THE STATE BAR OF CALIFORNIA

– LITIGATION SECTION, JURY INSTRUCTIONS COMMITTEE

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Via E-mail: civiljuryinstructions@jud.ca.gov.

Ms. Geraldine Dungo
Advisory Committee on Civil Jury Instructions
Judicial Council of California
455 Golden Gate Avenue
San Francisco, CA 94102

re: Invitations to Comment—CACI 12-02

Dear Ms. Dungo:

The Jury Instructions Committee of the State Bar of California's Litigation Section (the committee) has reviewed the proposed new and revised civil jury instructions and verdict forms (CACI 12-02) and appreciates the opportunity to submit these comments.

1. CACI No. 100. Pretrial Admonitions

The committee agrees with the proposal with the following suggested revisions:

a. The committee believes that it would be helpful to emphasize that the jury must consider only the evidence presented at trial. To this end, we suggest that the last sentence in the sixth paragraph of the instruction be set out in a new paragraph and that the words "in the courtroom" be added as follows:

"It is important that all jurors see and hear the same evidence in the courtroom at the same time."

b. For the same reason, the committee suggests retaining, rather than deleting, the second sentence in the penultimate paragraph, stating, "And, I repeat, your verdict must be based only on the evidence that you hear or see in this courtroom."

2. CACI No. 106. Evidence

The committee suggests modifying the first paragraph of the instruction as follows for greater clarity and to make it clear that although anything *may* be admitted in evidence, the jury should consider only those matters that are actually *admitted* in evidence:

"You must decide what the facts are in this case only from the evidence you see or hear during the trial~~.~~ which is s~~S~~worn testimony, documents, ~~or~~ and anything else ~~may be~~ that I admit~~ted~~ into evidence. You may not consider anything that you see or hear when court is not in session, even something said or done by one of the parties, attorneys, or witnesses."

3. CACI No. 107. Witnesses

Agree.

4. CACI No. 113. Bias

Agree.

5. CACI No. 202. Direct and Indirect Evidence

The committee suggests alternative revisions to this instruction We believe that the term "circumstantial evidence" is more familiar to lay jurors than "indirect evidence," and we believe that the instruction should define "circumstantial evidence" rather than define "indirect evidence" and then state that "indirect evidence" is also known as "circumstantial evidence." We also suggest that the cherry pie example set forth below would be better understood and more engaging than the jet plane example in the proposal.

We believe that first sentence of the third paragraph of the proposal is potentially misleading and that the second sentence of that paragraph specifies the point to be made. In addition to other proposed revisions set forth below, we also suggest showing gender balance by referring first to "he" and later to "she."

"Evidence can come in many forms. It can be testimony about what someone saw or heard or smelled. It can be an exhibit admitted into evidence. It can be someone's opinion.

You should give each item of evidence whatever weight you think it deserves. "Direct evidence can prove a fact ~~by itself~~ directly. For example, if a witness testifies he saw ~~a jet plaine flying across the sky~~ Johnny eating a cherry pie, that testimony is direct evidence that ~~a plane flew across the sky~~ Johnny ate a cherry pie. ~~Some~~ Circumstantial evidence can prove~~s~~ a fact indirectly, or by inference. For example, if a witness testifies that she saw ~~only the white trail that jet planes often leave~~ an empty pie plate and saw cherry pie filling on Johnny's face, that testimony is circumstantial evidence that Johnny ate a cherry pie. ~~This indirect evidence is sometimes referred to as "circumstantial evidence."~~ In either ~~instance~~ example, the witness's testimony is evidence that ~~a jet plane flew across the sky~~ Johnny ate a cherry pie.

"~~As far as the law is concerned, it makes no difference whether evidence is direct or indirect.~~ You may choose to believe or disbelieve ~~either kind~~ evidence whether it is direct or circumstantial. ~~Whether it is direct or indirect, you should give every piece of evidence whatever weight you think it deserves."~~

6. CACI No. 205. Failure to Explain or Deny Evidence

a. The committee believes that "could reasonably be expected to have done so" is cumbersome and potentially unclear, and that language similar to the language used in the proposed revisions to CACI No. 213, item 3 ("would . . . naturally") is preferable.

b. We also believe that there is ample authority for the proposition that the failure to explain unfavorable evidence supports an inference that the evidence is true (e.g., *Lumpkin v. Friedman* (1982) 131 Cal.App.3d 450, 456; *Westinghouse Credit Corporation v. Wolfer* (1970) 10 Cal.App.3d 63, 70; *Breland v. Traylor Engineering & Mfg. Co.* (1942) 52 Cal.App.2d 415, 426) and believe that the jury should be so instructed. We therefore suggest that the instruction be revised as follows:

"If a party failed to explain or deny evidence against [him/her/it] when [he/she/it] ~~could reasonably be expected to have done~~ would naturally be expected to do so based on what [he/she/it] knew, you may consider [his/her/its] failure to explain or deny in evaluating that evidence. Failure to explain or deny unfavorable evidence may suggest that the evidence is true.

"However, It is up to you to decide the meaning and importance of the failure to explain or deny evidence against the party."

c. We suggest adding to the Sources and Authorities citations to cases supporting the inference described above, such as the cases cited above.

d. We believe that the citation to 3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, should be to section 115, rather than section 116.

7. CACI No. 208. Deposition as Substantive Evidence

a. The committee agrees with the proposal but suggests that the name of the deponent be added to the instruction to assist the jury in relating the instruction to the evidence presented at trial. We suggest that the instruction be revised as follows:

"During the trial, you received deposition testimony by [*name of deponent(s)*] that was [read from the deposition transcript/[*describe other manner presented, e.g., shown by video*]]. A deposition is the testimony of a person taken before trial. At a deposition the person is sworn to tell the truth and is questioned by the attorneys. You must consider the deposition testimony that was presented to you in the same way as you consider testimony given in court."

b. We believe that the citation to 3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, should be to sections 153-162, rather than sections 153-163.

8. CACI No. 211. Prior Felony Conviction

The committee agrees with the proposal but suggests that the Directions for Use should also state that the instruction should be modified to describe another purpose for which the evidence was admitted if the evidence was admitted for a purpose other than to attack the witness's credibility.

9. CACI No. 213. Adoptive Admission

a. The committee notes that the instruction seems to be limited to oral statements but believes that it should encompass written statements as well by revising the second condition as follows:

"2. [*Name of party against whom the statement was offered*] [heard/read] the statement;"

b. We believe that the first paragraph of the Directions for Use does not accurately state the appropriate rule of law, which is that the instruction should be given if the court finds that there is substantial evidence to support each required condition, which is always the rule and need not be stated in the Directions for Use. Moreover, a jury question would arise not only if the evidence is conflicting evidence, but also is the evidence could give rise to conflicting inferences. We believe that this paragraph serves no useful purpose and would delete it.

10. CACI No. 214. Admission by Silence

Agree.

11. CACI No. 215. Exercise of a Communication Privilege

The committee believes that use of the word "absolute" is potentially misleading and that this qualifier serves no useful purpose in this instruction. Accordingly, we would delete the word "absolute."

12. CACI No. 216. Exercise of a Right Not to Incriminate Oneself

a. The committee believes that use of the word "absolute" is potentially misleading and that this qualifier serves no useful purpose in this instruction. Accordingly, we would delete the word "absolute."

b. We believe that the first sentence of the second paragraph of the Directions for Use seems to contradict the premise of this instruction, which is that right against self-incrimination may be invoked at trial. We therefore would delete this sentence.

13. CACI No. 306. Unformalized Agreement

The committee agrees with the proposed revisions, which are generally consistent with the suggestions in our prior comment letter.

14. CACI No. 325. Breach of Covenant of Good Faith and Fair Dealing—Essential Factual Elements

The committee would revise the Directions for Use as follows to make it clear that this instruction should be given in addition to CACI No. 303 (i.e., two separate instructions given), rather than combined with that instruction (i.e., one combined instruction given), in an appropriate case:

"This instruction should be given only if the plaintiff has brought a separate count for breach of the covenant of good faith and fair dealing. It may be ~~combined with~~ given in addition to CACI No. 303, Breach of Contract—Essential Factual Elements, if breach of contract on other grounds is also alleged. For discussion of element 3, see the Directions for Use to CACI No. 303."

15. CACI No. 380. Agreement Formalized by Electronic Means—Uniform Electronic Transactions Act

The committee agrees with the proposal with the following suggested revisions:

a. We suggest the following revisions to the instruction for greater clarity, so as not to limit its use to two-party contracts, and to avoid any implication that an electronic signature is necessary to the formation of a contract by electronic means:

"[*Name of plaintiff*] claims that the parties entered into a valid contract in which [some of] the required terms were supplied by [*specify electronic means, e.g., e-mail messages*]. If ~~both~~ the parties agree, they can form a binding contract ~~may be formed~~ using ~~an~~ electronic records ~~and signatures~~. An 'electronic record' is one created, generated, sent, communicated, received, or stored by electronic means. [*E.g., E-Mail*] is an electronic record.

b. There is an extra period at the end of the second paragraph of the instruction.

c. We suggest the following revision to the first sentence of the second paragraph of the Directions for Use to more accurately describe the instruction itself.

"The first paragraph asserts that electronic means were used to supply some or all of the essential elements of the contract."

d. The first sentence of the third paragraph of the Directions for Use seems to suggest that whether the parties agreed to form a contract using electronic records and whether they agree to use electronic signatures are one and the same issue. But we believe that these are

two distinct issues. Moreover, we believe that this sentence serves no useful purpose, so we would delete it.

16. CACI No. 1730. Slander of Title—Essential Factual Elements

The committee agrees with the proposal with the following suggested revisions:

a. The committee believes that the language "good and clear title" in elements 3 and 4 may be unfamiliar to many jurors and may create uncertainty. "Clear title" in particular may suggest that the property is free of liens, which the authorities cited in the Sources and Authority do not seem to require. Accordingly, we suggest modifying elements 3 and 4 as follows:

"3. That [the statement was untrue and] [*name of plaintiff*] did in fact ~~have good and clear title to~~ own the property;

"4. That [*name of defendant*] [knew that/acted with reckless disregard of the truth or falsity as to whether] [*name of plaintiff*] ~~had good and clear title to~~ owned the property;]"

b. The word "would" in element 5 seems to suggest a degree of certainty as to the foreseeability of harm that does not seem to be required according to the cases cited in the Sources and Authority. We suggest substituting other language connoting a lower threshold such as "could" or "was likely to."

c. Element 5 refers to "a third person," while element 6 refers to "a third party." We believe that these terms should be the same for greater clarity. We also believe that these terms are somewhat legalistic and that "another person" may be better understood by lay jurors.

d. The second paragraph of the Directions for Use includes the sentence, "The defendant has the burden of proving privilege as an affirmative defense." This seems inconsistent with requiring the plaintiff to prove implied malice in element 4 in order to overcome the privilege. We suggest revising the Directions for Use to correct this apparent inconsistency.

e. There is an apparent discrepancy between the elements stated in the first two bullet points in the Sources and Authority, which do not include actual malice (neither does the instruction), and the third bullet point, which requires actual malice. We suggest revising the Directions for Use or the Sources and Authority in some manner to explain this apparent inconsistency.

17. CACI No. 1821. Damages for Use of Name or Likeness

a. The proposal eliminates the reference to a $750 minimum damages award from the instruction and adds language to the Directions for Use on modifying the instruction to provide for such an award. The committee believes that this language in the Directions for Use should make it clear that the jury should be instructed to award $750 in damages only if it finds that the plaintiff has proved his or her claim:

"If no actual damages are sought, the first part of the instruction may be deleted or modified to simply instruct the jury to award $750 if the plaintiff has proved his or her claim."

An instruction on this point would be unnecessary, however, if the verdict form (VF-1804) were used and if it clearly set forth the $750 minimum award. (See our comments below.)

b. We believe that the items of damages identified in this instruction should correspond more closely with those listed on the verdict form. The instruction lists some items of damages ("Humiliation, embarrassment, and mental distress" and harm to reputation) and refers to "other item(s) of claimed harm." Meanwhile, the verdict form (VF-1804) identifies certain items of past and future economic loss—"lost earnings," "lost profits," "medical expenses," "other past economic loss," and "other future economic loss"—and items of past and future noneconomic loss—"humiliation/embarrassment/mental distress/physical pain." We suggest adding "physical pain" to the items of damages listed in the instruction and would also add "(*e.g., lost earnings, lost profits, medical expenses*") after "*other item(s) of claimed harm*."

c. The committee suggests adding to the Directions for Use for this instruction a cross-reference to the damages instructions (CACI Nos. 3900 et seq.) because those instructions elaborate on some of the items of damages in this instruction. In particular, lost earnings and lost profits are defined in CACI Nos. 3903C, 3903N, which we believe should be given with this instruction when those items of damages are sought.

d. The last sentence of the second paragraph of the Directions for Use explains when to use the bracketed language "that have not already been taken into account in computing the above damages" in the paragraph of the instruction beginning "In addition," but in doing so mistakenly refers to this as "the last full paragraph" of the instruction. We would describe this instead as the paragraph introducing the second part of the instruction. This sentence also states that the bracketed language should be given if the plaintiff's lost profits are included in the damages award, but at the time the instruction is given no one will know whether lost profits will be included in the damages to be awarded by the jury. What will be known is whether the plaintiff is seeking lost profits. We believe that the bracketed language should be given whenever the plaintiff seeks lost profits and that the reason is to avoid duplicative damages. Accordingly, we suggest modifying the last sentence of the second paragraph of the Directions for Use as follows:

"Give the bracketed phrase in the ~~last full~~ paragraph introducing the second part of the instruction only if the plaintiff~~'s~~ is seeking lost profits ~~have been included in the calculation of actual damages~~ under the first part of the instruction, to avoid duplicative damages."

e. We believe that VF-1804 should be used whenever this instruction is given, particularly if there is a potential for a $750 minimum damages award. We suggest so stating in the Directions for Use.

18. VF-1804. Privacy—Use of Name or Likeness

a. The revisions to this verdict form include a new question 5 asking whether the plaintiff suffered any "actual damages." We believe that this new question is unnecessary and should be deleted. Question 4 asks if the defendant's conduct was a substantial factor in causing the plaintiff harm and therefore encompasses the fact of harm. If the jury finds that no compensation is due for that harm, it will answer "0" in question 6 as to each item of damages.

b. The term "actual damages" is not used in the instruction (CACI No. 1821), which repeatedly refers to "damages." We believe that the language in the verdict form should correspond closely with that in the instruction to avoid confusion and therefore would delete the modifier "actual" in both question 5 (if question 5 is not deleted) and question 6. Also, the verb tense used in question 5 does not seem to encompass future damages, but it should because future damages may be included under question 6. Accordingly, we suggest modifying question 5 (if it is not deleted) and question 6 as follows and deleting the word "ACTUAL" from the total line at the end of question 6:

"5. ~~Did~~ Has [*name of plaintiff*] suffered any damages or is [he/she/it] reasonably certain to suffer any ~~actual~~ future damages?

"6. What are [*name of plaintiff*]'s ~~actual~~ damages?"

c. We suggest modifying question 7 for greater clarity and to avoid use of the term "actual damages":

"7. Did [*name of defendant*] receive any profits from the use of [*name of plaintiff*]'s [name/voice/signature/photograph/likeness] that you did not include ~~under~~ in [*name of plaintiff*]'s ~~actual damages~~ any award of lost profits to plaintiff above?"

d. The Directions for Use explain how to provide for an award of $750 if no actual damages are sought or if the jury awards less than that amount, but we believe that the jury should be informed in the verdict form itself that the plaintiff is entitled to at least $750 in damages if liability is established. That knowledge may save the jury time in its deliberation on damages and may help to avoid any artificial inflation of an award of the defendant's profits. We suggest revising the verdict form to provide for the jury, rather than the court, to award the greater of actual damages or $750.

e. We suggest that the Advisory Committee consider modifying this and other verdict forms to state the "stop here" option before the "answer question __" option. We believe that this would be more easily comprehendible to the jurors. We also suggest referring to "this question" rather than referring to the present question by number so as to reduce the clutter of numbers. For example:

"If your answer to this question is no, then stop here, answer no further questions, and have the presiding juror sign and date this form. If you answered yes to this question, then answer question 2."

19. CACI No. 2334. Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Within Liability Policy Limits—Essential Factual Elements

Agree.

20. CACI No. 2440. False Claims Act: Whistleblower Protection—Essential Factual Elements

a. The committee believes that the essential elements of this instruction could be fewer in number and should incorporate the alternative grounds for an act in furtherance so to avoid having to set out those alternatives separately after stating the essential elements. We also suggest revisions to the introductory paragraph to correspond more closely with Government Code section 12651, subdivision (a)(1), which refers to presenting "a false or fraudulent claim for payment or approval," and section 12653, subdivision (b), which refers to a "false claims action." We suggest the following revisions to this instruction:

"[*Name of plaintiff*] claims that [*name of defendant*] discharged [him/her] because [he/she] acted in furtherance of a false claims action. A false claims action is a lawsuit against a person who is alleged to have submitted a false claim to a government agency for payment or approval. In order to establish [his/her] unlawful discharge claim, [*name of plaintiff*] must prove all of the following:

"1. That [*name of plaintiff*] was an employee of [*name of defendant*];

"2. That [*name of ~~false claimant~~ plaintiff*] ~~was [under investigation for/charged with/[*other*]] defrauding the government of money, property, or services by submitting a false or fraudulent claim to the government for payment~~ filed a false claims action;

[or]

That [*name of plaintiff*] committed one or more acts in furtherance of a false claims action;

[or]

That [*name of plaintiff*] reasonably suspected that [*name of suspected false claimant*] had submitted a false claim and [*name of plaintiff*] committed one or more acts that reasonably could have resulted in the filing of a false claims action;"

~~"3. That [*name of plaintiff*] [*specify acts done in furthering the false claim action*];~~

~~"4. That [*name of plaintiff*]'s acts were in furtherance of a false claim action;~~

"~~5~~3. That [*name of defendant*] discharged [*name of plaintiff*];

"~~6~~4. ~~[~~That [*name of plaintiff*]'s ~~acts in furtherance of a false claim action~~ [filing of a false claims action/act or acts in furtherance of a false claims action/act or acts that reasonably could have resulted in the filing of a false claims action] [was/were] a motivating reason for [*name of defendant*]'s decision to discharge [him/her];

"~~7~~5. That [*name of plaintiff*] was harmed; and

"~~8~~6. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.

"~~An act is 'in furtherance of' a false claims action if:~~

~~[[*Name of plaintiff*] actually filed a false claims action [himself/herself].]~~

~~[or]~~

~~[Someone else filed a false claims action but [*name of plaintiff*] [*specify acts in support of action, e.g., gave a deposition in the action*], which resulted in the retaliatory acts.]~~

~~[or]~~

~~[No false claim action was ever actually filed, but [*name of plaintiff*] had reasonable suspicions of a false claim, and it was reasonably possible for [*name of plaintiff*]'s conduct to lead to a false claim action.]~~

b. The Directions for Use accompanying our proposed revision would state that the introductory paragraph and elements 3 and 4 should be modified if the adverse action is something other than a discharge.

c. The California False Claims Act not only prohibits false claims and conduct directly related to false claims, but also prohibits other conduct (Gov. Code, § 12651, subd. (a)(4)-(8)) and prohibits retaliation for lawfully disclosing information to a government or law enforcement agency (*id.*, § 12653, subd. (b)). Yet the proposed instruction and our suggested revision address only retaliation for whistleblowing conduct in connection with an actual or potential false claims action. We suggest that the Directions for Use should state that the instruction should be modified if the basis for the alleged retaliation is some other conduct protected under the CFCA.

21. CACI No. 2441. Discrimination Against Member of Military—Essential Factual Elements

a. The committee suggests deleting "[current/past]" in the introductory paragraph of the instruction and element 4, and deleting ["was serving/had served"] in element 2. We believe that these temporal references are unnecessary and of no benefit.

b. Military and Veterans Code section 394 prohibits discrimination against "any officer, warrant officer or enlisted member of the military or naval forces . . . ." We believe that this instruction should track this language rather than state more broadly that the plaintiff "was serving" or "had served" served in the armed services.

c. We note that the Directions for Use does not state why the fourth element should be optional, and we believe that it should be mandatory.

Accordingly, we suggest that the instruction be revised as follows:

"[*Name of plaintiff*] claims that [*name of defendant*] wrongfully discriminated against [him/her] because of [his/her] ~~[current/past]~~ service in the [United States/California] military. To establish this claim, [*name of plaintiff*] must prove all of the following:

"1. That [*name of plaintiff*] was an employee of [*name of defendant*];

"2. That [*name of plaintiff*] ~~[~~was ~~serving/had served]~~ [an officer/a warrant officer/an enlisted member] in the [*specify military branch, e.g., California National Guard*];

"3. That [*name of defendant*] discharged [*name of plaintiff*];

"4. ~~[~~That [*name of plaintiff*]'s [~~[~~past/current~~]~~ service in the armed forces/ need to report for required military [duty/training]] was a motivating reason for [name of defendant]'s decision to discharge [name of plaintiff];~~]~~

"5. That [*name of plaintiff*] was harmed; and

"6. That [*name of defendant*]'s conduct was a substantial factor in causing [name of plaintiff]'s harm."

22. CACI No. 2505. Retaliation

The committee agrees with the rejection of the criticism in *Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207 and the statement that the instruction may need to be modified in some cases. But we believe that such a modification could focus more on whether the plaintiff's complaint of discrimination was protected activity, rather than whether the defendant's motives were proper. An employee's complaint of discrimination is protected activity under FEHA if the employee reasonably believes the conduct complained of to be discriminatory. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1043.) Focusing on this issue may help to avoid the question of the impact of a defendant's mixed motives, which is an issue currently pending before the California Supreme Court in *Harris v. City of Santa Monica*, No. S181004. We suggest the following revisions to the proposed new paragraph in the Directions for Use:

"~~This instruction has been criticized in dictum because it is alleged that there is no element requiring retaliatory intent. (See~~ The court in *Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207, 1229–1231 [136 Cal.Rptr.3d 472]~~.)~~ criticized this instruction (in dictum) for

purportedly failing to include retaliatory intent as an element of the plaintiff's proof. The court urged the Judicial Council to redraft the instruction and the corresponding special verdict form so as to clearly state that retaliatory intent is a necessary element of a retaliation claim under FEHA. The jury in the case was instructed per element 3 "that Richard Joaquin's reporting that he had been sexually harassed was a motivating reason for the City of Los Angeles' decision to terminate Richard Joaquin's employment or deny Richard Joaquin promotion to the rank of sergeant." The committee believes that the instruction as given is correct for the intent element in a retaliation case. However, in cases such as *Joaquin* in which the ~~distinction between a prohibited motivating reason (based on a report of sexual harassment) and a permitted motivating reason (based on a good faith belief that the report was falsified) is a subtle one, the instruction may need to be modified to clarify this distinction, and to make it clear that plaintiff must prove that defendant acted based on the prohibited motivating reason and not the permitted motivating reason~~ employer's proffered legitimate reason involves the employee's alleged fabrication of a protected activity, the court may modify the instruction to emphasize that (a) plaintiff's activity is not protected unless he/she reasonably believed that the conduct complained of constituted sexual harassment or discrimination, or (b) plaintiff must prove that his/her report of sexual harassment or discrimination, rather than his/her having fabricated a report of sexual harassment or discrimination, motivated the adverse action."

23. CACI No. 2511. Adverse Action Made by Decision Maker Without Animus (Cat's Paw)

The committee agrees with the proposal with the following suggested revisions:

a. We would delete the words "In this case," at the beginning of this instruction as superfluous and unnecessary.

b. We suggest a citation to *Staub v. Proctor Hospital* (2011) 131 S.Ct. 1186 in the Sources and Authority for its discussion of the "cat's paw" doctrine under federal law.

24. CACI No. 2560. Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements

The committee believes that the cited discussion in EEOC v. Townley Engineering & Mfg. Co. (9th Cir. 1988) 859 F.2d 610, footnote 5, was not part of the holding in that case. We suggest revising the first sentence of the third paragraph of the Directions for Use by substituting the words "have suggested" for "have held."

25. VF-2500. Disparate Treatment

Agree.

26. CACI No. 2620. CFRA Rights Retaliation—Essential Factual Elements

Agree.

27. CACI No. 2720. Affirmative Defense—Nonpayment of Overtime—Executive Exemption

a. We believe that element 3 fails to accurately express the requirement that the employee either "[1] has the authority to hire or fire other employees or [2] whose suggestions and recommendations [a] as to the hiring or firing *and* [b] as to the advancement and promotion or any other change of status of other employees will be given particular weight." (Wage Order No. 9, Cal. Code Regs., tit. 8, § 11090, subd. 1(A)(1)(c), italics added.) We suggest modifying element 3 to state:

"3. [*Name of plaintiff*] has the authority to hire or terminate employees~~,~~;

or

[His/Her] suggestions as to hiring~~,~~ or firing~~,~~ and promotion or other changes in status are given particular weight;"

b. We would avoid use of the undefined term "executive duties" in element 5 and suggest revising this element as follows for greater clarity:

"5. [*Name of plaintiff*] spends more than one-half of [his/her] work time performing ~~performs executive~~ the duties ~~more than half of the time~~ described in items 1 through 4; and"

c. The third sentence of the second paragraph of the Directions for Use states that the requirements of the exemptions under the various wage orders are essentially the same. We believe that this is true with respect to the executive exemption under the various wage orders, but the executive exemption differs somewhat from the administrative and professional exemptions. We suggest modifying this sentence as follows:

"The requirements of the executive exemption~~s~~ under the various wage orders are essentially the same."

d. The Sources and Authority refer to the applicable wage orders, but do not cite or quote any wage order. We believe that Wage Order No. 9, on which the instruction is based, should be quoted in pertinent part in the Sources and Authority.

28. CACI No. 2721. Affirmative Defense—Nonpayment of Overtime—Administrative Exemption

a. We believe that element 1 of this instruction departs somewhat from the language of the wage orders. Wage Order No. 9, on which this instruction is based, refers to "[t]he performance of office or non-manual work directly related to management policies or general business operations of his employer or his/her employer's customers." (Cal. Code Regs., tit. 8, § 11090, subd. 1(A)(2)(a)(1); see also *United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1028, quoted in the Sources and Authority, which also refers to "management

policies or general business operations.") We suggest modifying element 1 of the instruction to follow this language more closely:

"1. [*Name of plaintiff*]'s duties and responsibilities involve the performance of office or nonmanual work directly related to management policies or ~~administrative~~ general business operations of [*name of defendant*] or [*name of defendant*]'s customers;"

b. The wage order states that the employee "executes" special assignments and tasks under only general supervision. (Cal. Code Regs., tit. 8, § 11090, subd. 1(A)(2)(d).) The proposed instruction uses the term "completes." We suggest changing "completes" to "performs," to dispel any suggestion that the employee must complete those special assignments or tasks to be exempt.

c. We would avoid use of the undefined term "administrative duties" in element 4 and would revise this element as follows for greater clarity:

"4. [*Name of plaintiff*] spends more than one-half of [his/her] work time performing ~~performs administrative~~ the duties ~~more than half of the time~~ described in items 1 through 3; and"

d. The third sentence of the second paragraph of the Directions for Use states that the requirements of the exemptions under the various wage orders are essentially the same. We believe that this is true with respect to the administrative exemption under the various wage orders, but the administrative exemption differs somewhat from the executive and professional exemptions. We suggest modifying this sentence as follows:

"The requirements of the administrative exemption~~s~~ under the various wage orders are essentially the same."

29. CACI No. 2730. Whistleblower Protection—Essential Factual Elements

a. Element 5 of the instruction states that the plaintiff's disclosure or refusal to participate was "a motivating reason" for the adverse employment action. Labor Code section 1102.5 does not use this language, but states that "[a]n employer may not retaliate against an employee for" specified behavior. Although the Sources and Authority cite no authority for expressing this as "a motivating reason," use of this language seems consistent with use of the same language (i.e., "a motivating reason") in other FEHA instructions where the statute prohibits any adverse employment action "because of" a particular characteristic (Gov. Code, § 12940, subd. (a)) or "because" of certain conduct (*id.*, subd. (h)) (CACI No. 2500, Disparate Treatment—Esssential Factual Elements, CACI No. 2505—Retaliation—Essential Factual Elements, CACI No. 2540, Disability Discrimination—Essential Factual Elements). The committee suggests, however, that any supporting authority on this point should be cited in the Sources and Authority.

b. The Directions for Use refer to other instructions in the FEHA series that can be modified for use with this instruction, but do not refer to CACI No. 2507, "Motivating Reason"

Explained, which we believe should be given with this instruction. We suggest adding a reference to CACI No. 2507 to the Directions for Use.

c. The Directions for Use for CACI No. 2507 list the instructions with which that instruction should be given. We suggesting adding CACI No. 2730 to that list of instructions, as well as CACI No. 2570, Age Discrimination—Disparate Treatment—Essential Factual Elements, which also uses the term "a motivating reason" in element 5.

d. We believe that the four bracketed paragraphs at the end of this instruction do not belong in this instruction stating the essential elements of the cause of action. We suggest that it would be appropriate to include such information in the Directions for Use instead, citing authority on point and explaining when it may be appropriate to instruct the jury on point (particularly as to the third bracketed paragraph). We note that no authority is cited in the Sources and Authority for the first and fourth bracketed paragraphs, and we question whether the fourth bracketed paragraph accurately states the law.

f. The last bullet point in the Sources and Authority is a quotation from *Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809, 822, stating that certain "personnel matters" such as "transferring employees, writing up employees, and counseling employees" do not "rise to the level of whistleblower retaliation." We believe that CACI No. 2509, "Adverse Employment Action" Explained, rather than this instruction, is the appropriate place to cite authorities on what conduct may constitute an adverse employment action. We also believe that the "personnel matters" listed in *Mueller* may constitute an adverse employment action depending on the circumstances, and that the Directions for Use for CACI No. 2509 support this view. We therefore suggest deleting this bullet point.

30. CACI No. 3007. Local Government Liability—Policy or Custom—Essential Factual Elements

The proposal deletes the deliberate indifference requirement from the essential factual elements and deletes the cited authority for that requirement, *Burke v. County of Alameda* (9th Cir. 2009) 586 F.3d 725, 734, and *Clouthier v. County of Contra Costa* (9th Cir. 2010) 591 F.3d 1232, 1249, from the Directions for Use and the Sources and Authority. The invitation to comment does not expressly state the reason for these changes.

The question is whether the local governmental entity's deliberate indifference is always an essential element of a cause of action against the entity for a civil rights violation under 42 United States Code section 1983 based on its policy or custom. We believe that the answer is "no," but that deliberate indifference is an essential element in some cases. We therefore would bracket current element 2 to make it optional, rather than delete it.

Monell v. New York City Dept. of Social Services (1978) 436 U.S. 658, 690-691, 694, held as a matter of statutory interpretation that a local governmental entity can be liable under section 1983 for a civil rights violation caused by the entity itself. A civil rights violation is caused by a local governmental entity only if the violation occurs in the course of executing the

entity's policy or custom. (*Ibid.*) *Monell* did not require deliberate indifference and imposed no state-of-mind requirement.

Canton v. Harris (1989) 489 U.S. 378, 388, held that deliberate indifference is an essential element of a section 1983 cause of action against a local governmental entity for a civil rights violation resulting from the inadequate training of its employees, or "failure to train." *Canton* stated, "Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." (*Id.* at p. 389.) Canton distinguished the deliberate indifference requirement with respect to "policy or custom" from the "degree of fault" that must be shown to establish the underlying constitutional violation. (*Id.* at p. 388, fn. 7.) (We note that element 3 of the instruction separately addresses the individual actor's state of mind relating to the underlying constitutional violation.)

The Ninth Circuit has extended the rule from Canton to other section 1983 actions involving an omission or failure to act to preserve constitutional rights. (*Van Ort v. Estate of Stanewich* (9th Cir. 1996) 92 F.3d 831, 835 [negligent training, supervision, and monitoring]; see *Clouthier v. County of Contra Costa, supra*, 591 F.3d at p. 1249.) *Burke v. County of Alameda, supra*, 586 F.3d 725, involved failure to train, but the court stated more generally that a plaintiff seeking to establish municipal liability under section 1983 must show that " 'the policy amounted to a deliberate indifference to her constitutional right.' " (*Id.* at p. 735.) In our view, the Ninth Circuit opinions are not reliable authority for extending the deliberate indifference requirement to all section 1983 municipal liability cases based on policy or custom. Accordingly, we would approve the proposal to the extent that it eliminates deliberate indifference as a necessary essential element.

We believe, however, that current element 2 should be bracketed for optional use as an essential element and that the Directions for Use should state that deliberate indifference is required in failure to train cases, citing *Canton v. Harris, supra*, 489 U.S. 378, and may be required in other section 1983 cases involving a local governmental entity's omission or failure to protect against a constitutional violation, citing the Ninth Circuit authorities most on point.

31. CACI No. 3015. Arrest by Police Officer Without Warrant—Probable Cause to Arrest

a. The proposal deletes this instruction entirely, but does not explain why. The instruction is for use in section 1983 cases based on warrantless arrest and presents the issue of probable cause to arrest as a question of fact for the jury. The proposed complete elimination of this instruction and a recent Ninth Circuit opinion on qualified immunity cited in the Directions for Use and Sources and Authority for the current instruction (*Conner v. Heiman* (9th Cir. 2012) 672 F.3d 1126) seem to suggest that the reason for the deletion is a belief that the existence of probable cause to arrest is not a question for the jury in this context. We believe, however, that the authorities closest on point do not justify the elimination of this instruction.

Absence of probable cause is an essential element of the cause of action (see CACI No. 3014) and is necessary to establish a Fourth Amendment violation. Qualified immunity, in

contrast, is an affirmative defense. We believe that the probable cause inquiry differs from the qualified immunity inquiry.

McKenzie v. Lamb (9th Cir. 1984) 738 F.2d 1005, 1008, cited as support for the current instruction, stated, "probable cause is a question for the jury . . . and summary judgment is appropriate only if no reasonable jury could find that the officers did or did not have probable cause to arrest." (See also *Gilker v. Baker* (9th Cir. 1978) 576 F.2d 245, 247 [stating that the existence of probable cause is a question of fact for the jury if the facts can support more than one reasonable conclusion].) This differs from California law, which holds that the existence of probable cause to arrest is a question for the court to decide with the jury's role limited to resolving any disputes in the historical facts. (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069.) The Ninth Circuit has not expressly disapproved its own precedents regarding probable cause as a jury question, but has revised its approach to issues of qualified immunity in light of *Hunter v. Bryant* (1991) 502 U.S. 224.

Qualified immunity protects individual local government officers from suit for damages unless they violated a "clearly established" constitutional right. (*Saucier v. Katz* (2001) 533 U.S. 194, 201.) "Clearly established" in this context means that a reasonable officer would understand that the conduct at issue violated a constitutional right. (*Id.* at p. 202.) A local government officer is immune from suit if a reasonable officer could have believed that the officer's conduct was lawful. (*Ibid.*; *Hunter v. Bryant*, *supra*, 502 U.S. at p. 227.)

Hunter stated that the trial court, rather than the jury, should decide whether qualified immunity applies and should do so early in the case, and the court should decide whether the defendants acted reasonably under settled law in the circumstances. (502 U.S. at p. 228.) Hunter rejected the Ninth Circuit's conclusion that summary judgment based on qualified immunity should be denied whenever there is a question of fact as to the existence of probable cause. *Hunter* stated that the defendants were "entitled to immunity if a reasonable officer could have believed that probable cause existed to arrest Bryant." *(Ibid.*) *Saucier* similarly stated that the Ninth Circuit in that case erred by requiring a showing that there was no triable issue of material fact as to the existence of probable cause in order to be entitled to summary judgment based on qualified immunity. (533 U.S. at pp. 202-204; see *Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 840 ["*Saucier* makes clear that a ruling on qualified immunity requires an analysis separate from the question whether a constitutional violation occurred].)

Conner v. Heiman, *supra*, 672 F.3d 1126, cited in the Directions for Use and Sources and Authority of the current instruction, held that the denial of summary judgment based on qualified immunity was error. *Conner* stated that *Hunter* compelled the conclusion that the trial court should decide whether qualified immunity applies if the historical facts are undisputed. (*Conner*, at p. 1131.) *Conner* concluded that the defendants reasonably could have determined that they had probable cause to arrest the plaintiff and that the plaintiff therefore could show no clear violation of his civil rights, so the defendants were entitled to qualified immunity. (*Id.* at 1133.) *Conner* also stated that the trial court should have decided " 'whether probable cause existed.' " Similarly, *Peng v. Penghu* (9th Cir. 2003) 335 F.3d 970, 979-980, concluded that the defendant was entitled to qualified immunity because his belief that probable cause existed was reasonable,

but also stated that the court should decide as a matter of law whether probable cause existed based on the undisputed historical facts.

We believe that these Ninth Circuit authorities involving the existence of qualified immunity are distinguishable from the prior Ninth Circuit cases involving the existence of probable cause where qualified immunity is not at issue. Absent some authority that the prior Ninth Circuit opinions have been overruled, we believe that probable cause is an issue of fact for the jury to decide if the court has not decided as a matter of law that qualified immunity applies. We therefore would retain this instruction.

b. The committee suggests that the invitation to comment should include some indication of the reasons for the proposed changes if the reasons are not apparent from those changes themselves. We believe that this would facilitate more informed comments.

32. CACI No. 3025. Bane Act—Essential Factual Elements

Agree.

33. CACI No. 3205. Failure to Begin Repairs Within Reasonable Time or to Complete Repairs Within 30 Days—Essential Factual Elements

a. The new paragraph in the Directions for Use includes the statement, "Section 1793.2(b) presumes repairs that are unreasonably delayed but ultimately successful." No authority is cited for this proposition in the Sources and Authority, and we believe that it may be inaccurate. Reading section 1793.2, subdivision (b) together with section 1794, subdivision (a) suggests that (1) damages can be awarded if no repairs are attempted within 30 days or if repairs are attempted but not completed within 30 days, even if repairs were not successfully completed later; and (2) the equitable remedy of an injunction requiring the defendant to complete repairs may be available in those same circumstances. In other words, section 1793.2, subdivision (b) arguably does not presume that repairs were unreasonably delayed but ultimately successful, but instead provides a basis for relief in other circumstances as well. If there is any doubt about the circumstances where relief is available under this provision, and no authority to support the quoted sentence, we suggest deleting the quoted sentence and the sentence that follows it.

b. Other instructions cover the remedies of restitution or replacement of a new motor vehicle pursuant to Civil Code section 1793.2, subdivision (d)(2) and define a reasonable number of repair opportunities under section 1793.22. We suggest including cross-references to those instructions in the new paragraph of the Directions for Use.

"A violation of Civil Code section 1793.2(b) would not entitle the consumer to the remedies of restitution or replacement for a new motor vehicle as provided in section 1793.2(d)(2). (See CACI Nos. 3201, 3241.) Before those remedies are available, the manufacturer is entitled to a reasonable number of repair opportunities as described in section 1793.22. (See CACI Nos. 3202, 3203.) ~~Section 1793.2(b) presumes repairs that are unreasonably delayed but ultimately successful. Damages would be those caused by the delay.~~

c. A new second bullet point is added to the Sources and Authorities quoting Civil Code section 1793.22, subdivision (b), which establishes a presumption that a reasonable number of repair attempts have been made if certain facts are true. We believe that this new paragraph does not belong here because relief under section 1793.2, subdivision (b), which is the subject of this instruction, does not require a reasonable number of repair attempts. Section 1793.22 is quoted in the Sources and Authorities for CACI No. 3203, Reasonable Number of Repair Opportunities—Rebuttable Presumption, where seems more appropriate. We suggest deleting this new bullet point.

34. CACI No. 4107. Duty of Disclosure by Real Estate Broker to Client

a. We believe that the new paragraph in the instruction, stating that a broker cannot accept as true and pass on to the client information provided by third parties without verifying that information or informing the client that the information has not been verified, will not be relevant in many cases involving breach of the duty of disclosure and therefore should be optional and bracketed, with a statement added to the Directions for Use as to when to use the bracketed language.

b. The final bullet point in the Sources and Authorities states that a broker's duty to his or her client does not arise from contract, so the contractual limitations period is inapplicable. But this instruction says nothing about the statute of limitations. This new bullet point does not support the instruction or anything stated in the Directions for Use. We believe that this bullet point does not belong here, but that it would be appropriate to include in the Sources and Authority for CACI No. 4120.

35. CACI No. 4120. Affirmative Defense—Statute of Limitations

The committee agrees with the proposed revisions and would move the final bullet point in the Sources and Authority for CACI No. 4107 to the Sources and Authority for this instruction, as stated above.

36. CACI No. 5002. Evidence

Consistent with our suggestions for CACI No. 106, the committee suggests modifying the first paragraph of this instruction as follows for greater clarity and to make it clear that although anything *may* be admitted in evidence, the jury should consider only those matters that actually have been admitted in evidence:

"You must decide what the facts are in this case only from the evidence you have seen or heard during the trial~~.~~ which is s~~S~~worn testimony, documents, ~~or~~ and anything else ~~may be~~ that I have admit~~ted~~ into evidence. You may not consider anything that you see or hear when court is not in session, even something said or done by one of the parties, attorneys, or witnesses."

37. CACI No. 5003. Witnesses

Agree.

38. CACI No. 5004. Service Provider for Juror with Disability

Agree.

39. CACI No. 5014. Substitution of Alternate Juror

The committee agrees with the proposal except that we believe that the admonition in the first paragraph would be better understood if some explanation were provided. We suggest revising he first paragraph as follows:

"One of your fellow jurors has been excused and an alternate juror has been selected to join the jury. Do not consider this substitution ~~for any purpose~~ because the reasons for this substitution do not relate to any matter that you should consider."

40. CACI No. 5015. Instruction to Alternate Jurors on Submission of Case to Jury

Agree.

41. User Guide

a. The committee agrees with revising the paragraph on uncontested elements (p. 118) to state that uncontested elements should not be omitted, but suggests the following revisions for greater clarity:

"~~Although some elements may be the subject of a stipulation that the element has been proven, the instruction should set forth all of the elements and indicate those that are deemed to have been proven by stipulation of the parties.~~ All of the elements set forth in the instruction should be read to the jury, even if the parties have stipulated that some elements are satisfied. If the parties have so stipulated, the instruction should be modified to indicate which elements are deemed satisfied. Omitting uncontested elements may leave the jury with an incomplete understanding of the cause of action and the plaintiff's full burden of proof. It is better to include all the elements and then indicate that one or more of them have been agreed to by the parties as ~~not at issue~~ satisfied."

b. The example that follows does not conform to the convention of referring to the parties as [*name of plaintiff*] and [*name of defendant*]. We suggest revising the example accordingly.

c. There appears to be a typographical error in the paragraph on multiple parties (p. 117) where "cross-complaints" should be "cross-complainants."

d. The committee believes that the User Guide is helpful, but feels that it is hard to find in the CACI official softcover publication by LexisNexis.

In the first volume of the LexisNexis publication, the User Guide begins on page xxvii after (1) "Publication Update" pages; (2) a title page; (3) "Preface to CACI Updates"; (4) a table

of new and revised CACI instructions; (5) a table of derived, renumbered, replaced and revoked instructions; (6) a page naming the Advisory Committee members; (7) a page naming the Judicial Council members; (8) a "Preface"; and (9) pages naming the members of the former Judicial Council Task Force on Jury Instructions Civil Instructions Subcommittee and organizations and individuals contributing to these efforts.

The table of contents appears immediately after the User Guide and does not list the User Guide or any of the preceding pages. We suggest that the Advisory Committee consider moving the User Guide to the beginning of the volume and listing it in the table of contents, or some other measure to make it more prominent and easy to locate.

DISCLAIMER

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Very truly yours,

Reuben A. Ginsburg
Chair, Jury Instructions Committee of the
State Bar of California's Litigation Section