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: Invitation to Comment—CACI 13-03

Dear Ms. Dungo:

The Jury Instructions Committee of the State Bar of California's Litigation Section (the committee) has reviewed the proposed revisions to civil jury instructions and verdict forms (CACI 13-03) and appreciates the opportunity to submit these comments.

1. CACI No. 1621. Negligent Infliction of Emotional Distress—Bystander—Essential Factual Elements

The committee suggests that "it" in element 2 should be replaced by a specific reference to the injury-causing event to make it clear that the plaintiff must observe that event rather than only observe the victim suffering from an injury after that event. This requirement is stated in the third bullet point in the Sources and Authority quoting *Thing v. La Chusa* (1989) 48 Cal.3d 644, 647.

We also suggest that "then" in element 3 should be replaced by more specific language to make it clear that the plaintiff, *while he or she was present at the scene*, must have been aware that the event was causing injury to or the death of the victim.

Accordingly, we suggest the following modifications to the proposal:

"2. That when ~~it~~ the [*describe event, e.g., traffic accident*] occurred, [*name of plaintiff*] was present at the scene of the [~~*describe event,*~~ *e.g., traffic accident*] that caused [injury to/the death of] [*name of victim*];

"3. That while present at the scene [*name of plaintiff*] was ~~then~~ aware that the [*e.g., traffic accident*] was causing injury to/the death of] [*name of victim*];"

2. CACI No. 1900. Intentional Misrepresentation

Agree.

3. CACI No. 1902. False Promise

Agree.

4. CACI No. 1903. Negligent Misrepresentation

Agree.

5. CACI No. 1905. Definition of Important Fact/Promise

Agree.

6. CACI No. 1907. Reliance

Agree.

7. CACI No. 1908. Reasonable Reliance

a. The committee believes that this instruction should be more concise and simpler. We believe that by instructing the jury that the plaintiff "must first prove that the matter was material" and then defining "material," and by instructing that "if . . . then . . ." and "[h]owever," this instruction seems to be creating things for the jury to keep track of, which may complicate the jury's deliberations. Moreover, we do not agree that "materiality" necessarily comes first in order or importance. Instead, we believe that all of the requirements stated in the instruction are essential to a finding of reliance.

The User Guide, Titles and Definitions states that definitions are avoided if possible in favor of incorporating the definition into the language of the instruction. We believe that this is good practice and would avoid use of the word "material" so as to avoid having to define that term.

We propose the following language in lieu of the proposed instruction:

"[*Name of plaintiff*]'s reliance on [*name of defendant*]'s [misrepresentation/concealment/ false promise] was reasonable if:

"1. A reasonable person would find the representation important in determining his or her choice of action; and

"2. It was reasonable for [*name of plaintiff*] to rely on the [misrepresentation/ concealment/false promise] considering [his/her/its] intelligence, knowledge, education, and experience.

"It is not reasonable for anyone to rely on a [misrepresentation/concealment/false promise] if facts that are within [his/her/its] observation show that it is obviously false."

OR

"In determining whether [*name of plaintiff*]'s reliance was reasonable, you must consider whether a reasonable person would find the [misrepresentation/concealment/false promise] important in determining his or her choice of action and whether it was reasonable for [*name of plaintiff*] to rely on the representation considering [*name of plaintiff*]'s intelligence, knowledge, education, and experience.

"It is not reasonable for anyone to rely on a [misrepresentation/concealment/false promise] if facts that are within [his/her/its] observation show that it is obviously false."

b. We believe that the Directions for Use should alert the user to special circumstances involving the instruction and may include references to other instructions and suggestions for modification of the instruction, as appropriate, as stated in the User Guide. The revised Directions for Use for this instruction, however, do not include such information. We suggest that consideration be given to including in the Sources and Authority the matters discussed in the revised Directions for Use and that the language in the revised Direction for Use be replaced with the following:

"Give this instruction with CACI No. 1907, *Reliance*."

8. CACI No. 2201. Intentional Interference with Contractual Relations—Essential Factual Elements

The committee agrees with the proposed revisions, except that we believe the jury should be instructed on the two alternatives in element 3 in the disjunctive, rather than only one or the other. *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1154, stated that the plaintiff may plead that the defendant intended to interfere with the plaintiff's prospective economic advantage or "may alternately plead that the defendant knew that the interference was certain or substantially certain to occur as a result of its action." We see no reason that the plaintiff should be required to choose between these two alternatives for purposes of jury instructions if the evidence may support either finding and can see nothing in *Korea Supply* suggesting that the plaintiff can proceed on only one theory and not the other. We would modify element 4 as follows:

"4. That [*name of defendant*] engaged in conduct [intend~~ed~~ing to disrupt the performance of th~~is~~e contract~~/~~ or kn~~e~~owing that disruption of performance was certain or substantially certain to occur];"

We also note a typographical error in the spelling of "Factual" in the title.

9. CACI No. 2202. Intentional Interference with Prospective Economic Relations—Essential Factual Elements

The committee suggests modifications to this instruction similar to those suggested above to CACI No. 2201 for the same reason:

"4. That ~~by~~ [*name of defendant*] engag~~ing~~ed in this conduct~~, [*name of defendant*] [~~intended~~ing to disrupt the relationship~~/~~ or kn~~e~~owing that disruption of the relationship was certain or substantially certain to occur."

We also believe that the proposed revisions to CACI Nos. 2201 and 2202 make unnecessary a separate instruction that "intent" for the purpose of these instructions includes knowledge of certainty or substantial certainty to occur. We therefore would delete CACI No. 2203, *Intent*. Moreover, we find the language of that instruction somewhat inaccurate in stating that the jury "may" rather than "must" consider whether the defendant knew that a disruption was substantially likely to occur. Again, we believe the remedy is to delete CACI No. 2203.

10. VF-2201. Intentional Interference with Contractual Relations

We suggest modifying this verdict form to reflect our proposed modifications to CACI No. 2201:

"4. Did [*name of defendant*] engage in conduct ~~[~~intended~~ed~~ing to disrupt the performance of th~~is~~e contract~~/~~ or kn~~e~~owing that disruption of performance was certain or substantially certain to occur~~]~~?"

11. VF-2202. Intentional Interference with Prospective Economic Relations

We suggest modifying this verdict form to reflect our proposed modifications to CACI No. 2202:

"4. ~~By~~ Did [*name of defendant*] engag~~ing~~ed in this conduct~~, did [*name of defendant*] [~~intended~~ing to disrupt the relationship~~/~~ or kn~~e~~owing that disruption of the relationship was certain or substantially certain to occur~~]~~?"

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

a. The committee commented at length on this instruction when it was first proposed in CACI 12-02. We have many of the same concerns with this revised instruction. We believe that the essential elements should be fewer in number and should incorporate the alternative grounds for an "act in furtherance" of a false claims action, rather than state those grounds at the end of the instruction. This is consistent with CACI's policy to "avoid separate definitions of

legal terms wherever possible. Instead, definitions have been incorporated into the language of the instructions," as stated in the User Guide, Titles and Definitions.

Also, we can see no support in the Sources and Authority for the stated requirement in element 2 that the false claimant must be under investigation for or charged with submitting a false claim. This purported requirement would not be satisfied in many cases where no false claims action was ever filed but the plaintiff had reasonable suspicions of a false claim.

We suggest modifying this instruction as follows:

"[*Name of plaintiff*] claims that [*name of defendant*] discharged [him/her] because [he/she] acted [in furtherance of a false claims action/to stop a false claim by [*name of false claimant*]]. A false claims action is a lawsuit against a person or entity that 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*] 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 or approval;~~

"2. That [*name of plaintiff*] [filed a false claims action/acted in furtherance of a false claims action/had reasonable suspicions of a false claim, and it was reasonably possible for [*name of plaintiff*]'s conduct to lead to a false claims action/acted to stop a false claim];

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

~~"4. That [*name of plaintiff*] acted [in furtherance of a false claim action/to stop a false claim];~~

"~~5~~3. That [*name of defendant*] [discharged/*other adverse action*] [*name of plaintiff*];

"~~6~~4. That [*name of plaintiff*]'s ~~acts [in furtherance of a false claim action/to stop a false claim]~~ [filing of a false claims action/act[s] in furtherance of a false claims action/act[s] that reasonably could have resulted in the filing of a false claims action] [was/were] a substantial 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:~~

~~[[*nof 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 claims 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 claims action.] The potential false claims action need not have turned out to be meritorious. [*Name of plaintiff*] need only show a genuine and reasonable concern that the government was being defrauded.]"~~

b. A "false claims action" is defined in the initial paragraph largely by reference to a "false claim," but the latter term is not defined. We suggest adding a definition or description of a "false claim" to the initial paragraph of the instruction.

c. Government Code section 12653 protects not only employees, but also contractors and agents. We believe that the Directions for Use should note the need to modify the instruction if a contractor or an agent, rather than an employee, is involved.

d. Government Code section 12653 provides protection not only where the employee, contractor or agent committed an act in furtherance of a false claims action or made efforts to stop a false claim, but also where "associated others" did so. We suggest noting this in the Directions for Use and stating that the instruction can be modified if an act in furtherance by "associated others" is at issue.

13. CACI No. 2512. Limitation on Damages—Same Decision

a. A same-decision showing is a partial defense to liability when a plaintiff has shown that an adverse employment action was motivated at least in part by discrimination (i.e., discrimination was a substantial motivating reason). (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 225.) "[A] same-decision showing precludes an award of reinstatement, backpay, or damages." (*Id.* at p. 241.) Same decision is an affirmative defense that should be pleaded in the defendant's answer. (*Id.* at p. 240.)

The title "Limitation on Damages—Same Decision" suggests a limitation on the amount of damages, but a same-decision showing precludes an award of damages altogether. "Affirmative Defense—Same Decision" would be a more accurate title. We suggest that the title should be so modified.

b. We believe that this instruction should be more concise. The first paragraph begins with a recap of the plaintiff's claim, but this is unnecessary because this instruction will follow CACI No. 2500, *Disparate Treatment—Essential Factual Elements*, CACI No. 2505,

Retaliation—Essential Factual Elements, CACI No. 2450, *Disability Discrimination—Disparate Treatment—Essential Factual Elements*, or CACI No. 2570, *Age Discrimination—Essential Factual Elements*, where the plaintiff's claim will be clearly stated.

The second paragraph states that if the jury finds that discrimination or retaliation was a substantial motivating reason, then it must consider the defendant's stated reason. But the jury should consider the defendant's stated reason in deciding whether the defendant was motivated by discrimination or retaliation or instead acted for a legitimate, nondiscriminatory reason, rather than only after making that determination. We believe that "if . . . then . . ." does not accurately describe the appropriate thought processes and provides no useful guidance to the jury.

The fourth paragraph conveys the point that the defendant's stated reason counts only if that reason actually motivated the defendant's decision, at least in part. We believe that this could be stated more clearly and concisely. It seems inaccurate to state that the jury must determine "what actually motivated [*name of defendant*], not what [he/she/it] might have been justified in doing" if what actually motivated the defendant was a combination of discrimination or retaliation and a legitimate reason. Our suggested language below states that the defendant must have based its decision on both discrimination or retaliation and a legitimate reason for the defense to apply, and we believe this is sufficient to convey the point.

Finally, *Harris*, *supra*, 56 Cal.4th 213, states that the jury should be instructed that a same-decision showing precludes an award of damages: "[A] jury in a mixed-motive case alleging unlawful termination should be instructed that it must find the employer's action was substantially motivated by discrimination before the burden shifts to the employer to make a same-decision showing, *and that a same-decision showing precludes an award of reinstatement, backpay, or damages*." (Italics added.) The proposed instruction does not explain the consequences of a same-decision showing, as we believe it should.

We suggest the following complete instruction in lieu of the proposal:

"[*Name of defendant*] claims that [*name of plaintiff*] [was discharged/[other adverse employment action]] because of [*specify reason, e.g., plaintiff's poor job performance*], which is a lawful reason. [*Name of defendant*] is not liable for any damages if [his/her/its] decision to [discharge/refuse to hire/[*other adverse employment action*]] [*name of plaintiff*] was motivated by both wrongful [discrimination/retaliation] and a legitimate, [nondiscriminatory/nonretaliatory] reason and [*name of defendant*] proves by a preponderance of the evidence that [he/she/it] would have [discharged/refused to hire/[*other adverse employment action*]] [*name of plaintiff*] at the time based on that legitimate reason alone."

c. The second paragraph of the Directions for Use distinguishes pretext from mixed motive. We believe that the distinction does not affect the decision whether to give this instruction. The instruction should be given if the defendant asserts the defense and there is substantial evidence that the decision was based at least in part on a legitimate, nondiscriminatory reason. The jury then decides (1) whether wrongful discrimination or retaliation was a substantial motivating factor, (2) whether the decision was also motivated by a legitimate reason, and (3) whether the defendant would have made the same decision anyway for

that legitimate reason. The jury's answers to these questions may indicate pretext or establish the same decision defense, but this does not affect the decision whether to give the instruction and therefore does not belong in the Directions for Use. We also find the language of the second paragraph somewhat troublesome, but rather than revise it would delete the second paragraph entirely.

d. The third and fourth bullet points in the Sources and Authority concern pretext, which is not the subject of this instruction. We would delete them and also would delete the fifth bullet point on the "same actor" defense, which seems out of place here. We believe that the authorities cited should be more specific to the instruction.

e. We suggest adding the following bullet points in support of points made in our proposed language (the second point below also supports the fourth paragraph of the proposed instruction):

" '[W]e hold that preponderance of the evidence is the standard of proof applicable to an employer's same-decision showing.' (*Harris*, *supra*, 53 Cal.4th at p. 239.)"

" 'To be clear, when we refer to a same-decision showing, we mean proof that the employer, in the absence of any discrimination, would have made the same decision at the time it made its actual decision. (See *Price Waterhouse*, *supra*, 490 U.S. at p. 252 ["proving ' "that the same decision would have been justified . . . is not the same as proving that the same decision would have been made" ' "]; *ibid.* [employer cannot make a same-decision showing "by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision"].)' (*Harris*, *supra*, 53 Cal.4th at p. 224.)"

"Same decision is an affirmative defense. (*Harris*, *supra*, 53 Cal.4th at pp. 239-240.)"

14. CACI. No. 2513. Business Judgment

We believe that an instruction on the business judgment rule should more closely follow the instruction that was improperly refused in *Veronese v. Lucasfilm Ltd.* (2012) 212 Cal.App.4th 1, which stated:

" 'You may not find that [employer] discriminated or retaliated against [employee] based upon a belief that [employer] made a wrong or unfair decision. Likewise, you cannot find liability for discrimination or retaliation if you find that [employer] made an error in business judgment. Instead, [employer] can only be liable to [employee] if the decisions made were motivated by discrimination or retaliation related to [employee's protected status].' " (*Veronese*, *supra*, 212 Cal.App.4th at p. 20.)

The proposed instruction states that the plaintiff must prove each element, which is stated in the essential factual elements instruction and need not be repeated here. It then states that employment is presumed to be "at will," but *Veronese* never stated that the business judgment rule is limited to "at will" employment. It seems that the business judgment rule precludes liability for discrimination or retaliation whenever an adverse employment decision is based on a

nondiscriminatory and nonretaliatory reason, regardless of whether the employment is at will or terminable only for cause. (*Veronese*, *supra*, 212 Cal.App.4th at p. 21.) We believe that the instruction refused in *Veronese* accurately states the rule and that the proposal does not.

15. CACI No. 2527. Failure to Prevent Harassment, Discrimination, or Retaliation—Essential Factual Elements—Employer or Entity Defendant

Government Code section 12940, subdivision (k) states that it is an unlawful employment practice "to fail to take all reasonable steps *necessary* to prevent discrimination and harassment from occurring" (italics added). Yet the instruction refers to only "reasonable steps." We believe that "all reasonable steps" could be construed as broader than "all reasonable steps necessary." We therefore would insert "necessary" after "reasonable steps" where those words appear in elements 3 and 5 of this instruction and in its title in order to more closely comport with the statutory requirement.

16. CACI No. 2528. "Reasonable Steps to Prevent Harassment" Explained

The committee disagrees with this proposed new instruction. Government Code section 12940, subdivision (k) imposes liability for an employer's failure to take all reasonable steps necessary to prevent discrimination and harassment from occurring. There is no requirement that the employer must have known of discriminatory or harassing conduct to be liable under this provision. Section 12940, subdivision (j)(1) imposes liability against an employer for harassment by a co-worker or a nonemployee, but only if the employer knew or should have known of the harassment but failed "to take immediate and appropriate corrective action." The cited regulation (2 Cal. Code Regs., § 7287.6(b)(3)) identifies "reasonable steps to prevent harassment from occurring" not for the purposes of establishing liability for failure "to take all reasonable steps necessary to prevent discrimination and harassment from occurring" under section 12940, subdivision (k), but for the purpose of imputing knowledge to the employer and establishing liability under section 12940, subdivision (j)(1) for harassment by a co-worker or nonemployee. The proposal cites no authority for the proposition that the nonexclusive list of reasonable steps in the regulation is an appropriate guide for purposes of liability under section 12940, subdivision (k) for failure to take all reasonable steps necessary to prevent (discrimination and) harassment from occurring.

Moreover, we are concerned that instructing on such a list of "reasonable steps" could cause the jury to conclude that an employer necessarily satisfies its duty by performing the listed steps. We believe that the reasonableness standard does not necessarily lend itself to a listing in this manner. We note that the listed steps do not include taking immediate and appropriate corrective action when discrimination or harassment occurs, which seems necessary to prevent similar conduct in the future.

For these reasons, we disagree with the proposed instruction.

17. CACI No. 2543. Disability Discrimination—Affirmative Defense—Inability to Perform Essential Job Duties

a. The first sentence of this instruction repeats an essential element on which the jury will be instructed under another instruction. We believe that to repeat an essential element in this manner creates an undue emphasis on that element and should be avoided. The first sentence also seems to place the burden of proof on the defendant that plaintiff was unable to perform an essential job duty, but the law is that the plaintiff has the burden to prove that he or she was able to perform the essential job duties. (*Green v. State of California* (2007) 42 Cal.4th 254, 262.) For these reasons, we would delete the first sentence.

b. We believe that the second listed factor to consider in determining whether a job duty is essential should more closely follow the statutory language, which makes it clear that a job function can be distributed to more than one employee and need not be taken on by a single employee. We also believe that the wording of the three factors should be more closely parallel. Accordingly, we would modify the second factor as follows:

"b. ~~The~~ Whether a limited number of employees are available ~~who can perform~~ among whom that duty can be distributed;"

18. VF-2515. Limitation on Damages—Same Decision

a. We would entitle this verdict form "Affirmative Defense—Same Decision" because we believe that same decision is an affirmative defense, as explained above.

b. We believe that the word "solely" in question c does not accurately reflect the holding in *Harris, supra*, 53 Cal.4th 203, which states that the employer must prove that it would have made the same decision absent discrimination, not that it would have made the decision based "solely" on a nondiscriminatory reason.

c. The second line of the Directions for Use refers to "VF-2500, *Disparate Impact*." The reference should be to "VF-2500, *Disparate Treatment*."

19. CACI No. 2700. Nonpayment of Wages—Essential Factual Elements

Several of the citations to the California Practice Guide: Employment Litigation (The Rutter Group) in the Sources and Authorities seem out of place. We recommend that the Advisory Committee review all of the citations to this treatise here. Examples of possibly incongruous citations are:

Citation to ¶5:173. This instruction is for use in a case alleging failure to pay wages. Section 5:173 identifies the statutory right to receive wages as a potential basis for a violation of public policy claim. The two are very different claims, and citing ¶5:173 as support for the essential elements listed in CACI 2700 seems illogical.

Citation to ¶11:499. This section contains no content ("reserved").

Citation to ¶11:513. This section discusses the timing of payment when an employee resigns. If the drafters consider this authority for the instruction, then ¶11:512, which discusses the timing of payment on discharge, and section ¶11:514, discussing the requirement that vacation pay be paid upon discharge or termination, should also be cited.

Citation to ¶¶11:545, 11:547. ¶11:540, entitled "Deductions from Wages," explains the rules regarding deducting items from earned wages, and contains a number of subsections that list permissible and impermissible deductions. Nothing in this section serves as direct authority for CACI No. 2700. Further, selecting two items from the list of impermissible deductions seems arbitrary. (Those two items are no right of offset for an employee's debts to employer, ¶11:545, and no deduction for business losses caused by employee negligence, ¶11:547.)

20. CACI No. 2730. Whistleblower Protection—Disclosure of Legal Violation—Essential Factual Elements

a. Labor Code section 1102.5 protects employees from retaliation not only for disclosing a legal violation but also for refusing to participate in an activity that would result in a legal violation, as stated in this instruction. The new language "Disclosure of Legal Violation" in the title is an incomplete description of this instruction and therefore is somewhat misleading. We would delete this new language.

b. We would insert the words "by a preponderance of the evidence" in the last sentence of the instruction so it reads, "In order to establish this claim, [*name of plaintiff*] must prove by a preponderance of the evidence all of the following:" Labor Code section 1102.6 states that the standard of proof under section 1102.5 is preponderance of the evidence, as quoted in the Sources and Authority. Particularly when CACI No. 2731 is given, which states the clear and convincing evidence standard applicable to the same decision affirmative defense, it would be helpful to specify the different standard of proof applicable under this instruction.

21. CACI No. 2731. Affirmative Defense—Same Decision

a. The committee agrees with the proposal except that we would add the words "for damages" after "the employer may avoid liability" in the Directions for Use. It is not clear from Labor Code section 1102.6 whether the same decision defense is only a defense to damages, as it is for FEHA violations under *Harris, supra,* 56 Cal.4th 203, or a complete defense.

b. Also, the second bullet point in the Sources and Authority states that the clear and convincing standard under Labor Code section 1102.6 is inapplicable for other statutory violations. We believe that this quotation from *Harris, supra,* 56 Cal.4th 203, is not authority for this instruction and should be deleted.

22. CACI No. 5000. Duties of the Judge and Jury

a. The committee agrees with the proposal except that we would not bracket the new language either here or in CACI No. 100, *Preliminary Admonitions*, where the same language

appears. It appears that violations of the prohibitions on electronic communications and research are increasingly common, so that an instruction on potential penalties is warranted as a matter of course in every case and should not be optional.

b. We also suggest that some authority be cited for the statement that contempt and other sanctions may apply.

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Very truly yours,

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