IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

TROY STATCZAR,

Plaintiff-Appellant,

v.

No. A-1-CA-41333
Santa Fe County
D-101-CV-2019-02971

THORNBURG INVESTMENT MANAGEMENT, INC., JASON BRADY, NIMISH BHATT, DANA JONES, AND GARRETT THORNBURG,

Defendants-Appellees.

PLAINTIFF-APPELLANT'S DOCKETING STATEMENT

Appeal taken from the First Judicial District Court
Santa Fe County, New Mexico
The Honorable Kathleen McGarry Ellenwood, District Judge, Presiding

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The Appellant, Troy Statczar ("Statczar" or "Appellant"), hereby files his docketing statement in accordance with Rule 12-208 NMRA. This Court has jurisdiction over this matter pursuant to N.M. Const., art. VI, § 29; NMSA 1978, Section 39-3-2; and Rule 12-102 NMRA.

I. Nature of the proceeding.

This appeal arises from "*Troy Statczar v. Thornburg Investment Management, Inc., Jason Brady, Nimish Bhatt, Dana Jones, and Garrett Thornburg*," Case No. D-101-CV-2019-02971, in which Plaintiff sued Defendants under New Mexico Human Rights Act ("NMHRA") and common-law wrongful discharge for retaliatory termination of his employment at Thornburg Investment Management, Inc. ("TIM"). The district court entered orders denying summary judgment on NMHRA claims and rulings initially denying summary judgment on wrongful discharge. While leaving intact its orders denying summary judgment on the NMHRA claims, the district court then reconsidered the latter motion and entered an order granting summary judgment on wrongful discharge. The case proceeded to trial by jury. During trial, the district court made additional oral rulings denying directed verdict on the NMHRA claims, but granting proposed defense jury instructions referring to its prior ruling on wrongful discharge, and rejecting alternate instructions proposed by Plaintiff. The jury returned a defense verdict. The district court entered a final judgment on the verdict. Plaintiff appeals.

II. Statement regarding the Court of Appeals' Jurisdiction

Plaintiff is appealing from the summary judgment ruling on wrongful discharge, entered April 3, 2023, and the final judgment, entered June 22, 2023, which drew upon the district court's oral rulings during trial (May 25, 2023 through June 6, 2023) regarding jury instructions. Plaintiff filed a Notice of Appeal as to the same orders with the district court on Monday, July 24, 2023—the due date for the Notice of Appeal, pursuant to Rule 12-201(A)(2) and Rule 12-308(A)(1) NMRA.

In turn, this Docketing Statement is due to be filed today, August 23, 2023, pursuant to Rule 12-208(B).

III. Statement of the Facts

A. Background Facts of Plaintiff's Employment, Defendants' Workplace, and the District Court Litigation Before Summary Judgment.

1. Founded by Thornburg in 1982, TIM is a Santa Fe investment management company that by 2018 managed $40 billion in client assets. *Plaintiff's Exhibits Package* (District Court Dckt. 03/06/2023), **Exhibit 2** (Complaint, 11/12/2019), ¶4, 8; **Exhibit 3** (Answer, 12/19/2019), ¶4, 8. [1]

2. At all relevant times, Thornburg owned 100% of TIM voting shares and was Chairman of its Board. *Id.*; **Exhibit 4** (Deposition of Shawn Lee, Former TIM HR Director) 24-25.

3. In May 2002, TIM hired Shawn Lee ("Lee") as an HR Assistant. *Id.*, 57-58.

4. In 2002, Lee noted TIM had no policy on supervisor/subordinate affairs and asked at an "MD" (or "Managing Director") Meeting, "Is this something we need to consider?" *Id.*, 169-171, 175. After a five-minute "debate," TIM's MD's rejected his proposal. *Id.*

5. From 2005, Rodey Law Firm ("Rodey") in three separate years and University of New Mexico's Anderson School of Management in other years periodically trained TIM managers in HR, court cases, employment laws, and policies. *Id.*, 48-50, 54-56, 144-152, 155, 164, 177.

6. At TIM, Lee looked to "many sources over a lot of years," *id.*, 53, for HR best

[1] Both the numbered facts and "Exhibit" references in this Subsection "a" of the Docketing Statement correspond to a statement of facts (referred to therein as Plaintiff's Material Facts or "PMF") and package of supporting evidence, both of which Plaintiff filed in the district court on March 6, 2023 to support various motions and briefs. While also presented to the district court in other forms at other times, each of the facts and items of evidence in this Subsection was presented to the district court in consolidated, chronologized form in that March 6, 2023 filing. For clarity of reference by the Court of Appeals in this Docketing Statement, Plaintiff-Appellant is also providing parallel identification of the documents composing each such exhibit.

practices:

a. a book from Society of HR Managers ("SHRM") entitled something like "How to Conduct an Investigation," *id*., 47;

b. other resources from SHRM, *id*. 48;

c. a subscription-based service from CEB, Inc., *id*., 49;

d. the New Mexico Employment Law Bulletin, *id*.;

e. articles by local attorney Robert Tinnin evaluating employment cases, *id*., 54;

f. the local chapter of SHRM, Northern New Mexico HR Association, of which Lee was a member, *id*., 50, 52; and

g. lunches, dinners, and annual meetings of the SHRM chapter, where local lawyers would also sometimes discuss New Mexico employment law cases, *id*.

7. In January 2007, TIM promoted Lee to HR Manager. *Id*., 58.

8. In 2008, Jones began working at TIM as an HR Generalist. *See* **Exhibit 5** (Deposition of Dana Jones, TIM HR Director), 10.

9. In April 2009, Lee and Jones were the sole persons in TIM HR. *Id*., 24.

10. In 2011, TIM promoted Lee to HR Director—head of TIM HR. **Ex. 4** (Lee Deposition) 93-94.

11. Lee reported matters like new hires, background checks, investigations, and lawsuits both to TIM's CEO and to its Chairman, Thornburg. *Id*., 20, 23-24, 59-64.

12. After his promotion to HR Director, Lee until he left (2018) had more frequent "external trainers" come train managers on HR issues, including employment law cases. *Id., 146-155*. An annual compliance meeting for managers also covered employment law in "a few slides" for "maybe ten minutes, roughly, typically." *Id*., 148, 157-58.

13. Key laws and court cases existing through Lee's time at TIM were listed for the district court in **Exhibit 6** to Plaintiff's Exhibits Package filed in the district court on March 6, 2023.

14. Besides knowing and recommending an "office romance policy" in 2002, *PMF* 4, *supra*, Lee admits by the time he became HR Director, such policies were "more of a topic in HR literature" and "more prevalent" in "mid 2000 or the early 2010's." *Id*., 173-174. And he

understood "sexual favoritism" (which he described as "someone gets special treatment for reasons that are sexual in nature") to overlap *quid pro quo* discrimination (which he said is "one of the most common examples given in sexual harassment trainings"). *Id*., 105-109.

15. But while Lee was HR Director, TIM never adopted such a policy, **Ex. 2** (Complaint), ¶88; **Ex. 3** (Answer), ¶88, and never trained its employees on supervisor-subordinate relationships. **Ex. 4** (Lee Deposition), 164-166.

16. In this time, TIM had no in-house counsel but handled HR with Rodey. *Id*., 32-34.

17. In November 2015, Hayley Print ("Print") told MD Keith Maestas, Portfolio Manager (later MD) Ali Hassan, and Jones that while Print was traveling with TIM staff, a married, male MD made unwanted advances toward her (a subordinate), which she repeatedly rejected and tried to avoid, but which culminated in "sexual assault." *See* **Exhibit 7** (Hayley Print Affidavit), ¶11-17. Print named the assailant (John Burnham) to Maestas and Hassan, but when she reported the incident to Jones and began to name him, Jones interrupted: "If you name the person, I will have to make it formal, and I don't know what the consequences of that could be for you. You might want to think that through… He's a managing director, and you're just an analyst. It will be his word against your word." Intimidated, Print did not name Burnham. *Id*. But Print maintains that because of the persons she named to Jones as being on the trip, the descriptions she gave Jones of the MD (including his TIM position), and the circumstances she described to Jones of how he continued seeking out Print after they returned to work (in response to which, Jones counseled Print on ways to avoid him), Jones "would have to know it was Burnham." *Id*., ¶15.

18. In January 2016, Brady became CEO, reporting to Thornburg. **Ex. 4** (Lee Deposition), 20; **Ex. 5** (Jones Deposition), 129.

19. At some time in 2016, Lee also investigated reports that a male TIM employee (not a party

to this lawsuit) in Bhatt's group was taking upskirt photographs of female coworkers. **Ex. 5** (Jones Deposition), 211-216. Because the accused denied he had been taking photographs, HR implemented no discipline except to tell him, "Don't let it happen." *Id.* And the employee kept working at TIM for another two years. *Id*., 213, 215-216.

20. Print resigned from TIM in April 2016. **Ex. 7** (Print Affidavit), ¶18. In her exit meeting, HR Director Lee asked why she was leaving. *Id*. Print gave two reasons: one, to return to her home country, England; and two, because HR did not want to know which MD assaulted her in 2015, she felt unsafe.[2] Lee replied, "It would not make sense to name the guy now, because you are leaving. What would be the point?" *Id*. After she left the interview, Print never heard from Lee. *Id*.

21. As described by Print, the way HR (both Jones and Lee) discouraged and did not act on her reports is at odds with how Jones now admits HR must operate. **Ex. 5** (Jones Deposition), 152.[3]

22. In November 2016, after reflecting and hoping Brady (as a more settled CEO) may take action, Print from November 17, 2016 to November 19, 2016 emailed Jones and Brady to follow up

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[2] Print also cites the climate of MD affairs and treatment of women, as described to her by other TIM employees from 2014 to 2016, as influencing her decision to resign. Id., ¶21-25.

[3] There, Jones testified:

> A: [Plaintiff] Troy did not make an—like an official complaint against Nimish. It was just a conversation.
> Q: It was just a conversation with the director of human resources from Thornburg. Yourself, correct?
> A: Yes. The conversation was with me.
> …
> Q: If someone unofficially tells you about a violation of law, do you have less obligation as director of HR to enforce the law?
> A: No, I wouldn't say that.
> Q: Does someone saying I want this to be an official complaint matter one way or the other as to whether you're going to make sure the law's followed at Thornburg?
> A: No, I wouldn't say that.

Ex. 5, 152, 183 ("Q: Okay. But you would agree that the fact that it was not, quote, a formal complaint did not keep you from taking a formal written action based on it? A: Correct").

on the assault and to note, in writing, that Burnham was the assailant. **Ex. 7** (Print Affidavit), ¶19. Brady never acknowledged or replied. *Id*.

23. Burnham still suffered no discipline, *see id.*, even now remains employed and an MD, , *see* https://www.thornburg.com/people/johnathan-burnham/, and TIM still did not adopt any policy on whether and on what terms supervisor/subordinate affairs were allowed. **Ex. 3** (Answer), ¶88.

24. In a separate incident in 2016 (according to Lee), TIM HR investigated an alleged affair between a (married) male MD and his (married) subordinate. **Ex. 5** (Jones Deposition), 49-51; **Ex. 4** (Lee Deposition), 78-80. Another TIM employee (the subordinate's husband) had (a) reported to Lee that the affair was occurring and (b) showed Lee suggestive texts between the MD and subordinate, which Lee later admitted were "intimate" and "potentially could be evidence of an affair." **Ex. 5** (Jones Deposition), 184-187. Lee did the investigation and discussed it with Jones. *Id*. From their discussions, Jones understood the HR issues arising from such an affair included that a supervisor should not be in a position to "make decisions about," "be supervising," or facilitating a "merit increase" or a "promotion" for a subordinate with whom the supervisor is in a relationship. *Id*., 50-51. Lee never asked the subordinate if the texts were real. **Ex. 4** (Lee Deposition), 188. But Lee testified to a fairly broad investigation of the matter, including meeting with the accuser, reviewing the texts, speaking to the MD and the subordinate, and volunteering that he may have reviewed emails between the MD and subordinate to check beyond their denials of the affair. *Id*., 189-190. But ultimately, because the supervisor denied the affair, HR allowed him to keep supervising the subordinate and remain at TIM for two years, during which time he was also head of the MD Nominating Committee (including the time at which Erin Carney ("Carney") made MD). *Id*., 109, 199.

25. According to Jones, the above affair was not reported and investigated in 2015 or 2016 (as

Lee had stated), but later, in 2017 or 2018. **Ex. 5** (Jones Deposition), 104-105.

26. In April 2017, TIM hired Plaintiff as Director of Fund Administration. **Ex. 3** (Answer), ¶16.

27. Describing the level of Plaintiff's position, Jones noted TIM has about 250 employees, 30-36 MD's, and Plaintiff "had a director position … it's a fairly flat organization with the CEO and then all of the – the MD's of various departments, and then [Plaintiff] was at the layer right below that." **Ex. 5** (Jones Deposition), 193.

28. At the time of Plaintiff's hire, TIM still had no written policy on "sexual favoritism" or on whether a ranking company employee could have a sexual relationship (whether disclosed or not) with a subordinate employee (whether direct reports or otherwise). **Ex. 2** (Complaint), ¶88; **Ex. 3** (Answer), ¶88.

29. But TIM did have Discrimination, Conflicts, and Whistleblowing policies:

a. requiring any employee to report suspected discrimination or harassment (as well as Conflicts of Interest and "suspected fraudulent, illegal, or other unethical activity") to persons including "his or her direct supervisor, any Managing Director, or Human Resources staff member, whomever the employee feels comfortable with, but not the person who is alleged to have discriminated against or harassed the employee,"
b. assuring employees TIM would investigate such complaints, and
c. assuring employees they would not experience retaliation.

Ex. 2 (Complaint), ¶26-29; **Ex. 3** (Answer), ¶26-29.

30. In November 2017, after Carney came to Santa Fe to "mee[t] up, ge[t] dinner or coffee, something like that," Brady began recruiting her for a position to report directly to himself, eventually named "Head of Strategic Development." **Exhibit 8** (Erin Carney Deposition), 2, 14-16.

31. Before Carney took that position, it did not exist at TIM. **Exhibit 9** (Plaintiff Rule 1-011(B) NMRA Affirmation), ¶2.

32. On learning of it, Lee asked, "What is this position, and why do we need it?" **Ex. 5** (Jones Deposition), 194.

33. At this time, a background check was part of TIM's process before offering employment,

and Jones typically would have—and "more than likely" did—run the check. *Id*., 70-71. But Jones cannot recall if she did, and even a year and four months into this lawsuit, she never confirmed whether anyone had ever run background on Carney before her hiring. *Id*.

34. If run then, a background check would find Carney was married to Doug Campbell and had most of her investment career at Fountain Capital Management ("Fountain"), 2004 to 2015, where Campbell was Managing Principal/Cofounder. **Ex. 8** (Carney Deposition), 12, 26. Carney started at Fountain as an analyst and was married to a Steve Roth. *Id*., 25-26. In one year from "mid 2007," she began a relationship with Campbell (who was also married), made partner at Fountain, and filed to divorce Roth. *Id*., 24-28, 47-50, 111-112; **Exhibit 10** (Johnson County, Kansas, District Court Public Divorce Records) showing Carney filed for her divorce on 06/18/2008 and Campbell filed for his on 05/07/2008).[4]

35. Carney says Fountain had no supervisor/subordinate affair policy but admits in TIM's recruiting, she did not disclose Campbell's role or their relationship at Fountain. **Ex. 8** (Carney Deposition), 109-110.

36. TIM's then-HR Director, Lee admits that if a candidate's references included a past job where the candidate had "a relationship" with the supervisor, "it might be a consideration … a factor weighed when thinking about reference checks," and "there would probably be an attempt to seek an additional reference, form of reference somehow." **Ex. 4** (Lee Deposition), 74-75.

37. Lee also admits there "could be, certainly" concerns of bias if spouses are in the same reporting line and of conflict of interest if one will be hiring or supervising the other. *Id*., 77-78.

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[4] Carney first testified she was **not** involved with Campbell when she filed to divorce Roth (which, she said, was May 2008). **Ex. 8** (Carney Deposition), 27, But after being pressed on the timing of her and Campbell's divorces, Carney changed to claiming their relationship began in May 2008. *Id*., 50. Regardless if this is true, it still admitted both (a) the affair was before she filed to divorce Roth (which, in truth, was June 18, 2008), and (b) she had falsely testified to begin with. *See* **Ex. 10** (Johnson County, Kansas, District Court Public Divorce Records).

38. In January 2018 and June 2018, a nationwide survey of 150 HR executives from companies of various sizes and industries found 70 percent of companies had a policy against manager/subordinate affairs in January 2018, and 78 percent had such a policy by June 2018. **Exhibit 11** (Survey by Challenger, Gray & Christmas, Inc., a global outplacement and executive coaching firm).

39. In June 2018, Carney was hired, began work, received orientation, and noted TIM had no policy on relationships between supervisors and subordinates. **Ex. 8** (Carney Deposition), 42-43.

40. HR Director Lee resigned the month Carney began work at TIM—June 2018. **Ex. 4** (Lee Deposition), 12.

41. The authority and duties of TIM's HR Director included:

a. overseeing TIM HR functions, which included:
   i. background checks on job applicants before they receive an offer of employment, **Ex. 5** (Jones Deposition), 70-71; and
   ii. investigating alleged advances and/or affairs between MD's and subordinates, *id*., 49-51;
   iii. advising supervisors when a conflict of interest may prevent them from making a decision, *id*., 50-51, 89-91, 125-27;
b. overseeing TIM's compliance with employment laws, *id*., 72;
c. having the greatest understanding and role in enforcing those laws, *id*.;
d. being the person to whom TIM executives and management look first to ensure TIM's compliance with New Mexico employment laws, *id*.;
e. staying informed on those laws, *id*., 74;
f. staying current on the areas of harassment, discrimination, and retaliation, *id*.;
g. coordinating firm-wide trainings regarding the same, *id*., 75;
h. having knowledge of workplace investigations of employees, *id*., 71;
i. implementing any policy on co-worker relationships, **Ex. 8** (Carney Deposition), 45-46;
j. initiating MD-nomination process by email to existing MD's, **Ex. 5** (Jones Deposition), 196-97; and
k. reporting HR matters like new hires, background checks, investigations, and lawsuits to the CEO and the Chairman, Thornburg, *PMF* 11, *supra*.

42. For a year beginning June 2018, TIM left the HR Director position vacant, with no one authorized or "acting" to carry out its duties. **Ex. 5** (Jones Deposition), 10-14.

43. During this time, in later 2018, new allegations came to Jones about the same male

employee (from 2016) in Bhatt's group again trying to take upskirt photos of a coworker. *Id*., 215-221. Even then, Jones did not proceed to terminate him, but only moved him to a different department and decreased his pay. *Id*. He was not terminated until months later. *Id*.

44. In connection with the same incident, two employees reported to Jones they were being retaliated against by their supervisor (also in Bhatt's group) for speaking out against the accused man's 2016 and 2018 actions. *Id*. The supervisor had threatened to eliminate the employees' positions if they did not stop talking about it. *Id*. Although that supervisor was eventually terminated, nobody in HR used the occasion to admonish the broader workforce on the kind of retaliation TIM would not tolerate. *Id*.

45. In October 2018, TIM began considering Carney for MD. *Id*., 197-98.

46. MD is a coveted TIM status that Plaintiff also was seeking; corresponded to a select level of corporate ownership, authority, and compensation; was reserved to the upper 16th percentile of firm employees; and tended to go to persons with exceptional experience, contributions, and time with the firm—none of which Carney appeared to have. **Ex. 9** (Lee Deposition), ¶2.

47. Written qualifications for MD included putting TIM's "well being ahead of petty personal issues" [sic] and objectively measured superior performance, as proved over "**a multi-year period, say at least 3 years with the Company.**" *Id*. (*MD Guidelines*) (emphasis added).

48. In October 2018, Carney (a) had only been on the job four months, and (b) did not meet TIM's written guidelines for MD. *Id.*; **Ex. 9** (Plaintiff's Rule 1-011(B) Affirmation), ¶2.

49. When first evaluated by the MD Nominating Committee for MD status, Carney was rejected/received a "no" decision by the Committee. **Ex. 5** (Jones Deposition), 198-201.

50. Only after Brady personally re-nominated Carney did the Committee approve her. *Id*.

51. The head of the MD Nominating Committee then retired year-end 2018. *Id*., 109, 199.

52. Effective January 1, 2019, Carney became a TIM MD. *Id*., 65.

53. Carney is one of few persons—and the only female—Jones knows of being promoted to MD in six months. *Id*., 66–69.

54. On January 1, 2019, Brady/TIM also made Jones an MD. *Id*., 59.

55. Jones had been at TIM 11 years before making MD. *Id*., 10-11, 59. Though just a "Senior HR Manager," she was the highest-ranked member of HR—there still being no HR Director. *Id*.

56. On March 26, 2019, TIM provided Plaintiff its "360º Feedback Report," which Jones explained as comprising inputs from some persons selected by TIM (including persons above him in the chain of command) and others whom he could recommend. **Ex. 9** (Plaintiff's Rule 1-011(B) Affirmation), ¶3.

57. On a scale of 1 (Strongly Disagree) to 7 (Strongly Agree), TIM's March 26, 2019 360º Feedback Report scored Plaintiff highest (above 6 points) for "Acts with Integrity—Is open, honest and inclusive," "Models the Way—Treats others with dignity and respect," "Inspires Continuous Improvement and Innovation—Takes initiative to solve problems," "Acts with Integrity—Maintains a larger perspective of what is best for the whole," and "Provides Clear Direction and Feedback—Works with team members in setting appropriate goals." *Id*., ¶4.

58. Jones at the time of the Report told Plaintiff that Bhatt had given each "Manager" Score on the Report, which also included a score of "6" ("Agree") on "Acts with Integrity" and an "Overall Score" of 5.67 out of 7. *Id.*, ¶5.[5]

59. From the date of his hire in April 2017 through April 2019, TIM peers—including Brady and Bhatt—gave Plaintiff uniformly favorable reviews. *Id.*, ¶1, 3, 4, 5.

[5] Later, in litigation, Defendants tried to minimize these reviews—claiming Plaintiff had cherry-picked all persons giving him positive marks in the Report. S*ee* **Ex. 3** (Complaint), ¶33-35; **Ex. 4** (Answer), ¶33-35.

60. In April 2019, Plaintiff told Jeanene Bettner (MD, Director of Project Management) his:

a. concerns with Carney's abilities, qualifications, promotion, and performance,
b. belief Carney was in an affair with her direct supervisor, CEO/MD Jason Brady,
c. belief that Carney's rapid promotion to MD status was unearned and unfair,
d. belief that it occurred in connection with and due to a Brady/Carney affair, and
e. knowledge that others within TIM shared his concerns.

Id., ¶6; *see also* **Exhibit 12** (Jeanene Bettner Affidavit).

61. The points Plaintiff reported to Bettner are the very definition of an employment-law *quid pro quo*, according to Jones. **Ex. 5** (Jones Deposition), 94 ("If the supervisor's maybe making promises of pay increase or promotion in exchange for, I guess, a romantic relationship").

62. Plaintiff also addressed his concerns to Bettner because of TIM policies and because:

a. he was concerned the affair did or could cause improper benefits for Carney, waste of TIM money and resources, and a hostile environment;
b. calling out the CEO on an affair felt extremely sensitive;
c. he knew TIM's policies allowed him to report to a direct manager, HR, or MD;
d. he no longer trusted his direct supervisor (Bhatt) to look out for his best interests;
e. he had concerns about HR/Jones's objectivity, since she, too, just made MD;
f. Bettner was an MD whom he knew well from working on projects; and
g. he expected Bettner to discuss the matter with whomever she (as an MD, and based on her time, experience, and stature in TIM) felt had proper HR authority.

Ex. 9 (Bettner Deposition), ¶7-8.

63. Bettner at that time knew as an MD, she must report any discrimination or harassment reports made to her, regardless of whether the person reporting it wanted her to do so. **Ex. 12** (Bettner Deposition).

64. But years later, Bettner claimed she did not report the comments to anyone else at TIM because she did not interpret his concerns as discrimination or harassment. *Id*. (raising questions on both Bettner's credibility and whether TIM trained MD's on even its own definitions of *quid pro quo* discrimination).

65. Brady later admitted he by Spring 2019 was, indeed, in an undisclosed affair with Carney while the two of them were (a) in direct supervisor-subordinate roles, and (b) married to other persons. **Ex. 5** (Jones Deposition), 125-127, 138-139.

66. Carney eventually admitted more, claiming the relationship was friendly/outside of work no later than January 2019 and romantic or sexual by February 2019. **Ex. 8** (Carney Deposition), 73.

67. Despite these later admissions, neither Brady nor TIM at any time in Plaintiff's remaining employment (through the first six months of 2019) acknowledged to the general TIM workforce either the affair or TIM's position on it. *Id*.; **Ex. 9** (Plaintiff's Rule 1-011(B) Affirmation), ¶6, 8, 11.

68. In April and May 2019, Plaintiff voiced critical concerns to Bhatt and MD Bettie Kroutil ("Kroutil") about Carney making poor decisions on the Bandelier Fund (for which she was responsible, and which to Plaintiff's understanding and Carney's later admission, **Ex. 8** (Carney Deposition), 74, did not launch), about it being ill-suited for TIM's processes and systems, and about her making poor decisions around TIM's UCITS[6] funds and her overall strategic planning. **Ex. 9** (Plaintiff Rule 1-011(B) Affirmation), ¶9.

69. Over a May 13, 2019 lunch, because of the issues' seriousness, Brady's "open door" policy, and Brady that day asking what was working or not at the firm, Plaintiff told Brady, too, of his concerns on Carney's decisions. *Id*., ¶10. Plaintiff did not name Carney. *Id*. But Brady was necessarily aware the strategic decisions in question fell within Carney's responsibility. *Id*.

70. For the rest of his employment, Plaintiff continued to suspect but not know that Brady and Carney were having an affair. *Id*., ¶11.

71. On May 21, 2019 (at Brady's direction from the 05/13/2019 meeting), Plaintiff met with Jones to give her an update on his team. **Ex. 2.1** (Complaint, attaching June 15, 2019 Memo

[6] "UCITS" stands for Undertakings for Collective Investment in Transferable Securities. This refers to a regulatory framework that allows for the sale of cross-Europe mutual funds.

from Plaintiff to Jones). As also described in his later Memos, Plaintiff mentioned a range of offensive questions and comments Bhatt made to him on March 6, 2019, asked Jones if she had received such feedback about him, and told her the comments were upsetting and felt like a personal attack. *Id*.

72. Jones now claims:

a. at some point in May 2019, Brady promoted her to HR Director (making the first time in a year anyone had held that position for TIM), **Ex. 5** (Jones Deposition), 11;
b. on the weekend of Sunday, May 26, 2019 or Sunday, June 2, 2019, Brady and Carney told their spouses of their affair and their plan to leave their spouses, *id*., 92, 138;
c. on the morning of Monday, June 3, 2019, Brady told Thornburg of the affair, *id*.;
d. and later the same day, Brady brought Carney to Jones so they both could disclose the affair to Jones, claiming it had begun "in 2019." *Id.*, 125–127, 138-139.

73. Even by Jones's account, Brady revealed the affair to his wife 11-20 days and to Jones and Thornburg 21 days after his May 13th meeting with Plaintiff. *PMF* 69, 72, *supra*.

74. Jones first testified Brady and Carney gave no reason for the timing of their June 3, 2019 disclosure to her. **Ex. 5** (Jones Deposition), 125–127, 138-13. She then claimed they had only just then decided to pursue the relationship and wanted to "proactively inform" HR and the Board. *Id*. Jones admits her training made her know this was a conflict of interest and wonder its impact on Brady's 2018 compensation decision for Carney (*i.e.*, her promotion to MD and six-figure pay increase). *Id*.; **Ex. 8** (Carney Deposition), 55-58. But Jones never investigated that. **Ex. 5** (Jones Deposition), 125–127, 138-13. She just took and accepted Brady's initial statement of when it had begun (vaguely, "in 2019"). *Id*.

75. Jones claims the Brady/Carney disclosure on June 3, 2019, is what made her first think it was time for TIM to have a "relationship policy." *Id*. at 43–45.[7]

76. Jones also admits that the very next day, June 4, 2019, she called in Carney, alone, to

[7] But as noted, both Jones and Lee admit **years earlier** investigating affairs/attempts between MD's and subordinates, including both the one investigated by Lee in 2016-2017, and the Burnham advances and assault Print reported to Jones in 2015-16. *PMF* 17, 19-21, 24-25*, supra*.

confirm—without Brady "near that area"—if the affair was "consensual." *Id*., 92. [8]

77. By doing so, Jones illustrated and/or later admitted:

a. she knew a CEO/subordinate affair is a valid HR issue, *id*.;
b. even if there was some appearance the affair was consensual, it remained appropriate for HR to investigate the question of consent, *id*.;
c. "even though [Carney] had already once told [Jones] it was a consensual relationship, as an HR professional [Jones] realized that [Jones] should probably still go back and confirm that directly with [Carney] outside [Brady]'s presence, *id*., 95;
d. it was "probably" part of her HR training to ensure that "what I was hearing from the two of them I was going to also hear the same thing from her individually," *id*., 93;
e. part of why she interviewed Carney separately is that "there's a power differential between a supervisor and a subordinate if they're in a relationship," *id*., 94; and
f. she needed to investigate whether this had been a "quid pro quo." *Id*.

78. Beginning June 4, 2019, Jones also discussed the affair with at least six other high ranking TIM agents—Brian McMahon (Board and MD), Connor Browne (MD), Carter Sims (MD), Dan Moon (now MD), Eliot Cutler (Board), and Joshua Gotbaum (Board)—as follows:

a. Jones told McMahon of the relationship between Brady and Carney. McMahon replied he "was not surprised," based on his having observed them seeming intimate on the trade floor or in Brady's office. **Ex. 5**, 131-132.
b. Jones over the next week (until June 11, 2019) spoke with Browne, Sims, and Moon, with all of them stating they had suspected an affair. Sims asked whether the affair could have dated back to Carney's initial hire. Jones only replied that she did not think so. But Jones still did not investigate the matter. *Id*., 133, 135-137.
c. Jones elsewhere suggests she told other Board members—Cutler and Gotbaum—of the affair around this same time. *Id*..

79. Lee, Brady, Carney, Jones, and TIM thus all admitted and showed their own awareness before Plaintiff's termination that an MD/subordinate affair, including the Brady/Carney affair, IS a valid HR concern. *PMF* 4, 24, 72-78, *supra*.

80. Their actions thus confirm the objective reasonableness of Plaintiff's concerns and actions to raise the Brady/Carney affair as a valid HR, conflict-of-interest, and potential *quid pro quo* matter—

[8] Jones's June 4, 2019 actions and later admissions are consistent with her knowing the actual workplace standard on this matter was as stated in *Miller v. Dept. of Corr.*, 30 Cal.Rptr.3d 797, 115 P.3d 77 (2005) (reporting a workplace affair is protected opposition, because sexual favoritism may involve **either** a consensual quid pro quo **or** hostile environment).

even if it appeared to be consensual, and regardless whether he cited it as an "NMHRA violation." *Id.*

81. Dr. Jay Finkelman, an expert in Human Resources Management and Industrial Psychology, has also opined that as a matter of generally accepted practices in each discipline, the Brady/Carney affair is a valid HR issue/concern for an employee to raise. *See* **Exhibit 13** (Jay Finkelman Expert Report).

82. After the June 3rd Brady/Carney disclosure, Jones did **not** begin clarifying and issuing any TIM policy on affairs and did **not** in any way write up Brady or Carney. **Ex. 5** (Jones Deposition), 139. Instead, she began writing up **Plaintiff** on vague allegations that would have only tangentially implicated a "relationship policy" **if such a policy had existed**. *Id.*; **Exhibit 2.2** (Complaint, attaching June 7, 2019 "Memo of Concern" issued from Bhatt to Plaintiff).

83. On June 5, 2019, after a team update, Bhatt told Plaintiff he was taking the "UCITS Directorship" role away from Plaintiff because "management" was "re-thinking the board composite." **Ex. 2.1** (Complaint, attaching June 15, 2019 Memo from Plaintiff to Jones), 1-2. Before, Bhatt had assigned Plaintiff to replace Kroutil, who requested to be removed from that role after 2018. *Id*. On June 5th, Bhatt told Plaintiff that Kroutil knew of the new decision and had agreed to stay on. *Id*. But when Plaintiff copied Bhatt and Kroutil on an email to confirm the change, Kroutil asked what was going on and—in following discussion—told Plaintiff she had no idea she was to stay in the UCITS Directorship. *Id*. Plaintiff returned to Bhatt and asked if Plaintiff had done something to change his mind. *Id*. Bhatt said, "No, not with the UCITS, but you did break the sacred cardinal rule." *Id*. Plaintiff asked how, and Bhatt replied, "I know of at least two people on this floor you told about the personal hygiene comment." *Id*. Plaintiff replied that since Bhatt had not provided specifics, Plaintiff did inquire with HR and other team members to see if

there was an issue and how he could change it. *Id*. Bhatt told Plaintiff the only reason Bhatt told Plaintiff was to look out for Plaintiff and to avoid others talking behind Plaintiff's back. *Id*.

84. Bhatt's withdrawal of the UCITS Directorship from Plaintiff was 23 days after Plaintiff's May 13, 2019 lunch meeting with Brady, criticizing Carney's work. *PMF* 69, 83, *supra*.

85. June 7, 2019, Bhatt issued Plaintiff a "Memo of Concern," ghostwritten by Jones, accusing **Plaintiff** of intrusiveness to one of **his** reports, (Ponn Lithulaxa). **Ex. 2.1** (Complaint, attaching June 15, 2019 Memo from Plaintiff to Jones).

86. The June 7, 2019 Memo of Concern came 25 days after Plaintiff's May 13, 2019 lunch meeting with Brady, criticizing Carney's work. *PMF* 69, 85, *supra*.

87. The Memo said Plaintiff violated TIM "lines" or "boundaries" on "the line of acceptable workplace behavior," "appropriate boundaries," "being 'friends,'" keeping "the lines clear between boss and buddy," keeping "work relationships professional," being "too friendly," not "needing to be liked," "keep[ing] your boss hat on," and being "intrusive" as between a male supervisor and a female subordinate.

88. On receipt of the June 7, 2019 "Memo of Concern," Plaintiff noted:

a. the Memo focused on how a "boss" interacts with subordinates (by using the terms "boss," "supervisor," and/or "direct report" several times);
b. the Memo overall seemed to accuse Plaintiff, as a supervisor, of being too friendly and intrusive with Lithulaxa;
c. while referring to "appropriate boundaries" for such relationships, the Memo did not indicate Plaintiff's conduct violated a TIM rule or policy—let alone, any law;
d. the Memo did not reference or cite any TIM rule, TIM policy, or law;
e. the Memo did not accuse Plaintiff of any form of "harassment" (and did not even contain that word);[9]
f. the Memo never suggested Plaintiff's conduct (even as alleged up to that time) was grounds for or planned to result in termination;
g. while the Memo did not state Plaintiff was facing any more discipline based on the accusations regarding Lithulaxa, Plaintiff:
    i. knew the accusations were false;

[9] Jones also later admitted Lithulaxa **never** accused Plaintiff of sexual harassment. **Ex. 6**, 153.

ii. felt prior actions (*i.e.*, the writeup, withdrawal of the UCITS Directorship, and reductions to his office arrangements and supervision roles) were groundless, even if TIM took the Lithulaxa allegations as true;
iii. did not understand what TIM's official policy—let alone, actual practice – was as between supervisor and subordinate interactions;
iv. felt clarification of that policy was necessary in general, as well as for Plaintiff fairly to defend myself in the Lithulaxa situation; and
v. believed the Memo motivated by something other than the allegations regarding Lithulaxa, though he was unsure what that other motivation could be.

Ex. 9 (Plaintiff Rule 1-011(B) Affirmation), ¶12.

89. Later, Carney (an MD, manager, and part of TIM leadership) agreed TIM had no policy on or against coworkers sharing lunch, dinner, drinks, travel, or rides. **Ex. 8** (Carney Deposition), 100-101. The only rule she even knew of bearing on coworkers "touching" was the harassment policy. *Id*.

90. Plaintiff thus emailed (a) a June 13, 2019 Memo to Jones and Bhatt, *see* **Ex. 2.3**, and (b) a June 15, 2019 Memo to Jones, opposing Jones and Bhatt's actions, *see* **Ex. 2.1**. *Id*, ¶12-13.

91. Based on his above impressions of the "Memo of Concern," Plaintiff in his June 13th and 15th reply Memos addressed their allegations while also posing his own questions, including:

a. TIM's actual policies on conduct between supervisors and subordinates,
b. whether TIM was applying those as written or implementing new ones,
c. whether TIM had "clearly communicated" such policies to him and others,
d. whether TIM was "equally applying" such policies to all TIM employees,
e. whether Jones and Bhatt had already retaliated against him, and
f. whether Jones or Bhatt was "neutral" as an investigator of his own concerns.

92. Plaintiff posed these questions on or near the same days Jones claims she, too, decided a supervisor/subordinate policy needed to be clarified, stated, and issued. *PMF* 75, *supra*. But no Defendants ever replied to Plaintiff acknowledging such a policy was appropriate, existed, needed clarification, or was coming. **Ex. 9** (Plaintiff Rule 1-011(B) Affirmation), ¶14-17.

93. Nor did Defendants ever reply to Plaintiff acknowledging or confirming that he had any right to clear notice of its supervisor-subordinate policy, nondiscriminatory application of that policy, a neutral investigation, or any protection from retaliation. *Id.*, ¶16.

94. Jones was out Wednesday, June 13, 2019 to Wednesday, June 20, 2019. **Ex. 5** (Jones Deposition), 158.

95. On June 20th or 21st, Jones returned to work and had her "very first conversation" with Bhatt regarding Plaintiff's June 13th and June 15th memos/emails. *Id*. Bhatt led off by stating he wanted to fire Plaintiff. *Id*. Jones has since admitted that in their following discussion:

a. she and Bhatt, together, agreed to recommend Plaintiff for termination,
b. she knew she and Bhatt were then subjects of written complaints by Plaintiff,
c. she "did have concern with" a potential conflict of interest in she and Bhatt deciding to recommend Plaintiff's termination,
d. still, neither she nor Bhatt told TIM of the conflict or excused themselves from the investigation/discipline processes directed at Plaintiff, and
e. the actual, final decision to terminate Plaintiff occurred those days.

Id., 89-91, 158-59, 162:12-14 ("Q: When was the final decision to terminate Troy made? A: I think the 20th, 21st timeframe").

96. This description of the termination decision (by Jones on March 10, 2021) contradicts the first description Defendants gave. *See* **Exhibit 14** (Correspondence from Defendants' initial counsel, Jeff Lowry, to Trent Howell). On July 3, 2019, Defendants' counsel, Jeff Lowry of Rodey, wrote, "Because Mr. Statczar had directed his allegations against Mr. Bhatt, Mr. Bhatt's supervisor, Jason Brady, the CEO of Thornburg, reviewed the circumstances and evidence and determined that Mr. Statczar's employment at Thornburg should terminate." *Id*.

97. But even taking as true Jones's account of how she and Bhatt initiated, decided, stayed within, and steered TIM's termination process, Jones violated HR guidelines acknowledged by past HR Director Lee. *See* **Ex. 4** (Lee Deposition), 118-119 ("I think one of the [investigation] guidelines is determine—to determine can an impartial—if an investigation is warranted, can it be impartial within the company, for example, or should an external party be hired").

98. In addition, although Jones later admitted Plaintiff's June 2019 memos had set forth "potential" retaliation by herself and Bhatt, **Ex. 5** (Jones Deposition), 185, HR never opened a

file in the name of Jones or Bhatt and never generated any written notes on investigating Jones or Bhatt for retaliation. *Id*., 185-189. This differed from how and when HR typically opened and named such files for other HR complaints. *Id*. For example, even in the case of Brady (the CEO) and even though she concluded the Carney affair was consensual, Jones still claims she opened an HR file in each of their names. *Id*.

99. Not until June 24, 2019 (when Brady simultaneously announced Plaintiff was being terminated) did any Defendant in any way comment to Plaintiff on his June 13th or June 15th emails. **Ex. 5** (Jones Deposition), ¶15.

100. On June 24, 2019, Jones called Plaintiff to a meeting with herself and Brady, who in person (which was rare) terminated Plaintiff. *Id.*, ¶18. He cited Plaintiff's June 13th and June 15th Memos as the cause. *Id.*, ¶18. He stated these amounted to an attack on "the message and the messenger." *Id.* He in no way suggested Plaintiff was fired for the alleged interactions with Lithulaxa or any form of sexual harassment. *Id.*, ¶19.

101. By citing the content of Plaintiff's June 13th and 15th Memos as cause, Brady on June 24th admitted he fired Plaintiff over a written document expressly calling out TIM's failure to document, clarify, and enforce at all levels its policy on supervisor/subordinate relationships. **Ex. 2.1**; **Ex. 2.3**. (And, of course, at that same time, Brady was very much aware of his own, still-undisclosed affair with Carney. *PMF* 65-67, *supra*.)

102. Jones, too, later admitted the alleged conduct toward Lithulaxa did not warrant termination; it was, instead, "how strongly [Plaintiff] denied everything." **Ex. 5** (Jones Deposition), 166-167.

103. Finding Plaintiff's "strong" denial grounds for termination conflicts with HR's standard when investigating more overtly sexual allegations against other TIM staff in 2016-2018. *PMF*

17-25, *supra*. In three such situations, TIM allowed accused male employees to stay employed for years, based on their denials of misconduct. *Id*. And in one, HR Director Lee **favorably emphasized** that the supervisor "**vehemently denied** that there was—that he was having an affair." **Ex. 4**, 189. TIM allowed him to stay employed, continue supervising the subordinate in question, and serve on a key TIM committee. *PMF* 24, *supra*.

104. TIM's termination of Plaintiff on June 24, 2019 occurred within

- 42 days of Plaintiff criticizing Carney's judgment to Brady,
- 34 days of Plaintiff complaining to Jones of Bhatt's offensive remarks,
- 21 days of Brady disclosing the affair to Jones and of Jones deciding TIM needed a supervisor/subordinate relationship policy;
- 20 days of Jones, herself, investigating whether the affair was "consensual,"
- 19 days of Bhatt withdrawing the UCITS Directorship from Plaintiff,
- 17 days of the "Memo of Concern" (stating no intent to terminate Plaintiff),
- 11 days of Jones and Bhatt receiving Plaintiff's June 13th Memo (questioning its broad policies and practices on supervisor/subordinate relationships);
- 9 days of Jones receiving Plaintiff's June 15th Memo,
- 3-4 days of Jones's first day back at work from a week away, Jones and Bhatt's "very first meeting" about Plaintiff's June 13th and 15th Memos, and Jones worrying she and Bhatt had a conflict of interest, and
- the same day TIM (Thornburg, himself) ended Brady's supervision of Carney.

See PMF 69, 71-72, 75-76, 83, 85, 90, 95, 100, *supra*, and 105, *infra.*

105. Carney first tried to claim she ceased reporting to Brady on June 3, 2019. *See* **Ex. 8** (Carney Deposition), 72. But Jones admitted it was not until June 24, 2019 that TIM cut the Brady/Carney line of report, per a Board decision after Brady confessed the affair to them. **Ex. 5** (Jones Deposition), 128–129. Jones admits on that date, she was "in the room when the decision was communicated to both Jason and Erin" by Thornburg. *Id*. And Carney eventually admitted, in truth, it was "three weeks" after the June 3, 2019 meeting that the Board met and changed her report-line to Thornburg. **Ex. 8** (Carney Deposition), 96-97.

106. Still, for another two months, until August 2019, no one at TIM outside of HR, Brady, Carney, and a few Board members (Thornburg, McMahon, Cutler, and Gotbaum) was told that

Brady had ceased supervising Carney. **Ex. 5** (Jones Deposition), 136-137.

107. Plaintiff filed his *Complaint* on November 12, 2019. (Ct. Dckt. 11/12/2019). The Complaint stated claims for violations of NMHRA, Common-Law Wrongful Discharge (Implied Contract and Discharge against Public Policy), Breach of Express or Implied Contract, Bad Faith, Interference with Contract, and Prospective Economic Advantage, Civil Conspiracy, and Punitive Damages.

108. On November 15, 2019, Albuquerque Journal published a statement on Plaintiff's Complaint by TIM's Director of Global Communications, Michael Corrao, insinuating Plaintiff had been terminated for sexually harassing a coworker:

> "Thornburg has explicit policies against workplace misconduct, ***including sexual harassment, and we take allegations seriously. When an allegation of inappropriate behavior was made against the now-former employee, it was investigated and appropriate action was taken.*** Therefore, we disagree with his claims and specifically deny any claims of disparate treatment and retaliation."

Monica Roman Gagnier, *Fired Thornburg Exec Alleges 'Sexual Favoritism' in Lawsuit*, ALBUQUERQUE JOURNAL, (Nov. 15, 2019 6:18pm), https://www.abqjournal.com/1392113/fired-thornburg-exec-alleges-sexual-favoritism-in-lawsuit.html (emphasis added).

109. On January 3, 2020, TIM served *Answers to Interrogatories*, verified under oath by its HR Director, Jones, which:

a. failed to disclose any of the above incidents of supervisor/MD affairs, advances, or sexual harassment or assault against, a subordinate, *except* the Brady/Carney affair;

b. identified the TIM Anti-Harassment policy as its only policy or practice since 2009 governing romantic, sexual, or socializing/fraternizing between its managers and subordinates,

c. denied it would be a conflict of interest for a TIM employee directly to supervise an employee with whom he or she has a romantic or sexual relationship; and

d. denied it would violate any TIM "policy or practice" for a TIM employee directly to supervise and employee with whom her or she has a romantic or sexual relationship.

Exhibit 15 (*TIM's Answers to Interrogatories*) at 7, *Interrogatory No. 4* (all known or alleged

romantic or sexual relationships and involvements … managers have had since January 1, 2009 with subordinate employees, members, staff, or contractors") (with Defendants answering "there were no known or alleged romantic or consensual relationships between managers and subordinate employees, members, staff, or contractors, other than between Jason Brady and Erin Carney, during Plaintiff's employment") (emphasis added); *id*. at 8, *Requests for Admission* 5 and 6.

110. Between January and March 2020, still another employee came to Jones to report her direct supervisor (also an MD) "had kissed her, and it was unwelcome, unwanted, and she was very upset about it." **Ex. 5** (Jones Deposition) 95-96. The supervisor admitted he had kissed the subordinate. *Id*. But he still kept his job, was only talked to (not otherwise disciplined), and did not even receive a memo in his personnel file. *Id*., 95-99 156-157. The only place the incident was documented was in an electronic file protected by a password only Jones has. *Id*. And while the line of report was changed, this was accomplished by moving the subordinate out of the department. *Id*.

111. Jones claims that in Summer 2020, TIM adopted a policy prohibiting undisclosed "romantic relationships" between supervisors and subordinates. **Ex. 5** (Jones Deposition), 43-45.

112. But Defendants never amended their *Answer*, which denied such a policy is "appropriate" or consistent with accepted human resources practices. *See* **Ex. 3** (Answer),¶¶ 85, 91; **Ex. 2** (Complaint), ¶¶ 85, 91.

113. Carney, in contrast, claims the policy was "implemented" the second half of 2019, **Ex. 8** (Carney Deposition), 43-45; had all along been the HR Director's authority to implement, *id*., 45-46; and from January 1, 2019 through May 21, 2021, was never discussed among MD's. *Id*.

114. On March 10, 2021, Jones testified that the reason HR/she discredited Plaintiff's June 2019 Memos regarding Bhatt was that they could not be "substantiated." **Ex. 5** (Jones Deposition), 149. When asked what that meant, she stated Bhatt had simply given conflicting information. *Id*., 149-

150. When asked what her practice was to resolve conflicting information in an investigation, Jones did not fully explain, other than to suggest she would believe whoever complained first. *Id*. And when questioned further on Plaintiff's June Memos, Jones acknowledged Bhatt had admitted some of the Memos' allegations. *Id*.

115. Even two years after becoming HR Director—and after preparing with her lawyer for a deposition as a Party-Defendant in this lawsuit—Jones still could not name a single New Mexico law protecting employees against discrimination or retaliation. **Ex. 5**, 174.

116. On or about April 6, 2021, TIM began advertising a new position for in-house General Counsel position on Glassdoor.com, which they filled on or about February 2022.

117. On May 7, 2021, Lithiluxa testified that she had never told Jones or Bhatt she was being sexually harassed by Plaintiff and that neither Jones nor Bhatt ever told her they felt it was sexual harassment. **Exhibit 16** (Ponn Lithiluxa Deposition), 110-111

B. Original Summary Judgment Proceedings as to Wrongful Discharge.

On July 27, 2022, Defendants moved for summary judgment on wrongful discharge. Plaintiff filed a written response in opposition on August 13, 2022. Defendants filed a reply in support on September 6, 2022. The district court heard oral argument on the matter on October 18, 2022 and at that time orally denied summary judgment.

1. Defendants' Motion for MSJ (July 27, 2022)

Defendants' motion set forth purported undisputed material facts ("UMF"), including assertion that the persons who had decided the termination—Brady, Bhatt, and Jones—were unaware that Plaintiff had previously reported his concerns of a Brady-Carney affair and perceived preferential treatment to Bettner. As support, Defendants attached an Affidavit from Bettner (the same Affidavit referenced and summarized in Subsection III.A, *supra*) in which Bettner (TIM

Director of Project Management and an MD of TIM) admitted Statczar had, in fact, reported his suspicions of the Brady-Carney affair to her in the Spring of 2019 while also questioning Carney's fitness for running strategy and her decision-making on another project. In the Affidavit, Bettner admits she knew she was required by TIM policies to report any complaint of discrimination or harassment she received, regardless of whether the person making the complaint wanted her to do so. However, Bettner claimed she did not report Plaintiff's comments to anyone else within TIM, because she did not interpret them as implicating discrimination or harassment.

Based on these factual arguments, Defendants cited *Lihosit v. I&W, Inc.*, 1996-NMCA-033, ¶ 12, 913 P.2d 262, for the principle that "an employee fails to prove the causal connection necessary to sustain a claim for retaliatory discharge when there is no evidence that the persons responsible for his discharge had any knowledge the employee engaged in an activity alleged to be protected."

In addition, Defendants argued that an incident of "sexual favoritism," or a supervisor providing preferential workplace treatment to a direct subordinate while the two were in a consensual romantic relationship, is not a covered form of discrimination or harassment under NMHRA. For this proposition, Defendants cited only other jurisdictions' authority, including *Kelly v. Howard I Shapiro & Assocs.*, 716 F.3d 10, 14 (2d Cir. 2013) ("Our Circuit has long since rejected 'paramour preference' claims, which depend on the proposition that the phrase 'discrimination on the basis of sex' encompasses disparate treatment not on one's gender, but rather on a romantic relationship between an employer and a person preferentially treated."; *Taken v. Oklahoma Corp. Comm 'n*, 125 F.3d 1366, 1369 (10th Cir. 1997) ("[W]e hold that Title VII's reference to 'sex' means a class delineated by gender, rather than sexual affiliations."); and EEOC Policy Guidance on Employer Liability under Title VII for Sexual Favoritism, January 12, 1990 ("Title VII does not

prohibit isolated instances of preferential treatment based upon consensual romantic relationships."). And by extension, Defendants argued that Plaintiff's report to Bettner of the Brady-Carney affair—or his comments on the lack of and inconsistency of applying rules on supervisor-subordinate relationships—could not qualify as "opposing any unlawful discriminatory practice" under NMSA § 28-1-6(I)(2) (NMHRA's provision against employer's retaliatory "threats, reprisal, or discrimination").

Defendants further argued that no viable cause of action can be stated under New Mexico common law for wrongful discharge in violation of public policy, if the matter the plaintiff-employee reported "served primarily to benefit their employer and themselves rather than the public at large," citing *Garrity v. Overland Sheepskin Co.*, 1996-NMSC-032, 917 P.2d 1382. Defendants argued that even if the concerns Plaintiff had raised to Defendants constituted a potential unlawful discriminatory practice under NMHRA, the facts permitted no reasonable inference that Plaintiff had raised those matters to his employer 'to benefit the public at large.' And in turn, the district court should grant summary judgment against Plaintiff's claim for wrongful discharge.

In turn, Defendants argued that Plaintiff had shown neither protected opposition activity under NMHRA, nor a reporting of concerns "to benefit the public at large," nor facts from which a jury could infer there was a causal connection between Plaintiff's reports on NMHRA concerns and Defendants' termination.

2. <u>Plaintiff's Response Opposing MSJ (August 13, 2022)</u>.

Plaintiff's response opposed summary judgment by arguing Defendants had not met their initial burden as movants under Rule 1-056(C) NMRA. Plaintiff noted the common-law wrongful discharge cause of action is an exception to the general rule in New Mexico that an employment contract is for an indefinite period and is terminable at the will of either party unless there is a

contract stating otherwise. *Hartbarger v. Frank Paxton Co.*, 115 N.M. 665, 669, 857 P.2d 776, 780 (1993). Plaintiff noted New Mexico recognizes two exceptions to this general rule: "wrongful discharge in violation of public policy (retaliatory discharge), and an implied contract term that restricts the employer's power to discharge." *Id*. Plaintiff noted retaliatory discharge against public policy is where the employee's discharge results from the employer's violation of a clear public policy. *Vigil v. Arzola*, 102 N.M. 682, 699 P.2d 613 (Ct.App.1983), *rev'd in part on other grounds*, 101 N.M. 687, 687 P.2d 1038 (1984). In such instances, the employee has a common-law tort cause of action for retaliatory discharge against public policy. *Id*. Plaintiff noted the Supreme Court has held when an employer's termination of an employee would otherwise violate NMHRA, the employee also has a common-law tort claim for retaliatory discharge against public policy. *Gandy v. Wal-Mart Stores, Inc.*, 1994-NMSC-040, 117 N.M. 441, 872 P.2d 859. In turn, Plaintiff argued that summary judgment against his "wrongful discharge" claim was improper on the same grounds and for the same reasons the district court at all times denied Defendants' motions for summary judgment on the NMHRA claims.

Plaintiff cited evidence to dispute Defendants' proposed UMF # 5. Plaintiff noted, in fact, his June 13, 2019 and June 15, 2019 in-office Memos (attached to Defendants' Motion as Exhibits D and E) had raised numerous NMHRA concerns, including defending his own actions with his own subordinate employee, Ponn Lithulaxa, as well as calling for equal scrutiny, standards, and treatment of other supervisor-subordinate relationships—including not only that between Nimish Bhatt and Ms. Lithulaxa, but also others throughout the company.

As additional material facts, Plaintiff noted that other portions of the TIM policy for "Reporting Complaints" instruct:

> Any employee who believes he or she is being discriminated against or harassed based on any of the grounds stated above must report it immediately to his or her

> direct supervisor, ***any Managing Director***, or Human Resources staff member, ***whomever the employee feels comfortable with***, but not the person who is alleged to have discriminated against or harassed the employee. ***The Company will investigate the complaint, and if determined appropriate, will prepare a plan of action designed to correct the issue and prevent a reoccurrence***. The Company may inform the employee who made the complaint of its determination.

Handbook, p. 3 (emphasis added). TIM also had and has a published policy against retaliation for reports to Human Resources. The TIM Standards of Professional Conduct provide:

> Employees can raise concerns and make reports without fear of reprisal. Anyone found to be engaging in any type of harassment or of unlawful discrimination may be subject to disciplinary action, up to and including termination of employment.

Handbook, p. 3 (emphasis added). Finally, the TIM Anti-Retaliation Policy reads:

> ***Under no circumstances will an employee be penalized for reporting what the employee believes in good faith to be discrimination or harassment under this policy***. ***If you believe that you are being retaliated against for bringing a complaint of harassment or discrimination, you should report such conduct immediately to your direct supervisor, any Managing Director or the Human Resources Department***. Any supervisor or manager who retaliates against an employee for making a complaint may be subject to disciplinary action up to and including termination.

Handbook, p. 4 (emphasis added).

Plaintiff argued, based on these and additional representations by TIM, he held throughout his employment a belief that TIM had extended, formed an agreement for, and intended to honor to him an offer of employment to continue in good faith, and not be terminated without good cause, pursuant to the Handbook, and not subject him to reprisal for complaints of misconduct or unequal treatment by TIM or its other employees. And when he acted in reliance, Defendants breached their contract and fired him in bad faith.

Plaintiff also disputed Defendants' proposed UMF # 6. Plaintiff attached his sworn Interrogatory Answers, noting his comments and inquiries on this matter—as well as on Carney appearing to receive favoritism treatment—were not limited to Ms. Bettner (for whom Defendants' motion attached an affidavit). But instead, he discussed such matters with a variety of ranking

employees and Managing Directors. Plaintiff cited and attached his Answer to Interrogatory No. 4, which listed the "co-workers" to whom he "raised questions of Carney's performance and her relationship with Brady" as follows:

> To Bettie Kroutil, Managing Director, late April-May 2019, in her office, about the Bandelier Fund being ill-suited for TIM's processes and systems, and about the nature of the product being difficult and perhaps prohibitively expensive to value.
>
> To Kyle McGuire and Raffael Maurer, several times in March-May 2019, in my office, about Carney's questionable strategy around the Bandelier Fund and about her request for registering UCITS funds in a wasteful way. In one of the last of these meetings, in May 2019, McGuire, Maurer, and I discussed the issues with Nimish Bhatt, in his office.
>
> To Nimish Bhatt, Managing Director, as noted above, in approximately May 2019.
>
> To Ponn Lithiluxa in March-May 2019, at lunches or in one of our offices, questioning why Carney was pursuing the same approach on the above topics. Lithiluxa also expressed to Statczar that Carney was arrogant and dismissive toward other staff, as if she owned the place.
>
> To Dan Moon in March-May 2019, at Tesuque Casino and at Coyote Cantina,
>
> questioning the same issues as above, in addition to Statczar's suspicion that Carney and Brady were in a sexual relationship. Moon agreed that it appeared odd Carney was getting special treatment.
>
> To Jeanene Bettner, Managing Director, in March-May 2019, in my office, questioning the same issues as above, in addition to my suspicion that Carney and Brady were in a sexual relationship. Bettner expressed shared concern with Carney's strategic decisions and special treatment. I also told Bettner, in her office, about the lunch with Brady where I had raised these issues to Brady.
>
> To Dominic Alto, in the same time frame, at his house or over golf, about the same issues. I also told Alto over golf about the details of my lunch with Brady. Alto also shared that he had observed Brady and Carney getting on an elevator together at the Eldorado Hotel in the middle of the day at a sales meeting, which Alto found odd and suspicious.
>
> To John Dowell, at his desk or with his wife, Bailey, at their house, in the same time frame about the same issues, including my suspicion of a sexual relationship.
>
> To Jason Brady, Managing Director, in the lunch (on approximately May 13, 2019) identified in the Complaint.

> To Dana Jones, Managing Director, in the meetings and Memoranda discussed in the Complaint.

Id.

In addition, Plaintiff noted that the timing of Brady and Carney finally disclosing their relationship to Jones (on June 3, 2019), to Mr. Thornburg (on or near the same date), and to the TIM Board of directors (on or about June 24, 2019), as well as the timing of TIM ending Brady's direct supervision of Carney (on June 24, 2019), all were on the same or temporally close days of Plaintiff's (June 24, 2019) termination, as well as within just a few weeks of Plaintiff's "Spring 2019" report of the affair and favoritism to TIM Project Manager and MD Bettner. And Plaintiff argued this "temporal proximity" presented additional circumstantial indication that Brady had, in fact, become aware of persons such as Plaintiff raising the issue of that affair, and that Brady had both pressed the termination and disclosed the relationship to the Board under the pressure of Plaintiff's prior inquiries.

Plaintiff argued that an employee may present either direct or indirect proof of a causal connection between his protected opposition activity and the employer's adverse employment action, citing *Juneau*, ¶¶ 19 & 22, 139 N.M. 12, 127 P.3d 548, 552. In *Juneau*, the New Mexico Supreme Court found that when the manager taking adverse action does so while commenting negatively on the employee's protected activity, this is sufficient direct evidence of causal connection to create a triable issue of fact, and no resort to indirect evidence was necessary. *Id*. There, the plaintiff testified the manager had stated his EEOC claim was "nonsense," and it was "such a headache," and she wished she did not have to deal with it. *Id*. This, the Court found, was sufficient proof, and in turn, the Court declined to address whether other indirect forms of proof, such as temporal proximity, would alternatively suffice. *Id*. Plaintiff argued he, too, had presented adequate direct evidence of causation, where not just one, but three high-ranking TIM officials

(Bhatt, Jones, and Brady) all admitted they were acting against him and terminated him as a reaction reports including his June 13, 2019 and June 15, 2019 Memos.

Plaintiff also argued that, as referenced in *Juneau*, another way an employee may present a triable issue of fact as to "causal connection" is by indirect proof, such as noting the close temporal proximity between the protected activity and the adverse employment action. Plaintiff argued he was also be entitled to reach a jury on the issue even if he relied solely on the timing between (a) his June 13th and 15th Memoranda to HR and (b) Brady's June 24th termination of Plaintiff. Plaintiff cited authority on these points including the United States Court of Appeals for the Tenth Circuit holding "a one and one-half month period between protected activity and adverse action may, by itself, establish causation." *Anderson v. Coors Brewing Co*., 181 F.3d 1171, 1179 (10th Cir.1999) (citation omitted); and *Marx v. Schnuck Markets, Inc*., 76 F. 3d 324, 326 (10th Cir. 1996), where the Tenth Circuit held summary judgment in favor of the employer improper, because a period of *just weeks* lapsed between the employee's protected conduct and employer's adverse action (commencement of write-ups, which only later resulted in demotion and termination) may justify an inference of retaliatory motive. The Court found the phrase "closely followed" must "not be read too restrictively where the pattern of retaliatory conduct begins soon after the filing of the FLSA complaint and only culminates later in actual discharge." *Id*. Plaintiff noted that among other events that closely followed each other, a period of just nine days lapsed between Plaintiff's June 13th and 15th Memoranda, and Brady's June 24th termination meeting.

Plaintiff noted that prior knowledge—like any "state of mind" issue—is usually reserved to the jury and disfavored for summary judgment, citing *Maxey v. Quintana*, 1972-NMCA-069, 84 N.M. 38, 499 P.2d 356, *cert. denied*, 84 N.M. 37, 499 P.2d 355 (determination of intent depends on credibility of witness); *McKay v. Farmers & Stockmens Bank*, 1978-

NMCA-070, 92 N.M. 181, 585 P.2d 325, *cert. denied*, 92 N.M. 79, 582 P.2d 1292 (good faith); and *Jeffers v. Martinez*, 1979-NMSC-083, 93 N.M. 508, 601 P.2d 1204 (prior knowledge or notice). Plaintiff also cited authorities particularly discouraging summary judgment in the type of fact-intensive state-of-mind questions that are presented in employment discrimination cases, citing *Luciano v. Monfort, Inc.*, 259 F.3d 906, 908 (8th Cir. 2001); *O'Shea v. Yellow Technology Services, Inc.*, 185 F.3d 1093, 1098 (10th Cir. 1999); and *Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1220-21 (10th Cir. 2015) (no summary judgment "mini trials" into a defendant's state of mind). Plaintiff quoted the following admonition given by the Tenth Circuit in *Lounds*:

> [I]n the context of employment discrimination, "[i]t is not the purpose of a motion for summary judgment to force the judge to conduct a `mini trial' to determine the defendant's true state of mind." Many of the highly fact-sensitive determinations involved in these cases "are best left for trial and are within the province of the jury." *Id.; see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) ("[T]he inquiry [at summary judgment is] whether the evidence presents a sufficient disagreement to require submission to a jury...."). Consequently, "in this Circuit ... an employment discrimination suit will always go to the jury so long as the evidence is sufficient to allow the jury to disbelieve the employer's [explanation for the alleged misconduct]." *see Randle v. City of Aurora*, 69 F.3d 441, 452 (10th Cir. 1995) ("[I]f . . . inferential evidence is sufficient to allow a plaintiff to prevail at trial, it is surely sufficient to permit a plaintiff to avoid summary judgment so that the plaintiff can get to trial.").

812 F.3d 1208, 1220-21 (citations and quotations omitted).

As to Defendants' contention that a report of sexual favoritism cannot be considered as "opposition" to an "unlawful discriminatory practice" under NMHRA, Plaintiff responded as follows. First, Plaintiff noted NMHRA allows Plaintiff to sue for discrimination and retaliation against TIM as his employer and against the other Defendants, individually. *See* NMSA § 28-1-7(I) (2017). To establish prima facie retaliation, he must show (1) he engaged in protected activity, (2) he was subject to adverse employment action subsequent to, or contemporaneous with the protected activity, and (3) a causal connection exists between the protected activity and the adverse

employment action. *Juneau v. Intel Corp.*, 2006-NMSC-002, ¶ 11, 139 N.M. 12, 127 P.3d 548, 552.

Second, Plaintiff argued each of Plaintiff's conversations with MD's, with HR, and written reports to HR was protected "participation" and "opposition" activity. Plaintiff argued the New Mexico Supreme looks at federal civil rights decisions for guidance interpreting NMHRA and has specifically done so to interpret "opposition" under NMHRA. *See Ocana v. American Furniture Co.*, 2004-NMSC-018, ¶ 35, 135 N.M. 539, 551-52 (citing *Gonzales v. N.M. Dep't of Health*, 2000-NMSC-029, ¶ 20, 129 N.M. 586, 11 P.3d 550). Plaintiff cited the *Ocana* court's holding that:

> … opposition may take many forms. Those forms include formal complaints, as well as informal protests of discriminatory employment practices, including making complaints to management, writing critical letters to customers, protesting against discrimination by industry or by society in general, and expressing support of co-workers who have filed formal charges.

Id. (internal citations omitted). Plaintiff argued, it stands to reason, the New Mexico Supreme Court will also follow the United States Supreme Court rule that:

> There is … no reason to doubt that a person can "oppose" by responding to someone else's question just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question.

Crawford v. Metro. Gov't of Nashville & Davidson Cty., Tenn., 555 U.S. 271, 276 (2009).

Plaintiff cited *Juneau*, *supra*, where a unanimous Supreme Court of New Mexico found protected "opposition" in a retaliation case where all plaintiff's "opposition" followed and responded to a coworker accusing him of sexual harassment. Plaintiff argued the broader factual context in *Juneau* supports Plaintiff's circumstances. In June 2001, a female Intel coworker reported Juneau (male) for alleged involvement in sexual conversations within her earshot. *Id*., ¶ 2. "Despite requests from his superiors during the course of the investigation that he admit to sexual harassment, Plaintiff steadfastly maintained his innocence." *Id*. ¶ 4. "During the course of the

investigation, Lin Harris, a Human Resources supervisor who knew Plaintiff from church, initiated a meeting with Plaintiff outside of work." *Id*. ¶ 5. "During the meeting, Harris allegedly threatened Plaintiff with repercussions if he continued to contest the allegations against him and pursued litigation." *Id*. "On the day after the meeting with Harris, August 14, 2001, Plaintiff received a permanent written warning regarding sexual harassment and attendance problems." *Id*. "Instead of accepting the warning, Plaintiff followed procedure and requested an open-door investigation of the manner in which the Human Resources Department had conducted the sexual harassment investigation." *Id*. "Two weeks later, on August 30, 2001, despite the alleged threat from Harris, Plaintiff filed the present claim with the [EEOC]." *Id*. "Shortly thereafter, beginning on September 6, Plaintiff's supervisor, Russell, began documenting claims of substandard performance on Plaintiff's part." *Id*. "On December 4, Russell initiated a third warning, which according to Intel's established policy, would result in Plaintiff's termination. On January 23, the third written warning actually issued, and Plaintiff was terminated." *Id*. Despite all plaintiff's "opposition" being *after* a coworker accused him of sexual conversations, a unanimous Supreme Court found the facts established triable issues on opposition, adverse employment action, causation between the two, and Intel's stated reasons for termination being a pretext for retaliation. The Supreme Court reversed an order of summary judgment and remanded the case for plaintiff to proceed to trial on retaliation.

Plaintiff further noted that in a Special Concurrence in *Juneau*, Justice Minzner wrote, "I am not persuaded that Plaintiff's actions prior to filing the complaint with the EEOC were protected activity under the New Mexico Human Rights Act." *Id*. ¶ 42. Justice Minzner explained:

> There is no indication in the record that Plaintiff was protesting discriminatory treatment. He simply asserted that he had not had any inappropriate conversations, and any discipline would therefore be unfair. Similarly, Plaintiff's internal complaint regarding the sexual harassment investigation alleges that the investigators "prejudged" his case, and reached their conclusions without adequate evidence. Plaintiff did not assert that the investigators were biased because of his membership

> in a protected class. He simply claims that the investigation was unfair. The NMHRA ought not be construed to protect such a general claim.

Id. at ¶ 43. Justice Minzner joined in the decision, because she found that Intel's actions after plaintiff filed his EEOC were sufficient to create triable issues on retaliation. However, Plaintiff noted that even excluding Justice Minzner's vote, a majority of the Supreme Court found simple, responsive, defensive actions by Plaintiff in the course of an internal investigation accusing Plaintiff of NMHRA violations were—by themselves—protected NMHRA "opposition."

In turn, Plaintiff argued that whatever the flow of conversation in which Plaintiff told TIM of the Brady/Carney affair, of Carney's questionable advancement, of Bhatt's offensive comments, or of Brady, Bhatt, and other TIM management overstepping supervisor/subordinate boundaries, all of these remarks were protected "opposition" activity. And Plaintiff noted that it was not until Plaintiff repeated a demand for 'company-wide' policing of supervisor/subordinate relationships that Brady escalated Bhatt's disciplinary action against Plaintiff from a demotion to a termination.

Third, Plaintiff noted that his report to Bettner, discussions with Jones, and Memos to Jones and to Bhatt had raised several NMHRA violations, of which the Brady-Carney affair/"sexual favoritism," was only one. And Plaintiff argued that even "sexual favoritism" is, in fact, a form of employment practice rendered unlawful by NMHRA. Plaintiff noted that among authorities considering "sexual favoritism" as a situation where a direct supervisor gives one employee preferential workplace treatment and advancement while the two have a sexual relationship, federal courts were actually split on whether and when it is discrimination under Title VII. In some cases, those courts required proof that not just one, but several managers in a company had such affairs. ***But Plaintiff argued that the New Mexico Supreme Court has recognized for 23 years that allegations of a single manager showing "sexual favoritism" to a subordinate-paramour will amount to "allegations of sexual discrimination" under the NMHRA***. *See Martinez v. City of*

Grants, 1996-NMSC-061, ¶ 11, 122 N.M. 507, 927 P.2d 1045. Plaintiff noted that in *Martinez*, plaintiff, the City Clerk, had discovered that one supervisor, City Manager Willie Alire, was having an affair with and giving preferential treatment to one temporary employee, Kathy Gallegos. *Id*., ¶¶ 4-9. The preferential treatment included Alire taking Gallegos on out-of-town business trips, providing her a City vehicle, and allowing her to arrive at work late and leave early. ¶¶ 7-9. And in its decision, the New Mexico Supreme Court noted:

> *In addition to protesting Alire's preferential treatment of Kathy Gallegos to Alire himself, Martinez protested his favoritism to* the mayor, *city council members*, an EEOC investigator, and an investigator hired by the city to resolve some of the problems related to Alire and the executive department.

Id. (emphasis added). Alire then terminated Martinez, and she sued for wrongful discharge. Finding the NMHRA covers those specific allegations, the *Martinez* Court held:

> *Martinez made allegations of sexual discrimination by Alire*, and that she suffered abuse, threats, *and continued harassment in retaliation for having reported Alire's actions to the city council*. Both the *New Mexico legislature* and the United States Congress have *expressly legislated against this type of conduct*. *Through this legislation society has voiced its concern with and condemnation of sexual discrimination and favoritism in the workplace*.

Id., ¶ 27 (*citing NMHRA* and Title VII) (emphasis added).

Fourth, Plaintiff argued that even if consensual, a *quid pro quo* relationship between a supervisor and subordinate is discrimination on basis of sex "in matters of compensation, terms, conditions or privileges of employment" under the NMHRA. Plaintiff cited authority including the *Martinez* holding that NMHRA expressly legislated against sex-based discrimination such as sexual favoritism given in a supervisor/subordinate affair. *Martinez,* ¶ 27 (citing NMSA § 28-1-7(A)); *Miller v. Dept. of Corr.*, 30 Cal.Rptr.3d 797, 115 P. 3d 77 (2005) (because supervisor/subordinate affair may be quid pro quo or create a hostile environment, employee reporting it is protected from and survives summary judgment on claim of retaliation, regardless whether the affair is technical discrimination) (applying California's equivalent of NMHRA, the Fair Employment and Housing

Act ("FEHA")). By allowing its managers to give preferential workplace treatment to employees they directly supervise and with whom they are having a sexual relationship, TIM encouraged all employees to believe sexual conduct with a direct supervisor is the way to get ahead in the workplace. *See id*. In addition, when a male supervisor gives preferential treatment to a female employee whom he directly supervises in connection with sexual conduct between the two, all male employees who report to that male supervisor do not have equal opportunity to compete for advancement. *See id*.

Finally, Plaintiff argued that an NMHRA retaliation claim—and by extension, a common-law wrongful discharge claim predicated on such retaliation—remains proper if the employee-plaintiff had a "reasonable, good-faith belief" the acts reported were illegal. Plaintiff cited authority that an employee need not be correct that the matter he reports is an NMHRA violation. *See Goodman v. OS Rest. Serv's, LLC*, No. A-1-CA-35971, (N.M. App. July 31, 2019), available at https://scholar.google.com/scholar_case?case=15610854392974586329&hl=en&as_sdt=6,32 ("to prosecute an ADA retaliation claim, a plaintiff need not show that she suffers from an actual disability"). "Instead, *a reasonable, good faith belief that the statute has been violated suffices.*" *Id*. (incorporating standard to sustain NMHRA retaliation verdict) (emphasis added).

Plaintiff also noted in *Miller*, *supra*, the Supreme Court of California specifically applied this rule to employees who reported a supervisor/subordinate affair, or "sexual favoritism." 30 Cal.Rptr.3d at 802. The court found such affairs *may* be "discrimination" under FEHA, as employment *quid pro quo* or by creating a hostile environment for other employees. *Id*. at 814. Thus, regardless whether the affair was ultimately found to be discrimination under the statute, its corresponding retaliation laws protected the employees reporting the affair from adverse action. *Id*. at 820-21. Even though the employees' reports only concerned the unfairness of promotions and

other benefits given by the supervisor to the subordinate, the court held, "although plaintiffs may not have recited the specific words "sexual discrimination" or "sexual harassment," the nature of their complaint certainly fell within the general purview of FEHA." *Id*. The court reversed summary judgment against the employees and let them proceed to trial on retaliation.

Plaintiff also cited a federal district court that held similarly under Title VII and the Texas Commission on Human Rights Act ("TCHRA") in *Garvin v. Southwestern Correctional, LLC*, No. 3:2018-cv-01732-B (N.D. Tex. June 18, 2019), available at https://cases.justia.com/federal/district-courts/texas/txndce/3:2018cv01732/304286/17/0.pdf?ts=1560957789. The court agreed a supervisor's voluntary sexual relations with a subordinate can give rise to a hostile environment. The court ultimately found the circumstances of *that* supervisor/subordinate relationship did **not** establish a hostile environment. However, the employee who reported the affair was ***still*** protected from retaliation under both Title VII and TCHRA. The Court reasoned as follows:

> … the Court focuses on the third set of complaints, which rely on Plaintiff's assumption that the sexual favoritism engaged in was an unlawful employment practice. At this stage, the Court assumes that this is an objectively reasonable belief, especially given that Plaintiff is not an attorney and that in some instances favoritism can give rise to a Title VII hostile-work-environment claim.

Id. at 14. In turn, the court dismissed the employee's hostile environment claim, but still allowed the employee to proceed on retaliation.

Plaintiff cited *Miller* and *Garvin* as illustrating that even if a reporting employee is incorrect on whether the supervisor/subordinate relationship is "discrimination," discrimination laws still ensure the employee can report the affair without fear of retaliation. Plaintiff also noted that New Mexico authority has supported the notion that a single supervisor/subordinate affair does violate NMHRA. *See Martinez*, *supra*. Brady and Carney, in fact, were having an affair. And in turn, Plaintiff argued his reports to MD's and requests to HR were *per se* reasonable and in good faith.

Plaintiff noted that the Supreme Court of New Mexico in *Martinez* made holdings like *Miller* and *Garvin*. *Martinez* arose from a wrongful-discharge verdict against a public employer. The issue on appeal was if the employee was fired for speech on a matter of "public concern" (in violation of her First Amendment rights). But the subject of her "speech," and focus of the court's analysis, was the single supervisor/subordinate affair she reported to the City Council. And in finding the employee's report of the affair amounted to speaking on a matter of public concern, the Court held NMHRA "expressly legislated against" and "condemns" the "sexual favoritism" that she had reported. *Id.*, ¶ 27.

Plaintiff argued that based on *Martinez*, this district court should find NMHRA prohibited TIM from retaliating against Plaintiff for reporting the Brady/Carney affair and favoritism. And Plaintiff argued that regardless whether that affair was consensual, regardless what impact the affair had on other staff, and even regardless whether that affair constituted "sexual discrimination," Plaintiff reported on a reasonable, good-faith belief that such an affair *could* involve a violation of NMHRA.

As to Defendants' argument under *Garrity* (that summary judgment is proper against a retaliatory discharge claim if the plaintiff-employee was reporting matters for his own benefit, rather than to benefit "the public at large"), Plaintiff noted that such a "rule" could not reasonably be extended to his situation from the facts or holding of either of the cases cited by Defendants (*Sherrill v. Farmers Ins. Exchange*, 2016-NMCA-056, ¶ 9, 374 P.3d 723, and *Garrity v. Overland Sheepskin Co.*, 1996-NMSC-032, 917 P.2d 1382).

Plaintiff noted that in *Sherrill*, the plaintiff-employee claimed to have been terminated by the defendant-employer (an insurance company), after she opposed the insurer's violation of duties it owed to third-parties (insurers) under statutes (Section 59A-16-20 of the Trade Practices and

Frauds Act (Article 16) of the Insurance Code, and the New Mexico Mandatory Financial Responsibility Act, NMSA 1978, §§ 66-5-201 to -239) that provided no express expectation for insurer-employees to report such matters, no express protection for persons reporting such violations, and no express remedy for employees terminated for such complaints.

Plaintiff similarly noted that in *Garrity*, the plaintiff-employee claimed to have been terminated by the defendant-employer after he made complaints of a coworker using drugs. Such drug use (a) was not by or imputable to the defendant-employer; (b) did not render plaintiff-employee a "victim" of such use; and (c) was proscribed by a statute that in no way stated or implied (i) a duty or expectation for a coworker to report such use, (ii) a protection of employees who reported the same to employers, or (iii) a remedy for employees terminated for such complaints.

Plaintiff argued that in contrast, the "public policy" Plaintiff has identified as basis for his wrongful discharge claim against Defendants is NMHRA. NMHRA prohibits employers from discriminatory and retaliatory conduct *toward its employees*. It entitles the employees to complain to the employer of the employer's discrimination or retaliation. Indeed, it *requires* the employee thus to complain to the employer before proceeding with administrative and court claims in certain cases. (Plaintiff cited *Ocana v. American Furniture Co.*, 2004-NMSC-018, 135 N.M. 539, 91 P.3d 58 (discussing employee's duty to use the employer's internal reporting procedures before employer will be subject to NMHRA liability for some types of coworker harassment).) NMHRA expressly forbids and protects employees against retaliation by the employer for making such complaints. *See* NMSA § 28-1-7(I). And it prescribes a specific remedy if the employer thus retaliates. *See* NMSA § 28-1-10; § 28-1-13.

Plaintiff also noted that based on these very same distinctions, the Supreme Court and Court

of Appeals have noted NHMRA as prototypical legislation 'defining public policy,' and NMHRA retaliation as prototypical wrongful discharge in violation of public policy. For this principle, Plaintiff cited *Shovelin v. Central N.M. Elec. Coop.*, 115 N.M. 293, 303, 850 P.2d 996, 1006 (1993); *Vigil v. Arzola*, 102 N.M. 682, 688, 699 P.2d 613, 619 (Ct.App. 1983), *rev'd in part on other grounds*, 101 N.M. 687, 687 P.2d 1038 (1984), *modified by Boudar v. E.G. & G.*, 106 N.M. 279, 280-81, 742 P.2d 491, 492-93 (1987) (allowing retroactive application), and *modified by Chavez v. Manville Prods. Corp.*, 108 N.M. 643, 649-50, 777 P.2d 371, 377-78 (1989) (lowering plaintiff's burden of proof of retaliatory discharge to a preponderance of the evidence and allowing recovery of damages for emotional distress); and *Martinez v. City of Grants*, 122 N.M. 507, 927 P. 2d 1045 (1996) (NMHRA covers sexual favoritism and covers employee reporting workplace affairs).[10]

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[10] In *Shovelin*, the Supreme Court noted:

> The linchpin of a cause of action for retaliatory discharge is whether by discharging the complaining employee the employer violated a "clear mandate of public policy." *See Vigil*, 102 N.M. at 688, 699 P.2d at 619. A clear mandate of public policy sufficient to support a claim of retaliatory discharge may be gleaned from the enactments of the legislature and the decisions of the courts and may fall into one of several categories. ***First, legislation may define public policy and provide a remedy for a violation of that policy. Id. at 688-89, 699 P.2d at 619-20 (citing the New Mexico Human Rights Act as an example)***.

115 N.M. 293, 303, 850 P.2d 996, 1006 (1993) (emphasis added).

Similarly, in *Vigil* (setting forth the standards later affirmed by the Supreme Court), the Court of Appeals noted:

> ***The strongest indicators of a state's public policies appear in legislative declarations. In one category we find legislation which not only defines public policy, 620*620 but also provides a remedy.*** As we noted in *Bottijliso v. Hutchison Fruit Co.*, ***the Human Rights Act, NMSA 1978, § 28-1-1 et.seq., dealing with discriminatory practices, falls within this category.***

699 P.2d at 620 (emphasis added).

Likewise, in *Martinez*, the Supreme Court noted with respect to the plaintiff-employee's internal complaints of a supervisor (Alire)'s affair and sexual favoritism to a female coworker:

> In that complaint Martinez made allegations of sexual discrimination by Alire, and that she suffered abuse, threats, and continued harassment in retaliation for having

Finally, Plaintiff noted that in *Shovelin*, while discussing four basic scenarios in which plaintiffs may seek to identify a "public policy" sufficient to claim wrongful/retaliatory discharge, the Supreme Court identified the NMHRA example as the top—and least questionable—in the hierarchy:

> A clear mandate of public policy sufficient to support a claim of retaliatory discharge may be gleaned from the enactments of the legislature and the decisions of the courts and may fall into one of several categories. First, legislation may define public policy and provide a remedy for a violation of that policy. *Id*. at 688-89, 699 P.2d at 619-20 (citing the New Mexico Human Rights Act as an example). Second, legislation may provide protection of an employee without specifying a remedy, in which case an employee would seek an implied remedy. *Id*. at 689, 699 P.2d at 620. Third, legislation may define a public policy without specifying either a right or a remedy, in which case the employee would seek judicial recognition of both. *Id*. Finally, "[t]here may, in some instances, be no expression of public policy, and here again the judiciary would have to imply a right as well as a remedy." Id.

850 P.2d at 1007. And in that same hierarchy, the scenarios addressed in *Garrity* and *Sherrill* (where statutes prohibited conduct certain conduct not directed at the plaintiffs, and identified no rights or remedies owed to the plaintiff in the event he complained of violations) fall at the bottom (in the third or fourth tiers) of that same hierarchy.

3. Defendants' Reply in Support of MSJ (September 6, 2022).

Defendants Reply continued to argue the same points on the same authorities. Defendants

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> reported Alire's actions to the city council. Both the New Mexico legislature and the United States Congress have expressly legislated against this type of conduct. See 42 U.S.C. § 2000e-2(a) (1994) (Title VII) (making it an unlawful discriminatory practice to discharge, promote, demote, or otherwise discriminate in the terms of employment any person on the basis of sex); NMSA 1978, § 28-1-7(A) (Cum.Supp.1995) (same). Through this legislation society has voiced its concern with and condemnation of sexual discrimination and favoritism in the workplace. As such, Martinez's allegation that she was terminated for filing a complaint alleging such sexual discrimination involved a matter of public concern.

927 P.2d at 1054.

also deposition testimony in which Plaintiff agreed that he had referenced the Brady-Carney affair in only his "Spring 2019" conversations with Jeanene Bettner, but had not voiced suspicions of the affair to a different employee (Bettie Kroutil) to whom he had also voiced concerns about Carney's performance on the Bandelier Fund. Defendants also cited deposition testimony in which Plaintiff agreed his conversations with Brady about Carney's performance had not included any reference to Plaintiff believing Brady and Carney were in a sexual relationship.

4. Court's Ruling on MSJ (October 18, 2022).

The district court heard oral argument on the matter on October 18, 2022 and at that time orally denied summary judgment. At the October 18th hearing, the district court had held summary judgment improper, not only due to lack of testimony from Brady, Bhatt, and Jones, but also because of concerns including that:

a. facts bearing on whether Brady, Bhatt, and/or Jones knew of Plaintiff's inquiries/complaints on the Brady/Carney affair are intertwined with facts of the other, NMHRA claims as to which summary judgment had not been sought or granted;

b. genuine issues of material fact exist as to whether TIM as an organization is imputed knowledge—and whether Brady, Bhatt, and/or Jones, individually, knew or should have known—of information other TIM Managing Directors are known/shown to have had of Plaintiff's inquiries/complaints on the Brady/Carney affair; and

c. an inference of retaliation may be drawn from—and is circumstantially supported by—close timing of Plaintiff's inquiries/complaints (April-June 2019), Bhatt's initiation (June 7, 2019) and escalation of discipline against Plaintiff, Defendants' termination of Plaintiff (June 24, 2019), and Brady/Carney's subsequent admission of the affair to TIM.

C. Proceedings Reconsidering Summary Judgment as to Wrongful Discharge.

On October 26, 2022, Defendants moved for reconsideration of summary judgment on wrongful discharge. On November 14, 2022, Plaintiff filed a response opposing reconsideration of summary judgment on wrongful discharge. Defendants filed a reply in support on December 2, 2022. The district court heard oral argument on the matter on February 3, 2023. At conclusion of the hearing, the district court took the matter under advisement. On April 3, 2023, the district court entered an order granting the motion for reconsideration and entering summary judgment against Plaintiff's cause of action for wrongful discharge.

1. Defendants' Motion for Reconsideration (October 26, 2022)

Defendants moved for reconsideration of summary judgment on wrongful discharge. As grounds, Defendants filed additional affidavits from Brady, Bhatt, and Jones, denying they were aware Plaintiff had made any report or complaint of a suspected affair or any perceived sexual favoritism between Brady and Carney. With these affidavits, Defendants essentially reargued the same points and authorities as were presented in their original Motion for Summary Judgment.

2. Plaintiff's Response Opposing Reconsideration (November 14, 2022)

On November 14, 2022, Plaintiff filed a response opposing reconsideration of summary judgment on wrongful discharge. As grounds, Plaintiff noted that at the October 18th hearing, the district court had held summary judgment improper, not only due to lack of testimony from Brady, Bhatt, and Jones, but also because of the other concerns stated above (in Subsection III.B.4, *supra*).

In addition, Plaintiff noted, the district court had originally denied summary judgment based in part on Plaintiff's filed Response (Ct. Dckt. 08/15/2022) to the original motion. As already discussed above, Plaintiff's original response to the original motion had disputed Defendants' proposed UMF # 5 and showed that, in fact, his June 13 and June 15 Memos (attached to

Defendants' underlying *Motion* (Ct. Dckt. 07/27/2022) as Exhibits D and E) raised numerous NMHRA concerns, including defending his own actions with his reporting employee, Ponn Lithulaxa, as well as calling for equal scrutiny, standards, and treatment of other supervisor-subordinate relationships—including not only that between Bhatt and Ms. Lithulaxa, *see Motion*, Exhibit D, but also others throughout the company. *Id.*[11]

Plaintiff argued that the narrow focus of supplemental affidavits Defendants filed with their motion for reconsideration does not resolve or eliminate any of the genuine issues of material fact upon which the Court denied the original motion for summary judgment as to wrongful discharge. Plaintiff argued under Rule 1-056(C) NMRA, Defendants do not meet their initial burden as movants. Plaintiff argued Defendants' motion for consideration does not even disprove that TIM, Brady, Bhatt, and Jones were or should have been aware of these reports/inquiries Statczar made to other ranking TIM employees and/or Managing Directors.

In addition, Plaintiff noted that although Defendants' new motion reiterated reliance on *Lihosit v. I & W, Inc.*, 1996-NMCA-033, 121 N.M. 455, 913 P.2d 262, the facts of *Lihosit* do not square with Defendants' argument or the present case. *Lihosit* did not involve a situation where, as here, the discharged employee (here, Plaintiff) had in fact made protected assertions to managerial

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[11] Plaintiff concluded his June 13, 2019 Memo:

> Regardless of what Thornburg's unpublished expectations for workplace etiquette may have been or may now be, the characterizations of my behavior in the Memo are false and defamatory. In addition, if Thornburg is implementing a policy of not having people that are long-term friends report to each other, I respect and will comply with that policy. If Thornburg is implementing new policies on the other topics Nimish mentions in the "Memo of Concern" (e.g., coworker lunches, coworker texts and e-mails after 5:00 p.m., etc.), I respect and will comply with those, as well. I only request that any such policy be clearly communicated and equally applied to all Thornburg employees, and that—in that process—I not be unfairly scandalized or prejudiced.

Motion, Exhibit D, p. 6.

agents of the employer who had a duty to act upon the information. As Judge Black noted in the decision, "Since Lihosit **does not claim anyone at I & W had any knowledge** of his contention that further driving … would violate state law, his claim for retaliatory discharge must fail." *Id*. at ¶ 19. Plaintiff noted that in contrast, as noted in his original *Response* (Ct. Dckt. 08/15/2022), when making his inquiries/complaints to other ranking TIM employees and Managing Directors, Plaintiff had done so under the express reporting procedures established in writing by TIM. *See* original *Response* (Ct. Dckt. 08/15/2022) at 1-2. And those same procedures created a duty in the TIM employees and Managing Directors receiving such information to, themselves, report and act upon it as well as refrain from retaliating against the employee. *See id*. (citing TIM Handbook pages 3-4). And the *Lihosit* dissent notes such situations receive different treatment. *See* 1996-NMCA-033, ¶ 25 (discussing cases where the third party who received the employer's protected complaint had a duty to convey the information to someone else).

Thus, Plaintiff argued his situation is more like those scenarios, and it involves a permissible, indirect proof, which was also discussed by the *Lihosit* dissent:

> In New Mexico, our Supreme Court has disavowed the direct evidence requirement in retaliatory discharge cases. *See Chavez v. Manville Prod. Corp.*, 108 N.M. 643, 648, 777 P.2d 371, 376 (1989) (stating "it is not to be expected in cases of this type that a plaintiff would necessarily discover documentary or other direct evidence in support of his claim"). *Reich v. Hoy Shoe, Co.*, 32 F.3d 361 (8th Cir.1994), on balance supports my view in that **it reasserts the desirability of allowing the fact finder to decide if the employer acted in response to the OSHA complaint, even in the absence of direct evidence whether the employer knew which employee "blew the whistle" to OSHA. The Reich court emphasized the propriety of allowing the fact finder to determine the ultimate issues of protected conduct and motivation after a full evidentiary hearing rather than by summary judgment.**

1996-NMCA-033, ¶ 39 (emphasis added).

Thus, Plaintiff argued, it remained the case that summary judgment is improper, first, because in addition to his oral reports about the Brady-Carney affair in particular, Plaintiff also

raised numerous NMHRA issues in writing beforehand, *see, e.g.*, Exhibits D and E to Defendants' Motion. And in such a situation, the employer may not obtain summary judgment simply by claiming certain managers were unaware of *still other* NMHRA concerns the employee raised. *See Motion* at III.B.2., pp. 6-8. And none of the Defendants deny, nor could they, that they were aware of Plaintiff having submitted those "protected activities" in writing prior to his termination.

Second, Plaintiff noted the cases that Defendants cite (at Motion, p. 6) all simply require that the Defendants had knowledge of *some* protected activity before they effected the retaliatory termination.

Third, Plaintiff noted the written Memos, themselves, give notice that Plaintiff was observing and reporting that other supervisor-supervisee relationships within TIM were not being conducted or controlled by the same standard as Bhatt's June 6th Memo had purported to apply to Plaintiff.

Fourth, Plaintiff noted Defendants' reconsideration motion did not establish that Defendant TIM as an organization had no knowledge of Statczar's specific inquiries on the Brady-Carney affair prior to the time that it effected his termination. In fact, the Bettner affidavit relied upon by Defendants had already established that she, as an MD and Project Manager, received notice of Plaintiff's concerns with the affair and the apparent favoritism. And in his sworn Interrogatory Answers, Statczar noted that his comments and inquiries on this matter—as well as on Carney appearing to receive favoritism treatment—were not limited to Ms. Bettner (for whom Defendants attached an affidavit). But instead, he discussed such matters to a variety of ranking employees and Managing Directors. *See* Ex. 1 (Interrogatory Answer Excerpts), Answer to Interrogatory No. 4.

Finally, Plaintiff reiterated his prior arguments on authority permitting causation in an NMHRA retaliation case to be proved both directly and indirectly, citing *Juneau*, *supra*; *Anderson*

v. Coors Brewing Co., supra; Marx v. Scnuck Markets, Inc., supra; and McDonnell-Douglas, supra. Plaintiff noted that the New Mexico Supreme Court Under the McDonnell Douglas process, once an employee has met his (above) prima facie burden to show retaliation, the burden then shifts to the employer to come forward with a valid justification for the adverse treatment. *Juneau*, ¶ 23, 139 N.M. 12, 127 P.3d 548, 552. Once the employer provides a justification, the burden shifts back to the employee to show the justification is merely pretext for a retaliatory motive.

Plaintiff argued pretext proof was shown—again, both directly and indirectly—on the same proof already given, citing *Juneau*, ¶ 25, 139 N.M. 12, 127 P.3d 548, 552 ("Indeed, much of the evidence that establishes a genuine issue of fact for causation also demonstrates a factual dispute as to pretext."). As noted above, in the moment of termination, Brady directly told Plaintiff his reason for termination was how Plaintiff—in his June 13th and June 15th Memoranda—replied to the Bhatt Memo. He stated, "Your responses to the feedback provided by Nimish were both an attack on the message and an attack on the messenger, which makes us question your ability to effectively lead your team." And Plaintiff cited authority to the effect that when the employer while implementing adverse employment action cites the employee's protected activity as having "expedited" the decision, this strengthens an employee's proof of retaliation and pretext. In *Yinger v. Postal Presort, Inc.*, No. 16-3239 (10th Cir. June 18, 2017), available at https://caselaw.findlaw.com/us-10th-circuit/1863972.html, the Tenth Circuit again held summary judgment to the employer was improper. The Court found temporal proximity of several days between employee Yinger's protected activity and the employer's initial written complaints against employee created genuine issues of fact as to the question of retaliation. The employer there believed Yinger had reported the employer to OSHA. After OSHA investigated, the employer's President issued two memoranda. One referred to Yinger by name, noted Yinger had been doing

maintenance work on payroll, and announced the company would no longer allow staff to perform such maintenance activities. In it, the President stated his decision was "not intended" and "should [not] be construed . . . to be reactive to the OSHA visit." But in the same e-mail, he admitted the inspection had "expedited" the policy change. The employer then allowed that memo to be posted in its breakroom, along with a second memorandum to all employees stating the OSHA inspection had been "trumped up by someone intending to do [employer] harm," the complaints about asbestos seemed "contrived just to cause trouble," and employees should be concerned "about unknown worms among us, if they are still here, who would attempt intentional harm instead of coming forward with trust." The Tenth Circuit held these circumstances entitled a jury to hear and to infer the fact of retaliation.

Plaintiff argued *Yinger* parallels CEO Brady's, CFO Bhatt's, and HR Director Jones's remarks. In the moments of taking adverse employment actions against Plaintiff, all three admitted those actions were causally connected to Plaintiff reporting to TIM HR and/or writing his June 13, 2019 and June 15, 2019 Memos opposing what he regarded as unlawful discrimination, harassment, and retaliation under the above-referenced laws.

3. Defendants' Reply in Support of Reconsideration (December 2, 2022).

Defendants filed a reply in support of reconsideration. The reply essentially reiterates the same points and authorities presented in the original briefs on summary judgment and in its motion for reconsideration.

4. District Court's Hearing and Ruling on Reconsideration of Summary Judgment on Wrongful Discharge.

The district court heard oral argument on the matter on February 3, 2023. During the oral argument, additional discussion focused on Defendants' argument that none of Plaintiff's concerns raised under NMHRA could be relied upon as grounds for a claim of common-law wrongful

discharge in violation of public policy, because the matters on which Plaintiff had spoken out "served primarily to benefit their employer and themselves rather than the public at large," citing *Garrity v. Overland Sheepskin Co.*, 1996-NMSC-032, 917 P.2d 1382. In response oral argument, Plaintiff reiterated that the argument was a misreading and misapplication of *Garrity*. Plaintiff reiterated that an employee comment to the employer of a perceived NMHRA violation was, in fact, the prototypical example of a report on a matter of "public policy" and "public concern." And Plaintiff objected to *Garrity* being read to add additional elements of proof to such a retaliation claim beyond those already set forth in actual NMHRA or NMHRA/wrongful-discharge decisions. At conclusion of the hearing, the district court took the matter under advisement.

On April 3, 2023, the district court entered an order granting the motion for reconsideration and entering summary judgment against Plaintiff's cause of action for wrongful discharge, to the extent it was predicated on any conduct by Plaintiff opposing the Brady-Carney affair. Among its stated grounds for the decision, the district court adopted Defendants' *Garrity* argument, finding, "Plaintiff's claim for wrongful discharge fails because his alleged expressions of concern about a potential relationship between Jason Brady and Erin Carney did not seek to advance a public interest, but instead address the purely private concern of Thornburg's business performance." As other grounds for the decision, the district court rejected Plaintiff's direct and indirect proofs of causation, including Plaintiff's evidence of pretext, by finding, "There is no evidence that Jason Brady, Nimish Bhatt or Dana Jones has **actual** knowledge that Plaintiff Statczar had expressed any concerns about the possibility of a Brady-Carney relationship." (emphasis added). The district court also then found, "There is no evidence that Jason Brady, Nimish Bhatt, or Dana Jones was aware of Plaintiff's expressions of suspicion about a Brady-Carney relationship at the time the decision was made to terminate Plaintiff's employment."

D. Subsequent Litigation Events in the District Court.

Defendants filed additional motions for summary judgment on February 1, 2023 with respect to Plaintiff's remaining causes of action for NMHRA discrimination and harassment. Plaintiff opposed those motions with responses filed February 23, 2023. Defendants filed replies in support of those motions on March 13, 2023. The district court heard these motions on April 7, 2023. After oral argument on the same, in which the parties argued similar points and authorities as are set forth above with respect to wrongful discharge, the district court denied Defendants' motions for summary judgment on Plaintiff's NMHRA discrimination and retaliation claims. The district court entered orders denying those motion on May 22, 2023.

On May 16, 2023, both Plaintiff and Defendants filed their respective Proposed Jury Instructions.

The case was tried on May 25, 26, 30, and 31, 2023 and on June 1, 2, 5, and 6, 2023.

In trial testimony on May 25, 2019, Plaintiff testified that in April 2019, he had told Bettner that Carney's promotion to MD seemed to result from her having an affair with her direct supervisor, CEO Brady. As also testified by both Plaintiff and Defendant Brady on May 25th and May 26th, Bettner is TIM's Director of Project Management and a Managing Director ("MD") of TIM. In addition, Bettner admitted both in a filed Affidavit (upon which Defendants have litigated and obtained a prior court ruling) and in trial testimony that she indeed received this report.

In trial testimony, on May 26, 2019, Defendant Brady (TIM's CEO) admitted that—as a matter of "common sense"—the occurrence of any supervisor-subordinate relationship raises a question of potential sexual harassment. Brady admitted that even if the relationship were consensual, questions of consent and others would remain to determine whether there were harassment involved. In the same section of testimony, Brady also stated he was aware the Board

may want to terminate his employment as soon as he confessed the affair with his direct subordinate, even if it were consensual. In addition, in the same trial testimony, Defendant/CEO Brady admitted that the company's "Managing Directors," including Jeanene Bender, are in fact partial owners of TIM. And Brady admitted that if, in fact, Plaintiff had made the reference report to Bender, he was thus making a report to not only an MD but also a co-owner of TIM.

On May 28, 2023, Plaintiff filed *Plaintiff's First Trial Brief: Plaintiff's NMHRA Opposition & TIM's Knowledge of Same*, as well as an *Errata Correction* to the same. In those briefs, Plaintiff argued Brady, for himself and for TIM as an entity, had admitted that when Plaintiff reported the Brady-Carney relationship to Jeanene Bender, this sufficiently conveyed a report of potential sexual harassment to TIM as an organization. In turn, Plaintiff argued Defendants had admitted Plaintiff's report to Bender was a form of NMHRA-protected opposition under NMSA §28-1-7(I)(2). Plaintiff argued that by Brady's characterization, Plaintiff's report to Bettner would be a report of possible sexual harassment even if he had only told Bettner he suspected the affair between Brady (supervisor) and Carney (Brady's direct subordinate). However, Plaintiff testified that he reported more than that to Bettner. Plaintiff testified he also told Bettner Carney's promotion to MD appeared related to her affair with Brady. And in turn, Plaintiff argued his report to Bettner is also (as Plaintiff throughout this litigation pled and asserted) a report of "sexual favoritism," or of an apparent "promot[ion] … because of … sex," which is also an illegal employment practice under NMHRA, see NMSA § 28-1-7(A), pursuant to *Martinez v. City of Grants*, 1996-NMSC-061, ¶27, 122 N.M. 507, 927 P.2d 1045. Plaintiff noted that in construing the covered forms of "opposition" under NMHRA Section 28-1-7(I)(2), the New Mexico Supreme Court has stated such opposition "may take many forms," including:

> formal complaints, as well as informal protests of discriminatory employment practices, including making complaints to management, writing critical letters to customers, protesting

> against discrimination by industry or by society in general, and expressing support of co-workers who have filed formal charges.

Ocana v. American Furniture Co., 2004-NMSC-018, ¶35, 135 N.M. 539, 91 P.3d 58 (quotation marks omitted). In *Ocana*, the Court noted an employee's communication to the employer should sufficiently convey the employee's reasonable concerns that the employer has acted or is acting in an unlawful discriminatory manner. However, the Court recognized an employee's statement to the employer will qualify as opposition either if it mentions a specific act of discrimination, or if the employer is able to discern from the context of the statement that the employee opposes an allegedly unlawful employment practice. *Id.*, ¶35. Plaintiff thus argued that Brady's trial testimony admitted TIM was or should have been able to discern from the context of Plaintiff's report to Bettner that he was raising a concern of potential harassment and discrimination. In the same May 28, 2023 Trial Brief, Plaintiff also argued that Bender's knowledge of that report is imputed to TIM, as a matter of law. Plaintiff noted the matter he reported to Bend was within her actual authority to received, based on TIM's Employee Handbook admitted in evidence on Thursday, May 25, 2019 2023 as Plaintiff's Exhibit 3. The Handbook contains a "Reporting Complaints" section and "Anti-Retaliation Policy," which together direct an employee to report suspected discrimination or harassment to, among other persons, "any Managing Director." Plaintiff's Exhibit 3, p. 4. In turn, by TIM's written policies, it was within the course and scope of Bettner's employment to receive and act on such reports. Plaintiff noted by general agency law, notice an agent receives with the course and scope of her agency is imputed to the principal. Plaintiff cited cases holding under New Mexico law, "Since a corporation can act only through its officers, agents and employees, it is necessarily chargeable with the composite knowledge of its officers and agents acting within the scope of their authority." *Sawyer v. Mid-Continent Petroleum Corp.*, 236 F.2d 518, 520 (10th Cir. 1958 (applying New Mexico law) (citing 19 C.J.S., Corporations, § 1081, p. 618); *Trinity Universal*

Ins. Co. v. Rocky Mountain Wholesale Co., 353 F.2d 574, 577 (10th Cir. 1965) (applying New Mexico law); Restatement (Second), Agency, § 275. Plaintiff also cited authority for the proposition that under NMHRA, a manager's knowledge of an illegal employment practice imputes to the corporation. Plaintiff cited *Ocana, supra*, as holding that in evaluating who is authorized to received binding notice of an NMHRA illegal employment practice for a corporation, the New Mexico Supreme Court asks whether the individual has managerial authority or was part of the corporation's management. *See Ocana, supra*, ¶34. And Plaintiff argued imputation was apt here, because the evidence established Bettner was both a Manager and a Co-Owner of TIM. As additional support for imputation being apt as to Defendants' NMHRA liability and punitive damages, Plaintiff cited cases holding scienter of senior controlling officers of a corporation may be attributed to the corporation itself to establish liability when those senior officials were acting within the scope of their apparent authority. *See Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1106-07 (10th Cir. 2003) (citing *Suez Equity Investors, L.P. v. Toronto Dominion Bank*, 250 F.3d 87, 100-01 (2d Cir. 2001) (holding that the scienter of an agent of a corporate defendant is attributable to the corporation as a primary violator of § 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934); *Cromer Finance Ltd. v. Berger*, Nos. 00 Civ. 2284(DLC) & 00 Civ. 2498(DLC), 2002 WL 826847, at *7-8 (S.D.N.Y. May 2, 2002) (holding that scienter of partner of accounting firm could be imputed to the firm itself under traditional agency principles); *In re JDN Realty Corp. Sec. Litig.*, 182 F.Supp.2d 1230, 1246 (N.D.Ga.2002) (holding that scienter of chief executive officer of defendant corporation was attributable to the corporation); 2 Thomas Lee Hazen, Treatise on the Law of Securities Regulation § 12.8[4], at 444 (4th ed. 2002) ("[K]nowledge of a corporate officer or agent acting within the scope of authority is attributable to the corporation.") On all these grounds, Plaintiff asked the Court to find TIM was aware in April 2019 that Plaintiff had engaged in

NMHRA-protected opposition and that Bettner's knowledge of Plaintiff's report is imputed, as a matter of law, to Defendant TIM.

On June 3, 2023, Defendants filed a response to Plaintiff's Trial Brief regarding NMHRA Opposition and TIM's Imputed Knowledge. In essence, Defendants argued that Bettner's knowledge could not be imputed to TIM for the same reasons set forth in its prior briefs regarding summary judgment on wrongful discharge and on reconsideration of the same. The district court did not take up these motions until discussions were made as to Jury Instructions.

E. Proceedings Regarding Jury Instructions.

On June 4, 2023, Defendants filed a set of Amended Proposed Jury Instructions.

On June 5, 2023, Plaintiff filed a set of Amended Proposed Jury Instructions.

In the last days of trial, on or about June 5, 2023 and June 6, 2023, in record proceedings with the court outside the Jury's hearing, Plaintiff and Defendants orally objected to each other's proposed Jury Instructions corresponding to Civil Uniform Jury Instruction 13-2307 (Human Rights Act Violation). Defendants proposed a modified form including a paragraph reading as follows:

> The Court has already determined as a matter of law that Jason Brady, Nimish Bhatt, and Dan Jones had no knowledge oof Plaintiffs alleged expressions of concern about a romantic relationship between Jason Brady and Erin Carney at the time the decision was made to terminate Plaintiff's employment.

Plaintiff noted that this paragraph was not a form instruction under UJI 13-2307, that it threatened to confuse the jury as to the actual standards on Plaintiff's statutory NMHRA retaliation claim, and that it also was an improper interpretation and extension of the limited findings and decision made by the district court in its April 3, 2023 Order granting summary judgment strictly on the common-law wrongful discharge claim as to any report of the Brady-Carney affair. Plaintiff reiterated his position that Defendants' arguments and the April 3, 2023 Order had misapplied the principles of *Garrity* and *Lihosit* (which are not NMHRA cases) in a way that contradicted *Gandy's* express

recognition of common-law wrongful discharge claims in connection with NMHRA complaints. Plaintiff also argued that the Court's April 3, 2023 Order as to wrongful discharge should not be applied to the question of Defendants' "notice" or "knowledge" of Plaintiff's Bettner report under NMHRA, because NMHRA had distinct forms of direct, indirect, and circumstantial proof available, and because the district court had not considered or applied those standards to its prior, April 3, 2023 Order disposing of the common-law wrongful discharge claim. Plaintiff also orally invoked and asked the Court to consider and apply the above-referenced trial testimony of Brady and Plaintiff and Plaintiff's arguments on Brady's admissions establishing grounds to impute that knowledge to TIM as a matter of law (as discussed in Plaintiff's May 29, 2023 Trial Brief). Based on these arguments, Plaintiff objected to Defendants' proposed language, and Plaintiff proposed that the Court grant Plaintiff's proposed alternate Instruction corresponding to Civ. UJI 13-2307 NMRA, or at least strike the referenced paragraph from Defendants' proposed form.

On the morning of June 6, 2023, the district court made an oral ruling that the UJI 13-2307 – equivalent instruction would include the language to which Plaintiff had objected. In the form the district court approved and then read to the Jury, that instruction included the following paragraph:

> … The Court has already determined that Jason Brady, Nimish Bhatt, and Dana Jones had no knowledge of Plaintiff's alleged expressions of concern about a romantic relationship between Jason Brady and Erin Carney at the time the decision was made to terminate Plaintiff's employment.

F. The Verdict and Judgment.

On June 6, 2023, after receiving these and other instructions for the Court, the Jury deliberated for less than two hours before rendering a verdict for the Defendants, finding no NMHRA discrimination or retaliation.

On June 16, 2023, the Court filed separate packets of each of the following: Plaintiff's Proposed Jury Instructions; Defendant's Proposed Jury Instructions, and the Instructions actually given to the Jury.

IV. Statement of the Issues & Statement of Preservation

A. The district court erred in granting summary judgment on wrongful discharge.

Plaintiff presented and preserved his arguments against such summary judgment as noted above, in Section 3. As above noted, On July 27, 2022, Defendants moved for summary judgment on wrongful discharge. Plaintiff filed a written response in opposition on August 13, 2022. Defendants filed a reply in support on September 6, 2022. The district court heard oral argument on the matter on October 18, 2022 and at that time orally denied summary judgment. On October 26, 2022, Defendants moved for reconsideration of summary judgment on wrongful discharge. On November 14, 2022, Plaintiff filed a response opposing reconsideration of summary judgment on wrongful discharge. Defendants filed a reply in support on December 2, 2022. The district court heard oral argument on the matter on February 3, 2023. At conclusion of the hearing, the district court took the matter under advisement. On April 3, 2023, the district court entered an order granting the motion for reconsideration and entering summary judgment against Plaintiff's cause of action for wrongful discharge.

B. The district court erred in instructing the Jury the Court had already determined—and thus, the Jury could not, itself, weigh the direct, indirect, or circumstantial evidence regarding—whether Jason Brady, Nimish Bhatt, and Dana Jones had actual, imputed, or constructive knowledge of Plaintiff's alleged expressions of concern about a romantic relationship between Jason Brady and Erin Carney at the time the decision was made to terminate Plaintiff's employment.

Plaintiff presented and preserved his arguments against such

jury instruction as noted above, in Section 3. As above noted, on May 16, 2023, Plaintiff filed his Proposed Jury Instructions. On May 28 and 29, 2023, Plaintiff filed *Plaintiff's First Trial Brief: Plaintiff's NMHRA Opposition & TIM's Knowledge of Same*, as well as an *Errata Correction* to the same, in which Plaintiff asked the district court, at close of evidence, to find and instruct the jury that Plaintiff's April 2019 report to Jeanene Bettner was protected NMHRA opposition and that Bettner's knowledge of the same is imputed, as a matter of law, to Defendant TIM. On June 5, 2023, Plaintiff filed a set of Amended Proposed Jury Instructions, including a proposed form corresponding to Civ. UJI 13-2307 NMRA, which did not include the commentary to which Plaintiff objected. In the last days of trial, on or about June 5, 2023 and June 6, 2023, in record proceedings with the court outside the Jury's hearing, Plaintiff orally objected to Defendant's proposed Jury Instructions corresponding to Civil Uniform Jury Instruction 13-2307 (Human Rights Act Violation). And in the same last days of trial, Plaintiff proposed that either his alternate form be given, or else that the objectionable paragraph from Defendants' form be stricken.

V. Legal Authority

A. Whether the District Court failed to apply proper standards under Rule 1-056 NMRA and Existing Caselaw in Granting Summary Judgment on Wrongful Discharge.

1. Standard of Review

Because the district court granted summary judgment in favor of Defendants, this court will apply a de novo standard of review. *McGarry v. Scott*, 2003-NMSC-016, ¶ 5, 134 N.M. 32, 72 P.3d 608. Summary judgment is the appropriate disposition if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Rule 1-056(C) NMRA. "Summary judgment may be proper even though some disputed issues remain, if there are sufficient undisputed facts to support a judgment and the disputed facts relate to immaterial issues." *Oschwald v. Christie*, 95 N.M. 251, 253, 620 P.2d 1276, 1278 (1980). Once the movant makes a

prima facie case that summary judgment should be granted, the burden "shifts to the opponent to show at least a reasonable doubt, rather than a slight doubt, as to the existence of a genuine issue of fact." *Ciup v. Chevron U.S.A., Inc.*, 1996-NMSC-062, ¶ 7, 122 N.M. 537, 928 P.2d 263.

2. Authorities Demonstrating Plaintiff Presented Genuine Issues of Material Fact Precluding Summary Judgment.

Plaintiff incorporates by reference herein the authorities set forth above in the "Facts" section of this Docketing Statement, as presented and argued in Plaintiff's response to the summary judgment motion and response to the motion for reconsideration.

B. As to the District Court's Erroneous Jury Instruction Corresponding to Civ. UJI 13-2307.

1. Standard of Review

Pursuant to Rule 1-051 NMRA, the District Court is required to instruct the jury in the language of Uniform Jury Instructions on the applicable rules of law and leave to counsel the application of such rules to the facts according to their respective contentions. Where the trial court fails to instruct on a certain subject, tendering of correct instruction is sufficient to presser error, and to preserve error where the court has given erroneous instruction, it is sufficient to alert the trial judge to that error by proper objection and by tendering a proper instruction. *Williams v. Vandenoven*, 82 N.M. 352, 482 P.2d 555 (1971). Reversible error occurs if, when considered together, the instructions do not fairly present the issues and the law applicable thereto. *Id*.

2. Authorities Demonstrating Defendants' Proposed Instruction, as adopted by the District Court, was Improper.

Plaintiff incorporates by reference herein the authorities set forth above in the "Facts" section of this Docketing Statement, as presented and argued in Plaintiff's proposed Jury Instructions, Plaintiff's May 28, 2023 and May 29, 2023 Trial Brief and Errata Correction regarding

Plaintiff's NMHRA Opposition & TIM's Knowledge of Same, and oral arguments regarding jury instructions on June 5, 2023 and June 6, 2023.

VI. Recording of Proceedings Below

To Appellant's understanding, the following, relevant hearings were taped, and not yet transcribed by a Court reporter:

- the October 18, 2022 hearing on summary judgment as to wrongful discharge;
- the February 3, 2023 hearing on reconsideration as to summary judgment on wrongful discharge;
- the April 7, 2023 hearing on summary judgment as to NMHRA discrimination and retaliation claims; and
- the May 24, 2023 hearing on pretrial motions.

However, the trial days were stenographically recorded.

VII. Related or Prior Appeals

There are no prior or related appeals.

VIII. Appointment of Appellate Counsel

Counsel for the Appellant in this appeal, attorney Trent A. Howell, represented Appellant in the trial court. There has been no appointment of separate appellate counsel.

Respectfully Submitted,

/s/ Trent A. Howell
-Electronically filed & signed-
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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2023, I filed the foregoing document electronically through the court's electronic-filing system and mailed the same to other parties entitled to notice.

Clerk of New Mexico Court of Appeals
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Santa Fe, NM 87504-2008

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