AGENDA
ADVISORY COMMITTEE
ON MODEL CIVIL JURY INSTRUCTIONS

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Council Room, Suite N31

March 13, 2005
4:00 TO 6:00 P.M.

Web demonstration	Tim Shea Steve Brown
Employer and employee rights instructions	Jathan Janove
Superseding cause.	Jonathan Jemming
Presentations to lawyers and judges	John Young
Proofreading prior to publication	Tim Shea

Meeting Schedule: Matheson Courthouse, 4:00 to 6:00, Education Room as available. Otherwise Judicial Council Room

April 10, 2006
May 8, 2006
June 12, 2006
July 10, 2006
August 14, 2006
September 11, 2006
October 9, 2006
November 13, 2006
December 11, 2006

Committee Web Page: http://www.utcourts.gov/committees/muji/

MINUTES

Advisory Committee on Model Civil Jury Instructions
February 13, 2006
4:00 p.m.

Present: Honorable William W. Barrett, Jr., Paul M. Belnap, Juli Blanch, Marianna Di Paolo, Phillip S. Ferguson, L. Rich Humpherys, Jathan Janove (chair of the employment instruction subcommittee), Jonathan G. Jemming, Timothy M. Shea, Paul M. Simmons, David E. West and John L. Young (chair)

Excused: Francis J. Carney, Ralph L. Dewsnup, Tracy H. Fowler, Colin P. King, Stephen B. Nebeker

Mr. Young called the meeting to order.

Report on Meeting with Supreme Court. Mr. Young and Mr. Shea met with the Utah Supreme Court and provided the court with a status report. As soon as the committee completes the employment law instructions, it will publish its work up to that point. The instructions will be posted on the web in a way that will facilitate copying and pasting. The instructions will also be presented at the district court judges' meeting in May. Mr. Shea has drafted a proposed introduction and will invite comments on it.

Employment Law Instructions. The committee continued its review of the employment law instructions:

1. *18.106. Rebutting the "at-will" presumption.* Mr. West asked whether the instruction needs to define "presumption." Mr. Young pointed out that the previous instruction (18.105) explains the presumption. The two instructions should be given together (18.105 followed by 18.106). At Dr. Di Paolo's suggestion, the first part of the instruction was revised to read: "An employee may defeat the presumption that his employment may be terminated at will by establishing . . ."

2. *18.107. Rebutting the "at-will" presumption. Express or implied agreement.* At Mr. Young's suggestion and consistent with other instructions, "by a preponderance of the evidence" was deleted from the first paragraph. Mr. Young suggested dividing subparagraph (1) into subparts and revising the order of subparagraphs (1) and (2). The committee struggled with clearer language for the phrase "unless pursuant to certain procedures." The last part of the instruction was revised to read as follows:

> This requires the employee to establish that:
>
> (1) the employer communicated its intent to the employee that the employee's employment would not be terminated–
>
> (a) except for certain conduct,

(b) until after a certain time period, or

(c) unless applicable procedures were followed; and

(2) the communication was sufficiently clear and definite to create a reasonable belief by the employee that his employment could not be terminated "at will."

3. *18.108. Rebutting the "at-will" presumption. Intent of the parties.* Mr. Ferguson suggested that the first sentence be revised to read: "In deciding whether the parties intended to create an employment contract that could not be terminated 'at will,' you must consider all of the circumstances of employment as a whole." Mr. West thought the instruction duplicated instruction 18.103. Other committee members pointed out that 18.103 deals with evidence of an implied employment contract, whereas 18.108 deals with evidence that an employment relationship cannot be terminated at will. The same jury may not get both instructions. Mr. Young suggested that the last sentence be bracketed and an advisory committee note added to the effect that the last sentence need not be given if 18.103 is also given. Dr. Di Paolo thought it was okay to repeat the concept. Mr. Belnap suggested that Mr. Janove take the committee's comments back to his subcommittee and see if instructions 18.103, 18.107 and 18.108 can be combined. Mr. Janove pointed out that instructions 18.103 and 18.108 are not duplicative; they cover different situations. But his subcommittee will consider combining instructions 18.107 and 18.108.

4. *18.109. Rebutting the "at-will" presumption. Violation of public policy.* Mr. West suggested eliminating gender-specific pronouns. Judge Barrett asked why subparagraph (1) was necessary, since a termination is presumed. Dr. Di Paolo asked what the difference was between subparagraphs (3) and (4). Mr. Shea suggested deleting subparagraph (3), but Mr. Janove thought that the case law made it significant. According to Mr. Janove, the cases suggest that the trier of fact must consider exactly what the employee was doing and its relation to public policy before reaching the question of causation. Mr. Ferguson asked whether the phrase "brought the policy into play" was understandable to the average juror. Other words were suggested, including "triggered," "related to," "covered" and "implicated." Mr. Humpherys asked whether the existence of a clear and substantial public policy was a question of fact for the jury to decide or a question of law for the court to decide. If the latter, he suggested that the instruction read: "The court has determined that public policy is [or requires] . . ." or "The court has determined that [describe the policy] is a clear and substantial public policy." The jury must then decide whether the employee's conduct brought the policy into play. Ms. Blanch asked whether the jury must also decide whether the public policy is "clear and substantial." Mr. Young suggested that the instruction read, "The court has determined that a substantial public policy exists, namely, . . . To establish a violation of that public policy, you must decide . . . ." Mr. Janove suggested that the instruction start out, "The employee alleges that he was fired

because [describe the relevant public policy]." Mr. Young compared the instruction to former MUJI 18.11, which is substantially different. Mr. Janove thought 18.11 was too general and that its language was out of date. Mr. Humpherys asked whether the standard for causation is a "substantial factor" (the standard under 18.11) or "at least in part" (the standard under 18.109). Mr. Janove said that if a public policy violation was at least part of the reason for the discharge, the burden shifts to the employer to prove that the employee would have been discharged anyway. Mr. Janove noted that the Utah Supreme Court will hear argument this spring in a case addressing discharges in violation of public policy and suggested that the instruction be tabled until the court's decision is issued. The committee suggested that Mr. Janove take the instruction back to his subcommittee for revisions in light of the committee's discussions.

5. *18.110. Violation of public policy. Shifting burdens.* Mr. Humpherys suggested combining instruction 18.110 with 18.109 and adding to the end of current 18.109 the sentence, "However, if the employer shows a legitimate reason for the employee's termination, then the employee must show that the public policy was a substantial factor in his termination." Dr. Di Paolo asked whether the jury must decide the issues in stages. Mr. West questioned whether the law in this area was clear. Mr. Humpherys asked what the relationship was between the instruction and federal employment law. Mr. Janove suggested that the instruction could read, in effect: "The plaintiff alleges that he was fired because [of a violation of public policy, which the court should describe]. The defendant alleges that the plaintiff was fired because [of a legitimate reason, which the court should describe]. You must decide whether the plaintiff was fired because of [the reason that violates public policy] or [the legitimate reason]." Mr. Young and Mr. Ferguson suggested leaving instructions 18.109 and 18.110 open until the Utah Supreme Court provides further clarification. Mr. Janove will present the issues to his subcommittee and see if the subcommittee wants to try to rewrite the instructions before the court decides the issues.

6. *18.111. Implied employment contract. New terms.* At the suggestion of Messrs. Ferguson and Young, "prospectively" was deleted from the first line. At the suggestion of Messrs. Humpherys and Shea, the last sentence was deleted, and the last line was revised to read, ". . . a new or modified employment contract is formed that includes the new terms."

Numbering System. Mr. Shea circulated with the meeting materials a memorandum outlining a proposed numbering system.

The meeting concluded at 6:00 p.m.

Next Meeting. The next meeting will be Monday, March 13, 2006, at 4:00 p.m. At the next meeting, the committee will consider proposed instructions on loss of consortium and intervening or superseding cause, among other things.

Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

MEMORANDUM

To: Civil and Criminal MUJI Committees
From: Tim Shea
Date: February 27, 2006
Re: Approval and publication of instructions

It appears that the planets will be aligned for publishing the initial batch of instructions. I've set May 1 as our target date. We may be able to move a little faster, but I hope not later than that so that we can present this to the district court judges at their May conference.

Web publication.

The web page for the instructions is complete except for suggestions from the committees. I will demonstrate that web page at your respective March meetings. The web page is, I believe, one of the best in the country, and I want to thank Steve Brown for all of his work in designing and building it. Except for the committees' review, the web page is finished and could be turned on tomorrow. We are waiting only for the Supreme Court to approve the instructions. Both committees appear to have an initial batch of instructions that are ready or almost ready for the Court's consideration.

Initial batch of instructions.

I encourage both committees to complete their work on that initial batch by early April. In addition to the instructions themselves, that might include, if warranted, references to cases, statutes and treatises and advisory committee notes. Our web publishing will include a place for both. An April target for the committees will leave some time for the Supreme Court to consider the instructions.

I recommend that the committee chairs, jointly or separately, prepare a brief cover letter to the Court, attaching the initial batch of instructions. The letter might refer the justices to the instructions web page (which is now available to internal court users) so that they can see the content of the instructions as well as the functionality of the web publishing.

After the initial instructions, the committees can submit proposals to the Supreme Court as they see fit. We will update the web page upon approval.

Model Utah Jury Instructions
Second Edition
Working Draft
March 7, 2006

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1906 Rebutting the "at-will" presumption.

An employee may defeat the presumption that his employment may be terminated at will by establishing that:

(1) there is an express or implied agreement that the employment relationship may be terminated only for cause or upon satisfaction of another agreed-upon condition; or

(2) the termination violated clear and substantial public policy; or

(3) a statute limits the employer's right to terminate the employee.

MUJI 1st References.

18.4.

References.

Burton v. Exam Center Industrial & General Medical Clinic, Inc., 994 P.2d 1261, 1264 (Utah 2000)
Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 400 (Utah 1998)
Fox v. MCI Communications, Corp., 931 P.2d 857, 859 (Utah 1997)
Hodgson v. Bunzl Utah, Inc., 844 P.2d 331 (Utah 1992)
Sanderson v. First Security Leasing Co., 844 P.2d 303 (Utah 1992)
Johnson v. Morton Thiokol, Inc., 818 P.2d 997 (Utah 1991)

Advisory Committee Notes.

Staff Notes.

Status. Approved 2/13/2006

1907 Rebutting the "at-will" presumption. Express or implied agreement.

To prove that the employment relationship was other than at-will, the employee must show that the parties expressly or impliedly intended to alter the at-will relationship.

This requires the employee to establish that:

(1) the employer communicated its intent to the employee that the employee's employment would not be terminated

(a) except for certain conduct,
(b) until after a certain time period, or
(c) unless applicable procedures were followed;

and

(2) the communication was sufficiently clear and definite to create a reasonable belief by the employee that his employment could not be terminated "at-will."

MUJI 1st References.

18.5; 18.6.

References.

Hodgson v. Bunzl Utah, Inc., 844 P.2d 331 (Utah 1992)
Sanderson v. First Security Leasing Co., 844 P.2d 303 (Utah 1992)
Johnson v. Morton Thiokol, Inc., 818 P.2d 997 (Utah 1991)
Arnold v. B.J. Titan Services Co., 783 P.2d 541, 543-44 (Utah 1989)
Gilmore v. Community Action Program, 775 P.2d 940, 942 (Utah Ct. App. 1989)
Johnson v. Kimberly Clark Worldwide, Inc., 86 F. Supp. 2d 1119, 1121 (D. Utah 2000)

Advisory Committee Notes.

Staff Notes.

Status. Approved 2/13/2006

1908 Rebutting the "at-will" presumption. Intent of the parties.

In deciding whether the parties intended to create an employment contract that could not be terminated at will, you must consider all of the circumstances of the employment. [Evidence may be derived from the employment manuals, oral statements, the conduct of the parties, announced personnel policies, practices of a particular trade or industry, and other circumstances.]

MUJI 1st References.

18.5; 18.6.

References.

Hodgson v. Bunzl Utah, Inc., 844 P.2d 331 (Utah 1992)
Sanderson v. First Security Leasing Co., 844 P.2d 303 (Utah 1992)
Johnson v. Morton Thiokol, Inc., 818 P.2d 997 (Utah 1991)
Arnold v. B.J. Titan Services Co., 783 P.2d 541, 543-44 (Utah 1989)
Gilmore v. Community Action Program, 775 P.2d 940, 942 (Utah Ct. App. 1989)
Johnson v. Kimberly Clark Worldwide, Inc., 86 F. Supp. 2d 1119, 1121 (D. Utah 2000)

Advisory Committee Notes.

The bracketed sentence need not be given if Instruction 1903 is given.

Staff Notes.

Status. Changes from 2/13/2006

1909 Rebutting the "at-will" presumption. Violation of public policy.

To establish that the termination was a violation of public policy, an employee must prove that:

(1) the public policy applies to the employee's conduct [describe conduct]; and

(2) the employment was terminated at least in part because the employee [did something] [did not do something] that brought the public policy into play.

MUJI 1st References.

18.11.

References.

Ryan v. Dan's Food Stores, Inc. 972 P.2d 395, 404 (Utah 1998)
Gottling v. P.R. Inc., 61 P.3d 989 (Utah 2002)

Advisory Committee Notes.

Whether a claimed public policy is sufficiently clear and substantial to give rise to a claim is a matter of law to be decided by the court.

Staff Notes.

Status.

1910 Violation of public policy. Shifting burdens.

If the employee establishes the factors listed in Instruction 1909, then the burden shifts to the employer to provide evidence of a legitimate reason for the discharge. If the employer provides evidence of a legitimate reason for the discharge, then the burden shifts back to the employee to prove that the employee's conduct implicating the public policy was a substantial factor in the discharge of the employee.

MUJI 1st References.

References.

Ryan v. Dan's Food Stores, Inc. 972 P.2d 395, 405 (Utah 1998)
Barela v. C.R. England & Sons, 197 F.3d 1313, 1316 (10th Cir. 1999)

Advisory Committee Notes.

Staff Notes.

Status.

1911 Implied employment contract. New terms.

An at-will employment contract may be modified by writings, conduct, or oral statements of the employer. When an employer communicates to the employee new policies, procedures or other terms or conditions of employment and the employee chooses to continue the employment, a new or modified employment contract is formed including the new terms.

MUJI 1st References.

18.8.

References.

Sanderson v. First Security Leasing Co., 844 P.2d 303, 306-07 (Utah 1992)
Trembly v. Mrs. Fields Cookies, 884 P.2d 1306, 1313 (Utah Ct. App. 1994)
Sorenson v. Kennecott-Utah Copper, Corp., 873 P.2d 1141, 1148 (Utah Ct. App. 1994)
Johnson v. Kimberly Clark Worldwide, Inc., 86 F. Supp. 2d 1119, 1122 (D. Utah 2000)

Advisory Committee Notes.

Staff Notes.

Status. Approved 2/13/2006

1912 Implied covenant of good faith and fair dealing.

The law implies into every contract a promise, also called a covenant, that neither party to the contract will take any action intended to deprive the other party of the benefit of the contract. This promise is implied because the law puts it into all contracts, even though the parties never discussed it. This implied promise is called the "covenant of good faith and fair dealing," which imposes a duty on both parties to a contract to act in good faith toward each other. Good faith means honesty in fact and behavior in such a way as to allow both parties to obtain the benefits for which they contracted.

To comply with the obligation to perform a contract in good faith, a party's expectation must be consistent with the agreed common purpose and the justified expectation of the other party. The purpose, intentions and expectations of the parties should be determined by considering the contract language and the course of dealings between the parties. If one party to a contract has discretion in a contract, that party must exercise that discretion reasonably and in good faith.

A breach of the covenant of good faith and fair dealing occurs whenever one party acts in bad faith toward the other party and deprives the other party of the expected benefits of the contract. Furthermore, a breach of this covenant can occur even though the terms of the contract are not technically violated.

The covenant of good faith and fair dealing does not, without more, limit an employer's right to terminate an at-will employee.

MUJI 1st References.

References.

Brehany v. Nordstroms, Inc., 812 P.2d 49, 55 (Utah 1991)
St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 199 (Utah 1991)
Cook v. Zion's First National Bank, 919 P.2d 56, 60-61 (Utah Ct. App. 1996)
Johnson v. Kimberly Clark Worldwide, Inc., 86 F.Supp. 2d 1119, 1122-23 (D. Utah 2000)

Advisory Committee Notes.

Staff Notes.

Delete "covenant" and simply call it a "promise" or as used in 1922 a "duty."

Status.

1913 Breach of employment contract. Just cause.

If under an express or implied contract the employee may only be discharged for just cause, the discharge violates the contract unless the employer shows that it acted with "objective reasonableness." Determining objective reasonableness does not mean second-guessing the employer's business decisions. Instead, it means determining whether the employer acted in good faith by adequately considering the facts it reasonably believed to be true at the time it made the decision to fire the employee.

MUJI 1st References.

References.

Uintah Basin Medical Center v. Hardy, 110 P.3d 168, 174-75 (Utah Ct. App. 2005).

Advisory Committee Notes.

Staff Notes.

Status.

1914 Constructive discharge.

The termination of employment by an employer may be either actual or constructive. The termination is actual when the employer notifies the employee, either orally, or in writing or through words or actions sufficient to lead a reasonable person to believe he or she has been discharged. The termination is constructive when an employee [resigns/retires] because an employer creates, or knowingly permits to exist, working conditions that are so intolerable that a reasonable person in the employee's position would be compelled to [resign/retire].

To prove a constructive discharge, the plaintiff must show that his working conditions were so intolerable at the time he [resigned/retired] that a reasonable person would have been compelled to [resign/retire].

Whether a reasonable person in the plaintiff's position would have been compelled to [resign/retire] is determined by an objective standard based on whether a person of ordinary intelligence and sensitivity in the same circumstances would have [resigned/retired]. The law recognizes that a forced [resignation/retirement] is the same as being fired.

MUJI 1st References.

References.

Sheikh v. Department of Pub. Safety, 904 P.2d 1103, 1007 (Utah Ct. App. 1995)
California Jury Instruction 10.02

Advisory Committee Notes.

Staff Notes.

Cite to CACI.

Status.

1915 Scope of employment.

In order to find that an employer is liable for the act or omission of an employee, you must find that the employee was acting within the scope of the employee's employment authority at the time of the act or omission. An employee was acting within the scope of the employee's employment authority if each of the following are true:

(1) the employee was engaged in conduct of the general kind the employee was employed to perform; in other words, the employee was engaged in carrying out the duties assigned by the employer, as opposed to being wholly involved in a personal endeavor; and

(2) the employee's conduct occurred within working hours, and within the normal work place; and

(3) the employee's conduct was motivated, at least in part, by the purpose of serving the employer's interest.

MUJI 1st References.

25.6.

References.

Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1040 (Utah 1991)
Birkner v. Salt Lake County, 771 P.2d 1053, 1056-57 (Utah 1989)

Advisory Committee Notes.

Staff Notes.

Is this an employment instruction or a vicarious liability instruction?

Status.

1916 Fiduciary duty.

A fiduciary relationship is a relationship in which one, or both, of the parties is required to act solely for the benefit of the other, within the scope of the relationship, with the highest duty of care. The relationship created by a contract is generally not a fiduciary relationship. Similarly, an employer-employee relationship is generally not a fiduciary relationship.

The party claiming the existence of a fiduciary relationship has the burden of proof to show that the relationship is a fiduciary relationship.

To establish a fiduciary relationship the party claiming that relationship must show that the claimed fiduciary owed the other fidelity, confidentiality, honor, trust and dependability above and beyond that of the parties to the average contract.

When the relationship which created the fiduciary duty ends, the fiduciary duty ends as well.

MUJI 1st References.

References.

Semenov v. Hill, 982 P.2d 578 (Utah 1999)
Margulies ex rel. Margulies v. Upchurch, 696 P.2d 1195 (Utah 1985)
Microbiological Research Corp. v. Muna, 625 P.2d 690, 695 (Utah 1981)
Renshaw v. Tracy Loan & Trust Co., 87 Utah 364, 49 P2.d 403, 404 (Utah 1935)
C&Y Corp. v. General Biometrics, 896 P.2d 47, 54 (Utah Ct. App. 1995)
Envirotech Corporation v. Callahan, 872 P.2d 487 (Utah Ct. App. 1994)
Black's Law Dictionary 640 (7th Ed. 1999)

Advisory Committee Notes.

Staff Notes.

Status.

1917 Damages. Express and implied contract claim.

If an employer has [terminated the employee in breach of] [breached] an express or implied contract, you may award the employee damages. Damages recoverable for breach of contract include both general damages, i.e., those flowing naturally from the breach, and consequential damages, i.e., those reasonably foreseeable by the parties at the time the contract was made.

General damages can be awarded even if no consequential damages are proven; likewise, consequential damages can be awarded even if no general damages are proven.

MUJI 1st References.

15.15; 18.12.

References.

Mahmood v. Ross, 1999 UT 104, 19, 990 P.2d 933, 937
Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989)
Beck v. Farmers Ins. Exch., 701 P.2d 795, 801 (Utah 1985)
Erickson v. PI, 73 Cal. App. 3d 850 (1977)
Parker v. Twentieth Century Fox Film Corp., 3 Cal. 3d 176 (1970)

Advisory Committee Notes.

Staff Notes.

Use "economic" and "non-economic" damages.

Second paragraph is not a point of law that the jury needs to know.

Status.

1918 Damages. General damages.

General damages are those which flow naturally from the employer's breach. In other words, they are those which, from common sense and experience, would naturally be expected to result from the employer's breach of employment contract. They can include [the amount of compensation and benefits that the employee would have received from the employer during the period you find the employment was reasonably certain to have continued, less any amounts that the employer proves the employee received or could have received with reasonable effort from other employment during the same period] [list other items of damage in evidence].

MUJI 1st References.

18.12.

References.

Mahmood v. Ross, 1999 UT 104, 19, 990 P.2d 933, 937
Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989)
Beck v. Farmers Ins. Exch., 701 P.2d 795, 801 (Utah 1985)
Prince v. Peterson, 538 P.2d 1325, 1328 (Utah 1975)
Erickson v. PI, 73 Cal. App. 3d 850 (1977)
Parker v. Twentieth Century Fox Film Corp., 3 Cal. 3d 176 (1970)

Advisory Committee Notes.

Staff Notes.

Status.

1919 Damages. Consequential damages.

Consequential damages are those damages that were within the contemplation of the parties or were reasonably foreseeable by the parties at the time the contract was made. That is, consequential damages are damages, other than lost compensation and benefits, that directly flow from the employer's breach of the employment contract. Although they are designed to place the employee in the same economic position he would have had if the employer had not breached the employment contract, they may reach beyond the bare contract terms.

To recover consequential damages, the employee must prove:

(1) that the consequential damages were caused by the contract breach;

(2) that the consequential damages ought to be allowed because they were foreseeable at the time the parties contracted; and

(3) the amount of the consequential damages within a reasonable certainty.

Although the employee must offer proof within a reasonable certainty of the amount of his loss, he does not need to prove them with absolutely precision.

MUJI 1st References.

18.12.

References.

Kraatz v. Heritage Imports, 2003 UT App 201, 48-49, 53-54, 71 P3d. 188, 199-201
Mahmood v. Ross, 1999 UT 104, 20, 990 P.2d 933, 937-38
Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989)
Beck v. Farmers Ins. Exch., 701 P.2d 795, 801 (Utah 1985)
Erickson v. PI, 73 Cal. App. 3d 850 (1977)
Parker v. Twentieth Century Fox Film Corp., 3 Cal. 3d 176 (1970)

Advisory Committee Notes.

Staff Notes.

We have an extensive definition of non-economic damages in Instruction 2004. Should that be copied here? Or should it and some other damages instructions be considered "general" instructions to be given regardless of the nature of the action?

Status.

1920 Compensatory damages. Public policy wrongful discharge.

An employee terminated in violation of public policy is entitled to recover all damages which flow naturally from the employee's termination. In other words, the employee is entitled to recover [the amount of compensation and benefits that the employee would have received from the employer during the period you find the employment was reasonably certain to have continued, less any amounts that the employer proves the employee received or could have received with reasonable effort from other employment during the same period] [list other items of damage in evidence].

An employee is also entitled to recover damages in an amount which will reasonably compensate the employee for the loss and injury suffered as a result of the employer's unlawful conduct. You may award reasonable compensation for the following:

(1) pain, suffering, and physical or emotional distress;

(2) embarrassment and humiliation; and

(3) loss of enjoyment of life; that is, the employee's loss of the ability to enjoy certain aspects of his life as a result of the employer's actions.

You may consider the testimony and the demeanor of the employee in considering and determining a fair allowance for any damages for emotional distress, humiliation, and loss of enjoyment of life. Emotional harm may manifest itself, for example, as sleeplessness, anxiety, stress, depression, marital strain, embarrassment, humiliation, loss of respect, emotional distress, loss of self-esteem, or excessive fatigue. Physical manifestations of emotional harm may also occur, such as ulcers, headaches, skin rashes, gastrointestinal disorders, or hair loss.

In the determination of the amount of the award, it will often be difficult for you to arrive at a precise award. These damages are intangible, and the plaintiff is not required to prove them with precision. It is difficult to arrive at a precise evaluation of actual damage for emotional harm. No opinion of any witness is required as to the amount of such reasonable compensation. Nonetheless, it is necessary to arrive at a reasonable award that is supported by the evidence.

MUJI 1st References.

18.11.

References.

3 Devitt, Blackmar & Wolf, Federal Jury Practice and Instructions, Section 104.6 (4th Ed. 1987)

Block v. R.H. Macy & Co., 712 F.2d 1241, 1245 (8th Cir., 1983)

E.E.O.C. Policy Guide on Compensatory and Punitive Damages Under 1991 Civil Rights Act (B.N.A., 1992) at II(A)(2), as modified
Stallworth v. Shuler, 777 F.2d 1431 (11th Cir. 1985)

Advisory Committee Notes.

Staff Notes.

The first paragraph simply restates 1919.

Status.

1921 Damages. Breach of the implied covenant of good faith and fair dealing.

If you find, by a preponderance of the evidence, that the employer breached its duty of good faith and fair dealing to the employee, you may award the employee both general damages and a broad array of consequential damages. Damages recoverable for the breach of this duty are damages for those injuries or losses flowing naturally from the breach, and those losses or injuries which were reasonably within the contemplation of, or reasonably foreseeable by, the parties at the time the contract was made.

In awarding these damages, you may award an amount in excess of the contract terms specified in the employment contract. In determining the amount of damages to award, you may consider [the employee's loss of income or profit] [the employee's past and future emotional suffering and mental anguish] [any other detriment naturally flowing from the employer's breach]. However, only those factors that were reasonably foreseeable by the parties and that were proximately caused by the employer's breach may be considered.

MUJI 1st References.

References.

Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1044, 1050 (Utah 1989)
Beck v. Farmers Ins. Exch., 701 P.2d 795, 801-02 (Utah 1985)
Cook v. Zion's First National Bank 919 P.2d 56 (Utah Ct. App. 1996)

Advisory Committee Notes.

Staff Notes.

Status.

1922 Damages. Employee duty to mitigate damages.

An employee who has lost wages as a result of termination has a duty to take steps to minimize the damage by making reasonable efforts to find comparable employment.

If the employee found new employment, the amount earned by the employee must be deducted from any damages awarded to the employee. If the employee, through reasonable efforts, could have found comparable employment, any amount that the employee could have earned in comparable employment must be deducted from the amount of damages awarded to the employee.

The employer has the burden of proving that the employee obtained or might have obtained comparable employment of a similar character.

In order to recover damages suffered due to the employer's actions, the employee is required to show that he or she took reasonable steps to avoid damages. The employee is not required to make every effort possible to avoid the damages.

MUJI 1st References.

18.13.

References.

Angelos v. First Interstate Bank of Utah, 671 P.2d 772 (Utah 1983)
Pratt v. Board of Education of Uintah County School District, 564 P.2d 294 (Utah 1977)

Advisory Committee Notes.

Staff Notes.

Status.

1923 Special damages. Unemployment compensation.

If you decide to award damages to compensate Plaintiff for financial losses, such as lost wages, lost benefits, medical expenses, and other out-of-pocket expenses, you are not to reduce the amount of those damages by the fact that Plaintiff may have received payment from such sources as unemployment insurance, workers' compensation, social security or disability benefits.

MUJI 1st References.

27.3.

References.

Gibbs M. Smith, Inc. v. US Fidelity, & Guaranty Co., 949 P.2d 337, 345 (Utah 1997)
Suniland Corp. v. Radcliffe, 576 P.2d 847, 849 (Utah 1978)
Green v. Denver & Rio Grande Western R. Co., 59 F.3d 1029, 1032 (10th Cir. 1995)
Whatley v. Skaggs Companies, Inc., 707 F.2d 1129, 1138 (10th Cir. 1983)

Advisory Committee Notes.

Staff Notes.

Cite to CACI.

Status.