Agenda
Advisory Committee on Model Civil Jury Instructions

October 11, 2016
4:00 to 6:00 p.m.

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

Welcome, announcements, and approval of minutes	4:00	Tab 1	Juli Blanch – Chair
Subcommittees and subject area timelines	4:03	Tab 2	Juli Blanch
Emotional Distress	4:05	Tab 3	Mark Dunn
Civil Rights	4:45	Tab 4	Heather White
Other business	5:55		Juli Blanch

Committee Web Page

Published Instructions

Meeting Schedule: Matheson Courthouse, Judicial Council Room, 4:00 to 6:00 p.m. unless otherwise stated.

November 14, 2016
December 12, 2016
January 9, 2017
February 13, 2017
March 13, 2017
April 10, 2017
May 8, 2017
June 12, 2017
September 11, 2017
October 9, 2017
November 13, 2017
December 11, 2017

Tab 1

MINUTES

Advisory Committee on Model Civil Jury Instructions
September 19, 2016
4:00 p.m.

Present: Juli Blanch (chair), Marianna Di Paolo, Tracy H. Fowler, Honorable Ryan M. Harris, Patricia C. Kuendig (by phone), Paul M. Simmons, Honorable Andrew H. Stone, Nancy Sylvester, Christopher M. Von Maack. Also present: David C. Reymann from the Defamation subcommittee; Heather S. White from the Civil Rights subcommittee; and Mark Dunn from the Emotional Distress subcommittee

Excused: Joel Ferre, Gary L. Johnson, Peter W. Summerill

1. *Minutes.* The committee approved the minutes of the June 13, 2016 meeting as corrected.

2. *Schedule.* Ms. Blanch asked committee members to prioritize the remaining subject areas. The Economic Interference instructions are scheduled next, after the Civil Rights instructions. Mr. Reymann reported that the Injurious Falsehood instructions were ready.

3. *Defamation Instructions.* Lee Warthen of the S.J. Quinney College of Law had asked why there was no instruction in the defamation instructions on truth as a defense. Mr. Reymann explained that, although there is one Utah case that refers to truth as an absolute defense, the Utah Supreme Court has consistently listed falsity as an element of a defamation claim, as opposed to truth being an affirmative defense. The U.S. Supreme Court has held that the states are constitutionally prohibited from putting the burden of proof on the defendant to show truth when the statement involves a matter of public concern. The committee note to CV1602 explains this, and CV1605 reflects this as well. The committee was satisfied that the instructions accurately state the law and saw no need to change them.

Dr. Di Paolo joined the meeting, and Mr. Reymann was excused.

4. *Civil Rights Instructions.* Ms. White reported that the Civil Rights subcommittee started out looking at employment and land use, but the land use attorneys did not think that jury instructions were necessary because the issues are usually resolved by motion or in federal court. Ms. White noted that many civil rights cases are removed to federal court, but some stay in state courts, and the federal courts have relied on MUJI because there are no Tenth Circuit pattern jury instructions in this area. Ms. White said there were a few instructions missing, but the majority were finished. She said that the committee's goals were to put the instructions in plain English and eliminate argument from them.

a. *CV1301. Excessive Force–General.* At Ms. Blanch's suggestion, the title was changed to "Excessive Force–Introductory Instruction." Mr. Simmons asked whether the defendant will always be an "Officer." Ms. White explained that there is no vicarious liability, and there are separate instructions for when a claim is against an entity. Mr. Simmons also noted that the committee had been using "proved" rather than "proven" for the past participle of "prove." On motion of Mr. Von Maack, seconded by Dr. Di Paolo, the committee approved the instruction.

b. *CV1302. Excessive Force–Standard.* Ms. White noted that CV1302 was based on MUJI 15.7. Judge Harris suggested changing the first sentence of the second paragraph to active voice ("all the facts [Officer] knew at the time [Officer] used the force") but acknowledge that "used the force" could have Star Wars overtones, especially to a lay jury. Ms. Sylvester suggested, "at the time [he/she] applied the force." Dr. Di Paolo thought that the passive voice was appropriate in this case. At Mr. Simmons's suggestion, the committee transposed the second and third paragraphs. Ms. Sylvester asked whether the references should include a reference to the Fourth Amendment, but Dr. Di Paolo pointed out that we would need to go back and add constitutional references to a number of other instructions if we started now. The committee thought it was sufficient to cite to case law applying the amendment. On motion of Mr. Simmons, seconded by Mr. Fowler, the committee approved the instruction as modified.

c. *CV1303. Search of Residence–General.* Dr. Di Paolo suggested putting "residence" in brackets if it does not always mean "residence" but can include such things as outbuildings and curtilage. At the suggestions of Messrs. Simmons and Von Maack, , the committee added "a constitutional" before "right" in the first sentence and made "rights" "right" in the second sentence, to make the wording of the two sentences consistent. Ms. Sylvester suggested that the subcommittee double check the references, noting that *Brower* was not a residence case. Mr. Von Maack pointed out that we have not been citing to the Supreme Court Reporter when a U.S. Reports cite is available, so the references were modified. On motion of Mr. Von Maack, seconded by Mr. Fowler, the committee approved the instruction as modified.

d. *CV1304. Searches–Property, Defined.* Judge Harris raised the question of whether something is a "constitutionally protected area" is a question of fact for the jury or a question of law for the court. Ms. White thought it was usually a question of law but noted that there may be a factual dispute over whether the plaintiff had a reasonable expectation of privacy in the area. Ms. Blanch and Judge Harris thought there should be a committee note saying that it is usually a question for the court and suggested that the subcommittee find a case where it was considered a question of fact. Dr. Di Paolo thought that the

first sentence needed something more, such as, "Under the law, a search occurs when . . ." Ms. Sylvester suggested inserting a sentence before it: "'Search' has a special meaning in the law. The legal term 'search' is used to indicate that . . . ." Ms. Blanch and Mr. Simmons thought that something more was required than merely intruding into a space; for example, if an officer blindly stumbled onto the plaintiff's property, would that be enough? Ms. White noted that intent is not required. Mr. Fowler asked whether "intrusion" means something more than simply entering on property. Judge Harris asked whether there is case law defining "intrusion." He noted that *U.S. v. Jacobsen* says that a "search" occurs when an "expectation of privacy is infringed" and asked where the subcommittee got "intrudes." Mr. Simmons suggested looking at the *Black's Law Dictionary* definitions. Dr. Di Paolo asked whether both uses of "reasonable" were necessary in the last sentence. Ms. White explained that the legal standard requires both that a reasonable person would have an expectation of privacy and that the expectation of privacy be reasonable. The committee deferred further discussion of the instruction.

Judge Stone joined the meeting.

e. *CV1305. Seizures–Property, Defined.* Ms. Blanch asked whether a "seizure" is a question for the court. Ms. White said that it often is but that there may be situations where the jury will have to answer special interrogatories relating to whether a "seizure" occurred. Ms. Blanch suggested adding a committee note to that effect. On further reflection, though, Ms. White thought that it was a jury question and that no committee note was necessary. Judge Harris thought that whether or not there has been a "seizure" can be a legal question, while the reasonableness of the seizure is a fact question. He noted that whether or not there has been a "seizure" is a question of law in the context of a motion to suppress. Ms. Sylvester and Dr. Di Paolo noted that it may be useful to include in the instructions definitions of terms (such as "seizure") that the jurors are likely to hear again, even if they are not something that the jury will have to make a finding on. Dr. Di Paolo asked what "personal property" meant. Ms. White explained that there can a seizure, but the plaintiff's constitutional rights may not have been violated if it was not the plaintiff's property. Others thought that it was to distinguish personalty from realty. Dr. Di Paolo asked whether one can have a constitutionally protected interest in loaned property, and Judge Stone asked the same about a leased vehicle, for example. Judge Harris noted that *Jacobsen* required an interference with a possessory interest in the property, which may be less than ownership (such as a lease or bailment). He suggested replacing "personal property" with "a person's property." Judge Stone suggested revising the instruction to read "A seizure of property occurs when a [government actor] interferes in a meaningful way with a person's right to possess that

property." Mr. Fowler suggested adding "or use" after "possess." The committee deferred further discussion of the instruction.

f. *CV1306. [Entry/Search] of a Residence.* Dr. Di Paolo suggested that "exigent" would be a problem for lay jurors. Ms. White and Mr. Simmons noted that "exigent" was defined in CV1312. The committee thought that the definition should be closer in sequence to CV1306.

Ms. White was excused.

5. *Emotional Distress Instructions.* Mr. Dunn, the chair of the Emotional Distress subcommittee, joined the meeting. The committee could not recall whether CV1501-CV1504 were approved; neither the minutes nor Mr. Simmons's notes showed that they had been approved. It deferred further discussion of those instructions and addressed the remaining instructions.

a. *CV1505. Negligent Infliction of Emotional Distress–Direct Victim*. Judge Harris thought that "zone of danger" needed to be defined. Mr. Dunn noted that CV1506 says "in the zone of danger–in actual physical peril" and quoted from *Figueroa v. U.S.*, 64 F. Supp. 2d 1125 (D. Utah 1999), which said that the plaintiffs were "in peril of the very same harm that had befallen their brother." Judge Harris asked, Why use "zone of danger," then; why not just say "in actual physical peril"? Dr. Di Paolo said that she was confused by "zone of danger" and noted that "peril" is not easily understood by lay people. The committee suggested "in danger of being physically injured," "threatened with bodily harm," or "in danger of actual physical injury." Judge Stone questioned the use of "actual." He thought it would leave the door open for the defendant to argue that the plaintiff was not in "actual" danger because the car (or foul ball or whatever) actually missed him, even though it was close enough to him to cause him to suffer a heart attack, for example. Dr. Di Paolo and Mr. Von Maack asked whether there was a perception element involved. Does there have to be a reasonable belief that the plaintiff was in danger? Ms. Blanch asked the subcommittee to draft a "zone of danger" instruction. Mr. Simmons questioned whether "zone of danger" was necessary in CV1505, since it only applied to "direct victims."

b. *CV1506. Negligent Infliction of Emotional Distress–Bystander*. The committee noted that the same problems with "zone of danger" exist in CV1506. There is also an issue as to whether the injured person must be a member of the plaintiff's immediate family. George Waddoups of the subcommittee did not think so and wrote a letter to the other members of the subcommittee explaining his position, which was included in the materials for this meeting. Mr. Simmons indicated that he agreed with Mr. Waddoups; he

could not find anything in Restatement (Second) of Torts § 313 that required the "third person" mentioned there to be an immediate family member. He also thought that the third element in both CV1505 and CV1506 (that the plaintiff "suffered severe and unmanageable mental distress in a reasonable person normally constituted") did not make sense and was not supported by Utah law but should be replaced in both instructions with the plaintiff suffered "illness or bodily harm." Ms. Blanch asked Mr. Simmons and Mr. Fowler to look into those two issues and scheduled a call for them to discuss the matter on Friday, September 23, at 11:00 a.m. They will then have a conference call with Ms. Blanch and Mr. Dunn on Thursday, September 29, at 11:30 a.m. to report on their discussion.

6. *Next meeting.* The next meeting will be Tuesday, October 11, 2016, at 4:00 p.m. (Monday, October 10, being a legal holiday).

The meeting concluded at 6:00 p.m.

Tab 2

Priority	Subject	Sub-C in place?	Sub-C Members	Projected Starting Month	Projected Finalizing Month	Comments Back?
1	Emotional Distress	Yes	Dunn, Mark (D)(Chair); Combe, Steve (D); Katz, Mike (P); Waddoups, George (P)	May-16	October-16	
2	Civil Rights	Yes	Ferguson, Dennis (D); Mejia, John (P); Guymon, Paxton (P); Stavors, Andrew (P); Burnett, Jodi (D); Plane, Margaret (D); Porter, Karra (P); White, Heather (D)	September-16	January-17	
3	Economic Interference	Yes	Frazier, Ryan (D) (Chair); Shelton, Ricky (D); Stevenson, David (P); Simmons, Paul (P); Kuendig, Patricia (P)	January-17	March-17	
4	Injurious Falsehood	Yes	Dryer, Randy (Chair); Hoole, Greg; Hoole, Roger; Hunt, Jeff; Reymann, David; Stevens, Greg	March-17	May-17	
5	Directors and Officers Liability	Yes	Burbidge, Richard D.; Call, Monica;Von Maack, Christopher (chair); Larsen, Kristine; Talbot, Cory	June-17	September-17	
6	Sales Contracts and Secured Transactions	Yes	Cox, Matt (chair); Boley, Matthew; Maudsley, Ade	October-17	December-17	
7	Assault/False Arrest	Yes	Rice, Mitch (chair); Carter, Alyson; Wright, Andrew (D); Cutt, David (P)	January-18	March-18	
8	Trespass and Nuisance	Yes (more members needed)	Hancock, Cameron; Figueira, Joshua (researcher); Abbott, Nelson (P)	May-18	September-18	
9	Insurance	No (more members needed)	Johnson, Gary (chair); Pritchett, Bruce; Ryan Schriever, Dan Bertch, Andrew Wright, Rick Vazquez	October-18	December-18	
10	Wills/Probate	No	Barneck, Matthew (chair)	January-19	March-19	
11	Unjust Enrichment	No (instructions from David Reymann)	David Reymann	April-19	June-19	
12	Abuse of Process	No (instructions from David Reymann)	David Reymann	September-19	November-19	

Tab 3

Model Utah Civil Jury Instructions, Second Edition

Emotional Distress

CV1501 INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS. Approved 6/13/16.

To prove a claim for intentional infliction of emotional distress, [name of plaintiff] must prove each of the following elements:

1. Outrageous and intolerable conduct by [name of defendant]; and
2. [name of defendant] intended to cause emotional distress or acted with reckless disregard of the probability of causing emotional distress; and
3. [name of plaintiff] suffered severe or extreme emotional distress that was caused by the [name of defendant]'s conduct.

These requirements will be explained in the following instructions.

References:

Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344 (1961)

White v. Blackburn, 787 P.2d 1315 (Utah Ct. App. 1990)

Nelson v. Target Corporation, 334 P.3d 1010 (Utah App. 2014)

Anderson Development Company v. Tobias, et al, 116 P.3d 323 (Utah 2005)

CV1502 OUTRAGEOUS CONDUCT. Approved 6/13/16.

"Outrageous and intolerable" conduct is conduct that offends generally accepted standards of decency and morality or, in other words, conduct that is so extreme as to exceed all bounds of what is usually tolerated in a civilized community. Conduct that is merely unreasonable, unkind, or unfair does not qualify as outrageous and intolerable conduct.

References:

Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344 (1961)

White v. Blackburn, 787 P.2d 1315 (Utah Ct. App. 1990)

Restatement (Second) of Torts § 46 comment d (1964)

Nelson v. Target Corporation, 334 P.3d 1010 (Utah App. 2014)

Anderson Development Company v. Tobias, et al, 116 P.3d 323 (Utah 2005)

CV1503 SEVERE OR EXTREME EMOTIONAL DISTRESS. Approved 6/13/16.

Emotional distress may include such things as mental suffering, mental anguish, mental or nervous shock, or highly unpleasant reactions, such as fright, horror, grief, or shame. However, you can award damages for emotional distress only when the distress is severe or extreme.

In determining the severity of distress, you may consider the intensity and duration of the distress, observable behavioral or physical symptoms, and the nature of the [name of defendant]'s conduct. It is possible to have severe and extreme emotional distress without observable behavioral or physical symptoms.

References:

Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344 (1961)

Restatement (Second) of Torts § 46 comment j (1964)

See also, *Anderson Development Company v. Tobias, et al*, 116 P.3d 323 (Utah 2005)

CV1504 DEFINITION OF INTENT AND RECKLESS DISREGARD. Approved 6/13/16.

[Name of plaintiff] must show that [name of defendant] either (1) acted with the intent of inflicting emotional distress, or (2) with no intent to cause harm, intentionally performed an act so unreasonable and outrageous that [name of defendant] knew or should have known it was highly probable that harm would result.

References:

White v. Blackburn, 787 P.2d 1315 (Utah Ct. App. 1990)

CV1505 NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS—DIRECT VICTIM

In order to recover for negligent infliction of emotional distress,

~~[name of plaintiff] must either:~~

~~suffer a physical injury, or~~

~~be in the zone of danger.~~

~~If [name of plaintiff] qualifies for one of the above,~~ [name of plaintiff] must prove all of the following:

1. [name of defendant] was negligent;
2. [name of defendant]'s negligence caused [name of plaintiff] a physical injury apart from any emotional distress or placed [name of plaintiff] in danger of actual physical ~~impact or~~ injury; and
3. [name of plaintiff] suffered severe ~~and unmanageable mental~~ emotional distress resulting in illness or bodily harm ~~in a reasonable person normally constituted~~.

~~This instruction is based upon Restatement (second) of Torts § 313 (1964) pursuant to the references cited below.~~

References*:*

Johnson v. Rogers, 763 P.2d 771, 785 (Utah 1988) (Zimmerman, J., concurring in part, joined by Hall, C.J.; Howe, Associate C.J.; and Stewart, J.) (adopting Restatement (Second) of Torts § 313 (1964) "as written")

White v. Blackburn, 787 P.2d 1315 (Utah Ct. App. 1990) ~~Restatement (second) of Torts § 313 (1964)~~

Hanson v. Sea Ray Boats, Inc., 830 P.2d 236 (Utah 1992)

Harnicher v. University of Utah Medical Center, 962 P.2d 67 (Utah 1998)

Committee Note

A plaintiff who was placed in danger of actual physical injury by the defendant's negligence is said to have been within the "zone of danger" created by the defendant's negligence.

The requirement of resulting "illness or bodily harm" "provides a check on feigned disturbances, thereby ensuring the genuineness of claims." *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 974 (Utah 1993) (per Durham, J.). "[E]motional disturbance that is not severe enough to result in illness or physical consequences is likely to be in the realm of the trivial." Id. Whether mental illness alone, in the absence of any physical manifestation, is sufficient to support a claim is an open question under Utah law. See id. at 983 (Zimmerman, J., concurring in part and concurring in the result, joined by Hall, C.J.; Howe, Associate C.J., and Stewart, J.). Cf. id. at 975 ("A plaintiff who can establish through appropriate expert testimony that he or she suffers from mental illness as a result of a defendant's negligent conduct may maintain an action for NIED.") (per Durham, J.). In any event, the emotional distress suffered must be severe. It must be "such that 'a reasonable [person,] normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.'" Id. at 975 (per Durham, J.) (citation omitted), quoted with approval in *Harnicher v. University of Utah Med. Ctr.*, 962 P.2d 67, 70 (Utah 1998). The defendant may still be liable, however, even if the plaintiff's reaction under the circumstances is more extreme than a normal person would experience, if the defendant knew or should have known that he was dealing with an especially sensitive plaintiff ("the familiar thin skull or eggshell skull rule as applied to emotional harm"). See, e.g., Dan B. Dobbs, et al., The Law of Torts § 397 ("Sensitive plaintiffs") (2d ed. 2011 & Supp. 2016). Moreover, the reasonable person standard does not limit the plaintiff to recovering only the amount of damages that a normal person would have suffered. "If the defendant's conduct would subject him to liability for severe distress to a reasonable person, he is also liable for damages to an especially sensitive person, even if those damages are much greater because of the special sensitivity." Id. (footnote omitted).

CV1506 NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS— INJURY TO ANOTHER~~BYSTANDER~~

In order to recover for negligent infliction of emotional distress caused by from harm to another,

~~as a bystander, [name of plaintiff] must:~~

~~be in the zone of danger – in actual physical peril;~~

~~fear injury to himself/herself; and,~~

~~witness – contemporaneous observation – an injury to an immediate family member.~~

~~If [name of plaintiff] so qualifies,~~ [name of plaintiff] must prove all of the following:

1. [name of defendant] was negligent;
2. [name of defendant]'s negligence placed both [name of plaintiff] and [name of the other] in danger of physical ~~impact or~~ injury; and
3. [name of plaintiff] suffered severe emotional ~~and unmanageable mental~~ distress resulting in illness or bodily harm~~in a person normally constituted~~.

References:

Restatement (Second) of Torts § 313(b) (1964)

Johnson v. Rogers, 763 P.2d 771 ~~(Utah 1988)~~, 785 (Utah 1988) (Zimmerman, J., concurring in part, joined by Hall, C.J.; Howe, Associate C.J.; and Stewart, J.) (adopting Restatement (Second) of Torts § 313 (1964) "as written")

White v. Blackburn, 787 P.2d 1315 (Utah Ct. App. 1990)

~~Restatement (second) of Torts § 313 (1964)~~

Hanson v. Sea Ray Boats, Inc., 830 P.2d 236 (Utah 1992)

Harnicher v. University of Utah Medical Center, 962 P.2d 67 (Utah 1998)

~~*Figueroa v. United States of America*, 64 F. Supp. 2d 1125 (D. Utah 1999)~~

Committee Note

Restatement (Second) of Torts § 313(2) says that the general rule for negligent infliction of emotional distress where the plaintiff suffers emotional distress as a result of fear for his own safety does not apply to illness or bodily harm "caused by emotional distress arising solely from harm or peril to a third person, *unless* the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the" plaintiff. (emphasis added). This is the so-called zone-of-danger test. While the Restatement refers to harm or peril to a "third person," the vast majority of cases where plaintiffs have sought recovery for negligent infliction of emotional distress have involved harm or peril to a member of the plaintiff's immediate family. *See Lawson v. Salt Lake Trappers, Inc.*, 901 P.2d 1013 (1995) (daughter); *Boucher ex rel. Boucher v. Dixie Med. Ctyr.*, 850 P.2d 1179 (Utah 1992) (son); *Hansen v. Sea Ray Boats, Inc.*, 830 P.2d 236 (Utah 1992) (son); *Johnson v. Rogers*, 763 P.2d 771 (Utah 1988) (son); *White v. Blackburn*, 787 P.2d 1315 (Utah Ct. App. 1990) (son). *But see Straub v. Fisher & Paykel Health Care*, 1999 UT 102, 990 P.2d 384 (respiratory therapist's patient). The Utah Supreme Court has not squarely addressed the issue, and the committee therefore expresses no opinion as to whether a plaintiff can recover where the third person is not a member of the plaintiff's immediate family.

See also the Committee Note to CV1505 regarding the requirement of severe emotional distress.

CV1507 DEFINITION OF "ZONE OF DANGER"

To be within the "zone of danger" [name of plaintiff] must be in such close proximity to a threat of harm created by defendant's negligent conduct that he/she is placed in actual physical peril and fears for his/her own safety.

References:

Hansen v. Sea Ray Boats, Inc., 830 P. 2d 236, 239-240 (Utah 1992)

Straub v. Fisher, 990 P.2d 384, 387 (Utah 1999)

Boucher v. Dixie Medical Center, 850 P.2d 1179, 1181 (Utah 1992)

Tab 4

Model Utah Civil Jury Instructions, Second Edition
Civil Rights

CV1301 SECTION 1983 CLAIM—ELEMENTS.

To establish [his/her] claims under Section 1983, [plaintiff's name] must demonstrate, by a preponderance of the evidence, the following three elements:

First, that [name of defendant]'s conduct was under color of state law;

Second, that this conduct deprived [name of plaintiff] of a right protected by the Constitution of the United States; and

Third, that [name of defendant]'s conduct was a proximate cause of the injuries and damages sustained by [name of plaintiff].

I will explain each of these elements to you.

CV1302 SECTION 1983 CLAIM—DEPRIVATION OF RIGHTS.

The second element of [name of plaintiff]'s claims is that [name of defendant]'s conduct deprived [him/her] of a federal right. [Name of plaintiff] claims in this case that [he/she] was deprived of

(i) [his/her] right to _____;

(ii) [his/her] right to _____;

(iii) and [his/her] right to _____.

I will explain the elements of each of these claims later in the Instructions.

CV1303 WARRANTLESS ARREST.

[Name of plaintiff] claims that [he/she] was unlawfully arrested by _____ on _____, without probable cause to believe he committed a crime. The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment prohibits the police from carrying out unreasonable seizures. An arrest is considered a "seizure" within the meaning of the Fourth Amendment. Under the Fourth

Amendment an arrest may be made only when a police officer has probable cause to believe that the person arrested has engaged in criminal conduct. An arrest without probable cause is an unreasonable seizure.

In this case, _____ did not have an arrest warrant. The law, however, does not require an arrest warrant when, as in this case, the arrest takes place in a public place. Whether the arrest was lawful depends upon whether _____ had "probable cause" to believe that the plaintiff was committing or had committed an offense or a crime.

CV1304 PROBABLE CAUSE.

Probable cause exists when an officer has knowledge of facts and circumstances that are of such weight and persuasiveness as to convince a prudent and reasonable person of ordinary intelligence, judgment, and experience, that it is reasonably likely that the person arrested committed an offense. In other words, probable cause exists when an officer has knowledge of facts and circumstances sufficient to warrant a reasonably prudent person in believing that a crime has been committed, and that the person arrested committed the crime.

Probable cause does not require proof beyond a reasonable doubt, or even proof by a preponderance of the evidence. In dealing with probable cause, we deal with probabilities. These are not technical concepts. They are factual and practical considerations of everyday life, on which reasonable and prudent persons act.

The existence of probable cause is measured as of the moment of the arrest, not on the basis of later developments. Thus, the ultimate disposition of the criminal charges is irrelevant. Therefore, in determining whether there was probable cause to arrest Mr. Webb, I instruct you that you are not to take into account that the fact that the charges against Mr. Webb were eventually dismissed.

CV1305 UNLAWFUL ARREST–ANY CRIME.

It is not necessary that _____ had probable cause to arrest the plaintiff for the offense for which he charged the plaintiff, so long as _____ had probable cause to arrest him for some criminal offense.

CV1306 UNLAWFUL ARREST – MINOR CRIME.

If a police officer has probable cause to believe an individual has committed even a very minor criminal offense in his presence, he may arrest the person. This does not violate the Fourth Amendment.

You are not to consider whether you think _____ should have arrested [name of plaintiff]. Instead, you must decide whether _____ had probable cause that [name of plaintiff] committed either of the offenses I just described to you.

If you determine that [name of plaintiff] established, by a preponderance of the evidence, that there was no probable cause that [he/she] _____ your verdict must be in favor of the plaintiff and against _____ as to the unlawful arrest cause of action.

However, if you determine that there was probable cause to arrest him on _____, then the arrest would be lawful and your verdict must be in favor of _____.

CV1307 REASONABLE SUSPICION.

The level of suspicion required for reasonable suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence. But, reasonable suspicion requires something more than a mere guess or hunch. Reasonable suspicion means that the police officer must be able to articulate specific facts which, taken together with rational inferences from the facts, reasonably warrant the officer's conclusion that the individual is engaging in particular conduct, here, carrying or concealing weapons or other contraband.

Reasonable suspicion may be based upon such factors as the nature of the offense for which the arrestee is charged, the arrestee's appearance and conduct, and the arrestee's prior criminal record, if any.

CV1308 EXCESSIVE FORCE—INTRODUCTORY INSTRUCTION. APPROVED 9/19/16.

[Plaintiff's name] claims that [Officer's name] used unreasonable force in [arresting/stopping] [him/her].

[Officer's name] claims the force [s]he used in [arresting/stopping] [Plaintiff's name] was reasonable.

It is your duty to determine whether [Plaintiff's name] has proved [his/her] claims against [Officer's name] by a preponderance of the evidence.

CV1309 EXCESSIVE FORCE—STANDARD. APPROVED 9/19/16

A person interacting with a law enforcement officer has a constitutional right to be free from unreasonable force. A police officer is entitled to use such force as is reasonably necessary to lawfully stop a person, take an arrested citizen into custody or prevent harm to the officer or others. A police officer is not allowed to use force beyond that reasonably necessary to accomplish these lawful purposes.

~~In determining whether [Officer's name] used unreasonable force with [Plaintiff's name], you should consider all the facts known to [Officer's name] at the time the force was used. You~~

~~are not to consider facts unknown to [Officer's name] at the time [Officer's name] applied force to [Plaintiff's name].~~

The test of reasonableness requires careful attention to the specific facts and circumstances of the case. The reasonableness of a particular use of force must be judged from the perspective of an officer on the scene rather than with the 20/20 vision of hindsight.

In determining whether [Officer's name] used unreasonable force with [Plaintiff's name], you should consider all the facts known to [Officer's name] at the time [he/she] applied the force ~~was used~~. You are not to consider facts unknown to [Officer's name] at the time [Officer's name] applied force to [Plaintiff's name].

You are not to consider [Officer's name]'s intentions or motivations, whether good or bad. Bad intentions will not make a constitutional violation out of an objectively reasonable use of force, and good intentions will not make an unreasonable use of force proper.

Reference:
Graham v. Connor, 490 U.S. 386 (1989)

MUJI 1st
15.7

CV1310 SEARCH OF RESIDENCE—GENERAL. APPROVED 9/19/16.

A person has ~~the~~ a constitutional right to be free from an unreasonable search of [his/her] [residence]. To prove [Defendant(s)' name(s)] violated [Plaintiff's name]'s constitutional rights~~,~~ [Plaintiff's name] must prove the following by a preponderance of the evidence:

1. [Defendant(s)] searched [Plaintiff]'s [residence];

2. [Defendant(s)] intended to search the [residence]; and

3. The search was unreasonable.

References:
Minnesota v. Carter, 525 U.S. 83 (1998)
Kentucky v. King, 563 U.S. 462 (2011)
~~*Katz v. United States*, 389 U.S. 347 (1967)~~
~~*Brower v. County of Inyo*, 489 U.S. 593, 109 S. Ct. 1378 (1989)~~

Committee Note:
These instructions ~~often~~ refer to residence. However, they would apply to any constitutionally protected area, which may include homes, outbuildings, curtilage, etc.

CV1311 SEARCHES – PROPERTY, DEFINED.

Search has a special meaning under the law. A "search" occurs if a [government actor] intrudes into a constitutionally protected area. A constitutionally protected area is one in which a reasonable person would have a reasonable expectation of privacy.

References:
Soldal v. Cook County, 506 U.S. 56, 62, (1992)
United States v. Jacobsen, 466 U.S. 109, 113 (1984)
United States v. Hutchings, 127 F.3d 1255, 1259 (1997)

Committee Note

Generally, in a damages action based on an alleged Fourth Amendment violation, the reasonableness of a search or seizure is a question for the jury. *Sherouse v.Ratchner*, 573 F.3d 1055 (10th Cir. 2009). However, when there is no genuine issue of material fact and no room for difference of opinion, the court should decide whether a search was reasonable as a matter of law. See id.; *Keylon v. City of Albuquerque*, 535 F.3d 1210 (10th Cir. 2008); Cavanaugh v. Woods Cross City, 718 F.3d 1244 (10th Cir. 2013).

CV1312 SEIZURES – PROPERTY, DEFINED.

A seizure of property occurs when a [government actor] [takes/removes] ~~personal~~ a person's property or otherwise interferes in a meaningful way with a person's right to possess that property.

References:
Soldal v. Cook County, 506 U.S. 56, 62, (1992)
United States v. Jacobsen, 466 U.S. 109, 113 (1984)

Committee Note
See Committee Note to CV1304, Searches—Property, Defined, regarding the circumstances in which this is a jury question.

CV1313 [ENTRY/SEARCH] OF A RESIDENCE.

To [enter/search] a residence without a warrant, an officer must either have:
(1) Consent; or
(2) Probable cause and exigent circumstances.

If [Defendant] did not have a warrant, then [Defendant] has the burden to prove by a preponderance of the evidence that there was consent, or probable cause and exigent circumstances.

References:
Steagald v. U.S., 451 U.S. 204, 101 S.Ct. 1642 (1981)

CV 1307 ENTRY OF RESIDENCE PURSUANT TO ARREST WARRANT.

Absent consent or exigent circumstances and probable cause, an officer can legally enter a residence with an arrest warrant only if there was probable cause to believe that at the time of entry:

1. The person named in the arrest warrant was living at that residence;

and

2. That person was actually in the residence at the time.

References:
Smith v. Oklahoma, 696 F.2d 784, 786 (10th Cir 1983)
Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371 (1980)

CV1314 SEARCH OF RESIDENCE PURSUANT TO ARREST WARRANT.

If an officer has legally entered a residence pursuant to an arrest warrant, the officer is allowed to make a protective security sweep of the residence at the time of arrest only if the suspect is believed to be dangerous. A search warrant must be obtained before any search greater than a protective security sweep is made.

References:
Smith v. Oklahoma, 696 F.2d 784, 786 (10th Cir 1983)
Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371 (1980)

CV1315 [ENTRY/SEARCH] OF RESIDENCE PURSUANT TO SEARCH WARRANT.

A search warrant must be supported by probable cause to be reasonable. To demonstrate that a warrant lacks probable cause, a plaintiff must prove by a preponderance of the evidence that:

(1) The warrant application omitted material information; or

(2) The warrant was issued based on [a false statement/false statements] that an officer made knowingly, intentionally, or with reckless disregard for the truth.

References:
Salmon v. Schwarz, 948 F.2d 1131, 1139 (10th Cir. 1991)
Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674 (1978)
Malley v. Briggs, 475 U.S. 335, 345, (1986)

CV1316 CONSENT.

Consent is permission for something to happen, or an agreement to do something. Consent must be voluntary, but it may be either express or implied. [Defendant] has the burden to prove by a preponderance of the evidence that there was consent to a warrantless search, and to prove that such consent was voluntary.

References:
United States v. Dewitt, 946 F.2d 1497 (10th Cir. 1991)

Committee Note:
In determining whether consent to search is voluntary, consider all of the circumstances, including:

- whether the consenting person was in custody;
- whether officers' guns were drawn;
- whether the consenting person was told he or she had the right to refuse a request to search;
- whether the consenting person was told he or she was free to leave;
- whether Miranda warnings were given;
- whether the consenting person was told a search warrant could be obtained;
- any other circumstances applicable to the particular case.

CV1317 PROBABLE CAUSE – SEARCH OF RESIDENCE.

Probable cause to search exists when the facts and circumstances known to the officer, based on reasonably trustworthy information, are such that a reasonable officer would believe [that the property to be seized/subject of the arrest warrant will be found in the residence or that there is a substantial chance that criminal activity is occurring in the residence].

References:
Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034 (1987)

Committee Note:
Mere suspicion that a suspect might be in the home of a third party generally does not establish probable cause to enter/search the third party's home. Speculation that a suspect was in a home because he visited it in the past does not justify entry/search.

CV1318 EXIGENT CIRCUMSTANCES.

Exigent circumstances exist when there was insufficient time to get a search warrant, and an officer, acting on probable cause and in good faith, reasonably believes, based on the totality of the circumstances known to the officer at the time, that [entry/search] of the residence is necessary to prevent:

(1) Evidence or contraband from being immediately destroyed; or

(2) An immediate risk of danger to the officer or a third person.

References:
Kirk v. Louisiana, 536 U.S. 635, 122 S. Ct. 2458 (2002)
Armijo ex rel. Armijo Sanchez v. Peterson, 601 F.2d 1065, 1071 (10th Cir. 2010)

CV 1319 ENTITY LIABILITY – ELEMENTS.

[Entity] is not liable for the actions of its employees or agents simply because they are employees or agents of [entity]. To demonstrate [entity] is liable, Plaintiff must prove all of the following by a preponderance of the evidence:

1. [Entity's employee] violated Plaintiff's constitutional rights;
2. [Entity] had policy or practice; and
3. That policy or practice was a moving force behind the violation of Plaintiff's constitutional rights.

References:
Monell v. Department of Social Services of City of New York, 436 U.S. 658, 98 S. Ct. 2018 (1978)

CV1320 ENTITY LIABILITY –DEFINITION OF POLICY OR PRACTICE.

A policy is a position that has been officially adopted or formally accepted by [entity]. A practice is a custom or course of conduct that has been informally accepted or condoned by [entity].

References:
Monell v. Department of Social Services of City of New York, 436 U.S. 658, 98 S. Ct. 2018 (1978)

CV1321 ENTITY LIABILITY – FINAL DECISION BY POLICYMAKER.

A single incident of unconstitutional activity demonstrates that [entity] had an unlawful policy or practice only if [Plaintiff] proves by a preponderance of the evidence that the

unconstitutional action was taken pursuant to a decision made by a person with authority to make policy decisions for [entity].

References:
Moss v. Kopp, 559 F.3d 1155, 1169 (10th Cir. 2009)
Jenkins v. Wood, 81 F.3d 988, 994 (10th Cir. 1996)
Bryson v. City of Oklahoma City, 627 F.3d 784 (10th Cir. 2010)

CV1322 ENTITY LIABILITY – FAILURE TO TRAIN.

To demonstrate [entity] is liable for failure to train, Plaintiff must prove all of the following by a preponderance of the evidence:

(1) [Entity's employee] violated Plaintiff's constitutional rights;
(2) [Entity] failed to provide adequate training to [entity's employee]; and
(3) That failure to train was a moving force behind the violation of Plaintiff's constitutional rights.

References:
City of Canton, Ohio v. Harris, 489 U.S. 378, 109 S. Ct. 1197 (1989)
City of Oklahoma City v. Tuttle, 471 U.S. 808, 105 S. Ct. 2427 (1985)

CV1323 ENTITY LIABILITY – INADEQUATE TRAINING DEFINITION.

Training is inadequate if the need for more or different training was so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that [entity] could reasonably be said to have been deliberately indifferent to the need.

References:
City of Canton, Ohio v. Harris, 489 U.S. 378, 109 S. Ct. 1197 (1989)
City of Oklahoma City v. Tuttle, 471 U.S. 808, 105 S. Ct. 2427 (1985)

CV1324 DELIBERATE INDIFFERENCE.

[Individual/agency/institution official] acts with deliberate indifference if that person disregards a known or obvious risk that is likely to result in the violation of the [Plaintiff's] constitutional rights. This knowledge can be actual or constructive.

References:
Barney v. Pulsipher, 143 F.3d 1299, 1307 (10th Cir. 1998)
MUJI 1st 15.6
Berry v. City of Muskogee, 900 F.2d 1489 (10th Cir. 1990)
Miranda v. Munoz, 770 F.2d 255 (1st Cir. 1985)

Garcia v. Salt Lake County, 768 F.2d 303 (10th Cir. 1985)
Todaro v. Ward, 565 F.2d 48 (2nd Cir. 1977); affd, 652 F.2d 54 (2nd Cir.1981)
McClelland v. Facteau, 610 F.2d 693 (10th Cir. 1979)
Choate v. Lockhart, 779 F.Supp. 987 (E.D.Ark. 1991)
Medcalf v. State of Kansas, 626 F.Supp. 1179 (D. Kan. 1986)

CV1325 DELIBERATE INDIFFERENCE TO SERIOUS MEDICAL NEEDS – POLICY OR PRACTICE.

Deliberate indifference can also be shown where a policy or practice disregards a known or obvious risk that is likely to result in the violation of an inmate's constitutional rights.

References:
Sealock v. Colorado, 218 F.2d 1205, 1209 (10th Cir. 2000)
Self v. Crum, 439 F.3d 1227, 1232 (10th Cir. 2006)
Heidtke v. Corr. Corp. of Am., 489 F. App'x 275,280 (10th Cir. 2012)
MUJI 1st, 15.9, 15.10
Hudson v. McMillian, 503 U.S. ___, 117 L.Ed.2d 156 (1992)
Whitley v. Albers, 475 U.S. 312 (1986)
Estelle v. Gamble, 429 U.S. 97 (1976), rehearing denied, 429 U.S. 1066 (1977) DeGidio v. Pung, 920 F.2d 525 (8th Cir. 1990)
Berry v. City of Muskogee, 900 F.2d 1489 (10th Cir. 1990)
Miranda v. Munoz, 770 F.2d 255 (1st Cir. 1985)
Todaro v. Ward, 565 F.2d 48 (2nd Cir. 1977)

CV1326 DELIBERATE INDIFFERENCE TO SERIOUS MEDICAL NEEDS – [PRISON/JAIL] OFFICIAL.

A [prison/jail] official's deliberate indifference to an inmate's serious medical needs violates the Eighth Amendment. A [prison/jail] official acts with deliberate indifference to a serious medical need when the official knows of a serious medical need, or the need for medical attention is obvious, and that official disregards the need.

To find an official liable for the violation of [Plaintiff's] constitutional rights, [Plaintiff] must prove by a preponderance of the evidence all of the following:

1. [Plaintiff] was suffering from a serious medical condition that required medical attention while incarcerated;

2. The [prison/jail] official knew of the serious medical need, or the need was obvious; and

3. The [prison/jail] official failed to timely or adequately arrange for medical attention to be provided, or denied the inmate access to medical personnel capable of evaluating the inmate's condition.

References:
Sealock v. Colorado, 218 F.2d 1205, 1209 (10th Cir. 2000)
Self v. Crum, 439 F.3d 1227, 1232 (10th Cir. 2006)
Heidtke v. Corr. Corp. of Am., 489 F. App'x 275,280 (10th Cir. 2012)
MUJI 1st, 15.9, 15.10
Hudson v. McMillian, 503 U.S. ___, 117 L.Ed.2d 156 (1992)
Whitley v. Albers, 475 U.S. 312 (1986)
Estelle v. Gamble, 429 U.S. 97 (1976), rehearing denied, 429 U.S. 1066 (1977) DeGidio v. Pung, 920 F.2d 525 (8th Cir. 1990)
Berry v. City of Muskogee, 900 F.2d 1489 (10th Cir. 1990)
Miranda v. Munoz, 770 F.2d 255 (1st Cir. 1985)
Todaro v. Ward, 565 F.2d 48 (2nd Cir. 1977)

CV1327 DELIBERATE INDIFFERENCE TO SERIOUS MEDICAL NEEDS – MEDICAL PROVIDER.

A medical professional may be deliberately indifferent to an inmate's serous medical needs by failing to treat a serious medical condition properly. Mere negligence does not constitute deliberate indifference. A medical professional is liable for deliberate indifference to an inmate's serious medical needs when the need for additional treatment or referral to a medical specialist is obvious.

References:
Self v. Crum 439 F.3d 1227, 1232 (lOth Cir. 2006)
Heidtke v. Corr. Corp. of Am., 489 F. App'x 275, 280 (10th Cir. 2012)

Committee Notes:
The 10th Circuit has given three specific examples of circumstances where the need is obvious:
1. A provider recognizes an inability to treat the inmate because of the seriousness of the medical condition and/or lack of expertise, but declines or delays referring the inmate for treatment.
2. A provider fails to treat a medical condition so obvious that even a layman would recognize the condition.
3. A provider denies care even though he or she observed or was made aware of recognizable symptoms which could signal a medical emergency.

CV1328 SUPERVISORY LIABILITY FOR DELIBERATE INDIFFERENCE TO SERIOUS MEDICAL NEEDS.

The deliberate indifference standard applies to [prison/jail] officials, as well as those who directly provide medical services. A [prison/jail] official is liable for the violation of [Plaintiff's] constitutional rights regardless of that official's actual knowledge of [Plaintiff's] serious medical needs, if you find that official:

1. Had a supervisory position;

2. Disregarded a known or obvious deficiency in the health care system at the [prison/jail]; and

3. Failed to remedy the deficiencies or alleviate the conditions that led to the constitutional violation,

References:
Berry v. City of Muskogee, 900 F.2d 1489 (10th Cir. 1990)
Miranda v. Munoz, 770 F.2d 255 (1st Cir. 1985)
Garcia v. Salt Lake County, 768 F.2d 303 (10th Cir. 1985)
McClelland v. Facteau, 610 F.2d 693 (10th Cir. 1979)
Todaro v. Ward, 565 F.2d 48 (2nd Cir. 1977), affd, 652 F.2d 54 (2nd Cir.1981)
Choate v. Lockhart, 779 F.Supp. 987 (E.D. Ark. 1991)
Medcalf v. State ofKansas, 626 F.Supp. 1179 (D. Kan. 1986)

MUJI 1st Instruction
15.11

CV1329 SERIOUS MEDICAL NEED DEFINED.

A medical need is serious if:

1. It has been diagnosed by a medical provider as requiring treatment;

2. It is so obvious that even a lay person would easily recognize the necessity for a doctor's attention; or

3. Proper diagnosis would have revealed the seriousness of the problem, but such diagnosis was withheld.

The seriousness of an inmate's medical need may also be determined by considering the effect of denying the particular treatment. Where a delay in medical treatment causes an inmate to suffer a long-term handicap or permanent loss, the medical need is considered serious.

References:

Monmouth Co. Corr'l Inst. Inmates v. Lanzaro, 834 F.2d 326 (3rd Cir.1987), cert. denied, 486 U.S. 1006 (1988)
Toombs v. Bell, 798 F.2d 297 (8th Cir. 1986)
Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), cert. den., 450 U.S. 1041 (1981)
Medcalf v. State of Kansas, 626 F.Supp. 1179 (D. Kan. 1986)
Weaver v. Jarvis, 611 F.Supp. 40 (N.D. Ga. 1985)

MUJI 1st Instruction
15.13

CV1330 SUPERVISORY LIABILITY – ELEMENTS.

[Supervisory defendant] is not liable for the actions of an individual under [his/her] supervision simply because [he/she] is a supervisor. To demonstrate [supervisory defendant] is liable, Plaintiff must prove all of the following by a preponderance of the evidence:

1. [Supervised employee] violated Plaintiff's constitutional rights;
2. [Supervisory defendant] failed to provide adequate supervision and/or discipline of [supervised employee]; and
3. That failure to supervise was a moving force behind the violation of Plaintiff's constitutional rights.

References:
City of Canton, Ohio v. Harris, 489 U.S. 378, 109 S. Ct. 1197 (1989)
Dodds v. Richardson, 614 F.3d 1185 (10th Cir. 2010)
Snell v. Tunnell, 920 F.2d 673 (10th Cir. 1990)
Valanzuela v. Snider, 889 F.Supp. 1409, (D. Colo. 1995)

CV1331 SUPERVISORY LIABILITY – FAILURE TO SUPERVISE DEFINITION.

Supervision is inadequate if the need for more or different supervision was so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that [supervisory defendant] could reasonably be said to have been deliberately indifferent to the need.

References:
City of Canton, Ohio v. Harris, 489 U.S. 378, 109 S. Ct. 1197 (1989)
Dodds v. Richardson, 614 F.3d 1185 (10th Cir. 2010)
Snell v. Tunnell, 920 F.2d 673 (10th Cir. 1990)
Valanzuela v. Snider, 889 F.Supp. 1409, (D. Colo. 1995)

CV1332 ELEMENTS OF AGE DISCRIMINATION CLAIM.

For Plaintiff to establish a claim of age discrimination, Plaintiff must prove by a

preponderance of the evidence that Defendant would not have [adverse action] but for his age.

So long as Plaintiff proves that age was a factor that made a difference in [adverse action], Defendant may be held liable even if other factors contributed to its decision to [adverse action].

References:

Gross v. FBL Financial. Servs., Inc., 557 U.S. 167 (2009)
Burrage v. United States, ___ U.S. ___, 134 S.Ct. 881, 187 L.Ed.2d 715, 82 U.S.L.W. 4076 (2014) ("Given the ordinary meaning of the word "because, "we held that §2000e-3(a) "require[s] proof that the desire to retaliate [134 S.Ct. 889] was [a] but-for cause of the challenged employment action." *Nassar*, supra, at __, 133 S.Ct. 2517, 186 L.Ed.2d 503 at 2528. The same result obtained in an earlier case interpreting a provision in the Age Discrimination in Employment Act that makes it "unlawful for an employer . . . to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. §623(a)(1) (emphasis added). Relying on dictionary definitions of "[t]he words "because of"—which resemble the definition of "results from" recited above—we held that "[t]o establish a disparate-treatment claim under the plain language of [§623(a)(1)] ... a plaintiff must prove that age was [a] 'but for' cause of the employer's adverse decision."
Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993)
Jones v. Okla. City Pub. Schools, 617 F.3d 1273, 1277-78 (10th Cir. 2010)

Committee Notes:
Evidence that may be utilized to show that age was a determinative factor in an adverse action differs depending on the specific facts of the case. Where age-based comments are at issue, practitioners may want an instruction on stray remarks. See e.g., *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2111-12 (2000); *Hare v. Denver Merch. Mart, Inc.*, 255 F. App'x 298, 303 (10th Cir. 2007); *Danville v. Regional Lab Corp.*, 292 F.3d 1246, 1251 (10th Cir. 2002); *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1140 (10th Cir. 2000); *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1129 (10th Cir. 1998); *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 531-32 (10th Cir. 1994). Where there are issues related to the age of comparable employees or the age of a replacement, practitioners may want a specific instruction on the age of the replacement. See e.g., *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996)*; Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1138 (10th Cir. 2000)*; Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1167 (10th Cir. 1998)*; Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 560 (10th Cir. 1996).

In many cases an employer will have numerous affirmative defenses. Those affirmative defenses are not set forth in these instructions. Where an employer asserts an affirmative defense based upon a bona fide occupational qualification, a specific instruction should be given consistent with 29 U.S.C. § 623(f)(1); 29 C.F.R. § 1625.6; see also *Smith v. City of Jackson*, 544 U.S. 228, 233 FN3 (2005); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, (2000); *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 413-417 (1985). Where an employer asserts an affirmative defense based upon a bona fide seniority system consistent with 29 U.S.C. § 623(f)(2)(A); 29 C.F.R. § 1625.8;

see also *Hiatt v. Union Pacific R.R.*, 65 F.3d 838, 842 (10th Cir. 1995), *cert. denied* 516 U.S. 1115 (1996).

CV1333 PRETEXT - ADEA CLAIM.

Plaintiff claims that Defendant's stated reason for [adverse action] are not the true reasons for [adverse action], but instead a pretext to cover up for age discrimination.

If you do not believe one or more of the reasons Defendant offered for Plaintiff's [adverse action], or if you do not believe the stated reason is the real reason for [adverse action], then you may, but are not required to, infer that age was a factor that made a difference in Defendant's decision to [adverse action].

Committee Notes:
This instruction should only be given when Plaintiff contends that Defendant's stated reasons for its adverse action are pretextual. In the Tenth Circuit, a Plaintiff can show pretext by offering evidence showing weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in Defendant's stated reasons for the adverse action. See e.g., *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2108-09 (2000); *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1230 (10th Cir. 2000); *Townsend v. Lumberman's Mut. Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002); *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 266-68 (1977) (disturbing procedural irregularities); *Plotke v. White*, 405 F.3d 1092, 1102 (10th Cir. 2005) (rejection of the Defendant's proffered legitimate reason for the adverse employment action will permit the trier of fact to infer the ultimate fact of intentional discrimination); *Green v. New Mexico* 420 F.3d 1189, 1195 (10th Cir. 2005); *Morgan v. Hilti, Inc.*108 F.3d 1319, 1323 (10th Cir. 1997). Practitioners should craft an instruction on pretext related to the evidence at issue in the case.

CV1334 ADEA –WILLFUL – DEFINED.

If you find Defendant discriminated against Plaintiff on the basis of age, you must now determine whether Defendant's violation was "willful." Defendant acted "willfully" if it either knew or showed reckless disregard for whether its decision to [adverse action] was prohibited by the ADEA.

References:
29 U.S.C. § 626(b)(7)(b);
Hazen Paper v. Biggins, 507 U.S. 604, 616 (1993)
Minshall v. McGraw Hill Broadcasting Co., Inc., 323 F.3d 1273, 1283 (10th Cir. 2003)

CV1335 CAUSATION.

[Refer to CV209 "Cause" defined.]

CV1336 DAMAGES—GENERAL.

If you find that the Defendant did not violate the Plaintiff's constitutional [or statutory] rights, do not award Plaintiff any damages. If you find that the Defendant violated the Plaintiff's constitutional [or statutory] rights, you should determine what damages to award the Plaintiff. There are two kinds of damages, nominal and compensatory. Compensatory damages are the amount of money that you think will reasonably and fairly compensate the Plaintiff for injuries resulting from the deprivation of his/her constitutional [or statutory]rights, and can be both economic and non-economic in nature. Nominal damages are awarded when the only injury is the violation of the constitutional [or statutory] right itself.

References:
MUJI 2d CV2002
Stevens-Henager College v. Eagle Gate College, Provo College, Jana Miller, 2011 Ut App 37, Para. 16, 248 P.3d 1025.

CV1337 COMPENSATORY DAMAGES.

Plaintiff has the burden to show that he/she is entitled to compensatory damages. To recover compensatory damages, Plaintiff must show that it is more likely than not that he/she suffered injury because of the Defendant's violation of the Plaintiff's constitutional rights beyond just the violation of the right.

References:
MUJI 2d CV2002
Stevens-Henager College v. Eagle Gate College, Provo College, Jana Miller, 2011 Ut App 37, Para. 16, 248 P.3d 1025.

CV1338 COMPENSATORY DAMAGES – ADA TITLE VII/SECTION 1981 CASES ONLY.

If you find that the Defendant unlawfully discriminated [or retaliated] against the Plaintiff on the basis of [his][her] [protected activity, race, sex, disability, etc.], then you must determine an amount that is fair compensation for Plaintiff's losses. You may award compensatory damages for injuries that the Plaintiff proved were caused by the Defendant's wrongful conduct. The damages that you award must be fair compensation, no more and no less.

Insert bold provision only if court determines back pay is not a jury question:
[In calculating damages, you should not consider any back pay or front pay that the Plaintiff lost. The award of back pay and front pay, should you find the Defendant liable on the Plaintiff's claims, will be calculated and determined by the Court.]

You may award damages for any emotional distress, pain, suffering, inconvenience or mental anguish [insert all other claimed damages, such as embarrassment, humiliation, damage to reputation, etc.] that Plaintiff experienced as a consequence of the wrongful conduct. No evidence of monetary value of such intangible things as pain and suffering has been, or need be, introduced into evidence. There is no exact standard for setting the compensation to be awarded for these elements of damages. Any award you make should be fair in light of evidence presented at trial.

Insert bold provision if Plaintiff is seeking other consequential damages.
[You may also reimburse the Plaintiff for the value of other out-of-pocket losses or expenses, including expenses for past medical bills, expenses for counseling or mental health care, moving expenses, employment search expenses, and [insert all other quantifiable out-of-pocket expenses sought by the Plaintiff].

In determining the amount of any damages that you decide to award, you should be guided by dispassionate common sense. You must use sound discretion in making an award of damages, drawing reasonable inferences from the facts in evidence. You may not award damages based on speculation or guesswork. On the other hand, the law does not require that the Plaintiff prove the amount of her losses with mathematical precision, but only with as much definiteness and accuracy as circumstances permit.

References:
42 U.S.C. § 1981a. Taken from *Model Employment Law Jury Instructions*, Faculty of Federal Advocates (*Ad Hoc Committee*) (Sept. 2013).

Committee Notes:
Under Title VII and the ADA, the amount of compensatory damages is capped by statute. The elements of compensatory damages that are subject to the statutory cap are (1) future pecuniary losses, and (2) all nonpecuniary losses, which includes emotional distress, anguish, loss of enjoyment of life, embarrassment, reputational damage, adverse effects on credit rating, physical harms caused by distress, etc. The statutory cap does not apply to <u>past</u> pecuniary losses that occurred prior to the date of trial. These losses may include past medical bills, expenses for counseling or mental health care, moving expenses, employment search expenses, and other quantifiable out-of-pocket expenses. *See also* EEOC Enforcement Guidance: Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991 (July 1992).

CV1339 NON-ECONOMIC DAMAGES.

As mentioned previously, there are two types of compensatory damages: economic and non-economic. Non-economic damages are the amount of money that will fairly and adequately compensate Plaintiff for losses that are not capable of exact measurement in dollars. There is no fixed rule, standard or formula to determine them, so they can be difficult to arrive at. If Plaintiff has shown that he/she has suffered such damages, however, do not let this difficulty stop you from awarding them, but use your calm and reasonable judgment to reach an amount. The law does not require evidence of the monetary value of intangible things like pain, suffering, and other non-economic damages.

References:
CV2004 Noneconomic damages defined.
C.S. v. Neilson, 767 P.2d 504 (Utah 1988)
Judd v. Rowley's Cherry Hill Orchards, Inc., 611 P.2d 1216 (Utah 1980).

CV1340 ECONOMIC DAMAGES.

Economic damages are the amount of money that will fairly and adequately compensate [name of plaintiff] for measurable losses of money or property caused by [name of defendant]'s violation of the Plaintiffs' constitutional rights.

References:
CV2003 Economic Damages defined.

CV1341 BACK PAY.

If you find that the Defendant unlawfully discriminated [or retaliated] against the Plaintiff on the basis of [his][her] [protected activity, race, sex, disability, etc.], then you must determine the amount of back pay that the Plaintiff proved was caused by the Defendant's wrongful conduct.

In determining back pay, you must make several calculations:
First, calculate the amount of pay and bonuses that Plaintiff would have earned had [he][she] not been [describe employment action at issue] from the date of that [describe employment action at issue] until today's date.

Then calculate and add the value of the employee benefits (health, life and dental insurance, vacation leave, etc.) that Plaintiff would have received had [he][she] not been [describe employment action at issue] from the date of that [describe employment action at issue] until the date of trial.

Then, subtract from this sum the amount of pay and benefits that Plaintiff actually earned from other employment during this time.

References:
Federal Employment Jury Instructions, § 1:1260; Model Jury Instructions (Civil) Eighth Circuit §5.02 (1998).
Model Employment Law Jury Instruct., Faculty of Fed. Advocates (*Ad Hoc Comm.*) Sept. 2013)

Committee Notes:
There is a question as to whether back pay is an issue of fact for a jury determination, or an issue of law for the Court. *Compare Dodoo v. Seagate Tech., Inc.*, 235 F.3d 522, 527 (10th Cir. 2000), as representative of a case where back pay was determined by a jury; *with Mallinson-Montague v. Pocrnick*, 224 F.3d 1224, 1236 (10th Cir. 2000) (where back pay was determined by the Court). In cases where a claim is also brought under 42 U.S.C. § 1981, back pay is properly a jury question. *See Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1444 (10th Cir. 1988).

In appropriate cases, this instruction should be followed by an instruction regarding failure to mitigate.

CV1342 FAILURE TO MITIGATE.

Plaintiff is required to make reasonable efforts to minimize damages. In this case, the Defendant claims that Plaintiff failed to minimize damages because [state the reason, *e.g.*, Plaintiff failed to use reasonable efforts to find employment after discharge.]
It is the Defendant's burden to prove that Plaintiff failed to make reasonable efforts to minimize [his][her] damages. This defense is proven if you find by a preponderance of the evidence that:

1. There were or are substantially comparable positions which Plaintiff could have discovered and for which Plaintiff was qualified; and

2. Plaintiff failed to use reasonable diligence to find suitable employment. "Reasonable diligence" does not require that Plaintiff be successful in obtaining employment, but only that [he][she] make a good faith effort at seeking employment.

If the Defendant has proven the above, then you must deduct from any award of back pay the amount of pay and benefits Plaintiff could have earned with reasonable effort.

References:
Aguinaga v. United Food & Com. Worker's Intern., 993 F.2d 1463, 1474 (10th Cir. 1993) *citing* 510 U.S. 1072 (1994); *E.E.O.C. v. Sandia Corp.*, 639 F.2d 600, 627 (10th Cir. 1980).
Taken from *Model Employment Law Jury Instructions*, Faculty of Federal Advocates (*Ad Hoc Committee*) (Sept. 2013)

Committee Notes:
There is authority to support language defining "reasonable diligence" to the effect that, "you may find that Plaintiff failed to use reasonable diligence during periods where Plaintiff was not

ready, willing and available for employment," e.g., Plaintiff has enrolled in school. *See Miller v. Marsh*, 766 F.2d 490, 493 (11th Cir. 1985); *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 267268 (10th Cir. 1975) *overruled on other grounds; Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983).

However, where the Defendant fails to bring forward any evidence supporting the first prong of this instruction, then the Defendant has failed to meet its burden of showing that Plaintiff failed to mitigate damages, and the Plaintiff's status as a full-time student is then irrelevant. *Goodman v. Fort Howard Corp.*, No. 93-7067, 1994 U.S. App. LEXIS 17507, *11 (10th Cir. July 18, 1994) (unpublished).

Those cases contrast with cases where the enrollment period is nonetheless recognized as a "reasonable" attempt to mitigate damages: *Bray v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1275-76 (4th Cir. 1985); *Dailey v. Societe Generale*, 108 F.3d 451, 455-57 (2d Cir. 1997); *Smith v. American Serv. Co.*, 796 F.2d 1430, 1431-32 (11th Cir. 1986); *Hanna v. American Motors Corp.*, 724 F.2d 1300, 1307-09 (7th Cir. 1984). Those cases recognize that only "reasonable" efforts to mitigate damages are required, not ultimate success.

CV1343 UNCONDITIONAL OFFER OF EMPLOYMENT.

You have heard evidence in this case that Defendant offered to return Plaintiff to work and that Plaintiff rejected that offer. If you find that the Defendant made an unconditional offer of employment (that is, an offer that was not conditioned upon Plaintiff taking any other action or relinquishing any rights) of a job substantially comparable to Plaintiff's former employment and that Plaintiff unreasonably refused that offer, Plaintiff may not recover back pay after the date of the offer, unless special circumstances exist. In considering whether special circumstances exist, you must consider the circumstances under which the offer was made or rejected, including the terms of the offer and Plaintiff's reasons for refusing the offer.

References:

Ford Motor Co. v. EEOC, 458 U.S. 219 (1982); *Giandonato v. Sybron Corp.*, 804 F.2d 120, 123124 (10th Cir. 1986).

Model Employment Law Jury Instructions, Faculty of Fed. Advocates (*Ad Hoc Committee*) (Sept. 2013)

CV1344 NOMINAL DAMAGES.

If you return a verdict for the Plaintiff, but find that the Plaintiff has failed to prove that [he][she] suffered any damages, then you must award the Plaintiff the nominal amount of $1.00.

References:

See Model Jury Instructions (Civil) Eighth Circuit § 5.23 (1999); *Barber v. T.D. Williamson, Inc.*, 254 F.3d 1223, 1228 (10th Cir. 2001); *Salazaar v. Encinias*, 2000 U.S. App. LEXIS 32022, *7-8 (10th Cir. Dec. 15, 2000).
Taken from *Model Employment Law Jury Instructions,* Faculty of Federal Advocates (*Ad Hoc Committee*) (Sept. 2013).

CV1345 PUNITIVE DAMAGES – MUNICIPALITIES GENERALLY IMMUNE.

Although punitive damages are authorized against individual defendants in civil rights actions, municipalities are generally immune from punitive damage awards.

References:
Smith v. Wade, 461 U.S. 30, 103 S. Ct. 1625 (1983)
Garrick v. City and County of Denver, 652 F.2d 969 (10th Cir. 1981)
City of Newport v. Facts Concerts, Inc., 453 U.S. 247, 101 S. Ct. 2748 (1981)

CV1346 PUNITIVE DAMAGES.

[Refer to CV2026-2032 Punitive Damage Instructions].

CV1347 ATTORNEYS' FEES AND TAXES.

You are not to award damages for the purpose of punishing [Defendant's name]. You must not include any additional damages to compensate [Plaintiff's name] for attorneys' fees or other legal costs incurred in connection with this lawsuit. That is an issue the Court will resolve following the trial. Furthermore, you may not increase the amount of your verdict by reason of federal, state or local income taxes.

Committee note:
The first sentence should be given only if punitive damages are no longer an issue for the jury to consider.
