasurer’s Office*, 2001-NMSC-003, ¶ 39, 130 N.M. 25, 16
9 P.3d 1084.

10 The last bracketed paragraph in this instruction relates to the concept of pretext. In cases in which
11 the plaintiff is relying on circumstantial evidence to prove illegal discrimination, the plaintiff may
12 present evidence that the reason asserted by defendant for the action taken against plaintiff is not
13 credible. In these cases, the jury is permitted, but not required, to infer that the true reason for the
14 defendant's action was the plaintiff's race, gender, or other protected status. *See, e.g.*, [~~*Sonntag v.*~~
15 ~~*Shaw*, 2001-NMSC-015, ¶ 27, 130 N.M. 238, 22 P.3d 1188]~~ *Sonntag*, 2001-NMSC-015, ¶ 27
16 (citing [~~*St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993)]~~ *Hicks*, 509 U.S. at 511). The
17 last bracketed paragraph is to be used in these cases. In instructing the jury on these issues, the
18 trial court must keep in mind that the ultimate burden of persuading the trier of fact that the
19 defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff,
20 [~~*Garcia-Montoya v. State Treasurer’s Office*, 2001-NMSC-003, ¶ 39, 130 N.M. 25, 16 P.3d 1084]~~
21 ~~*Garcia-Montoya*, 2001-NMSC-003, ¶ 39,~~ and should not instruct the jury in a way that implies to
22 the jury any other burden. The last bracketed paragraph should not be used in cases in which a
23 plaintiff is relying only on direct evidence of discrimination, and not circumstantial evidence.

- 1 [Approved by Supreme Court Order No. 10-8300-024[, ~~effective September 27, 2010~~]; as
- 2 amended by Supreme Court Order No. S-1-RCR-2025-00126.]