

August 31, 2018

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

Mr. Bruce Greenlee
Advisory Committee on Civil Jury Instructions
Judicial Council of California
455 Golden Gate Avenue
San Francisco, CA 94102

re: Invitation to Comment—CACI 18-02

Dear Mr. Greenlee:

The Jury Instructions Committee of the California Lawyers Association’s Litigation Section has reviewed the proposed revisions to civil jury instructions (CACI 18-02) and appreciates the opportunity to submit these comments.

1. CACI No. 206. Evidence Admitted for Limited Purpose

a. We prefer the current instruction, which explicitly states in active voice that the court (“I”) previously explained that certain evidence was admitted for a limited purpose. We believe this helps to remind the jury of a specific admonition. The statement that “certain evidence was admitted for a limited purpose” is less definite, more abstract, and does not clearly state that evidence was admitted for a limited purpose only if the court expressly so stated during trial.

b. We would modify the first sentence in the Directions for Use for greater clarity:

“It is recommended that the judge, when reading this instruction, remind the jury of the limited purpose to which the evidence applies and of the admonition made at the time of the limiting request call attention to the purpose to which the evidence relates.”

2. CACI No. 435. Causation for Asbestos-Related Cancer Claims

Agree.

3. CACI No. 450C. Negligent Undertaking

Agree.

4. CACI No. 1208. Component Parts Rule

Agree.

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

a. The word “disparagement,” appearing for the first time in element 6, refers to the defendant’s statement or other conduct that cast doubt on plaintiff’s title. We believe a more explicit reference to that statement or conduct is preferable, as in element 5 and earlier in element 6. We would also insert the word “plaintiff’s” before “title” for greater clarity. Accordingly, we propose:

6. “That [*name of plaintiff*] did in fact suffer immediate and direct financial harm [because someone else acted in reliance on the [statement/*e.g.*, *deed*]/ [or] by incurring legal expenses necessary to remove the doubt cast by the ~~disparagement~~ [statement/*e.g.*, *deed*] and to clear plaintiff’s title.”

6. CACI No. 1802. False Light

Agree.

7. CACI No. 2023. Failure to Abate Artificial Condition on Land Creating Nuisance

a. The second sentence of this instruction states that the plaintiff must prove the following elements “in addition to proving that the condition created a nuisance.” We believe a prior instruction using the term “nuisance” and explaining its elements is necessary for the jury to understand the term “nuisance” as used in this instruction. CACI No. 2020, *Public Nuisance—Essential Factual Elements*, uses the term “nuisance,” but CACI No. 2021, *Private Nuisance—Essential Elements*, does not. We suggest modifying the first paragraph of CACI No. 2021 as follows:

“[*Name of plaintiff*] claims that [*name of defendant*] ~~interfered with [*name of plaintiff*’s use and enjoyment of [*his/her*] land~~ created a nuisance.

b. We understand the last sentence in the Directions for Use to mean that when this instruction is given with CACI No. 2021 element 3 of that instruction should be deleted. We would modify the sentence for greater clarity and to avoid any misunderstanding that this instruction should be substituted in the place of (i.e. replace) element 3:

“For private nuisance, ~~this instruction replaces~~ delete element 3 of CACI No. 2021.”

8. CACI No. 2400. Breach of Employment Contract—Unspecified Term—“At Will” Presumption

Agree.

9. CACI No. 2401. Breach of Employment Contract—Unspecified Term—Actual or Constructive Discharge—Essential Factual Elements.

a. We agree with the proposed new language “[by forcing *[name of plaintiff]* to resign]” in the introductory paragraph, and believe the instruction should provide the same specificity with respect to an actual discharge:

“*[Name of plaintiff]* claims that *[name of defendant]* breached their employment contract ~~by~~ [discharging *[name of plaintiff]*/forcing *[name of plaintiff]* to resign]”

b. In element 4, we would insert the language “by forcing *[name of plaintiff]* to resign” for greater clarity:

“That *[name of defendant]* [constructively] discharged *[name of plaintiff]* by forcing *[name of plaintiff]* to resign [e.g., *without good cause*]; and”

c. We believe the reference in the Directions for Use to the need to modify elements 4 and 5 for adverse employment actions other than discharge should be to elements 2 and 4.

10. CACI No. 2402. Breach of Employment Contract—Unspecified Term—Constructive Discharge—Essential Factual Elements

Agree.

11. CACI No. 2404. Breach of Employment Contract—Unspecified Term—“Good Cause” Defined

a. We believe the proposed new language “An employer has substantial but not unlimited discretion regarding personnel decisions” provides no useful guidance to the jury, raises more questions than it answers, and should be stricken. The existing instruction explains the scope of the employer’s discretion, without using the potentially unfamiliar word “discretion,” and this new gloss on that is not helpful.

b. We believe the instruction should refer to the employer’s substantial discretion regarding managerial employees using plainer language than “discretion”:

“~~[An employer has substantial but not unlimited discretion regarding personnel decisions], particularly~~ must be allowed a substantial scope for the exercise of subjective judgment with respect to an employee in a sensitive or confidential managerial position].”

12. CACI No. 2407. Affirmative Defense—Employee’s Duty to Mitigate Damages

Agree.

13. CACI No. 2430. Wrongful Discharge in Violation of Public Policy—Essential Factual Elements

a. We agree with the proposed revisions to this instruction.

b. In light of the new reference to “substantial factor,” we would add to the Directions for Use a cross-reference to CACI No. 430, *Causation: Substantial Factor*.

c. We believe the language reference in the second paragraph of the Directions for Use “causation between the public policy and the discharge” should state “causation between the public policy violation and the discharge.”

14. CACI No. 2433. Wrongful Discharge in Violation of Public Policy—Damages

Agree.

15. CACI No. 2510. “Constructive Discharge” Explained

a. We find the proposed new language somewhat unclear and suggest modifying it for greater clarity. We would refer to “an unusually offensive incident” and “repeated offensive conduct” rather than “adverse working conditions” that were “unusually or repeatedly offensive.” We also believe the new language should be optional because in many cases instructing the jury on this point would not help the jury to understand whether the working conditions were intolerable under the standard set forth in element 1 (i.e. so intolerable that a reasonable person in plaintiff’s position would have no reasonable alternative but to resign). Accordingly, we suggest:

~~“To be intolerable, the adverse working conditions must be unusually or repeatedly offensive to a reasonable person in [name of plaintiff]’s position. [Working conditions may be intolerable because of an unusually offensive incident or because of repeated offensive conduct.]”~~

16. CACI No. 2528. Failure to Prevent Sexual Harassment by Nonemployee

a. We would identify the nonemployee by name in the introductory paragraph and element 2 for greater clarity:

“[Name of plaintiff] claims that [name of defendant] failed to take reasonable steps to prevent harassment by a nonemployee, [name of person].

...

“2. That while in the course of employment, [name of plaintiff] was subjected to sexual harassment by a nonemployee, [name of person];”

b. Language in elements 2 and 3 seems to assume the plaintiff was an employee. We would add language to the Directions for Use to suggest modifying those elements if the plaintiff was not an employee:

“If the plaintiff was not an employee, the references to the course of employment and employees in elements 2 and 3 should be modified.”

c. We suggest the Advisory Committee consider citing the following secondary sources:

“41 Cal. Jur. 3d Labor § 82, *Sexual harassment under Fair Employment and Housing Act—Employer’s obligation to ensure workplace free of sexual harassment*

“California Civil Practice, Employment Litigation § 2:95, *Matters to consider in bringing civil action for violation of FEHA*”

17. CACI No. 2705. Affirmative Defense to Wage Order Violations—Plaintiff Was Not Defendant’s Employee

a. Other CACI instructions based on wage order violations (CACI No. 2071, *Nonpayment of Minimum Wages—Essential Factual Elements*, CACI No. 2072, *Nonpayment of Overtime Compensation—Essential Factual Elements*) do not use the language “wage order violations.” That language in this instruction would be unfamiliar to lay jurors. We would eliminate that language and specify the particular wage order violation:

“[Name of defendant] claims that [he/she/it] is not liable for any ~~wage order violations~~ nonpayment of [minimum wages/overtime pay] because [*name of plaintiff*] was not [his/her/its] employee, but rather an independent contractor.”

b. We believe the Directions for Use should cross-reference the CACI instructions based on wage order violations with which this instruction may be given: CACI Nos. 2071 and 2072.

18. CACI No. 3066. Bane Act—Essential Factual Elements

Agree.

19. CACI No. 3210. Breach of Implied Warranty of Merchantability—Essential Factual Elements

a. We agree with the proposed revisions to this instruction.

b. In light of the new reference to “substantial factor,” we would add to the Directions for Use a cross-reference to CACI No. 430, *Causation: Substantial Factor*.

20. CACI No. 3211. Breach of Implied Warranty of Fitness for a Particular Purpose—Essential Factual Elements

a. We agree with the proposed revisions to this instruction.

b. In light of the new reference to “substantial factor,” we would add to the Directions for Use a cross-reference to CACI No. 430, *Causation: Substantial Factor*.

21. CACI No. 3220. Affirmative Defense—Unauthorized or Unreasonable

Agree.

22. CACI No. 3244. Civil Penalty—Willful Violation

Agree.

23. CACI No. 3704. Existence of “Employee” Status Disputed

Agree.

24. CACI No. 3903J. Damage to Personal Property (Economic Damage)

Agree.

25. CACI No. 3903P. Damages from Employer for Wrongful Discharge (Economic Damage)

Agree.

26. CACI No. 3963. Affirmative Defense—Employee’s Duty to Mitigate Damages

Agree.

27. CACI No. 3965. No Deduction for Workers’ Compensation Benefits Paid

Agree.

28. CACI No. 4550. Affirmative Defense—Statute of Limitations—Patent Construction Defect

Agree.

29. CACI No. 4551. Affirmative Defense—Statute of Limitations—Latent Construction Defect

Agree.

Finally, although it is not within the scope of the present invitation to comment, we suggest the Advisory Committee consider the following suggestion.

We believe that when elements or other items are listed in the conjunctive or disjunctive, an “and” or “or” should follow each item, except the last item, rather than follow only the penultimate item. This way the jury will see sooner rather than later that the list is either conjunctive or disjunctive and can keep this in mind from the beginning without having to refer to the penultimate item in the list to know whether the list is conjunctive or disjunctive.

Sincerely,

Reuben A. Ginsburg
Chair, Jury Instructions Committee of the
California Lawyers Association’s
Litigation Section