Agenda
Advisory Committee on Model Civil Jury Instructions

June 12, 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, Chair
Subcommittees and subject area timelines	4:03	Tab 2	Juli Blanch
Civil Rights Instructions	4:05	Tab 3	Dani Cepernich, 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.

September 11, 2017
October 9, 2017
November 13, 2017
December 11, 2017

Tab 1

MINUTES
Advisory Committee on Model Civil Jury Instructions
May 8, 2017
4:00 p.m.

Present: Juli Blanch (chair), Marianna Di Paolo, Joel Ferre, Tracy H. Fowler, Honorable Ryan M. Harris, Patricia C. Kuendig, Ruth A. Shapiro, Paul M. Simmons, Honorable Andrew H. Stone, Nancy Sylvester. Also present: Dani N. Cepernich from the Civil Rights subcommittee

Excused: Peter W. Summerill, Christopher M. Von Maack

1. *Minutes*. On motion of Mr. Ferre, seconded by Mr. Fowler, the committee approved the minutes of the April 11, 2017 meeting.

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

a. *State v. Martinez*. Judge Stone asked whether the Utah Supreme Court's recent decision in *State v. Martinez,* 2017 UT 26, affects any of the civil rights instructions. Ms. Blanch asked Ms. Cepernich to have the subcommittee consider what effect if any the case has on the instructions.

b. *CV1310, Search or entry of property, and CV1313, Lawful [entry/search] of property*. Ms. Cepernich explained that the plaintiff has the initial burden to show that the search was without a valid warrant. The burden then shifts to the defendant to offer proof of an exception (consent, or probable cause and exigent circumstances). But it is ultimately the plaintiff's burden to prove that the search or seizure was unreasonable (that is, to disprove the exception). This is contrary to the last paragraph of CV1313. At Judge Stone's suggestion, the paragraph was deleted.

Judge Harris and Dr. Di Paolo joined the meeting.

Judge Stone thought that the jury did not need to be instructed on this burden shifting, since it is for the court to decide whether the defendant has come forward with some evidence of an exception, such as consent. He suggested collapsing CV1310 and CV1313.

Judge Stone also asked if the issue of a warrant would ever be litigated. Ms. Cepernich said that it would be if the validity of the warrant were challenged, for example, where the plaintiff claimed that it was improperly obtained. Judge Harris noted that, in such a case, the complaint would be against the officer who obtained the warrant, not the officer who executed it. Ms. Cepernich explained that you could have a claim against the officer who lied (for example) to obtain the warrant and also against the officer who executed the warrant if the warrant

was facially invalid. At Judge Stone's suggestion, CV1313(1) was changed to "The officer has a valid warrant." At Ms. Kuendig's suggestion, "valid" was also inserted before "warrant" in CV1316, "[Entry/Search] of residence pursuant to search warrant."

At Ms. Blanch's suggestion, CV1310(3) was changed back to "The [search/entry] was unreasonable." Ms. Shapiro noted that "valid" and "reasonable" were not synonymous and cautioned that the committee should be careful in its use of the terms.

The committee moved CV1313 up to follow CV1310 and renumbered it CV1311. It also added a note to the effect that the jury should only be instructed on those exceptions for which there is evidence. Mr. Simmons noted that the way the committee has dealt with parts of instructions that may be unnecessary depending on the evidence is to bracket them. He suggested revising old CV1313 to read, "A search is unreasonable if [(1) the officer did not have a valid warrant;] [(2) the officer did not obtain consent]; [or] [(3) the officer did not have probable cause and exigent circumstances did not exist.]" The committee decided to change CV1310(3) to read, "The [search/entry] was not 'reasonable'" and add a sentence, "'Reasonable' has a special meaning here. I will now instruct you on what 'reasonable' means." It then revised old CV1313 to say,

> A search is reasonable if
> (1) The officer had a valid warrant;
> (2) The officer had obtained consent; or
> (3) The officer had probably cause, and exigent circumstances existed.

Dr. Di Paolo thought the use of the term "exigent" was problematic. The committee noted that "exigent circumstances" is defined in CV1319.

Mr. Simmons expressed concern with the order of the instructions. He suggested dividing CV1310 into two instructions. The first would read, "A person has a constitutional right to be free from an unreasonable [search/entry] of [his/her] property." It would then include the definition of "search" from old CV1311. At Judge Harris's suggestion, old CV1311 was moved up ahead of CV1310. Judge Harris then asked what should be done with CV1312, defining "seizure." Ms. Cepernich suggested adding "seizure" to the bracketed phrase "[search/entry]" in the first line of CV1310 (and presumably also to the titles that refer to searches and/or entries). Judge Harris suggested asking the subcommittee whether seizures of property are treated the same as searches and entries. Dr. Di Paolo thought that former CV1311, "Searches of property," more accurately described an entry on property. She noted that she does not know what a "search" is from the

instructions. Mr. Fowler noted that there can be a search of real property without entering onto the property, such as by the use of a listening device. Judge Harris noted that we only need to define the terms "entry," "search," and "seizure" if there is a meaningful distinction among them; if not, we can stay with just one term, such as "search."

Ms. Cepernich thought that instructions CV1310 through CV1319 were meant to apply only to real property and not necessarily to all searches of property, including such things as vehicles, backpacks, and computer files, as the note the committee added to CV1310 at the last meeting suggested. Old CV1313, for example, was focused on entry into a residence. Ms. Cepernich noted that the conditions for a valid search listed in old CV1313 were not complete, not even for searches of real property. A search may also be valid if it is a protective sweep of property, if it is incident to an arrest, or if it is an inventory search of a car, for example. Moreover, a search with a valid warrant could be invalid if the search exceeds the scope of the warrant. The committee asked if it was possible to write a general instruction that would cover searches in every situation. The committee thought it may not be possible. Mr. Simmons suggested looking at model instructions from other jurisdictions to see how they handle searches and seizures. Judge Stone suggested keeping general instructions and adding a committee note explaining that the instruction addresses the most common situations, that the reasonableness of a search may need to be defined in the context of the specific case, and that it is beyond the scope of the instructions to state every exception for every type of search.

Judge Stone asked what the damages are for an unreasonable search of property. Mr. Ferre noted that a prevailing plaintiff can recover his attorney's fees, which may be the most significant recovery in this type of case. Ms. Shapiro asked whether the plaintiff could also recover his defense costs from the underlying case and thought that general damages, such as for loss of reputation, may also be available. Mr. Simmons pointed out that CV1340 allows for recovery of general (or "non-economic") damages.

3. *Negligent Infliction of Emotional Distress (NIED) Instructions*. The committee continued its discussion of Judge Harris's proposed changes to the NIED instructions. Judge Stone thought that the zone-of-danger requirement applied even in direct victim cases and that the plaintiff had to have suffered some physical impact in direct victim cases. He cited *Straub v. Fisher & Paykel Health Care,* 1999 UT 102, 990 P.2d 384, as support, noting that, in ¶ 12 of the opinion, the court notes that Straub was claiming to have been a direct victim of the defendant's negligence; the court did not reject this claim but instead held that the plaintiff's claim failed because she was not in physical peril. Judge Harris disagreed that a zone-of-danger analysis applies in direct

victim cases, citing *Harnicher v. University of Utah Medical Center,* 962 P.2d 67 (Utah 1998), and *Candelaria v. CB Richard Ellis,* 2014 UT App 1, 319 P.3d 708, as support. He noted that those decisions do not expressly so hold, but the courts in those cases could have decided them without reaching the other issues in those cases if the plaintiff had to be within the zone of danger. Ms. Blanch suggested offering alternative instructions--the current instructions, and Judge Harris's proposed instructions. The committee did not want to do that. Mr. Fowler suggested adopting Judge Harris's proposed instructions but adding a committee note to the effect that the case law is less than clear. Judge Harris asked if the committee could agree on his proposed CV1506, covering bystander cases. Mr. Simmons noted that he disagreed that the fourth element, namely, that the plaintiff actually witnessed the third party sustain physical harm, was required. It is not required under Restatement (Second) of Torts § 313(2) but is based on dicta from *Lawson v. Salt Lake Trappers, Inc.,* 901 P.2d 1013 (Utah 1995). Judge Harris indicated that he would be okay with a committee note acknowledging Mr. Simmons's view, but Ms. Blanch did not think that the disagreement of one committee member was sufficient to warrant a committee note. On motion of Judge Harris, the committee approved new CV1506 as drafted, with Mr. Simmons dissenting. The question then was whether there should be a separate instruction for direct victims. Mr. Simmons noted that Judge Harris's proposed CV1505 tracked section 313(1) of the Restatement, which the court adopted as written in *Johnson v. Rogers,* 763 P.2d 771, 785 (Utah 1998). On motion of Mr. Simmons, seconded by Dr. Di Paolo, the committee approved CV1505 as written, with the understanding that Judge Stone would draft a committee note stating that it is unclear from the case law whether the plaintiff has to be in actual physical peril in a direct victim case. Ms. Sylvester will circulate Judge Stone's proposed committee note by e-mail. The motion passed without opposition.

4. *Next meeting*. The next meeting is Monday, June 12, 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	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	June 2017 (wrap up 1/2, then send for comment)	
2	Fault/Negligence	N/A	Judge Lawrence	September-17	September-17	Revisit old instructions
3	Economic Interference	Yes	Frazier, Ryan (D) (Chair); Shelton, Ricky (D); Stevenson, David (P); Simmons, Paul (P); Kuendig, Patricia (P)	September-17	November-17	
4	Injurious Falsehood	Yes	Dryer, Randy; Hoole, Greg; Hoole, Roger; Hunt, Jeff; Reymann, David (Chair); Stevens, Greg	December-17	February-18	
5	Assault/False Arrest	Yes	Rice, Mitch (chair); Carter, Alyson; Wright, Andrew (D); Cutt, David (P)	March-18	May-18	
6	Trespass and Nuisance	Yes (more members needed)	Hancock, Cameron; Figueira, Joshua (researcher); Abbott, Nelson (P); Steve Combe (D)	June-18	October-18	
7	Insurance	Yes	Johnson, Gary (chair); Pritchett, Bruce; Ryan Schriever, Dan Bertch, Andrew Wright, Rick Vazquez; Stewart Harman (D); Ryan Marsh (D)	November-18	January-19	
8	Unjust Enrichment	No (instructions from David Reymann)	David Reymann	February-19	February-19	
9	Abuse of Process	No (instructions from David Reymann)	David Reymann	March-19	March-19	
10	Directors and Officers Liability	Yes	Call, Monica;Von Maack, Christopher (chair); Larsen, Kristine; Talbot, Cory; Love, Perrin; Buck, Adam	April-19	June-19	
11	Wills/Probate	No	Barneck, Matthew (chair); Petersen, Rich; Tippet, Rust; Sabin, Cameron	September-19	November-19	
12	Civil Rights (other half)	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)	December-19	February-20	
13	Sales Contracts and Secured Transactions	Yes	Cox, Matt (chair); Boley, Matthew; Maudsley, Ade	March-20	May-20	

Tab 3

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Jury Instructions Committee
From: Nancy Sylvester
Date: June 6, 2017
Re: Civil Rights Instructions

According to my notes, here are the takeaways from May's meeting for the Civil Rights subcommittee:

- *State v. Martinez*: any changes to approved civil rights instructions in light of this case?
- Should we eliminate "entry" from CV1310?
- Does CV1312 cover everything related to searches of real property?

The other instructions the committee needs to finish up are CV1311, CV1315, and CV1316.

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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] 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 federal law; and

Third, that [name of defendant]'s conduct was a cause of harm sustained by [name of plaintiff].

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 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 will explain [this/these] right[s]] later in the Instructions.

CV1303 WARRANTLESS ARREST. Approved 4/10/17.

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

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

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.

CV1304A OFFENSES AT ISSUE. Approved 3/13/17.

You are to determine whether [name of defendant] had probable cause to believe [name of plaintiff] committed [any of] the following offense[s]:

1)
2)
3)

Committee note

In this instruction, the parties will need to insert each offense. The elements of each offense will need to be listed in separate instructions.

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 plaintiff] for the offense with which [he/she] was charged, so long as [name of officer[s]] had probable cause to arrest [name of plaintiff] for some criminal offense.

CV1306 UNLAWFUL ARREST – MINOR CRIME. APPROVED 3/13/17.

If a police officer has probable cause to believe a person has committed any criminal offense, however minor, he may arrest the person without violating the Constitution.

You are not to consider whether you think [name of defendant] should have arrested [name of plaintiff]. Instead, you must decide whether [name of defendant] had probable cause to believe that [name of plaintiff] committed [any of] the offense[s] listed in [CV1304A].

CV 1307A INVESTIGATIVE STOP. Approved 3/13/17.

The Constitution permits a law enforcement officer to detain a person without arresting [him/her] if two requirements are met.

First, the officer must have reasonable suspicion that the person detained has committed a crime.

Second, the officer's actions must be reasonably limited in time and scope to the investigation of the suspected crime.

References:
U.S. v. Fonseca, 744 F. 3d 674, 680-81 (10th Cir. 2014) ("A twofold inquiry determines whether a Terry stop is reasonable under the Fourth Amendment. 'First, the officer's action must be 'justified at its inception.'" *United States v. King*, 990 F.2d 1552, 1557 (10th Cir.1993) (quoting *Terry*, 392 U.S. at 20, 88 S.Ct. 1868). Thus, "[f]or an investigative detention, the officer must have an articulable and reasonable suspicion that the person detained is engaged in criminal activity.' *Id.* Second, the officer's actions must be 'reasonably related in scope to the circumstances which justified the interference in the first place.'" *Id.* (*quoting Terry*, 392 U.S. at 20, 88 S.Ct. 1868). 'There is no bright-line rule to determine whether the scope of police conduct was reasonably related to the goals of the stop; rather our evaluation is guided by common sense and ordinary human experience.' *United States v. Albert*, 579 F.3d 1188, 1193 (10th Cir.2009) (internal quotation marks omitted)."
State v. Chettero, 2013 UT 9 n.11 (Terry stop "must be justified at its inception")

CV1307 REASONABLE SUSPICION. APPROVED 4/10/17.

Reasonable suspicion means the officer was aware of specific facts that would lead a reasonable officer to conclude that the person in question committed a crime. 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.

Whether an officer has reasonable suspicion is evaluated objectively under all of the circumstances known to the officer.

References
State v. Peterson, 2005 UT 17 ¶ 11 ("Whether an officer has reasonable suspicion to subject an individual to a Terry stop and frisk is 'evaluated objectively according to the totality of the circumstances.'")

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.

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. 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 SEARCHES OF PROPERTY. Approved 1/9/2017.

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.

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)

CV1311 SEARCH OR ENTRY OF ~~RESIDENCE—GENERAL~~PROPERTY.

Comment [NS1]: Eliminate "entry?"

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

1. [Defendant(s)] [searched/entered] [Plaintiff]'s [~~residence~~property];

2. [Defendant(s)] intended to [search/enter] the [~~residence~~property]; and

3. The [search/entry] was not "reasonable."~~unreasonable~~.

"Reasonable" has a special meaning under the law. I will now instruct you on what "reasonable" means.

References:
Minnesota v. Carter, 525 U.S. 83 (1998)
Kentucky v. King, 563 U.S. 462 (2011)

Committee Note:
These instructions refer to ~~residence~~"property" in brackets, but it may be clearer to refer to the specific type of property involved in the case, such as~~. However, they would apply to any constitutionally protected area, which may include~~ homes, ~~outbuildings, curtilage~~businesses, vehicles, backpacks, computer files, etc.

CV1312 LAWFUL [ENTRY/SEARCH] OF REAL PROPERTY~~A RESIDENCE~~.

Comment [NS2]: Does this cover everything for real property?

A [search of/entry into] real property is reasonable if:

(1) The officer has a valid warrant;

(2) The officer has obtained consent; or
(3) The officer has probable cause, and exigent circumstances exist.

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

Committee note:
If one or more of the above is not at issue in this case, it should be omitted from the instruction. Similar exceptions will be applicable to other searches, such as automobile searches.

The committee has here attempted to define reasonableness in a single, common ~~context.~~ context. But in contexts other than real property, be it automobiles, backpacks, computers, etc., the parties and the court should define what a reasonable search or entry is.

Comment [NS3]: Nancy will make this note prettier.

CV1313 SEIZURES OF PROPERTY. Approved 1/9/2017.

Seizure has a special meaning under the law. A "seizure" of property occurs when a [government actor] [takes/removes] 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)

CV 1314 ENTRY OF RESIDENCE PURSUANT TO ARREST WARRANT. Approved 2/27/17.

To lawfully enter a residence based on an arrest warrant, the officer must have reason to believe at the time of entry that 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:
Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371 (1980)

Committee note:
This instruction is limited to entries of residences based only on an arrest warrant. It does not apply to entries based on a search warrant, consent, or exigent circumstances and probable cause.

CV1315 SEARCH OF RESIDENCE PURSUANT TO ARREST WARRANT.

Comment [NS4]: Below is what the subcommittee came up with in response to the committee's questions.

If an officer has lawfully entered a residence pursuant to an arrest warrant, the officer is allowed to conduct a "protective security sweep" if the officer has reasonable suspicion that a person posing danger to the officer or others is in the area to be searched. A "protective security sweep" is a limited search of the residence for the sole purpose of securing the officers' safety during the arrest. It is limited to a cursory inspection of those spaces where a person may be found. A search warrant must be obtained before any search greater than a protective security sweep is made.

~~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:

Maryland v. Buie, *494 U.S. 325*, *327 (1990)*

Fishbein ex rel. Fishbein v. City Of Glenwood Springs, *Colorado*, *469 F.3d 957*, *961 (10th Cir. 2006)*

State v. Grossi, *2003 UT App 181*, *72 P.3d 686*

~~*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.

Comment [NS5]: Question for subcommittee: who is the person charged with knowledge or omission? Does it go just to the affiant (the officer)? To the agency? The committee grappled with passive versus active voice and with active voice, it matters who is charged with this.

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) at the time of the search warrant application, the officer who made the application knowingly, intentionally, or with reckless disregard for the truth, omitted information from or included false statements in the application, and 2) the information, if accurately included, would have affected the magistrate's decision to issue the warrant..

Alternative:

1) the search warrant application contained one or more omissions and/or false statements that were made knowingly, intentionally, or with reckless disregard for the truth, and 2) the information, if accurately included, would have affected the magistrate's decision to issue the warrant.

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)

Committee note:

Some of the issues in this instruction may be questions for the judge to decide, rather than the jury. It will be up to the parties and the judge to determine how to appropriately tailor the instruction for the jury.

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.

CV1318 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.

CV1319 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 1320 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)

CV1321 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)

CV1322 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)

CV1323 ENTITY LIABILITY – FAILURE TO TRAIN. (FIX NUMBERING)

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)

CV1324 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)

CV1325 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)

CV1326 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)

CV1327 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)

CV1328 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.

CV1329 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

CV1330 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

CV1331 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)

CV1332 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)

CV1333 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).

CV1334 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.

CV1335 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)

CV1336 CAUSATION.

[Refer to CV209 "Cause" defined.]

CV1337 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.

CV1338 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.

CV1339 COMPENSATORY DAMAGES – ADA TITLE VII/SECTION 1981 CASES ONLY.

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

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

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

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

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

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

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

CV1340 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).

CV1341 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.

CV1342 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.

CV1343 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.

CV1344 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)

CV1345 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).

CV1346 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)

CV1347 PUNITIVE DAMAGES.

[Refer to CV2026-2032 Punitive Damage Instructions].

CV1348 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.
