

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”), NMSA 1978, §§ 10-16C-1 to -6 (2010), 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. 22-8300-030, effective for all cases pending or filed on or after December 31, 2022.]