

# Whistleblower Protection Act & *Lerma's* Impact

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# Objectives



This presentation discusses:

- What constitutes whistleblowing
- Other non-whistleblowing conduct of public employees protected by the New Mexico Whistleblower Protection Act (“WPA”).
- Impact of *Lerma v. State of New Mexico, NM Dept. of Corrections*, No. A-1-CA-39774, (Aug 29, 2023)
- The best practices to avoid WPA claims.

# What is whistleblowing?



- A public employee's communications
  - to the public employer or
  - a third party
  - about an action or a failure to act that the employee believes in **good faith** constitutes an **unlawful** or **improper** act"

NMSA § 10-16C-3(A)

# Other conduct protected— B & C

A public employee who:

- A. communicates to the public employer or a third-party information about an action or a failure to act that the public employee believes in **good faith** constitutes an unlawful or improper act;
- B. **provides information to, or testifies** before, a public body as part of an investigation, hearing or inquiry into an unlawful or improper act; or
- C. **Objects to or refuses to participate** in an activity, policy or practice that constitutes an unlawful or improper act.

N.M. Stat. Ann. § 10-16C-3 (West)



# Difference from A and the B & C prongs

**A :**

- “The first prong requires plaintiffs to demonstrate a **good faith** belief that an action or failure to act on the part of the public employer ‘constitutes an unlawful or improper act.’ Section 10-16C-3(A).”
- Under this prong, no burden to prove the “unlawful or improper act” in question was in fact unlawful or improper.
- Billy v. Curry Cnty. Bd. of Cnty. Commissioners, No. A-1-CA-36071, 2020 WL 2096097, at \*2 (N.M. Ct. App. Apr. 9, 2020)

# Difference from A and the B & C prongs

## B & C:

“[A] plaintiff proceeding under the second or third prong must establish the “unlawful or improper act” in question **was, in fact, unlawful or improper**, as otherwise defined in the WPA.”

Billy v. Curry Cnty. Bd. of Cnty. Commissioners, No. A-1-CA-36071, 2020 WL 2096097, at \*3 (N.M. Ct. App. Apr. 9, 2020)



# What's good faith?



“Good faith” means that a reasonable basis exists in fact as evidenced by the facts available to the public employee.

§ 10-16C-2 NMSA

# What is 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:

- (1) violates a federal law, a federal regulation, a state law, a state administrative rule or a law of any political subdivision of the state;
- (2) constitutes malfeasance in public office; or
- (3) constitutes gross mismanagement, a waste of funds, an abuse of authority or a substantial and specific danger to the public.

NMSA § 10-16C-2





# What is the “protection” provided?



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The public employee who engages in the “protected activity” in Section 10-16C-3 is **protected against “retaliatory action”** by the employer.

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“**Retaliatory action**” means taking any discriminatory or **adverse employment action** against a public employee in the terms and conditions of public employment. § 10-16C-2 NMSA

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The **retaliatory action must be because the employee engaged in the protected activity.** § 10-16C-3 NMSA

# What is an Adverse Employment Action



- “An adverse employment action occurs when an employer imposes a tangible, significant, harmful change in the conditions of employment.” *Ulibarri v. N.M. Corr. Acad.*, 2006-NMSC-009, 2006-NMSC-009, ¶ 16.
- Examples of such a change include “hiring, firing, failing to promote, reassignment with significantly different responsibilities, [and] a decision causing a significant change in benefits.” *Id.* (internal quotation marks and citation omitted).

# Adverse Employment Action—HRA vs WPA



“Ulibarri interpreted the HRA. See 2006-NMSC-009, ¶ 1. Neither the WPA nor, as far as we are aware, our cases interpreting the WPA, shed light on the meaning of “adverse employment action” in the WPA context. The City implicitly assumes that the term has the same meaning under the WPA as under the HRA. Because Lucero does not argue otherwise, we accept the City's assumption, but only for the purposes of this opinion.”

*Lucero v. City of Albuquerque*, No. A-1-CA-38301, 2022 WL 17335805, at \*4 (N.M. Ct. App. Nov. 30, 2022), cert. denied (Mar. 1, 2023)(Unpublished opinion)

# Adverse Employment Action—HRA vs Title VII



Title VII:

objectively harmful to the employee and the type of harm that would discourage a reasonable employee from pursuing a claim. (see *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 72-73 (2006)).

HRA:

"[A] tangible, significant, harmful change in the conditions of employment." *Ulibarri v. N.M. Corr. Acad.*, 2006-NMSC-009, 2006-NMSC-009, ¶ 16.

# Adverse Employment Action—HRA vs Title VII



“This standard [Title VII], however, has not been accepted by the New Mexico Supreme Court; as just discussed, Ulibarri adopted a different test for adverse employment actions. . . . Further, his suggestion that we forge a different path than our Supreme Court has followed on the meaning of adverse employment action is not well taken.”

Lucero v. City of Albuquerque, No. A-1-CA-38301, 2022 WL 17335805, at \*4 (N.M. Ct. App. Nov. 30, 2022), cert. denied (Mar. 1, 2023)(Unpublished opinion).

**“discriminatory  
Or adverse  
employment  
action”**  
**§ 10-16C-2 NMSA**

## What is considered discriminatory action???

“You may be familiar with the word "discrimination." But do you know what it really means? And do you understand how it applies in the context of your job? To "discriminate" against someone means to treat that person differently, or less favorably, for some reason. “

<https://www.eeoc.gov/youth/what-employment-discrimination#:~:text=To%20%22discriminate%22%20against%20someone%20means,a%20mall%20or%20subway%20station.>



# Employer Affirmative Defenses



- The action taken by a public employer against a public employee was:
  - **due to the employee's misconduct,**
  - the employee's **poor job performance,**
  - a **reduction in work force** or
  - **other legitimate business purpose** unrelated to conduct prohibited pursuant to the Whistleblower Protection Act **and that retaliatory action was not a motivating factor.** § 10-16C-4 NMSA

# Causation



## Motivating Factor not But For standard of Title VII

“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 reason, nor latest reason, for the employer's action.”

UJI 13-2324



# Causation



Courts generally analyze retaliation claims under the three-step, burden-shifting test created by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

**First**, the employee must establish a prima facia case of retaliation and raise an inference of causation, usually through showing the temporal proximity of the protected activity and the adverse action.

**Second**, the employer must express a legitimate business purpose for the adverse action.

**Third**, if a legitimate reason is provided, the employee must show that the employer's reason is a pretext (big fat lie) for the true retaliatory motive and that retaliation is a motivating factor in the adverse decision.

# Timing can be deadly in proving causation



- The time between the protected activity and the adverse employment action is critical.
- A small gap of time can help show causation.
- The shorter the period the more likely your toast!
- The longer the period the stronger the defense.
- Beyond three months, the courts are less likely to find that the timing by itself is evidence of retaliatory intent.
- Cf *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, (2001)(Title VII case) (noting that the temporal connection must be “very close”: a three- or four-month period between an adverse action and protected activity is insufficient to show a causal connection, and a twenty-month period suggests “no causality at all”).

# Other Evidence to Establish Causation



- Employees who did not engage in protected activity are treated more favorably. This is some of the strongest circumstantial evidence that can be presented.
- Unprecedented low performance evaluations after the protected activity.
- Unprecedented monitoring of work activities after the protected activity.
- Conducting a **sham investigation** of an employee who engaged in protected activity.
- Failing to investigate other employees accused of the same misconduct as the plaintiff.
- Unprecedented unreasonable workplace demands after the protected activity. ( Set up to fail.)

# Example of Protected Activity



- Police detective **communicated to his supervisors and chain of command his belief** that police department **was not timely investigating CYFD child abuse and neglect referrals** and that it was impossible for him to handle his caseload.
- Police chief responded that he could not give detective more resources. **Detective sent memorandum** to sergeant and others in chain of command characterizing police **department's failure to investigate or provide resources to investigate CYFD referrals as "potential negligence."**

*Dart v. Westall*, 2018-NMCA-061.

# Example of Retaliation



- Detective consistently received positive performance evaluations for his work prior to sending memo to sergeant and others in chain of command alleging “potential negligence.”
- After sending memo, the **detective was reprimanded by sergeant, removed from task force and reassigned to a new division, defendants created a hostile work environment and made humiliating comments about him to his colleagues, and issued a substandard work vehicle.**
- Detective suffered depression, rage, fear he would be terminated, and loss of detective and task force overtime pay as a result of transfer.

*Dart v. Westall*, 2018-NMCA-061.

# Example of Protected Activity



- **Campus director was communicating in good faith with college about “a waste of funds”** when she alerted college of the **importance of making requested expenditures for campus' revitalization.**
- Substantial funds had already been spent in pursuing college's unfinished revitalization project, further funding contingent on group visits and grant funding were integral to project's success, cancellation of visits would deprive campus of revenue stream, and previously purchased equipment would go unused if funding requests were not approved, causing college to violate criteria used to obtain the funds.
- *Velasquez v. Regents of N. New Mexico Coll.*, 2021-NMCA-007, cert. denied (Feb. 12, 2021)

# Example of Retaliation



- College removed director from her position just a few weeks after she communicated her concerns (waste of funds).
- Director received a positive performance evaluation before her communication but **received two negative evaluations after her communication, and director was transferred to a position that had recently been eliminated and was likely to be eliminated again at the end of the fiscal year.**
- *Velasquez v. Regents of N. New Mexico Coll.*, 2021-NMCA-007, cert. denied (Feb. 12, 2021)

# Overruled Not protected activity



- No authority supported employee's proposition that, by communicating about his dispute with employer over whether employer was required to pay him according to the terms of his expired employment contract, he engaged in an activity that was protected by the WPA.

*Wills v. Bd. of Regents of Univ. of New Mexico*, 2015-NMCA-105, ¶¶ 20, 21. Overruled by *Lerma v. State of New Mexico, NM Dept. of Corrections*, No. A-1-CA-39774, (Aug 29, 2023).



# *Wills v. Bd. of Regents of Univ. of New Mexico*

- Whistleblowing provides an important public benefit.
- Whistleblower protection does not extend to an employee's **personal grievances** about his job.
- Whistleblower protection laws **are designed to protect employees who risk their own personal job security for the benefit of the public.**
- Legislative intent—“whistleblowing”—evokes the type of public disclosure that “serve[s] the public interest by assisting in the elimination of fraud, waste, abuse, and unnecessary government expenditures. *Wills v. Bd. of Regents of Univ. of New Mexico*, 2015-NMCA-105, ¶ 20

# Federal Analog

*Willis v. Department of Agriculture & Kahn v. Department of Justice*

- “[M]erely performing ... required duties” are not protected by the WPA. *Willis*, 141 F.3d 1139, 1144 (Fed. Cir. 1998).
- “[A]n employee must communicate the information either outside the scope of his normal duties or outside of normal channels to qualify as a protected disclosure.” *Kahn*, 618 F.3d 1306, 1313 (Fed. Cir. 2010).

# Lerma rejects *Wills*, *Willis*, and *Kahn*



- Normal duties & channels—rejected. *Wills & Kahn* is discredited—Congress amended federal WPA to abrogate *Willis* and it is inconsistent with NM legislative intent.
- The intent of serving the public interest—rejected. NMWPA says nothing about an intent or motive requirement.
- WPA is designed to protect employees who risk their own personal job security for the benefit of the public—rejected. Same as above.
- Communicate a public concern—rejected. Not in the text, and *Garrity v. Overland Sheepskin Co. of Taos*, 1996-NMSC-032, is not persuasive. It involved retaliatory discharge not WPA

*Lerma v. State of New Mexico, NM Dept. of Corrections*, No. A-1-CA-39774, ¶¶13-15 (Aug 29, 2023):



# *Lerma* Impact

- Communications made through ordinary workplace channels or as part of an employee's normal work duties are not excluded from protection
- An employee's motive and intent have no bearing on whether a communication is protected.
- Whether a communication is protected by the NMWPA does not hinge on whether the communication pertains to a matter of public concern or on whether the communication benefits the public.

# Wills Progeny Wiped out

- Plaintiff's written communication was part of a personal personnel grievance.
  - The fact that Plaintiff alleged RISD violated federal law, state law, and RISD policy in his personal grievance, does not automatically transform his communication into one protected by the WPA.
  - Nothing about Plaintiff's response to his negative performance evaluation indicates an intent to serve any purpose other than to refute the basis for the negative evaluation.
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- Kakuska v. Roswell Indep. Sch. Dist., No. A-1-CA-36488, 2019 WL 2103358, at \*3 (N.M. Ct. App. Apr. 16, 2019)

# Wills Progeny Wiped out

- “Plaintiff’s undisputed **job duties required him to advise** his employer on compliance with state and federal wage laws and regulations.”
- Therefore, **it was in Plaintiff’s own interest** as Assistant Superintendent to communicate to the Superintendent his understanding of the relevant wage laws as they related to the proposed salary restructuring.
- **Plaintiff did not make these communications to another entity**, nor did Plaintiff **communicate on the subject matter outside of his defined job duties**. Plaintiff failed to show his verbal communication was anything other than the exact benefit RISD expected to receive by employing Plaintiff.”
- Kakuska v. Roswell Indep. Sch. Dist., No. A-1-CA-36488, 2019 WL 2103358, at \*3 (N.M. Ct. App. Apr. 16, 2019)

# Wills Progeny Wiped out

“Like the plaintiff's grievance in Wills, **Mr. Gonzales's grievance is a personal personnel grievance** rather than an act of whistleblowing for the benefit of the public. Thus, Mr. Gonzales's objections to working overtime in violation of his FMLA agreement do not qualify as whistleblowing activities.”

- Gonzales v. New Mexico Dep't of Health, No. 1:22-CV-00525-WJ-SCY, 2023 WL 2601500, at \*9 (D.N.M. Mar. 22, 2023)

# Wills Progeny Wiped out

“[I]t was in Plaintiff's own interest and to the benefit of her employer to communicate what she believed to be a conflict of interest and violation of the Anti-Donation Clause. In other words, **Plaintiff was not putting her job security at risk for the benefit of the public, but instead was doing her job.** See Wills, 2015-NMCA-105, ¶ 20, 357 P.3d 453 (stating that “whistleblower laws are designed to protect employees who risk their own personal job security for the benefit of the public”).

Additionally, **Plaintiff did not make either of these communications to another entity, nor did she communicate on a subject matter outside of her defined job duties.** In sum, the benefits of Plaintiff's communications, therefore, enured to her employer and to herself, and not the public.”

*Klaus v. Vill. of Tijeras*, No. CV 20-1105 JFR/KK, 2022 WL 4289952, at \*10 (D.N.M. Sept. 16, 2022), appeal withdrawn, No. 22-2124, 2022 WL 19520184 (10th Cir. Nov. 1, 2022)



# Wills Progeny Wiped out

“Plaintiff’s internal complaint of workplace harassment, even assuming it was made on behalf of herself and others, was primarily for Plaintiff’s own benefit. Plaintiff concedes that purely personal grievances do not suffice to state a NMWPA claim, but asserts “that is not is what entailed herein.” (Doc. 36 at 7.)


Regardless of whether Plaintiff chose to “tak[e] the heat” for other employees by voicing her concerns, (id. at 8), **the Court is hard pressed to conclude that Plaintiff’s actions are akin to the actions of employees who “risk their own personal job security for the benefit of the public”**

Woerner v. Bd. of Educ. of Rio Rancho Pub. Sch., No. 1:18-CV-1231-WJ-JFR, 2020 WL 85135, at \*2 (D.N.M. Jan. 7, 2020)

# What is the Remedy

- **Actual damages;**
- **Reinstatement** with the same seniority status that the employee would have had but for the violation;
- **Two times the amount of back pay** with interest on the back pay; and
- Compensation for any **special damage** sustained as a result of the violation.
- In addition, an employer shall be required to pay the **litigation costs and reasonable attorney fees** of the employee.

§ 10-16C-4 NMSA



# Best Practices for Preventing WPA Claims

Below are practical tips for avoiding retaliation claims.

# Boomerang Investigations



Before initiating an investigation ask yourself:



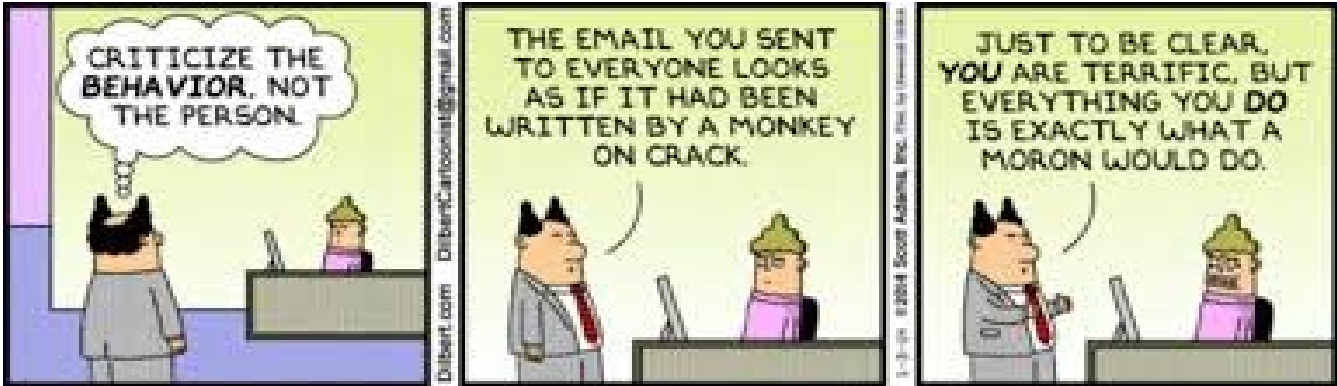
- Is the target a whistleblower?
- Does the information triggering the need for the investigation come (directly/indirectly) from the employee(s)/supervisor(s) affected by sound of the whistle?
- Does the alleged misconduct, if true, amount to much of anything or is it simply petty or small?
- Absent the whistleblowing/protected activity, would you investigate the whistleblower?
- Are you digging up old bones to tarnish the whistleblower?
- **Are you tempted to assign a nemeses to conduct the investigation?**

# Discipline

**Always, always, always document the reason for the termination, demotion or suspension even if the employee is AT-WILL!!!**

- Juries are suspicious of a lack of relevant documents, which can indicate to them that discrimination or other unlawful motives are the reason for the employment decision.

Treat departing employees with respect. It reduces the risk of litigation.



# Discipline



"We asked the employees for more feedback, but after reprimanding those who spoke up, none was forthcoming."

Before imposing discipline ask yourself:

- Has the employee engaged in recent whistleblowing/protected activity?
- Is the basis for discipline rock solid and does it pass the smell test?
- Is the discipline fair and consistent with others who engaged in similar misconduct?
- **Engaging in protected activity does not grant immunity from discipline but be wise and don't take the bait.**

# Best Practices



- Adopt a stand-alone Whistleblower/Retaliation Policy.
- Train managers and supervisors on anti-retaliation, including identification and prevention.
- **Maintain employee complaint hotline (fraud, waste, abuse).**
- Make anti-retaliation policies accessible to employees and obtain acknowledgments.
- Redistribute policies regularly and provide training, and incorporate discrimination, harassment, retaliation, and whistleblowing training into **new hire orientations.**

# Best Practices



- Respond to complaints promptly.
- Encourage written complaints and require supervisors to document verbal complaints.
- Conduct thorough, well-documented investigations of employee complaints.
- When notifying a supervisor of a complaint, remind the supervisor that retaliation is prohibited in writing.
- Notify each witness that retaliation is prohibited and document it.
- Limit disclosure to a need-to-know basis.



# Best Practices



- Make sure HR is aware of all personnel decisions affecting employees who engaged in protected activity.
- Be proactive and anticipate issues that may arise.
- Consider reassignment to a different supervisor (being careful to ensure such a transfer would not be considered an adverse employment action).
- Consider whether steps should be taken to ensure the employee's co-workers do not engage in any retaliatory actions.
- Consider no-contact order.

Thank you!

Progress happens  
when all 33 come together.



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