

LITIGATION



March 2, 2021

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

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

re: Invitation to Comment—CACI 21-01

Dear Mr. Long:

The Jury Instructions Committee of the California Lawyers Association’s Litigation Section has reviewed the proposed revisions to civil jury instructions (CACI 21-01) and appreciates the opportunity to submit these comments.

1. CACI No. 440. Negligent Use of Nondeadly Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements

- a. We agree with the proposed revisions to the instruction.
- b. We suggest adding clear authority for the statement in the Directions for Use, and the title, that this instruction can be given if the defendant is any law enforcement officer. Penal Code section 830 et seq. do not appear to support the distinction between this instruction, stated to apply to any law enforcement officer, and CACI No. 441, applicable only to peace officers.
- c. Although it is beyond the scope of this Invitation to Comment, we suggest adding language to the Directions for Use explaining when to include the optional sentence in the first paragraph of the instruction. We suggest, “Include the bracketed sentence in the first paragraph of the instruction if there is evidence the person being arrested or detained used force to resist.”

2. CACI No. 702. Waiver of Right-of-Way

Agree.

3. CACI No. 1010. Affirmative Defense—Recreation Immunity—Exceptions

a. The California Supreme Court granted a petition for review in *Hoffman v. Young* (2000) 56 Cal.App.5th 1021, so the opinion is not binding authority. (Cal. Rules of Court, rule 8.1115(e)(1).) We would delete from the proposed revisions language for which *Hoffman* is the only authority, including the new language in the Directions for Use and citation to *Hoffman*, and the last bullet point in the Sources and Authority.

b. We agree with the deletion of “for the recreational purpose” from the instruction and with the new language in the Sources and Authority and citation to *Calhoon v. Lewis* (2000) 38 Cal.App.4th supporting this change.

4. CACI No. 1305. Battery by Peace Officer—Essential Factual Elements

Agree.

5. CACI No. 1305A. Battery by Law Enforcement Officer (Nondeadly Force)—Essential Factual Elements

a. We believe the sentence “Even if the officer is mistaken . . . unreasonable force” in the second paragraph of the instruction should be optional, in brackets, as in CACI No. 440, and language should be added to the Directions for Use stating to include this sentence if there is evidence the person being arrested or detained was using force to resist.

b. We would add an optional factor (d) to the instruction as it is in CACI No. 440:

“[(d) [*Name of defendant*]'s tactical conduct and decisions before using force on [*name of plaintiff*].]”

We find support for this factor in Penal Code section 835a, subdivision (d), which suggests, without expressly stating, that whether tactical repositioning or other de-escalation tactics were available is a factor to consider in deciding whether the force was reasonable. Also supporting this change are Penal Code section 835a, subdivision (a)(3) (declaration of legislative intent to “ensure that officers use force consistent with law and agency policies”) and Government Code section 7286, subdivision (b)(1) (requires law enforcement agencies to maintain a policy including “A requirement that officers utilize deescalation techniques, crisis intervention tactics, and other alternatives to force when feasible”).

c. We would delete the optional final paragraph of the instruction.

We find the first sentence duplicative of prior language to the effect that an officer may use reasonable force to overcome resistance: “[A/An [*insert type of officer*] may use reasonable

force to [arrest/detain/ [,/or] prevent the escape of/[,/or] overcome the resistance of] . . .”; “(c) Whether [*name of plaintiff*] was actively resisting”

The second sentence introduces a double negative that may be difficult for the jury to understand: An officer does not have to retreat; tactical repositioning is not retreat. We believe the point is that whether tactical repositioning or other de-escalation tactics were available is a factor to consider in deciding whether the force was reasonable, as stated above. We suggest adding this as factor (d), as stated, and deleting this second sentence.

The third sentence seems to invoke the affirmative defense stated in CACI No. 1304. We would delete the third sentence, delete the final paragraph in the Directions for Use, and add language to the Directions for Use stating to give CACI No. 1304 if the defendant claims to have acted in self-defense.

d. We suggest adding clear authority for the statement in the Directions for Use, and the title, that this instruction can be given if the defendant is any law enforcement officer. Penal Code section 830 et seq. do not appear to support the distinction between this instruction, stated to apply to any “law enforcement officer,” and CACI No. 1305B, stated to apply only to “peace officers.”

e. We suggest adding language to the Directions for Use explaining that the *Graham* factors are not exclusive and that additional factors can be added:

“Factors (a), (b), and (c) are often referred to as the ‘*Graham* factors.’ (See *Graham v. Connor* (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) The *Graham* factors are not exclusive (see *Glenn v. Wash. County* (9th Cir. 2011) 673 F.3d 864, 872); additional factors may be added if appropriate to the facts of the case.”

6. CACI No. 1305B. Battery by Peace Officer (Deadly Force)—Essential Factual Elements

a. We believe this instruction should begin by stating the nature of the plaintiff’s claim, as in the second sentence, rather than the defendant’s potential justification. Accordingly, we would move the first sentence to the beginning of the second paragraph, which discusses the defendant’s potential justification for using deadly force.

b. The essence of the claim is that the defendant’s use of deadly force was unlawful. We would add the word “unlawfully” to the second sentence:

“[Name of plaintiff] claims that [name of defendant] [harmed/killed] [him/her/nonbinary pronoun/name of decedent] by unlawfully using deadly force”

c. The second sentence seems to limit the claim to use of deadly force in an arrest or detention, or to prevent escape or overcome resistance incident to an arrest or detention. The plaintiff would be required to show that the plaintiff was being arrested or detained. But deadly force may be used against persons other than arrestees or detainees, and Penal Code section 835a

applies in those situations too because it applies to use of deadly force “upon another person.” (Pen. Code, § 835a, subd. (c)(1).) So we would delete the words “to arrest/detain/ [,/or] prevent escape of/ [,/or] overcome resistance to] [him/her/*nonbinary pronoun/name of decedent.*]”

d. Element 2 states that the defendant used deadly force to arrest or detain the plaintiff, but Penal Code section 835a is not so limited, as stated above. The plaintiff should not have to prove that the plaintiff was being arrested or detained. We would modify element 2 (as in CACI No. 441):

“2. That [*name of defendant*] used deadly force to ~~arrest/detain/ [,/or] prevent the escape of/ [,/or] overcome the resistance of~~ on [*name of plaintiff/decedent*]”

e. The duty to make reasonable efforts to identify oneself as a peace officer and warn that deadly force will be used applies only “Where feasible.” (Pen. Code, § 835a, subd. (c)(1)(B).) Yet condition iii does not include this qualifier. We suggest modifying condition iii:

“If practical under the circumstances, [Name of defendant] made reasonable efforts to identify [himself/herself/*nonbinary pronoun*] as a peace officer and to warn that deadly force would be used”

f. We believe the words “resources and techniques” in the penultimate paragraph of the instruction could be clearer. We would modify this sentence:

“. . . used tactical repositioning or other deescalation techniques ~~other available resources and techniques~~ as [an] alternative[s] to deadly force,”

g. The last paragraph of the instruction seems cumbersome and difficult for jurors to understand. We would modify the first sentence for greater clarity, as shown below. We would delete the reference to self-defense because CACI No. 1304 covers self-defense and should be given if self-defense is at issue; we see no need to include the right to self-defense in this instruction. Moreover, stating that an officer can use “objectively reasonable force” without stating that the use of deadly force is limited to the circumstances stated above may be misleading. We believe the discussion of retreat in the second sentence is duplicative of the previous paragraph and should be deleted. Accordingly, we would modify this paragraph:

“[A peace officer who makes or attempts to make an arrest does not have to need not retreat or stop because the person being arrested resists or threatens to resist ~~desist from efforts by reason of the resistance or threatened resistance and shall not lost the right to self defense by use of objectively reasonable force to effect the arrest or to prevent escape or to overcome resistance. Retreat does not mean tactical reposition or other deescalation tactics.~~ A peace

officer does, however, have a duty to use reasonable tactical repositioning or other de-escalation tactics.]”

h. The reference to “two options” in the first sentence of the third paragraph of the Directions for Use could be clarified by beginning that paragraph with the words “In the second paragraph of the instruction.”

7. VF-1303. Battery by Peace Officer

Agree.

8. VF-1303A. Battery by Law Enforcement Officer (Nondeadly Force)

Agree.

9. VF-1303B. Battery by Peace Officer (Deadly Force)

We would modify question 2 for the same reasons stated above relating to CACI No. 1305B:

“Did [*name of defendant*] use deadly force that was not necessary in defense of human life in [~~arresting/preventing the escape of/overcoming the resistance of~~] on [*name of plaintiff/decedent*]?”

10. CACI No. 2303. Affirmative Defense—Insurance Policy Exclusion

a. We agree with the first proposed revisions to the Directions for Use.

b. CACI No. 2306 only applies to first party insurance cases, as stated in the second paragraph of the Directions for Use for that instruction. We recommend modifying the second paragraph of the Directions for Use for this instruction to note this limitation:

“If a first party loss policy is involved, Use CACI No. 2306”

11. VF-2506A. Work Environment Harassment—Conduct Directed at Plaintiff—Employer or Entity Defendant

We agree with the proposed revision. We note that this instruction does not include “an applicant,” as in Government Code section 12940, subdivision (j)(1). Because this language should be qualified in the instruction (e.g., “an applicant for employment”), we suggest adding language to the Directions for Use stating that the statute also protects applicants and that the instruction should be modified to state the kind of applicant if applicable.

We suggest the same for CACI No. 2521A, the instruction on which this verdict form is based.

12. VF-2506B. Work Environment Harassment—Conduct Directed at Others—Employer or Entity Defendant

We agree with the proposed revision. We note that this instruction does not include “an applicant,” as in Government Code section 12940, subdivision (j)(1). Because this language should be qualified in the instruction (e.g., “an applicant for employment”), we suggest adding language to the Directions for Use stating that the statute also protects applicants and that the instruction should be modified to state the kind of applicant if applicable.

We suggest the same for CACI No. 2521B, the instruction on which this verdict form is based.

13. VF-2506C. Work Environment Harassment—Sexual Favoritism—Employer or Entity Defendant

We agree with the proposed revision. We note that this instruction does not include “an applicant,” as in Government Code section 12940, subdivision (j)(1). Because this language should be qualified in the instruction (e.g., “an applicant for employment”), we suggest adding language to the Directions for Use stating that the statute also protects applicants and that the instruction should be modified to state the kind of applicant if applicable.

We suggest the same for CACI No. 2521C, the instruction on which this verdict form is based.

14. VF-2507A. Work Environment Harassment—Conduct Directed at Plaintiff—Individual Defendant

We agree with the proposed revision. We note that this instruction does not include “an applicant,” as in Government Code section 12940, subdivision (j)(1). Because this language should be qualified in the instruction (e.g., “an applicant for employment”), we suggest adding language to the Directions for Use stating that the statute also protects applicants and that the instruction should be modified to state the kind of applicant if applicable.

We suggest the same for CACI No. 2522A, the instruction on which this verdict form is based.

15. VF-2507B. Work Environment Harassment—Conduct Directed at Others—Individual Defendant

We agree with the proposed revision. We note that this instruction does not include “an applicant,” as in Government Code section 12940, subdivision (j)(1). Because this language should be qualified in the instruction (e.g., “an applicant for employment”), we suggest adding language to the Directions for Use stating that the statute also protects applicants and that the instruction should be modified to state the kind of applicant if applicable.

We suggest the same for CACI No. 2522B, the instruction on which this verdict form is based.

16. VF-2507C. Work Environment Harassment—Sexual Favoritism—Individual Defendant

We agree with the proposed revision. We note that this instruction does not include “an applicant,” as in Government Code section 12940, subdivision (j)(1). Because this language should be qualified in the instruction (e.g., “an applicant for employment”), we suggest adding language to the Directions for Use stating that the statute also protects applicants and that the instruction should be modified to state the kind of applicant if applicable.

We suggest the same for CACI No. 2522C, the instruction on which this verdict form is based.

17. CACI No. 2600. Violation of CFRA Rights—Essential Factual Elements

a. We agree with the proposed revisions to the instruction, Directions for Use, and Sources and Authority.

b. We suggest adding to the Directions for Use language noting that “parent-in-law” is defined in the definitions (Gov. Code, § 12945.2, subd. (b)(11)), but is not included in the list of persons for whom family care leave can be taken (*id.*, 12945.2, subd. (b)(4)(B).) If the court finds that the legislative intent was to include parents-in-law, the instruction can be modified.

18. CACI No. 2601. Eligibility

Agree.

19. CACI No. 2602. Reasonable Notice by Employee of Need for CFRA Leave

Agree.

20. CACI No. 2603. “Comparable Job” Explained

Agree.

21. CACI No. 2613. Affirmative Defense—Key Employee

Agree.

22. 2620. CFRA Rights Retaliation—Essential Factual Elements

We agree with the proposed revisions, but we would modify the second paragraph of the Directions for Use to include “an inquiry.” Government Code section 12945.2, subdivision (k)(2) refers to “any inquiry or proceeding related to rights guaranteed under this section.” An inquiry may be more informal than or otherwise differ from a “proceeding.”

“The ‘other protected activity’ option of the opening paragraph and elements 2 and 4 could be providing information or testimony in an inquiry or a proceeding related to CFRA rights. (Gov. Code, § 12945.2(k)).”

23. 2630. Violation of New Parent Leave Act—Essential Factual Elements

Agree.

24. 2705. Affirmative Defense to Labor Code, Unemployment Insurance Code, and Wage Order Violations—Plaintiff Was Not Defendant’s Employee

We agree with the proposed revisions, but we believe it would be helpful to specify subdivision (b)(1) in citing Labor Code section 2775(b) in the second sentence of the second paragraph of the Directions for Use because subdivision (b)(1) is the specific authority for the statement.

25. CACI No. 3050. Retaliation—Essential Factual Elements

a. We believe the language “a substantial or motivating factor” in element 3 requires some explanation. Just as “substantial factor” (CACI No. 430) and “substantial motivating reason” (CACI No. 2507) are explained in CACI, we believe the jury requires an explanation of “a substantial or motivating factor.”

b. We believe the sixth paragraph in the Directions for Use misstates the required causation. We would modify this paragraph to better describe the required causation:

“The plaintiff must show that the defendant acted with a retaliatory motive and that the defendant’s retaliatory motive ~~plaintiff’s injury~~ was a ‘but-for’ cause of the plaintiff’s injury, *i.e.*, that the retaliatory action would not have been taken without ~~absent~~ the retaliatory motive. (See *Nieves, supra*, 139 S.Ct. at p. 1722.)”

c. Although it is beyond the scope of the Invitation to Comment, we believe the language “ordinary firmness” in element 5 is arcane and unhelpful. We would change “a person of ordinary firmness” to “an ordinary person.”

26. CACI No. 3055. Rebuttal of Retaliatory Motive

a. This proposed new instruction states an affirmative defense, so we believe the title should indicate this consistent with other affirmative defense instructions. We suggest: “Affirmative Defense—Causation: Rebuttal of Retaliatory Motive.”

b. The second and third paragraphs seem duplicative. We would modify the second paragraph as follows and delete the third:

“~~Even if~~ if [*name of plaintiff*] proves that retaliation was a substantial or motivating reason for [*name of defendant*]’s [*specify alleged retaliatory conduct*], ~~you must then consider if~~

[name of defendant] is not responsible for [name of plaintiff]’s harm if [name of defendant] proves that [name of defendant] would have taken the same action even in the absence of [name of plaintiff]’s constitutionally protected activity.”

c. We would delete the third paragraph of the instruction as unnecessary and to avoid using the language “stated nonretaliatory reason for the adverse action,” which may be difficult for the jury to understand.

d. We would modify the first paragraph of the Directions for Use for greater clarity and because we believe there is no reason to focus on the need to prove “a nonretaliatory reason,” which we view as the means, when what is really needed is to prove the result, that the defendant would have taken the same action even without plaintiff’s protected activity.

“This instruction sets forth a ~~defendant’s response~~ defense to a plaintiff’s claim of retaliation. See CACI No. 3050, *Retaliation—Essential Factual Elements*. The defendant bears the burden of proving the defense ~~non-retaliatory reason for the allegedly retaliatory conduct.~~”

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

Agree.

28. CACI No. 3904A. Present Cash Value

Agree.

29. CACI No. 4302. Termination for Failure to Pay Rent—Essential Factual Elements

We agree with the proposed revisions, but recent legislation extends the time period when the mandatory notice requirements apply to June 30, 2021, so “June 30, 2021” should replace “January 31, 2021” in the Directions for Use.

30. CACI No. 4303. Sufficiency and Service of Notice of Termination for Failure to Pay Rent

We agree with the proposed revisions, but recent legislation extends the time period when the mandatory notice requirements apply to June 30, 2021, so “June 30, 2021” should replace “January 31, 2021,” in the Directions for Use.

31. CACI No. 4308. Termination for Nuisance or Unlawful Use—Essential Factual Elements)

Agree.

32. 4329. Affirmative Defense—Failure to Provide Reasonable Accommodation

We agree with this proposed new instruction, but we would cite authority for the second sentence in the Directions for Use:

“Such a request may be made by the individual with a disability, a family member, or someone authorized by the individual with a disability to act on the individual’s behalf. (Cal. Code Regs. tit. 2, § 12176(c)(2).)”

33. CACI No. 4560. Recovery of Payments to Unlicensed Contractor

We agree with the proposed revisions. Because this instruction states the elements of a claim, we believe the title should include “Essential Factual Elements.”

34. CACI No. 4561. Damages—All Payments Made to Unlicensed Contractor

We agree with the proposed revisions. We would add Business and Professions Code section 7031, subdivision (b) to the Sources and Authority because the statute provides authority for recovery of “all compensation paid to the unlicensed contractor.”

35. CACI No. 4562. Payment for Construction Services Rendered

a. We agree with this proposed new instruction, but would modify the first sentence to state more clearly the nature of the claim, which is not only that defendant has not paid for services, but that plaintiff is entitled to recover the unpaid amount:

“[Name of plaintiff] claims that [name of plaintiff] is entitled to payment for construction services that [name of plaintiff] provided to [name of defendant] has not paid for [name of plaintiff]’s construction services.”

b. Because this instruction states the elements of a claim, we believe the title should include “Essential Factual Elements.”

Sincerely,

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