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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

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FRANK DART,

Plaintiff-Appellee

vs.

Ct. App No. 34,675
Eleventh Judicial District
No. D-1116-CV-2012-216

CHIEF KYLE WESTFALL,
CITY OF FARMINGTON
POLICE DEPARTMENT, and
CITY OF FARMINGTON,

Defendants-Appellants.

PLAINTIFF-APPELLEE'S ANSWER BRIEF

On Appeal from the Eleventh Judicial District Court, County of San Juan,
The Honorable Louis E. DePauli Jr.

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I. SUMMARY OF PROCEEDINGS

A. Nature of the Case

This whistleblower protection and retaliation action, brought pursuant to the Whistleblower Protection Act, NMSA 1978 § 10-16C-1 et seq. (2010) (the "WPA,") came into focus after the Court's Order on Defendant's Summary Judgment Motion, [RP 214-219]; and, the Court's Order Denying Defendant's Motion to Reconsider [RP 261-262]. After the District Court ruled, Plaintiff-Appellee Frank Dart ("Dart") decided to focus his claim on the WPA. [RP 115-118, 128].

The first thirty-three (33) paragraphs of Dart's complaint provided a biographical context for his protected speech on the matter of the Farmington Police Department's ("Department") failure to investigate child abuse cases and CYFD referrals. [RP 1-8, 115]. Rather than merely continuing to verbally disagree with his supervisors about his job duties in the spring of 2011, as Defendants-Appellants assert, Dark complained to his chain of command numerous times over many years about Defendants' repeated failure to protect the children of San Juan County pursuant to § 32A-4-3 NMSA 1978. Defendants' refusal to provide the necessary resources to properly investigate each child abuse case in their jurisdiction became even more evident and unbearable to Frank Dart, when Defendants failed to meet their obligations under the Cyber Task Force

Memorandum of Understanding ("MOU") and arrested Robert Messenger without proper investigation. The District Court correctly found that Dart presented sufficient evidence for a jury to consider whether Frank Dart had engaged in protected activity pursuant to § 10-16C-3(A). The culmination of Dart's voicing his objection to the Defendants' indifference to investigation of CYFD referrals was Dart's written communication to Sergeant Perez on March 10, 2011. [RP 218]. Thus, District Judge Louis E. DePauli, Jr.'s orders properly framed the issue for the jury around whether Frank Dart had communicated to the Department his allegation that the Department was failing to obey § 32A-4-3 NMSA 1978 – an issue of public concern. [RP 219].

The Defendants' retaliation that Frank Dart faced resulted from the Department's very real expectation that the police code of silence was expected to be observed by all. Frank Dart exposed the Department's chronic failure to allocate resources to competently investigate crimes against children, in contravention of the code of silence. The breach of the code of silence resulted in retaliation against Dart. [Tr. IV: 151-153]. Due to the dangerous nature of police work one of the most respected tenants of a police department is loyalty.

Police officials have written about the unwritten police code as a "veil of silence surrounding police agencies," and as the "Blue Wall." Bouza, Chief Anthony V., (Ret.), *The Police Mystique* 52 (Plenum Press 1990). As explained in

Whistleblowing and the Police, 3 Rutgers J.L. & Urb. Pol'y 74, Rutgers Journal of Law and Urban Policy, 2005, "This Blue Wall of Silence makes whistleblowing even more unlikely for the police." The existence and intractability of the Blue Wall of Silence renders the rare Frank Darts of the world even more essential to democracy and provide the perfect background for the enforcement of the WPA.

Frank Dart scaled the Blue Wall of Silence and Defendants-Appellants sought, repeatedly, to demean and bully him. [Tr. Vol II: 149]. During the trial, when Dart was talking about being afraid to put his concerns in writing for fear of being retaliated against, the Defendants' counsel began laughing. [Tr. II: 129]. During Defendants-Appellants' closing, she mocked him as an egoist: "Was he advancing his own agenda, or trying to help children? Read that memo." [Tr. Vol IV: 171]. She analogized Frank Dart to a child, or a young teenager: "they ask you for some impractical thing and you tell them no." [Tr. Vol IV: 179-180]. Frank Dart was not acting like a petulant teenage boy when he was speaking and writing to his chain of command that he had human limitations. [Tr. Vol IV: 180-184].

Still today, even after the solemn verdict of the jury, the Department appeals the verdict from its own citizens because the administrators are angry that Dart exposed the systemic nature of their failure to investigate crimes against children. The Department has repeatedly lashed out at Dart because police officers typically respect the code of silence. The Appellants are unable to themselves that the jury

found, based on the direct examination of Frank Dart, that the police department was engaged in a systemic failure to timely investigate crimes against children. Frank Dart broke rank and the code of silence, when in March of 2011 he put in writing his long held belief that the Department was failing to uphold the law by failing to investigate CYFD reports of child abuse within 48 hours. [RP 124-129]. The existence of the Defendants' *de facto* code of silence is the nature of this case, and the context in which Frank Dart's whistleblower protection and retaliation case must be understood. *McNeil v. City of Allentown*, No. 99-CV-2892, 2001 WL 1468314 (E.D. Penn. 2001).

B. Appellee's Summary of Material Facts

The trial court correctly determined in both its ruling on Defendants' Motion for Summary Judgment, filed March 6, 2013, and its ruling on Defendants' Motion to Reconsider, filed September 10, 2013, that a jury properly found that Frank Dart's communication to his supervisors regarding their potential violation under § 32A-4-3, NMSA 1978, by failing their duties regarding the handling of child abuse cases, was protected communication under the WPA. [RP 214-219, 261-262, 805, 806] The Pretrial Order established by stipulation the uncontroverted facts, the disputed facts, and summarized the general nature of the claims of the parties, that came before the Jury, and are now before this Court. [RP 626-638].

In the Pretrial Order, filed August 4, 2014, Dart's claim was that the Defendants-Appellants engaged in retaliatory action in violation of the New Mexico WPA, in part, because he orally complained and then finally complained in writing that Defendants-Appellants were failing to adequately investigate crimes against children in violation of section 32A-4-3. Specifically, Dart wrote a memorandum to his Sergeant Robert Perez, and copied his chain of command. [RP 626][Exhibit 8].

Defendants-Appellants claimed that they took employment actions against Frank Dart for "legitimate reasons" and now, on appeal, claim no knowledge of Dart's complaints against the Departments' failures to timely investigate crimes against children. [RP 628]. Appellants' Brief in Chief, at pp. 19-20. Defendants-Appellants brought this appeal, not because Judge Louis E. De Pauli misapplied the facts of this case to the WPA; but rather, because they are still angry at Appellee Dart for speaking out against the Department's *de facto* policy of not immediately investigating CYFD reports of child abuse. Appellants' Brief in Chief, at pp. 19-25. They still think he is wrong. However, a jury decided differently.

In March, 2011, when Frank Dart wrote a memorandum to his immediate supervisor, Sgt. Robert Perez ("Perez"), he put the safety of vulnerable children before his loyalty to the Department by claiming they had been "negligent" in their

inability to investigate CYFD referrals. [TR. Vol II 269]. In the eyes of the Defendants-Appellants, he had the audacity to refuse a direct command from Perez. They were all copied on Dart's Interoffice Memorandums dated 03/10/2011 and 03/15/2011, and thus had ample notice of Darts' protected communications to Perez and to them. [Ex.8] [Exhibit N].

As the jurors heard in closing: "the reason we have a Whistleblowers' Act is we, as a community in New Mexico, encourage employees to speak out about matters of public concern. He did that in this case. And why does it matter? Because we don't retaliate against people who do the right thing. And why don't we retaliate against people who do the right thing? Because as a consequence the right thing does not get done. And in this case, as a consequence of Frank Dart being removed from the federal Cyber-Crimes Task Force, fewer children were helped because they took away the best." [Tr. IV: 159].

The jury rendered a verdict on August 8, 2014, finding: "Plaintiff engaged in protected activity by communicating to his superiors his belief that Defendants were violating state law by failing its duty required by state law; that Plaintiff made these communications in good faith; that Plaintiff suffered a retaliatory action by the Defendants; and that Dart's protected activity was a cause of the retaliatory action. And as a result of Defendants' conduct, Plaintiff Dart

experienced emotional pain and suffering and economic harm." Final Judgment [RP 865].

C. Appellants' Failure to Call Sgt. Robert Perez Justly Caused Exclusion of Exhibits and Dart's Counsel's Proper Comment.

Appellants miscast their own failure to call Perez as a witness by speculating they were prejudiced by the court excluding Perez's March 15 memo to Dart due to Defendants' failure to lay foundation. Appellants' Brief in Chief at p. 20. In the Pretrial Order both Dart and the Department identified Sergeant Robert Perez as a person they would have available to call at trial. [RP 642, 645]. In Defendants' portion of the Pretrial Order the Defendants-Appellants wrote that they would call Perez "regarding his supervision of Plaintiff while he was a detective, his write up of Plaintiff and the decision to remove Plaintiff from the FBI Cyber Task Force." They listed Robert Perez among seventeen witnesses they claimed they would call or could call at trial. [RP 644-648].

Then during the direct examination of Darren Hardy, who was the lieutenant over detectives at the time, [Tr. III: 67] Defendants' counsel began eliciting hearsay concerning the conversations Hardy had with Perez about their decision to discipline Frank Dart after his March memorandum. The Court properly sustained Dart's Counsel's hearsay objection. [Tr.III: 87-88]. The Court explained: "You'll probably have to bring in Mr. Perez to say what he told Mr. Hardy." [Tr. III: 88]. The Court had to ask Ms. Anderman three times:

1. **Court**: Are you going to have Perez testify? **Ms. Anderman**: It's a memo from Sergeant Perez to Lieutenant Hardy. [Tr. III: 93-94];

2. **Court**: Are you going to have Perez testify? **Ms. Anderman**: No, Your Honor. We believe it's' admissible under the—[Tr. III: 94]; and,

3. **Court**: Well I know that. But are you going to have Perez testify? **Ms. Anderman**: Probably Not, Your Honor. **Court**: Probably Not? [Id.].

Then, Ms. Anderman loudly announced to the jury that the reason she had decided not to call the former Perez was "to move things along." [Id.]. In front of the jury, Defendants-Appellants' counsel made an issue of her decision not to call Perez purportedly to "move things along." Defendants' counsel could have called Perez as her witness to lay a foundation or to testify as to the contents of Exhibits L and O, instead she decided "to move things along." Id. Now Defendants are trying to claim the trial court somehow denied them a fair trial by excluding hearsay of an available witness. It was not the trial court who prevented them from calling Perez.

Defendants' counsel's gamesmanship was not the fault of the trial court, Dart, nor his counsel. Whether the Defendants failed to call Perez to "move things along," or because "he sued the department" was not material. [Vol III: 95]. Dart's Counsel had reasonably assumed that Defendants would be calling Sgt. Perez at trial to place the content of all the memorandums between himself, Dart and Hardy

in context and that she would have an opportunity to cross-examine him. Statements in Perez's memorandum such as, "It was also explained to Det. Dart that directives, case assignments or case reviews given to him in any fashion regarding any investigative matter by a supervisor in the Detective Bureau were his responsibility," were duplicative of the evidence Defendants offered and the Court admitted in the form of Perez's written employment evaluation of Dart. [Plaintiff's Exhibit 1G, page 5]. Defendants-Appellants improperly attempted to admit hearsay through Hardy to gain a tactical advantage that would allow them to spin the contents of Exhibit L rather than elicit the testimony of the author of Exhibit L, Sgt. Perez, as to the real meaning of his written words at the time he wrote them. [Tr. IV: 93].

Finally, post-trial, Defendants-Appellants submitted an affidavit of Heather Parmley, Defendants' paralegal, and an affiant Dart's counsel never was able to confront or cross-examine, who after trial allegedly located the only juror who voted against Frank Dart, Sabrina Stahler, Juror 11. Ms. Parmley attested that though Ms. Stahler had *not* heard Dart's Counsel say that Perez was suing the City, she had heard other jurors discussing "it during breaks." [RP 837, 895]. Defendants were unable to produce an affidavit from Ms. Stahler herself or from any juror who allegedly was discussing "it during breaks" let alone prove that the extraneous comment prejudiced Defendants. [Id].

At trial, the Judge and the people sitting closest to the jury did not hear Ms. Kennedy say that "Perez was suing the City," at all, let alone loud enough for the jury to hear. [Tr. III: 179-181]. When the Judge asked if Ms. Anderman wanted a curative instruction, she declined the offer. While Ms. Kennedy did not believe that the jury had heard her say "Perez was suing the City," during a bench conference, she did make an offer of proof that Perez had "sued Chief Westall for retaliation, and Mr. Westall said on the stand that he had never retaliated against anyone." [Tr. III: 181]. The Judge made the valid point that as far as anyone knew "Maybe he is in Alaska or something somewhere." [Tr. II: 182]. Why Defendants failed to call Perez is not a "material fact" and the exclusion of Perez's memorandum in no way prejudiced the Defendants. [RP 804-826].

II. ARGUMENT AND AUTHORITIES

THE DISTRICT COURT DID NOT ERR IN DENYING JUDGEMENT TO DEFENDANTS-APPELLANTS

A. STANDARD OF REVIEW

Notwithstanding NMRA 12-213(A)(4), Defendants-Appellants failed to set forth any standard of review for its baseless claims that Dart presented insufficient evidence in support of his WPA claim and his claim to damages. Defendants then proceed to gloss the facts as they wish the jury would have seen them. The proper standard of review is to consider the evidence in the light most favorable to Frank Dart. "'In reviewing a sufficiency of the evidence claim, this Court views the

evidence in a light most favorable to the prevailing party and disregard[s] any inferences and evidence to the contrary.'" *Littell v. Allstate Ins. Co.,* 2008-NMCA-012, 143 N.M. 506, 511, 177 P.3d 1080, 1085, quoting, *Weidler v. Big J Enters., Inc.,* 1998–NMCA–021, ¶ 30, 124 N.M. 591, 953 P.2d 1089 (alteration in original) (internal quotation marks and citations omitted). "We defer to the jury's determination regarding the credibility of witnesses and the reconciliation of inconsistent or contradictory evidence." Id. "We simply review the evidence to determine whether there is evidence that a reasonable mind would find adequate to support a conclusion." Id. Rather than present the evidence in the light most favorable to Frank Dart, Appellants continue to cast aspersions on him claiming that he "misread the statute, and his Chief possessed a correct understanding of it." Brief in Chief at p. 36. The jury properly decided differently.

With respect to the Defendants claim that the trial court erred in excluding Exhibits L and O, Brief in Chief at p. 39, the Court generally applied an abuse of discretion standard where the application of an evidentiary rule involves an exercise of discretion or judgment, but does also apply a de novo standard to review any interpretations of law underlying the evidentiary ruling. *See State v. Martinez,* 2008–NMSC–060, ¶ 10, 145 N.M. 220, 195 P.3d 1232 ("A misapprehension of the law upon which a court bases an otherwise discretionary evidentiary ruling is subject to de novo review.").

B. DART'S JURY VERDICT FULFILLS THE LEGISLATIVE INTENT OF THE WHISTLEBLOWER PROTECTION ACT.

In February of 2010, when Representative Joseph Cervantes sponsored the WPA, he found overwhelming support. The unifying purpose of the Act was to protect the public from government corruption or criminally irresponsible behavior by removing the barrier of fear of retribution from employees, like Frank Dart, who are in the best position to report corruption. The legislature chose to create a safe harbor for public employees to speak out when they witness or are ordered to participate in unlawful or improper acts. *Whistleblower Protection Act* (HB165).

In March, 2011, from this safe harbor, Frank Dart wrote his memorandum calling out the Farmington Police Department for failing the people of its community by forcing him to triage child abuse cases. The jury found that Frank Dart shed light on a negligent system that failed vulnerable children, an issue of public concern. [Exhibit, 8]. When Governor Bill Richardson signed the WPA into law February 27, 2010, he prohibited public employers, like the Farmington Police Department, from silencing public employees, like Frank Dart, who take action, object to, or refuse to participate in a matter they believe, in good faith, to be an unlawful or improper act.

http://www.shrm.org/legalissue/stateandlocalresources/pages/newmexicogovernor.aspx.

The jury found that the chain of command disciplined Dart because he put in writing the police department's refusal to protect and serve the children of the City of Farmington as codified in section 32A-4-3. [Tr. III: 199]. Frank Dart, who had his boots on the ground for over ten years investigating crimes against children, believed in good faith that the City of Farmington was endangering children by failing to investigate CYFD referrals in a timely manner. The jury was tasked with the job of finding whether Frank Dart acted in good faith when he refused to participate in a detective department that he believed was placing children at risk. [Tr. IV: 150]. The jury returned a Special Verdict in which it found that Dart acted in good faith, was retaliated against, that his protected activity was a cause of the retaliation, that he suffered economic harms in the amount of $4,000.00 and emotional pain and suffering in the amount of $200,000.00 [RP 849-50]. The jury listened to Frank Dart and found that he sincerely wanted the Department to protect children by ending the practice of allowing CYFD reports to languish for weeks uninvestigated. There is no legal basis to question the jury's verdict. The jury had a choice to make between believing Frank Dart, valuing his speech, and not believing him and they chose to believe him and to credit his actions as valuable to the community. There is nothing punitive about the jury's award. The jury's Special Verdict embodies the very intent of the New Mexico Whistleblower Act and thus, should be upheld.

C. DART COMMUNICATED AN ISSUE OF PUBLIC CONCERN TO HIS CHAIN OF COMMAND.

For ten years, detective Frank Dart told his supervisors in the Department of the statutory obligation to timely investigate CYFD referrals or "reports" of child abuse and of his concerns that the Department was failing to allocate enough resources to investigate child abuse. [Tr. II: 17-18]. Frank Dart explained to the jury that from 2001-2009, the Department received literally hundreds of "CYFD reports." [Tr. II: 13-14]. A person would report to CYFD that a child was being abused or neglected and CYFD would create a written report of the information obtained from the caller. [Tr. II: 14]. Those reports then were forwarded to the police department for investigative purposes. Frank Dart testified it is a statutory requirement for law enforcement to investigate the matter "immediately" or "promptly," to ensure the safety or well-being of the child or children that are involved in the CYFD report. [Tr. II: 14]. Due to the sheer number of CYFD reports, from 2001-2005, Frank Dart had to triage the CYFD referrals as he did not have the time to investigate all of the referrals. Dart's sergeant, Kim Walker, told Dart to do the best that he could and that he did not have time himself to deal with it. [Tr. II: 16-17].

In 2004, Frank Dart received a letter from the National Center for Missing and Exploited Children about someone in the Farmington area who was trading child pornography on-line. [Tr. II: 20]. Dart was able to work with the FBI to

identify the person who was in the area selling child pornography, place him under arrest and seize the child pornography.

After that case, Dart was able to hone his skills in investigating internet crimes against children through training with the New Mexico Attorney General's Office. [Tr. II: 21-23]. In May of 2004, Frank Dart was able to investigate and solve the first two complex internet child pornography cases in the history of the Department and clear a burglary ring in which ten burglaries had occurred and seven suspects were arrested. [Tr. II: 35]. He would work late nights and try to do the best he could to investigate the CYFD referrals. He called it "triaging." [Tr. II: 35].

In 2007, Kyle Westall, who had been a lieutenant, became the Captain of the detective division and supervised and completed evaluation forms on Frank Dart. In 2008, Kyle Westall was the deputy Chief. [Tr. II: 37, 38, 44]. For many years, Frank Dart expressed to Defendant Westall his concern that CYFD referrals were not being promptly and immediately investigated. Defendant Westall's response was to tell Mr. Dart that his hands were tied. [Tr. II: 37-38, 97]. Frank Dart expressed his concerns verbally about the Department's inability to timely investigate CYFD referrals. Frank Dart told the jury that he would see envelopes containing up to thirty CYFD referrals or reports pile up in the detective

department for two weeks before he could call the source of the referral to begin to investigate the child's possibly deadly situation. [Tr. II: 41-43].

The continued two week delays, in the heart and mind of Frank Dart, were unreasonable and unlawful. To Dart, the delays did not fulfill the statute's directive of "immediate," thus, the department ignored its duty to follow the law. His anxiety about violating the Children's Code came from his experience in the field investigating crimes against children day in and day out. He testified that the supervisors in the detective division, including Sergeant Robert Perez, would see the stacks of envelopes containing multiple referrals inside stacking up on the detectives' desks. [Tr. II: 42-43].

Each year Dart's chain of command, in the persons of Westall and Perez, filled out a "Detective Job Performance Evaluation" documenting his superior work ethic. The Court admitted these evaluations for Rating Periods 04/2009 to 04/2010 (Plaintiff's Exhibit 1f); 04/2010 to 04/2011 (Plaintiff's Exhibit 1g) [TR. II: 121-124]. By the time the March 2011 evaluation was completed Frank Dart had been working for the Farmington Police Department for fifteen years. [Tr. II: 124]. On Plaintiff's Exhibit 1g, Sgt. Perez explained, in the Supervisor Comment section of the Evaluation, his and the Department's alleged reasons for removing Frank Dart from the Cyber Crimes Taskforce. In the Officer Comments section Frank Dart explained why he refused to follow Sgt. Perez's directive to "review"

several CYFD reports. Frank Dart asserts, "Members of the detective division are keenly aware we are not handling CYFD reports in a manner consistent with state law. It should be noted there were 900 CYFD reports in San Juan County last year!" (Plaintiff's Exhibit 1g) [RP 567]. [Tr. II: 49-55, 127].

On March 9, 2011, Sgt. Perez ordered Frank Dart to "review" some CYFD reports. Frank Dart responded that the CYFD reports could not just be "reviewed," that they had to be "investigated," and that he could not properly "investigate" the CYFD referrals as he was assigned to work on the Cyber-Crimes Task Force. [Tr. II: 94]. On March 10, 2011, Frank Dart wrote a memorandum to Perez explaining that he could not timely investigate the stale CYFD reports. [Plaintiff's Exhibit 8, March 9, 2011, Memorandum from Frank Dart to Sgt. Perez]. At the time Frank Dart received the order to investigate these stale CYFD reports, they were already three to four weeks old. At the time Frank Dart received the order to investigate the CYFD reports, he was already working other sex abuse cases and cyber-crime cases on the FPD/FBI Cyber-Crimes Task Force. He knew that he could not both comply with the statute requiring timely investigation of CYFD reports and pursue child predators on-line. He was deeply saddened. [Tr. II: 100-101]. As a result of Frank Dart's calling the department to task for failing to devote sufficient resources to CYFD referrals, Sgt. Perez gave him a "verbal" reprimand. On March 15, 2011, Frank Dart wrote a second memorandum to his chain of command asking

to grieve the verbal reprimand. [Tr. II: 107-108]. The Department never gave him a grievance hearing. Instead, the department removed Dart from the FPD/FBI Cyber-Task Force and placed an employee there who had no training in conducting cyber-crimes investigations. [Tr. II: 104-108]. Defendants knew that Frank Dart's putting in writing the Departments' negligence, created a written record that could correctly expose it to liability in the tragic event a child was harmed due to the City's knowing failure to timely investigate CYFD reports of child abuse.

Defendant Westall listened to Frank Dart testify that the City of Farmington received and investigated CYFD referrals from Aztec and Bloomfield and that envelopes containing these referral would lay on a desk in the detective division for weeks unopened. Westall did not have a problem with envelopes remaining unopened for weeks and he testified he didn't believe that Frank Dart's understanding of the statute was correct. [Tr. III 187-189]. Westall quipped that one would have to have ESP to know whether the allegation of child abuse contained in those envelopes contained the need for "immediate" action or investigation. [Tr. III 190].

When asked on cross-examination what Defendant Westall did to address Frank Dart's concerns regarding a lack of resources to investigate crimes against children, Westall claimed that he was assured by his supervisors that the Department was "handling crimes against children in an appropriate manner." [Tr.

III: 209]. Westall told the jury that his hands were tied to provide the resources necessary to protect child victims as the county was in the midst of a recession. [Tr. III: 147-49, 209-10].

On cross-examination, Defendant Westall conceded that in 2011, when Frank Dart was asking that additional resources be allotted for investigating CYFD child abuse referrals, the City of Farmington had 5.8 million dollars in surplus. Moreover, he testified that the City has to keep, by policy, 16.8 million dollars in cash reserves so the State does not have to bail them out. [Tr. III: 184-185]. He also conceded on cross-examination that Perez could have assigned the investigation of child abuse to school resource officers within the detective division. [Tr. III: 186-187]. Finally, he conceded that he did not know whether he had read Frank Dart's memorandum prior to approving his removal from the Cyber-Crimes Task Force. [Tr. III: 192]. Even worse, Westall testified he did not know what happened to the FBI Cyber-task force after the Department removed Frank Dart from his position on the task force. [Tr. III: 170].

During the cross-examination of Lieutenant Darren Hardy, he revealed that Frank Dart's detective division had a total of 31 employees, ample staff to more promptly investigate crimes against children. [Tr. III: 67, 121-123]. Hardy testified he disciplined Frank Dart before he had even spoken to him. [Tr. III: 131-132]. Hardy told the jury that Frank Dart could investigate both cyber-crimes

against children and a CYFD child abuse referral at the same time. [Tr. III: 87, 89]. However, Hardy admitted that he could have assigned the CYFD referrals to someone else. [Tr. III: 90]. One reason Hardy disciplined Dart was due to Dart writing a memo explaining that the Department had given him a directive to conduct investigations on CYFD referrals that were weeks old. Hardy decided to remove Dart from the FBI Cyber Task force without even asking Frank Dart how that would make him feel. Hardy testified that he did not even bother to discover whether Frank Dart had eventually followed the order and investigated the stale CYFD referrals, which had languished in violation of the law. [Tr. III: 98-100, 131-132].

A reasonable juror could find that the disciplinary decision was retaliatory for Dart's protected activity. More importantly, the Department was indifferent to the loss to the community caused by removing Frank Dart from the FBI Cyber-Task force. No one questioned Frank Dart's expertise in investigating cyber-crimes against children. The Department punished the community through the retaliation against Frank Dart, as much or even more than Frank Dart. Because the discipline was so obviously destructive to the community, the jury could reasonably discredit the department's claim of its non-retaliatory motivation and find that the department would only remove a supremely qualified officer from a critical

position due to its desire to retaliate against Dart for his act of blowing the whistle on languishing CYFD reports.

The Defendants called a witness from CYFD, Nicole Garcia, to infer that it was appropriate to only "cross-report" child abuse between CYFD and a police department, as opposed to requiring a police department to actually "investigate" child abuse pursuant to NMSA 1978 § 32A-4-3 . [Tr. III 219-220] Ms. Garcia had worked with Frank Dart from 1998 until present and knew Frank Dart to be honest, a man of integrity, and an advocate on behalf of children, who had a clear understanding of the Children's Code in terms of the statutory duty to investigate crimes against children in timely manner as only police departments have arrest powers. [Tr. III 228-229]. The Defendants-Appellants' attorney vehemently objected to Ms. Garcia providing information as to the number of CYFD referrals that were made in San Juan County while Frank Dart was complaining that he could not get to it all. [Tr. III 221-228]. The Defendants-Appellants wanted to hide from the jury the truth about its failure to address the problem of not allocating enough resources to timely investigate crimes against children. Thus, Frank Dart was left with Ms. Garcia vaguely recalling that she had discussed with him his concern about a delay from the time of receiving a CYFD referral and actually being able to follow up with an investigation. [Tr. III 228].

Each of the Department's witnesses could not deny that Frank Dart was a dedicated public servant who was forced by virtue of his work to see the darkest recesses of humanity and who knew all too well the consequences to children of a failure to arrest a predator. [Tr. IV: 158-159]. Fewer children were helped because in retaliating against Frank Dart, the Department took away the best they had to fight the people who seek to harm children on the internet. [Tr. IV: 159-160]. The jury did not appreciate the Defendants callousness towards Dart and the children he sought to protect and serve.

1. **Dart's March 10 Memorandum is Proof of His Good Faith Belief that Defendants were Violating the Children's Code.**

Detective Dart's March 10 Memorandum implores his chain of command to follow the law protecting children. [Exhibit 8]. Frank Dart's good faith understanding of the Children's Code is that law enforcement has a duty to "immediately" investigate a CYFD referral concerning the potential abuse of a child. [Tr. III: 9-13]. Some referrals were never investigated at all. [Tr. III: 13]. Sgt. Perez gave Dart four or five CYFD referrals to investigate that were three or four weeks stale. [Tr. III: 24]. The fact that Sgt. Perez gave to Frank Dart CYFD referrals that were as much as a month stale supported Frank Dart's reasonable belief that the Department was systemically failing to timely investigate CYFD referrals of child abuse. [Tr. III: 24-25.] Frank Dart was taken off the Cyber-Crimes Task Force within two hours of writing the March 10 memorandum

complaining of the Department's failure to timely investigate CYFD referrals. [Tr. III: 25]. Defendants would like to pretend that they did not understand that they had placed Dart in the impossible position or "Sophie's choice," of having to choose between protecting children who were potential victims of Cyber-predators verse investigating children facing violence in their own homes. To this day, Appellants would like to diminish Dart's reasonable assertion that he could not be in two places at once. Frank Dart explains in his March 10 Memorandum that he is only human, that he has limitations and that he needed help. The Department turned their back on him and humiliated him by removing him from the FBI Cyber task force. [Tr. IV: 151]. The Department put Frank Dart between a rock and a hard place. He had to resign from detective and go to patrol in order to survive until his retirement. Frank Dart became angry, frustrated and depressed, essentially broken, because the Department crushed his dream of proactively preventing child abuse by catching on-line predators. [Tr. III: 41, 43].

The jury heard Frank Dart and the goal of their verdict was to make him whole. No devoted public employee should have to face retaliation when he speaks the truth with the purpose of protecting the most vulnerable of this state's children from child abuse. The jury, was given a copy of the statute, and found that Dart was right about NMSA 1978 § 32A-4-3 and that the Department's chain of command was wrong. The Jury voted for Frank Dart as he was truthful with

them. Whereas those in his chain of command called to speak for Appellants were not credible and Heather Chavez, an officer who took over teaching Dart's PowerPoint, took the stand to express a chilling coldness towards Dart's obvious distress about the "common knowledge" that he was removed from the task force. [Tr. III 237-240]. It boiled down to the jury believing that Dart was placing the safety of children over the safety of his own career.

For Appellants, a low moment of the trial was when Deputy Chief Keith McPheeters, who had "a great deal of oversight fleet management," claimed Dart was not given a substandard patrol car when he returned to detectives as "every one of our vehicles that has white paint on it, that paint is coming off in in great big spots like that." [Tr. III: 244, 245]. Lieutenant Hardy picked out the car given to Frank Dart when he was removed from the FBI Cyber-Task force and it looked like no patrol car any juror had ever seen due to its missing white paint patches. He claimed "they chose the best one available." [Plaintiff's Exhibit 5A] [Tr. III: 260].

The jury's response was to award Frank Dart a fair amount for the loss of his dream job on the FPD/FBI Cyber-Task force; for the loss of his faith in the police department to which he had devoted his professional life; for the loss of his access to the computer forensic labs where he had been conducting cyber investigation; for the humiliation he suffered driving a sub-standard police car and forfeiting his PowerPoint trainings; for the loss of his ability to drive his personal car to the

Department so that he could drive his daughters to their sporting events; for his loss of professional reputation being stripped of his remaining child abuse cases and his teaching materials; and for the pain and anguish suffered knowing from the time he was removed from the FBI-Cyber Task force that he could not do his best job, be safe and protect and serve. [Tr. II: 109-111, 146-153].

Mr. Dart decided to process his "rage" and depression at the Department by going to see a therapist for about three months and by chopping wood. [Tr. II: 130-131, Tr.. III: 18, 40-43]. Most frighteningly of all, there came a time where Frank Dart was not provided back up when he went out on a call. [Tr. II: 133-134]. Based on everything that had happened, Frank Dart decided that the only safe thing he could do was to go back to the patrol division to ride out his last years before retirement. [Tr. II: 134-136; Tr. III, 40-43]. This decision cost Frank Dart, by the jury's calculations $4,000.00 in economic harm, but most importantly, Dart lost his faith in his profession and thus his ability to protect and serve the children of San Juan County. This was more than just a hostile workplace, this was utter heartbreak. The jury reasonably found that a fair value for that loss was $200,000.00. [RP 850].

D. <u>The Court's Exclusion of Exhibits L and O was Not Error.</u>

Defendants-Appellants claim that if admitted, Exhibits L and O, would have somehow shown that Defendants were "unaware that Dart, based upon his unique

misreading of the statute, was attempting to accuse Farmington of illegal or unlawful activity." Brief in Chief, at p. 25. This claim is completely unsupported by Exhibits L and O, or by any testimonial evidence. Presumably, Defendants feared what Perez would have said during direct or on cross-examination or they would have called him.

E. Defendants Retaliated Against Dart in Violation of the WPA

What happened to Frank Dart is strikingly similar to the systematic retaliation faced by officers who report the misconduct of other officers as part of their job duties. See *White-Ruiz v. City of New York*, 983 F. Supp. 365, 368 (S.D.N.Y. 1997); *Zinnermon v. City of Chicago Department of Police*, 209 F. Supp. 2d 908, 909 (N.D. Ill. E.D. 2002); *Baron v. Hickey*, 242 F. Supp. 2d 66 (D. Mass. 2003). *Spina v. Forest Preserve District of Cook County*, 207 F. Supp. 2d 764, 767 (N.D. Ill. E.D. 2002); and *Simon v. City of Naperville*, 88 F. Supp. 2nd 872, 877 (N.D. Ill. E.D. 2000). All of these cases illustrate how harsh the code of silence can be on police officers and how intractable police departments can be when it comes to implementing even basic reforms. They also represent that over the last ten to fifteen years Courts around the country have acknowledged that effective whistleblower protection is vital to combating the code of silence and rewarding good officers.

Key is that none of the cases cited by the Defendants involve "whistleblowing" police officers like Dart who had a "good faith" belief that leaving CYFD referral uninvestigated for weeks was a *de facto* a violation of state law. Uniformly, in cases involving whistleblowing police officers, the courts, the judges, and the jurors all come down on the side of the rank and file officers who have to courage to tell the truth.

For example, in *Monico v. City of Cornelius*, No. 03:13-CV-02129-HZ, 2015 WL 1538786 (D. Or. Apr. 6, 2015), Plaintiffs, former police officers, brought suit against the City, City Manager and Police Chief, raising a violation of an Oregon whistleblower statute. The response of Dart's superiors to his refusal to blindly follow orders is similar to *Monico*, where several members of the Cornelius Police Department filed a Complaint alleging corruption and wrongdoing within the Department. *Id.* at *1. Approximately one month later, a new interim chief of the police department, Summers, was appointed. *Id.* at *3. Summers began posting inspirational posters in the men's restroom, which included messages about how to be "successful followers", not guessing the chain of command, intolerance of employees second-guessing the chain of command, and one that emphasized loyalty. *Id.* Members of the police department viewed the posters as implying that those who participated in the Complaint were holding the department back. *Id.* at *4. The United States District Court determined that when considered in the light

most favorable to the Plaintiffs, there were issues of fact as to whether the posters, as well as placing Monico on leave for other actions, were sufficiently retaliatory. *Id.* at *15. The court focused on the idea that hanging of posters functioned as though the Department was officially sanctioning conduct. *Id.* Further, the court reasoned that the placement of the posters in a public area creates a high chance of communicating an antagonistic environment to the whole department. *Id.* The court concluded that a reasonable juror could find that when a message of hostility is placed in a public location in an area where teamwork is essential to the protection of both the public and officers, the hanging of the posters could be seen as deterring a person from engaging in future protected conduct. *Id.* Frank Dart certainly experienced a message of hostility when after fifteen years of working for the Department he was suddenly made to drive a patrol car that looked like it had been in a demolition derby. [Plaintiff's Exhibit 5A].

Another example of the types of retaliation suffered by police whistleblowers can be found in *City of Austin v. Ender*, 30 S.W.3d 590 (Tex. App.--Austin 2000), where Officer Ender was threatened by his supervisor Senior Sergeant Warren with a transfer due to his low number of issued traffic tickets. *Id.* Ender believed that Warren was trying to compete with other shifts to determine who could distribute the most tickets. *Id.* On this belief, Ender informed Warren that ticket quotas were illegal. *Id.* Subsequently, Ender informed a police Captain,

an Assistant City Attorney and the Deputy Police Chief of Warren's threat and his suspicion of illegal issuance of tickets. *Id* at 591–592. Several days after verbally informing his superiors of the Warren interaction, Ender reported the threat and belief of improper practices to the Department's Internal Affairs Division. *Id* at 592. The following day, Ender was transferred to the Patrol Division, losing certain benefits from his prior position in the process. *Id.* Approximately two and a half weeks later, Ender began the formal grievance process by filling in the Department's fill-in-the-blank form. *Id.* Thirty-one days later, there was still no ruling on Ender's grievance, so he filed suit in the District Court alleging statutory whistleblower violations. *Id.* In the City's response to the court, they claimed that Ender was transferred because of his job performance problems, including low-ticket writing productivity. *Id.* On appeal to the Court of Appeal of Texas, Austin, the Court held that the City had not proven that Ender's reports were not the cause of his transfer and remanded the case back to the district court. *Id.* After remand, the City argued that Ender did not present a specific claim of retaliation or discrimination and that he failed to exhaust the City's grievance procedures (per an exhaustion provision in the whistleblower statute). *Id.* at 593. The Court emphasized that the statute does not contain a requirement that particular words must be used when filing a grievance, "[w]e refuse to hold handwritten complaints drafted by employees to the same exacting standard we might apply to pleadings

drafted by attorneys." *Id.* at 595. Rather, Ender's repeated reports of being transferred on an illegal basis were sufficient to put the City on notice of a potential whistleblower claim. Like in *Ender*, Dart is alleging loss due to removal from the FBI Cyber-Crimes Task Force and a constructive transfer back to patrol where he felt he could survive until retirement. Importantly, the court in *Ender* rejected the City's contention that Ender's grievance must contain distinct phrasing, such as the words "retaliation" or "discrimination." *Id.* at 594. Defendants are alleging that because Dart failed to use certain verbiage, his complaint that the Department was violating the Children's Code lacked validity. The Court's reasoning in *Ender* should be adapted here – the repeated complaints of an officer whether written or verbal, provide sufficient notice for a potential whistleblower claim. Similarly, the Ohio Supreme Court held that to gain protection of whistleblower statute, a whistleblowing officer did not need to show that a co-worker had actually violated statute, city ordinance, work rule, or company policy. *Fox v. Bowling Green*, 668 N.E.2d 898 (Ohio 1996). Also in *McCall v. D.C. Hous. Auth.*, No. 14-CV-337, 2015 WL 7289508 (D.C. App. Nov. 19, 2015) the court reasoned that the creation of a hostile work environment in retaliation for a protected disclosure constitutes a violation of the WPA. *Id.* at *4. The court further noted that, "the very definition of a hostile work environment demonstrates that retaliation in this form is not an insignificant matter." *Id.* And

finally, in *Town of Flower Mound v. Teague*, 111 S.W.3d 742 (Tex. App. – Fort Worth 2003), the court commented that a report of an alleged violation of law may be in good faith, even if it is incorrect, as long as a reasonable person with the employee's same level of training and experience would have believed a violation transpired. *Id.* at 753. Additionally, this good faith belief must be analyzed according to the information in front of the accusing employee at the time their report or grievance is made. *Id.* The court found that a good faith basis existed in this case, as evidenced by the fact that even other law enforcement, namely the Chief, acted in a way that indicated he believed that a violation of law had occurred. *Id.*

The good faith analysis that the court conducted in *Teague* is helpful because it indicates that an actual violation of law does not need to take place for a whistleblower to obtain protection. Rather, if there is a solid basis that a person believes a violation is taking place, the protection of the law may be triggered. Therefore, it is inconsequential whether the Department was actually violating the law, rather, as long as Dart had a good faith basis for his accusations (and the jury found he did), then Dart is entitled to whistleblower protection. The connections for proof of retaliatory conduct do not need to be direct, but are sufficient as long as there are indications that but for the reported grievance, the whistleblower would not have experienced negative repercussions. These well-reasoned cases

rebut Defendants' assertion that a series of negative events taken together are not enough to be taken together as an inference of retaliatory conduct. Appellants' Brief in Chief at p. 35.

When Defendant Westall claimed during trial that he thought Frank Dart was only complaining about "an unlawful order," he was impeached not only by his deposition testimony but also by his wooden demeanor. [Tr. Vol. III, 201-202]. He testified he would "defer" to Sergeant Perez or Lieutenant Hardy. Ms. Kennedy's **Question**: What did you do to investigate Frank Dart's concerns with regards to lack of resources to investigate crimes against children? Mr. Westall's **Answer**: "Well, I was assured by my supervisors that we were handling our crimes against children in an appropriate manner. And at the time I was chief, more resources were not a possibility due to the financial issues I've spoken about before." [Tr. Vol. III, 201-202, 209]. In other words, he did nothing to help Dart when he asked for it.

Previously, when Hardy was on the stand, Hardy testified extensively about the information he gained from Perez prior to authorizing the removal of Frank Dart from the FBI Cyber-Crimes Task Force and that he "Absolutely," relied upon "Mr. Dart's statements in his memos in deciding on whether to remove him from the task force." [Tr. Vol. III: 134]. Moreover, the issue is not whether anyone in Dart's chain of command agreed with his claim in his memorandum that the

Department was violating its statutory duty to immediately investigate CYFD reports of child abuse; the issue is whether Frank Dart had a "good faith" belief that the Farmington Police Department's policies of allowing CYFD referrals to go uninvestigated for weeks was a violation of their statutory duty. The jury found that he did and there was ample evidence to support their finding. [RP 849-850].

Though Defendants still claim that Frank Dart was simply disgruntled by his job assignment, Brief in Chief, at p. 28, and that provided the basis for his grievance rather than his reasonable belief that the police department had placed him in the horrible position where he could not fulfill his obligations under the law to timely investigate CYFD reports of child abuse, the trial court, and a fact-finding jury, both disagreed. *Id.*, and [RP 985-986].

F. Defendants misstate Plaintiff's burden of proof regarding a causal connection between his "good faith" communication and Defendants' retaliation.

Defendants argue that Frank Dart should have been required to show that Defendants took adverse action against him "because of" the protected communication claiming that Defendants did not even know Frank Dart was complaining that they were violating the law. Appellants' Brief in Chief, at 19-20. In fact, the jurors did find that exact element when they answered: "Yes," to Question 4, "Was the Plaintiff's protective activity a

cause of the retaliatory action?" [RP 849-850]. In *Henry v. City of Detroit*, 594 N.W.2d 107 (Mich. App. 1999), the court reasoned that the WPA must be construed in favor of the persons it was intended to benefit. *Id.* The court in *Henry* emphasized that whistleblower laws must not be subject to stringent interpretations if they are to function as they were intended to –to protect whistleblowers. This guidance is directly relevant to Dart's case because Defendants are attempting to indicate that because certain formalities (which are not specified anywhere) were not followed, the grievance that Dart filed was invalid and therefore he is not entitled to whistleblower protections. Appellants' Brief in Chief, at p. 36. While the jury found that Dart's memorandum did constitute good faith "written notification" to his chain of command a violation of Section 32A-4-3. The statutory language of the WPA does not require Dart show that retaliation occurred *only* because of the protected communication, but rather requires Defendants to show as an affirmative defense that "retaliatory action was **not** a motivating factor" in its adverse action against Plaintiff. *See* §10-16C-4(B), NMSA 1978 (emphasis added). Therefore, the jury properly concluded that Defendants failed to provide evidence that retaliation was **not** a factor in their decision to remove Frank Dart from the Task Force and thus failed to meet their burden under the statute. Defendants are apparently forgetting both the language of the WPA itself and the mutually

agreed upon instructions tendered to the jury in this case. As discussed above, the statutory language and the tendered jury instructions allow for a "mixed motive" standard for Defendants' retaliation. Jury Instruction No. 7 explains: "In determining whether Plaintiff was retaliated against because he engaged in protected activity, you must determine whether that conduct was *a motivating factor* in the retaliatory conduct against Plaintiff. [RP 811].

A motivating factor is a factor that plays a role in the decision to retaliate against Plaintiff. It need not be the only reason, nor the last or latest reason, for the retaliatory actions of the Defendants."[Id]. Therefore, even if Defendants had a legitimate non-retaliatory reason for Dart's removal from the Task Force, to teach Dart a lesson for failing to follow an order, the jury was still free to determine from the evidence that retaliation was *a motivating factor* nonetheless.[Id.] The case rose and fell on Frank Dart's testimony and the jury credited his testimony over that of his chain of command, who stubbornly refused to listen to his pleas to allocate more resources to protect vulnerable children to this very day.

The New Mexico WPA contains "motivating factor" language and also carries the broad policy goals of opposing fraud, waste, abuse, and corruption, and fostering transparency in government. Thus, it is simply

common legal sense and easily garnered from the plain "motivating factor" language of the statute that the Legislature similarly intended that an employer be relieved from an otherwise valid hostile work environment claim simply because other factors aside from the protected communication contributed to making the work environment hostile – in this case there were other factors like Dart not being allowed to devote more of his time to working on the FBI/FPD Cyber-Crimes Task Force. The jury could reasonably have found that retaliation in this case was a least a motivating factor for the adverse actions taken against Frank Dart. [RP 811].

G. It is well-established that Perez's Memos, even if discussing business matters, were not a "business record" under the Rules of Evidence.

In the case of *Rogers v. Oregon Trail Electric Consumers Cooperative, Inc.*, No. 3:13-CV-1337-AC, 2012 WL 1635127 (D. Or.), the court found that a memorandum expressing dissatisfaction with Dart's job performance did fall under the business records exception because Defendant produced other similar memorandum which evidenced that these memorandum were regularly kept in the course of business and because a witness with actual knowledge of the creation of such memorandum laid proper foundation for them. There, the Director of Human Resources testified that she did have personal knowledge of the content of the

memorandum after extensively reviewing Dart's personnel file and having personal knowledge due to her position. However, here, the Defendants failed to produce Robert Perez, director of Human Resources, or any authenticating evidence.

Moreover, Defendants' contention that a reference to an absent witness unfairly prejudices a party is contrary to well established law. Rather, "[t]he rule, even in criminal cases, is that, if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." *Graves v. United States*, 150 U.S. 118, 120-21, 14 S. Ct. 40, 41, 37 L. Ed. 1021 (1893). New Mexico recognizes the absent witness rule and permits a party to comment on an absent witness as proper argument. See NMRA, Rule 13-2104, see also, *State v. Vallejos*, 1982-NMCA-146, 98 N.M. 798, 800-01, 653 P.2d 174, 176-77 ("New Mexico law permits comment, in closing argument, concerning the failure to call a witness.") An attorney may not comment on the absence of a witness when that witness was not competent to testify. See *Graves* 150 U.S. at 120-21 (finding it improper to reference a spouse's failure to testify because of marital privilege.). In this case, Robert Perez was competent and available to testify. [Vol III: 93-94].

Defendants' reliance on *Young v. Guild*, 7 So. 3d 251 (Miss. 2009) is misplaced because it does not stand for the general proposition that an attorney may not reference an absent witness thereby allowing the jury to consider that absent testimony as prejudicial. Appellants' Brief in Chief, at p. 41. Rather, in *Young* the defendant's attorney told the jury that they would not hear from the plaintiff's divorce attorney. *Young* 7 So. 3d. 251 (Miss. 2009). The trial court instructed the jury to disregard the comment because it infringed on the protections of attorney client privilege. *Id.* The Court found that "any taint that resulted from counsel's comment about the absence of [plaintiff's divorce attorney] was cured by the court's instruction to the jury to disregard the comment. This issue is without merit." *Id.* at 263.

H. The Jury's Damages Award Was Not Punitive or Excessive

In *Spina*, 207 F. Supp. 2d 764 (N.D. Ill. E.D. 2002), Cynthia Spina alleged that she had endured ten years of consistent sexual harassment by her fellow officers and that her complaints to supervisors resulted in retaliation. Her tires were slashed, inappropriate rumors were spread about her, she was denied prestigious job assignments, and her fellow officers refused to give her back up or cooperate with her. *Id.* at 767, 775. Of the department, the court found that "its willingness to sacrifice a good officer instead of addressing serious sexual harassment and internal grievance problems reveals an anachronistic attitude that

has no place in today's law enforcement community." *Id.* at 778. Likewise, in this case the department's willingness to sacrifice a good officer can be understood only through the prism of retaliation. A jury awarded Spina $3 million, though she had not received any mental health treatment, so the Judge reduced her award to $300,000.00. *Id.*

Over ten years later, a jury awarded Dart a total of $204,000.00 for his constructive demotion, loss of overtime; the loss of his reputation, his loss of happiness and joy working in his specialty within his profession, the loss of his faith in his profession, and for the fear, rage, retaliation, humiliation, sleeplessness, and depression he suffered from March of 2011 until his retirement from the police department. This amount is reasonable.

As previously decided by this court and other courts that have heard New Mexico WPA cases, emotional distress damages are indeed allowable under the statute as evinced by the plain statutory language of §10-16C-4, NMSA 2010. Furthermore, in cases brought for retaliatory discharge, which can be likened to cases brought under the WPA, New Mexico courts have confirmed a Plaintiff's right to emotional distress damages. *Chavez v. Manville Prods. Corp.,* 108 N.M. 643, 649, 777 P.2d 371, 377 (1989) is the seminal case on the topic. While the financial impact of Dart's constructive demotion was only thousands of dollars, his removal from the Cyber-Crimes Task Force was emotionally devastating to him.

Defendants persistent devaluing of the harms they caused is in keeping with their tone deaf demeanor throughout the trial.

Defendants claim that the amount of the judgment was somehow influenced by jurors talking during a break about Ms. Kennedy alleging that Perez was suing the department is ludicrous. Appellants' Brief in Chief, at p. 41. Even if a juror had heard Ms. Kennedy's alleged comment, "the judgment should not be disturbed unless it clearly appears that the remarks in question unduly aroused the sympathy of the jury and thereby influenced the verdict." Julander v. Ford Motor Co., 488 F.2d 839, 842 (10th Cir. 1973). The jury was instructed to base its verdict solely upon the evidence, without prejudice or sympathy, multiple times during the trial. *See* Jury Instruction No. 19, filed with the court, 08/08/2014. [RP 823]. A central assumption of American jurisprudence is that juries follow the instructions they receive. *Marshall v. Lonberger*, 459 U.S. 422, 438 (1983). It is simply gross speculation to assume that any juror heard the remark at all, much less used a single comment to improperly impassion them against Defendants.

"The proper amount of damages is of course bound up in the assessments made by a jury during the actual trial itself, for its verdict is presumed to be correct. It is a fundamental function of a jury to determine damages." Allsup's Convenience Stores, Inc., v. North River Ins. Co., 1999-NMSC-006, ¶ 16, 127 N.M. 1, 976 P.2d 1 (quotation marks and internal citations omitted). Defendants

constructively demoted Dart from his dream position of working on a FBI Cyber-Crimes Task Force to protect children from on-line sexual predators. The jurors were able to see in Dart's employee evaluations that he had dedicated his life to protecting the most vulnerable of children from child abuse. Frank Dart testified for almost two full days about the retaliatory actions taken by Defendants as well as how the Defendants' treatment of him caused him to suffer anxiety, sleeplessness, and anger, to such a degree that he sought professional therapy for three months. Dart testified to having the position he had worked toward for many years taken from him out of spite and retaliation causing him to feel "rage". Moreover, a fellow police officer, Mark Lukow, testified concerning Dart's emotional suffering, expressed by "splitting wood," which the jury clearly found compelling. [Tr. II: 130-131; Tr. III: 18, 40-43]. Terrifyingly, Dart was not provided back up when he went out on a call. [Tr. II: 133-134]. The only safe thing Dart could do was to go back to the patrol division to ride out his last years before retirement. [Tr. II: 134-136; Tr. III, 40-43].

An expert is not required to prove emotional damages. *See* Folz v. State, 1990-NMSC-075, ¶44, 110 N.M. 457, 471, 797 P.2d 246, 260 ("Nor do we believe it mandatory for the plaintiff to produce expert medical testimony in order to establish the claim for emotional injury … the use of expert medical testimony should be employed when the trial court reasonably decides that it is necessary to

properly inform the jurors on the issues.") (internal citations omitted). The testimony of lay witnesses can adequately describe obvious emotional suffering.

Dart was, in fact, removed from the Task Force position, did receive professional mental health care to deal with his emotions regarding his work environment, and did not ask for a specific amount of emotional distress damages during closing which the jury far exceeded. Thus, the Defendants have not presented any factually similar cases under the WPA to demonstrate that circumstances such as Dart's are not compensated by an award this size. "The findings of the jury should not be disturbed as excessive except in extreme cases, as where it results from passion, prejudice, partiality, sympathy, undue influence, or some corrupt cause or motive where palpable error is committed by the jury, or where the jury has mistaken the measure of damages. However, the mere fact that a jury's award is possibly larger than the court would have given is not sufficient to disturb a verdict." *Allsup's*, 1999-NMSC-006, ¶ 16, *citing Richardson v. Rutherford*, 109 N.M. 495, 503, 787 P.2d 414, 422 (1990).

The record further shows that Defendants' attempts to humiliate and discount Dart's feelings and concerns were very obvious in their demeanor toward Dart during trial. The jury had a choice to either side with Defendants and discount Dart's suffering or side with Dart and award him a reasonable sum of money to fairly compensate him. Thus, Defendants' speculative assumption, that

the jury was improperly motivated by the words of attorneys carries no more weight than the suggestion that the jury was instead motivated by Defendants' conduct during trial. In other words, without substantial evidence regarding what the jury actually considered during deliberations, any assumptions are simply improper speculation and do not warrant overturning the jury's verdict.

Similarly, simply because the jury's award for emotional damages is larger than the Defendants thought it would be, Defendants have still not presented anything more than mere speculation that the jury came to its verdict by some other means than simply assessing the evidence presented. Disagreement with the amount a jury awarded does not equate to insufficient evidence to award such an amount. The jury acted with a thorough and complete understanding of their duties, were conscientious in examining the evidence presented, and came to a reasonable verdict based on that evidence. The fixing of damages is "peculiarly a function of the jury" and its determination should not be overturned unless it is "grossly excessive." State Office Sys., Inc. v. Olivetti Corp. of America, 762 F.2d 843, 847 (10th Cir. 1985). There is nothing "grossly excessive" about the award of damages in this case.

It is the exclusive function of the jury to appraise the credibility of witnesses, to determine the weight to be given particular testimony, to draw inferences from the facts established, to resolve conflicts in the evidence, and to

reach ultimate conclusions of fact. United Phosphorous, Ltd. V. Midland Fumigant, Inc., 205 F.3d 1219, 1226 (10th Cir. 2000); *see also* Wulf v. City of Wichita, 883 F.2d 842, 874-75 (10th Cit. 1989)("[A]bsent an award so excessive or inadequate as to … raise an *irresistible* inference that passion, prejudice or another improper cause invaded the trial, the [court's] determination of the amount of damages is inviolate.") Thus, Dart respectfully requests that the Court affirm the jury's decisions on damages.

III. STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

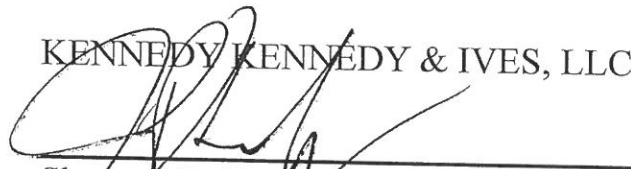
Because of the importance of the issues at stake and because counsel's knowledge of the record will aid the Court, Frank Dart requests oral argument.

IV. CONCLUSION AND REQUEST FOR RELIEF

For the reasons set forth herein, Frank Dart requests that the Court deny Defendants' request that the Judgment be reversed and affirm the decisions of the District Court and the jury's verdict.

Respectfully Submitted,

KENNEDY KENNEDY & IVES, LLC



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RULE 12-213(F) NMRA STATEMENT OF COMPLIANCE

As required by Rule 12-213(f)(2) NMRA, I hereby certify that this Answer Brief is a total of 44 pages. As Required by Rule 12-213(f)(3) NMRA, I hereby certify that the body of this Answer Brief contains 10, 608 words and was prepared using a proportionally-spaced type style or typeface, Times New Roman. In reaching this total, I relied upon word-processing program WORD Version 13, last updated on February 7, 2016.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served on the following by U.S. First Class mail and electronic mail on this 8th day of February, 2016 to:

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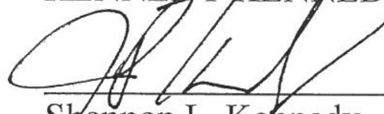

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