Agenda
Advisory Committee on Model Civil Jury Instructions

February 27, 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
Civil Rights Instructions	4:05	Tab 3	Heather White
Other business	5:55		Juli Blanch

Committee Web Page

Published Instructions

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

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
January 9, 2017
4:00 p.m.

Present: Juli Blanch (chair), Joel Ferre, Tracy H. Fowler, Honorable Ryan M. Harris, Gary L. Johnson, Paul M. Simmons, Honorable Andrew H. Stone (by phone), Peter W. Summerill, Nancy Sylvester, Christopher M. Von Maack. Also present: Karra J. Porter from the Civil Rights subcommittee

Excused: Marianna Di Paolo, Patricia C. Kuendig

1. *Minutes.* On motion of Mr. Ferre, seconded by Mr. Johnson, the committee approved the minutes of the December 12, 2016 meeting.

2. *Emotional Distress Instructions.* The committee reviewed the revised committee note to CV1505. Mr. Simmons pointed out that *Johnson v. Rogers* was a bystander case. The committee added a reference to *Hansen v. Sea Ray Boats, Inc.*, 830 P.2d 236 (Utah 1992), which discusses the distinction between direct and bystander claims, and completed the reference to *Lawson v. Salt Lake Trappers.* The committee also deleted the second reference to *Johnson v. Rogers* in the third paragraph of the note, since the parenthetical did not represent the opinion of the court in that case. On motion of Mr. Simmons, seconded by Mr. Johnson, the committee approved the note as revised. This concluded the committee's review of the Emotional Distress instructions.

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

a. *CV1304, Probable Cause.* Dr. Di Paolo had questioned whether the second sentence of the first paragraph added much. At Judge Harris's suggestion, the firs paragraph was revised to read:

> 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 a crime has been committed and that the person arrested committed the crime.

Ms. Porter expressed her opinion that there is a tendency to include comments in jury instructions that are properly left for argument and thought the instruction should only instruct the jury on what it needs to know to decide the factual issues in the case. Based on that, she suggested deleting the last sentences of the second and third paragraphs. The committee agreed. Ms. Porter also questioned whether there was a difference between "prudent" and "reasonable." She thought that if both terms were used together, jurors would not think they were synonyms

but would mistakenly equate "prudent" with "cautious." Judge Harris and Mr. Fowler agreed that, if they are intended to mean the same thing, "prudent" could be deleted. Judge Stone disagreed and thought that the committee was getting away from its assignment if it strayed too far from the Supreme Court's language ("prudent and reasonable"). (Milo, his dog, concurred.) Mr. Simmons asked what the standard was for probable cause, since the definition in the first paragraph says, "reasonably likely," suggesting more likely than not, but the second paragraph said that it is not a preponderance of the evidence. Judge Harris noted that the standard is less than a preponderance. Mr. Simmons suggested that the concept is that an officer needs a sufficient basis that a reasonable person would feel justified in acting on it, even though it may be less than a preponderance. At Judge Harris's suggestion, the committee deleted all of the second paragraph except the first sentence, revised the first sentence to read, "Probable cause does not require that the officer had proof beyond a reasonable doubt, or even that the officer had proof by a preponderance of the evidence," and moved this sentence to the beginning of the instruction. Mr. Summerill noted that the committee had traditionally not spent time telling the jury what is *not* required and questioned whether this sentence was necessary. The committee (and subcommittee, according to Ms. Porter) thought that it was helpful to draw the distinction between probable cause and other standards of proof that the jury may have heard about, namely, beyond a reasonable doubt and a preponderance of the evidence, and therefore left the sentence in. The committee deleted the last sentence of the instruction and the committee note referring to it. On motion of Mr. Simmons, seconded by Judge Harris and Mr. Summerill, the committee approved the instruction as revised.

b. *CF1305, Unlawful arrest–any crime.* The committee revised the instruction to read:

> It is not necessary that [name of arresting officer] had probable cause to arrest [name of plaintiff] for the offense with which [he/she] was charged so long as [name of arresting officer] had probable cause to arrest [him/her] for some criminal offense.

Mr. Porter noted that on rare occasions the person making the arrest may not be an officer but thought that the instruction as revised would cover the vast majority of situations. In the rare case where the arrest was not made by an officer, the court and parties can modify the instruction to fit the facts. On motion of Mr. Johnson, seconded by Mr. Fowler, the committee approved the instruction as modified.

c. *CV1306, Unlawful arrest–minor crime.* Mr. Johnson questioned whether the last two paragraphs were necessary. Ms. Porter questioned whether

the instruction was necessary. She thought it was more in the nature of a comment that was best left for the attorneys to argue. The committee asked what the genesis of the instruction was. The instruction was tabled to give Ms. Porter a chance to go back to the subcommittee with the committee's questions and concerns.

d. *CV1307, Reasonable suspicion.* Ms. Porter suggested deleting the instruction. Judge Harris thought it was helpful. He suggested substituting "justify" for "warrant" in the first paragraph. Ms. Porter thought that the second paragraph unduly emphasized some factors to the exclusion of others and should be dropped. Mr. Simmons asked how the issue comes up, since none of the prior instructions mention "reasonable suspicion." Ms. Porter explained that it is the standard for detentions that don't amount to an arrest, such as a *Terry* stop. Ms. Sylvester did a word search of the Civil Rights instructions and did not find any other uses of the term. Ms. Porter thought that an instruction on detentions may have been inadvertently dropped. The committee decided to table the instruction and review it in connection with the instruction or instructions it relates to.

e. *CV1311, Searches–property, defined.* Mr. Simmons noted that the instruction defines "search," but the title makes it look like it is a definition of "property." The committee revised the title to "Searches of property." Mr. Simmons also noted that the definition seemed to be at odds with a lay understanding of "search" in that it does not require that the person intruding on the property actually look for anything. Ms. Porter explained that that was because the law does not want the lawfulness of a search to depend on whether the officer entering on property had the subjective intent to look for something; otherwise, a defendant could escape liability for a civil rights violation by simply claiming that the officer wasn't looking for anything when he went on the property. At Judge Harris's suggestion, the instruction was revised to read:

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

The committee debated whether the last clause should read "in which a *reasonable* person would have a reasonable expectation of privacy." The committee thought that the plaintiff did not have to be a reasonable person in other respects; he or she just had to have a reasonable expectation of privacy in his or her property. The committee deleted the committee note as unnecessary. Cases in which it would arise would never get to a jury because they would be decided on summary judgment. Mr. Summerill asked whether the subcommittee had considered Utah law under the Utah Constitution. Ms. Porter said that it had. Utah law was similar to federal law in some respects and more favorable to

the rights of individuals in other respects. The subcommittee did not consider whether Utah law required a higher standard because most of the cases plead both federal and state law since federal law provides for an award of attorney fees to a prevailing plaintiff, whereas Utah law does not clearly do so; therefore, most civil rights cases get removed to federal court and decided under federal law. Mr. Summerill and others questioned why the committee was preparing instructions for use in federal court. Ms. Blanch and Ms. Porter explained that the federal district court in Utah looks to the Model Utah Jury Instructions for guidance. On motion of Judge Harris, seconded by Mr. Johnson, the committee approved the instruction as revised.

f. *CV1312, Seizures–property defined.* Consistent with its treatment of CV1311, the committee changed the title of the instruction to "Seizures of property" and inserted an introductory sentence: "'Seizure' has a special meaning in the law." The committee deleted the committee note, which referred to the deleted note to CV1311. Ms. Porter said she did not know why the subcommittee included the alternatives "[takes/removes]"; she thought "removes" was broad enough to cover all situations. The committee decided to leave the alternatives in. Messrs. Fowler and Simmons questioned whether a seizure could involve interference with a person's right to use the property without interfering with his right to possess it. Mr. Summerill offered the example of putting a boot on a car; the owner remains in possession of the car but cannot drive it. Mr. Simmons suggested substituting "[possess/use]" for "possess." Ms. Porter thought that "possess" was broad enough to cover use. She noted that the Supreme Court had recently decided in *Shaw v. United States,* No. 15-5991 (U.S. Dec. 12, 2016), that a bailee had a sufficient property interest in bailed property to have been deprived of the property by a scheme to defraud. She thought a court would have no trouble finding that a meaningful interference with a person's right to use property also meaningfully interferes with his right to possess the property. Mr. Von Maack did not disagree with the idea that interference with use of property can amount to a civil rights violation but said that he could not find "use" in the case law. The committee decided to stay with "possess" and not add "use." On motion of Mr. Von Maack, seconded by Mr. Summerill, the committee approved the instruction.

g. *CV1313, [Entry/Search] of a Residence.* Judge Harris questioned the use of "[enter/search]." He noted that the definition of "search" in CV1311 is broad enough to cover entries on property. All entries are searches (by CV1311's definition), but not all searches are entries. He thought if they are separate concepts, they should be treated separately, by changing the definition of "search" or adding a committee note to CV1311 saying that it is broad enough to cover entries, which a lay person may not consider a "search"; adding a committee note to CV1313 explaining the addition of the term "enter"; using

"[enter/search]" throughout the instructions (including CV1311); adding an instruction on the right to be free from unconstitutional "entries"; or some other way. Ms. Porter thought that they were separate concepts (that is, that you could have an entry that was not a search) but that they were governed by the same standard. The committee sent the issue back to the subcommittee to consider the best way to deal with it.

4. *Next meeting.* Because Ms. Blanch will be in trial on the next regularly scheduled meeting date (February 13), the next meeting was changed to Monday, February 27, 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
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. Approved 1/9/2016.

Probable cause does not require that the officer had proof beyond a reasonable doubt, or even proof by a preponderance of the evidence. 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 a ~~the person arrested committed an offense~~crime has been committed and the person arrested committed that crime.

~~In other words, probable cause exists when an officer has knowledge of facts and circumstances sufficient to warrant a reasonably prudent person in believing that a crime has been committed and that the person arrested committed the crime.~~

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

The existence of probable cause is measured as of the moment of the arrest, not on the basis of later developments. Thus, the ultimate resolution of the criminal charges is irrelevant. ~~[Therefore, in determining whether there was probable cause to arrest , you are not to take into account that the fact that the charges against 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. Approved 1/9/2016.

It is not necessary that ~~_____~~[name of officer[s]] had probable cause to arrest [name of ~~the~~ plaintiff] for the offense ~~for which he charged the plaintiff~~with which [he/she] was charged, so long as ~~_____~~[name of officer[s]] had probable cause to arrest [~~him~~name of plaintiff] for some criminal offense.

CV1306 UNLAWFUL ARREST – MINOR CRIME.

Comment [NS1]: Subcommittee will let committee know what the genesis was for this instruction.

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.

Comment [NS2]: This needs to be before a Terry Stop instruction. Karra will talk to Heather about whether there is a missing instruction.

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~~ justify 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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15.7

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

Comment [NS3]: Have new instruction that says Entry of Residence? Or present in the alternative in this instruction? Karra will take back to subcommittee.

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 OF—PROPERTY~~, DEFINED~~. Approved 1/9/2017.

Search has a special meaning under the law. A "search" of property occurs if a [government actor] intrudes into ~~a constitutionally protected area. A constitutionally protected~~an 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)

CV1312 SEIZURES OF– PROPERTY~~, DEFINED~~. Approved 1/9/2017.

Seizure has a special meaning under the law. 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)

CV1313 [ENTRY/SEARCH] OF A RESIDENCE.

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

If [name of ~~D~~defendant] did not have a warrant, then [~~Defendant~~he/she] 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)

Committee note:
All entries are searches, but not all searches are entries. The parties should select the term that fits the case.

CV 1314 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)

CV1315 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)

CV1316 [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)

CV1317 CONSENT.

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

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

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

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

CV1317 PROBABLE CAUSE – SEARCH OF RESIDENCE.

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

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

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

CV1318 EXIGENT CIRCUMSTANCES.

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

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

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

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

CV 1319 ENTITY LIABILITY – ELEMENTS.

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

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

References:

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

CV1320 ENTITY LIABILITY –DEFINITION OF POLICY OR PRACTICE.

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

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

CV1321 ENTITY LIABILITY – FINAL DECISION BY POLICYMAKER.

A single incident of unconstitutional activity demonstrates that [entity] had an unlawful policy or practice only if [Plaintiff] proves by a preponderance of the evidence that the unconstitutional action was taken pursuant to a decision made by a person with authority to make policy decisions for [entity].

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

CV1322 ENTITY LIABILITY – FAILURE TO TRAIN.

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

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

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

CV1323 ENTITY LIABILITY – INADEQUATE TRAINING DEFINITION.

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

References:

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

CV1324 DELIBERATE INDIFFERENCE.

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

References:

Barney v. Pulsipher, 143 F.3d 1299, 1307 (10th Cir. 1998)
MUJI 1st 15.6
Berry v. City of Muskogee, 900 F.2d 1489 (10th Cir. 1990)
Miranda v. Munoz, 770 F.2d 255 (1st Cir. 1985)
Garcia v. Salt Lake County, 768 F.2d 303 (10th Cir. 1985)
Todaro v. Ward, 565 F.2d 48 (2nd Cir. 1977); affd, 652 F.2d 54 (2nd Cir.1981)
McClelland v. Facteau, 610 F.2d 693 (10th Cir. 1979)
Choate v. Lockhart, 779 F.Supp. 987 (E.D.Ark. 1991)
Medcalf v. State of Kansas, 626 F.Supp. 1179 (D. Kan. 1986)

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

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

References:

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

Todaro v. Ward, 565 F.2d 48 (2nd Cir. 1977)

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

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

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

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

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

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

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

CV1327 DELIBERATE INDIFFERENCE TO SERIOUS MEDICAL NEEDS – MEDICAL PROVIDER.

A medical professional may be deliberately indifferent to an inmate's serous medical needs by failing to treat a serious medical condition properly. Mere negligence does not constitute deliberate indifference. A medical professional is liable for deliberate indifference to

an inmate's serious medical needs when the need for additional treatment or referral to a medical specialist is obvious.

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

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

CV1328 SUPERVISORY LIABILITY FOR DELIBERATE INDIFFERENCE TO SERIOUS MEDICAL NEEDS.

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

1. Had a supervisory position;

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

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

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

MUJI 1st Instruction
15.11

CV1329 SERIOUS MEDICAL NEED DEFINED.

A medical need is serious if:

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

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

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

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

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

MUJI 1st Instruction
15.13

CV1330 SUPERVISORY LIABILITY – ELEMENTS.

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

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

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

CV1331 SUPERVISORY LIABILITY – FAILURE TO SUPERVISE DEFINITION.

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

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

CV1332 ELEMENTS OF AGE DISCRIMINATION CLAIM.

For Plaintiff to establish a claim of age discrimination, Plaintiff must prove by a preponderance of the evidence that Defendant would not have [adverse action] but for his age.

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

References:

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

Committee Notes:
Evidence that may be utilized to show that age was a determinative factor in an adverse action differs depending on the specific facts of the case. Where age-based comments are at issue, practitioners may want an instruction on stray remarks. See e.g., *Reeves v. Sanderson Plumbing*

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

In many cases an employer will have numerous affirmative defenses. Those affirmative defenses are not set forth in these instructions. Where an employer asserts an affirmative defense based upon a bona fide occupational qualification, a specific instruction should be given consistent with 29 U.S.C. § 623(f)(1); 29 C.F.R. § 1625.6; see also *Smith v. City of Jackson*, 544 U.S. 228, 233 FN3 (2005); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, (2000); *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 413-417 (1985). Where an employer asserts an affirmative defense based upon a bona fide seniority system consistent with 29 U.S.C. § 623(f)(2)(A); 29 C.F.R. § 1625.8; see also *Hiatt v. Union Pacific R.R.*, 65 F.3d 838, 842 (10th Cir. 1995), *cert. denied* 516 U.S. 1115 (1996).

CV1333 PRETEXT - ADEA CLAIM.

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

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

Committee Notes:

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

CV1334 ADEA –WILLFUL – DEFINED.

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

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

CV1335 CAUSATION.

[Refer to CV209 "Cause" defined.]

CV1336 DAMAGES—GENERAL.

If you find that the Defendant did not violate the Plaintiff's constitutional [or statutory] rights, do not award Plaintiff any damages. If you find that the Defendant violated the Plaintiff's constitutional [or statutory] rights, you should determine what damages to award the Plaintiff. There are two kinds of damages, nominal and compensatory. Compensatory damages are the amount of money that you think will reasonably and fairly compensate the Plaintiff for injuries resulting from the deprivation of his/her constitutional [or statutory]rights, and can be both economic and non-economic in nature. Nominal damages are awarded when the only injury is the violation of the constitutional [or statutory] right itself.
References:
MUJI 2d CV2002
Stevens-Henager College v. Eagle Gate College, Provo College, Jana Miller, 2011 Ut App 37, Para. 16, 248 P.3d 1025.

CV1337 COMPENSATORY DAMAGES.

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

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

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

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

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

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

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

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

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

Committee Notes:
Under Title VII and the ADA, the amount of compensatory damages is capped by statute. The elements of compensatory damages that are subject to the statutory cap are (1) future pecuniary losses, and (2) all nonpecuniary losses, which includes emotional distress, anguish, loss of enjoyment of life, embarrassment, reputational damage, adverse effects on credit rating, physical harms caused by distress, etc. The statutory cap does not apply to 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.
