Agenda
Advisory Committee on Model Civil Jury Instructions

January 9, 2017
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
Subcommittees and subject area timelines	4:03	Tab 2	Juli Blanch
Emotional Distress: review 1505 note	4:05	Tab 3	Juli Blanch
Civil Rights Instructions	4:15	Tab 4	Karra Porter
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.

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
December 12, 2016
4:00 p.m.

Present: Marianna Di Paolo, Joel Ferre, Tracy H. Fowler, Honorable Ryan M. Harris, Paul M. Simmons, Honorable Andrew H. Stone, Peter W. Summerill, Nancy Sylvester, Christopher M. Von Maack. Also present: Mark Dalton Dunn from the Emotional Distress subcommittee and Heather White from the Civil Rights subcommittee

Excused: Juli Blanch (chair), Gary L. Johnson, Patricia C. Kuendig

Mr. Fowler conducted the meeting in Ms. Blanch's absence.

1. *Minutes.* Mr. Fowler noticed a typo in the last line of paragraph 3.c of the minutes of November 14, 2016: the reference to CV1302 should be to CV1303 instead. Ms. Sylvester will make the correction. On motion of Mr. Von Maack, seconded by Judge Harris, the committee approved the minutes as corrected.

2. *Emotional Distress Instructions.* The committee continued its review of the Emotional Distress instructions. Mr. Dunn reported that the subcommittee had reviewed the instructions in light of *Candelaria v. CB Richard Ellis*, 2014 UT App 1, ¶ 1, 319 P.3d 708, and *Anderson Dev. Co. v. Tobias*, 2005 UT 36, 116 P.3d 323, as the committee had requested, and its review did not change its recommendations. Ms. Sylvester had circulated a memorandum before the meeting with the subcommittee's discussion of the cases and its conclusions.

a. *CV1505, Negligent infliction of emotional distress--direct victim; CV1506, Negligent infliction of emotional distress--bystander.* Judge Harris continued to question whether there was a meaningful legal difference between a direct-victim claim and a bystander claim. Mr. Simmons thought the distinction was in the damages recoverable; in a direct-victim claim the plaintiff is recovering for emotional distress the plaintiff suffered as a result of fearing for his or her own safety, whereas in a bystander claim the plaintiff is recovering for emotional distress the plaintiff suffers as a result of injury to a third person. But Judge Harris noted that in both cases the plaintiff is recovering for his or her own emotional distress. Judge Harris did not think the distinction affected the elements of the two claims and did not think that the current instructions adequately explained the distinction with respect to damages. In both cases, the plaintiff must have been within the zone of danger and can recover for his or her own emotional distress, whether from fearing for his or her own safety or fearing for the safety of another. Dr. Di Paolo did not think it mattered whether there was one instruction or two. Mr. Fowler agreed as long as a committee note explained that the committee intended the same instruction to apply to both so-called direct and bystander claims. The committee therefore revised CV1505 to

delete "Direct Victim" from the title and to list the elements of the claim as follows:

1. [name of defendant] was negligent;
2. [name of plaintiff] was in the zone of danger;
3. [name of plaintiff] feared for his own safety and/or witnessed injury to another; and
4. [name of plaintiff] suffered severe emotional distress.

Dr. Di Paolo noted that the last element needs to include a causation element. At her suggestion, the committee revised subparagraph 4 to read, "[name of plaintiff] suffered severe emotional distress as a result of [name of defendant]'s negligence."

Ms. Sylvester revised the committee note to delete the first paragraph, defining "zone of danger" (since a definition of "zone of danger" is included in the instructions themselves); to include a reference to CV202A for the definition of "negligent"; to include a reference to CV1507 for the definition of "zone of danger"; and to explain that the committee did not see any difference in the elements of a direct-victim and a bystander claim and intended the instruction to cover both. Mr. Dunn will consolidate the rest of the committee note to CV1505 with the committee note to CV1506, and CV1506 will be deleted. The subcommittee continued to think that bystander claims should be limited to cases involving an injury to a family member, but the committee thought that there was no controlling authority on point and that the committee note adequately addressed the issue. On motion of Judge Harris, seconded by Mr. Ferre, the committee approved the instruction as revised, subject to revisiting the final, revised committee note.

b. *CV1507, Definition of "zone of danger."* On motion of Judge Harris, seconded by Mr. Simmons, the committee approved the latest version of CV1507.

Mr. Dunn was excused.

3. *Civil Rights Instructions.* The committee continued its review of the Civil Rights instructions:

a. *CV1301, Section 1983 claim—elements.* Ms. White reported that the subcommittee had looked for a plain-language definition of "acting under color of state law." The Supreme Court has defined the term as "exercis[ing] power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *W. v. Atkins,* 487 U.S. 42, 49 (1988).

The committee thought this definition too hard for lay jurors to understand. The committee had proposed revising the first element of the instruction to read, "First, that [name of defendant] was a state employee acting or pretending to act in an official capacity or exercising [his/her] responsibilities under state law." Dr. Di Paolo asked what "pretending" meant in this context–acting? trying to act? trying to deceive? Mr. Fowler suggested using "purporting" rather than "pretending"; some committee members thought "pretending" implies an intent to deceive, which is not required. Judge Harris noted that the proposed definition requires the defendant (1) to have acted or pretended to act or (2) to have exercised responsibility under state law and asked whether there was a difference between the two standards. Judge Stone questioned whether the language was broad enough to cover a failure to act when a state employee has a duty to act. The committee questioned whether acting under color of state law was even a question for the jury. Mr. Von Maack said it was a mixed question of law and fact. Ms. White noted that the issue does not come up often. Judge Harris suggested saying that the defendant "exercised or attempted to exercise power possessed by virtue of state law." Mr. Von Maack suggested that the essential elements were (1) that the defendant was a state actor, and (2) that he or she acted or failed to act in some official capacity. Ms. Sylvester suggested stating the element as "the defendant was a state employee who acted or attempted to act in his or her official capacity." Judge Harris thought "under state law" did not add anything. Mr. Simmons pointed out that the California pattern instruction, CACI 3000, says, "That [name of defendant] was acting or purporting to act in the performance of [his/her] official duties." Dr. Di Paolo preferred "pretending" to "purporting," while some committee members preferred "purporting." Judge Stone suggested "seeming." At Judge Harris's suggestion, the committee rewrote the first element to read, "First, that [name of defendant] was a state employee acting, purporting, or pretending to act in the performance of [his/her] official duties." Dr. Di Paolo suggested including a committee note saying that "purporting" may need to be explained to the jury. Ms. Sylvester said in the committee note that the first element was meant to define "acting under color of state law" as explained in *W. v. Atkin*, 487 U.S. 42, 49 (1988). On motion of Mr. Ferre, seconded by Judge Harris, the committee approved the instruction as revised. Mr. Von Maack dissented on the inclusion of "pretending" in the instruction, and Dr. Di Paolo dissented on the inclusion of "purporting."

Mr. Summerill was excused.

b. *CF1303, Warrantless arrest.* The committee had asked the subcommittee to confirm that an officer can only arrest with a warrant or, if the officer does not have a warrant, with probable cause. The subcommittee confirmed that that is the law. At Mr. Ferre's and Dr. Di Paolo's suggestion, the committee reversed the order of the first two paragraphs, and at Judge Harris's

suggestion, the committee deleted the phrase "without probable cause to believe he committed a crime" from the end of the new second paragraph. The committee also deleted "In this case" from the start of the third paragraph and combined the new second and third paragraphs. It also substituted "[name of defendant]" for the first and third blanks and substituted "[date]" for the second blank. On motion of Mr. Simmons, seconded by Judge Stone, the committee approved the instruction as revised.

c. *CV1304, Probable cause.* Ms. White suggested bracketing the last sentence of the instruction and questioned whether it was even necessary. Mr. Simmons and Dr. Di Paolo thought it was helpful, especially if evidence is admitted showing that the charges were dismissed. The committee thought the first paragraph was hard to understand. Judge Harris suggested starting it by saying, "Probable cause exists when a reasonably prudent person would believe that a crime has been committed and that the person arrested committed the crime." Ms. White and Mr. Simmons questioned whether the standard should be "a reasonably prudent person" or "a reasonable officer." The committee thought it was a "reasonable person" standard, not a "reasonable officer" standard, but Mr. Fowler pointed out that an officer may know things that a reasonable person may not know, such as the requirements of the law and where jurisdictional boundaries are. Judge Stone thought that probable cause just relates to the facts and circumstances and that an officer is always entitled to rely on his knowledge of the law. The committee deferred further discussion of CV1304 until the next meeting.

4. *Next meeting.* The next meeting will be Monday, January 9, 2017, at 4:00 p.m.

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	December-16	Will send out for comment after committee reviews 1505 note
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	May-17	
3	Fault/Negligence	N/A	Judge Lawrence	June-17	June-17	Revisit old instructions
4	Economic Interference	Yes	Frazier, Ryan (D) (Chair); Shelton, Ricky (D); Stevenson, David (P); Simmons, Paul (P); Kuendig, Patricia (P)	September-17	October-17	
5	Injurious Falsehood	Yes	Dryer, Randy (Chair); Hoole, Greg; Hoole, Roger; Hunt, Jeff; Reymann, David; Stevens, Greg	November-17	January-18	
6	Directors and Officers Liability	Yes	Burbidge, Richard D.; Call, Monica;Von Maack, Christopher (chair); Larsen, Kristine; Talbot, Cory	February-18	March-18	
7	Sales Contracts and Secured Transactions	Yes	Cox, Matt (chair); Boley, Matthew; Maudsley, Ade	April-18	May-18	
8	Assault/False Arrest	Yes	Rice, Mitch (chair); Carter, Alyson; Wright, Andrew (D); Cutt, David (P)	June-18	September-18	
9	Trespass and Nuisance	Yes (more members needed)	Hancock, Cameron; Figueira, Joshua (researcher); Abbott, Nelson (P)	October-18	November-18	
10	Insurance	No (more members needed)	Johnson, Gary (chair); Pritchett, Bruce; Ryan Schriever, Dan Bertch, Andrew Wright, Rick Vazquez	December-18	January-19	
11	Wills/Probate	No	Barneck, Matthew (chair)	February-19	March-19	
12	Unjust Enrichment	No (instructions from David Reymann)	David Reymann	April-19	June-19	
13	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. Approved 12/12/16.

In order to recover for negligent infliction of emotional distress, [name of plaintiff] must prove all of the following:

1. [name of defendant] was negligent;
2. [name of plaintiff] was in the "zone of danger";
3. [name of plaintiff] feared for [his/her] own safety and/or witnessed an injury to another; and
4. [name of plaintiff] suffered severe emotional distress as a result of [name of defendant]'s negligence.

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)

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

Committee Note

For a definition of negligence, please see CV202A "Negligence" defined.

This instruction covers both direct victim NIED claims and bystander NIED claims. The committee determined that although the circumstances giving rise to each claim differ depending on whether the claimant is the direct victim or a bystander, the elements of each are the same. *See, e.g., Lawson v. Salt Lake Trappers, Inc.*, 901 P.2d 1013 (bystander claim); *Johnson v. Rogers*, 763 P.2d 771, 785 (Utah 1988) (direct victim claim).

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); Johnson v. Rogers, 763 P.2d 771, 782 (In upholding the trial court's determination that a claim for NIED could be sustained, noting that the three foreseeability of injury factors listed in *Dillon v Legg*, 69 Cal. Rptr. 72 (1968) were met, including that the person physically injured was a member of the plaintiff/bystander's immediate family). *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.

Whether mental illness alone, in the absence of any physical manifestation, is sufficient to support a NIED claim has not been resolved under Utah law. *See Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 983 (Utah 1993) (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.). *But see Id.* at 974 (The requirement of resulting "illness or bodily harm" "provides a check on feigned disturbances, thereby ensuring the genuineness of claims." "[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.") (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—BYSTANDER~~

A bystander can recover for negligent infliction of emotional distress even if he/she was not physically injured.

In this case [name of plaintiff] claims to have suffered emotional distress related to [name of other]'s physical injury.

In order for [name of plaintiff] to recover on this claim, for negligent infliction of emotional distress defendant ingas 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 the other] was injured;
3. [name of plaintiff] was in the zone of danger;
4. [name of plaintiff] either feared for his/her own safety or witnessed the injury to [name of the other]; and
5. [name of plaintiff] suffered severe and unmanageable mental distress harmin 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)

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

Committee Note

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

~~CV1507~~ CV1506 DEFINITION OF "ZONE OF DANGER". Approved 12/12/16.

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. Approved 12/12/16.

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;~~ was a state employee and was acting, purporting to act, or pretending to act in performance of [his/her] official duties.

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

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

~~I will explain each of these elements to you.~~

References

W. v. Atkins, 487 U.S. 42, 49, 108 S. Ct. 2250, 2255, 101 L. Ed. 2d 40 (U.S. 1988)

Committee Note

See CV209 for a definition of "cause."

In the first element above, the committee has attempted to define "acting under color of state law" in plain language. The United States Supreme Court case of *W. v. Atkins*, 487 U.S. 42, 49, 108 S. Ct. 2250, 2255, 101 L. Ed. 2d 40 (U.S. 1988) provides that "[t]he traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."

If the claim is that the defendant was purporting to act under color of state law, the judge may need to define what it means to purport to do something.

CV1302 SECTION 1983 CLAIM—DEPRIVATION OF RIGHTS. APPROVED 11/14/16.

The second element of [name of plaintiff]'s claims is that [name of defendant]'s conduct deprived [him/her] of a ~~federal~~ right protected by federal law. [Name of plaintiff] claims in this case that [he/she] was deprived of [his/her] right to [list the right or rights].

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

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

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

I will explain [this/these] right[s]~~the elements of each of these claims~~] later in the Instructions.

CV1303 WARRANTLESS ARREST. Approved 12/12/16.

The Fourth Amendment to the United States Constitution 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 1) a police officer has an arrest warrant, or 2) when a police officer has probable cause to believe that the person arrested has engaged in criminal conduct. An arrest without either an arrest warrant or a probable cause is an unreasonable seizure.

[Name of plaintiff] claims that [he/she] was unlawfully arrested by [name of defendant] on [date]. [Name of defendant] did not have an arrest warrant. Therefore, you must determine whether [name of defendant] had probable cause to arrest [name of plaintiff]. ~~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.~~

Committee Note

Utah Code section 77-7-2 places limitations on when a police officer can make a warrantless arrest.

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.

Comment [NS1]:
Prof. DiPaolo thinks this doesn't seem to add much.

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 resolution of the criminal charges is irrelevant. [Therefore, in determining whether there was probable cause to arrest [name of plaintiff], you are not to take into account that the fact that the charges against [name of plaintiff] were eventually dismissed.]

Committee Note

The final sentence in the instruction may or may not be given depending on whether evidence of the plaintiff's charges being dismissed is offered.

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)

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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 right~~s~~, [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)
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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)

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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)

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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 past 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.
