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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

Court of Appeals of New Mexico

2 **SALLY DYER and MANDI ABERNATHY,**

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3 Plaintiffs-Appellants,



Ramon J. Maestas
Chief Clerk

4 and

5 **TERESA ROMERO,**

6 Plaintiff-Cross-Appellee/Cross-Appellant,

7 v.

No. A-1-CA-41069

8 **CITY OF ALBUQUERQUE, ex rel.**

9 **ALBUQUERQUE POLICE DEPARTMENT,**

10 Defendant-Appellee/Cross-Appellant/

11 Cross-Appellee.

12 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

13 **Nancy J. Franchini, District Court Judge**

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5 **MEMORANDUM OPINION**

6 **BOGARDUS, Judge.**

7 {1} Plaintiffs Sally Dyer and Mandi Abernathy appeal from the district court’s
8 judgment, following a bench trial, in favor of Defendant City of Albuquerque, ex
9 rel. Albuquerque Police Department (the City) on Plaintiffs’ claims of retaliation
10 under New Mexico’s Whistleblower Protection Act (WPA), NMSA 1978, §§ 10-
11 16C-1 to -6 (2010). The City has filed a cross-appeal seeking reversal of the district
12 court’s judgment in favor of Plaintiff Teresa Romero on her claims of discrimination
13 and retaliation under New Mexico’s Human Rights Act (NMHRA), NMSA 1978, §
14 28-1-1 to -15 (1969, as amended through 2024). For the reasons set forth below, we
15 affirm in part and reverse in part.

16 **BACKGROUND**

17 {2} Ms. Dyer, Ms. Abernathy, and Ms. Romero are former detectives who worked
18 in the Sexual Crimes Unit (SCU), a specialized unit within the Albuquerque Police
19 Department’s (APD) Violent Crimes Division, within the City. The SCU is
20 responsible for the investigation of sex crimes.

1 {3} All three Plaintiffs filed suit under the WPA alleging that they engaged in
2 protected conduct when they communicated to their employer and third parties about
3 actions or failures to act that they believed in good faith constituted unlawful or
4 improper acts regarding the City’s operation of the SCU and the City retaliated
5 against them for engaging in such protected conduct. Ms. Romero brought an
6 additional claim under the NMHRA, alleging that the City discriminated against her
7 because of her disability—Post Traumatic Stress Disorder (PTSD)—and retaliated
8 against her for engaging in a protected activity. We begin by addressing Ms. Dyer’s
9 and Ms. Abernathy’s appeal before turning to the City’s cross-appeal.

10 **DISCUSSION**

11 **I. Ms. Dyer’s and Ms. Abernathy’s Appeal**

12 {4} Plaintiffs brought this action under the WPA claiming they experienced
13 retaliation after voicing concerns about the operation of the SCU. On appeal,
14 Plaintiffs argue that the district court erred by finding in favor of the City on their
15 WPA claims because, they assert, it applied an incorrect standard of law in
16 determining that they were not engaged in a protected activity under the WPA and
17 that it also failed to consider their claims of a hostile work environment as a form of
18 retaliation under the WPA. We address each of Plaintiffs’ arguments in turn and
19 ultimately affirm.

1 {5} We begin by addressing Plaintiffs’ argument that the district court applied an
2 incorrect standard of law in concluding that they were not engaged in a protected
3 activity under the WPA. Specifically, Plaintiffs contend that this Court’s holding in
4 *Lerma v. State*, clarifies that a plaintiff asserting a claim under the WPA “is not
5 required to prove that [their] communication pertains to a matter of public concern
6 or that the communication benefits the public.” 2024-NMCA-011, ¶ 25, 541 P.3d
7 151, *cert. granted* (S-1-SC-40126, Dec. 28, 2023).

8 {6} Here, the district court found that Plaintiffs both failed to prove the first
9 element of a WPA claim—that they were engaged in a protected activity. The district
10 court concluded that Plaintiffs each failed to prove they had a good faith belief that
11 the City had engaged in unlawful or improper action or that such action was
12 imminent—it went on to conclude that their complaints related to their personal
13 work conditions or their personal disagreements with the City’s legitimate
14 managerial decisions.

15 {7} In order to have established a violation of the WPA, Ms. Dyer and Ms.
16 Abernathy were required to prove: (1) she engaged in an activity protected by the
17 WPA; (2) the City took an adverse action against her; (3) the adverse action was
18 retaliatory in that her engagement in the protected activity was a cause of the adverse
19 action; and (4) such violation of the WPA by the City was a cause of her damages.
20 UJI 13-2321 NMRA; *see* §§ 10-16C-1 to -6.

1 {8} We agree with Plaintiffs that the district court erred insofar as it concluded
2 that because their complaints related to private interests, they were not engaged in a
3 protected activity. The WPA prohibits public employers from, among other things,
4 “tak[ing] any retaliatory action against a public employee because the public
5 employee . . . communicates to the public employer or a third party . . . about an
6 action or a failure to act that the public employee believes in good faith constitutes
7 an unlawful or improper act.” Section 10-16C-3(A). The WPA defines “unlawful or
8 improper act” as “a practice, procedure, action or failure to act on the part of a public
9 employer: (1) violates a federal law, a federal regulation, a state law, a state
10 administrative rule or a law of any political subdivision of the state; (2) constitutes
11 malfeasance in public office; or (3) constitutes gross mismanagement, a waste of
12 funds, an abuse of authority or a substantial and specific danger to the public.”
13 Section 10-16C-2(E). As this Court recently acknowledged in *Lerma*, there is simply
14 no language within the WPA requiring “that [a] communication pertain to a matter
15 of public concern or benefit the public” rather than a private interest. 2024-NMCA-
16 011, ¶ 11.

17 {9} Next, we turn to Plaintiffs’ assertion that the district court erred because it
18 failed to consider their claims of hostile work environment as a form of retaliation
19 under the WPA. Based on our review of the record, it is clear that the district court

1 both considered and rejected Plaintiffs’ hostile work environment claims in its
2 capacity as finder of fact.

3 {10} Although the district court found that Plaintiffs were not engaged in acts
4 protected under the WPA, it went on to determine whether the City took any adverse
5 action against them. Plaintiffs submitted proposed findings of fact and conclusions
6 of law asserting that the City took adverse actions against them by subjecting them
7 to a hostile work environment. In its final order, the district court did not adopt
8 Plaintiffs’ requested findings related to hostile work environment; instead, it found
9 that Plaintiffs failed to prove that the City took *any* adverse action against them. In
10 fact, the district court found that each action alleged by Plaintiffs as retaliatory,
11 “either did not impose a tangible, significant, harmful change in the conditions of
12 employment, or was taken for nonretaliatory business reasons.” “It is well-
13 established that a district court’s failure to make a specific requested finding of fact
14 constitutes a finding against the requesting party.” *Gabriele v. Gabriele*, 2018-
15 NMCA-042, ¶ 31, 421 P.3d 828. Accordingly, we cannot say the district court failed
16 to consider Plaintiffs’ retaliation claims based on hostile work environment, and so
17 we discern no error.

18 {11} Apart from Plaintiffs’ assertion that the district court failed to consider its
19 hostile work environment claims, which we’ve determined is incorrect, Plaintiffs
20 make no legal argument demonstrating that the district court erred in concluding that

1 they were not subject to any adverse employment actions, a required element of a
2 WPA claim. *See* UJI 13-2321; *see also Elane Photography, LLC v. Willock*, 2013-
3 NMSC-040, ¶ 70, 309 P.3d 53 (“To rule on an inadequately briefed issue, this Court
4 would have to develop the arguments itself, effectively performing the parties’ work
5 for them.”). Therefore, even considering that the district court applied an incorrect
6 standard of law to determine whether Plaintiffs engaged in a protected activity, we
7 cannot say the district court erred by ultimately finding in favor of the City.
8 Accordingly, we affirm.

9 **II. Ms. Romero’s Cross-Appeal**

10 {12} Ms. Romero brought a claim under the NMHRA alleging, in relevant part,
11 that the City discriminated against her “in the terms, conditions and privileges of her
12 employment” by failing to accommodate her disability, PTSD, and retaliated against
13 her for opposing the City’s discriminatory conduct.

14 {13} On cross-appeal, the City argues that the district court erred in finding that it
15 violated Ms. Romero’s rights under the NMHRA for several reasons. The City
16 asserts: (1) Ms. Romero failed to exhaust her administrative remedies; (2) Ms.
17 Romero failed to present sufficient evidence to establish a claim for discrimination;
18 (3) the district court erred in concluding that the City retaliated against Ms. Romero
19 after she filed her charge of discrimination; and (4) the district court’s damages

1 award was improper, unsupported by the evidence and excessive. We provide a
2 factual background and then address each of the City’s arguments in turn.

3 {14} Ms. Romero began her employment with APD in 2002 and was promoted to
4 detective in the APD Violent Crimes Division in 2003. She then moved to the SCU
5 in 2009. In October 2016, Ms. Romero experienced a “trigger” during a reality based
6 training (RBT) in which she was expected to shoot and kill a male suspect. During
7 the training, Ms. Romero hyperventilated. There was no therapist on scene during
8 the RBT to address the “trigger” Ms. Romero experienced. No one in her chain of
9 command referred her to behavioral health services at that time.

10 {15} APD’s RBT is mandatory and the training is pass/fail. If an officer fails
11 training, APD provides remedial training and runs the scenario again. If an officer
12 fails on the second try, “APD should provide additional remedial training and run
13 the officer through the [training] scenario one last time.” After Ms. Romero failed
14 the first RBT, she did not receive remedial training, she was not asked to retest, nor
15 was her failure reported to the Professional Accountability Bureau.

16 {16} In August 2017, Ms. Romero sought counseling from the Public Safety
17 Psychology Group and was diagnosed with PTSD resulting from job-related trauma
18 while working for APD. After her diagnosis, on October 20, 2017, Ms. Romero
19 experienced another “trigger” during a separate RBT. Following this, Ms. Romero
20 experienced acute symptoms, including stress, flashbacks, crying at work and home,

1 and severe anxiety, all of which made managing job-related stress very difficult
2 because she could not sleep.

3 {17} In the fall of 2017, Ms. Romero told her sergeant that she was seeing a
4 counselor for job-related PTSD. From October 20, 2017 to November 3, 2017, an
5 APD instructor (the instructor) at the police academy who oversaw all RBT,
6 repeatedly asked Ms. Romero to provide a doctor's note stating that she could not
7 complete RBT. During this time, Ms. Romero was under the belief that her sergeant
8 and the instructor required that she release her therapy notes. Ms. Romero refused
9 to do so because she was worried that she would be referred for a fitness for duty
10 evaluation or that information about her mental health would be spread through the
11 department. The instructor told Ms. Romero that he needed a doctor's note excusing
12 her from RBT by November 8, 2017, or he would have to inform his chain of
13 command. Ms. Romero replied, "Do what you have to do."

14 {18} In November 2017, Ms. Romero took leave under the Family and Medical
15 Leave Act because of job-related trauma. Around that time, the instructor wrote a
16 memo to the head of the Professional Accountability Bureau stating that he had tried
17 to obtain documentation validating Ms. Romero's claim that her disability prevented
18 her from participating in RBT for six months.

19 {19} In December 2017, Ms. Romero's therapist sent a letter to APD explaining
20 that Ms. Romero was receiving therapy that started after her last RBT and that she

1 regularly attended sessions and actively participated in treatment. Also in the letter,
2 Ms. Romero’s therapist stated that they had determined that Ms. Romero was able
3 to return to duty in a “light duty” capacity and that this determination would be
4 reassessed every three to four weeks.

5 {20} As a result of the therapist’s letter, APD placed Ms. Romero on light duty in
6 January 2018. She was sent an interoffice memo detailing her restricted duty status.
7 The letter stated that Ms. Romero’s badge and weapon use would be restricted until
8 she was released to full duty status. Specifically, Ms. Romero was “directed not to
9 display or present [her] badge and department issued gun on or off duty unless it is
10 a deadly force situation, which requires . . . immediate action.” Moreover, the letter
11 stated that Ms. Romero would be assisted by the bureau deputy chief to arrange for
12 an unmarked vehicle. Ms. Romero signed the letter.

13 {21} In March 2018, Ms. Romero’s therapist wrote a second letter to APD to notify
14 them that she was still attending regular therapy sessions and she should remain on
15 light duty. The letter also stated that this determination would continue to be
16 reassessed every four weeks.

17 {22} At some point, Ms. Romero’s sergeant witnessed her disobeying the restricted
18 duty requirement of keeping her badge and gun concealed and pulled Ms. Romero
19 aside to speak to her about it. During the conversation, they had a disagreement about
20 whether Ms. Romero was allowed to go to the gun range. The sergeant claimed that

1 Ms. Romero became overly emotional, raised her voice and slammed her office
2 door. The sergeant admitted that she raised her voice as well toward Ms. Romero.

3 {23} The sergeant drafted a memo in March of 2018 detailing her interactions with
4 Ms. Romero and it was sent to the director of human resources with the City (the
5 Director). In the memo, the sergeant requested that Ms. Romero be “evaluated for
6 . . . ‘[f]it[ness] for [d]uty’ to ensure her safety and the safety of those she works with
7 on a daily basis.”

8 {24} That same month, the interim chief of police sent a memo to the Director
9 requesting an in-service examination for fitness for duty citing Ms. Romero’s
10 “[r]epeated emotional breakdowns at work.” Ms. Romero was placed on
11 administrative leave, and during her time on leave Ms. Romero was supposed to be
12 paid; she was to remain available to the interim chief of police Monday through
13 Friday; and all department property, including her badge, ID card, police vehicle,
14 and firearms had to be surrendered.

15 {25} Ms. Romero was scheduled for a fitness for duty evaluation with Dr. Foote on
16 May 14 and 15, 2018. Ms. Romero attended the evaluation. In June 2018, Dr. Foote
17 submitted his evaluation of Ms. Romero’s fitness for duty finding that she was
18 *temporarily* unfit for duty and that further counseling was mandatory. Then on July
19 3, 2018, the Director sent a memo to the interim chief of police quoting Dr. Foote’s

1 findings on Ms. Romero’s fitness for duty evaluation. One month later, Ms. Romero
2 “applied for worker’s compensation based on her PTSD diagnosis.”

3 {26} Six months after Dr. Foote’s fitness for duty evaluation, the Director sent Ms.
4 Romero a letter informing her about Dr. Foote’s findings and stating that she was
5 scheduled for a follow-up appointment on December 18, 2018—Ms. Romero
6 attended the evaluation. Dr. Foote submitted his follow-up report on December 20,
7 2018—in the report he determined that Ms. Romero had improved but she was still
8 not ready to return to work, and that he would conduct an additional evaluation after
9 three months of Ms. Romero continuing her weekly session with her therapist. The
10 Director then sent a memo to the interim chief of police regarding Dr. Foote’s
11 follow-up evaluation.

12 {27} On February 5, 2019, Ms. Romero was sent an email from the City stating that
13 as of February 2, 2019, she was no longer on administrative leave, but instead was
14 on injury leave because she was placed off duty by the Employee Health Center as
15 a result of her workers’ compensation claim. “At some point, [Ms.] Romero was
16 released from workers’ compensation care and [she] asked for PERA disability
17 paperwork to be filed.” Ms. Romero was approved for one year of disability
18 retirement pension on December 6, 2019. “Thereafter, the City filled out a
19 [r]etirement [c]hecklist and [Ms.] Romero announced her retirement effective
20 January 1, 2020.”

1 **A. Failure to Exhaust Administrative Remedies**

2 {28} As an initial matter, the City argues that Ms. Romero failed to exhaust her
3 administrative remedies regarding her discrimination claim. According to the City,
4 Ms. Romero’s charge of discrimination did not include facts alleging that she was
5 denied a reasonable accommodation nor that she made a request for an
6 accommodation in the first place. Ms. Romero responds that the charge of
7 discrimination can be read reasonably to request an accommodation. We agree with
8 Ms. Romero.

9 {29} Before a plaintiff may state a valid claim pursuant to NMHRA, they must first
10 exhaust their administrative remedies. *Lobato v. N.M. Env’t Dep’t*, 2012-NMSC-
11 002, ¶ 10, 267 P.3d 65. NMHRA grievance procedure requires that “[a] person
12 claiming to be aggrieved by an unlawful discriminatory practice . . . may file with
13 the human rights division of the labor department a written complaint that shall state
14 the name and address of the person alleged to have engaged in the discriminatory
15 practice, all information relating to the discriminatory practice and any other
16 information that may be required by the commission.” Section 28-1-10(A). An
17 “employee’s communications to the employer must sufficiently convey the
18 employee’s reasonable concerns that the employer has acted or is acting in an
19 unlawful discriminatory manner.” *Ocana v. Am. Furniture*, 2004-NMSC-018, ¶ 35,
20 135 N.M. 539, 91 P.3d 58 (alteration, internal quotation marks, and citation omitted).

1 {30} The City raised exhaustion of administrative remedies to the district court in
2 its motion to reconsider and the district court denied the motion. First, regarding Ms.
3 Romero’s request for an accommodation, the district court “liberally constru[ed]”
4 the portion of the charge reading, “In August 2017, I informed [my sergeant] about
5 my disability. I was placed on restrictions in January 2018” as Ms. Romero
6 requesting an accommodation. As to the City’s failure to accommodate, the district
7 court relied on the portion of the charge reading, “In March 2018, I was subjected
8 differently by [my sergeant] to include . . . not [being] allowed to qualify with my
9 service weapon.” The court found that these allegations “can be reasonably
10 construed as pertaining to the reasonableness of the accommodation.”

11 {31} Here, Ms. Romero filed her charge of discrimination with the New Mexico
12 Department of Workforce Solutions, Human Rights Bureau on May 21, 2018. She
13 identified the time period for the discrimination as taking place sometime between
14 August 1, 2017 and March 19, 2018. In the charge of discrimination, Ms. Romero
15 stated that she informed her sergeant about her disability and thereafter she was
16 treated differently—specifically, Ms. Romero stated she was placed on restrictions
17 and not permitted to qualify with her service weapon. Ms. Romero received a letter
18 of nondetermination from the New Mexico Human Rights Commission on July 1,
19 2020.

1 {32} Although Ms. Romero did not specifically state that she requested an
2 accommodation and that such accommodation was denied, the City was on notice
3 that Ms. Romero disclosed her disability and was thereafter restricted in the
4 performance of her job duties. *See Ocana*, 2004-NMSC-018, ¶ 35 (stating that “at
5 the very least, if the statement does not mention a specific act of discrimination, the
6 employer must be able to discern from the context of the statement that the employee
7 opposes an allegedly unlawful employment practice” (alteration, internal quotation
8 marks, and citation omitted)).

9 {33} Beyond merely asserting that Ms. Romero’s charge of discrimination “did not
10 contain facts concerning the claims . . . she was allowed to assert[] at trial,” that the
11 City failed to develop a legal argument demonstrating that Ms. Romero’s recitation
12 of the facts was insufficient under the circumstances to apprise it of her
13 discrimination claim. *See Muse v. Muse*, 2009-NMCA-003, ¶ 51, 145 N.M. 451, 200
14 P.3d 104 (stating that “[t]he mere assertions and arguments of counsel are not
15 evidence”); *see also Lee v. Lee (In re Adoption of Doe)*, 1984-NMSC-024, ¶ 2, 100
16 N.M. 764, 676 P.2d 1329 (explaining that “where arguments in briefs are
17 unsupported by cited authority,” we presume counsel was unable to find supporting
18 authority, we will not research authority for counsel, and will not review issues
19 unsupported by authority). We therefore conclude that Ms. Romero exhausted her
20 administrative remedies in relation to her discrimination claim.

1 **B. Discrimination**

2 {34} The City next argues, relying on *Kitchell v. Public Service Co. of New Mexico*,
3 that Ms. Romero did not and could not establish that she was “otherwise qualified”
4 to perform the job duties of a detective. *See* 1998-NMSC-051, ¶ 7, 126 N.M. 525,
5 972 P.2d 344 (internal quotation marks and citation omitted). According to the City,
6 Ms. Romero admitted she was not “otherwise qualified” when she applied for and
7 accepted disability benefits, and again when she confirmed at trial that she applied
8 for disability retirement because she was unable to perform her job duties. Ms.
9 Romero responds that the City’s interpretation of *Kitchell* is strained—however she
10 fails to address the City’s arguments concerning both her application for disability
11 retirement and her subsequent admission during trial. We agree with the City.

12 {35} The district court found in favor of Ms. Romero’s discrimination claim,
13 concluding, in relevant part, that “[a]bsent the disability, [Ms.] Romero was
14 otherwise qualified for her work as a detective for the SCU with reasonable
15 accommodation.” In its motion to reconsider, the City argued in part, that Ms.
16 Romero was not otherwise qualified because of her application for disability
17 retirement. The district court declined to address the City’s argument regarding Ms.
18 Romero’s application for disability retirement and subsequent admission during
19 trial, referencing the City’s failure to cite to the relevant portion of the transcript of
20 Ms. Romero’s trial testimony.

1 {36} Upon review of the record, we agree with the City that Ms. Romero conceded
2 she was unable to perform the essential duties of her job with or without an
3 accommodation. Pursuant to the NMHRA, it is unlawful discriminatory conduct for
4 an employer “to discriminate in matters of compensation, terms, conditions or
5 privileges of employment against any person *otherwise qualified* because of . . .
6 physical or mental disability [or] serious medical condition.” Section 28-1-7(A)
7 (emphasis added). Our Supreme Court has defined the term “otherwise qualified” to
8 refer “to a person who, though affected by a handicap or medical condition,
9 maintains the underlying ability to do the job.” *Kitchell*, 1998-NMSC-051, ¶ 6
10 (internal quotation marks omitted).

11 {37} Here, Ms. Romero applied for disability retirement pension and her
12 application was approved. In order for Ms. Romero to have qualified for disability
13 retirement benefits, it must have been determined that she was “mentally or
14 physically totally incapacitated for continued employment with an affiliated public
15 employer” and that such “incapacity is likely to be permanent.” NMSA 1978, § 10-
16 11-10.1(C)(1) (2013). To reiterate, during trial Ms. Romero confirmed that she
17 applied for disability retirement pension and she did so because she was unable to
18 perform her job duties due to her PTSD.

19 {38} We agree with Ms. Romero’s assertion that “employers have an affirmative
20 obligation to make reasonable accommodation for a disability,” but her briefing fails

1 to acknowledge both her application for disability retirement pension as well as her
2 admission during trial that her PTSD rendered her unable to return to work. She
3 raises no argument that her application for disability retirement is unlike the
4 plaintiff's application for workers' compensation in *Kitchell*. In *Kitchell* our
5 Supreme Court concluded that a plaintiff admitted he was not "otherwise qualified"
6 because he admitted in his workers' compensation claim that his injury prevented
7 him from "engaging, for remuneration or profit, in any occupation for which he is
8 or becomes fitted by age, training, or experience." 1998-NMSC-051, ¶ 7 (internal
9 quotation marks and citation omitted). Here, Ms. Romero made an admission that
10 her disability prevented her from pursuing continued employment, just as the
11 plaintiff did in *Kitchell*. *See id.*

12 {39} Finally, Ms. Romero cites no evidence in her briefing to this Court
13 establishing that she was "otherwise qualified" for her position. Accordingly, we
14 conclude that Ms. Romero failed to establish that she was "otherwise qualified" for
15 her employment as is required for a disability discrimination claim under the
16 NMHRA. The district court erred in concluding otherwise.¹

17 **C. Retaliation**

¹Because we conclude that Ms. Romero admitted she was not "otherwise qualified" we do not reach the City's argument that the district court erred in concluding Ms. Romero was subject to an adverse employment action.

1 {40} The City next argues that the district court erred in concluding that it retaliated
2 against Ms. Romero after she filed her charge of discrimination. Specifically, the
3 City asserts that the district court erred in concluding that it took adverse action
4 against Ms. Romero by not reasonably accommodating her; failing to provide her
5 with options necessary to return to work; and that Ms. Romero’s engagement in a
6 protected activity was a motivating factor in failing to bring her back to work or
7 provide her with options and a path for doing so. We again agree with the City.

8 {41} “The NMHRA makes it unlawful for any person or employer to retaliate
9 against any person who has opposed any unlawful discriminatory practice.” *Ocana*,
10 2004-NMSC-018, ¶ 35 (internal quotation marks and citation omitted); see § 28-1-
11 7(I)(2). To prove that the City retaliated against Ms. Romero in violation of the
12 NMHRA, she had to show: “(1) she engaged in [a] protected activity; (2) she
13 suffered an adverse employment action; and (3) there is a causal connection between
14 these two events.” See *Ocana*, 2004-NMSC-018, ¶ 33. The City does not dispute
15 that Ms. Romero engaged in a protected activity. Accordingly, we are only
16 concerned with the second and third elements for retaliation claims as discussed in
17 *Ocana*. See *id.*

18 {42} The City’s retaliation, as alleged by Ms. Romero, is that it “engaged in reprisal
19 and/or further discrimination against [her] for opposing . . . unlawful
20 discrimination.” According to Ms. Romero, the actions the City took in attempting

1 to accommodate her were retaliatory in nature. On appeal, she points to her
2 sergeant's demand that she sign a mental health medical release to provide "therapy
3 notes" to her chain of command, being referred by her chain of command for a
4 fitness for duty evaluation, the City withholding Dr. Foote's evaluations from her
5 after the evaluation, and her sergeant's aggressive and humiliating demeanor
6 towards her in the work place.

7 {43} Our Supreme Court has held that "[a]n adverse employment action occurs
8 when an employer imposes a tangible, significant, harmful change in the conditions
9 of employment." *Ulibarri v. N.M. Corr. Acad.*, 2006-NMSC-009, ¶ 16, 139 N.M.
10 193, 131 P.3d 43. Examples of such a change include "hiring, firing, failing to
11 promote, reassignment with significantly different responsibilities, [and] a decision
12 causing a significant change in benefits." *Id.* (internal quotation marks and citation
13 omitted). Even if we were to assume that the above-mentioned actions that Ms.
14 Romero points to constitute adverse employment actions, there is simply no basis to
15 conclude that they were motivated by any retaliatory intent on the City's part.

16 {44} Here, it is undisputed that Ms. Romero could not complete the mandatory
17 RBT training and that the City merely sought documentation from Ms. Romero
18 excusing her participation in such mandatory training. Moreover, it is undisputed
19 that Ms. Romero's referral for a fitness for duty evaluation was due to her repeated

1 emotional outbursts in the workplace and her disobeying restricted duty
2 requirements.

3 {45} Regarding the City’s failure to provide Ms. Romero with information
4 necessary for her return to work, it is unclear how inaction on the City’s part was
5 motivated by any retaliatory intent because it was determined by Dr. Foote that Ms.
6 Romero was temporarily unfit for duty and that she required further counseling
7 before returning to work. Dr. Foote made no determination that Ms. Romero could
8 return to work under any sort of modified working conditions. Additionally, as
9 discussed in the previous section, Ms. Romero had filed for disability retirement and
10 sought not to return to work given her inability to perform the duties of her job. In
11 doing so, she had to prove that she was “mentally or physically totally incapacitated
12 for continued employment with an affiliated public employer.” Section 10-11-
13 10.1(C)(1)(a).

14 {46} Finally, Ms. Romero fails to develop any legal argument explaining how her
15 sergeant’s behavior towards her was motivated by retaliatory intent rather than
16 simply the sergeant’s response to Ms. Romero repeatedly failing to comply with the
17 “light duty” requirements—after all, Ms. Romero’s light duty status was an
18 accommodation requested by her own therapist.

19 {47} Based on the record before us, we conclude that there was insufficient
20 evidence to support the district court’s determination that the City retaliated against

1 Ms. Romero. Rather, it is clear from the record that the City made multiple attempts
2 to accommodate Ms. Romero's PTSD.

3 {48} For these reasons, we reverse the district court's determination in favor of Ms.
4 Romero on her claims of discrimination and retaliation.

5 **D. Damages Award**

6 {49} Because we reverse on both claims, we need not reach the City's damages
7 argument.

8 **CONCLUSION**

9 {50} For the foregoing reasons, we affirm in part and reverse in part.

10 {51} **IT IS SO ORDERED.**

11 
12 _____
KRISTINA BOGARDUS, Judge

13 **WE CONCUR:**

14 
15 _____
J. MILES HANISEE, Judge

16 
17 _____
GERALD E. BACA, Judge