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REPORT TO THE JUDICIAL COUNCIL

For business meeting on June 22, 2012

Title
Jury Instructions: Additions, Revisions, and Revocations to Civil Jury Instructions

Rules, Forms, Standards, or Statutes Affected
Judicial Council of California Civil Jury Instructions (*CACI*)

Recommended by
Advisory Committee on Civil Jury Instructions
Hon. H. Walter Croskey, Chair

Agenda Item Type
Action Required

Effective Date
June 22, 2012

Date of Report
May 9, 2012

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Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approval of the proposed additions and revisions to the *Judicial Council of California Civil Jury Instructions (CACI).* These changes will keep *CACI* current with statutory and case authority.

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective June 22, 2012, approve for publication under rule 2.1050 of the California Rules of Court the civil jury instructions prepared by the committee. On Judicial Council approval, the new and revised instructions will be published in the June 2012 supplement to the 2012 edition of the *Judicial Council of California Civil Jury Instructions (CACI).*

A table of contents and the proposed additions and revisions to the civil jury instructions are attached at pages 7-42.

Previous Council Action

At its meeting on July 16, 2003, the Judicial Council adopted what is now rule 10.58 of the **California Rules of Court, which established the advisory committee and its charge.[1] At** this meeting, the council voted to approve the *CACI* instructions under what is now rule 2.1050 of the California Rules of Court. Since that time, the committee has complied with both rules by regularly proposing to the council additions and changes to *CACI.* This is the 20th release of *CACI.*

The council approved *CACI* release 19 at its December 2011 meeting.

Rationale for Recommendation

The committee recommends proposed additions, revisions to, and renumbering of the following 25 instructions and verdict forms: 409, VF-404, 2334, 2421, 2500, 2505, 2509, 2510, 2540, 2541, 2560, 2570, 3001, 3008, 3020, 3021, 3026, 3027, VF-3010, VF-3011, 3206, 3222, 3230, 3231, and 5013. Of these, 19 are revised and 4 are newly drafted. Two (CACI Nos. 3206 and 3222) are proposed to be renumbered from CACI Nos. 3230 and 3213, respectively.

The Judicial Council's Rules and Projects Committee (RUPRO) has also approved changes to 71 additional instructions under a delegation of authority from the council to RUPRO.[2]

The instructions were revised or added based on comments or suggestions from justices, judges, and attorneys; proposals by staff and committee members; and recent developments in the law. Below is a summary of the more significant changes recommended to the council.

Primary Assumption of Risk—liability of instructors, trainers, or coaches

The committee proposes revising CACI Nos. 409 and VF-404, *Primary Assumption of Risk—Liability of Instructors, Trainers, or Coaches,* to account for an additional basis of liability. In order to avoid the defense of primary (or implied) assumption of risk, the plaintiff must currently show that the coach, trainer, or instructor intended to cause the injury or acted so recklessly that

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[1] Rule 10.58(a) states: "The committee regularly reviews case law and statutes affecting jury instructions and makes recommendations to the Judicial Council for updating, amending, and adding topics to the council's civil jury instructions."

[2] At its October 20, 2006, meeting, the Judicial Council delegated to RUPRO the final authority to approve nonsubstantive technical changes and corrections and minor substantive changes to jury instructions unlikely to create controversy. The council also gave RUPRO the authority to delegate to the jury instructions advisory committees the authority to review and approve nonsubstantive grammatical and typographical corrections and other similar changes to the jury instructions, which RUPRO has done.

Under the implementing guidelines that RUPRO approved on December 14, 2006, which were submitted to the council on February 15, 2007, RUPRO has the final authority to approve (among other things) additional cases and statutes cited in the Sources and Authority and additions or changes to the Directions for Use. RUPRO has already given final approval to 48 instructions that have only these changes. Further, under its delegation of authority from RUPRO, the advisory committee has made other nonsubstantive grammatical, typographical, and technical corrections.

his or her conduct was entirely outside the range of ordinary activity involved in teaching or coaching the sport or activity. The proposed revision would provide for liability also if the coach's, trainer's, or instructor's failure to use reasonable care increased the risks over and above those inherent in the sport or activity. A 2011 case clarifies that liability may also be based on an unreasonable increase in risk.[3]

Fair Employment and Housing Act—adverse employment action and constructive discharge

Several trial judges have requested a specific CACI instruction on what constitutes an "adverse employment action" under the California Fair Employment and Housing Act (FEHA). Currently, CACI No. 2505, *Retaliation,* defines an adverse employment action as "conduct that, taken as a whole, materially and adversely affected the terms and conditions of employment.[4]" However, whether there has been an adverse employment action is not a question limited to retaliation cases; various discrimination claims under FEHA also require an adverse employment action. Therefore, the committee proposes new CACI No. 2509, *"Adverse Employment Action" Explained,* as a separate instruction that can be used with any claim under FEHA for which an adverse action is required.

Similarly, the committee proposes new FEHA instruction CACI No. 2510, *"Constructive Discharge" Explained.* A constructive discharge is the equivalent of a dismissal and, therefore, also constitutes an adverse employment action.[5]

The committee proposes modifying five FEHA discrimination and retaliation instructions[6] to provide options for alleging an adverse employment action or constructive discharge if there was no clear and obvious adverse action such as a termination. The two new specific instructions would be given in support of the instruction on the underlying claim.

Unruh Civil Rights Act and related state civil rights claims

The committee proposes revisions to several of the instructions in the group on California civil rights actions (CACI Nos. 3020–3028 and corresponding verdict forms). First, the Legislature has expanded the express protected classifications in Civil Code sections 51 and 51.5 to include genetic information, marital status, and sexual orientation.[7] CACI Nos. 3020, *Unruh Civil Rights Act—Essential Factual Elements,* and 3021, retitled *Discrimination in Business Dealings—*

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[3] *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 845.

[4] *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1053–1054.

[5] *Mullins v. Rockwell Internat. Corp.* (1997) 15 Cal.4th 731, 737.

[6] See CACI Nos. 2500, *Disparate Treatment—Essential Factual Elements;* 2505, *Retaliation;* 2540, *Disability Discrimination—Disparate Treatment—Essential Factual Elements;* 2560, *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements;* and 2570, *Age Discrimination—Disparate Treatment—Essential Factual Elements*.

[7] See Sen. Bill 559 (Stats. 2011, ch. 261), Assem. Bill 887 (Stats. 2011, ch. 719).

Essential Factual Elements (and VF-3010 and VF-3011), have been revised to include these new protected classifications.

An attorney also pointed out that several instructions are currently incorrectly titled as being under the Unruh Act. The Unruh Act is actually limited to Civil Code section 51[8] (CACI Nos. 3020, VF-3010). Civil Code section 51.5 (CACI Nos. 3021, VF-3011), which prohibits discriminating boycotts and other similar business dealings, is not part of the act. Hence, the titles of CACI Nos. 3021 and VF-3011 have been changed to remove reference to the Unruh Act.

CACI Nos. 3026, *Unruh Civil Rights Act—Damages*, and 3027, currently titled *Unruh Civil Rights Act—Civil Penalty*, are based on Civil Code section 52, which provides two measures of damages for violation of the various California civil rights statutes, including the Unruh Act. Section 52(a) provides a measure of damages for section 51 (the Unruh Act) and also sections 51.5 and 51.6 (gender price discrimination). The title reference to the Unruh Act in CACI No. 3026 has been retained, and the Directions for Use would now note that the instruction also applies to sections 51.5 and 51.6 and can be given with CACI Nos. 3021 and 3022, *Gender Price Discrimination—Essential Factual Elements*.

Civil Code section 52(b) provides a measure of damages for violations of the Ralph Act (Civ. Code, § 51.7) and also section 51.9, sexual harassment in certain defined relationships. The title reference of CACI No. 3027 has been changed from the Unruh Act to the Ralph Act. The Directions for Use would now note that the instruction can be given with CACI Nos. 3023A, *Acts of Violence—Ralph Act—Essential Factual Elements;* 3023B, *Threats of Violence—Ralph Act—Essential Factual Elements;* and 3024, *Sexual Harassment in Defined Relationship—Essential Factual Elements*.

Several public commentators pointed out that harm and causation are presumed in order to recover $4,000 statutory damages.[9] Therefore, it is unnecessary to prove elements 3 and 4 (harm and substantial factor) of CACI Nos. 3020 and 3021, or to give CACI No. 3026, unless actual damages are sought in addition to the statutory damages. The Directions for Use of all three instructions would now make this clear.

Finally, for CACI No. 3020, disability has been removed as a basis of discrimination for which intent to discriminate must be proved.[10]

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[8] See *Semler v. General Electric Capital Corp.* (2011) 196 Cal.App.4th 1380, 1404 [The [Unruh] Act is contained solely in Civil Code section 51].

[9] Civ. Code, § 52(a); see *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33.

[10] See Civ. Code, § 51(f); *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 665.

Song-Beverly Consumer Warranty Act

An attorney who specializes in Song-Beverly (lemon law) cases provided the committee with a number of additional instructions that he proposed adding to the Song-Beverly series. The committee considered them all and agreed to propose two for adoption. Proposed new CACI No. 3230, *Conditional Reasonable Use Permitted,* clarifies that just because the consumer continues to use the product does not automatically mean that there has *not* been a breach of warranty. Several comments from or submitted on behalf of automobile manufacturers and dealers pointed out that continued use is relevant to the jury's consideration of whether the product was substantially impaired, as required by the Song-Beverly Act. Substantial impairment is the subject of a separate CACI instruction (see CACI No. 3204, *"Substantially Impaired" Explained*). Factor (d) in 3204 directs the jury to consider continued use in determining substantial impairment. The committee expanded the Directions for Use of 3230 to direct users to 3204 factor (d).

A second proposed new instruction is CACI No. 3231, *Continuation of Express or Implied Warranty During Repairs*. This instruction clarifies that a warranty cannot expire while the product is undergoing repairs after having been returned to the dealer. When the product is then returned to the consumer after repairs have been completed, the warranty will terminate unless the consumer gives notice within 60 days of completion that the repairs were unsuccessful. The committee shared the proponent's concern that the jury might notice that the warranty expired while the product was "in the shop," and incorrectly take this into account. The auto-industry commentators were concerned that the jury might think that the warranty would never expire once the product has been returned for repairs, and that a warranty claim could be brought years later when the repaired part reached its normal replacement date. The committee did not see any possibility that the instruction could be construed or misunderstood in this way.

Finally, the committee decided that some renumbering and reorganization of the Song-Beverly instructions was needed. Currently, there is a single instruction numbered between 3230 and 3239: CACI No. 3230, *Breach of Disclosure Obligations—Essential Factual Elements*. In order to open up numbers 3230–3239 for new instructions, current 3230 is proposed to be renumbered to 3206, which would group it with other "essential factual elements" instructions under Song-Beverly. The committee also proposes renumbering CACI No. 3213, *Affirmative Defense—Statute of Limitations*, to number 3222 in order to group all the affirmative defenses together between 3220 and 3229.

Deadlocked jury admonition

A trial judge requested stronger language in CACI No. 5013, *Deadlocked Jury Admonition*, to encourage a deadlocked jury to keep deliberating and to try to reach a verdict. The trial judges on the committee were strongly in support of this proposal. The committee proposes adding an optional paragraph advising the jury that: "If you are unable to reach a verdict, the case will have to be tried before another jury selected in the same manner and from the same community from which you were chosen and at additional cost to everyone."

Comments, Alternatives Considered, and Policy Implications

The proposed additions and revisions to *CACI* circulated for comment from January 23 to March 2, 2012. Comments were received from 27 different commentators. The committee evaluated all comments and revised some of the instructions as a result. A chart with summaries of all comments received and the committee's responses is attached at pages 43-130.

Of the comments received, 9 addressed the proposed changes to the Unruh Act instructions, principally CACI Nos. 3020, *Unruh Civil Rights Act—Essential Factual Elements,* and CACI No. 3021, *Discrimination in Business Dealings—Essential Factual Elements,* discussed above.

Rule 2.1050 of the California Rules of Court requires the committee to update, amend, and add topics to *CACI* on a regular basis and submit its recommendations to the council for approval. The proposed new, revised, and renumbered instructions are necessary to ensure that the instructions remain clear, accurate, and complete; therefore, the advisory committee did not consider any alternative actions.

Implementation Requirements, Costs, and Operational Impacts

No implementation costs are associated with this proposal. To the contrary, under the publication agreement, the official publisher, LexisNexis, will print a new edition and pay royalties to the Administrative Office of the Courts (AOC). Other licensing agreements with other publishers provide additional royalties.

The official publisher will also make the revised content available free of charge to all judicial officers in both print and HotDocs document assembly software. With respect to commercial publishers, the AOC will register the copyright of this work and continue to license its publication of the instructions under provisions that govern accuracy, completeness, attribution, copyright, fees and royalties, and other publication matters. To continue to make the instructions freely available for use and reproduction by parties, attorneys, and the public, the AOC provides a broad public license for their noncommercial use and reproduction.

Attachments

1. Chart of comments, at pages 7-42
2. Full text of new and revised *CACI* instructions, at pages 43-130

CACI 12-01
New and Revised CACI Instructions
All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Summary of Comment	Proposed Response (BG)
306A, *Unformalized Agreements*	State Bar of California, Litigation Section, Jury Instructions Committee	The first sentence of the instruction refers to an agreement that "was never written and signed." Such an agreement may be (1) unwritten and unsigned or (2) written but unsigned. The committee believes that element 2 of the instruction should encompass both of these situations. That element begins, "That the parties agreed to be bound without a written agreement." This language encompasses the situation in which the agreement was unwritten and unsigned, but does not encompass the situation where the agreement was written but unsigned. Because a signed agreement typically must be in writing, the committee believes that "without a signed agreement" would encompass both the situation where the agreement was unwritten and unsigned and the situation where the agreement was written but unsigned. We therefore suggest modifying element 2 as follows (additions underscored, deletions shown by strikethrough): 2. That the parties agreed to be bound without a ~~written~~ signed agreement" [or before a written agreement was prepared].	CACI No. 306A was included in this release only for renumbering. This comment addresses matters not considered by the committee and outside of the revisions posted for comment. It will be considered in the next release cycle.
		The Directions for Use do not alert the user to the need to consider whether to use the bracketed text in the instruction. The committee suggests adding such language as follows: "Do not give this instruction unless the defendant has testified or offered other evidence in support of his or her contention. Adapt this instruction as necessary with the bracketed optional text to fit the circumstances of the particular case and to avoid jury confusion in applying the rule."	This comment addresses matters not considered by the committee and outside of the revisions posted for comment. It will be considered in the next release cycle.
306B, *Agreement Formalized by*	Orange County Bar Association,	The Instruction uses "contract" and "agreement" seemingly without regard to the very distinct and complex definitions	In light of the many points made by the two commentators that the committee

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Electronic Means—Uniform Electronic Transactions Act	by Dimetria Jackson, President	for each, set forth in the Act (see Section 1633.2(d) and (a), respectively). These definitions cannot be ignored, as the Instruction is intended to apply only to transactions governed by the Act.	has not fully considered, this proposed new instruction will be returned to the committee for further consideration and development.
		The first sentence of the instruction implies and could be interpreted by a jury to mean, that the plaintiff is claiming, simply because the parties used electronic means, a valid contract resulted. The instruction essentially sets forth the first hurdle for a plaintiff, yet makes numerous references to "contract" in various contexts which present its existence as almost presumed, e.g., "valid contract," "binding contract," contract documents," "to sign the contract." This should be presented as a threshold issue, with some tie-in or reference to contract elements yet to be proved or which also must be proved by the plaintiff.	This comment will be addressed when the committee reconsiders this instruction.
		Based on its title, the instruction applies to any agreement formalized by electronic means. Its second sentence, however, apparently derives from Section 1633.8(a) (cited at "Sources and Authority"), which applies only "[i]f the parties have agreed to conduct a transaction by electronic means and a law requires [a writing] … (emphasis added)." If no law requires a writing, would it then be appropriate to include this sentence in this instruction? It seems that the Act may contemplate contracts without a required writing, to wit, without a record capable of retention.	This comment will be addressed when the committee reconsiders this instruction.
		This second sentence uses the phrase "the opportunity to keep copies of the contract documents." This phrase appears nowhere in the Act. If the sentence is relying for its authority on Section 1633.8(a), the use of "opportunity" is vague, inaccurate, and unnecessary, as the section states the relevant time as "at the time of receipt." The Instruction should reflect this.	This comment will be addressed when the committee reconsiders this instruction.

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		No reference could be found in the Act to "copies." Section 1633.8(a) does, in connection with an electronic record, reference "print and store" in explaining what "capable of retention" means. "Capable of retention" or "retention" are otherwise, undefined in the Act. The definition of neither "electronic record" nor of "record" (see § 1633.2(g) and (m), respectively) mentions "retention" or "capable of retention." Given the language of the Act then, the concept or use of the word "copies" may be inappropriate and confusing to a jury.	This comment will be addressed when the committee reconsiders this instruction.
		In the second paragraph of the Instruction, the language addressing electronic signatures should more accurately reflect the proof required of the plaintiff as regards not only the intent but the act of the party alleged to have used an electronic signature.	This comment will be addressed when the committee reconsiders this instruction.
		The following recasting of the instruction's language is offered as a suggested starting point for a revised instruction: If the parties agree, a binding contract may be formed using [*specify electronic means, e.g., email messages*] as long as the parties were able, at the time each [*e.g., email message*] was received, to retain the [*e.g., email message*] in a form which the parties are able to retrieve and read, or by printing it. [*Name of plaintiff*] claims that the parties entered into a valid contract, the required terms of which were set forth in [*e.g., email messages*]. [*Name of plaintiff*] must prove that … [If the parties have agreed, a contract may be signed by use of an electronic signature. [*Name of plaintiff*] must prove that [*name of defendant*] intended to sign the contract using an electronic signature, and did so.]	This comment will be addressed when the committee reconsiders this instruction.

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		Section 1633.3(e) should be included in the Sources and Authority.	This comment will be addressed when the committee reconsiders this instruction.
	State Bar of California, Litigation Section, Jury Instructions Committee	The committee agrees with the proposed instruction, but with suggested revisions. The first sentence should refer to a "valid contract in which some or all of the required terms were supplied by" electronic means. We believe that "because" may suggest a causation requirement that seems inappropriate in this instruction and is potentially distracting in this context. We also believe that the definition of "automated transaction" in Civil Code section 1633.2(b) as a transaction that takes place "in whole or in part" by electronic means indicates that a contract formed by an automated transaction may have some or all of the required terms supplied by electronic means. We believe that the instruction should expressly encompass the situation in which electronic means supplied only some of the required terms.	This comment will be addressed when the committee reconsiders this instruction.
		The second sentence refers to the parties' "opportunity to keep copies of the contract documents." Civil Code section 1633.8, subdivision (a) refers to "an electronic record capable of retention by the recipient at the time of receipt." The committee believes that "copies of contract documents" could be construed to refer to paper copies, as distinguished from electronic records. We suggest that this language be modified to more closely follow the statutory language.	This comment will be addressed when the committee reconsiders this instruction.
		Civil Code section 1633.8(a) seems to state that the electronic record must be capable of retention by the recipient only if "a law requires a person to provide, send, or deliver information in writing." The proposed new instruction, in contrast, seems to require that "the parties had the opportunity to keep copies of the contract documents" in all circumstances involving a contract formed by electronic means, even if the law does not specifically require the	This comment will be addressed when the committee reconsiders this instruction.

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		provision of information in writing. The committee suggests that the instruction be modified to conform with the statute in this regard.	
		The committee suggests that the following language be added at the end of the first paragraph of the instruction. Civil Code section 1633.5(b) and the second paragraph of the Directions for Use refer to this, but the instruction does not: "You must determine whether the parties agreed to do so in this case from the context and surrounding circumstances, including the conduct of the parties."	This comment will be addressed when the committee reconsiders this instruction.
		The second paragraph seems to state that a contract may be signed using an electronic signature only if the parties specifically so agreed, apart from the more general agreement to enter into a contract by electronic means, which is referenced in the first paragraph. The Sources and Authority cite no authority for the specific requirement that the parties must have agreed to use an electronic signature. The committee suggests that appropriate authority should be cited in the Sources and Authority or, alternatively, the instruction should modified in this regard.	This comment will be addressed when the committee reconsiders this instruction.
		The second paragraph states that the plaintiff must prove that the defendant "intended to sign the contract using an electronic signature." The committee believes that this language should be tailored to the particular circumstances of each case as follows for greater clarity: "… [*name of defendant*] intended by the [*specify the electronic act or event that plaintiff contends was an electronic signature*] to sign the contract.	This comment will be addressed when the committee reconsiders this instruction.
		The committee believes that it would be helpful to revise the Directions for Use as follows:	This comment will be addressed when the committee reconsiders this

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		This instruction is for use if the plaintiff is relying on the Uniform Electronic Transactions Act (UETA, Civ. Code § 1633.1 et seq.) to prove contract formation. Do not use this instruction where the transactions in issue are excluded under Civil Code section 1633.3(b) or (c) and the UETA is not made applicable under Civil Code section 1633.3(d) or (f). The first paragraph of the instruction asserts that a party contends that electronic communications ~~means~~ were used to supply some or all of the essential elements of the contract. Give the second paragraph also if a party contends that an electronic signature was used. ~~The most likely~~ This instruction deals only with the most basic jury issues presented by Civil Code section 1633.5(b), ~~is~~ whether the parties agreed to rely on electronic records and signatures to ~~finalize~~ enter into their agreement and whether an electronic signature was actually made and delivered. ~~Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct. (See Civ. Code, § 1633.5(b).)~~ Separate instructions will be necessary where the case presents for jury resolution fact issues raised by other provisions of the UETA.	instruction.

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		Although ~~T~~the UETA does not specify any particular transmissions that meet the definition of 'electronic record,' such as e-mail or fax~~.~~ (~~S~~see Civ. Code, § 1633.2(g)~~.~~), the broad definition of 'electronic' in the statute (*id.*, § 1633.2(e)) leaves no doubt that commonly used electronic transmission devices such as ~~Nevertheless, there would seem to be little doubt that~~ e-mail and fax meet the definition. ~~The parties will probably stipulate accordingly, or~~ In the absence of a stipulation on this point, the court may find that the particular transmission at issue meets the definition as a matter of law. Note that the third paragraph above refers to the issue whether the parties agreed to rely on electronic signatures. If the Advisory Committee determines that the law does not require such an agreement and modifies the instruction accordingly, this language in the Directions for Use should be modified.	
		The committee suggests that consideration be given to drafting additional instructions under the UETA. We would be pleased to offer our assistance in this regard.	The committee will work with the Bar Association group in the future development of jury instructions under the Uniform Electronic Transactions Act.
409, *Primary Assumption of Risk—Liability of Instructors, Trainers, or Coaches*, and VF-404, *Liability of*	Consumer Attorneys of California, by Nancy Peverini, Legislative Director and Cody A. Drabble,	The revision of the term "sport" to "sport or other activity," can confuse a jury by inappropriately applying the primary assumption of risk affirmative defense to a multitude of activities that have inherent risks. Further, we could find no specific case law justifying this expansion. For example, jogging and bicycling for pleasure have	The words "or other activity" are not part of the static text of the instruction that would be seen by the jury. They are only used in italicized instructions to the drafter as to what sport or activity to use in the instruction. The court will have decided whether the activity in the case

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Instructors, Trainers, or Coaches	Associate Research Attorney	inherent risks relating to everyday traffic accidents, tripping and falling, or colliding with other pedestrians or dogs on a sidewalk. The rationale of *Knight v. Jewett* would not apply to these ordinary recreational activities, but the phrase "or other activity" would open the door to include activities not within the ambit of *Knight v. Jewett* and other primary assumption of risk case law. Since current law only supports instructing the jury on the primary assumption of risk affirmative defense under certain circumstances, the proposed revision should also include appropriately restricted phraseology. A second option would be rephrasing the term to state "sport or other competitive activity" to clarify that the primary assumption of risk affirmative defense does not apply to ordinary recreational activities.	is one to which primary assumption of risk applies. The jury will not be asked to make that determination, and the instruction does not suggest that it will.
	Kristine Meredith, Attorney at Law, San Mateo, CA	I urge approval of CACI 409 & VF-404.	No response necessary.
	State Bar of California, Litigation Section, Jury Instructions Committee	409: Agree. VF-404. The committee agrees with the proposal with the following suggested revisions: a. The committee suggests that the proposed new language in the transitional paragraph following question 2, “either option for” and “to both options,” be made optional by placing that language in brackets because one or both of the questions in item 2 may be given. b. It appears that the proposed new option in question 2 should end with a question mark rather than a semicolon.	Both comments regarding VF-404 correctly point out drafting errors. These errors have been fixed. The title to the verdict form has also been revised to include “Primary Assumption of Risk—“ to match the same addition to CACI No. 409

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Contracts and Negligence Series	Hon. Geoffrey Glass, Judge of the Superior Court, Orange County	New Contract and Negligence Instructions: I think the instructions are unnecessary as the concepts are already covered in existing instructions.	No new negligence instructions are proposed. The only new contract instruction proposed is CACI No. 306B concerning the Uniform Electric Transactions Act, which is not addressed in any existing instruction.
2421. *Breach of Employment Contract—Specified Term—Good-Cause Defense*	State Bar of California, Litigation Section, Jury Instructions Committee	The committee agrees with the proposal with the following suggested revisions: Although the proposed revisions do not modify the instruction itself, the committee suggests that "continually" in the second option be changed to "habitually" to more closely follow Labor Code section 2924, which refers to "habitual neglect." The committee believes that habitual neglect is not necessarily continual.	The CACI task force changed the statutory "habitually" to a more plain-language "continually" in its original version. The committee does not think it necessary to revisit this decision.
		In the second sentence of the first paragraph of the Directions for Use, the committee suggests retaining "employment contract for a specified term" for greater clarity, even with the additional proposed language in the first sentence.	Those words have been added to the first sentence and the committee does not believe they need to be repeated in the second sentence.
		The committee disagrees with the proposed revisions to the second paragraph of the Directions for Use and would retain the current language. We believe that the cited opinions do not directly address whether parties may contractually modify the statutory grounds to terminate an employment contract for good cause and should not be cited as authority on this point.	The committee recognizes that *Uecker & Assocs. v. Lei (In re San Jose Med. Mgmt.*) (2007 B.A.P. 9th Cir.) 2007 Bankr. LEXIS 4829 does not expressly hold that the parties may define "good cause" in the contract. However, the court discusses the issue and cites several sources that are on point. Reading the case enhances one's understanding of the issue. Further, the committee believes the freedom to contract would require authority expressly denying the right to draft around the statute. In the absence of that authority, the parties are free to define "good cause" as they choose.

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Instruction	Commentator	Summary of Comment	Proposed Response (BG)
		The committee disagrees with the proposed revisions to the third paragraph of the Directions for Use. Statutes enacted after the enactment of Labor Code section 2924 may protect an employee who is absent from work because of a disability or on medical or family leave. A plaintiff's continued incapacity may be excused in those circumstances to the extent that another statute affords protection to the plaintiff, but questions may arise as to whether those protections cover the entire period of incapacity. We believe that in such cases it may be appropriate to modify the third option rather than delete it entirely. We therefore suggest the following changes to the current third option: Modification or deletion of the third option may be necessary if the plaintiff's ~~has a~~ statutory right to be absent from work (for example, for family ~~and~~ or medical leave) or disability-related rights (for example, for accommodation) are at issue."	The commentator's proposed revision does not really assist in determining when "modification" is appropriate as opposed to "deletion." The committee did, however, revise the last sentence to clarify that the statutory right to be absent must last for the entire period of incapacity. The committee also changed "family *and* medical leave" to "family *or* medical leave."
		The committee believes that the quotation from *Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 38-39, in the fourth bullet point in the Sources and Authority is too lengthy and should be limited to the first three lines and end after the words "breached the contract."	The committee believes that the entire excerpt is helpful to understanding the law supporting the instruction.
		The committee believes that the Sources and Authority ordinarily should be limited to primary sources and that the quotation from the Rutter Group (which is also cited in Secondary Sources) in the ninth bullet point should be deleted.	As a general principle, the committee agrees that secondary sources should not be included under Sources and Authority. Occasionally, however, when a secondary source expressly addresses an unresolved issue and no primary authority is found, inclusion of the secondary source is considered

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			acceptable. That is the case here. Justice Chin's Rutter Group publication expressly acknowledges that the parties are free to expand grounds for termination beyond those stated in the statute; albeit, without a citation to primary authority.
2500, 2505, 2509, 2510, 2540, 2560, 2570 (FEHA Adverse Employment Action and Constructive Discharge	Hon. Judy Hersher, Superior Court of Sacramento	I like and applaud the proposed changes to the FEHA causes of action. I am particularly appreciative of the new paragraph(s) numbered 3 in the various FEHA claims and their ease of use with the new definitions of adverse employment action and constructive discharge. Much needed and much appreciated.	No response necessary.
2500. *Disparate Treatment—Essential Factual Elements*	The California Apartment Association	The instruction should be revised to add an additional essential factual element. According to the case law referenced in the instructions (*Jones v. Department of Corrections*), the plaintiff must prove that he or she was qualified for the position in order to prevail on a claim of disparate treatment.	This comment addresses matters not considered by the committee and outside of the revisions posted for comment. It will be considered in the next release cycle.
	State Bar of California, Litigation Section, Jury Instructions Committee	The committee agrees with the proposal, except that we believe that the first line of the new paragraph in the Directions for Use should refer to "whether the employer's *alleged* acts constituted an adverse employment action." This is because whether those acts occurred at all may be a question of fact for the jury under the third element of the instruction.	While the commentator is technically correct, the committee does not believe that it is important to include "alleged" in this sentence.
2505. *Retaliation*	State Bar of California, Litigation Section, Jury Instructions Committee	Agree	No response necessary.

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2509. *"Adverse Employment Action" Explained*	California Employment Lawyers Association, by David M. deRobertis	CELA agrees that it makes sense to have a separate instruction defining "adverse employment" action rather than incorporating the definition of "adverse employment action" directly into the instructions that list the elements of the particular claim (e.g., instructions 2500, 2505, etc.).	No response necessary
		The proposed definition of "adverse employment action" lacks the key defining language found in *Yanowitz* ,- i.e., "adverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects/or advancement or promotion. There are times when conduct that does not presently constitute a material and adverse change in the terms and conditions of employment may nonetheless constitute an adverse employment action because of its likely impact on the employee in the future. The "reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion" standard thus encompasses the concept that conduct that could in the future have a material and adverse effect itself can constitute adverse action.	The committee agrees and has added the proposed language to the instruction. The committee has also added a second sentence from the same paragraph in *Yanowitz:* "However, minor or trivial actions or conduct that are not reasonably likely to do more than anger or upset an employee cannot constitute an adverse employment action."
	Tony M. Sain, Attorney at Law, Los Angeles	I suggest that "materially" be revised to "materially and substantially".	Adding the language about "minor or trivial actions" (see response above) addresses substantiality.
		Add to Sources and Authority: An "adverse employment action" is an "action that materially affects the terms, conditions, or privileges of employment...." See *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1051; *Gathenji v. Autozoners, LLC* (E.D. Cal. 2011) 2011 U.S. Dist. LEXIS 46276, *43 (where plaintiff had not had his job responsibilities, pay, or position-rank diminished in the actionable period, he could not meet his prima facie burden of showing an adverse employment action subsequent to his demotion). While an	The suggested language is not a direct quotation from a case and therefore does not conform to CACI format. However, the committee has added an excerpt from *Yanowitz* that includes the language added to the instruction in response to the comment from CELA.

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		"adverse employment action" includes not only "so-called ultimate employment actions such as termination or demotion, but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career," as a matter of law, "a mere offensive utterance or even a pattern of social slights by either the employer or coemployees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment." Id. at p. 1054.	
		Add to Sources and Authority: "Mere ostracism in the work place is insufficient to establish an adverse employment decision." See *Kelley v. The Conco Cos.* (2011) 196 Cal.App.4th 191, 212.	The committee has added the entire paragraph from Kelley in which the proposed sentence is found: "Mere ostracism in the workplace is insufficient to establish an adverse employment decision. [Citations] However, "'[W]orkplace harassment, if sufficiently severe or pervasive, may in and of itself constitute an adverse employment action sufficient to satisfy the second prong of the prima facie case for … retaliation cases.' [Citation]."
		Add to Sources and Authority: Minor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable. *Holmes v. Petrovich* (2011) 191 Cal.App.4th 1047, 1062-1063. In other words, the	The excerpt from *Yanowitz* that has been added includes language that explains that minor or relatively trivial actions or conduct is insufficient.

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		acts at issue must cause "a 'substantial adverse change in the terms and conditions of the plaintiff's employment'" in order to constitute adverse employment actions at law. Id. at p. 1063.	
		Add to Sources and Authority: Under California law, "[a] change [in employment conditions] that is merely contrary to the employee's interests or not to the employee's liking is insufficient" to constitute an adverse employment action. See *Malais v. Los Angeles City Fire Dept.* (2007) 150 Cal.App.4th 350, 358 (affirming that a limitation to special assignments cannot be an adverse employment action). This is because "[w]orkplaces are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that...to the level of a materially adverse employment action." Id. (internal quotations and citations omitted).	The committee agreed that the proposed excerpt, if properly formatted as a direct quotation from the case, is helpful and has added it to the Sources and Authority.
		Add to Sources and Authority: Thus, for example, the following workplace acts and omissions were held not to constitute adverse employment actions under FEHA as a matter of law: written evaluations that were negative; a single offensive confrontation; lack of lab apparel for a doctor; sharing of a desk/work-space; transfer to a facility alleged to be more dangerous and/or of lower reputation; requirement to be on-call; and/or lack of training-orientation where timing was an issue. See *McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 390–397; *Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1455–1457 (concluding that courts must "requir[e] an employee to prove a substantial adverse job effect" in order to "'guard[]	This proposed addition is not a direct quotation from a case. CACI standards restrict Sources and Authority to direct quotations.

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		against both 'judicial micromanagement of business practices'...and frivolous suits over insignificant slights' "). Along these lines, if negative comments by themselves cannot be adverse employment actions, lack of commendations (positive comments) also cannot be adverse employment actions. See generally *Malais, supra,* 150 Cal.App.4th at p. 357.	
		Add to Sources and Authority: Similarly, where a plaintiff-employee alleged that her employer subjected her to coworkers' negative comments by forwarding a work email about her prior miscarriages and potential abortion, the court held that, plaintiff's allegations were "insufficient to establish an adverse employment action." See *id.* at pp. 1062–1063. Furthermore, where a plaintiff-employee claimed that she had received less overtime opportunities than others, the court held that such a claim did not rise to the level of an adverse employment action. See *Malais, supra,* 150 Cal.App.4th at p. 358; accord *Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 511-512. Additionally, where an employee was subjected to daily comments that she was not doing her job, these acts did not rise to the level of adverse employment actions supporting a FEHA claim. See Jones v. Department of Corrections (2007) 152 Cal.App.4th 1367, 1379. Likewise, the mere utterance of a racial epithet to an employee was held to be insufficient to constitute an adverse employment action. See *Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 463.	This proposed addition is not a direct quotation from a case. CACI standards restrict Sources and Authority to direct quotations.
	State Bar of California, Litigation Section, Jury	The committee agrees with the proposal to create a separate instruction explaining the meaning of "adverse employment action" and agrees with the second paragraph of the instruction. We believe that the first paragraph, however, is	The committee agrees that this instruction should not address causation and has deleted the "because of" language from the first paragraph.

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	Instructions Committee	unnecessary and potentially misleading and therefore would delete it. Other instructions state the essential elements of the particular cause of action, including for example that the plaintiff's protected status or protected activity "was a motivating reason" for the adverse employment action (CACI Nos. 2500, 2505). So there is no need for this instruction to restate in different words the element of causation. Moreover, the statement in this instruction that the plaintiff was subjected to an adverse employment action "because of" the defendant's discriminatory or retaliatory acts may suggest a different standard from the statement that the plaintiff's protected status or protected activity "was a motivating reason" for the adverse employment action, resulting in jury confusion.	
2510 *"Constructive Discharge" Explained*	California Apartment Association, by Heidi Palutke, Research Counsel	Add at end of instruction: In general, single, trivial or isolated acts of misconduct are insufficient to support a claim of constructive discharge. This language comes from the case law (*Turner v. Anheuser-Busch*) cited in support of the instruction.	The committee believes that language currently in the instruction adequately expresses this point. The instruction says that the defendant's conduct must be "so intolerable that a reasonable person in [*name of plaintiff*]'s position would have had no reasonable alternative except to resign."
	John Scheppath, Attorney at Law, Irvine	Currently, the operative instructions dealing with constructive discharge (CACI Nos. 2402, 2431, 2432) all include language: "That [name of plaintiff] resigned because of the intolerable conditions." This language is designed to capture the causation requirement in constructive discharge cases – the employee must resign because of the intolerable work conditions, otherwise the causal link between the intolerable conditions and the cessation of the plaintiff's employment is severed.	The committee agrees with the comment and has added a second element requiring the employee to have resigned because of the intolerable working conditions.

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		The proposed revisions to the FEHA cause-of-action instructions (2500, 2505, 2540, 2560, 2570), all now expressly list "constructive discharge" as a form of adverse employment action on which a jury can be instructed. However, none of the proposed revisions include, or account for, the causation language quoted above. To create consistency between the proposed revisions and the currently operative instructions on constructive discharge (CACI Nos. 2402, 2431, 2432), and to fully capture the causation requirement in constructive discharge cases, something must be added to the proposed revisions. One solution is to modify the proposed instruction CACI No. 2510 ("'Constructive Discharge' Explained") to make plain that the plaintiff must prove that he/she resigned because of the intolerable work conditions. Such language can easily be added to the end of that instruction.	
	State Bar of California, Litigation Section, Jury Instructions Committee	The committee agrees with the proposal to create a separate instruction explaining the meaning of "constructive discharge." For the reasons stated above with respect to CACI No. 2509, however, we believe that the first sentence of the instruction is unnecessary and potentially misleading and therefore would delete it.	The committee agrees that this instruction should not address causation and has deleted the "because of" language from the first paragraph.
		The committee believes that the essence of a "constructive discharge" is that the plaintiff was forced to resign. We believe that this concept should be stated more clearly and more prominently in the instruction. We also believe that the purpose of this instruction is to define "constructive discharge," rather than to state the essential elements of a cause of action or what the plaintiff must prove, and therefore would avoid language referring to what the plaintiff "must prove." We suggest modifying the second sentence of the instruction as follows:	The burden of proof should always be expressed in a CACI instruction.

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		~~To establish constructive discharge, [Name of plaintiff] must prove that~~ A constructive discharge has occurred if [*name of defendant*] [through [*name of defendant*]'s officers, directors, managing agents, or supervisory employees] intentionally created or knowingly permitted working conditions to exist that were so intolerable that a reasonable person in [name of plaintiff]'s position would have had no reasonable alternative except to resign.	
		The Directions for Use refer to the employee's allegation that "he or she had no alternative other than to leave the employment." The instruction and the cases, however, use the language "no reasonable alternative." We believe that the word "reasonable" should not be omitted and suggest modifying this language as follows: "he or she had no *reasonable* alternative other than to leave the employment."	The word "reasonable" has been added.
2540. *Disability Discrimination—Disparate Treatment—Essential Factual Elements.*	State Bar of California, Litigation Section, Jury Instructions Committee	The committee agrees with the proposal, except that we believe that the first line of the new paragraph in the Directions for Use should refer to "whether the employer's *alleged* acts constituted an adverse employment action." This is because whether those acts occurred at all may be a question of fact for the jury under the fifth element of the instruction.	While the commentator is technically correct, the committee does not believe that it is important to include "alleged" in this sentence.
2541. *Disability Discrimination—Reasonable Accommodation—Essential Factual Elements*	California Employment Lawyers Association (CELA), by David M. deRobertis	The proposed "Directions for Use" for instruction 2541 correctly states: "No element has been included that requires the plaintiff to specifically request reasonable accommodation." But, at the end of this same paragraph, the "Directions for Use" states: "but see *Avila v. Continental Airlines, Inc.* (2008) 165 Ca1.App.4th 1237, 1252 [82 Ca1.Rptr.3d 440] [employee must request an accommodation].)" The suggestion that *Avila* holds that an employee must always request an accommodation to state a claim for failure to accommodate under Government Code section 12940(m) is flat-out incorrect - both in that it would	The committee agrees and has deleted the "but see" citation to *Avila.*

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		misstate California accommodation law generally and that it would misstate the holding of *Avila* specifically.	
	State Bar of California, Litigation Section, Jury Instructions Committee	The committee believes that whether the plaintiff or the defendant has the burden of proof regarding the plaintiff's ability to perform the essential functions of the job with reasonable accommodation for purposes of a failure to accommodate claim is still an open question, with conflicting opinions by the Courts of Appeal. We believe that *Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 756 did not hold on point and provides at best very weak authority for the proposition that the plaintiff bears the burden of proof on this issue. We would reject the proposed revisions to sixth paragraph of the Directions for Use and leave the current language unchanged.	The committee no longer believes that the point is in dispute. The court in *Cuiellette* says that an essential element of a reasonable accommodation claim is that "the plaintiff is a qualified individual (i.e., he or she can perform the essential functions of the position)". Accord *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952. Two recent unpublished cases say so also. If the courts thought the issue was unresolved, they might have published the opinions.
		The committee agrees with the proposed revisions to the seventh paragraph of the Directions for Use, but suggests modifying the first sentence of that paragraph as follows: ~~There may still be an unresolved issue if~~ A similar question on the burden of proof arises when the employee claims that the employer failed to provide . . .	The committee does not think that the proposed revision improves the instruction.

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2560. *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements*	Church State Council, by Alan J. Reinach	The chief problem with this instruction, in both its original form, and the proposal, is that it does not account for a common situation in which the employee violates a: sincerely held religious belief in order to avoid discipline/termination. A common example is when a Sabbath observer is scheduled to work on the Sabbath, and chooses to work rather than suffer the consequences. The statute, by its terms, does not require an adverse action. The statute requires only that the employer failed to provide the reasonable accommodation needed. Thus, element 7 requires revision. We would propose an alternative for element: 7. [or] did [*name of plaintiff*] violate [his/her] sincerely held religious beliefs due to a threat of an adverse employment action?	The committee understands the comment as proposing an additional option for element 7, rather than a criticism of the revisions now proposed for element 7. That is a matter not considered by the committee and outside of the revisions posted for comment. It will be considered in the next release cycle.
		Elements 8 and 9 (harm and substantial factor) should be deleted. Proof of harm is not an element of Plaintiff s prima facie case, and indeed, there are cases in which Plaintiff s civil rights have been violated, but proof of damages may be lacking. For example, a typical case we encounter involves a new convert who has been working on Saturdays, but now seeks accommodation for Sabbath observance. When the employer fails to provide the needed accommodation, the Plaintiff files her action, but continues to work on Sabbath, in violation of her faith. Her civil rights have been violated by the requirement that she violate her sincerely held religious belief as a condition of continued employment. She is entitled to declaratory and injunctive relief, even if she is not able to prove either economic or noneconomic damages. In its present form, the jury instruction would tend to mislead both the judge and jury, and prejudice the plaintiff. Once the	This comment addresses matters not considered by the committee and outside of the scope of the revisions posted for comment. It will be considered in the next release cycle.

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		Plaintiff has proven that she was denied religious accommodation, the burden of proof shifts to the defendant to demonstrate that it could not provide the accommodation without undue hardship.	
	State Bar of California, Litigation Section, Jury Instructions Committee	The committee agrees with the proposal, except that we believe that the first line of the new paragraph in the Directions for Use should refer to "whether the employer's *alleged* acts constituted an adverse employment action." This is because whether those acts occurred at all may be a question of fact for the jury under the seventh element of the instruction.	While the commentator is technically correct, the committee does not believe that it is important to include "alleged" in this sentence.
2570. *Age Discrimination—Disparate Treatment—Essential Factual Elements*	State Bar of California, Litigation Section, Jury Instructions Committee	The committee agrees with the proposal, except that we believe that the first line of the new paragraph in the Directions for Use should refer to "whether the employer's *alleged* acts constituted an adverse employment action." This is because whether those acts occurred at all may be a question of fact for the jury under the third element of the instruction.	While the commentator is technically correct, the committee does not believe that it is important to include "alleged" in this sentence.
2620. *CFRA Rights Retaliation—Essential Factual Elements*	John Scheppath, Attorney at Law, Irvine	The proposed revisions to the FEHA causes of action (CACI Nos. 2500, 2505, 2540, 2560, and 2570) now all expressly list constructive discharge as a form of adverse employment action on which a jury can be instructed. The proposed revisions, however, leave untouched the current instruction on CFRA Retaliation (CACI No. 2620). The CFRA is a part of the FEHA, and, as mentioned, a constructive discharge is a form of adverse employment action on which a FEHA discrimination or retaliation claim can be predicated. To create consistency among the FEHA instructions, the instruction on CFRA Retaliation (CACI No. 2620) should be modified to include "constructive discharge" in the language of the instruction, using the same wording/structure the drafters employed in the proposed revisions to the FEHA instructions.	CACI No. 2620 is not proposed for revision in this release. Whether FEHA rules apply under CFRA is a matter not considered by the committee. It will be considered in the next release cycle.

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3020. *Unruh Civil Rights Act—Essential Factual Elements* and 3021, *Discrimination in Business Dealings—Essential Factual Elements*	The Asian Pacific American Legal Center, the Disability Rights Center, Legal Aid of Marin, the Law Foundation of Silicon Valley, and the Western Center on Law and Poverty, by Della Barnett, Attorney at Law, The Impact Fund, Berkeley Scott N. Johnson, Attorney at Law, Carmichael Amy J. Lepine, Attorney at Law, The Lupine Law Group, San Diego Richard D. Prager, Attorney at Law, Law Offices of Charles S. Roseman, San Diego Alfred G. Rava,	We believe that reference to the term "animus" should be deleted from: the "Directions for Use" section of both instructions. While the Unruh Act does require an intent to discriminate (See, Harris v. Capital Growth investors, 52 CaL 3d 1142, 1149 (1991), an intent to discriminate does not equal discriminatory animus as that term is commonly understood (ill will or malice). (Barnett) My disagreement has to do with the proposed addition to both of these instructions of a "discriminatory animus" or "animus" element for which there is no authority--either from the applicable Civil Code sections, the legislative history, or the case law interpreting these statutes. For example, if a store was to employ a Men's Day promotion offering a discount to only male patrons in order to increase sales to men, a female patron would not have to prove that the store acted with animus towards female patrons to prevail on an Unruh Act or Civil Code section 51.5 claim. (Rava)	The committee agrees and has deleted the proposed sentence in the Directions for Use that equated “animus” with intent.

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	Attorney at Law, San Diego Janet E. Sobel, Attorney at Law, San Diego Greg Adler, Attorney at Law		
	The Asian Pacific American Legal Center, the Disability Rights Center, Legal Aid of Marin, the Law Foundation of Silicon Valley, and the Western Center on Law and Poverty, by Della Barnett, Attorney at Law, The Impact Fund, Berkeley Alfred G. Rava, Attorney at Law, San Diego	Elements 3 and 4 of the proposed jury instructions are problematic. Those elements require plaintiff to prove that s/he was "harmed" and that defendant's conduct was a substantial factor in causing the harm. In our opinion, these elements are not required in the large number of Unruh Act cases in which plaintiffs are only seeking the statutory minimum damages. Those damages must be awarded automatically once discrimination has been shown. I Courts have held that discrimination under the Unruh Act is "per se injurious." (See, e.g., *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33.) Therefore, unless the plaintiff is seeking more than the minimum damages, proof of harm is not necessary. Both 3020 and 3021 should be revised to make it clear that plaintiff does not need to prove either harm or that defendant's conduct was a substantial factor in causing harm, unless, plaintiff is seeking "actual damages" beyond the statutory minimum.	The committee agrees that harm and causation of harm are not required if only statutory damages are sought (no other actual damages). The Directions for Use have been revised to indicate that elements 3 and 4 may be omitted unless actual damages are alleged.
3020. *Unruh Civil Rights Act—Essential Factual Elements* and	Al Rava, Attorney at Law, San Diego	The first paragraph in the Directions for Use for both CACI 3020 and 3021 should be removed in its entirety because there is no authority for including "a motivating reason" in these instructions or in the Directions for Use for these two	The committee has not yet considered whether “motivating reason” as defined in CACI No. 2507 for the Fair Employment and Housing Act is the

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3021, *Discrimination in Business Dealings—Essential Factual Elements*	Scottlynn J. Hubbard IV, Attorney at Law, Chico	instructions. The text of Civil Code sections 51, 51.5, and 52 do not include anything about "a motivating reason," nor does the legislative history for either of these statutes, nor do any Unruh Act or section 51.5 cases require, define, or even discuss "a motivating reason." This includes the sentence about "mixed motive" - because this "mixed motive" phrase also seems to be mistakenly lifted from employment discrimination cases brought under FEHA. To my knowledge, there is not one published Unruh Act or Civil Code section 51.5 case in which "mixed motive" is decided, defined, or even discussed.	proper causation standard under the Unruh Act. It will be addressed in the next release cycle. The committee believes, however, that it is appropriate to mention that the question of "mixed motive" is unresolved under the Uhruh Act. While discrimination in public accommodations and discrimination in employment present different concerns, a major unresolved issue under employment law certainly could become a major unresolved issue under the Unruh Act, even if it has not been to date.
	The Asian Pacific American Legal Center, the Disability Rights Center, Legal Aid of Marin, the Law Foundation of Silicon Valley, and the Western Center on Law and Poverty, by Della Barnett, Attorney at Law, The Impact Fund, Berkeley	The citation to *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686 should be deleted. That case arose under the Fair Employment and Housing Act, a wholly distinct statutory scheme with a myriad of differences from the Unruh Act. Most pertinent here, *Mamou* was a case alleging discriminatory and retaliatory termination in violation of FEHA, which called for a *McDonnell-Douglas*-type allocation of proof. (*Id.* at p. 714). The applicability of that test under the Unruh Act is in doubt. At least one aspect of the *McDonnell-Douglas* test in a public accommodations case has been rejected. (See *Wilson v. Murillo* (2008) 163 Cal.App.4th 1124.)	The committee agrees and has deleted the citation to *Mamou.* The sentence pointing out the two different causation elements does not require a citation.
	Scottlynn J. Hubbard IV, Attorney at Law, Chico	If Judicial Council is determined to keep an intent or intentional element to Unruh Act jury instructions, we recommend that it adopt a general intent standard. General intent is simply the intent to do the act that constitutes the	Intent is clearly required under the Unruh Act for discrimination on all grounds except disability. (See *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d

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		violation. The California Supreme Court has not yet weighed in on the definition of "intentional discrimination" under the Unruh Act. (See *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661 679.) Therefore, the Council may not want to insert its own definition in any Unruh Act-related jury instructions at this time.	1142, 1149.) So there must be an intent element for claims other than disability. The commentator is correct that the precise meaning of "intent" is unresolved. Hence, there is no authority for a "general intent" element. As noted above, the appropriateness of "motivating reason" as the proper intent standard under the Unruh Act will be considered in the next release cycle.
3020. *Unruh Civil Rights Act—Essential Factual Elements*	The Asian Pacific American Legal Center, the Disability Rights Center, Legal Aid of Marin, the Law Foundation of Silicon Valley, and the Western Center on Law and Poverty, by Della Barnett, Attorney at Law, The Impact Fund, Berkeley	The Judicial Council should consider a separate jury instruction for cases arising under section 51(f) rather than attempting to use CACI No. 3020 to fit all cases arising under section 51. In most cases arising under section 51 of the Unruh Act, plaintiffs must prove that perceived protected status was a motivation for the defendant's conduct. (*Harris v. Capital Growth Investors* (1991) 52 Cal.3d 1142, 1149.) Section 51(f) eliminates this intent requirement with regard to acts that violate the Americans With Disabilities Act. To discriminate under the ADA means to engage in a range of behavior, including a failure to make required construction modifications, failure to remove barriers, failure to provide integrated settings, or failing to provide reasonable accommodations. See 42 U.S.C. § 12182(b) (defining forms of discrimination). Element 2 of proposed CACI NO. 3020 requires proof of a "motivating reason." To alert the trial court that cases under section 51(f) are to be treated differently, the Directions for Use contains the warning, "For claims that are also violations of the ADA, do not give element 2." However, that language appears only at the bottom of the second paragraph and may be missed or misunderstood by the trial court or the parties.	The committee's proposed revision is to remove disability discrimination from the intent element. CACI No. 3020 is not intended in any way to apply to senior citizen housing under Civil Code section 51.3.

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		The holding of *Munson* should extend not only to cases under section 51(f), but also those arising under section Civil Code section 51.3, which requires accessible housing for senior citizens. The same logic and reasoning applies to both situations. Therefore, we believe it would be prudent to create a separate instruction for section 51(f) and 51.3 violations. If not, at a minimum, the warning not to give Element 2 in such cases should appear prominently in the text of the instruction itself.	
	Scottlynn J. Hubbard IV, Attorney at Law, Chico	The legislative history of the 1992 amendment clearly and unequivocally shows that the California Legislature intended to conform the Unruh Act (and related provisions) to the standards set forth in its provisions, not merely incorporate ADA violations into the Unruh Act. Because the ADA provides that intent is no longer necessary in disability discrimination claims, and because the California Legislature intended to incorporate those same standards into the Unruh Act, any jury instruction that includes an intent element for disability discrimination conflicts with that intent and is not good law.	The committee's proposed revisions include removing disability discrimination from the intent element. The comment, therefore, does not apply to the revised instruction.
	California Apartment Association	The proposed instruction and accompanying commentary should be revised to clarify how the factor of "legitimate business reason for the alleged practice or conduct/reasonable commercial relation to objectives appropriate to serving the pubic" is to be addressed. Specifically, whether this factor is applicable to the analysis of whether discrimination is "reasonable and, therefore, not arbitrary" as suggested by the citation to *Hankins v. El Torito* or whether its applicability is limited to the evaluation of nonenumerated "other actionable characteristics" as in *Harris* and *Semler*, and whether this is a question for the jury or the court to evaluate.	This comment raises new matters not considered by the committee. It will be addressed in the next release cycle.
3026. *Unruh Civil*	Scottlynn J.	This instruction is *extremely* inaccurate and does not reflect	The applicability of the CRAS Act is a

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Instruction	Commentator	Summary of Comment	Proposed Response (BG)
Rights Act—Damages	Hubbard IV, Attorney at Law, Chico	existing authority. Under the newly enacted Construction Related Accessibility Standards Act or ("CRAS Act"), statutory damages may be recovered under the Unruh Act if a violation of one or more construction-related accessibility standards denied the disabled plaintiff full and equal access. (See Civ. Code, § 55.56(a), citing §§ 52(a) and 54.3(a) (Unruh Act and CDP A, respectively). In other words, disabled plaintiffs must receive the statutory minimum damages under the Unruh Act if they (1) personally encountered a CRAS violation, which relates to their disability, at a facility on a particular occasion, or (2) were deterred from accessing a facility on a particular occasion because (a) they had actual knowledge of the CRAS violation that prevented, or reasonably dissuaded, them from accessing facility on a particular occasion, and (b) the CRAS violation would have actually denied him full and equal access if they had accessed the facility on that occasion. (Civ. Code §§ 52(a), 55.56(a)-(e).)	new matter that is beyond the scope of the matters posted for public comment. It will be addressed in the next release cycle. However, CACI 3026 was never intended to be given if only statutory damages are sought. This has now been made clear in the Directions for Use.
		The proposed CACI 3026 is silent about the mandatory awards of statutory damages of at least $4,000. Also, this proposed instruction's requirement that a plaintiff "must prove the amount of his/her damages" is contrary to cases that have held that Unruh Act plaintiffs do not have to prove actual damages or even have actual damages in order to have been harmed or suffered injury and be entitled to the other remedies provided by Civil Code section 52.	The committee has not considered whether the jury needs to be instructed to award $4000 statutory damages if no other actual damages are sought. This question will be addressed in the next release cycle. It has now been made clear that the instruction should be given only if actual damages are sought.
3206. *Breach of Disclosure Obligations—Essential Factual Elements*	Bentley Motors Inc. and Volkswagon Group of America, Inc., by Sean P. Conboy, Attorney at Law, Carroll, Burdick	The wording of this instruction is problematic because it ignores the principal nonconformity language of the Act (see, e.g., Civ. Code, § 1793.23(f); 1793.2(d)(2)(C), etc), and uses the term "defect" even though there could be more than one nonconformity. But not all nonconformities give rise to liability under the Act, thus leading to confusion. The word "defect" should therefore be replaced with the phrase "principal defect (or nonconformity) for which the vehicle	This instruction is being revised only for renumbering. This comment will be considered in the next release cycle.

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Instruction	Commentator	Summary of Comment	Proposed Response (BG)
	& McDonough, San Francisco	was reacquired."	
3230. *Continued Reasonable Use Permitted*	Bentley Motors Inc. and Volkswagon Group of America, Inc., by Sean P. Conboy, Attorney at Law, Carroll, Burdick & McDonough, San Francisco Kate S. Lehrman, Attorney at Law, Rogan Lehrman, Los Angeles Brian Takahashi, Attorney at Law, Bowman and Brooke, Gardena	This instruction will mislead jurors into believing that continued use of the vehicle is irrelevant to the jury's analysis, when in reality continued use is one factor used to determine substantial impairment. For example, if the plaintiff continues to drive the vehicle for an additional 60,000 miles after the alleged nonconformity was repaired, it tends to show that use of the vehicle was not substantially impaired. In short, this instruction is unnecessary and conflicts with CACI 3204's explanation of substantial impairment of use, value or safety, and more specifically, CACI 3402 factor (d), which asks the jury to consider the degree to which the vehicle could be used. If this instruction is to be approved the following sentence should be added: "However, continued use can be considered as evidence that the vehicle's use, value or safety was not substantially impaired to plaintiff."	CACI No. 3204 factor d tells the jury that continued use is relevant to substantial impairment. The committee does not believe that the instructions are in conflict. 3204 says that it is relevant to impairment; 3230 says that it is not a per se waiver nor a ground for setoff. Both are correct. A sentence has been added to the Directions for Use cross referring to 3204.
	Bentley Motors Inc. and Volkswagon Group of America, Inc., by Sean P. Conboy, Attorney at Law, Carroll, Burdick & McDonough, San Francisco	The instruction creates a potential conflict with CACI 3241, which states that a plaintiff's recovery must be reduced by the value of the use of the vehicle under to Civil Code section 1793.2(d)(C).	There is no conflict. 3241 provides for the value of use *before* being brought in for repairs. This instruction refers to continued use after.
	Kate S. Lehrman,	An instruction on this subject might conceivably be	The committee considered this argument

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Instruction	Commentator	Summary of Comment	Proposed Response (BG)
	Attorney at Law, Rogan Lehrman, Los Angeles	appropriate if a manufacturer ever argued that it was entitled to an offset against damages for the consumer's continued use of a vehicle, or that the consumer had waived his or her rights under Song-Beverly by continuing to use the vehicle. To our knowledge, manufacturers do not make these arguments, and trial Courts do not allow manufacturers to make these arguments, since the Court of Appeal rejected these arguments in *Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235, 1240-44. There are no reported decisions (either certified for publication or not) in which manufacturers have made either of these arguments, since *Jiagbogu* was decided. This instruction is, therefore, a solution in search of a problem that does not exist. It should not be adopted, because it is unnecessary.	before approving this proposed instruction. It decided that whether or not the defense makes the argument, jurors might view continued use as a waiver. The instruction just makes it clear that it is not.
	State Bar of California, Litigation Section, Jury Instructions Committee	The Committee agrees with the proposal with the exception of the quoted language from *Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878 in the Sources and Authority. We believe that after noting the conflicting authority in the Directions for Use and stating that the instruction assumes that *Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235 is correct, the Sources and Authority should cite only authorities supporting the instruction. We therefore would delete the quotations from *Ibrahim* in the second and third bullet points in the Sources and Authority.	CACI standards are that Sources and Authority should provide conflicting authority if it exists, not just authority that supports the instruction.
	Brian Takahashi, Attorney at Law, Bowman and Brooke, Gardena	The second sentence of proposed CACI 3230 regarding damages not being reduced is unnecessary and potentially misleading. For Song Beverly claims other than failure to repair after a reasonable number of attempts under Civil Code Section 1793.2(d), restitution is not necessarily the remedy. See *Gavaldon v. DaimlerChrysler Corp.* (2004) 32 Cal.4th 1246 (restitution not available as remedy for Song Beverly claim based on breach of service contract). By adding language to this instruction, the instruction indirectly infers that restitution or replacement is the appropriate	Per the first sentence, this instruction would not be given unless the plaintiff is claiming a right to replacement or reimbursement.

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Instruction	Commentator	Summary of Comment	Proposed Response (BG)
		remedy for all Song Beverly claims. There is no need for this language as the first sentence of CACI 3230 instructs the jury there is no waiver or bar because of continued use. The jury can figure out damages without the implicit suggestion that restitution or replacement is the remedy for all Song Beverly claims.	
	Jon D. Universal, Attorney at Law, Universal, Shannon and Wheeler, Roseville	The Judicial Council may have overstepped its legal authority by claiming that the *Jiagbogu* case "correctly states the law", essentially "overruling" the *Ibrahim* case, which has been on the books since 1989. At most there is a conflict between two different California appellate districts. In such a circumstance, it is up to the California Supreme Court, not the Judicial Council, to resolve any conflict between multiple appellate districts.	The committee accepts the commentator's point and has revised this sentence to no longer state that *Jiagbogu* correctly states the law.
		The cases are not in *conflict*; instead, they are clearly *distinguishable*. The *Jiagbogu* court distinguished *Ibrahim* for the reason that Ms. Ibrahim invoked, among other things, the U.C.C. and its remedies and/or defenses, whereas Mr. Jiagbogu only filed under the Song-Beverly Act. Thus, he did not afford the defendant any defenses under the U.C.C. Therefore, to the extent that this draft jury instruction would also apply in *any* case, even if the buyer evokes the U.C.C., it is simply not a correct statement of existing California law, whether it be both under *Ibrahim* or *Jiagbogu*. Neither case supports the premise that a motor vehicle manufacturer is foreclosed from employing U.C.C. defenses if the buyer also elects U.C.C. remedies by way of his/her lawsuit. The *Jiagbogu* case does not support this premise either, which distinguished *Ibrahim.*	The committee does not find the court in *Jiagbogu's* efforts to distinguish *Ibrahim* to be very convincing. If there is no set off for continued use under Song-Beverly and the plaintiff proves a Song-Beverly violation, then there is no set off. The fact that the claim is also brought under the UCC to which the there may be defenses not available under Song-Beverly should not make any difference. But even if there is a valid distinction, it would not affect the instruction, which is supported by *Jiagbogu.* It would only go to the second paragraph of the Directions for Use.
		A fertile imagination can envision circumstances in which a patterned jury instruction denying off set would be totally misleading and thus inappropriate. For example, in *Jiagbogu*, Mr. Jiagbogu frequently and consistently	Whether *Jiagbogu* should be limited as the commentator proposes is a valid argument for a future case that involves these facts. But that case has not yet

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Instruction	Commentator	Summary of Comment	Proposed Response (BG)
		complained of, among other things, an "engine hesitation", claimed that the problem was unsuccessfully resolved, promptly complained to the warrantor and still unsatisfied, further promptly filed his lawsuit, but only continued using his vehicle after having done same. But that fact pattern is not always present. Even the *Jiagbogu* court would have come to a different conclusion and allowed a reasonable mileage offset if the plaintiff did not report further complaints until just before the written warranty had expired after first reporting that problem within the first week of sale. No reasonable interpretation of the Song-Beverly Act should in any way allow a windfall to the buyer on these facts. In that circumstance, the U.C.C. offset articulated in *Ibrahim* would be entirely appropriate, whether or not the buyer invoked the U.C.C., or (as in the *Jiagbogu* circumstance) sued solely under the Song-Beverly Act. In this latter example, it would not be a situation in which the buyer was forced to continue using the vehicle pending his/her lemon law claim; instead, it would constitute an abuse of the legal system to reap a monetary windfall. Therefore, since there are countless variables that may affect whether or not the buyer is entitled to a reasonable offset, a patterned jury instruction is legally inappropriate and should be withdrawn immediately.	been decided. Therefore, the committee believes that an instruction based on *Jiagbogu* without any limitations states the current law of offset under Song-Beverly.
3231. *Continuation of Express Warranty During Repairs*	Bentley Motors Inc. and Volkswagon Group of America, Inc., by Sean P. Conboy, Attorney at Law, Carroll, Burdick & McDonough, San Francisco	The proposed instruction attempts to use a "one-size-fits-all" approach to breach of warranty claims, when no two lemon law fact patterns are the same – especially in terms of where on the warranty coverage timeline the various repairs occur. Accordingly, the jury and the parties would be better served by the parties' or the court's creation of a "hand-tailored" instruction at the time of trial, which would promote fairness and flexibility relative to the facts of each case and the issue of the so-called "statutory warranty extension" contemplated by No. 3231.	The instruction sets forth an express statutory rule. Nothing in the instruction or Directions for Use would prohibit the court from giving supplemental special instructions as appropriate to the particular facts of the case.

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Instruction	Commentator	Summary of Comment	Proposed Response (BG)
		The phrase "if a defect exists within the warranty period" is ambiguous and does not clarify whether or not the consumer needs to provide the warrantor with an opportunity to repair the vehicle during the warranty period.	The committee has revised the instruction to clarify that the vehicle must have been returned for repairs in order to extend the warranty.
	Bentley Motors Inc. and Volkswagon Group of America, Inc., by Sean P. Conboy, Attorney at Law, Carroll, Burdick & McDonough, San Francisco Kate S. Lehrman, Attorney at Law, Rogan Lehrman, Los Angeles Brian Takahashi, Attorney at Law, Bowman and Brooke, Gardena Jon D. Universal, Attorney at Law, Universal, Shannon and Wheeler, Roseville	This instruction effectively creates open-ended, "forever warranties." It takes otherwise clear statutory language (Civil Code section 1793.1(a)(2)) and mischaracterizes the statute, essentially increasing the chances of confusion. The wording suggests that a similar symptom arising late in the life of the car -- after the warranty expires -- can be a basis for liability as long as the same or similar symptom appeared at any time during the warranty period. This makes no practical sense, and is unfair to manufacturers. Consider the following scenario: a car experienced a transmission symptom at 5,000 miles (so the dealer replaced the control module for the transmission under the warranty)...the warranty expired at 50,000 miles. There were no other transmission problems until the car experienced a second transmission symptom at 120,000 miles (so the dealer replaces a valve body, but not under warranty). The jury may conclude that, based on the instruction, the warranty never expired, so even unrelated repairs occurring after 50,000 miles should have been covered by the warranty.	The committee sees no possibility that the commentator's scenario could ever get to a jury. The instruction makes it clear that the extension is only until the problem is fixed. If the car has been driven symptom-free for 70,000, the problem was fixed.
	Kate S. Lehrman, Attorney at Law, Rogan Lehrman,	The error in the instruction arises because the instruction is based on the language of the notice requirement set forth in Civil Code § 1793.1(a)(2), rather than on the language of the	The committee agrees and has revised the instruction to be based on Civ. Code section 1795.6(b) instead of section

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Instruction	Commentator	Summary of Comment	Proposed Response (BG)
	Los Angeles Brian Takahashi, Attorney at Law, Bowman and Brooke, Gardena Jon D. Universal, Attorney at Law, Universal, Shannon and Wheeler, Roseville	underlying, substantive tolling provision, which is set forth in Civil Code '1795.6. Section 1793.1(a)(2) merely paraphrases the tolling provisions in Section 1795.6; it is not the source of the tolling provisions. Section 1795.6(b) makes clear that: "When the warranty repairs or service has been performed so as to remedy the nonconformity, the warranty period shall expire in accordance with its terms, including any extension to the warranty period for warranty repairs or service." (Lehrman) Interpreting the plain and commonsense meaning of the Song-Beverly Act as a whole means that: (1) express warranties are tolled by the total days out of service, and (2) specific nonconformities are deemed fixed if they are not presented to the manufacturer or repair facility again within 60 days. (Takahashi)	1793.1(a)(2). Under section 1795.6, the requirement that the buyer give notice that the repairs were unsuccessful is a limitation on that statement in the notice that the warranty won't expire until the defect has been fixed. It as a separate basis for nonexpiration. The instruction has been revised to correctly present the notice requirement.
	Kate S. Lehrman, Attorney at Law, Rogan Lehrman, Los Angeles	To our knowledge, manufacturers do not defend Song-Beverly litigation by arguing that they were excused from their obligation to repair a vehicle or other consumer good, because the warranty expired while they were making repairs. There are no reported decisions, whether certified for publication or not, in which a manufacturer has ever taken this position. This instruction, too, should not be adopted, because it is unnecessary.	The committee considered this argument before approving this proposed instruction. It decided that whether or not the defense makes the argument, jurors might view expiration of the warranty while the vehicle is being repaired as a termination of the manufacturer/dealer's obligations under the warranty. The instruction just makes it clear that it is not.
	State Bar of California, Litigation Section, Jury Instructions Committee	Agree	No response necessary.
	Jon D. Universal, Attorney at Law,	Civil Code § 1795.6 applies to both express and implied warranties, not just express warranties. Therefore, on this	The committee agrees with the comment and has added references to implied

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Instruction	Commentator	Summary of Comment	Proposed Response (BG)
	Universal, Shannon and Wheeler, Roseville	basis alone the draft jury instruction is underinclusive.	warranties also.
		I would suggest that the jury instruction state as follows: Every warranty period relating to an implied or express warranty accompanying a sale or consignment for sale of consumer goods shall be automatically tolled or continued when the goods are appropriately presented to the seller for the period of such repairs. If such warranties were set to expire on time during such repairs, such warranties will not expire and will thus be extended if the warranty repairs have not been performed because of delays caused by circumstances beyond the control of [name of plaintiff], or if [name of defendants] repairs did not fix the defect and [name of plaintiff] notified [name of defendant] of the failure of the repairs within 60 days after they were completed. When the warranty repairs or service either successfully remedies the nonconformity or the buyer does not timely give such notification the warranty period, including any extension to the warranty period, shall expire in accordance with its own terms.	The committee believes that the instruction as revised makes most of the same points, but in plain English. The committee does not believe that the commentator's proposed final sentence is necessary.
5013. *Deadlocked Juror Admonition*	Hon. Judy Hersher, Superior Court, Sacramento County	I would not use the word "fail" in the proposed new paragraph. It seems heavy handed, and many jurors/juries desperately and in good faith try to reach a verdict and are unable to do so. I don't think we should be labeling them failures. I suggest instead substituting the word "unable."	The committee agrees and has made this change.
		I suggest eliminating the second sentence which reads: "There is no reason to believe that the case will ever be tried to a jury that is any more competent to decide it than you are." First of all, this is disingenuous. As trial judges know, there are some juries that are more competent than others to reach decisions. Secondly, it doesn't really get us where we need to go. Instead, I would propose the following: "If you	The committee agrees and has deleted this sentence. It also agrees that adding "and at additional cost to all concerned" is appropriate and has made this revision.

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Instruction	Commentator	Summary of Comment	Proposed Response (BG)
		are unable to reach a verdict, the case will have to be tried before another jury selected in the same manner and from the same community from which you were chosen, *and at additional cost to all concerned. These factors merit your careful continued consideration of the facts as you find them and the law that has been provided to you before you make any final decision that you remain deadlocked."* (portion in italics is suggested language)	The committee does not believe that the proposed new sentence beginning with "These factors merit …" is an improvement.
		You may wish to consider adding to the very first paragraph the following: You should reach a verdict if you reasonably can. You have spent time trying to reach a verdict and your resolution of the case is important to the parties *so that they may move on with their lives/businesses*. I suggest this addition because people/jurors seem to respond more to real life situations, and they can understand and appreciate the importance of resolution of issues so they can move forward.	The committee agrees and has added the italicized language.
	State Bar of California, Litigation Section, Jury Instructions Committee	Agree	No response necessary.
Multiple	Orange County Bar Association, by Dimetria A. Jackson, President	Agree with all new and revised instructions except as indicated above	No response necessary.
General	Hon. Perry Parker, Judge of the Superior	Six months prior to the adoption of the CACI instructions, I took the time and effort to make a PowerPoint presentation of some the then current BAJI instructions and attached	Naming parties rather than just relying on "plaintiff" and "defendant" to label them is an important CACI reform,

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	Court, Sutter County	WAV files to those instructions. In general, I did the first third and the last third of the general instructions. At trial I let the computer project and "read" the introductory instructions, then I turned on the lights, read the specialized instructions, turned off the lights and, again, let the computer do all the work. It worked wonderfully, and all I had to do is press the space bar after each instruction was projected and "read". Even the attorneys watched and listened. Then CACI appeared. For reasons best know to others, those instructions allowed for the introductions of names and sex specific pronouns. Thus it became impossible to prepare instructions as I did with BAJI. At least not in generic form. It disturbs me that in this day and age we can't get the computer to do all the work of projecting and reading instructions (at least the generic ones), via PowerPoint. The only real thing that is preventing the reading of the introductory and concluding instructions, now, is this misguided insistence with personalizing the instructions. I see no need to do so and in fact, I used BAJI for many years without a problem. If you can find one judge that enjoys reading jury instructions, I will buy you a lunch.	granted one that requires more work. In multi-party cases, it clarifies just who the parties are that each instruction relates to. Not all defendants may be named under all alleged causes of action. All plaintiffs may not have the same claims. There is nothing about CACI that makes it incompatible with PowerPoint. But yes one must assemble the instructions first by resolving all the variable material. HotDocs has a feature that allows the user to export the instructions to PowerPoint once they are assembled.

CIVIL JURY INSTRUCTIONS (CACI 12–01)
SUMMER 2012 REVISIONS—TABLE OF CONTENTS

409. Primary Assumption of Risk—Liability of Instructors, Trainers, or Coaches

[*Name of plaintiff***] claims [he/she] was harmed by [***name of defendant***]'s [coaching/training/instruction]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [***name of plaintiff***]'s [coach/trainer/instructor];**

2. **That [***name of defendant***] intended to cause [***name of plaintiff***] injury or acted recklessly in that [his/her] conduct was entirely outside the range of ordinary activity involved in teaching or coaching [***sport or other activity***]~~the sport~~ in which [***name of plaintiff***] was participating;**

[or]

2. **That [***name of defendant***]'s failure to use reasonable care increased the risks to [***name of plaintiff***] over and above those inherent in [***sport or other activity***];**

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

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

New September 2003; Revised April 2004, June 2012

Directions for Use

This instruction sets forth a plaintiff's response to a defendant's assertion of the affirmative defense of primary assumption of risk. Primary assumption of risk generally absolves the defendant of a duty of care toward the plaintiff with regard to injury incurred in the course of a sporting or other activity covered by the doctrine. (See *Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2, 834 P.2d 696].)

There are exceptions, however, in which there is a duty of care. Use the first option for element 2 if it is alleged that the coach or trainer intended to cause the student's injury or engaged in conduct totally outside the range of the ordinary activity involved in teaching or coaching the sport or activity. Use the second option if it is alleged that the coach or trainer's failure to use ordinary care increased the risk of injury to the plaintiff by, for example, by encouraging or allowing him or her to participate in the sport or activity when he or she was physically unfit to participate or by allowing the plaintiff to use unsafe equipment or instruments. (See *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 845 [120 Cal.Rptr.3d 90].) If the second option is selected, also give CACI No. 400, *Negligence—Essential Factual Elements.*

While duty is generally a question of law, there may be disputed facts that must be resolved by a jury before it can be determined if the doctrine applies. (See *Shin v. Ahn* (2007) 42 Cal.4th 482, 486 [64

Cal.Rptr.3d 803, 165 P.3d 581].)

For an instruction on primary assumption of risk applicable to coparticipants, see CACI No. 408, *Primary Assumption of Risk—Liability of.Coparticipant in Sport or Other Activity.*

Sources and Authority

- "In order to support a cause of action in cases in which it is alleged that a sports instructor has required a student to perform beyond the student's capacity or without providing adequate instruction, it must be alleged and proved that the instructor acted with intent to cause a student's injury or that the instructor acted recklessly in the sense that the instructor's conduct was 'totally outside the range of the ordinary activity' involved in teaching or coaching the sport." (*Kahn v. East Side Union High School District* (2003) 31 Cal.4th 990, 1011 [4 Cal.Rptr.3d 103, 75 P.3d 30], internal citation omitted.)

- "Here, we do not deal with the relationship between coparticipants in a sport, or with the duty that an operator may or may not owe to a spectator. Instead, we deal with the duty of a coach or trainer to a student who has entrusted himself to the former's tutelage. There are precedents reaching back for most of this century that find an absence of duty to coparticipants and, often, to spectators, but the law is otherwise as applied to coaches and instructors. For them, the general rule is that coaches and instructors owe a duty of due care to persons in their charge. The coach or instructor is not, of course, an insurer, and a student may be held to notice that which is obvious and to ask appropriate questions. But all of the authorities that comment on the issue have recognized the existence of a duty of care." (*Tan v. Goddard* (1993) 13 Cal.App.4th 1528, 1535–1536 [17 Cal.Rptr.2d 89, internal citations omitted.)

- "[D]ecisions have clarified that the risks associated with learning a sport may themselves be inherent risks of the sport, and that an instructor or coach generally does not increase the risk of harm inherent in learning the sport simply by urging the student to strive to excel or to reach a new level of competence." (*Kahn, supra*, 31 Cal.4th at p. 1006.)

- "To the extent a duty is alleged against a coach for 'pushing' and/or 'challenging' a student to improve and advance, the plaintiff must show that the coach intended to cause the student's injury or engaged in reckless conduct—that is, conduct totally outside the range of the ordinary activity involved in teaching or coaching the sport. Furthermore, a coach has a duty of ordinary care not to increase the risk of injury to a student by encouraging or allowing the student to participate in the sport when he or she is physically unfit to participate or by allowing the student to use unsafe equipment or instruments." (*Eriksson, supra, ~~v. Nunnink (2011)~~* 191 Cal.App.4th at p.~~826,~~ 845 ~~[120 Cal.Rptr.3d 90]~~, internal citation omitted.)

- "[T]he mere existence of an instructor/pupil relationship does not necessarily preclude application of 'primary assumption of the risk.' Learning any sport inevitably involves attempting new skills. A coach or instructor will often urge the student to go beyond what the student has already mastered; that is the nature of (inherent in) sports instruction." (*Allan v. Snow Summit, Inc.* (1996) 51 Cal.App.4th 1358, 1368-1369 [59 Cal.Rptr.2d 813].)

- "Instructors, like commercial operators of recreational activities, 'have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport. Thus, although a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm. The cases establish that the latter type of risk, posed by a ski resort's negligence, clearly is not a risk (inherent in the sport) that is assumed by a participant.'" (*Fortier v. Los Rios Community College Dist.* (1996) 45 Cal.App.4th 430, 435 [52 Cal.Rptr.2d 812], internal citations omitted.)

- "'Primary assumption of the risk' applies to injuries from risks 'inherent in the sport'; the risks are not any the less 'inherent' simply because an instructor encourages a student to keep trying when attempting a new skill." (*Allan, supra*, 51 Cal.App.4th at p. 1369.)

- Coaches and sports instructors "owe students a duty 'not to increase the risks inherent in the learning process undertaken by the student.' But this does not require them to 'fundamentally alter the nature of the sport and, in some instances, effectively preclude participation altogether ... .' Instead, '[b]y choosing to participate in a sport that poses the obvious possibility of injury, the student athlete must learn to accept an adverse result of the risks inherent in the sport.'" (*Lupash v. City of Seal Beach* (1999) 75 Cal.App.4th 1428, 1436-1437 [89 Cal.Rptr.2d 920], internal citations omitted.)

- "'[T]he existence and scope of a defendant's duty of care is a legal question which depends on the nature of the sport or activity in question and on the parties' general relationship to the activity, and is an issue to be decided by the court, rather than the jury.' Thus, when the injury occurs in a sports setting the court must decide whether the nature of the sport and the relationship of the defendant and the plaintiff to the sport as coparticipant, coach, premises owner or spectator support the legal conclusion of duty." (*Mastro v. Petrick* (2001) 93 Cal.App.4th 83, 88 [112 Cal.Rptr.2d 185], internal citations omitted.)

- "The existence of a duty of care is a separate issue from the question whether (on the basis of forseeability among other factors) a particular defendant breached that duty of care, which is an essentially factual matter." (*Kockelman v. Segal* (1998) 61 Cal.App.4th 491, 498 [71 Cal.Rptr.2d 552].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1090A-1090C, 1339, 1340, 1343–1350

Haning, Flahavan & Kelly, California Practice Guide: Personal Injury, Ch. 3-D, *Mitigating Factors In Reduction Of Damages*, ¶¶ 3:234-3:254.30 (The Rutter Group)

1 Levy et al., California Torts, Ch. 4, *Comparative Negligence, Assumption of the Risk, and Related Defenses*, § 4.03 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 273, *Games, Sports, and Athletics*, § 273.31 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.401 et seq. (Matthew Bender)

VF-404. Primary Assumption of Risk—Liability of Instructors, Trainers, or Coaches

We answer the questions submitted to us as follows:

1. Was [*name of defendant***] [***name of plaintiff***]'s [coach/trainer/instructor]?**
____ Yes ____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of defendant***] intend to cause [***name of plaintiff***] injury or act recklessly in that [his/her] conduct was entirely outside the range of ordinary activity involved in teaching or coaching [***sport or other activity***]~~the sport~~ in which [***name of plaintiff***] was participating?**
____ Yes ____ No

[or]

2. Did [*name of defendant***]'s failure to use reasonable care increase the risks to [***name of plaintiff***] over and above those inherent in [***sport or other activity***]?**
____ Yes ____ No

If your answer to [either option for] question 2 is yes, then answer question 3. If you answered no [to both options], stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [*name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**
____ Yes ____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. What are [*name of plaintiff***]'s damages?**

[a. Past economic loss

[lost earnings	**$ _____]**
[lost profits	**$ _____]**
[medical expenses	**$ _____]**
[other past economic loss	**$ _____]**

Total Past Economic Damages: $ _____]

[b. Future economic loss

[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other future economic loss $ _____]

Total Future Economic Damages: $ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]

$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New September 2003; Revised April 2004, April 2007, December 2010, June 2012

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 409, *Primary Assumption of Risk—Liability of Instructors, Trainers, or Coaches.*

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If

different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

2334. Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Within Liability Policy Limits—Essential Factual Elements

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[*Name of plaintiff***] claims that [he/she/it] was harmed by [***name of defendant***]'s breach of the obligation of good faith and fair dealing because [***name of defendant***] failed to accept a reasonable settlement demand in a lawsuit against [***name of plaintiff***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff in underlying case***] brought a lawsuit against [***name of plaintiff***] for a claim that [[he/she/it] alleged] was covered by [***name of defendant***]'s insurance policy;**

2. **That [***name of defendant***] failed to accept a reasonable settlement demand for an amount within policy limits; and**

3. **That a monetary judgment was entered against [***name of plaintiff***] for a sum greater than the policy limits.**

"Policy limits" means the highest amount available under the policy for the claim against [*name of plaintiff***].**

A settlement demand is reasonable if [*name of defendant***] knew or should have known at the time the settlement demand was rejected that the potential judgment was likely to exceed the amount of the settlement demand based on [***name of plaintiff in underlying case***]'s injuries or loss and [***name of plaintiff***]'s probable liability.**

New September 2003; Revised December 2007, June 2012

Directions for Use

The instructions in this series assume that the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction is intended for use if the insurer assumed the duty to defend the insured, but failed to accept a reasonable settlement offer. It may also be used if the insurer rejects the defense, but did in fact owe its insured a duty to indemnify (i.e., coverage can be established). (See *Dewitt v. Monterey Ins. Co.* (2012) – Cal.App.4th --, -- [-- Cal.Rptr.3d --].) 2012 Cal. App. LEXIS 283 For instructions regarding general breach of contract issues, refer to the Contracts series (CACI No. 300 et seq.).

If it is alleged that a demand was made in excess of limits and there is a claim that the defendant should have contributed the policy limits, then this instruction will need to be modified.

This instruction should be modified if the insurer did not accept the policy-limits demand because of potential remaining exposure to the insured, such as a contractual indemnity claim or exposure to other

claimants.

Sources and Authority

- "[T]he implied obligation of good faith and fair dealing requires the insurer to settle in an appropriate case although the express terms of the policy do not impose such a duty. [¶] The insurer, in deciding whether a claim should be compromised, must take into account the interest of the insured and give it at least as much consideration as it does to its own interest. When there is great risk of a recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest requires the insurer to settle the claim." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 659 [328 P.2d 198], citation omitted.)

- "Liability is imposed not for a bad faith breach of the contract but for failure to meet the duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing." (*Crisci v. Security Insurance Co. of New Haven, Connecticut* (1967) 66 Cal.2d 425, 430 [58 Cal.Rptr. 13, 426 P.2d 173].)

- "In determining whether an insurer has given consideration to the interests of the insured, the test is whether a prudent insurer without policy limits would have accepted the settlement offer." (*Crisci*, *supra*, 66 Cal.2d at p. 429.)

- "[I]n deciding whether or not to compromise the claim, the insurer must conduct itself as though it alone were liable for the entire amount of the judgment. ... [T]he only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer." (*Johansen v. California State Auto. Asso. Inter-Insurance Bureau* (1975) 15 Cal.3d 9, 16 [123 Cal.Rptr. 288, 538 P.2d 744], internal citation omitted.)

- "The size of the judgment recovered in the personal injury action when it exceeds the policy limits, although not conclusive, furnishes an inference that the value of the claim is the equivalent of the amount of the judgment and that acceptance of an offer within those limits was the most reasonable method of dealing with the claim." (*Crisci*, *supra*, 66 Cal.2d at p. 431.)

- "The covenant of good faith and fair dealing implied in every insurance policy obligates the insurer, among other things, to accept a reasonable offer to settle a lawsuit by a third party against the insured within policy limits whenever there is a substantial likelihood of a recovery in excess of those limits. The insurer must evaluate the reasonableness of an offer to settle a lawsuit against the insured by considering the probable liability of the insured and the amount of that liability, without regard to any coverage defenses. An insurer that fails to accept a reasonable settlement offer within policy limits will be held liable in tort for the entire judgment against the insured, even if that amount exceeds the policy limits. An insurer's duty to accept a reasonable settlement offer in these circumstances is implied in law to protect the insured from exposure to liability in excess of coverage as a result of the insurer's gamble—on which only the insured might lose." (*Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 146 Cal.App.4th 831, 836 [53 Cal.Rptr.3d 245], internal citations omitted.)

- "Determination of the reasonableness of a settlement offer for purposes of a reimbursement action is based on the information available to [the insurer] at the time of the proposed settlement." (*Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 793 [244 Cal.Rptr. 655, 750 P.2d 297].)

- "Whether [the insurer] 'refused' the 'offer,' and whether it could reasonably have acted otherwise in light of the 11-day deadline imposed by the offer's terms, were questions for the jury." (*Coe v. State Farm Mut. Auto. Ins. Co.* (1977) 66 Cal.App.3d 981, 994 [136 Cal.Rptr. 331].)

- "A cause of action for bad faith refusal to settle arises only after a judgment has been rendered in excess of the policy limits. ... Until judgment is actually entered, the mere possibility or probability of an excess judgment does not render the refusal to settle actionable." (*Safeco Ins. Co. of Am. v. Superior Court* (1999) 71 Cal.App.4th 782, 788 [84 Cal.Rptr.2d 43], internal citations omitted.)

- "An insurer's wrongful failure to settle may be actionable even without rendition of an excess judgment. An insured may recover for bad faith failure to settle, despite the lack of an excess judgment, where the insurer's misconduct goes beyond a simple failure to settle within policy limits or the insured suffers consequential damages apart from an excess judgment." (*Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 527 [115 Cal.Rptr.3d 42], internal citations omitted.)

- "[A]n insurer who refused a reasonable settlement offer, on the ground of no coverage, does so at its own risk, so that the insurer has no defense that its refusal was in good faith if coverage is, in fact, found. However, where the kind of claim asserted is not covered by the insurance contract (and not simply the amount of the claim), an insurer has no obligation to pay money in settlement of a noncovered claim, because 'The insurer does not … insure the entire range of an insured's well-being, outside the scope of and unrelated to the insurance policy, with respect to paying third party claims.…' " (*DeWitt, supra*, -- Cal.App.4th at p. --.)

- "A good faith belief in noncoverage is not relevant to a determination of the reasonableness of a settlement offer." (*Samson v. Transamerica Insurance Co.* (1981) 30 Cal.3d 220, 243 [178 Cal.Rptr. 343, 636 P.2d 32], internal citation omitted.)

- "An insurer that breaches its duty of reasonable settlement is liable for all the insured's damages proximately caused by the breach, regardless of policy limits. Where the underlying action has proceeded to trial and a judgment in excess of the policy limits has been entered against the insured, the insurer is ordinarily liable to its insured for the entire amount of that judgment, excluding any punitive damages awarded." (*Hamilton v. Maryland Casualty Co.* (2002) 27 Cal.4th 718, 725 [117 Cal.Rptr.2d 318, 41 P.3d 128], internal citations omitted.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance, §§ 257–258

Croskey et al., California Practice Guide: Insurance Litigation, ¶¶ 12:201–12:686 (The Rutter Group)

2 California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar) Actions for Failure to

Settle, §§ 26.1–26.35

2 California Insurance Law and Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.07[1]–[3] (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.24 (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.195, 120.199, 120.205, 120.207 (Matthew Bender)

2421. Breach of Employment Contract—Specified Term—Good-Cause Defense (Lab. Code, § 2924)

[*Name of defendant***] claims that [he/she/it] did not breach the employment contract because [he/she/it] [discharged/demoted] [***name of plaintiff***] for good cause. To establish good cause, [***name of defendant***] must prove:**

[that [*name of plaintiff***] willfully breached a job duty] [or]**

[that [*name of plaintiff***] continually neglected [his/her] job duties] [or]**

[that a continued incapacity prevented [*name of plaintiff***] from performing [his/her] job duties.]**

New September 2003; Revised June 2012

Directions for Use

This instruction sets forth the statutory grounds under which an employer may terminate an employment contract for a specified term. (See Lab. Code, § 2924.) It should be given when the employee alleges wrongful discharge in breach of the ~~of an employment~~ contract ~~for a specified term~~ and the employer defends by asserting plaintiff was justifiably discharged.

This instruction may not be appropriate ~~in the context of an employment contract where~~if the parties have agreed to a particular meaning of "good cause" (e.g., a written employment agreement specifically defining "good cause" for discharge). (See *Uecker & Assocs. v. Lei* (*In re San Jose Med. Mgmt.*) (2007 B.A.P. 9th Cir.) 2007 Bankr. LEXIS 4829.) If so, the instruction should be modified to set forth the contractual grounds for good cause~~accordingly~~. In the absence of grounds for termination in the contract, the employer is limited to those set forth in the statute. (See *Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 57 [100 Cal.Rptr.2d 627].)

~~Modification of t~~The third ~~element~~ option may not be asserted~~be necessary~~ if the plaintiff has a statutory right to be absent ~~for~~ from work (for example, for family ~~and~~ or medical leave or to accommodate a disability) throughout the entire period of incapacity.

Sources and Authority

- Labor Code section 2922 provides: "An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means employment for a period of greater than one month."
- Labor Code section 2924 provides: "An employment for a specified term may be terminated at any time by the employer in case of any willful breach of duty by the employee in the course of his employment, or in case of his habitual neglect of his duty or continued incapacity to perform it."

- "[L]abor Code section 2924 has traditionally been interpreted to 'inhibit[] the termination of employment for a specified term except in case of a wilful breach of duty, of habitual neglect of, or continued incapacity to perform, a duty.' " (*Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 57 [100 Cal.Rptr.2d 627], internal citations omitted.)

- "Unlike a wrongful discharge based on an implied-in-fact contract, an employee who has a contract for a specified term may not be terminated prior to the term's expiration based on an honest but mistaken belief that the employee breached the contract: Such a right would treat a contract with a specified term no better than an implied contract that has no term; such a right would dilute the enforceability of the contract's specified term because an employee who had properly performed his or her contract could still be terminated before the term's end; and such a right would run afoul of the plain language of Labor Code section 2924, which allows termination of an employment for a specified term only 'in case of any willful breach of duty . . . habitual neglect of . . . duty or continued incapacity to perform it.' Termination of employment for a specified term, before the end of the term, based solely on the mistaken belief of a breach, cannot be reconciled with either the governing statute's text or settled principles of contract law.~~Labor Code section 2924 "does not grant a right to terminate prior to the end of the employee's term on the basis of a mistaken belief of a breach.~~" (*Khajavi, supra,* 84 Cal.App.4th at pp. ~~58~~38-~~59~~39.)

- Good cause in the context of wrongful termination based on an implied contract " 'is quite different from the standard applicable in determining the propriety of an employee's termination under a contract for a specified term.' " (*Khajavi, supra,* 84 Cal.App.4th at p. 58, internal citations omitted.)

- "An employer is justified in discharging his employee, when the latter fails to perform his duty, even though injury does not result to the employer as a result of the employee's failure to do his duty." (*Bank of America National Trust & Savings Ass'n v. Republic Productions, Inc.* (1941) 44 Cal.App.2d 651, 654 [112 P.2d 972], internal citation omitted.)

- "To terminate an employment without the expiration of its contractual term 'there must be good cause.' The grounds for terminating such an employment are stated in Labor Code section 2924. … It is therefore not every deviation of the employee from the standard of performance sought by his employer that will justify a discharge. There must be some 'wilful act or wilful misconduct ...' when the employee uses his best efforts to serve the interests of his employer." (*Holtzendorff v. Housing Authority of the City of Los Angeles* (1967) 250 Cal.App.2d 596, 610 [58 Cal.Rptr. 886], internal citation omitted.)

- " 'Willful' disobedience of a specific, peremptory instruction of the master, if the instruction be reasonable and consistent with the contract, is a breach of duty-a breach of the contract of service; and, like any other breach of the contract, of itself entitles the master to renounce the contract of employment." (*May v. New York Motion Picture Corp.* (1920) 45 Cal.App. 396, 403 [187 P. 785].)

- "An employment agreement that specifies the length of employment (e.g., two years) limits the employer's right to discharge the employee within that period. Unless the agreement provides otherwise (e.g., by reserving the right to discharge for cause), the employer may terminate employment for a specified term only for [the grounds specified in Labor Code section 2924]." (Chin

et al., Cal. Practice Guide: Employment Litigation ¶ 4:47 (The Rutter Group)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-A, *Employment Presumed At Will,* ~~(The Rutter Group)~~ ¶¶ 4:2, 4:47, 4:56, 4:57 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-B, *Agreements Limiting At-Will Termination,* ¶¶ 4:47, 4:56, 4:57 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.22–8.26

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline,* §§ 249.13, 249.21, 249.60–249.63 (Matthew Bender)

2500. Disparate Treatment—Essential Factual Elements (Gov. Code, § 12940(a))

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**

3. **That [***name of defendant***] [discharged/refused to hire/[***other adverse employment action***]] [***name of plaintiff***];**

[or]

[That [*name of defendant***] subjected [***name of plaintiff***] to an adverse employment action;]**

[or]

[That [*name of plaintiff***] was constructively discharged;]**

4. **That [***name of plaintiff***]'s [***protected status-for example, race, gender, or age***] was a motivating reason for ~~the~~ [***name of defendant***]'s [decision to discharge/refuse~~al~~ to hire/[***other adverse employment action***]] [***name of plaintiff***]/conduct];**

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

6. **That ~~the [discharge/refusal to hire~~/[~~*other adverse employment action*~~]]~~ [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised April 2009, June 2011, June 2012

Directions for Use

This instruction is intended for use when a plaintiff alleges disparate treatment discrimination under the FEHA against an employer or other covered entity. Disparate treatment occurs when an employer treats an individual less favorably than others because of the individual's protected status. In contrast, disparate impact (the other general theory of discrimination) occurs when an employer has an employment practice that appears neutral but has an adverse impact on members of a protected group. For disparate impact claims, see CACI No. 2502, *Disparate Impact—Essential Factual Elements*.

If element 1 is given, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment

agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

Read the first option for element 3 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained*, if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 3 and also give CACI No. 2510, *"Constructive Discharge" Explained*. Select "conduct" in element 4 if the either the second or third option is included for element 3.

Note that there are two causation elements. There must be a causal link between the discriminatory animus and the adverse action (see element 4), and there must be a causal link between the adverse action and the damage (see element 6). (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406].)

For damages instructions, see applicable instructions on tort damages.

Sources and Authority

- Government Code section 12940(a) provides that it is an unlawful employment practice "[f]or an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment."

- Government Code section 12926(~~m~~n) provides: " 'Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, or sexual orientation' includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics."

- "[C]onceptually the theory of 'disparate treatment' ... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin." (*Mixon v. Fair Employment and Housing Com.* (1987) 192 Cal.App.3d 1306, 1317 [237 Cal.Rptr. 884], quoting *Teamsters v. United States* (1977) 431 U.S. 324, 335–336, fn. 15 [97 S.Ct. 1843, 52 L.Ed.2d 396].)

- "California has adopted the three-stage burden-shifting test for discrimination claims set forth in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed. 2d 668]. 'This so-called *McDonnell Douglas* test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained.' " (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 307 [115 Cal.Rptr.3d 453], internal citations omitted.)

- "At trial, the *McDonnell Douglas* test places on the plaintiff the initial burden to establish a prima facie case of discrimination. This step is designed to eliminate at the outset the most patently meritless claims, as where the plaintiff is not a member of the protected class or was clearly unqualified, or where the job he sought was withdrawn and never filled. While the plaintiff's prima facie burden is 'not onerous', he must at least show ' "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a [prohibited] discriminatory criterion . . . .' …." …' " (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354–355 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)

- "If, at trial, the plaintiff establishes a prima facie case, a presumption of discrimination arises. This presumption, though 'rebuttable,' is 'legally mandatory.' Thus, in a trial, '[i]f the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.' [¶] Accordingly, at this trial stage, the burden shifts to the employer to rebut the presumption by producing admissible evidence, sufficient to 'raise[] a genuine issue of fact' and to 'justify a judgment for the [employer],' that its action was taken for a legitimate, nondiscriminatory reason. [¶] If the employer sustains this burden, the presumption of discrimination disappears. The plaintiff must then have the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive. In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias. The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff." *(Guz, supra,* 24 Cal.4th at pp. 355–356, internal citations omitted.)

- "[W]hether or not a plaintiff has met his or her prima facie burden [under *McDonnell Douglas Corp., supra,* 411 U.S. 792], and whether or not the defendant has rebutted the plaintiff's prima facie showing, are questions of law for the trial court, not questions of fact for the jury." (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 201 [48 Cal.Rptr.2d 448].)

- "To succeed on a disparate treatment claim at trial, the plaintiff has the initial burden of establishing a prima facie case of discrimination, to wit, a set of circumstances that, if unexplained, permit an inference that it is more likely than not the employer intentionally treated the employee less favorably than others on prohibited grounds. Based on the inherent difficulties of showing intentional discrimination, courts have generally adopted a multifactor test to determine if a plaintiff was subject to disparate treatment. The plaintiff must generally show that: he or she was a member of a protected class; was qualified for the position he sought; suffered an adverse employment action, and there were circumstances suggesting that the employer acted with a discriminatory motive. [¶] On a defense motion for summary judgment against a disparate treatment claim, the defendant must show either that one of these elements cannot be established or that there were one or more legitimate, nondiscriminatory reasons underlying the adverse employment action." (*Jones v. Department of Corrections* (2007) 152 Cal.App.4th 1367, 1379 [62 Cal.Rptr.3d 200], internal citations omitted.)

  "[Defendant] still could shift the burden to [plaintiff] by presenting admissible evidence showing a legitimate, nondiscriminatory reason for terminating her. 'It is the employer's honest belief in the stated reasons for firing an employee and not the objective truth or falsity of the underlying facts that is at issue in a discrimination case.' … '[I]f nondiscriminatory, [the employer's] true reasons need not necessarily have been wise or correct. … While the objective soundness of an employer's proffered

reasons supports their credibility … , the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*. Thus, "legitimate" reasons … in this context are reasons that are *facially unrelated to prohibited bias,* and which, if true, would thus preclude a finding *of discrimination. …' "* (*Wills v. Superior Court* (2011) 194 Cal.App.4th 312, 339 [-- Cal.Rptr.3d --], original italics, internal citations omitted.)

- "While a complainant need not prove that [discriminatory] animus was the sole motivation behind a challenged action, he must prove by a preponderance of the evidence that there was a 'causal connection' between the employee's protected status and the adverse employment decision." (*Mixon, supra,* 192 Cal.App.3d at p. 1319.)

- "In cases involving a comparison of the plaintiff's qualifications and those of the successful candidate, we must assume that a reasonable juror who might disagree with the employer's decision, but would find the question close, would not usually infer discrimination on the basis of a comparison of qualifications alone. In a close case, a reasonable juror would usually assume that the employer is more capable of assessing the significance of small differences in the qualifications of the candidates, or that the employer simply made a judgment call. [Citation.] But this does not mean that a reasonable juror would in every case defer to the employer's assessment. If that were so, no job discrimination case could ever go to trial. If a factfinder can conclude that a reasonable employer would have found the plaintiff to be *significantly better* qualified for the job, but this employer did not, the factfinder can legitimately infer that the employer consciously selected a less-qualified candidate—something that employers do not usually do, unless some other strong consideration, such as discrimination, enters into the picture." (*Reeves v. MV Transportation, Inc.* (2010) 186 Cal.App.4th 666, 674–675 [111 Cal.Rptr.3d 896], original italics.)

- "While not all cases hold that 'the disparity in candidates' qualifications "must be so apparent as to jump off the page and slap us in the face to support a finding of pretext" ' the precedents do consistently require that the disparity be substantial to support an inference of discrimination." (*Reeves, supra,* 186 Cal.App.4th at p. 675, internal citation omitted.)

- "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes." (*Guz, supra,* 24 Cal.4th at p. 354.)

- "We have held 'that, in a civil action under the FEHA, all relief generally available in noncontractual actions ... may be obtained.' This includes injunctive relief." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

- "The FEHA does not itself authorize punitive damages. It is, however, settled that California's punitive damages statute, Civil Code section 3294, applies to actions brought under the FEHA ... ." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1147–1148 [74 Cal.Rptr.2d 510], internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 915, 916, 918

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:194, 7:200–7:201, 7:356, 7:391–7:392 (The Rutter Group)~~¶¶ 4:25, 5:153, 7:194, 7:200–7:201, 7:356, 7:391–7:392 (The Rutter Group)~~

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.44–2.82

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23[2] (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 2:2, 2:20 (Thomson Reuters West)

2505. Retaliation—Essential Factual Elements (Gov. Code, § 12940(h))

[*Name of plaintiff***] claims that [***name of defendant***] retaliated against [him/her] for [***describe activity protected by the FEHA***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [***describe protected activity***];**

2. **[That [***name of defendant***] [discharged/demoted/[***specify other adverse employment action***]] [***name of plaintiff***];]**

   [**or**]

   [That [*name of defendant***] subjected ~~engaged in conduct that, taken as a whole, materially and adversely affected the terms and conditions of~~ [***name of plaintiff***] to an adverse~~'s~~ employment action;]**

   [**or**]

   [That [*name of plaintiff***] was constructively discharged;]**

3. **That [***name of plaintiff***]'s [***describe protected activity***] was a motivating reason for [***name of defendant***]'s [decision to [discharge/demote/[***specify other adverse employment action***]] [***name of plaintiff***]/conduct];**

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

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

New September 2003; Revised August 2007, April 2008, October 2008, April 2009, June 2010, June 2012

Directions for Use

In elements 1 and 3, describe the protected activity in question. Government Code section 12940(h) provides that it is unlawful to retaliate against a person "because the person has opposed any practices forbidden under [Government Code sections 12900 through 12966] or because the person has filed a complaint, testified, or assisted in any proceeding under [the FEHA]."

Read the first option for element 2 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained,* if whether there was an adverse employment action is a question of fact for the jury. For example, the case may involve a pattern of employer harassment consisting of acts that might not individually be sufficient to constitute retaliation, but taken as a whole establish prohibited conduct. (See *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1052–1056 [32 Cal.Rptr.3d 436, 116 P.3d 1123].) ~~Or the case may involve acts that, considered alone, would not appear to be adverse, but~~

~~could be adverse under the particular circumstances of the case. (See *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1389–1390 [37 Cal.Rptr.3d 113] [lateral transfer can be adverse employment action even if wages, benefits, and duties remain the same].)~~ Give both options if the employee presents evidence supporting liability under both a sufficient-single-act theory or a pattern-of-harassment theory. (See, e.g., *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 423–424 [69 Cal.Rptr.3d 1].) Also select "conduct" in element 3 if the second option or both options are included for element 2.

Retaliation in violation of the FEHA may be established by constructive discharge; that is, that the employer intentionally created or knowingly permitted working conditions to exist that were so intolerable that a reasonable person in the employee's position would have had no reasonable alternative other than to resign. (See *Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241, 1253 [76 Cal.Rptr.3d 632].) If constructive discharge is alleged, give the third option for element 2 and also give CACI No. 2510, *"Constructive Discharge" Explained*~~replace element 2 with elements 4 and 5 of CACI No. 2402, *Breach of Employment Contract—Unspecified Term—Constructive Discharge—Essential Factual Elements*~~. Also select "conduct" in element 3 if the third option is included for element 2.

Note that there are two causation elements. There must be a causal link between the retaliatory animus and the adverse action (see element 3), and there must be a causal link between the adverse action and damages (see element 5). (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406].)

Sources and Authority

- Government Code section 12940(h) provides that it is an unlawful employment practice "[f]or any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part."

- The FEHA defines a "person" as "one or more individuals, partnerships, associations, corporations, limited liability companies, legal representatives, trustees, trustees in bankruptcy, and receivers or other fiduciaries." (Gov. Code, § 12925(d).)

- The Fair Employment and Housing Commission's regulations provide: "It is unlawful for an employer or other covered entity to demote, suspend, reduce, fail to hire or consider for hire, fail to give equal consideration in making employment decisions, fail to treat impartially in the context of any recommendations for subsequent employment which the employer or other covered entity may make, adversely affect working conditions or otherwise deny any employment benefit to an individual because that individual has opposed practices prohibited by the Act or has filed a complaint, testified, assisted or participated in any manner in an investigation, proceeding, or hearing conducted by the Commission or Department or their staffs." (Cal. Code Regs., tit. 2, § 7287.8(a).)

- "[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's

action. Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation ' " 'drops out of the picture,' " ' and the burden shifts back to the employee to prove intentional retaliation." (*Yanowitz, supra*, 36 Cal.4th at p. 1042, internal citations omitted~~Employees may establish a prima facie case of unlawful retaliation by showing that (1) they engaged in activities protected by the FEHA, (2) their employers subsequently took adverse employment action against them, and (3) there was a causal connection between the protected activity and the adverse employment action." (*Miller v. Department of Corr.* (2005) 36 Cal.4th 446, 472 [30 Cal.Rptr.3d 797, 115 P.3d 77]~~.)

- "It is well established that a plaintiff in a retaliation case need only prove that a retaliatory animus was at least a substantial or motivating factor in the adverse employment decision." (*George v. California Unemployment Ins. Appeals Bd.* (2009) 179 Cal.App.4th 1475, 1492 [102 Cal.Rptr.3d 431].)

- "Retaliation claims are inherently fact-specific, and the impact of an employer's action in a particular case must be evaluated in context. Accordingly, although an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1052 [32 Cal.Rptr.3d 436, 116 P.3d 1123].)

- ~~"Appropriately viewed, [section 12940(a)] protects an employee against unlawful discrimination with respect not only to so-called ultimate employment actions such as termination or demotion, but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career. Although a mere offensive utterance or even a pattern of social slights by either the employer or coemployees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment for purposes of section 12940(a) (or give rise to a claim under section 12940(h)), the phrase 'terms, conditions, or privileges' of employment must be interpreted liberally and with a reasonable appreciation of the realities of the workplace in order to afford employees the appropriate and generous protection against employment discrimination that the FEHA was intended to provide." (*Yanowitz, supra*, 36 Cal.4th at pp. 1053–1054, footnotes omitted.)~~

- "Contrary to [defendant]'s assertion that it is improper to consider collectively the alleged retaliatory acts, there is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries. Enforcing a requirement that each act separately constitute an adverse employment action would subvert the purpose and intent of the statute." (*Yanowitz, supra*, 36 Cal.4th at pp. 1055–1056, internal citations omitted.)

- "Moreover, [defendant]'s actions had a substantial and material impact on the conditions of employment. The refusal to promote [plaintiff] is an adverse employment action under FEHA. There was also a pattern of conduct, the totality of which constitutes an adverse employment action. This includes undeserved negative job reviews, reductions in his staff, ignoring his health concerns and acts which caused him substantial psychological harm." (*Wysinger, supra*, 157 Cal.App.4th at p. 424,

internal citations omitted.)

- "A long period between an employer's adverse employment action and the employee's earlier protected activity may lead to the inference that the two events are not causally connected. But if between these events the employer engages in a pattern of conduct consistent with a retaliatory intent, there may be a causal connection." (*Wysinger, supra,* 157 Cal.App.4th at p. 421, internal citation omitted.)

- "Both direct and circumstantial evidence can be used to show an employer's intent to retaliate. 'Direct evidence of retaliation may consist of remarks made by decisionmakers displaying a retaliatory motive.' Circumstantial evidence typically relates to such factors as the plaintiff's job performance, the timing of events, and how the plaintiff was treated in comparison to other workers." (*Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1153 [119 Cal.Rptr.2d 131], internal citations omitted.)

- ~~"The employment action must be both detrimental and substantial ... . We must analyze [plaintiff's] complaints of adverse employment actions to determine if they result in a material change in the terms of her employment, impair her employment in some cognizable manner, or show some other employment injury ... . [W]e do not find that [plaintiff's] complaint alleges the necessary material changes in the terms of her employment to cause employment injury. Most of the actions upon which she relies were one time events ... . The other allegations ... are not accompanied by facts which evidence both a substantial and detrimental effect on her employment." (*Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 511–512 [91 Cal.Rptr.2d 770], internal citations omitted.)~~

- "The retaliatory motive is 'proved by showing that plaintiff engaged in protected activities, that his employer was aware of the protected activities, and that the adverse action followed within a relatively short time thereafter.' 'The causal link may be established by an inference derived from circumstantial evidence, "such as the employer's knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision." ' " (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 615 [262 Cal.Rptr. 842], internal citations omitted.)

- "[A]n employer generally can be held liable for the retaliatory actions of its supervisors." (*Wysinger, supra,* 157 Cal.App.4th at p. 420.)

- "[A]n employer may be found to have engaged in an adverse employment action, and thus liable for retaliation under section 12940(h), 'by permitting … fellow employees to punish [him] for invoking [his] rights.' We therefore hold that an employer may be held liable for coworker retaliatory conduct if the employer knew or should have known of coworker retaliatory conduct and either participated and encouraged the conduct, or failed to take reasonable actions to end the retaliatory conduct." (*Kelley v. The Conco Cos.* (2011) 196 Cal.App.4th 191, 213 [126 Cal.Rptr.3d 651], internal citation omitted.)

- "[T]he employer is liable for retaliation under section 12940, subdivision (h), but nonemployer individuals are not personally liable for their role in that retaliation." (*Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1173 [72 Cal.Rptr.3d 624, 177 P.3d 232].)

- "[U]nder certain circumstances, a retaliation claim may be brought by an employee who has complained of or opposed conduct, even when a court or jury subsequently determines the conduct actually was not prohibited by the FEHA. Indeed, this precept is well settled. An employee is protected against retaliation if the employee reasonably and in good faith believed that what he or she was opposing constituted unlawful employer conduct such as sexual harassment or sexual discrimination." (*Miller~~, supra,~~ v. Department of Corr.* (2005) 36 Cal.4th 446~~, at pp~~. 473–474 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

- " 'The legislative purpose underlying FEHA's prohibition against retaliation is to prevent employers from deterring employees from asserting good faith discrimination complaints … .' Employer retaliation against employees who are believed to be prospective complainants or witnesses for complainants undermines this legislative purpose just as effectively as retaliation after the filing of a complaint. To limit FEHA in such a way would be to condone 'an absurd result' that is contrary to legislative intent. We agree with the trial court that FEHA protects employees against preemptive retaliation by the employer." (*Steele, supra,* 162 Cal.App.4th at p. 1255, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 922, 940, 941

Chin, et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:680–7:841 (The Rutter Group) ~~¶¶ 7:680–7:841~~

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.83–2.88

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.131 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.37, 115.94 (Matthew Bender)

California Civil Practice: Employment Litigation ~~(Thomson West)~~, §§ 2:74–2:75 (Thomson Reuters West)

2509. "Adverse Employment Action" Explained

[*Name of plaintiff***] must prove that [he/she] was subjected to an adverse employment action.**

Adverse employment actions are not limited to ultimate actions such as termination or demotion. There is an adverse employment action if [*name of defendant***] has taken an action or engaged in a course or pattern of conduct that, taken as a whole, materially and adversely affected the terms, conditions, or privileges of [***name of plaintiff***]'s employment. An adverse employment action includes conduct that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion. However, minor or trivial actions or conduct that is not reasonably likely to do more than anger or upset an employee cannot constitute an adverse employment action.**

New June 2012

Directions for Use

Give this instruction with CACI No. 2500, *Disparate Treatment—Essential Factual Elements,* CACI No. 2505, *Retaliation,* CACI No. 2540, *Disability Discrimination—Disparate Treatment—Essential Factual Elements,* CACI No. 2560, *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements,* or CACI No. 2570, *Age Discrimination—Disparate Treatment—Essential Factual Elements,* if there is an issue as to whether the employee was the victim of an adverse employment action.

For example, the case may involve a pattern of employer harassment consisting of acts that might not individually be sufficient to constitute discrimination or retaliation, but taken as a whole establish prohibited conduct. (See *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1052–1056 [32 Cal.Rptr.3d 436, 116 P.3d 1123].) Or the case may involve acts that, considered alone, would not appear to be adverse, but could be adverse under the particular circumstances of the case. (See *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1389–1390 [37 Cal.Rptr.3d 113] [lateral transfer can be adverse employment action even if wages, benefits, and duties remain the same].)

Sources and Authority

- "Appropriately viewed, [section 12940(a)] protects an employee against unlawful discrimination with respect not only to so-called ultimate employment actions such as termination or demotion, but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career. Although a mere offensive utterance or even a pattern of social slights by either the employer or coemployees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment for purposes of section 12940(a) (or give rise to a claim under section 12940(h)), the phrase 'terms, conditions, or privileges' of employment must be interpreted liberally and with a reasonable appreciation of the realities of the workplace in order to afford employees the appropriate and generous protection against employment discrimination that the FEHA was intended to provide." (*Yanowitz, supra,* 36 Cal.4th at pp. 1053–1054, footnotes omitted.)

- "[T]he determination of what type of adverse treatment properly should be considered discrimination in the terms, conditions, or privileges of employment is not, by its nature, susceptible to a mathematically precise test, and the significance of particular types of adverse actions must be evaluated by taking into account the legitimate interests of both the employer and the employee. Minor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable, but adverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion falls within the reach of the antidiscrimination provisions of sections 12940(a) and 12940(h)." (*Yanowitz, supra*, 36 Cal.4th at pp. 1054–1055.)

- "An ' "adverse employment action," ' … , requires a 'substantial adverse change in the terms and conditions of the plaintiff's employment.' " (*Holmes v. Petrovich Development Co., LLC* (2011) 191 Cal.App.4th 1047, 1063 [119 Cal.Rptr.3d 878, internal citations omitted.)

- "Contrary to [defendant]'s assertion that it is improper to consider collectively the alleged retaliatory acts, there is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries. Enforcing a requirement that each act separately constitute an adverse employment action would subvert the purpose and intent of the statute." (*Yanowitz, supra*, 36 Cal.4th at pp. 1055–1056, internal citations omitted.)

- "Moreover, [defendant]'s actions had a substantial and material impact on the conditions of employment. The refusal to promote [plaintiff] is an adverse employment action under FEHA. There was also a pattern of conduct, the totality of which constitutes an adverse employment action. This includes undeserved negative job reviews, reductions in his staff, ignoring his health concerns and acts which caused him substantial psychological harm." (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424 [69 Cal.Rptr.3d 1], internal citations omitted.)

- "The employment action must be both detrimental and substantial ... [¶]. We must analyze [plaintiff's] complaints of adverse employment actions to determine if they result in a material change in the terms of her employment, impair her employment in some cognizable manner, or show some other employment injury ... . [W]e do not find that [plaintiff's] complaint alleges the necessary material changes in the terms of her employment to cause employment injury. Most of the actions upon which she relies were one time events ... . The other allegations ... are not accompanied by facts which evidence both a substantial and detrimental effect on her employment." (*Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 511–512 [91 Cal.Rptr.2d 770], internal citations omitted.)

- "The 'materiality' test of adverse employment action … looks to 'the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career,' and the test 'must be interpreted liberally … with a reasonable appreciation of the realities of the workplace … .' " (*Patten, supra,* 134 Cal.App.4th at p. 1389.)

- "Mere ostracism in the workplace is insufficient to establish an adverse employment decision. However, ' "[W]orkplace harassment, if sufficiently severe or pervasive, may in and of itself constitute an adverse employment action sufficient to satisfy the second prong of the prima facie case for … retaliation cases." [Citation].' " (*Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191, 212 [126 Cal.Rptr.3d 651], internal citations omitted.)

- "Not every change in the conditions of employment, however, constitutes an adverse employment action. ' "A change that is merely contrary to the employee's interests or not to the employee's liking is insufficient." … ' '[W]orkplaces are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action.' " (*Malais v. Los Angeles City Fire Dept.* (2007) 150 Cal.App.4th 350, 357 [58 Cal.Rptr.3d 444].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 11

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 940

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act,* ¶¶ 7:203, 7:731, 7:785 (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws,* § 43.01 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, § 249.12 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.42 (Matthew Bender)

2510. "Constructive Discharge" Explained

[*Name of plaintiff***] must prove that [he/she] was constructively discharged. To establish constructive discharge, [***name of plaintiff***] must prove the following:**

1. **That [***name of defendant***] [through** [*name of defendant*]**'s officers, directors, managing agents, or supervisory employees] intentionally created or knowingly permitted working conditions to exist that were so intolerable that a reasonable person in [***name of plaintiff***]'s position would have had no reasonable alternative except to resign; and**

2. **That [***name of plaintiff***] resigned because of these working conditions.**

New June 2012

Directions for Use

Give this instruction with CACI No. 2500, *Disparate Treatment—Essential Factual Elements,* CACI No. 2505, *Retaliation,* CACI No. 2540, *Disability Discrimination—Disparate Treatment—Essential Factual Elements,* CACI No. 2560, *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements,* or CACI No. 2570, *Age Discrimination—Disparate Treatment—Essential Factual Elements,* if the employee alleges that because of the employer's actions, he or she had no reasonable alternative other than to leave the employment. Constructive discharge can constitute the adverse employment action required to establish a FEHA violation for discrimination or retaliation. (See *Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241, 1253 [76 Cal.Rptr.3d 632].)

Sources and Authority

- "[C]onstructive discharge occurs only when an employer terminates employment by forcing the employee to resign. A constructive discharge is equivalent to a dismissal, although it is accomplished indirectly. Constructive discharge occurs only when the employer coerces the employee's resignation, either by creating working conditions that are intolerable under an objective standard, or by failing to remedy objectively intolerable working conditions that actually are known to the employer. We have said 'a constructive discharge is legally regarded as a firing rather than a resignation.' " (*Mullins v. Rockwell Internat. Corp.* (1997) 15 Cal.4th 731, 737 [63 Cal.Rptr.2d 636, 936 P.2d 1246], internal citations omitted.)

- "Actual discharge carries significant legal consequences for employers, including possible liability for wrongful discharge. In an attempt to avoid liability, an employer may refrain from actually firing an employee, preferring instead to engage in conduct causing him or her to quit. The doctrine of constructive discharge addresses such employer-attempted 'end runs' around wrongful discharge and other claims requiring employer-initiated terminations of employment." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244 [32 Cal.Rptr.2d 323, 876 P.2d 1022].)

- "Standing alone, constructive discharge is neither a tort nor a breach of contract, but a doctrine that transforms what is ostensibly a resignation into a firing." (*Turner, supra,* 7 Cal.4th at p. 1251.)

- "In order to amount to constructive discharge, adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable. In general, '[s]ingle, trivial, or isolated acts of [misconduct] are insufficient' to support a constructive discharge claim. Moreover, a poor performance rating or a demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge." (*Turner, supra,* 7 Cal.4th at p. 1247, internal citation and fns. omitted.)

- "In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.' " (*Turner, supra,* 7 Cal.4th at p. 1247, fn. 3.)

- "Whether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact." (*Valdez v. City of Los* Angeles (1991) 231 Cal.App.3d 1043, 1056 [282 Cal.Rptr. 726].)

- "[T]he standard by which a constructive discharge is determined is an objective one—the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' " (*Turner, supra,* 7 Cal.4th at p. 1248, internal citations omitted.)

- "In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign. [¶] For purposes of this standard, the requisite knowledge or intent must exist on the part of either the employer or those persons who effectively represent the employer, i.e., its officers, directors, managing agents, or supervisory employees." (*Turner, supra,* 7 Cal.4th at p. 1251.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency, § 225

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-G, *Constructive Discharge* ¶¶ 4:405 et seq. (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws,* § 43.01 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination,* § 115.34 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline,* § 249.15 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.31 et seq. (Matthew Bender)

2540. Disability Discrimination—Disparate Treatment—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her] based on [his/her] [perceived] [history of [a]] [***select term to describe basis of limitations, e.g., physical condition***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**

3. **[That [***name of defendant***] [knew that [***name of plaintiff***] had/treated [***name of plaintiff***] as if [he/she] had] [a] [***e.g., physical condition***] [that limited [***insert major life activity***]];] [or]**

   [That [*name of defendant***] [knew that [***name of plaintiff***] had/treated [***name of plaintiff***] as if [he/she] had] a history of having [a] [***e.g., physical condition***] [that limited [***insert major life activity***]];]**

4. **That [***name of plaintiff***] was able to perform the essential job duties [with reasonable accommodation for [his/her] [***e.g., physical condition***]];**

5. **That [***name of defendant***] [discharged/refused to hire/[***other adverse employment action***]] [***name of plaintiff***];**

   [or]

   [That [*name of defendant***] subjected [***name of plaintiff***] to an adverse employment action;]**

   [or]

   [That [*name of plaintiff***] was constructively discharged;]**

6. **[That [***name of plaintiff***]'s [[history of [a]] [***e.g., physical condition***]] was a motivating reason for ~~the~~ [***name of defendant***]'s decision to [discharge/~~refusal~~ refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]/conduct];] [or]**

   [That [*name of defendant***]'s belief that [***name of plaintiff***] had [a history of [a]] [***e.g., physical condition***] was a motivating reason for [***name of defendant***]'s decision to~~the~~ [discharge/refuse~~al~~ to hire/***other adverse employment action***]] [***name of plaintiff***]/conduct];]**

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

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

New September 2003; Revised June 2006, December 2007, April 2009, December 2009, June 2010, June 2012

Directions for Use

Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

In the introductory paragraph, include "perceived" or "history of" if the claim of discrimination is based on a perceived disability or a history of disability rather than a current actual disability.

For element 1, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

Under element 3, select the claimed basis of discrimination: an actual disability, a history of a disability, a perceived disability, or a perceived history of a disability. For an actual disability, select "knew that [*name of plaintiff*] had." For a perceived disability, select "treated [*name of plaintiff*] as if [he/she] had." (See Gov. Code, § 12926(~~i~~j)(4), (~~k~~*l*)(4) [mental and physical disability include being regarded or treated as disabled by the employer].)

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(~~h~~i)) is alleged, omit "that limited [*insert major life activity*]" in element 3. (Compare Gov. Code, § 12926(~~h~~i) with Gov. Code, § 12926(~~i~~j), (~~k~~*l*) [no requirement that medical condition limit major life activity].)

Regarding element 4, it is now settled that the ability to perform the essential duties of the job is an element of the plaintiff's burden of proof. (See *Green v. State of California* (2007) 42 Cal.4th 254, 257–258 [64 Cal.Rptr.3d 390, 165 P.3d 118].)

Read the first option for element 5 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained*, if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 5 and also give CACI No. 2510, *"Constructive Discharge" Explained*. Select "conduct" in element 6 if either the second or third option is included for element 5.

If the existence of a qualifying disability is disputed, additional instructions defining "physical disability," "mental disability," and "medical condition" may be required. (See Gov. Code, § 12926(~~h~~i), (~~i~~j), (~~k~~*l*).)

Sources and Authority

- Government Code section 12940(a) provides that it is an unlawful employment practice "[f]or an

employer, because of the ... physical disability, mental disability, [or] medical condition ... of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment."

- Government Code section 12940(a)(1) also provides that the FEHA "does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability ... where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations."

- For a definition of "medical condition," see Government Code section 12926(~~h~~i).

- For a definition of "mental disability," see Government Code section 12926(~~i~~j).

- For a definition of "physical disability," see Government Code section 12926(~~k~~*l*).

- Government Code section 12926.1(c) provides, in part: "[T]he Legislature has determined that the definitions of 'physical disability' and 'mental disability' under the law of this state require a 'limitation' upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a 'substantial limitation.' This distinction is intended to result in broader coverage under the law of this state than under that federal act. Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990. Further, under the law of this state, 'working' is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments."

- "[T]he purpose of the 'regarded-as' prong is to protect individuals rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities. In other words, to find a perceived disability, the perception must stem from a false idea about the existence of or the limiting effect of a disability." (*Diffey v. Riverside County Sheriff's Dept.* (2000) 84 Cal.App.4th 1031, 1037 [101 Cal.Rptr.2d 353], internal citation omitted.)

- "[T]he plaintiff initially has the burden to establish a prima facie case of discrimination. The plaintiff can meet this burden by presenting evidence that demonstrates, even circumstantially or by inference, that he or she (1) suffered from a disability, or was regarded as suffering from a disability; (2) could perform the essential duties of the job with or without reasonable accommodations, and (3) was subjected to an adverse employment action because of the disability or perceived disability. To establish a prima facie case, a plaintiff must show ' " ' "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a [prohibited] discriminatory criterion … ." ' " …' The prima facie burden is light; the evidence necessary to sustain the burden is minimal. As noted above, while the elements of a plaintiff's prima facie case can vary considerably, generally an employee need only offer sufficient

circumstantial evidence to give rise to a reasonable *inference* of discrimination." (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 310 [115 Cal.Rptr.3d 453], original italics, internal citations omitted.)

- "Summary adjudication of the section 12940(a) claim … turns on … whether [plaintiff] could perform the essential functions of the relevant job with or without accommodation. [Plaintiff] does not dispute that she was unable to perform the essential functions of her *former* position as a clothes fitter with or without accommodation. Under federal law, however, when an employee seeks accommodation by being reassigned to a vacant position in the company, the employee satisfies the 'qualified individual with a disability' requirement by showing he or she can perform the essential functions of the *vacant position* with or without accommodation. The position must exist and be vacant, and the employer need not promote the disabled employee. We apply the same rule here. To prevail on summary adjudication of the section 12940(a) claim, [defendant] must show there is no triable issue of fact about [plaintiff]'s ability, with or without accommodation, to perform the essential functions of an available vacant position that would not be a promotion." (*Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 965 [83 Cal.Rptr.3d 190], original italics, internal citations omitted.)

- "[Defendant] asserts the statute's 'regarded as' protection is limited to persons who are denied or who lose jobs based on an employer's reliance on the 'myths, fears or stereotypes' frequently associated with disabilities. … However, the statutory language does not expressly restrict FEHA's protections to the narrow class to whom [defendant] would limit its coverage. To impose such a restriction would exclude from protection a large group of individuals, like [plaintiff], with more mundane long-term medical conditions, the significance of which is exacerbated by an employer's failure to reasonably accommodate. Both the policy and language of the statute offer protection to a person who is not actually disabled, but is wrongly perceived to be. The statute's plain language leads to the conclusion that the 'regarded as' definition casts a broader net and protects *any* individual 'regarded' or 'treated' by an employer 'as having, or having had, any physical condition that makes achievement of a major life activity difficult' or may do so in the future. We agree most individuals who sue exclusively under this definitional prong likely are and will continue to be victims of an employer's 'mistaken' perception, based on an unfounded fear or stereotypical assumption. Nevertheless, FEHA's protection is nowhere expressly premised on such a factual showing, and we decline the invitation to import such a requirement." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 53 [43 Cal.Rptr.3d 874], original italics, internal citations omitted.)

- " 'An adverse employment decision cannot be made "because of" a disability, when the disability is not known to the employer. Thus, in order to prove [a discrimination] claim, a plaintiff must prove the employer had knowledge of the employee's disability when the adverse employment decision was made. … While knowledge of the disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the only reasonable interpretation of the known facts. "Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations … ." … ' " (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1008 [93 Cal.Rptr.2d 338].)

- "[W]e interpret FEHA as authorizing an employer to distinguish between disability-caused misconduct and the disability itself in the narrow context of threats or violence against coworkers. If

employers are not permitted to make this distinction, they are caught on the horns of a dilemma. They may not discriminate against an employee based on a disability but, at the same time, must provide all employees with a safe work environment free from threats and violence." (*Wills v. Superior Court* (2011) 194 Cal.App.4th 312, 334–335 [-- Cal.Rptr.3d --], internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 936, 937

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act (FEHA)*, ¶¶ 9:2160–9:2241 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.78–2.80

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.32[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.14, 115.23, 115.34, 115.77[3][a] (Matthew Bender)

California Civil Practice: Employment Litigation § 2:46 (Thomson Reuters West)

2541. Disability Discrimination—Reasonable Accommodation—Essential Factual Elements (Gov. Code, § 12940(m))

[*Name of plaintiff***] claims that [***name of defendant***] failed to reasonably accommodate [his/her] [***select term to describe basis of limitations, e.g., physical condition***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**

3. **That [[***name of plaintiff***] had/[***name of defendant***] treated [***name of plaintiff***] as if [he/she] had] [a] [***e.g., physical condition***] [that limited [***insert major life activity***]];**

4. **[That [***name of defendant***] knew of [***name of plaintiff***]'s [***e.g., physical condition***] [that limited [***insert major life activity***]];]**

5. **That [***name of plaintiff***] was able to perform the essential job duties with reasonable accommodation for [his/her] [***e.g., physical condition***];**

6. **That [***name of defendant***] failed to provide reasonable accommodation for [***name of plaintiff***]'s [***e.g., physical condition***];**

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

8. **That [***name of defendant***]'s failure to provide reasonable accommodation was a substantial factor in causing [***name of plaintiff***]'s harm.**

[In determining whether [*name of plaintiff***]'s [***e.g., physical condition***] limits [***insert major life activity***], you must consider the [***e.g., physical condition***] [in its unmedicated state/without assistive devices/[***describe mitigating measures***]].]**

New September 2003; Revised April 2007, December 2007, April 2009, December 2009, June 2010, December 2011, June 2012

Directions for Use

Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

For element 1, the court may need to instruct the jury on the statutory definition of "employer" under the

FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(~~h~~i)) is alleged, omit "that limited [*insert major life activity*]" in elements 3 and 4 and do not include the last paragraph. (Compare Gov. Code, § 12926(~~h~~i) with Gov. Code, § 12926(~~i~~j), (~~k~~*l*) [no requirement that medical condition limit major life activity].)

In a case of perceived disability, include "[*name of defendant*] treated [*name of plaintiff*] as if [he/she] had" in element 3, and delete optional element 4. (See Gov. Code, § 12926(~~i~~j)(4), (~~k~~*l*)(4) [mental and physical disability include being regarded or treated as disabled by the employer].) In a case of actual disability, include "**[***name of plaintiff*] had" in element 3, and give element 4.

If the existence of a qualifying disability is disputed, additional instructions defining "physical disability," "mental disability," and "medical condition" may be required. (See Gov. Code, § 12926(~~h~~i), (~~i~~j), (~~k~~*l*).)

The California Supreme Court has held that under Government Code section 12940(a), the plaintiff is required to prove that he or she has the ability to perform the essential duties of the job with or without reasonable accommodation. (See *Green v. State of California* (2007) 42 Cal.4th 254, 260 [64 Cal.Rptr.3d 390, 165 P.3d 118].) While the court left open the question of whether the same rule should apply ~~There is apparently some divergence of authority as to whether this rule applies~~ to cases under Government Code section 12940(m)~~, and if so, which party bears the burden of proof.~~ (~~See~~ see *id.* at p. 265), appellate courts have subsequently placed the burden on the employee to prove that he or she would be able to perform the job duties with reasonable accommodation (see element 5). (See~~; compare~~ *Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 766 [123 Cal.Rptr.3d 562]; *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 973–979 [83 Cal.Rptr.3d 190]~~ with *Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 360–363 [118 Cal.Rptr.2d 443].) If the court decides that the plaintiff does not bear the burden of proof, omit element 5~~.)

~~If the plaintiff bears the burden of proof, t~~There may still be an unresolved ~~also be an~~ issue if ~~of~~ the employee claims that the employer failed to provide him or her with other suitable job opportunities that he or she might be able to perform with reasonable accommodation.~~how far the employee must go with regard to whether a reasonable accommodation was possible.~~ The rule has been that the employer has an affirmative duty to make known to the employee other suitable job opportunities and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to other disabled or nondisabled employees or has a policy of offering such assistance or benefit to any other employees. (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 950–951 [62 Cal.Rptr.2d 142]; see also *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35 Cal.Rptr.3d 837]; *Hanson v. Lucky Stores* (1999) 74 Cal.App.4th 215, 226 [87 Cal.Rptr.2d 487].) In contrast, other courts have said that it is the employee's burden to prove that a reasonable accommodation could have been made, i.e., that he or she was qualified for a position in light of the potential accommodation. (See *Nadaf-Rahrov, supra,* 166 Cal.App.4th at p. 978; see also *Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 767 [123 Cal.Rptr.3d 562] [plaintiff proves he or she is a qualified individual by establishing that he or she can perform the essential functions of the position to which reassignment is

sought].) The question of whether the employee has to present evidence of other suitable job descriptions and prove that a vacancy existed for a position that the employee could do with reasonable accommodation may not be fully resolved.

No element has been included that requires the plaintiff to specifically request reasonable accommodation. Unlike Government Code section 12940(n) on the interactive process (see CACI No. 2546, *Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process*), section 12940(m) does not specifically require that the employee request reasonable accommodation; it requires only that the employer know of the disability. (See *Prilliman, supra,* 53 Cal.App.4th at pp. 950–951~~; but see *Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1252 [82 Cal.Rptr.3d 440] [employee must request an accommodation]~~.)

Sources and Authority

- Government Code section 12940(m) provides that it is an unlawful employment practice "[f]or an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in ... subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation."

- "Any employer or other covered entity shall make reasonable accommodation to the disability of any individual with a disability if the employer or other covered entity knows of the disability, unless the employer or other covered entity can demonstrate that the accommodation would impose an undue hardship." (Cal. Code Regs., tit. 2, § 7293.9.)

- Government Code section 12926(~~n~~o) provides:

  "Reasonable accommodation" may include either of the following:

  (1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.

  (2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

- Government Code section 12940(n) provides that it is an unlawful employment practice "[f]or an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition."

- For a definition of "medical condition," see Government Code section 12926(~~h~~i).

- For a definition of "mental disability," see Government Code section 12926(~~i~~j).

- For a definition of "physical disability," see Government Code section 12926(~~k~~*l*).

- Government Code section 12926.1(c) provides, in part: "[T]he Legislature has determined that the definitions of 'physical disability' and 'mental disability' under the law of this state require a 'limitation' upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a 'substantial limitation.' This distinction is intended to result in broader coverage under the law of this state than under that federal act. Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990. Further, under the law of this state, 'working' is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments."

- "The essential elements of a failure to accommodate claim are: (1) the plaintiff has a disability covered by the FEHA; (2) the plaintiff is a qualified individual (i.e., he or she can perform the essential functions of the position); and (3) the employer failed to reasonably accommodate the plaintiff's disability." (*Cuiellette, supra,* 194 Cal.App.4th at p. 766.)

- "Under the FEHA, 'reasonable accommodation' means 'a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired.' " (*Cuiellette, supra,* 194 Cal.App.4th at p. 766.)

- "The question now arises whether it is the employees' burden to prove that a reasonable accommodation could have been made, i.e., that they were qualified for a position in light of the potential accommodation, or the employers' burden to prove that no reasonable accommodation was available, i.e., that the employees were not qualified for any position because no reasonable accommodation was available. [¶¶] Applying *Green's* burden of proof analysis to section 12940(m), we conclude that the burden of proving ability to perform the essential functions of a job with accommodation should be placed on the plaintiff under this statute as well. First, … an employee's ability to perform the essential functions of a job is a prerequisite to liability under section 12940(m). Second, the Legislature modeled section 12940(m) on the federal reasonable accommodation requirement (adopting almost verbatim the federal statutory definition of 'reasonable accommodation' by way of example). Had the Legislature intended the employer to bear the burden of proving ability to perform the essential functions of the job, contrary to the federal allocation of the burden of proof, … it could have expressly provided for that result, but it did not. Finally, general evidentiary principles support allocating the burden of proof on this issue to the plaintiff." (*Nadaf-Rahrov, supra,* 166 Cal.App.4th at pp. 977–978, internal citations omitted.)

- "Although no particular form of request is required, ' "[t]he duty of an employer reasonably to accommodate an employee's handicap does not arise until the employer is 'aware of respondent's disability and physical limitations.' … " ' ' "[T]he employee can't expect the employer to read his mind and know he secretly wanted a particular accommodation and sue the employer for not providing it. Nor is an employer ordinarily liable for failing to accommodate a disability of which it had no knowledge. …" … ' " (*Avila, supra,* 165 Cal.App.4th at pp. 1252–1253, internal citations

omitted.)

- "Employers must make reasonable accommodations to the disability of an individual unless the employer can demonstrate that doing so would impose an 'undue hardship.' " (*Prilliman, supra,* 53 Cal.App.4th at p. 947.)

- " 'Ordinarily the reasonableness of an accommodation is an issue for the jury.' " (*Prilliman, supra,* 53 Cal.App.4th at p. 954, internal citation omitted.)

- "[T]he duty of an employer to provide reasonable accommodation for an employee with a disability is broader under the FEHA than under the ADA." (*Bagatti, supra,* 97 Cal.App.4th at p. 362.)

- "Under the FEHA ... an employer is relieved of the duty to reassign a disabled employee whose limitations cannot be reasonably accommodated in his or her current job only if reassignment would impose an 'undue hardship' on its operations or if there is no vacant position for which the employee is qualified." (*Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1389 [96 Cal.Rptr.2d 236].)

- "On these issues, which are novel to California and on which the federal courts are divided, we conclude that employers must reasonably accommodate individuals falling within any of FEHA's statutorily defined 'disabilities,' including those 'regarded as' disabled, and must engage in an informal, interactive process to determine any effective accommodations." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 55 [43 Cal.Rptr.3d 874].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 762

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act (FEHA),* ¶¶ 9:2250–9:2285, 9:2345–9:2347 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.79

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* §§ 41.32[2][c], 41.51[3] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination,* §§ 115.22, 115.35, 115.92 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:50 (Thomson Reuters West)

2560. Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements (Gov. Code, § 12940(l))

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her] by failing to reasonably accommodate [his/her] religious [belief/observance]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***other covered relationship to defendant***]];**

3. **That [***name of plaintiff***] has a sincerely held religious belief that [***describe religious belief, observance, or practice***];**

4. **That [***name of plaintiff***]'s religious [belief/observance] conflicted with a job requirement;**

5. **That [***name of defendant***] knew of the conflict between [***name of plaintiff***]'s religious [belief/observance] and the job requirement;**

6. **That [***name of defendant***] did not reasonably accommodate [***name of plaintiff***]'s religious [belief/observance];**

7. **That [***name of defendant***] [discharged/refused to hire/[***other adverse employment action***]] [***name of plaintiff***] for failing to comply with the conflicting job requirement;**

[or]

[That [*name of defendant***] subjected [***name of plaintiff***] to an adverse employment action for failing to comply with the conflicting job requirement;]**

[or]

[That [*name of plaintiff***] was constructively discharged for failing to comply with the conflicting job requirement;]**

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

9. **That [***name of defendant***]'s failure to reasonably accommodate [***name of plaintiff***]'s religious [belief/observance] was a substantial factor in causing [his/her] harm.**

If more than one accommodation is reasonable, an employer satisfies its obligation to make a reasonable accommodation if it selects one of those accommodations in good faith.

New September 2003; Revised June 2012

Directions for Use

If element 1 is given, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

Read the first option for element 7 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained*, if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 7 and also give CACI No. 2510, *"Constructive Discharge" Explained*.

Sources and Authority

- Government Code section 12940(*l*) provides that it is an unlawful employment practice "[f]or an employer ... to refuse to hire or employ a person, ... or to discharge a person from employment, ... or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer ... demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance ... but is unable to reasonably accommodate the religious belief or observance without undue hardship on the conduct of the business of the employer ... . Religious belief or observance ... includes, but is not limited to, observance of a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance."

- Government Code section 12926(~~o~~p) provides: "'Religious creed,' 'religion,' 'religious observance,' 'religious belief,' and 'creed' include all aspects of religious belief, observance, and practice."

- The Fair Employment and Housing Commission's regulations provide: "'Religious creed' includes any traditionally recognized religion as well as beliefs, observances, or practices which an individual sincerely holds and which occupy in his or her life a place of importance parallel to that of traditionally recognized religions. Religious creed discrimination may be established by showing: ... [t]he employer or other covered entity has failed to reasonably accommodate the applicant's or employee's religious creed despite being informed by the applicant or employee or otherwise having become aware of the need for reasonable accommodation." (Cal. Code Regs., tit. 2, § 7293.1(b).)

- The Fair Employment and Housing Commission's regulations provide: "An employer or other covered entity shall make accommodation to the known religious creed of an applicant or employee unless the employer or other covered entity can demonstrate that the accommodation is unreasonable because it would impose an undue hardship." (Cal. Code Regs., tit. 2, § 7293.3.)

- "In evaluating an argument the employer failed to accommodate an employee's religious beliefs, the employee must establish a prima facie case that he or she had a bona fide religious belief, of which

the employer was aware, that conflicts with an employment requirement ... . Once the employee establishes a prima facie case, then the employer must establish it initiated good faith efforts to accommodate or no accommodation was possible without producing undue hardship." (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 370 [58 Cal.Rptr.2d 747], internal citation omitted.)

- "Any reasonable accommodation is sufficient to meet an employer's obligations. However, the employer need not adopt the most reasonable accommodation nor must the employer accept the remedy preferred by the employee. The reasonableness of the employer's efforts to accommodate is determined on a case by case basis ... . '[O]nce it is determined that the employer has offered a reasonable accommodation, the employer need not show that each of the employee's proposed accommodations would result in undue hardship.' '[W]here the employer has already reasonably accommodated the employee's religious needs, the ... inquiry [ends].' " (*Soldinger, supra*, 51 Cal.App.4th at p. 370, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 876, 922, 940, 941

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ~~(The Rutter Group)~~ ¶¶ 7:151, 7:215, 7:305, 7:610–7:611, 7:631–7:634, 7:641 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.52[3] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.22, 115.35[d], 115.91 (Matthew Bender)

California Civil Practice: Employment Litigation ~~(Thomson West)~~ §§ 2:71–2:73 (Thomson Reuters West)

1 Lindemann and Grossman, Employment Discrimination Law (3d ed. 1996) Religion, pp. 219–224, 226–227; *id.* (2000 supp.) at pp. 100–101

2570. Age Discrimination—Disparate Treatment—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her] because of [his/her] age. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**

3. **That [***name of defendant***] [discharged/refused to hire/[***other adverse employment action***]] [***name of plaintiff***];**

   [or]

   [That [*name of defendant***] subjected [***name of plaintiff***] to an adverse employment action;]**

   [or]

   [That [*name of plaintiff***] was constructively discharged;]**

4. **That [***name of plaintiff***] was age 40 or older at the time of the [discharge/[***other adverse employment action***]];**

5. **That [***name of plaintiff***]'s age was a motivating reason for [***name of defendant***]'s ~~the~~ [decision to discharge/refus~~al~~ to hire/[***other adverse employment action***]] [***name of plaintiff***]/conduct];**

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

7. **That ~~the [discharge/refusal to hire~~/[~~*other adverse employment action*~~]]~~[name of defendant]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New June 2011; Revised June 2012

Directions for Use

Give also CACI No. 2507, *"Motivating Reason" Explained.* See also the Sources and Authority to CACI No. 2500, *Disparate Treatment—Essential Factual Elements.*

Read the first option for element 3 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained*, if whether there was an adverse employment action is a question of fact

for the jury. If constructive discharge is alleged, give the third option for element 3 and also give CACI No. 2510, "*Constructive Discharge" Explained*. Select "conduct" in element 5 if the either the second or third option is included for element 3.

Note that there are two causation elements. There must be a causal link between the discriminatory animus based on age and the adverse action (see element 5), and there must be a causal link between the adverse action and the damage (see element 7). (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406].)

Under the *McDonnell Douglas* (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668]) process for allocating burdens of proof and producing evidence, which is used in California for disparate-treatment cases under FEHA, the employee must first present a prima facie case of discrimination. The burden then shifts to the employer to produce evidence of a nondiscriminatory reason for the adverse action. At that point, the burden shifts back to the employee to show that the employer's stated reason was in fact a pretext for a discriminatory act.

Whether or not the employee has met his or her prima facie burden, and whether or not the employer has rebutted the employee's prima facie showing, are questions of law for the trial court, not questions of fact for the jury. (See *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 201 [48 Cal.Rptr.2d 448].) In other words, by the time that the case is submitted to the jury, the plaintiff has already established his or her prima facie case, and the employer has already proffered a legitimate, nondiscriminatory reason for the adverse employment decision. The *McDonnell Douglas* shifting burden drops from the case. The jury is left to decide which evidence it finds more convincing, that of the employer's discriminatory intent or that of the employer's age-neutral reasons for the employment decision. (See *Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1118, fn. 5 [94 Cal.Rptr.2d 579]).

Under FEHA, age-discrimination cases require the employee to show that his or her job performance was satisfactory at the time of the adverse employment action as a part of his or her prima facie case (see *Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 321 [115 Cal.Rptr.3d 453]), even though it is the employer's burden to produce evidence of a nondiscriminatory reason for the action. Poor job performance is the most common nondiscriminatory reason that an employer advances for the action. Even though satisfactory job performance may be an element of the employee's prima facie case, it is not an element that the employee must prove to the trier of fact. Under element 5 and CACI No. 2507, the burden remains with the employee to ultimately prove that age discrimination was a motivating reason for the action. (See *Muzquiz, supra*, 79 Cal.App.4th at p. 1119.)

Sources and Authority

- Government Code section 12940(a) provides that it is an unlawful employment practice "[f]or an employer, because of the ~~race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, …~~*age*~~, or sexual orientation~~… of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment." (emphasis added)

- Government Code section 12926(b) provides: " 'Age' refers to the chronological age of any individual who has reached his or her 40th birthday."

- Government Code section 12941 provides: "The Legislature hereby declares its rejection of the court of appeal opinion in *Marks v Loral Corp.* (1997) 57 Cal. App.4th 30, and states that the opinion does not affect existing law in any way, including, but not limited to, the law pertaining to disparate treatment. The Legislature declares its intent that the use of salary as the basis for differentiating between employees when terminating employment may be found to constitute age discrimination if use of that criterion adversely impacts older workers as a group, and further declares its intent that the disparate impact theory of proof may be used in claims of age discrimination. The Legislature further reaffirms and declares its intent that the courts interpret the state's statutes prohibiting age discrimination in employment broadly and vigorously, in a manner comparable to prohibitions against sex and race discrimination, and with the goal of not only protecting older workers as individuals, but also of protecting older workers as a group, since they face unique obstacles in the later phases of their careers. Nothing in this section shall limit the affirmative defenses traditionally available in employment discrimination cases including, but not limited to, those set forth in Section 7286.7 of Title 2 of the California Code of Regulations."

- "In order to make out a prima facie case of age discrimination under FEHA, a plaintiff must present evidence that the plaintiff (1) is over the age of 40; (2) suffered an adverse employment action; (3) was performing satisfactorily at the time of the adverse action; and (4) suffered the adverse action under circumstances that give rise to an inference of unlawful discrimination, i.e., evidence that the plaintiff was replaced by someone significantly younger than the plaintiff." (*Sandell, supra,* 188 Cal.App.4th at p. 321.)

- "In other words, '[b]y the time that the case is submitted to the jury, . . . the plaintiff has already established his or her prima facie case, and the employer has already proffered a legitimate, nondiscriminatory reason for the adverse employment decision, leaving only the issue of the employer's discriminatory intent for resolution by the trier of fact. Otherwise, the case would have been disposed of as a matter of law for the trial court. That is to say, if the plaintiff cannot make out a prima facie case, the employer wins as a matter of law. If the employer cannot articulate a nondiscriminatory reason for the adverse employment decision, the plaintiff wins as a matter of law. In those instances, no fact-finding is required, and the case will never reach a jury. [¶] In short, if and when the case is submitted to the jury, the construct of the shifting burden "drops from the case," and the jury is left to decide which evidence it finds more convincing, that of the employer's discriminatory intent, or that of the employer's race or age-neutral reasons for the employment decision.' " (*Muzquiz, supra,* 79 Cal.App.4th at p. 1118, fn. 5.)

- "Because the only issue properly before the trier of fact was whether the [defendant]'s adverse employment decision was motivated by discrimination on the basis of age, the shifting burdens of proof regarding appellant's prima facie case and the issue of legitimate nondiscriminatory grounds were actually irrelevant." (*Muzquiz, supra,* 79 Cal.App.4th at p. 1119.)

- "An employee alleging age discrimination must ultimately prove that the adverse employment action taken was based on his or her age. Since direct evidence of such motivation is seldom

available, the courts use a system of shifting burdens as an aid to the presentation and resolution of age discrimination cases. That system necessarily establishes the basic framework for reviewing motions for summary judgment in such cases." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1002 [67 Cal.Rptr.2d 483], internal citations omitted.)

- "While we agree that a plaintiff must demonstrate some basic level of competence at his or her job in order to meet the requirements of a prima facie showing, the burden-shifting framework established in *McDonnell Douglas* compels the conclusion that any measurement of such competency should, to the extent possible, be based on objective, rather than subjective, criteria. A plaintiff's burden in making a prima facie case of discrimination is not intended to be 'onerous.' Rather, the prima facie burden exists in order to weed out patently unmeritorious claims." (*Sandell, supra*, 188 Cal.App.4th at p. 322, internal citations omitted.)

- "A discharge is not 'on the ground of age' within the meaning of this prohibition unless age is a 'motivating factor' in the decision. Thus, ' "an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision." ' '[A]n employee claiming discrimination must offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.' " (*West v. Bechtel Corp.* (2002) 96 Cal.App.4th 966, 978 [117 Cal.Rptr.2d 647].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 932–935

Chin et al., California Practice Guide: Employment Litigation, Ch. 8-B, *California Fair Employment and Housing Act*, ¶¶ 8:740, 8:800 et seq. (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.31 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.22 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.43 (Matthew Bender)

3001. Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] used excessive force in [~~arresting/~~detaining/arresting] [him/her]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] used force in [~~arresting/~~detaining/arresting] [***name of plaintiff***];**

2. **That the force used by [***name of defendant***] was excessive;**

3. **That [***name of defendant***] was acting or purporting to act in the performance of [his/her] official duties;**

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

5. **That [***name of defendant***]'s use of excessive force was a substantial factor in causing [***name of plaintiff***]'s harm.**

Force is not excessive if it is reasonably necessary under the circumstances ~~to [detain/make a lawful arrest]~~. In deciding whether force is reasonably necessary or excessive, you should determine what force a reasonable law enforcement officer would have used under the same or similar circumstances. You should consider, among other factors, the following:

(a) Whether [*name of plaintiff***] reasonably appeared to pose an immediate threat to the safety of [***name of defendant***] or others ~~The seriousness of the crime at issue~~;**

(b) The seriousness of the crime at issue~~Whether [*name of plaintiff*] reasonably appeared to pose an immediate threat to the safety of [*name of defendant*] or others~~; and

(c) Whether [*name of plaintiff***] was actively [resisting [detention/arrest]/ [or] ~~[~~attempting to avoid [detention/arrest] by flight].**

New September 2003; Revised June 2012

Directions for Use

The "official duties" referred to in element 3 must be duties created pursuant to any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 3.

The three factors listed 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) 661 F.3d 460, 467–468, internal citations omitted.) Additional factors may be added if appropriate to the facts of the case.

Sources and Authority

- "In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force. In most instances, that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct." (*Graham, supra, v. Connor* (1989) 490 U.S. at p. 386, 395 [109 S.Ct. 1865, 104 L.Ed.2d 443], internal citations and footnote omitted.)

- "Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons ... against unreasonable ... seizures' of the person." (*Graham, supra,* 490 U.S. at p. 394.)

- "[A]ll claims that law enforcement officers have used excessive force-deadly or not-in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." (*Graham, supra,* 490 U.S. at p. 395.)

- "Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' ... its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." (*Graham, supra,* 490 U.S. at p. 396, internal citation omitted.)

- "Ultimately, the ' "most important" ' *Graham* factor is whether the suspect posed an ' "immediate threat to the safety of the officers or others." ' " (*Mattos v. Agarano* (9th Cir. 2011) 661 F.3d 433, 441.)

- "[The *Graham*] factors, however, are not exclusive. We 'examine the totality of the circumstances and consider "whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*." ' Other relevant factors include the availability of less intrusive alternatives to the force employed, whether proper warnings were given and whether it should have been apparent to officers that the person they used force against was emotionally disturbed." (*Glenn, supra,* 661 F.3d at p. 467, internal citations omitted.)

- "Because the reasonableness standard 'nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly.' " (*Torres v. City of Madera* (9th Cir. 2011) 648 F.3d 1119, 1125.)

- ~~"In *Forrester v. City of San Diego*, we noted that the three factors listed in *Graham* are not the sole considerations a fact finder should entertain in determining whether force is excessive under the Fourth Amendment. Instead, 'the [*Graham*] Court instructed that the jury should consider "whether the totality of the circumstance justifies a particular sort of seizure." ' In *Chew v. Gates*, we stated that the three factors listed in *Graham* should be taken into account in excessive force cases, but that they are not the exhaustive criteria for determining excessive force." (*Fikes v. Cleghorn* (9th Cir. 1995) 47 F.3d 1011, 1014, internal citations omitted.)~~

- "We are cognizant of the Supreme Court's command to evaluate an officer's actions 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.' We also recognize the reality that 'police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation.' This does not mean, however, that a Fourth Amendment violation will be found only in those rare instances where an officer and his attorney are unable to find a sufficient number of compelling adjectives to describe the victim's conduct. Nor does it mean that we can base our analysis on what officers actually felt or believed during an incident. Rather, we must ask if the officers' conduct is ' "objectively reasonable" in light of the facts and circumstances confronting them' without regard for an officer's subjective intentions." (*Bryan v. MacPherson* (9th Cir. 2010) 630 F.3d 805, 831, internal citations omitted.)

- "[A]n officer may not use deadly force to apprehend a suspect where the suspect poses no immediate threat to the officer or others. On the other hand, it is not constitutionally unreasonable to prevent escape using deadly force '[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.' " (*Wilkinson v. Torres* (9th Cir. 2010) 610 F.3d 546, 550, internal citations omitted.)

- " '[A] simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern.' Here, whether objective factors supported [defendant]'s supposed subjective fear is not a question that can be answered as a matter of law based upon the limited evidence in the record, especially given that on summary judgment that evidence must be construed in the light most favorable to [plaintiff], the non-moving party. Rather, whether [defendant]'s claim that he feared a broccoli-based assault is credible and reasonable presents a genuine question of material fact that must be resolved not by a court ruling on a motion for summary judgment but by a jury in its capacity as the trier of fact." (*Young v. County of Los Angeles* (9th Cir. 2011 ~~—~~655 F.3d ~~--,~~ 1156, 1163–1164~~--~~.) ~~2011 U.S. App. LEXIS 17829~~

- "Although *Graham* does not specifically identify as a relevant factor whether the suspect poses a threat to *himself*, we assume that the officers could have used some reasonable level of force to try to prevent [decedent] from taking a suicidal act. But we are aware of no published cases holding it reasonable to use a *significant* amount of force to try to stop someone from attempting suicide. Indeed, it would be odd to permit officers to use force capable of causing serious injury or death in an effort to prevent the possibility that an individual might attempt to harm only himself. We do not rule out that in some circumstances some force might be warranted to prevent suicide, but in cases like this one the 'solution' could be worse than the problem." (*Glenn, supra*, 661 F.3d at p. 468.)

- "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of

law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties." ' By contrast, an officer who is ' "pursuing his own goals and is not in any way subject to control by [his public employer]," ' does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)

- "We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." (*Heck v. Humphrey* (1990) 512 U.S. 477, 486–487 [114 S. Ct. 2364; 129 L. Ed. 2d 383], footnotes and internal citation omitted.)

- ~~"When a plaintiff who has been convicted of a crime under state law seeks damages in a § 1983 suit, 'the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence.' " (*Hooper v. County of San Diego* (9th Cir. 2011) 629 F.3d 1127, 1130.)~~

- "[Plaintiff]'s section 1983 claim *is* barred to the extent it alleges that [the arresting officer] lacked justification to arrest him or to respond with reasonable force to his resistance. The use of deadly force in this situation, though, requires a separate analysis. 'For example, a defendant might resist a lawful arrest, to which the arresting officers might respond with excessive force to subdue him. The subsequent use of excessive force would not negate the lawfulness of the initial arrest attempt, or negate the unlawfulness of the criminal defendant's attempt to resist it. Though occurring in one continuous chain of events, two isolated factual contexts would exist, the first giving rise to criminal liability on the part of the criminal defendant, and the second giving rise to civil liability on the part of the arresting officer.' " (*Yount v. City of Sacramento* (2008) 43 Cal.4th 885, 899 [76 Cal.Rptr.3d 787, 1*83 P.3d 471]*, *o*riginal italics.)

- "[P]rivate parties ordinarily are not subject to suit under section 1983, unless, sifting the circumstances of the particular case, the state has so significantly involved itself in the private conduct that the private parties may fairly be termed state actors. Among the factors considered are whether the state subsidized or heavily regulated the conduct, or compelled or encouraged the particular conduct, whether the private actor was performing a function which normally is performed exclusively by the state, and whether there was a symbiotic relationship rendering the conduct joint state action." (*Robbins v. Hamburger Home for Girls* (1995) 32 Cal.App.4th 671, 683 [38 Cal.Rptr.2d

534], internal citations omitted.)

- "Private parties act under color of state law if they willfully participate in joint action with state officials to deprive others of constitutional rights. Private parties involved in such a conspiracy may be liable under section 1983." (*United Steelworkers of America v. Phelps Dodge Corp.* (9th Cir.1989) 865 F.2d 1539, 1540, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 816, 819 et seq.

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶¶ 10.00–10.03 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

3008. "Official Policy or Custom" Explained (42 U.S.C. § 1983)

"Official [policy/custom]" means: [*insert one of the following:***]**

[A rule or regulation approved by the [city/county]'s legislative body;] [or]

[A policy statement or decision that is officially made by the [city/county]'s lawmaking officer or policymaking official;] [or]

[A custom that is a permanent, widespread, or well-settled practice of the [city/county];] [or]

[An act or omission approved by the [city/county]'s lawmaking officer or policymaking official.]

New September 2003; Revised June 2012

Directions for Use

These definitions are selected examples of official policy drawn from the cited cases. The instruction may need to be adapted to the facts of a particular case. The court may need to instruct the jury regarding the legal definition of "policymakers."

In some cases, it may be necessary to include additional provisions addressing factors that may indicate an official custom in the absence of a formal policy. The Ninth Circuit has held that in some cases the plaintiff is entitled to have the jury instructed that evidence of governmental inaction—specifically, failure to investigate and discipline employees in the face of widespread constitutional violations—can support an inference that an unconstitutional custom or practice has been unofficially adopted. (*Hunter v. County of Sacramento* (9th Cir. 2011) 652 F.3d 1225, 1234, fn. 8.)

Sources and Authority

- "The [entity] may not be held liable for acts of [employees] unless 'the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers' or if the constitutional deprivation was 'visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels.' " (*Redman v. County of San Diego* (9th Cir. 1991) 942 F.2d 1435, 1443-1444, internal citation omitted.)

- "[A]n act performed pursuant to a 'custom' that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law. " (*Bd. of the County Comm'Rs v. Brown* (1997) 520 U.S. 397, 404 [117 S.Ct. 1382, 137 L.Ed.2d 626].)

- "While a rule or regulation promulgated, adopted, or ratified by a local governmental entity's

legislative body unquestionably satisfies *Monell's* policy requirement, a 'policy' within the meaning of § 1983 is not limited to official legislative action. Indeed, a decision properly made by a local governmental entity's authorized decisionmaker—i.e., an official who 'possesses final authority to establish [local government] policy with respect to the [challenged] action'—may constitute official policy. 'Authority to make municipal policy may be granted directly by legislative enactment or may be delegated by an official who possesses such authority, and of course whether an official had final policymaking authority is a question of state law.' " (*Thompson v. City of Los Angeles* (9th Cir. 1989) 885 F.2d 1439, 1443, internal citations and footnote omitted.)

- "As with other questions of state law relevant to the application of federal law, the identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge *before* the case is submitted to the jury." (*Jett v. Dallas Independent School Dist.* (1989) 491 U.S. 701, 737 [109 S.Ct. 2702, 105 L.Ed.2d 598].)

- "[I]t is settled that whether an official is a policymaker for a county is dependent on an analysis of state law, not fact." (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 352 [70 Cal.Rptr.2d 823, 949 P.2d 920], internal citations omitted.)

- "Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether *their* decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur, or by acquiescence in a longstanding practice or custom which constitutes the 'standard operating procedure' of the local governmental entity." (*Jett, supra,* 491 U.S. at p. 737, internal citations omitted.)

- "Discussing liability of a municipality under the federal Civil Rights Act based on 'custom,' the California Court of Appeal for the Fifth Appellate District recently noted, 'If the plaintiff seeks to show he was injured by governmental "custom," he must show that the governmental entity's "custom" was "made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." ' " (*Bach v. County of Butte* (1983) 147 Cal.App.3d 554, 569, fn. 11 [195 Cal.Rptr. 268], internal citations omitted.)

- "The federal courts have recognized that local elected officials and appointed department heads can make official policy or create official custom sufficient to impose liability under section 1983 on their governmental employers." (*Bach, supra,* 147 Cal.App.3d at p. 570, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 816, 819 et seq.

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

1 Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 8, *Answers and Responsive Motions Under Rule 12,* 8.40

3020. Unruh Civil Rights Act—Essential Factual Elements (Civ. Code, §§ 51, 52)

[*Name of plaintiff***] claims that [***name of defendant***] denied [him/her] full and equal [accommodations/advantages/facilities/privileges/services] because of [his/her] [sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/[***insert other actionable characteristic***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [denied/aided or incited a denial of/discriminated or made a distinction that denied] full and equal [accommodations/advantages/facilities/privileges/services] to [***name of plaintiff***];**

2. [**That a motivating reason for** [*name of defendant*]**'s conduct was [its perception of] [***name of plaintiff***]'s [sex/race/color/religion/ancestry/national origin/ ~~disability/~~medical condition/genetic information/marital status/sexual orientation/[***insert other actionable characteristic***]];]**

   [That the [sex/race/color/religion/ancestry/national origin/ ~~disability/~~medical condition/genetic information/marital status/sexual orientation/[*insert other actionable characteristic***]] of a person whom [***name of plaintiff***] was associated with was a motivating reason for [***name of defendant***]'s conduct;]**

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

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

New September 2003; Revised December 2011, June 2012

Directions for Use

Select the bracketed option from element 2 that is most appropriate to the facts of the case. Note that this instruction includes ~~uses the standard of "~~a motivating reason~~."~~ element (see element 2). The possible effect of a mixed motive (both discriminatory and nondiscriminatory) ~~The causation standard~~ is still an open issue under this statute.

With the exception of claims that are also violations of the Americans With Disabilites Act (ADA) (see *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 665 [94 Cal.Rptr.3d 685, 208 P.3d 623]), intentional discrimination is required for violations of the Unruh Act. (See *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1149 [278 Cal.Rptr. 614, 805 P.2d 873].) The intent requirement is encompassed within the motivating-reason element. For claims that are also violations of the ADA, do not give element 2.

Note that there are two causation elements. There must be a causal link between the discriminatory intent and the adverse action (see element 2), and there must be a causal link between the adverse action and the

harm (see element 4).

For an instruction on damages under the Unruh Act, see CACI No. 3026, *Unruh Civil Rights Act—Damages*. Note that a successful plaintiff is entitled to a minimum recovery of $4,000 regardless of any actual harm. (Civ. Code, § 52(a).) In this regard, harm is presumed, and elements 3 and 4 may be considered as established if no actual damages are sought. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195]. [Section 52 provides for minimum statutory damages for every violation of section 51, regardless of the plaintiff's actual damages]; see also Civ. Code, § 52(h) ["actual damages" means special and general damages].)

The judge may decide the issue of whether the defendant is a business establishment as a matter of law. (*Rotary Club of Duarte v. Bd. of Directors* (1986) 178 Cal.App.3d 1035, 1050 [224 Cal.Rptr. 213].) Special interrogatories may be needed if there are factual issues. This element has been omitted from the instruction because it is unlikely to go to a jury.

The Act is not limited to the categories expressly mentioned in the statute. Other forms of arbitrary discrimination by business establishments are prohibited. (*In re Cox* (1970) 3 Cal.3d 205, 216 [90 Cal.Rptr. 24, 474 P.2d 992].) Therefore, this instruction allows the user to "*insert other actionable characteristic*" throughout. Nevertheless, there are limitations on expansion beyond the statutory classifications. First, the claim must be based on a personal characteristic similar to those listed in the statute. Second, the court must consider whether the alleged discrimination was justified by a legitimate business reason. Third, the consequences of allowing the claim to proceed must be taken into account. (*Semler v. General Electric Capital Corp.* (2011) 196 Cal.App.4th 1380, 1392–1393[127 Cal.Rptr.3d 794]; see *Harris, supra, v. Capital Growth Investors XIV* (1991) 52 Cal.3d at pp.1142, 1159–1162 [278 Cal.Rptr. 614, 805 P.2d 873].) However, these issues are most likely to be resolved by the court rather than the jury. (See *Harris, supra,* 52 Cal.3d at p. 1165.) Therefore, no elements are included to address what may be an "other actionable characteristic." If there are contested factual issues, additional instructions or special interrogatories may be necessary.

Sources and Authority

- Civil Code section 51 provides:

  (a) This section shall be known, and may be cited, as the Unruh Civil Rights Act.

  (b) All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition, genetic information, marital status or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

  (c) This section shall not be construed to confer any right or privilege on a person that is conditioned or limited by law or that is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, disability, or medical condition, marital status, or sexual orientation or to persons regardless of their genetic information.

(d) Nothing in this section shall be construed to require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor shall anything in this section be construed to augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.

(e) For purposes of this section:

(1) ~~(1)~~ "Disability" means any mental or physical disability as defined in Section 12926 of the Government Code.

(2)

(A) "Genetic information" means, with respect to any individual, information about any of the following:

(i) The individual's genetic tests.

(ii) The genetic tests of family members of the individual.

(iii) The manifestation of a disease or disorder in family members of the individual.

(B) "Genetic information" includes any request for, or receipt of, genetic services, or participation in clinical research that includes genetic services, by an individual or any family member of the individual.

(C) "Genetic information" does not include information about the sex or age of any individual.

(~~2~~3) "Medical condition" has the same meaning as defined in subdivision (h) of Section 12926 of the Government Code.

(4) "Religion" includes all aspects of religious belief, observance, and practice.

(5) "Sex" includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. "Sex" also includes, but is not limited to, a person's gender. "Gender" means sex, and includes a person's gender identity and gender expression. "Gender expression" means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.

(6) "Sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation" includes a perception that the person has any particular characteristic or characteristics within the listed categories or that the person is associated with a person who has, or is perceived to have, any particular characteristic or characteristics within the listed categories.

(7) "Sexual orientation" has the same meaning as defined in subdivision (r) of Section 12926 of the Government Code.

(f) A violation of the right of any individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) shall also constitute a violation of this section.

- Civil Code section 52 provides:

(a) Whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51, 51.5, or 51.6, is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars ($4,000), and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51, 51.5, or 51.6.

(b) Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:

(1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.

(2) A civil penalty of twenty-five thousand dollars ($25,000) to be awarded to the person denied the right provided by Section 51.7 in any action brought by the person denied the right, or by the Attorney General, a district attorney, or a city attorney.

(3) Attorney's fees as may be determined by the court.

(c) Whenever there is reasonable cause to believe that any person or group of persons is engaged in conduct of resistance to the full enjoyment of any of the rights described in this section, and that conduct is of that nature and is intended to deny the full exercise of those rights, the Attorney General, any district attorney or city attorney, or any person aggrieved by the conduct may bring a civil action in the appropriate court by filing with it a complaint. The complaint shall contain the following:

(1) The signature of the officer, or, in his or her absence, the individual acting on behalf of the officer, or the signature of the person aggrieved.

(2) The facts pertaining to the conduct.

(3) A request for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for the conduct, as the complainant deems necessary to

ensure the full enjoyment of the rights described in this section.

(d) Whenever an action has been commenced in any court seeking relief from the denial of equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States on account of race, color, religion, sex, national origin, or disability, the Attorney General or any district attorney or city attorney for or in the name of the people of the State of California may intervene in the action upon timely application if the Attorney General or any district attorney or city attorney certifies that the case is of general public importance. In that action, the people of the State of California shall be entitled to the same relief as if it had instituted the action.

(e) Actions brought pursuant to this section are independent of any other actions, remedies, or procedures that may be available to an aggrieved party pursuant to any other law.

(f) Any person claiming to be aggrieved by an alleged unlawful practice in violation of Section 51 or 51.7 may also file a verified complaint with the Department of Fair Employment and Housing pursuant to Section 12948 of the Government Code.

(g) This section does not require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor does this section augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.

(h) For the purposes of this section, "actual damages" means special and general damages. This subdivision is declaratory of existing law.

- " 'The Legislature used the words "all" and "of every kind whatsoever" in referring to business establishments covered by the Unruh Act, and the inclusion of these words without any exception and without specification of particular kinds of enterprises, leaves no doubt that the term "business establishments" was used in the broadest sense reasonably possible. The word "business" embraces everything about which one can be employed, and it is often synonymous with "calling, occupation, or trade, engaged in for the purpose of making a livelihood or gain." The word "establishment," as broadly defined, includes not only a fixed location, such as the "place where one is permanently fixed for residence or business," but also a permanent "commercial force or organization" or "a permanent settled position, (as in life or business)." ' " (*O'Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790, 795 [191 Cal.Rptr. 320, 662 P.2d 427], internal citations omitted.)

- Whether a defendant is a "business establishment" is decided as an issue of law. (*Rotary Club of Duarte, supra,* 178 Cal.App.3d at p. 1050.)

- "In addition to the particular forms of discrimination specifically outlawed by the Act (sex, race, color, etc.), courts have held the Act 'prohibit[s] discrimination based on several classifications which are not specifically enumerated in the statute.' These judicially recognized classifications include unconventional dress or physical appearance, families with children, homosexuality, and persons under 18." (*Hessians Motorcycle Club v. J.C. Flanagans* (2001) 86 Cal.App.4th 833, 836 [103 Cal.Rptr.2d 552], internal citations omitted.)

- "[T]he language and history of the Unruh Act indicate that the legislative object was to prohibit intentional discrimination in access to public accommodations. We have been directed to no authority, nor have we located any, that would justify extension of a disparate impact test, which has been developed and applied by the federal courts primarily in employment discrimination cases, to a general discrimination-in-public-accommodations statute like the Unruh Act. Although evidence of adverse impact on a particular group of persons may have probative value in public accommodations cases and should therefore be admitted in appropriate cases subject to the general rules of evidence, a plaintiff must nonetheless plead and prove a case of intentional discrimination to recover under the Act." (*Harris, supra*, 52 Cal.3d at p. 1149.)

- "On examining the language, statutory context, and history of section 51, subdivision (f), we conclude … [t]he Legislature's intent in adding subdivision (f) was to provide disabled Californians injured by violations of the ADA with the remedies provided by section 52. A plaintiff who establishes a violation of the ADA, therefore, need not prove intentional discrimination in order to obtain damages under section 52." (*Munson, supra*, 46 Cal.4th at p. 665.)

- " 'Although the Unruh Act proscribes "any form of arbitrary discrimination", certain types of discrimination have been denominated "reasonable" and, therefore, not arbitrary.' Thus, for example, 'legitimate business interests may justify limitations on consumer access to public accommodations.' " (*Hankins v. El Torito Restaurants, Inc.* (1998) 63 Cal.App.4th 510, 520 [74 Cal.Rptr.2d 684], internal citations omitted.)

- "Unruh Act issues have often been decided as questions of law on demurrer or summary judgment when the policy or practice of a business establishment is valid on its face because it bears a reasonable relation to commercial objectives appropriate to an enterprise serving the public." (*Harris, supra*, 52 Cal.3d at p. 1165, internal citations omitted.)

- "It is thus manifested by section 51 that all persons are entitled to the full and equal privilege of associating with others in any business establishment. And section 52, liberally interpreted, makes clear that discrimination by such a business establishment against one's right of association on account of the associates' color, is violative of the Act. It follows ... that discrimination by a business establishment against persons on account of their association with others of the black race is actionable under the Act." (*Winchell v. English* (1976) 62 Cal.App.3d 125, 129 [133 Cal.Rptr. 20].)

- ~~"Section 51 by its express language applies only within California. It cannot (with its companion penalty provisions in § 52) be extended into the Hawaiian jurisdiction. A state cannot regulate or proscribe activities conducted in another state or supervise the internal affairs of another state in any way, even though the welfare or health of its citizens may be affected when they travel to that state." (*Archibald v. Cinerama Hawaiian Hotels, Inc.* (1977) 73 Cal.App.3d 152, 159 [140 Cal.Rptr. 599],~~

~~internal citations omitted, disapproved on other grounds in *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24 [219 Cal.Rptr. 133, 707 P.2d 195].)~~

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 898–914 ~~et seq.~~

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, §§ 116.10-116.13 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, § 35.20 et seq. (Matthew Bender)

3021. ~~Unruh Civil Rights Act—Boycott, etc.~~Discrimination in Business Dealings—Essential Factual Elements (Civil Code, § 51.5)

[*Name of plaintiff***] claims that [***name of defendant***] denied [him/her] full and equal rights to conduct business because of [***name of plaintiff***]'s [sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/[***insert other actionable characteristic***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [discriminated against/boycotted/blacklisted/refused to buy from/refused to contract with/refused to sell to/refused to trade with] [***name of plaintiff***];**

2. **[That a motivating reason for [***name of defendant***]'s conduct was [its perception of] [***name of plaintiff***]'s [sex/race/color/religion/ancestry/national origin/ disability/medical condition/genetic information/marital status/sexual orientation/[***insert other actionable characteristic***]];]**

   [That a motivating reason for [*name of defendant***]'s conduct was [its perception of] the [sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/[***insert other actionable characteristic***]] of [***name of plaintiff***]'s [partners/members/stockholders/directors/officers/managers/superintendents/agents/ employees/business associates/suppliers/customers];]**

   [That a motivating reason for [*name of defendant***]'s conduct was [its perception of] the [sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/[***insert other actionable characteristic***]] of a person whom [***name of plaintiff***] was associated with;]**

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

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

New September 2003; Revised June 2012

Directions for Use

Select the bracketed option from element 2 that is most appropriate to the facts of the case. Note that this instruction includes a ~~uses the standard of "~~motivating ~~-~~ reason element (element 2). The possible effect of a mixed motive (both discriminatory and nondiscriminatory)~~" The causation standard~~ is still an open issue under this statute.

Under the Unruh Civil Rights Act (see CACI No. 3020, *Unruh Civil Rights Act—Essential Factual*

Elements), the California Supreme Court has held that intentional discrimination is required. (See *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159–1162 [278 Cal.Rptr. 614, 805 P.2d 873].) While there is no similar California case imposing an intent requirement under Civil Code section 51.5, Civil Code section 51.5 requires that the discrimination be *because of* the protected category. The kinds of prohibited conduct would all seem to involve intentional acts. (See *Nicole M. v. Martinez Unified Sch. Dist.* (N.D. Cal. 1997) 964 F.Supp. 1369, 1389, superseded by statute on other grounds as stated in *Sandoval v. Merced Union High Sch.* (E.D. Cal. 2006) 2006 U.S. Dist. LEXIS 28446.) The intent requirement is encompassed within the motivating-reason element.

There is an exception to the intent requirement under the Unruh Act for conduct that violates the Americans With Disabilities Act. (See *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 665 [94 Cal.Rptr.3d 685, 208 P.3d 623].). Because this exception is based on statutory construction of the Unruh Act (see Civ. Code, § 51(f)), the committee does not believe that it applies to sction 51.5, which contains no similar language.

Note that there are two causation elements. There must be a causal link between the discriminatory intent and the adverse action (see element 2), and there must be a causal link between the adverse action and the harm (see element 4).

For an instruction on damages under Civil Code section 51.5, see CACI No. 3026, *Unruh Civil Rights Act—Damages*. Note that a successful plaintiff is entitled to a minimum recovery of $4,000 regardless of any actual harm. (Civ. Code, § 52(a).) In this regard, harm is presumed, and elements 3 and 4 may be considered as established if no actual damages are sought. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195]. [Section 52 provides for minimum statutory damages for every violation of section 51, regardless of the plaintiff's actual damages]; see also Civ. Code, § 52(h) [“actual damages” means special and general damages].)

The judge may decide the issue of whether the defendant is a business establishment as a matter of law. (*Rotary Club of Duarte v. Bd. of Directors* (1986) 178 Cal.App.3d 1035, 1050 [224 Cal.Rptr. 213].) Special interrogatories may be needed if there are factual issues. This element has been omitted from the instruction because it is unlikely to go to a jury.

~~Select the bracketed option from element 2 that is most appropriate to the facts of the case.~~

Conceptually, this instruction has some overlap with CACI No. 3020, *Unruh Civil Rights Act—Essential Factual Elements.* For a discussion of the basis of this instruction, see *Jackson v. Superior Court* (1994) 30 Cal.App.4th 936, 941 [36 Cal.Rptr.2d 207].

Sources and Authority

- Civil Code section 51.5 provides:

> (a) No business establishment of any kind whatsoever shall discriminate against, boycott or blacklist, or refuse to buy from, contract with, sell to, or trade with any person in this state on account of any characteristic listed or defined in subdivision (b) or (e) of Section 51, ~~because of the race, creed, religion, color, national origin,~~

~~sex, disability, or medical condition of the person or~~ of the person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers, because the person is perceived to have one or more of those characteristics, or because the person is associated with a person who has, or is perceived to have, any of those characteristics.

(b) As used in this section, "person" includes any person, firm, association, organization, partnership, business trust, corporation, limited liability company, or company.

(c) This section shall not be construed to require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor shall this section be construed to augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.

~~(d) For purposes of this section:~~

~~(1) "Disability" means any mental or physical disability as defined in Section 12926 of the Government Code.~~

~~(2) "Medical condition" has the same meaning as defined in subdivision (h) of Section 12926 of the Government Code.~~

- "In 1976 the Legislature added Civil Code section 51.5 to the Unruh Civil Rights Act and amended Civil Code section 52 (which provides penalties for those who violate the Unruh Civil Rights Act), in order to, inter alia, include section 51.5 in its provisions." (*Pines v. Tomson* (1984) 160 Cal.App.3d 370, 384 [206 Cal.Rptr. 866], footnote omitted.)

- "[I]t is clear from the cases under section 51 that the Legislature did not intend in enacting section 51.5 to limit the broad language of section 51 to include only selling, buying or trading. Both sections 51 and 51.5 have been liberally applied to all types of business activities. Furthermore, section 51.5 forbids a business to 'discriminate against' 'any person' and does not just forbid a business to 'boycott or blacklist, refuse to buy from, sell to, or trade with any person.' " (*Jackson, supra,* 30 Cal.App.4th at p. 941, internal citation and footnote omitted.)

- "Although the phrase 'business establishment of every kind whatsoever' has been interpreted by the Supreme Court and the Court of Appeal in the context of section 51, we are aware of no case which interprets that term in the context of section 51.5. We believe, however, that the Legislature meant the identical language in both sections to have the identical meaning." (*Pines, supra,* 160 Cal.App.3d at p. 384, internal citations omitted.)

- "[T]he classifications specified in section 51.5, which are identical to those of section 51, are likewise not exclusive and encompass other personal characteristics identified in earlier cases." (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 538 [30 Cal.Rptr.2d 706], internal citations omitted.)

- "[T]he analysis under Civil Code section 51.5 is the same as the analysis we have already set forth for purposes of the [Unruh Civil Rights] Act." (*Semler v. General Electric Capital Corp*. (2011) 196 Cal.App.4th 1380, 1404 [127 Cal.Rptr.3d 794].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 898–914 ~~et seq.~~

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, §§ 116.10–116.13 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, § 35.20 (Matthew Bender)

3026. Unruh Civil Rights Act—Damages (Civ. Code, §§ 51, ~~51.5, 51.6~~52(a))

If you decide that [*name of plaintiff*] has proved [his/her] claim against [*name of defendant*], you also must decide how much money will reasonably compensate [him/her] for the harm. This compensation is called "damages."

[*Name of plaintiff*] must prove the amount of [his/her] damages. However, [*name of plaintiff*] does not have to prove the exact amount of the harm or the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.

The following are the specific items of damages claimed by [*name of plaintiff*]:

[*Insert item(s) of claimed harm.***]**

In addition, you may award [*name of plaintiff*] up to three times the amount of [his/her] actual damages as a penalty against [*name of defendant*].

New September 2003; Revised June 2012

Directions for Use

Give this instruction for violations of the Unruh Civil Rights Act in which actual damages are claimed. (See Civ. Code, § 51; CACI No. 3020, *Unruh Civil Rights Act—Essential Factual Elements*.) This instruction may also be given for claims under Civil Code section 51.5 (see CACI No. 3021, *Discrimination in Business Dealings—Essential Factual Elements*) and Civil Code section 51.6 (see CACI No. 3022, *Gender Price Discrimination—Essential Factual Elements*). If the only claim is for statutory damages of $4,000 (see Civ. Code, § 52(a)), this instruction is not needed.

See the instructions in the Damages series (CACI Nos. 3900 et seq.) for additional instructions on actual damages and punitive damages. Note that the statutory minimum amount of recovery for a plaintiff is $4,000 in addition to actual damages. If the verdict is for less than that amount, the judge should modify the verdict to reflect the statutory minimum.

Sources and Authority

- Civil Code section 52(a) provides: "Whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51, 51.5, or 51.6, is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars ($4,000), and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51, 51.5, or 51.6."

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 898, 1548–1556

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.15 (Matthew Bender)

3027. ~~Unruh Civil Rights~~Ralph Act—~~Civil Penalty~~Damages and Penalty (Civ. Code, §§ 51.7, 52(b)~~51.9~~)

If you decide that [*name of plaintiff***] has proved [his/her] claim against [***name of defendant***], you must award the following:**

1. **Actual damages sufficient to reasonably compensate [***name of plaintiff***] for the harm;**

2. **A civil penalty of $25,000; and**

3. **Punitive damages.**

[*Name of plaintiff***] must prove the amount of [his/her] actual damages. However, [***name of plaintiff***] does not have to prove the exact amount of the harm or the exact amount of damages that will provide reasonable compensation for the harm. You must not speculate or guess in awarding damages.**

The following are the specific items of actual damages claimed by [*name of plaintiff***]:**

[*Insert item(s) of claimed harm.***]**

New September 2003; Revised June 2012

Directions for Use

Give this instruction for violations of the Ralph Act. (See Civ. Code, § 51.7; CACI No. 3023A, *Acts of Violence—Ralph Act—Essential Factual Elements,* and CACI No. 3023B *Threats of Violence—Ralph Act—Essential Factual Elements*.) This instruction may also be given for claims under Civil Code section 51.9 (see CACI No. 3024, *Sexual Harassment in Defined Relationship—Essential Factual Elements*) with item 2 omitted. (See Civ. Code, § 52(b)(2).)
~~Note that the $25,000 civil penalty is applicable only to actions brought under Civil Code section 51.7. Do not include element 2 in cases brought under Civil Code section 51.9.~~

See the Damages series (CACI Nos. 3900 et seq.) for additional instructions on actual damages and punitive damages. CACI No. 3942, *Punitive Damages—Individual Defendant—Bifurcated Trial (Second Phase),* instructs the jury on how to calculate the amount of punitive damages.

Sources and Authority

- Civil Code section 52(b) provides:

  > Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:

(1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.

(2) A civil penalty of twenty-five thousand dollars ($25,000) to be awarded to the person denied the right provided by Section 51.7 in any action brought by the person denied the right, or by the Attorney General, a district attorney, or a city attorney.

(3) Attorney's fees as may be determined by the court.

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 898–914

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.15 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, § 35.48 (Matthew Bender)

VF-3010. Unruh Civil Rights Act (Civ. Code, §§ 51, 52(a))

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [deny/aid or incite a denial of/discriminate or make a distinction that denied] full and equal [accommodations/advantages/facilities/privileges/services] to [***name of plaintiff***]?**
   ____ Yes ____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [[***name of defendant***]'s perception of] [***name of plaintiff***]'s [sex/race/color/religion/ancestry/national origin/ ~~disability/~~medical condition/genetic information/marital status/sexual orientation/[***insert other actionable characteristic***]] a motivating reason for [***name of defendant***]'s conduct?**
   ____ Yes ____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**
   ____ Yes ____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **What are [***name of plaintiff***]'s damages?**

   [a. Past economic loss
   [lost earnings $ _____]
   [lost profits $ _____]
   [medical expenses $ _____]
   [other past economic loss $ _____]
   Total Past Economic Damages: $ _____]

   [b. Future economic loss
   [lost earnings $ _____]
   [lost profits $ _____]
   [medical expenses $ _____]
   [other future economic loss $ _____]

Total Future Economic Damages: $ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]

$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]

_____]

TOTAL $ _____

Answer question 5.

5. What amount, if any, do you award as a penalty against [*name of defendant***]?**
$ _____

Signed: _____
Presiding Juror

Dated: _____

[After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New September 2003; Revised April 2007, December 2010, June 2012

Directions for Use

This verdict form is based on CACI No. 3020, *Unruh Civil Rights Act—Essential Factual Elements.* Question 3 may be omitted if only the statutory minimum of $4000 damages is sought. Harm is assumed for this amount. (See Civ. Code, § 52(a); *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195].)

Because the award of a penalty in question 5 can be a maximum of three times the amount of actual damages, the judge should correct the verdict if the jury award goes over that limit. Also, if jury inserts an amount less than $4,000 in question 5, ~~then~~ the judge should increase that award to $4,000 to reflect the statutory minimum.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

~~This verdict form is based on CACI No. 3020, *Unruh Civil Rights Act—Essential Factual Elements.*~~

If the plaintiff's association with another is the basis for the claim, modify question 2 as in element 2 of CACI No. 3020.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

VF-3011. ~~**Unruh Civil Rights Act—Boycott, etc.**~~**Discrimination in Business Dealings** **(Civ. Code, §§ 51.5. 52(a))**

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [discriminate against/boycott/blacklist/refuse to buy from/refuse to contract with/refuse to sell to/refuse to trade with] [***name of plaintiff***]?**
   ____ Yes ____ No

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. **Was [[***name of defendant***]'s perception of] [***name of plaintiff***]'s [sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/[***insert other actionable characteristic***]] a motivating reason for [***name of defendant***]'s conduct?**
   ____ Yes ____ No

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**
   ____ Yes ____ No

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **What are [***name of plaintiff***]'s damages?**

   [a. Past economic loss
   [lost earnings $ _____]
   [lost profits $ _____]
   [medical expenses $ _____]
   [other past economic loss $ _____]
   Total Past Economic Damages: $ _____]

   [b. Future economic loss
   [lost earnings $ _____]
   [lost profits $ _____]
   [medical expenses $ _____]
   [other future economic loss $ _____]

Total Future Economic Damages: $ _____]

[c. Past noneconomic loss, including [physical pain/mental suffering:]

$ _____]

[d. Future noneconomic loss, including [physical pain/mental suffering:]

$ _____]

TOTAL $ _____

Answer question 5.

5. What amount, if any, do you award as a penalty against [*name of defendant***]?**

$ _____

Signed: _____

Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New September 2003; Revised April 2007, December 2010, June 2012

Directions for Use

This verdict form is based on CACI No. 3021, *Discrimination in Business Dealings —Essential Factual Elements.* Question 3 may be omitted if only the statutory minimum of $4000 damages is sought. Harm is assumed for this amount. (See Civ. Code, § 52(a); *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195].)

Because the award of a penalty in question 5 can be a maximum of three times the amount of actual damages, the judge should correct the verdict if the jury award goes over that amount. Also, if the jury inserts an amount less than $4,000 in question 5, then the judge should increase that award to $4,000 to reflect the statutory minimum.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

~~This verdict form is based on CACI No. 3021, *Unruh Civil Rights Act—Boycott, etc.—Essential Factual Elements.*~~

If an alternative basis for the defendant's alleged motivation is at issue, modify question 2 as in element 2 of CACI No. 3021.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

~~3230~~3206. Breach of Disclosure Obligations—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] violated California's motor vehicle warranty laws. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] [bought/leased] a [*motor vehicle*] from [*name of defendant*];**

2. **[That the vehicle was returned by a previous [buyer/lessee] to [*name of manufacturer*] under [California/[*name of state*]]'s motor vehicle warranty laws; and]**

   [That [*name of defendant*] knew or should have known that the vehicle had been returned to the manufacturer under [California/[*name of state*]]'s motor vehicle warranty laws; and]

[3. That before the [sale/leasing], [*name of defendant*] failed to tell [*name of plaintiff*], in clear and simple language, about the nature of the defect experienced by the original [buyer/lessee] of the vehicle; [or]]

[4. That before the [sale/leasing] to [*name of plaintiff*], the defect experienced by the vehicle's original [buyer/lessee] was not fixed; [or]]

[5. That [*name of defendant*] did not provide a written warranty to [*name of plaintiff*] that the vehicle would be free for one year of the defect experienced by the vehicle's original [buyer/lessee].]

New September 2003; Revised June 2011; Renumbered from CACI No. 3230 June 2012

Directions for Use

Use the first bracketed option in element 2 if the defendant is the manufacturer. Otherwise, use the second option.

This instruction is based on the disclosure and warranty obligations set forth in Civil Code section 1793.22(f). The instruction may be modified for use with claims involving the additional disclosure obligations set forth in California's Automotive Consumer Notification Act. (Civ. Code, §§ 1793.23, 1793.24.)

Sources and Authority

- Civil Code section 1793.22(f)(1) provides, in part: "[N]o person shall sell, either at wholesale or retail, lease, or transfer a motor vehicle transferred by a buyer or lessee to a manufacturer pursuant to paragraph (2) of subdivision (d) of Section 1793.2 or a similar statute of any other state [i.e., a "lemon law" buyback], unless the nature of the nonconformity experienced by the original buyer or lessee is clearly and conspicuously disclosed to the prospective buyer, lessee, or transferee, the nonconformity

is corrected, and the manufacturer warrants to the new buyer, lessee, or transferee in writing for a period of one year that the motor vehicle is free of that nonconformity."

- Civil Code section 1794(a) provides, in part: "Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this [act] ... may bring an action for the recovery of damages and other legal and equitable relief."

- Civil Code section 1793.23 provides, in part:

> (b) This section and Section 1793.24 shall be known, and may be cited as, the Automotive Consumer Notification Act.
>
> (c) Any manufacturer who reacquires or assists a dealer or lienholder to reacquire a motor vehicle registered in this state, any other state, or a federally administered district shall, prior to any sale, lease, or transfer of the vehicle in this state, or prior to exporting the vehicle to another state for sale, lease, or transfer if the vehicle was registered in this state and reacquired pursuant to paragraph (2) of subdivision (d) of Section 1793.2, cause the vehicle to be retitled in the name of the manufacturer, request the Department of Motor Vehicles to inscribe the ownership certificate with the notation "Lemon Law Buyback," and affix a decal to the vehicle in accordance with Section 11713.12 of the Vehicle Code if the manufacturer knew or should have known that the vehicle is required by law to be replaced, accepted for restitution due to the failure of the manufacturer to conform the vehicle to applicable warranties pursuant to paragraph (2) of subdivision (d) of Section 1793.2, or accepted for restitution by the manufacturer due to the failure of the manufacturer to conform the vehicle to warranties required by any other applicable law of the state, any other state, or federal law.
>
> (d) Any manufacturer who reacquires or assists a dealer or lienholder to reacquire a motor vehicle in response to a request by the buyer or lessee that the vehicle be either replaced or accepted for restitution because the vehicle did not conform to express warranties shall, prior to the sale, lease, or other transfer of the vehicle, execute and deliver to the subsequent transferee a notice and obtain the transferee's written acknowledgment of a notice, as prescribed by Section 1793.24.
>
> (e) Any person, including any dealer, who acquires a motor vehicle for resale and knows or should have known that the vehicle was reacquired by the vehicle's manufacturer in response to a request by the last retail owner or lessee of the vehicle that it be replaced or accepted for restitution because the vehicle did not conform to express warranties shall, prior to the sale, lease, or other transfer, execute and deliver to the subsequent transferee a notice and obtain the transferee's written acknowledgment of a notice, as prescribed by Section 1793.24.
>
> (f) Any person, including any manufacturer or dealer, who sells, leases, or transfers ownership of a motor vehicle when the vehicle's ownership certificate is inscribed with the notation "Lemon Law Buyback" shall, prior to the sale, lease, or

ownership transfer of the vehicle, provide the transferee with a disclosure statement signed by the transferee that states:

"THIS VEHICLE WAS REPURCHASED BY ITS MANUFACTURER DUE TO A DEFECT IN THE VEHICLE PURSUANT TO CONSUMER WARRANTY LAWS. THE TITLE TO THIS VEHICLE HAS BEEN PERMANENTLY BRANDED WITH THE NOTATION 'LEMON LAW BUYBACK'."

(g) The disclosure requirements in subdivisions (d), (e), and (f) are cumulative with all other consumer notice requirements and do not relieve any person, including any dealer or manufacturer, from complying with any other applicable law, including any requirement of subdivision (f) of Section 1793.22.

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 320

8 California Forms of Pleading and Practice, Ch. 91, *Automobiles: Actions Involving Defects and Repairs*, § 91.19 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.08 et seq. (Matthew Bender)

30 California Legal Forms: Transaction Guide, Ch. 92, *Service Contracts*, § 92.53 (Matthew Bender)

5 California Civil Practice: Business Litigation, § 53:29 (Thomson Reuters West)

~~3213~~3222. Affirmative Defense—Statute of Limitations (U. Com. Code, § 2725)

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that**

[the date of [tender of] delivery occurred before [*insert date four years before filing of complaint***].]**

[*or***]**

[any breach was discovered or should have been discovered before [*insert date four years before filing of complaint***].]**

New June 2010; Renumbered from CACI No. 3213 June 2012

Directions for Use

Use this instruction to assert a limitation defense based on the four-year period of California's Uniform Commercial Code section 2725. (See *Mexia v. Rinker Boat Co., Inc.* (2009) 174 Cal.App.4th 1297, 1305 [95 Cal.Rptr.3d 285] [four-year statute of U. Com. Code, § 2725 applies to warranty claims under Song-Beverly].)

A breach of warranty occurs when tender of delivery is made. (U. Com. Code, § 2725(2).) Include "tender of" if actual delivery was not made or if delivery was made after tender. If whether a proper tender was made is at issue, the jury should be instructed on the meaning of "tender." (See U. Com. Code, § 2503.)

Under the statute, a breach of warranty occurs when tender of delivery is made regardless of the aggrieved party's knowledge of the breach—that is, there is no delayed-discovery rule. However, if an express warranty explicitly extends to future performance of the goods (for example, a warranty to repair defects for three years or 30,000 miles) and discovery of the breach must await the time of the performance, the cause of action accrues when the breach is or should have been discovered. (U. Com. Code, § 2725(2).) In such a case, give the second option in the second sentence. If delayed discovery is alleged, CACI No. 455, *Statute of Limitations—Delayed Discovery*, may be adapted for use. (See *Krieger v. Nick Alexander Imports, Inc.* (1991) 234 Cal.App.3d 205, 215–220 [285 Cal.Rptr. 717].)

Under the Uniform Commercial Code, by the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it. (U. Com. Code, § 2725(1).) Presumably, this provision does not apply to claims under the Song-Beverly Act. (See Civ. Code, §§ 1790.1 [buyer's waiver of rights under Song-Beverly Act is unenforceable], 1790.3 [in case of conflict, provisions of Song-Beverly Act control over U. Com. Code].)

Sources and Authority

- Uniform Commercial Code section 2725 provides:

  (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

  (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

  (3) Where an action commenced within the time limited by subdivision (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

  (4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this code becomes effective.

- Civil Code section 1790.1 provides: “Any waiver by the buyer of consumer goods of the provisions of this chapter, except as expressly provided in this chapter, shall be deemed contrary to public policy and shall be unenforceable and void.”

- Civil Code section 1790.3 provides: “The provisions of this chapter shall not affect the rights and obligations of parties determined by reference to the Commercial Code except that, where the provisions of the Commercial Code conflict with the rights guaranteed to buyers of consumer goods under the provisions of this chapter, the provisions of this chapter shall prevail.”

- “The [Song Beverly] Act was intended to supplement the provisions of the California Uniform Commercial Code, rather than to supersede the rights and obligations created by that statutory scheme. (See Civ. Code, § 1790.3.) California Uniform Commercial Code section 2725 specifically governs actions for breach of warranty in a sales context. We conclude that this special statute of limitations controls rather than the general provision of Code of Civil Procedure section 338, subdivision (a) for liabilities created by statute.” (*Krieger, supra,* 234 Cal.App.3d at p. 215.)

- “[Defendants] now concede that the statute of limitations for an action for breach of warranty under the Song-Beverly Act is four years pursuant to section 2725 of the California Uniform Commercial Code. Under that statute, a cause of action for breach of warranty accrues, at the earliest, upon tender of delivery. Thus, the earliest date the implied warranty of merchantability regarding [plaintiff]'s boat could have accrued was the date [plaintiff] purchased it … . Because he filed this action three years seven months after that date, he did

so within the four-year limitations period. Therefore, [plaintiff]'s action is not barred by a statute of limitations." (*Mexia, supra,* 174 Cal.App.4th at p. 1306.)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 213

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 474, 519, 962

1 California Products Liability Actions, Ch. 8, *Statute of Limitations* § 8.02[2] (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 500, *Sales Under the Commercial Code,* § 500.78 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales,* §§ 206.38, 206.61, 206.62 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 4, *Determining Applicable Statute of Limitations and Effect on Potential Action,* 4.05

3230. Continued Reasonable Use Permitted

The fact that [*name of plaintiff***] continued to use the [***consumer good/new motor vehicle***] after delivering it for repair does not waive [his/her] right to demand replacement or reimbursement. Nor does it reduce the amount of damages that you should award to [***name of plaintiff***] if you find that [he/she] has proved [his/her] claim against [***name of defendant***].**

New June 2012

Directions for Use

Give this instruction to make it clear to the jury that the fact that the buyer continued to use the product after delivering it for repair does not waive his or her right to reimbursement and damages. (See *Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235, 1240–1244 [13 Cal.Rptr.3d 679].) Continued use is relevant, however, to the jury's consideration of whether the vehicle was substantially impaired. See CACI No. 3204, *"Substantially Impaired" Explained*, factor (d).

There may be some uncertainty about the defendant's right to a damages offset for continued use. In an older case, the court held that principles of rescission under the Uniform Commercial Code survive under Song-Beverly, and that the seller remains protected through a recoupment right of setoff for the buyer's use of the good beyond the time of revoking acceptance. (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 898 [263 Cal.Rptr. 64].) However, a more recent case rejected the proposition that pre Song-Beverly Commercial Code rules on continued use survive under Song-Beverly. (See *Jiagbogu, supra,* 118 Cal.App.4th at p. 1240.) The last sentence of this instruction is based on *Jiagbogu*, but in light of the potential uncertainty on the damages offset issue, the trial court will need to decide whether *Jiagbogu* or *Ibrahim* states the applicable rule.

Sources and Authority

- "[Defendant] contends that [plaintiff]'s request for restitution amounted to a rescission. But [Civil Code] section 1793.2 does not refer to rescission or any portion of the Commercial Code that discusses rescission. The [Song-Beverly] Act does not parallel the Commercial Code; it provides different and more extensive consumer protections. [Plaintiff] did not invoke rescission, or any of the common law doctrines or Commercial Code provisions relating to that remedy. It would not matter if he had referred to rescission in his buyback request, as long as he sought a remedy only under the Act, which contains no provision requiring formal rescission to obtain relief. [Defendant] acknowledges in its brief that [plaintiff] requested refund *or replacement*. That comports with a claim under the Act, not with a traditional cause of action for rescission." (*Jiagbogu, supra,* 118 Cal.App.4th at p. 1240, original italics, internal citations omitted.)

- "Within the context of the California Uniform Commercial Code courts around the country are in general agreement that reasonable continued use of motorized vehicles does not, as a matter of law, prevent the buyer from asserting rescission (or its U.Com.Code equivalent, revocation of acceptance). This consensus is based upon the judicial recognition of practical realities—purchasers of unsatisfactory vehicles may be compelled to continue using them due to the

financial burden to securing alternative means of transport for a substantial period of time. The seller remains protected through a recoupment right of setoff for the buyer's use of the good beyond the time of revoking acceptance." (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 897–898 [263 Cal.Rptr. 64], internal citations omitted.)

- "Nothing in the language of either the Uniform Commercial Code or the Song-Beverly Act suggests that abrogation of the common law principles relating to continued use and waiver of a buyer's right to rescind was intended. The former expressly specifies that 'the principles of law and equity . . . shall supplement its provisions.' (Cal. U. Com. Code, § 1103.) The legal principles governing continued use quoted previously are thus still applicable, as are the rules regulating the equitable right of setoff." (*Ibrahim, supra,* 214 Cal.App.3d at p. 898, internal citations omitted.)

- "Since we reject [defendant]'s basic argument that a request for replacement or refund under the Act constitutes rescission, we find no error in the trial court's refusal to instruct on waiver of right to rescind or on statutory offsets for postrescission use." (*Jiagbogu, supra,* 118 Cal.App.4th at p. 1242.)

- "[Civil Code] Section 1793.2, subdivision (d)(2)(C), and (d)(2)(A) and (B) to which it refers, comprehensively addresses replacement and restitution; specified predelivery offset; sales and use taxes; license, registration, or other fees; repair, towing, and rental costs; and other incidental damages. None contains any language authorizing an offset in any situation other than the one specified. This omission of other offsets from a set of provisions that thoroughly cover other relevant costs indicates legislative intent to exclude [post-delivery use] offsets." (*Jiagbogu, supra,* 118 Cal.App.4th at pp. 1243–1244.)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 198, 318

8 California Forms of Pleading and Practice, Ch. 91, *Automobiles: Actions Involving Defects and Repairs*, § 91.18 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales*, § 502.42 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.102 et seq. (Matthew Bender)

30 California Legal Forms: Transaction Guide, Ch. 92, *Service Contracts*, § 92.53 (Matthew Bender)

3231. Continuation of Express or Implied Warranty During Repairs (Civ. Code, § 1795.6)

Regardless of what the warranty says, if a defect exists within the warranty period and the [*consumer good/new motor vehicle***] has been returned for repairs, the warranty will not expire until the defect has been fixed. [***Name of plaintiff***] must have notified [***name of defendant***] of the failure of the repairs within 60 days after they were completed. The warranty period will also be extended for the amount of time that the warranty repairs have not been performed because of delays caused by circumstances beyond the control of [***name of plaintiff***].**

New June 2012

Directions for Use

Give this instruction if it might appear to the jury from the language of an express or implied warranty that the warranty should have expired during the course of repairs. By statute, the warranty cannot expire until the problem has been resolved as long as the defendant had notice that the defect had not been repaired. (Civ. Code, § 1795.6(b).)

Sources and Authority

- Civil Code section 1795.6 provides:

  (a) Every warranty period relating to an implied or express warranty accompanying a sale or consignment for sale of consumer goods selling for fifty dollars ($50) or more shall automatically be tolled for the period from the date upon which the buyer either (1) delivers nonconforming goods to the manufacturer or seller for warranty repairs or service or (2), pursuant to subdivision (c) of Section 1793.2 or Section 1793.22, notifies the manufacturer or seller of the nonconformity of the goods up to, and including, the date upon which (1) the repaired or serviced goods are delivered to the buyer, (2) the buyer is notified the goods are repaired or serviced and are available for the buyer's possession or (3) the buyer is notified that repairs or service is completed, if repairs or service is made at the buyer's residence.

  (b) Notwithstanding the date or conditions set for the expiration of the warranty period, such warranty period shall not be deemed expired if either or both of the following situations occur: (1) after the buyer has satisfied the requirements of subdivision (a), the warranty repairs or service has not been performed due to delays caused by circumstances beyond the control of the buyer or (2) the warranty repairs or service performed upon the nonconforming goods did not remedy the nonconformity for which such repairs or service was performed and the buyer notified the manufacturer or seller of this failure within 60 days after the repairs or service was completed. When the warranty repairs or service has been performed so as to remedy the nonconformity, the warranty period shall expire in accordance with its terms, including any extension to the warranty period for warranty repairs or service.

  (c) For purposes of this section only, "manufacturer" includes the manufacturer's service or repair facility.

(d) Every manufacturer or seller of consumer goods selling for fifty dollars ($50) or more shall provide a receipt to the buyer showing the date of purchase. Every manufacturer or seller performing warranty repairs or service on the goods shall provide to the buyer a work order or receipt with the date of return and either the date the buyer was notified that the goods were repaired or serviced or, where applicable, the date the goods were shipped or delivered to the buyer.

- Civil Code section 1793.1(a)(2) provides: “Every work order or repair invoice for warranty repairs or service shall clearly and conspicuously incorporate in 10-point boldface type the following statement either on the face of the work order or repair invoice, or on the reverse side, or on an attachment to the work order or repair invoice: "A buyer of this product in California has the right to have this product serviced or repaired during the warranty period. The warranty period will be extended for the number of whole days that the product has been out of the buyer's hands for warranty repairs. If a defect exists within the warranty period, the warranty will not expire until the defect has been fixed. The warranty period will also be extended if the warranty repairs have not been performed due to delays caused by circumstances beyond the control of the buyer, or if the warranty repairs did not remedy the defect and the buyer notifies the manufacturer or seller of the failure of the repairs within 60 days after they were completed. If, after a reasonable number of attempts, the defect has not been fixed, the buyer may return this product for a replacement or a refund subject, in either case, to deduction of a reasonable charge for usage. This time extension does not affect the protections or remedies the buyer has under other laws.”

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 316

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 539, 760

44 California Forms of Pleading and Practice, Ch. 502, *Sales*, § 502.52 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, §§ 206.100, 206.102 (Matthew Bender)

21 California Legal Forms: Transaction Guide, Ch. 52, *Sales of Goods Under the Uniform Commercial Code*, § 52.128 (Matthew Bender)

30 California Legal Forms: Transaction Guide, Ch. 92, *Service Contracts*, § 92.52 (Matthew Bender)

5013. Deadlocked Jury Admonition

You should reach a verdict if you reasonably can. You have spent time trying to reach a verdict, and this case is important to the parties so that they can move on with their lives with this matter resolved.

[If you are unable to reach a verdict, the case will have to be tried before another jury selected in the same manner and from the same community from which you were chosen and at additional cost to everyone.]

Please carefully consider the opinions of all the jurors, including those with whom you disagree. Keep an open mind and feel free to change your opinion if you become convinced that it is wrong.

You should not, however, surrender your beliefs concerning the truth and the weight of the evidence. Each of you must decide the case for yourself and not merely go along with the conclusions of your fellow jurors.

New September 2003; Revised April 2004, June 2012

Directions for Use

Give the optional second paragraph if desired. Similar language has been found to be noncoercive in a civil case as long as it is accompanied by language such as that included in the last paragraph of the instruction. (See *Inouye v. Pacific Southwest Airlines* (1981) 126 Cal.App.3d 648, 650–652 [179 Cal.Rptr. 13]; cf. *People v. Gainer* (1977) 19 Cal. 3d 835, 852 [139 Cal.Rptr. 861, 566 P.2d 997] [in criminal case, it is error for a trial court to give an instruction that states or implies that if the jury fails to agree, the case will necessarily be retried].)

Sources and Authority

- Rule 2.1036 of the California Rules of Court provides:

  (a) Determination

  After a jury reports that it has reached an impasse in its deliberations, the trial judge may, in the presence of counsel, advise the jury of its duty to decide the case based on the evidence while keeping an open mind and talking about the evidence with each other. The judge should ask the jury if it has specific concerns which, if resolved, might assist the jury in reaching a verdict.

  (b) Possible further action

  If the trial judge determines that further action might assist the jury in reaching a verdict, the judge may:

  (1) Give additional instructions;

(2) Clarify previous instructions;
(3) Permit attorneys to make additional closing arguments; or
(4) Employ any combination of these measures.

- "The court told the jury they should reach a verdict if they reasonably could; they should not surrender their conscious convictions of the truth and the weight of the evidence; each juror must decide the case for himself and not merely acquiesce in the conclusion of his fellows; the verdict should represent the opinion of each individual juror; and in reaching a verdict each juror should not violate his individual judgment and conscience. These remarks clearly outweighed any offensive portions of the charge. The court did not err in giving the challenged instruction." (*Inouye v. Pacific Southwest Airlines* (1981) 126 Cal.App.3d 648, 652 [179 Cal.Rptr. 13].)

- "A trial court may properly advise a jury of the importance of arriving at a verdict and of the duty of individual jurors to hear and consider each other's arguments with open minds, rather than to prevent agreement by obstinate adherence to first impressions. But, as the exclusive right to agree or not to agree rests with the jury, the judge may not tell them that they must agree nor may he harry their deliberations by coercive threats or disparaging remarks." (*Cook v. Los Angeles Ry. Corp.* (1939) 13 Cal.2d 591, 594 [91 P.2d 118], internal citations omitted.)

- "Only when the instruction has coerced the jurors into surrendering their conscientious convictions in order to reach agreement should the verdict be overturned." (*Inouye v. Pacific Southwest Airlines, supra,* 126 Cal.App.3d at p. 651.)

- "The instruction says if the jury did not reach a verdict, the case would have to be retried. It also says the jurors should listen with deference to the arguments and distrust their own judgment if they find a large majority taking a different view of the case. In a criminal case the mere presence of these remarks in a jury instruction is error. However, civil cases are subject to different considerations; the special protections given criminal defendants are absent." (*Inouye v. Pacific Southwest Airlines, supra,* 126 Cal.App.3d at p. 651, internal citation omitted.)

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, § 281

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 15-D, *Juror Requests For Additional Information During Deliberations*, ¶¶ 15:137 et seq. (The Rutter Group)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 17, *Dealing With the Jury*, 17.39