

**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 items 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, §§ 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 -2325 NMRA, as applicable, to further instruct on any disputed element.

[Adopted by Supreme Court Order No. 22-8300-030, effective for all cases pending or filed on or after December 31, 2022.]