**PROPOSED REVISIONS TO THE UNIFORM JURY INSTRUCTIONS - CIVIL**
**PROPOSAL 2022-017**

**March 7, 2022**

The Uniform Jury Instructions - Civil Committee has recommended new UJIs 13-2321, 13-2322, 13-2323, 13-2324, 13-2325, 13-2326, and 13-2327 NMRA for the Supreme Court's consideration.

If you would like to comment on the proposed amendments set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's web site at http://supremecourt.nmcourts.gov/open-for-comment.aspx or sending your written comments by mail, email, or fax to:

Sally A. Paez, Deputy Clerk of Court
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
nmsupremecourtclerk@nmcourts.gov
505-827-4837 (fax)

**Your comments must be received by the Clerk on or before April 6, 2022**, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

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**[NEW MATERIAL]**
**13-2321. Whistleblower Protection Act Claim; Elements.**

In this case, you must [also] determine whether _____ (*name of public employer defendant*) violated the Whistleblower Protection Act by taking a retaliatory action in response to _____'s *(name of public employee plaintiff)* engagement in protected activity.

To establish a violation of the Whistleblower Protection Act, _____ (*name of plaintiff*) has the burden of proving each of the following five elements:

1. _____ (*name of defendant*) was a public employer and _____ (*name of plaintiff*) was a public employee.

["Public employer" means [(1) any department, agency, office, institution, board, commission, committee, branch or district of state government]; or [(2) any political subdivision of the state, created under either general or special act, that receives or expends public money from whatever source derived]; [(3) any entity or instrumentality of the state specifically provided for by law]; and/or [(4) every office or officer of any entity listed in Paragraphs (1) through (3) of this subsection].]

["Public employee" means a person who works for or contracts with a public employer.]

2. _____(*name of plaintiff*) engaged in an activity that is protected by the Whistleblower Protection Act.

3. _____ (*name of defendant*) took an adverse action against _____ (*name of plaintiff*).

4. The adverse action was retaliatory in that _____'s (*name of plaintiff*) engagement in the protected activity was a cause of the adverse action.

AND

5. _____(*name of plaintiff*) suffered damages as a result of the retaliatory action.

[In this case, the parties agree that the following elements were met: _____ (*insert element(s) parties agree were met*). What is in dispute is whether the following elements were met: _____ (*insert element(s) parties do not agree were met*).]

USE NOTES

This instruction should be given in every case alleging violation of the Whistleblower Protection Act ("WPA"), NMSA 1978, Sections 10-16C-1 to -6 (2010), and includes the general elements of a WPA claim. The instruction sets out all the elements that must be established for a WPA claim. If there is no factual dispute as to the existence of any particular element, or if the court determines that the element has been established as a matter of law, the last paragraph of the instruction should be given to inform the jury which elements should be taken as established and which elements remain to be determined by the jury. If the public character of the employment is disputed, the drafter should incorporate the bracketed definitions from NMSA 1978, Section 10-16C-2, or equivalent language, to allow the jury to consider whether a party's status comes within the terms of "public employer" or "public employee," as might justify WPA protection.

Following this instruction, the jury should be given supplemental instructions, UJI 13-2322 through 13-2325 NMRA, as applicable, to further instruct on any disputed element. [Adopted by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

**[NEW MATERIAL]**

**13-2322. Whistleblower Protection Act; protected activity.**

To establish that _____ (*name of plaintiff*) engaged in an activity that is protected under the Whistleblower Protection Act, _____ (*name of plaintiff*) has the burden of proving that _____ (*name of plaintiff*):

[communicated information to the public employer or a third party about an action or failure to act that the public employee believed in good faith constituted an unlawful or improper act. Good faith means that a reasonable basis existed for the belief as evidenced by the facts available to the public employee;]

[or]

[provided information to, or testified before, a public body as part of an investigation, hearing or inquiry into an unlawful or improper act;]

[or]

[objected to or refused to participate in an activity, policy, or practice that constitutes an unlawful or improper act.]

"Unlawful or improper act" means a practice, procedure, action, or failure to act on the part of a public employer that:

[violates a federal law, a federal regulation, a state law, a state administrative rule or a law, ordinance, or rule of any political subdivision of the state;]
[or]
[constitutes malfeasance in public office;]
[or]
[constitutes gross mismanagement, a waste of funds, an abuse of authority, or a substantial and specific danger to the public.]

USE NOTES

This instruction should be given in a case alleging violation of the Whistleblower Protection Act ("WPA") if protected activity is in dispute. The instruction consists of two parts. The first part sets out three kinds of conduct – communicating information, providing information or testimony, or objecting to or refusing to participate in certain activities – that an employee might engage in and claim protection under the WPA. The drafter should choose one or more of these activities as applicable to the case. The second part defines the term "unlawful or improper act," which is a term appearing in the descriptions of protected activity. The definition includes three bracketed phrases. The drafter should choose one or more of these phrases as applicable to the case.

[Adopted by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

**[NEW MATERIAL]**

**13-2323. Whistleblower Protection Act; retaliatory action.**

"Retaliatory action" means taking any discriminatory or adverse employment action against a public employee in the terms and conditions of public employment.

USE NOTES

This instruction should be given in a case alleging violation of the Whistleblower Protection Act ("WPA") if there is a dispute about whether the employer's action of which the employee complains is "retaliatory action" as defined by the WPA.

[Adopted by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

**Committee commentary —** The Whistleblower Protection Act forbids public employers from taking "any retaliatory action" against a public employee because the public employee engaged in certain protected conduct. *See* NMSA 1978, § 10-16C-3(A); *see Velasquez v. Regents of Northern N.M. College*, 2021-NMCA-007, ¶ 27, 484 P.3d 970. "Retaliatory action" is defined as "any discriminatory or adverse employment action against a public employee in the terms and conditions of public employment." NMSA 1978, § 10-16C-2(D); *Velasquez*, 2021-NMCA-007, ¶ 40.

[Adopted by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

**[NEW MATERIAL]**

**13-2324. Whistleblower Protection Act; causation.**

An employee's engagement in protected activity is a cause of an employer's retaliatory action, if the employee's protected activity was a factor that motivated, at least in part, the employer's action against the employee. A motivating factor is a factor that plays a role in an

employer's decision to act. To be considered a motivating factor, the employee's protected activity need not be the only reason, nor the last, nor latest reason, for the employer's action.

USE NOTES

This instruction should be given in a case alleging violation of the Whistleblower Protection Act if causation is in dispute.

[Adopted by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

**Committee commentary —** *See Dart v. Westall*, 2018-NMCA-061, ¶ 20, 428 P.3d 292 (concluding sufficient evidence was presented to establish plaintiff suffered retaliatory action after plaintiff engaged in protected activity, which was found to be a cause of the retaliatory action). The definition of "motivating factor" used in this instruction is derived from UJI 13-2304 NMRA (discussing retaliatory discharge).

[Adopted by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

**[NEW MATERIAL]**

**13-2325. Whistleblower Protection Act; affirmative defense.**

To establish a defense to a claim under the Whistleblower Protection Act, _____ (*name of defendant*) has the burden of proving that the action taken against _____ (*name of plaintiff*) was due to:

[_____'s (*name of plaintiff*) misconduct]

[or]

[_____'s (*name of plaintiff*) poor job performance]

[or]

[a reduction in work force]

[or]

[_____ (*insert another legitimate business purpose claimed by the employer unrelated to the conduct prohibited by the Whistleblower Protection Act*],

AND that

_____'s (*name of plaintiff*) engagement in the protected activity was not a motivating factor for the retaliatory action.

USE NOTES

This instruction applies in every case alleging violation of the Whistleblower Protection Act in which the employer asserts an affirmative defense under NMSA 1978, Section 10-16C-4.

[Adopted by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

**Committee commentary —** This jury instruction is based on the Whistleblower Protection Act ("WPA"), NMSA 1978, § 10-16C-4 (2010). One element of the affirmative defense described in Paragraph (B) of that section is that "retaliatory action was not a motivating factor" in the action taken by the employer against the employee. The Committee believes that the statutory language is potentially confusing and that the intent underlying the statutory phrasing is better expressed, in the context of these instructions, by stating that the employer must show that the employee's engagement in the protected conduct was not a motivating factor for the employer's action. The instruction has been phrased accordingly. *See State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶¶ 23-26, 117 N.M. 346, 871 P.2d 1352 (explaining that if the plain language of a statute

would render its application absurd or unreasonable, the statute should be construed to accomplish legislative intent).

[Adopted by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

**[NEW MATERIAL]**

**13-2326. Whistleblower Protection Act; damages.**

If you decide in favor of _____ (*name of plaintiff*) on [any of] _____'s (*name of plaintiff*) claim[s] under the Whistleblower Protection Act, then you must fix the amount of money damages that will reasonably and fairly compensate _____ (*name of plaintiff*) for any of the following elements of damages proved by to have resulted from the wrongful conduct of _____ (*name of defendant*):

[(1) The wages _____ *(name of plaintiff)* would have earned during the period that _____ (*name of plaintiff*) would have remained employed by _____ *(defendant)* had there been no retaliatory action.]

[(2) The value of employment benefits, including _____ *(insert specific benefits at issue).*]

[(3) Compensation for any _____ (*insert any special damage*) sustained as a result of the violation.]

Whether any of these elements of damages has been proved by the evidence is for you to determine. Your verdict must be based on proof, and not on speculation, guess, or conjecture. Further, sympathy for a person, or prejudice against any party, should not affect your verdict and is not a proper basis for determining damages.

USE NOTES

This is the basic form of damages instructions for Whistleblower Protection Act claims. It must be completed by inserting appropriate elements of general and/or special damages as supported by the law and the evidence. The Court should decide what, if any, special damages may be included.

[Adopted by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

**Committee commentary —** The Whistleblower Protection Act ("WPA"), NMSA 1978, §§ 10-16C-1 to 06 (20210), permits recovery of actual damages, special damages, double back pay with interest, and an order of reinstatement. *See* NMSA 1978, § 10-16C-4(A) (2010); *Maestas v. Town of Taos*, 2020-NMCA-027, ¶ 17, 464 P.3d 1056. This combination of legal and equitable remedies implicates both the court and the jury. The term "actual damages" is "synonymous with compensatory damages." *Behrmann v. Phototron Corp*., 1990-NMSC-073, ¶ 24, 110 N.M. 323, 795 P.2d 1015 (addressing the meaning of "actual damages" under the New Mexico Human Rights Act, NMSA 1978, § 28-1-13(D)). General and/or special damages may include lost wages (UJI-13-2311 NMRA), lost benefits (UJI 13-2312 NMRA), and reasonable expenses (UJI 13-2313 NMRA). Expenses of securing new employment (UJI 13-2313 NMRA) is a typical element of special damage that could be inserted in appropriate cases. *See* § 10-16C-4(A); *see also Velasquez v. Regents of Northern N.M. College*, 2021-NMCA-007, 484 P.3d 970 (addressing reinstatement remedy under the Whistleblower Protection Act). Subsections 10-16A-4(C) and (D) indicate that the remedies provided under the WPA are not exclusive.

In addition, an employer shall be required to pay the litigation costs and reasonable attorney fees of the employee. "The WPA provides that an employer that violates the WPA 'shall' be required to pay the employee's reasonable attorney fees." *Maestas*, 2020-NMCA-027, ¶ 19 (citing Section 10-16C-4(A)). "Attorney fees under the WPA, in contrast [to attorney fee statutes that contain the term "prevailing party"], depend on whether a public employer is found to have violated the provisions of the WPA, and are not conditioned on an employee's status as a prevailing party." *Id.* ¶ 20.

"Section 10-16C-4(A) creates two kinds of remedies—*viz.,* monetary damages and the injunctive relief of reinstatement of a public employee to his or her former position of employment." *Flores v. Herrera*, 2016-NMSC-033, ¶ 13, 384 P.3d 1070. "Courts are in general agreement that front pay is only available if the court finds that reinstatement is inappropriate." *Maestas*, 2020-NMCA-027, ¶ 12 (internal quotation marks and citations omitted).

As a result of the potential mix of equitable and legal claims under the WPA, the court should consider the division of roles under Section 10-16C-4(A) between the jury and the judge. Where, for example, the Act's equitable remedy of reinstatement is implicated, "the district court must determine the mode and order of trial when legal and equitable claims have been joined." *Maestas*, 2020-NMCA-027, ¶ 11 (internal quotation marks, citations, and brackets omitted). "As a general matter, the district court determines when and if equitable relief is appropriate, not a jury." *Id*. Further, "when equitable and legal claims present common issues of fact which are material to the disposition of both claims, the legal claims must be submitted to a jury before the equitable claims are decided. Otherwise, the judge while deciding the equitable claims will have invaded the province of the jury by deciding disputed facts that are material to the legal claim." *Blea v. Fields*, 2005-NMSC-029, ¶ 1, 138 N.M. 348, 120 P.3d 430.

These instructions have been drafted on the assumption that the jury will be asked to determine the amount of back pay and the court will double that amount in entering judgment, as a ministerial act pursuant to the statutory directive. The instructions also have been drafted on the assumption—though the statute is not specific on this point—that the court will determine the rate of interest to be applied to the award of double back pay.

[Adopted by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

**[NEW MATERIAL]**

**13-2327. Whistleblower Protection Act; special verdict.**

On the questions submitted, the jury finds as follows:

*Question 1*: Did _____ (*name of plaintiff*) engage in protected activity?

*Answer*: _____ (Yes or No)

If the answer to Question 1 is "Yes," answer Question 2.

*Question 2*: Did _____ (*name of defendant*) take retaliatory action against _____ (*name of plaintiff*)?

*Answer*: _____ (Yes or No)

If the answer to Question 2 is "Yes," answer Question 3.

*Question 3*: Was _____'s (*name of plaintiff*) engagement in protected activity a cause of the retaliatory action by_____ (*name of defendant*)?

*Answer*: _____ (Yes or No)
If the answer to Question 3 is "Yes," answer Question 4.

*Question 4*: Did _____'s (*name of defendant*) retaliation against _____ (*name of plaintiff*) cause damage to _____ (*name of plaintiff*)?
*Answer*: _____ (Yes or No)
If the answer to Question 4 is "Yes," answer Question 5.

*Question 5:* In accordance with the damage instructions given by the court, we find the damages suffered by _____ *(name of plaintiff)* to be:

| | |
|---|---|
| Back pay | $_____ |
| (Add other elements of damages) | $_____ |
| _____ | $_____ |

_____
Foreperson

USE NOTES

This instruction provides a form of special verdict for claims involving violation of the Whistleblower Protection Act ("WPA"), NMSA 1978, Sections 10-16C-1 to -6. The amount awarded as back pay, if any, should appear on a separate line so that the court may double the award and add interest pursuant to NMSA 1978, § 10-16C-4(A) (2010). This special verdict form should be modified as necessary to suit the case at hand. Additionally, in appropriate cases it may be necessary to add questions relating to the employer's affirmative defense under UJI 13-2325 NMRA and NMSA 1978, Section 10-16C-4(B).

[Adopted by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

# [nmsupremecourtclerk-grp] Proposed Enactment of Uniform Jury Instructions On Whistleblower Protection Act Claims

1 message

**Paul Hibner** <paul.hibner.work@gmail.com> Mon, Mar 7, 2022 at 12:50 PM
Reply-To: paul.hibner.work@gmail.com
To: nmsupremecourtclerk@nmcourts.gov, Ben furth <benfurth64@yahoo.com>, Christi Sanders <christi.sanders.furthfirm@gmail.com>

Good afternoon,

Please see the attached letter regarding the proposed enactment of Uniform Jury Instructions On Whistleblower Protection Act Claims.

Sincerely,

Paul Darby Hibner
The Furth Law Firm, P.A.
The Furth Building
780 South Walnut, #5
Las Cruces, NM 88001



**3-7-2022 - Letter re UJI on WPA.pdf**
121K

**THE FURTH LAW FIRM, P.A.**
780 South Walnut, #5
Las Cruces, New Mexico 88001
Telephone: 575-522-3996
Facsimile: 575-532-5815
www.furthlawfirm.com

**VIA ELECTRONIC MAIL**

March 7, 2022

Sally A. Paez, Deputy Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, NM 87504-0848
nmsupremecourtclerk@nmcourts.gov

**Re:** ***Proposed Enactment of Uniform Jury Instructions On Whistleblower Protection Act Claims.***

Dear Ms. Paez:

We write to address the proposed Uniform Jury Instructions for Whistleblower Protection Act ("WPA") claims. The majority of our firm's practice is in employment law, and a substantial portion of those claims are WPA claims. *See, e.g. Vinyard v. N.M. Human Servs. Dep't,* 2019 N.M. App. Unpub. LEXIS 452 (November 12, 2019).

The Instructions improperly place the ultimate burden of persuasion for causation on the plaintiff (that the plaintiff's protected activity was one of the reasons for the adverse action). *See proposed* U.J.I. 12-2321. Under the WPA, causation is an affirmative defense. N.M.S.A. §10-16C-4(B). *Velasquez v. Regents of N. N.M. Coll.,* 2021-NMCA-007, ¶43. Defendant therefore must have the ultimate burden of persuasion regarding causation.

The WPA states: "[i]t shall be an affirmative defense... that the action taken by a public employer against a public employee was due to... [a] legitimate business purpose unrelated to conduct prohibited pursuant to the [WPA] and that retaliatory action was not a motivating factor." *Id.*; *Velasquez,* 2021-NMCA-007, ¶43 (jury may reject affirmative defense on the basis of "mixed motives, including a forbidden retaliatory one"). Under the WPA, the defendant has an affirmative defense to show the adverse employment action was: (1) due to a legitimate business purpose unrelated to the protected activity; and, (2) the protected activity was not a motivating factor in the adverse action. *See proposed* U.J.I. 12-2325; N.M.S.A. §10-16C-4(B).

Because WPA provides the defendant has the burden to show plaintiff's protected activity was not a motivating factor in the adverse action, that portion of the statute must mean something more than a defendant can prevail by negating an element of the claim (which is always true). Otherwise, the affirmative defense listed in N.M.S.A. §10-16C-4(B) would be surplusage.

Accordingly, a plain reading of the statute shows the ultimate burden of causation is not on the plaintiff, but rather with the defendant.

We respectfully note another remedial statute provides the defendant has the ultimate burden of persuasion on causation: the Family and Medical Leave Act Interference claim. *Spakes v. Broward Cty. Sheriff's Office*, 631 F.3d 1307, 1309-10 (11th Cir. 2011) ("[o]ur cases make clear that a causal nexus is not an element of an interference claim, but that the employer can raise the lack of causation as an affirmative defense."); *Defreitas v. Horizon Inv. Mgmt. Corp*., 577 F.3d 1151, 1159-60 (10th Cir. 2009) ("[a]n employer can defend [an FMLA interference claim] however, by showing that 'the dismissal would have occurred regardless of the employee's request for or taking of FMLA leave.'"). The Legislature's insert of an affirmative defense on causation—N.M.S.A. §10-16C-4(B)—shows they intended a similar burden of proof in the WPA.

We respectfully request the proposed UJIs be amended to address this important issue regarding causation. As they currently read, a contradiction exists between plaintiff's stated elements—stating plaintiff must show protected activity was one of the reasons for the adverse action—and defendant's affirmative defense—stating defendant must show protected activity was not one of the reasons for the adverse action. Put another way, if a Jury found neither plaintiff nor defendant showed causation, the proposed instructions are not clear what party would prevail.

Thank you for your time in this matter. If we can be assistance to the Committee, please let us know.

Sincerely,
*/s/ Ben Furth and Paul Hibner*
Ben Furth and Paul Hibner

New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

# Rule Proposal Comment Form, 04/06/2022, 4:45 pm

1 message

**web-admin@nmcourts.gov** <nmcourtswebforms@nmcourts.gov> Wed, Apr 6, 2022 at 4:45 PM
Reply-To: "ccook@cabq.gov" <ccook@cabq.gov>
To: supjdm@nmcourts.gov, suptls@nmcourts.gov, supjls@nmcourts.gov, supajf@nmcourts.gov, supsap@nmcourts.gov, supkld@nmcourts.gov

| | |
|---|---|
| Your Name: | Carrie Cook |
| Phone Number: | 505-768-4500 |
| Email: | ccook@cabq.gov |
| Proposal Number: | 2022-017 |

Comment: To who it may concern,
I respectfully address the proposed Uniform Jury Instructions for Whistleblower Protection Act ("WPA") claims on behalf of the City of Albuquerque.

13-2322 mentions activity protected under the WPA, but does not include any mention that communications furthering a private interest or grievance, or that are personal disagreements with legitimate managerial decisions, are not protected by the WPA. Velasquez v. Regents of NNMC, 2021-NMCA-007 at ¶37; Wills v. Board of Regents of University of New Mexico, 357 P.3d 453 (2015). The communication of information under the WPA is intended to be for the benefit of the public, not just for the benefit of the individual who files a complaint under the WPA.
In addition, the commentary in 13-2326 should also consider asking juries to consider reducing back pay if the former employee found work elsewhere. Walck v. City of Albuquerque, 1994-NMCA-058. Further, if the damages are multiplied, the multiplier should address whether the multiplier applies to the reduced amount or the original total of damages.
Finally, the special verdict form should include the question of whether the employer established its affirmative defense. A yes answer should direct the jury to enter judgment in favor of the employer.

I appreciate this opportunity for comment.

Thank you,

Carrie Cook

New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

# [nmsupremecourtclerk-grp] Comments on WPA proposed jury instructions

1 message

**Long, Komer & Associates, P.A.** <email@longkomer.com> Wed, Apr 6, 2022 at 5:03 PM
Reply-To: email@longkomer.com
To: Sally Paez <nmsupremecourtclerk@nmcourts.gov>
Cc: Mark Komer <mark@longkomer.com>

Dear Ms. Paez:

Enclosed are Mark Komer's comments on the WPA proposed jury instructions.

--
Jane Clifford, Paralegal

LONG, KOMER & ASSOCIATES
P.O. Box 5098
Santa Fe, NM 87502-5098
505-982-8405 (Main)
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505-982-8513 (Fax)
email@longkomer.com

UPDATED CONTACT INFO: Please note that I have changed my email address to email@longkomer.com. Further correspondence to email@longpoundkomer.com will not be read after 5/1/2017. I urge you to update your contact information. Thank you.



**2022-04-06 Komer to Supreme Court Clerk re WPA proposed revised jury instructions.pdf**
2707K

Long Komer & Associates
attorneys at law
Nancy R. Long | Mark E. Komer | Jonas M. Nahoum

April 6, 2022

By email: nmsupremecourtclerk@nmcourts.gov

Sally A. Paez, Deputy Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, NM 87504-0848

Re: ***Proposed Enactment of Uniform Jury Instructions on Whistleblower Protection Act Claims***

Dear Ms. Paez:

I am writing about the proposed Uniform Jury Instructions for the Whistleblower Protection Act ("WPA"). The proposed language on causation and the affirmative defense is not clear and does not appear to track the intent of the WPA.

In civil rights retaliation cases, there are generally two standards of causation. One is "because of" also known as "but for" causation. The other is the "motivating factor" test. Under the "motivating factor" test, the plaintiff must show that the protected conduct played some role in the retaliatory action. It need not be the determining factor. If the plaintiff makes that showing, the burden then shifts to the defendant to show that it would have taken the same adverse action in the absence of the protected conduct.

The "motivating factor" test along with the affirmative defense is the standard for First Amendment retaliation cases, which are the closest analog to the WPA. Although the New Mexico WPA is somewhat confusing because it initially includes "because" in its causation language, *see* NMSA 1978, § 10-16C-3(A), the statute as a whole evinces a legislative intent to adopt the motivating factor test by later including the affirmative defense. *See* § 10-16C-4(B).

Although the motivating factor test and the accompanying affirmative defense are very well-established, the legislature's articulation of these standards in the WPA

leaves very much to be desired. A brief comparison with First Amendment retaliation law demonstrates the problem.

In First Amendment employment retaliation cases, once it is established that the employee has engaged in protected speech, "there are two factual issues for the jury. The employee must prove that the protected speech was a substantial or motivating factor in the employment decision. The burden then shifts to the employer to establish that the negative employment decision would have been made despite the protected speech." *Martinez v. City of Grants*, 1996 NMSC 061, ¶ 20, 122 N.M. 507, 513 (applying affirmative defense from *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977)). In other words, the employer must show by "a preponderance of the evidence that it would have made the negative employment decision even in the absence of the protected conduct." *See id.* at 18, 122 N.M. at 513.

The WPA, however, does not track this language. Section 10-16C-4(B) gets off to a good start by describing various legitimate business reasons that constitute an affirmative defense. But then, the section throws in a clause at the end "that retaliation was not a motivating factor." The proposed jury instruction, 13-2325, includes this language in its last sentence. The Committee's comment acknowledges that the statutory language is "confusing" and suggests that the employer be required to "show that the employee's engagement in the protected conduct was not a motivating factor for the employer's action."

Unfortunately, this language does not correct the problem; if anything, it may compound it. The instructions should read as a whole. Under 13-2321, the plaintiff must show initially that the protected conduct ***was a cause,*** *i.e.*, a motivating factor, for the employer's action. If the jury makes that finding, they then move on to the affirmative defense. Section 13-2325 then requires the employer to show that protected conduct ***was not*** a motivating factor – a conclusion that the jury already rejected in the initial instruction, 13-2321. Why would the jury ever make a finding on the affirmative defense that the protected conduct was not a motivating factor when they've already concluded that the protected conduct was a cause for the adverse action in the first place? These two formulations conflict with each other, and as a practical matter, negate the available affirmative defense.

The other problem is that the formulation requires a defendant to prove a negative. How does a party show that something was "not a motivating factor"? It is much clearer to state that the defendant has the burden of showing that the employment action would have occurred anyway due to a legitimate business reason, which is the traditional formulation.

Perhaps the confusion arises from the WPA's language suggesting the "because of" or "but for" causation standard in the first part of statute, instead of clearly articulating the "motivating factor" test. But as the Committee's comment recognizes, there is no reason to carry forward confusing statutory language that does not achieve the legislative intent. There are legally tested, pattern jury instructions setting forth the motivating factor test and the employer's affirmative defense. The Committee may wish to reconsider the language in 13-2321 and 13-2325 together and adopt a motivating factor test with a correct formulation of the affirmative defense. I'm attaching a pattern instruction as a general reference though there probably are many others the Committee might reference.

Thank you for the opportunity to offer comments and thank you to the Committee for your service.

Very truly yours,

LONG, KOMER & ASSOCIATES, P.A.

Mark E. Komer

Mark E. Komer

MEK/jmc

Enclosure

## 10.6 First Amendment Retaliation—Public Employees

Plaintiff [name] claims that Defendant [name] violated [his/her] rights under the First Amendment to the United States Constitution. More specifically, Plaintiff [name] claims that Defendant [name] [specify the allegedly adverse action] in retaliation for Plaintiff [name]'s decision to exercise [his/her] First Amendment free-speech right when [he/she] [specify the speech].

The First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.[1]

To recover damages for this alleged constitutional violation, Plaintiff [name] must prove by a preponderance of the evidence that:

1. Plaintiff [name] suffered an adverse employment action;[2]

2. Plaintiff [name]'s speech motivated[3] Defendant [name]'s decision to [specify action] Plaintiff [name]; and

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[1]*Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006).

[2]Whether the defendant acted "under color of law" is obviously an essential element of First Amendment retaliation. But this element is often conceded. If so, eliminating reference to it may avoid unnecessary confusion. If it is not conceded, or if the court wishes to include it, then the first element should read, "That the actions of Defendant [name] were 'under color' of the authority of the State of _____." Further instructions on this element are in Pattern Jury Charge 10.2.

[3]Defendant's motivation may be based on a factual mistake about Plaintiff's behavior. *Heffernan v. City of Paterson, New Jersey*, 136 S. Ct. 1412 (2016). In *Heffernan*, the United States Supreme Court held that an employee could bring a First Amendment retaliation claim against an employer who took an adverse action against the employee for protected speech that the employer mistakenly attributed to the employee. 136 S. Ct. at 1418.

3. the [specify action] caused Plaintiff [name]'s damages.[4]

If Plaintiff [name] fails to prove any of these elements, you must find for Defendant [name].

**(If the parties stipulate that the employment action was adverse):**

[The parties have stipulated (agreed) that the [specify action] was "adverse." You must accept that fact as proved.]

**OR**

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[4]These elements are based on cases such as *Oscar Renda Contracting, Inc. v. City of Lubbock*, 577 F.3d 264, 271 (5th Cir. 2009) (listing these elements). Two points must be noted.

First, the instructions set out the elements of the prima facie case excluding the elements that should be decided as a matter of law before trial. For example, there is a threshold issue under *Garcetti* whether the plaintiff spoke as a citizen or pursuant to official duty. 547 U.S. at 419; *see also Lane v. Franks*, 573 U.S. 228 (2014) (explaining *Garcetti* and noting that "the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech. The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties"). The prima facie case elements listed in summary judgment opinions also include the need to prove that the speech was protected under *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). This is a question of law. *Buchanan v. Alexander*, 919 F.3d 847, 853 (5th Cir. 2019). There may be instances, however, in which there are disputes about historical facts that should be submitted to the jury. For example, in *Kinney v. Weaver*, 367 F.3d 337 (5th Cir. 2004), the Fifth Circuit addressed the *Pickering* issues as a mixed law-and-fact question, noting that "the governmental interests at stake in a particular case necessarily depend on the facts of the case." *Id.* at 363. If material historical facts are disputed, the court should consider submitting them to the jury for resolution.

Second, a more frequent articulation of the causation element is that the speech must be a "substantial or motivating factor." *Winn v. City of New Orleans*, 620 F. App'x 270 (5th Cir. 2015). This language is consistent with *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, in which the Supreme Court of the United States observed that causation first requires proof that the speech was a " 'substantial factor' or to put it in other words, that it was a 'motivating factor.' " 429 U.S. 274, 287 (1977). The pattern uses the simple language that the speech must "motivate," but then explains the element consistent with *Mt. Healthy*.

**(If the parties dispute whether the employment action was adverse):**

[As to the first element—whether the [specify action] was "adverse"—adverse employment actions include discharges, demotions, refusals to hire, refusals to promote, and reprimands.[5] They can also include transfers if they would be equivalent to a demotion. To be equivalent to a demotion, a transfer need not result in a decrease in pay, title, or grade; it can be a demotion if the new position proves objectively worse than the former position, such as being less prestigious or less interesting or providing less room for advancement.[6,7]]

As to the second element, to prove Plaintiff [name]'s speech motivated Defendant [name]'s [specify action], Plaintiff [name] must show the speech was a substantial factor. In other words, Plaintiff [name] must show that [his/her] speech was a motivating factor in Defendant [name]'s decision to [specify action].[8] Plaintiff [name]

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[5]*Juarez v. Aguilar*, 666 F.3d 325 (5th Cir. 2011) (citing *Sharp v. City of Houston*, 164 F.3d 923, 933 (5th Cir. 1999)).

[6]*Sharp*, 164 F.3d at 933.

[7]The instruction is based on numerous cases decided by the Fifth Circuit. *See, e.g.*, *Sharp*, 164 F.3d at 933. But in *Burlington North and Santa Fe Railway Co. v. White*, the Supreme Court adopted a different test in the Title VII context. 548 U.S. 53, 68 (2006). To date, the Fifth Circuit has not adopted the *Burlington* standard for adverse employment actions in the First Amendment context. *Johnson v. Halstead*, 916 F.3d 410, 422 n.5 (5th Cir. 2019) ("It is not clearly established whether *Burlington*'s 'materially adverse' standard applies to retaliation for protected speech."). In addition, courts should be aware that the Fifth Circuit has adopted more precise tests depending on the nature of the employee's job. For example, in the educational context, the Fifth Circuit "has held that 'actions such as decisions concerning teaching assignment, pay increases, administrative matters, and departmental procedures, while extremely important to the person who has dedicated his or her life to teaching, do not rise to the level of a constitutional deprivation.' " *DePree v. Saunders*, 588 F.3d 282, 287–88 (5th Cir. 2009) (citing *Harrington v. Harris*, 118 F.3d 359, 365 (5th Cir. 1997) (citation and internal punctuation omitted)).

[8]*Mt. Healthy City Sch. Dist. Bd. of Educ.*, 429 U.S. at 287.

need not prove [his/her] speech was the only reason Defendant [name] made the decision.[9]

[If you find that Plaintiff [name] has proved each element of [his/her] claim by a preponderance of the evidence, then you must consider whether Defendant [name] would have reached the same decision in the absence of the protected speech.[10] If you find Defendant [name] has proved by a preponderance of the evidence that [he/she/it] would have [specify action] whether or not Plaintiff [name] engaged in protected speech, then you must return a verdict for Defendant [name] and against Plaintiff [name].]

If you find that Plaintiff [name] has proved each of the three elements and that Defendant [name] failed to prove that [he/she/it] would have reached the same decision anyway, then Defendant [name] violated Plaintiff [name]'s First Amendment right to free speech [and your verdict will be for Plaintiff [name] on this claim] *or* [and you must then consider whether Defendant [name] is entitled to qualified immunity, which is a bar to liability that I will explain later] (*give first bracketed language if there is no qualified immunity issue; give second if there is such an issue along with the qualified immunity instruction at Pattern Jury Instruction 10.3*). If Plaintiff [name] failed to make this showing, then

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[9]In contrast to prior precedent, those without the ability to make final employment decisions may be found liable. *Sims v. City of Madisonville*, 894 F.3d 632, 641 (5th Cir. 2018). ("*Johnson*'s absolute bar on First Amendment liability for those who are not final decisionmakers is not binding."); *contra Johnson v. Louisiana*, 369 F.3d 826, 831 (5th Cir. 2004) (holding that non-final decisionmakers could not be found liable). To find an individual with retaliatory motives, but who does not have final decision-making authority, liable, there must be a "causal link" between the individual's action and the injury. *Sims*, 894 F.3d at 642; *see Jett v. Dallas*, 798 F.2d 748, 758 (5th Cir. 1986).

[10]*Crawford-El v. Britton*, 523 U.S. 574, 593 (1998) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ.*, 429 U.S. at 287); *Oscar Renda Contracting*, 577 F.3d at 271 (noting that Defendant "can respond" to prima facie case with proof that it would have reached same decision).

your verdict must be for Defendant [name] on Plaintiff [name]'s First Amendment claim.

*[Insert qualified-immunity instruction (10.3) if appropriate.]*

*[Insert supervisor/municipal liability instruction (10.4) if appropriate.]*

*[Insert standard damages instructions and emotional-distress instructions (10.13) if appropriate.]*

New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

# Rule Proposal Comment Form, 04/06/2022, 5:20 pm

1 message

**web-admin@nmcourts.gov** <nmcourtswebforms@nmcourts.gov> Wed, Apr 6, 2022 at 5:20 PM
Reply-To: "istoker@cabq.gov" <istoker@cabq.gov>
To: supjdm@nmcourts.gov, suptls@nmcourts.gov, supjls@nmcourts.gov, supajf@nmcourts.gov, supsap@nmcourts.gov, supkld@nmcourts.gov

| | |
|---|---|
| Your Name: | Ian Stoker |
| Phone Number: | 505-768-4665 |
| Email: | istoker@cabq.gov |
| Proposal Number: | 2020-017 |

Comment: To who it may concern,
We respectfully address the proposed Uniform Jury Instructions for Whistleblower Protection Act ("WPA") claims on behalf of the City of Albuquerque.

13-2322 mentions activity protected under the WPA, but does not include any mention that communications furthering a private interest or grievance, or that are personal disagreements with legitimate managerial decisions, are not protected by the WPA. Velasquez v. Regents of NNMC, 2021-NMCA-007 at ¶37; Wills v. Board of Regents of University of New Mexico, 357 P.3d 453 (2015). The communication of information under the WPA is intended to be for the benefit of the public, not just for the benefit of the individual who files a complaint under the WPA.

In addition, the commentary in 13-2326 should also consider asking juries to consider reducing back pay if the former employee found work elsewhere. Walck v. City of Albuquerque, 1994-NMCA-058. Further, if the damages are multiplied, the multiplier should address whether the multiplier applies to the reduced amount or the original total of damages.

Finally, the special verdict form should include the question of whether the employer established its affirmative defense. A yes answer should direct the jury to enter judgment in favor of the employer.

We support the bifurcation of legal and statutory remedies.

We appreciate this opportunity for comment.

Thank you,
Ian Stoker
Managing City Attorney, Labor/Employment
City of Albuquerque