AGENDA
ADVISORY COMMITTEE
ON MODEL CIVIL JURY INSTRUCTIONS

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

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

Employer and employee rights instructions	Jathan Janove
Report on meeting with Supreme Court	John Young
Recommended number system	Tim Shea
Presentations to lawyers and judges	John Young
Proofreading “Fixes”	Tim Shea

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

March 13, 2006
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
January 9, 2006
4:00 p.m.

Present: Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Jathan Janove (chair of the employment instruction subcommittee), Timothy M. Shea, Paul M. Simmons, David E. West and John L. Young (chair)

Excused: Honorable William W. Barrett, Jr., Paul M. Belnap, Ralph L. Dewsnup, Colin P. King

Mr. Young called the meeting to order.

1. *Damage Instructions.* The committee reviewed the following damage instructions:

a. *15.109. Economic damages. Injury to real property.* Mr. Young asked whether stigma damages only apply in the case of repair, since any stigma would presumably be included in the fair market value of the property if the property cannot be repaired. The committee reviewed the case allowing for recovery of stigma damages (*Walker Drug v. La Sal Oil,* 972 P.2d 1238 (Utah 1998)). Mr. Young suggested that the last, bracketed sentence of the instruction be moved to the advisory committee note and that the last paragraph be placed in brackets. He also suggested making the last sentence of the second paragraph the first sentence of the last paragraph. Mr. Shea suggested changing the order of the last sentence and stating, "if the plaintiff proves by a preponderance of the evidence" rather than "if the evidence establishes." The committee rejected this last suggestion on the grounds that the burden of proof is adequately explained in other instructions. In the first sentence of the second paragraph, "is" was changed to "are." After further discussion, the last paragraph of the instruction was revised to read:

> If the property can be repaired for a lesser amount, then the damages would be the reasonable cost of repair. [In addition, if the evidence establishes that the repaired property will not return to its original value because of a lingering negative public perception that was caused by the injury, you may award stigma damages for any reduction in the value of the property.]

The following advisory committee note was added: "The bracketed sentence should be given only if there is evidence to support a claim of lingering negative public perception." As modified, the instruction was approved.

b. *15.120. Present cash value.* At Mr. Simmons's suggestion, the phrase "and even recommended" was deleted from the last paragraph of the advisory committee

note. The committee noted that the issues raised in the advisory committee note cannot be resolved by the committee but will have to be resolved by the court. The committee deferred further discussion of the instruction.

2. *Employment Instructions.* Mr. Shea noted that two employment law instructions included in the current MUJI--instructions 18.7 regarding the provisions of an implied employment contract, and instruction 18.10 defining public policy--appear to have been omitted. Jathan Janove, the chair of the employment law subcommittee, thought that they were covered in substance by the revised instructions. Mr. Young asked whether the determination of public policy is made by the court or the jury. Mr. Janove believed that as a practical matter it is generally determined as a matter of law by the court on summary judgment but acknowledged that there may be situations in which a jury would have to decide factual issues related to public policy.

After a brief introduction by Mr. Janove, the committee reviewed the following employment law instructions:

a. *18.101. Definition of employment contract.* Mr. Shea suggested that an instruction on the elements of breach of an employment contract be given as an introductory instruction. Mr. Janove thought that the instructions adequately covered the elements of a cause of action. At Mr. Fowler's suggestion, the phrase "express or implied" was added after "an agreement" in the first line. Mr. Young and Mr. Shea suggested adding an introductory sentence stating that the plaintiff is the employee and the defendant is the employer. Mr. Simmons noted that in some cases there may be an issue of fact as to whether an employer-employee relationship exists, making such a statement inappropriate, so no introductory sentence was added.

b. *18.102. Corporation as person.* The committee thought this instruction should be included in the general instructions, since it is not specific to employment law. The instruction was added to the beginning of instruction 1-201. Dr. Di Paolo suggested substituting the term "actual" for "natural" before "person." At Mr. Young's suggestion, the phrase "a natural person or" was deleted so that the instruction now reads: "A person means an individual or a corporation, organization, or other legal entity." As modified, the instruction was approved.

c. *18.103. Creation of express employment contract. Burden of proof.* At Mr. Shea's suggestion, the phrase "orally or in writing" was deleted from the second line on the grounds that it was adequately covered in instruction 18.101. Mr. Simmons suggested making the last sentence a separate instruction on burden of proof, not limited to express contracts. The committee rejected the suggestion and approved the instruction as modified.

d. *18.104. Creation of implied employment contract. Elements of proof.* Mr. Simmons suggested that the instruction needed an introductory sentence defining an implied contract. Mr. West suggested revising the instruction to follow the structure of instruction 18.103 on express contracts. Dr. Di Paolo asked what difference it makes whether an employment contract or provision is express or implied. She noted that the elements of an implied employment contract as stated in the instruction are not what an average person would understand from the term "implied," since they require that the employer clearly communicate his intent to the employee. For that reason, she suggested putting the term "implied" in quotation marks, to cue jurors that "implied" was being used in a special way. Mr. Young did not think that quotation marks were necessary. Mr. Janove agreed that the elements would seem to be those for an express contract and noted that the differences between express and implied employment contracts are not clearly defined in Utah. Mr. West noted that subparagraph (1) was broader than its counterpart in the old MUJI 18.6, which said that the employee's employment would not be terminated "except for certain conduct or pursuant to certain procedures." Mr. Janove noted that the change was intentional, since the *Cook* case extended the concept of implied employment provisions beyond cases of termination. Dr. Di Paolo asked how subparagraphs (2) and (3) differed. Mr. Ferguson noted that a contract requires a meeting of the minds; subparagraph (2) focuses on the employer, while subparagraph (3) focuses on the employee. Mr. Shea questioned whether the instruction should spell out the types of evidence the jury may consider, since the instructions do not do so for other areas of the law. The committee thought that it was appropriate to list them in this case. Ms. Blanch noted that the evidence enumerated in the last paragraph can apply to each element of the claim and is not limited to evidence of the employer's intention. After further discussion, the instruction was revised to read:

> An implied employment contract is created when:
>
> (1) the employer intended that the employee's employment would include [describe terms in dispute]; and
>
> (2) the employer communicated its intent to the employee; and
>
> (3) the communication was sufficiently clear and definite to create a reasonable belief by the employee that his employment would include [describe terms in dispute].
>
> A party seeking to establish the existence of an implied contract has the burden of proving these things. 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. However, an implied contract cannot contradict a written contract term.

e. *18.105. Breach of employment contract.* The instruction was approved as drafted.

f. *18.106. Employment contract may be terminated at will.* Mr. Young suggested adding an introductory sentence to the effect that the defendant claims that the plaintiff was an at-will employee. Mr. Janove thought that such a sentence might imply that the employer has the burden of proving that the relationship was at will. Mr. Young also suggested simplifying the second sentence. Mr. Ferguson suggested making it the third sentence. Mr. Shea suggested striking the phrase "by the employer or the employee" in the second sentence, since the concept was covered in the first sentence. He also suggested limiting the instruction to the party claiming wrongful termination. Mr. Janove and Mr. Carney thought that it was important for the instruction to state that the relationship could be terminated by either side with or without cause. After further discussion, the instruction was revised to read:

> You must decide whether the employment here was an "at-will" relationship. An employment relationship is presumed to be at will if the employment is for an unspecified time and without other restrictions on either the employer's or the employee's ability to terminate the relationship. When the employment relationship is "at will," there does not have to be any reason for the termination other than the employer's or the employee's desire to discontinue the employment relationship. It may be terminated at any time, for any reason or for no reason, with or without cause. [However, it may not be terminated for an illegal reason.]

An advisory committee note was added that reads, "The bracketed final sentence should be used only when a claim is made for termination for an illegal reason." As modified, the instruction was approved.

The meeting concluded at 6:00 p.m.

Next Meeting. The next meeting will be Monday, February 13, 2006, at 4:00 p.m.

Model Utah Jury Instructions
Second Edition
Working Draft
February 6, 2006

01.111. All parties equal before the law.

"Person" means an individual, corporation, organization, or other legal entity. In this case the plaintiff is [identify entity] and the defendant is [identify entity]. This should make no difference to you. You must decide this case as if it were between individuals.

MUJI 1st References.

02.08.

References.

Advisory Committee Notes.

Staff Notes.

Status. Approved 6/1/2005

15.109. Economic damages. Injury to real property.

Economic damages include injury to [name of plaintiff]'s real property.

The damages to be awarded for injury to real property are the difference in the fair market value of the land immediately before and immediately after the injury, unless the property can be repaired for a lesser amount.If the property can be repaired for a lesser amount, then the damages would be the reasonable cost of repair.

[In addition, if the evidence establishes that the repaired property will not return to its original value because of a lingering negative public perception that was caused by the injury, you may award stigma damages for any reduction in the value of the property.]

MUJI 1st References.

27.16; 27.17

References.

Walker Drug vs. La Sal Oil, 972 P.2d 1238 (Utah 1998)
Thorsen v. Johnson, 745 P.2d 1243 (Utah 1987)
Pehrson v. Saderup, 28 Utah 2d 77, 498 P.2d 648 (1972)
Brereton v. Dixon, 20 Utah 2d 64, 433 P.2d 3 (1967)
Henderson v. For-Shor Co., 757 P.2d 465 (Utah Ct. App. 1988)
Ault v. Dubois, 739 P.2d 1117 (Utah Ct. App. 1987)

Advisory Committee Notes.

The sentence on "stigma damages" is to be given only if there is evidence to support a claim of lingering negative public perception.

Staff Notes.

Status. Approved 1/9/2006

15.120. Present cash value.

If you decide that [name of plaintiff] is entitled to damages for future economic losses, then the amount of those damages must be reduced to present cash value. This is because any damages awarded would be paid now, even though the plaintiff would not suffer the economic losses until some time in the future. Money received today would be invested and earn a return or yield.

To reduce an award for future damages to present cash value, you must determine the amount of money needed today that, when reasonably and safely invested, will provide [name of plaintiff] with the amount of money needed to compensate [name of plaintiff] for future economic losses. In making your determination, you should consider the earnings from a reasonably safe investment.

MUJI 1st References.

27.11.

References.

Gallegos ex rel. Rynes v. Dick Simon Trucking, Inc., 2004 UT App 322, 110 P.3d 710, cert. denied (Utah 2005)
Bennett v. Denver & Rio Grande Western R. Co., 213 P.2d 325 (Utah 1950)

Advisory Committee Notes.

Utah law is silent on whether inflation should be taken into account in discounting an award for future damages to present value. The United States Supreme Court, however, has ruled that inflation should be taken into account when discounting to present value. See Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523 (1983).

Utah law is silent on whether plaintiff or defendant bears the burden of proving present cash value. Other jurisdictions are split. Some courts treat reduction to present value as part of the plaintiff's case in chief. See, e.g., Abdulghani v. Virgin Islands Seaplane Shuttle, Inc., 746 F. Supp. 583 (D. V.I. 1990); Steppi v. Stromwasser, 297 A.2d 26 (Del. Super. Ct. 1972). Other courts treat reduction to present value as a reduction of the plaintiff's damages akin to failure to mitigate, on which the defendant bears the burden of proof. See, e.g., Energy Capital Corp. v. United States, 47 Fed. Cl. 382 (Fed. Cl. 2000), aff'd in part, rev'd in part on other grounds, 302 F.3d 1314 (Fed. Cir. 2002); CSX Transp., Inc. v. Casale, 441 S.E.2d 212 (Va.1994). There is a good discussion of the issue in Lewin Realty III, Inc. v. Brooks, 771 A.2d 446 (Md. Ct. Spec. App. 2001), aff'd, 835 A.2d 616 (Md. 2003), holding the burden to be on the defendant. It cites Miller v. Union P.R. Co., 900F.2d 223, 226 (10th Cir.1990), as support.

There are several Utah cases holding that the burden is on the defendant to show that a damage award should be reduced, but they deal with failure to mitigate, not reduction to present value. See Covey v. Covey, 2003 UT App 380, 29, 80 P.3d 553; John Call Eng'g, Inc. v. Manti City Corp., 795 P.2d 678, 680 (Utah Ct. App. 1990).

Expert testimony on annuities as relevant to present value of future damages is permitted. Gallegos ex rel. Rynes v. Dick Simon Trucking, Inc., 2004 UT App 322, 110 P.3d 710, cert. denied (Utah 2005). Annuity tables and their related data also are permitted. See Schlatter v. McCarthy, 113 Utah 543, 196 P.2d 968 (1948). But Utah law is silent on whether expert testimony, government tables or other evidence is necessary before a jury is charged to calculate present cash value. Other jurisdictions require evidence before the jury can be instructed to calculate present cash value. See Schiernbeck v. Haight 7 Cal.App.4th 869, 877, 9 Cal.Rptr.2d 716 (1992), citing Wilson v. Gilbert, 25 Cal.App.3d 607, 614, 102 Cal.Rptr. 31 (1972).

Staff Notes.

Status. Approved 1/9/2006

18.101. Definition of employment contract.

A contract of employment is an agreement, express or implied, by which one person, called the employer, engages another person, called the employee, to do something for the benefit of the employer or a third person for which the employee is to receive compensation. The contract may be written or oral. An oral contract is as valid and enforceable as a written contract.

MUJI 1st References.

18.01.

References.

Cook v. Zion's First National Bank, 919 P.2d 56 (Utah Ct. App. 1996)

Advisory Committee Notes.

Staff Notes.

Status. Approved 1/9/2006

18.102. Creation of express employment contract. Burden of proof.

An express employment contract is created when the employer and employee agree with one another that they are entering into a contract setting forth the terms on which the employer will employ the employee. The party seeking to establish the existence of an express contract has the burden of proving its terms.

MUJI 1st References.

18.02.

References.

Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1044 (Utah 1989)
Cook v. Zion's First National Bank, 919 P.2d 56, 59-60 (Utah Ct. App. 1996)

Advisory Committee Notes.

Staff Notes.

Status. Approved 1/9/2006

18.103. Creation of implied employment contract. Elements of proof.

An implied employment contract is created when:

(1) the employer intended that the employee's employment would include [describe terms in dispute]; and

(2) the employer communicated its intent to the employee; and

(3) the communication was sufficiently clear and definite to create a reasonable belief by the employee that his employment would include [describe terms in dispute].

The party seeking to establish the existence of an implied contract has the burden of proving these things. 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. However, an implied contract cannot contradict a written contract term.

MUJI 1st References.

18.05; 18.06.

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 (Utah 1989)
Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1044, 1044-45 (Utah 1989)
Rio Algom Corp. v. Jimco Ltd., 618 P.2d 497, 505 (Utah 1980)
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. Changes from 1/9/2006

18.104. Breach of employment contract.

An employment contract is breached if a party does not comply with a provision of the contract.

MUJI 1st References.

18.09.

References.

Lowe v. Sorensen Research Co., 779 P.2d 668, 670 (Utah 1989)
Sanderson v. First Security Leasing Co., 844 P.2d 303, 306-07 (Utah 1992)
Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1044-45 (Utah 1989)
Cook v. Zion's First National Bank 919 P.2d 56, 59-60 (Utah Ct. App. 1996)

Advisory Committee Notes.

Staff Notes.

Status. Approved 1/9/2006

18.105. Employment contract may be terminated "at-will."

You must decide whether the employment was an "at-will" relationship. An employment relationship is presumed to be "at-will" if the employment is for an unspecified time and without other restrictions on either the employer's or the employee's ability to terminate the relationship. When the employment relationship is "at will" there does not have to be any reason for the termination other than the employer's or the employee's desire to discontinue the employment relationship. It may be terminated at any time, for any reason or for no reason, with or without cause. [However, it may not be terminated for an illegal reason.]

MUJI 1st References.

18.03.

References.

Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 400 (Utah 1998)
Fox v. MCI, 931 P.2d 857, 859 (Utah 1997)
Johnson v. Morton Thiokol, 818 P.2d 997 (Utah 1991)
Brehany v. Nordstrom, 812 P.2d 49 (Utah 1991)
Hodges v. Gibson Product Co., 811 P.2d 151 (Utah 1991)
Caldwell v. Ford, Bacon & Davis Utah, Inc., 777 P.2d 43 (Utah 1989)
Berube v. Fashion Centre Ltd., 771 P.2d 1033 (Utah 1989)
Rose v. Allied Development Co., 719 P.2d 83 (Utah 1986)
Bihlmaier v. Carson, 603 P.2d 790 (Utah 1972)
Held v. American Linen Supply Co., 307 P.2d 210 (Utah 1957)
Rackley v. Fairview Care Centers, Inc., 970 P.2d 277, 280 (Utah Ct. App. 1998)

Advisory Committee Notes.

The bracketed sentence should be used only if there is evidence to support a claim for termination for an illegal reason.

Staff Notes.

Status. Approved 1/9/2006

18.106. Rebutting the "at-will" presumption.

An at-will employee may defeat the presumption that his employment is terminable 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.

18.04.

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.

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

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

This requires the employee to establish that:

(1) the parties intended that the employee's employment would not be terminated except for certain conduct, until after a certain time period, or unless pursuant to certain procedures; and

(2) the employer communicated its intent to the employee; and

(3) 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.

18.05; 18.06.

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.

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

You must consider the intent of the parties to create an employment contract that could not be terminated "at-will" and the circumstances of employment as a whole. Evidence of the employer's intention 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.

18.05; 18.06.

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.

Should this be added as the last paragraph of 18.108?

Status.

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

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

(1) the employer terminated him;

(2) a clear and substantial public policy existed;

(3) the employee's conduct brought the policy into play; and

(4) the employer discharged him at least in part because he [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.

18.110. Violation of public policy. Shifting burdens.

If an employee establishes the four factors listed in Instruction ____, 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.

None.

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.

Should this be added as the last paragraph of 18.110?

Status.

18.111. Implied employment contract. New terms.

An at-will employment contract may be modified prospectively 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. The new terms of the modified employment contract supersede the prior terms.

MUJI 1st References.

18.08.

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.

18.112. 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.

None.

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 18.122 a "duty."

Status.

18.113. 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.

None.

References.

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

Advisory Committee Notes.

Staff Notes.

Status.

18.114. 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.

None.

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.

18.115. 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.

25.06.

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.

18.116. 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.

None.

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 Disctionary 640 (7th Ed. 1999)

Advisory Committee Notes.

Staff Notes.

Status.

18.117. 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.

18.118. 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.

18.119. 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 15.103. 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.

18.120. 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 18.119.

Status.

18.121. 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.

None.

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.

18.122. 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.

18.123. 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.

27.03.

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.

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: MUJI Committee
From: Tim Shea
Date: February 8, 2006
Re: Publication of instructions so far

It looks like we will be able to complete the several tasks necessary for publishing the first batch of instructions by April or May:

Complete the employment instructions.
Update references and committee notes.
Proofread everything.
Design the web page. (I hope to demonstrate the web page at our March meeting and then incorporate your suggestions.)
Present to the district court judges' Spring conference (May 24-26).
Present to the lawyers' Fall Forum

I've tinkered with the numbering sequence for the instructions a few times, and each time that sequence becomes simpler. We need to stay with whatever sequence is published. John suggested grouping the current MUJI into a sequence that makes logical sense. So, I've taken the current MUJI and the subcommittee topics to develop this list for your consideration:

Proposed Series	**Proposed Content**	**Current MUJI**
100	General Instructions	§1. Preliminary Instructions Before Trial. §2. General Instructions.
200	Negligence (Including special tort doctrines)	§3. Negligence/Causation §4. Tort Special Doctrines.
300	Professional Liability: Medical	§6. Medical Negligence.
400	Professional Liability: Lawyers and Accountants	§7. Other Professional Negligence.
500	Professional Liability: Architects and Engineers	§7. Other Professional Negligence.
600	Motor Vehicles	§5. Motor Vehicles.
700	Railroad Crossings	§8. Railroad Crossings.

Proposed Series	Proposed Content	Current MUJI
800	Common Carriers	§9 Common Carriers
900	Product Liability	§12. Product Liability
1000	Premises Liability	§11. Owners and Occupiers of Land.
1100	Trespass and Nuisance	§4. Tort Special Doctrine
1200	Civil Rights	§15. Civil Rights.
1300	Economic Interference	§19. Business Torts and Interference with Contracts
1400	Emotional Distress	§22 Emotional Distress.
1500	Defamation	§10. Intentional Torts.
1600	Assault, Malicious Prosecution, False Arrest, and Abuse of Process	§10 Intentional Torts.
1700	Fraud and Deceit	§17. Fraud and Deceit
1800	Tort Damages	§27 Damages
1900	Commercial Contracts	§26. Contracts/Sales/Secured Transactions
2000	Construction Contracts	§26. Contracts/Sales/Secured Transactions
2100	Sales Contracts and Secured Transactions	§26. Contracts/Sales/Secured Transactions
2200	Insurance Litigation	§21. Insurance Company Obligations
2300	Liability of Officers, Directors, Partners, and Insiders	§20. Liability of Officers, Directors, Partners, and Insiders
2400	Employer and Employee Rights	§18. Employee rights.
2500	Federal Employer's Liability Act	§14. Federal Employer's Liability Act
2600	Wills	§23 Will Contest
2700	Eminent Domain and Condemnation	§16. Eminent Domain and Condemnation
2800	Vicarious Responsibility	§25. Vicarious Responsibility
5000	Criminal	

John suggests publishing whatever table of contents is agreed to recognizing that initially several of the sections will be empty.

I suggest including the special tort doctrines in the nuisance category after separating Trespass and Nuisance as its own section. I suggest separating Defamation from the other intentional torts. Liability of Officers, Directors, Partners, and Insiders is a current MUJI category but there is no content.