

**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 \_\_\_\_\_’s (*name of defendant*) action against \_\_\_\_\_ (*name of plaintiff*).

**USE NOTES**

This instruction applies in every case alleging violation of the Whistleblower Protection Act, NMSA 1978, §§ 10-16C-1 to -6 (2010), in which the employer asserts an affirmative defense under NMSA 1978, Section 10-16C-4.

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

1           **Committee commentary.** — This jury instruction is based on the Whistleblower  
2 Protection Act (“WPA”), NMSA 1978, § 10-16C-4 (2010). One element of the affirmative defense  
3 described in Paragraph B of that section is that “retaliatory action was not a motivating factor” in  
4 the action taken by the employer against the employee. The Committee believes that the statutory  
5 language is potentially confusing and that the intent underlying the statutory phrasing is better  
6 expressed, in the context of these instructions, by stating that the employer must show that the  
7 employee’s engagement in the protected conduct was not a motivating factor for the employer’s  
8 action. The instruction has been phrased accordingly. *See State ex rel. Helman v. Gallegos*, 1994-  
9 NMSC-023, ¶¶ 19-26, 117 N.M. 346, 871 P.2d 1352 (explaining that if the plain language of a  
10 statute would render its application absurd or unreasonable, the statute should be construed to  
11 accomplish legislative intent).

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13 after December 31, 2022.]