

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 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. 22-8300-030, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — The Whistleblower Protection Act (“WPA”), NMSA 1978, §§ 10-16C-1 to -6 (2010), permits recovery of actual damages, special damages, and double back pay with interest, and an order of reinstatement. *See* NMSA 1978, § 10-16C-4(A); *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) (2005)). 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) 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 N. N.M. Coll.*, 2021-NMCA-007, ¶¶ 50-60, 484 P.3d 970 (addressing reinstatement remedy under the WPA). 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.” *Maestas*, 2020-NMCA-027, ¶ 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 under 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. 22-8300-030, effective for all cases pending or filed on or after December 31, 2022.]