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11 **UNITED STATES DISTRICT COURT**
12 **EASTERN DISTRICT OF CALIFORNIA**

13
14 **DAVID F. JADWIN, D.O.**

15 Plaintiff,

16 vs.

17 **COUNTY OF KERN, et al.,**

18 Defendants.
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Case No.: 1:07-cv-00026-OWW-DLB

PLAINTIFF'S PROPOSED JURY INSTRUCTIONS

Date: May 14, 2009

Time: 9:00 a.m.

Place: U.S. District Court, Courtroom 3
2500 Tulare Street, Fresno, CA

Date Action Filed: January 6, 2007

21
22 Plaintiff hereby proposes that the Court uses applicable Ninth Circuit model jury
23 instructions, series 1-3 as the general instructions on the trial process; the CACI instructions and
24 verdict forms applicable to Plaintiff's claims, and Plaintiff's special instructions that clarify the
25 CACI instructions.

26 The Judicial Council has not mandated use of CACI to the exclusion of other jury
27 instructions. However, under Rule 2.1050 of the California Rules of Court, the CACI
28 instructions are designated as the "official instructions for use in the state of California." The rule

1 further states that use of the new instructions is “strongly encouraged” and they are
2 recommended for use unless a judge “finds that a different instruction would more accurately
3 state the law and be understood by jurors.” Rule 2.1050(a), (e). So CACI instructions are clearly
4 preferred, and there is an affirmative burden to make a legal case for using a non-CACI
5 instruction if there is a CACI instruction on the subject.

6 Special instructions may be proposed under Code of Civil Procedure § 609, but they must
7 conform to the format requirements of Rule 2.1055. If there is no CACI instruction on a subject
8 on which the trial judge determines that the jury should be instructed, or if a CACI instruction
9 cannot be modified to submit the issue properly, another instruction may be given on that
10 subject. The instruction should be accurate, brief, understandable, impartial, and free from
11 argument. Rule 2.1050(e).

12 Per the Court's instructions, Plaintiff has included the Comments and Use Notes for each
13 instruction, which can be deleted before these instructions are submitted to the jury, and
14 highlighted any modifications to the standard format.

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16 RESPECTFULLY SUBMITTED on May 11, 2009.

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19 /s/ Joan Herrington
20 Attorney for Plaintiff
21 DAVID F. JADWIN. D.O.
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2 **TABLE OF PROPOSED JURY INSTRUCTIONS**
3 **NINTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS**

4 1. INSTRUCTIONS ON THE TRIAL PROCESS

- 5 1.1A Duty of Jury (Court Reads and Provides Written Set of Instructions)
6 1.1C Duty of Jury (Court Reads and Provides Written Instructions at End of Case)
7 1.2 Claims and Defenses
8 1.3 Burden of Proof—Preponderance of the Evidence
9 1.4 Burden of Proof—Clear and Convincing Evidence
10 1.6 What Is Evidence
11 1.7 What Is Not Evidence
12 1.8 Evidence for Limited Purpose
13 1.9 Direct and Circumstantial Evidence
14 1.10 Ruling on Objections
15 1.11 Credibility of Witnesses
16 1.12 Conduct of the Jury
17 1.13 No Transcript Available to Jury
18 1.14 Taking Notes
19 1.15 Question to Witnesses by Jurors
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21 1.19 Outline of Trial

22 TYPES OF EVIDENCE

- 23 2.1 Stipulated Testimony
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25 2.3 Judicial Notice
26 2.4 Deposition in Lieu of Live Testimony
27 2.5 Transcript of Tape Recording
28

- 1 2.8 Impeachment Evidence—Witness
- 2 2.10 Use of Interrogatories of a Party
- 3 2.11 Expert Opinion
- 4 2.12 Charts and Summaries Not Received in Evidence
- 5 2.13 Charts and Summaries in Evidence
- 6 2.14 Evidence in Electronic Format
- 7 3. INSTRUCTIONS CONCERNING DELIBERATIONS
- 8 3.1 Duty to Deliberate
- 9 3.2 Communication With Court
- 10 3.3 Return of Verdict
- 11 3.4 Additional Instructions of Law
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- 13 5. DAMAGES
- 14 5.1 Damages—Proof
- 15 5.2 Measures of Types of Damages
- 16 5.3 Damages—Mitigation
- 17 5.4 Damages Arising in the Future—Discount to Present Cash Value
- 18 5.6 Nominal Damages

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INSTRUCTION NO. __
DUTY OF JURY

Ladies and gentlemen:

It is my duty to instruct you on the law.

You must not infer from these instructions or from anything I may say or do as indicating that I have an opinion regarding the evidence or what your verdict should be.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all important.

Ninth Circuit Model Civil Jury Instruction, 1.1B

Proposed By: Plaintiff

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

OWW: _____

1 **INSTRUCTION NO. __**

2 **CLAIMS AND DEFENSES**

3 To help you follow the evidence, I will give you a brief summary of the positions of the
4 parties:

5 The plaintiff claims that defendant interfered with his rights under the Family Medical
6 Leave Act (FMLA) and the California Family Rights Act (CFRA), that defendant retaliated
7 against him for asserting his rights under the FMLA and CFRA, that defendant discriminated
8 against him on the basis of a disability, that defendant failed to reasonably accommodate his
9 disability, that defendant failed to engage in an interactive process to find a reasonable
10 accommodation of his disability, that defendant retaliated against him for asserting his rights
11 under California Fair Employment and Housing Act (FEHA), and that defendant denied him due
12 process. The plaintiff has the burden of proving these claims.

13 The defendant denies those claims, asserts that it acted according to all applicable laws,
14 and contends that [defendant's affirmative defense]. The defendant has the burden of proof on
15 this affirmative defense.

16 The plaintiff denies defendant's affirmative defense.
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23 Ninth Circuit Model Civil Jury Instruction, 1.2

24 Given: _____

25 Given as Modified: _____

26 Withdrawn: _____

27 Refused: _____

OWW: _____

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1 **INSTRUCTION NO. __**

2 **BURDEN OF PROOF—PREPONDERANCE OF THE EVIDENCE**

3 When a party has the burden of proof on any claim or defense by a preponderance of the
4 evidence, it means you must be persuaded by the evidence that the claim or defense is more
5 probably true than not true.

6 You should base your decision on all of the evidence, regardless of which party presented
7 it.

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23 Ninth Circuit Model Civil Jury Instruction, 1.3

24 Proposed by: Joint

25 Given: _____

26 Given as Modified: _____

27 Withdrawn: _____

28 Refused: _____

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WHAT IS EVIDENCE

The evidence you are to consider in deciding what the facts are consists of:

1. The sworn testimony of any witness;
2. The exhibits which are received into evidence; and
3. Any facts to which the lawyers have agreed.

Ninth Circuit Model Civil Jury Instruction, 1.6

Proposed By: Joint

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

OWW: _____

1 **INSTRUCTION NO. __**

2 **WHAT IS NOT EVIDENCE**

3 In reaching your verdict, you may consider only the testimony, exhibits and stipulations,
4 if any, received into evidence. Certain things are not evidence, and you may not consider them
5 in deciding what the facts are. I will list them for you:

6 (1) Arguments and statements by lawyers are not evidence. The lawyers are not
7 witnesses. What they have said in their opening statements and closing arguments, and at other
8 times is intended to help you interpret the evidence, but it is not evidence. If the facts as you
9 remember them differ from the way the lawyers have stated them, your memory of them
10 controls.

11 (2) Questions and objections by lawyers are not evidence. Attorneys have a duty to
12 their clients to object when they believe a question is improper under the rules of evidence. You
13 should not be influenced by the objection or by the court's ruling on it.

14 (3) Testimony that has been excluded or stricken, or that you have been instructed to
15 disregard, is not evidence and must not be considered. In addition sometimes testimony and
16 exhibits are received only for a limited purpose; when I give] [have given] a limiting instruction,
17 you must follow it.

18 (4) Anything you may have seen or heard when the court was not in session is not
19 evidence. You are to decide the case solely on the evidence received at the trial.

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23 Ninth Circuit Model Civil Jury Instruction, 1.7

24 Proposed By: Joint

25 Given: _____

26 Given as Modified: _____

27 Withdrawn: _____

28 Refused: _____

OWW: _____

1 **INSTRUCTION NO. __**

2 **EVIDENCE FOR LIMITED PURPOSE**

3 Some evidence may be admitted for a limited purpose only.

4 When I instruct you that an item of evidence has been admitted for a limited purpose, you
5 must consider it only for that limited purpose and for no other.

6 The testimony [you are about to hear] [you have just heard] may be considered only for
7 the limited purpose of [describe purpose] and for no other purpose.]

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23 Ninth Circuit Model Civil Jury Instruction, 1.8

24 Proposed By: Joint

25 Given: _____

26 Given as Modified: _____

27 Withdrawn: _____

28 Refused: _____

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INSTRUCTION NO. __

DIRECT AND CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

Ninth Circuit Model Civil Jury Instruction, 1.9

Proposed By: Joint

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

OWW: _____

1 **INSTRUCTION NO. __**

2 **RULING ON OBJECTIONS**

3 There are rules of evidence that control what can be received into evidence. When a
4 lawyer asks a question or offers an exhibit into evidence and a lawyer on the other side thinks
5 that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the
6 objection, the question may be answered or the exhibit received. If I sustain the objection, the
7 question cannot be answered, and the exhibit cannot be received. Whenever I sustain an
8 objection to a question, you must ignore the question and must not guess what the answer might
9 have been.

10 Sometimes I may order that evidence be stricken from the record and that you disregard
11 or ignore the evidence. That means that when you are deciding the case, you must not consider
12 the evidence that I told you to disregard.

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23 Ninth Circuit Model Civil Jury Instruction, 1.10

24 Proposed By: Joint

25 Given: _____

26 Given as Modified: _____

27 Withdrawn: _____

28 Refused: _____

OWW: _____

1 **INSTRUCTION NO. __**

2 **CREDIBILITY OF WITNESSES**

3 In deciding the facts in this case, you may have to decide which testimony to believe and
4 which testimony not to believe. You may believe everything a witness says, part of it, or none of
5 it. Proof of a fact does not necessarily depend on the number of witnesses who testify about it.

6 In considering the testimony of any witness, you may take into account:

- 7 (1) The opportunity and ability of the witness to see or hear or know the things
8 testified to;
- 9 (2) The witness's memory;
- 10 (3) The witness's manner while testifying;
- 11 (4) The witness's interest in the outcome of the case and any bias or prejudice;
- 12 (5) Whether other evidence contradicts the witness's testimony;
- 13 (6) The reasonableness of the witness's testimony in light of all the evidence; and
- 14 (7) Any other factors that bear on believability.

15 The weight of the evidence as to a fact does not necessarily depend on the number of
16 witnesses who testify about it.

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22 Ninth Circuit Model Civil Jury Instruction, 1.11

23 Proposed By: Joint

24 Given: _____

25 Given as Modified: _____

26 Withdrawn: _____

27 Refused: _____

OWW: _____

1 **INSTRUCTION NO. __**
2 **CONDUCT OF THE JURY**

3 I will now say a few words about your conduct as jurors.

4 First, you are not to discuss this case with anyone, including members of your family,
5 people involved in the trial, or anyone else; this includes discussing the case in internet chat
6 rooms or through internet “blogs,” internet bulletin boards or e-mails. Nor are you allowed to
7 permit others to discuss the case with you. If anyone approaches you and tries to talk to you
8 about the case, please let me know about it immediately;

9 Second, do not read or listen to any news stories, articles, radio, television, or online
10 reports about the case or about anyone who has anything to do with it;

11 Third, do not do any research, such as consulting dictionaries, searching the Internet or
12 using other reference materials, and do not make any investigation about the case on your own;

13 Fourth, if you need to communicate with me simply give a signed note to the clerk to
14 give to me; and

15 Fifth, do not make up your mind about what the verdict should be until after you have
16 gone to the jury room to decide the case and you and your fellow jurors have discussed the
17 evidence. Keep an open mind until then.

18 Finally, until this case is given to you for your deliberation and verdict, you are not to
19 discuss the case with your fellow jurors.

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23 Ninth Circuit Model Civil Jury Instruction, 1.12

24 Proposed By: Joint

25 Given: _____

26 Given as Modified: _____

27 Withdrawn: _____

28 Refused: _____

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INSTRUCTION NO. ____
TAKING NOTES

If you wish, you may take notes to help you remember the evidence. If you do take notes, please keep them to yourself until you and your fellow jurors go to the jury room to decide the case. Do not let note-taking distract you. When you leave, your notes should be left in the jury room. No one will read your notes. They will be destroyed at the conclusion of the case.

Whether or not you take notes, you should rely on your own memory of the evidence. Notes are only to assist your memory. You should not be overly influenced by your notes or those of your fellow jurors.

Comment

It is well settled in this circuit that the trial judge has discretion to allow jurors to take notes. *United States v. Baker*, 10 F.3d 1374, 1403 (9th Cir.1993), cert. denied, 513 U.S. 934 (1994). See also Jury Instructions Committee of the Ninth Circuit, *A Manual on Jury Trial Procedures*, § 3.4 (2004).

Ninth Circuit Model Civil Jury Instruction, 1.14

Proposed By: Joint

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

OWW: _____

1 **INSTRUCTION NO. __**

2 **QUESTIONS TO WITNESSES BY JURORS**

3 You will be allowed to propose written questions to witnesses after the lawyers have
4 completed their questioning of each witness. You may propose questions in order to clarify the
5 testimony, but you are not to express any opinion about the testimony or argue with a witness. If
6 you propose any questions, remember that your role is that of a neutral fact finder, not an
7 advocate.

8 Before I excuse each witness, I will offer you the opportunity to write out a question on a
9 form provided by the court. Do not sign the question. I will review the question with the
10 attorneys to determine if it is legally proper.

11 Some questions you propose may not be asked or may not be asked as you have written
12 them. This might be because of the rules of evidence or other legal reasons or because the
13 question is expected to be answered later in the case. If I do not ask a proposed question, or if I
14 rephrase it, do not speculate as to the reasons. Do not give undue weight to questions you or
15 other jurors propose. You should evaluate the answers to those questions in the same manner
16 you evaluate all of the other evidence.

17 By giving you the opportunity to propose questions, I am not requesting or suggesting
18 that you do so. It will often be the case that a lawyer has not asked a question because it is
19 legally objectionable or because a later witness may be addressing that subject.

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23 Ninth Circuit Model Civil Jury Instruction, 1.15

24 Proposed: Joint

25 Given: _____

26 Given as Modified: _____

27 Withdrawn: _____

28 Refused: _____

OWW: _____

1 **INSTRUCTION NO. __**

2 **BENCH CONFERENCES AND RECESSES**

3 From time to time during the trial, it may be necessary for me to talk with the attorneys
4 out of the hearing of the jury by having a conference at the bench. Please understand that while
5 you are waiting, we are working. The purpose of these conferences is not to keep relevant
6 information from you, but to decide how certain evidence is to be treated under the rules of
7 evidence and to avoid confusion and error.

8 We will do our best to keep the number and length of these conferences to a minimum. I
9 may not always grant an attorney's request for a bench conference. Do not consider my granting
10 or denying a request for a bench conference as any indication of my opinion of the case or of
11 what your verdict should be.

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23 Ninth Circuit Model Civil Jury Instruction, 1.18

24 Proposed By: Joint

25 Given: _____

26 Given as Modified: _____

27 Withdrawn: _____

28 Refused: _____

OWW: _____

INSTRUCTION NO. __
OUTLINE OF TRIAL

The next phase of the trial will now begin: First, each side may make an opening statement. An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show. A party is not required to make an opening statement.

The plaintiff will then present evidence, and counsel for the defendant may cross-examine. Then the defendant may present evidence, and counsel for the plaintiff may cross-examine.

After the evidence has been presented, I will instruct you on the law that applies to the case and the attorneys will make closing arguments.

After that, you will go to the jury room to deliberate on your verdict.

Ninth Circuit Model Civil Jury Instruction, 1.19

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

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INSTRUCTION No. ____
STIPULATED TESTIMONY

The parties have agreed what [witness]’s testimony would be if called as a witness. You should consider that testimony in the same way as if it had been given here in court.

Comment

There is a difference between stipulating that a witness would give certain testimony and stipulating that the facts to which a witness might testify are true. *United States v. Lambert*, 604 F.2d 594, 595 (8th Cir.1979); *United States v. Hellman*, 560 F.2d 1235, 1236 (5th Cir.1977).

Ninth Circuit Model Civil Jury Instruction, 2.1

Proposed By: Plaintiff

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

OWW: _____

INSTRUCTION No. _____
STIPULATIONS OF FACT

The parties have agreed to certain facts [to be placed in evidence as Exhibit ___] [that will be read to you]. You should therefore treat these facts as having been proved.

Comment

When parties enter into stipulations as to material facts, those facts will be deemed to have been conclusively proved, and the jury may be so instructed. *United States v. Mikaelian*, 168 F.3d 380, 389 (9th Cir.1999) (citing *United States v. Houston*, 547 F.2d 104, 107 (9th Cir.1976)), amended by 180 F.3d 1091 (9th Cir.1999).

Ninth Circuit Model Civil Jury Instruction, 2.2

Proposed By: Plaintiff

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

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INSTRUCTION No. _____

2.3 JUDICIAL NOTICE

The court has decided to accept as proved the fact that [state fact], even though no evidence has been introduced on the subject. You must accept this fact as true.

Comment

An instruction regarding judicial notice should be given at the time notice is taken. In civil cases, Fed. R. Evid. 201(g) permits the judge to determine that a fact is sufficiently undisputed to be judicially noticed and requires that the jury be instructed that it is required to accept that fact. But see *United States v. Chapel*, 41 F.3d 1338, 1342 (9th Cir.1994) (in a criminal case, “the trial court must instruct ‘the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.’”) (citing Fed. R. Evid. 201(g)); Ninth Circuit Model Criminal Jury Instruction 2.5 (2003) (Judicial Notice).

Ninth Circuit Model Civil Jury Instruction, 2.3

Proposed By: Joint

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

OWW: _____

1 INSTRUCTION NO. __

2 DEPOSITION IN LIEU OF LIVE TESTIMONY

3 A deposition is the sworn testimony of a witness taken before trial. The witness is placed
4 under oath to tell the truth and lawyers for each party may ask questions. The questions and
5 answers are recorded.

6 The deposition of [witness] was taken on [date]. You should consider deposition
7 testimony, presented to you in court in lieu of live testimony, insofar as possible, in the same
8 way as if the witness had been present to testify.

9 [Do not place any significance on the behavior or tone of voice of any person reading the
10 questions or answers.]

11
12 **Comment**

13
14 This instruction should be used only when testimony by deposition is used in lieu of live
15 testimony. The committee recommends that it be given immediately before a deposition is to be
16 read. It need not be repeated if more than one deposition is read. If the judge prefers to include
17 the instruction as a part of his or her instructions before evidence, it should be modified
18 appropriately.

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23 Ninth Circuit Model Civil Jury Instruction, 2.4

24 Proposed By: Joint

25 Given: _____

26 Given as Modified: _____

27 Withdrawn: _____

28 Refused: _____

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INSTRUCTION No. _____

IMPEACHMENT EVIDENCE—WITNESS

The evidence that a witness [e.g., has been convicted of a crime, lied under oath on a prior occasion, etc.] may be considered, along with all other evidence, in deciding whether or not to believe the witness and how much weight to give to the testimony of the witness and for no other purpose.

Comment

If this instruction is given during the trial, the committee recommends giving the second sentence in numbered paragraph 3 of Instruction 1.7 (What Is Not Evidence) with the concluding instructions. See also Instruction 1.8 (Evidence for Limited Purpose).

Ninth Circuit Model Civil Jury Instruction, 2.8

Proposed By: Plaintiff

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

OWW: _____

1 INSTRUCTION NO. __

2 USE OF INTERROGATORIES OF A PARTY

3 Evidence [will now be] [was] presented to you in the form of answers of one of the
4 parties to written interrogatories submitted by the other side. These answers [have been] [were]
5 given in writing and under oath, before the actual trial, in response to questions that were
6 submitted in writing under established court procedures. You should consider the answers,
7 insofar as possible, in the same way as if they were made from the witness stand.

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9 Comment

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11 Use this oral instruction before interrogatories and answers are read to the jury; it may
12 also be included in the concluding written instructions to the jury. The attorney should warn the
13 judge ahead of time and give the judge an opportunity to give this oral instruction. This oral
14 instruction is not appropriate if answers to interrogatories are being used for impeachment only.

15
16 Do not use this instruction for requests for admission under Fed. R. Civ. P. 36. The effect
17 of requests for admission under the rule is not the same as the introduction of evidence through
18 interrogatories. If an instruction is needed, a special one will have to be drafted.

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23 Ninth Circuit Model Civil Jury Instruction, 2.10

24 Proposed by: Joint

25 Given: _____

26 Given as Modified: _____

27 Withdrawn: _____

28 Refused: _____

OWW: _____

1 **INSTRUCTION NO. __**

2 **EXPERT OPINION**

3 Some witnesses, because of education or experience, are permitted to state opinions and
4 the reasons for those opinions.

5 Opinion testimony should be judged just like any other testimony. You may accept it or
6 reject it, and give it as much weight as you think it deserves, considering the witness's education
7 and experience, the reasons given for the opinion, and all the other evidence in the case.

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9 Comment

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11 See Fed. R. Evid. 602, 701–05.
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23 Ninth Circuit Model Civil Jury Instruction, 2.11

24 Proposed by: Joint

25 Given: _____

26 Given as Modified: _____

27 Withdrawn: _____

28 Refused: _____

OWW: _____

1 **INSTRUCTION NO. __**

2 **CHARTS AND SUMMARIES IN EVIDENCE**

3 Certain charts and summaries [may be] [have been] received into evidence to illustrate
4 information brought out in the trial. Charts and summaries are only as good as the underlying
5 evidence that supports them. You should, therefore, give them only such weight as you think the
6 underlying evidence deserves.

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8 Comment

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10 This instruction applies only where the charts and summaries are not received into
11 evidence and are used for demonstrative purposes. See Jury Instructions Committee of the Ninth
12 Circuit, A Manual on Jury Trial Procedures, § 3.10A (2004).

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23 Ninth Circuit Model Civil Jury Instruction, 2.12

24 Proposed by: Joint

25 Given: _____

26 Given as Modified: _____

27 Withdrawn: _____

28 Refused: _____

OWW: _____

1 **INSTRUCTION NO. __**

2 **CHARTS AND SUMMARIES NOT RECEIVED IN EVIDENCE**

3 Certain charts and summaries not received in evidence [may be] [have been] shown to
4 you in order to help explain the contents of books, records, documents, or other evidence in the
5 case. They are not themselves evidence or proof of any facts. If they do not correctly reflect the
6 facts or figures shown by the evidence in the case, you should disregard these charts and
7 summaries and determine the facts from the underlying evidence.

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9 Comment

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11 See United States v. Johnson, 594 F.2d 1253, 1254-55 (9th Cir.1979) (error to permit the
12 introduction of a summary of evidence without the establishment of a foundation for the
13 evidence). See also Fed. R. Evid. 1006. See also Jury Instructions Committee of the Ninth
14 Circuit, A Manual on Jury Trial Procedures, § 3.10A(1) (2004). This instruction may be
15 unnecessary if there is no dispute as to the accuracy of the chart or summary.

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23 Ninth Circuit Model Civil Jury Instruction, 2.13

24 Proposed by: Joint

25 Given: _____

26 Given as Modified: _____

27 Withdrawn: _____

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INSTRUCTION NO. __

DUTY TO DELIBERATE

When you begin your deliberations, you should elect one member of the jury as your presiding juror. That person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not hesitate to change your opinion if the discussion persuades you that you should. Do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

Ninth Circuit Model Civil Jury Instruction, 3.1

Proposed by: Joint

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

OWW: _____

1 **INSTRUCTION NO. __**

2 **COMMUNICATION WITH COURT**

3 If it becomes necessary during your deliberations to communicate with me, you may send
4 a note through the marshal, signed by your presiding juror or by one or more members of the
5 jury. No member of the jury should ever attempt to communicate with me except by a signed
6 writing; I will communicate with any member of the jury on anything concerning the case only
7 in writing, or here in open court. If you send out a question, I will consult with the parties before
8 answering it, which may take some time. You may continue your deliberations while waiting for
9 the answer to any question. Remember that you are not to tell anyone--including me--how the
10 jury stands, numerically or otherwise, until after you have reached a unanimous verdict or have
11 been discharged. Do not disclose any vote count in any note to the court.

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23 Ninth Circuit Model Civil Jury Instruction, 3.2

24 Proposed by: Joint

25 Given: _____

26 Given as Modified: _____

27 Withdrawn: _____

28 Refused: _____

OWW: _____

1 **INSTRUCTION No. ____**

2 **RETURN OF VERDICT**

3
4 A verdict form has been prepared for you. [Any explanation of the verdict form may be
5 given at this time.] After you have reached unanimous agreement on a verdict, your presiding
6 juror will fill in the form that has been given to you, sign and date it, and advise the court that
7 you are ready to return to the courtroom.

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9 Comment

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11 The judge may also wish to explain to the jury the particular form of verdict being used
12 and just how to “advise the court” of a verdict.

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23 Ninth Circuit Model Civil Jury Instruction, 3.3

24 Proposed by: Plaintiff

25 Given: _____

26 Given as Modified: _____

27 Withdrawn: _____

28 Refused: _____

OWW: _____

INSTRUCTION No. _____

ADDITIONAL INSTRUCTIONS OF LAW

At this point I will give you a further instruction. By giving a further instruction at this time, I do not mean to emphasize this instruction over any other instruction.

You are not to attach undue importance to the fact that this was read separately to you. You shall consider this instruction together with all of the other instructions that were given to you.

[Insert text of new instruction.]

You will now retire to the jury room and continue your deliberations.

Comment

Use this instruction for giving a jury instruction to a jury while it is deliberating. If the jury has a copy of the instructions, send the additional instruction to the jury room. Unless the additional instruction is by consent of both parties, both sides must be given an opportunity to take exception or object to it. If this instruction is used, it should be made a part of the record. The judge and attorneys should make a full record of the proceedings.

See Jury Instructions Committee of the Ninth Circuit, A Manual on Jury Trial Procedures, § 5.2.C (2004).

Ninth Circuit Model Civil Jury Instruction, 3.4

Proposed by: Plaintiff

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

OWW: _____

1 **INSTRUCTION NO. __**

2 **DEADLOCKED JURY**

3 Members of the jury, you have advised that you have been unable to agree upon a verdict
4 in this case. I have decided to suggest a few thoughts to you.

5 As jurors, you have a duty to discuss the case with one another and to deliberate in an
6 effort to reach a unanimous verdict if each of you can do so without violating your individual
7 judgment and conscience. Each of you must decide the case for yourself, but only after you
8 consider the evidence impartially with your fellow jurors. During your deliberations, you should
9 not hesitate to reexamine your own views and change your opinion if you become persuaded that
10 it is wrong. However, you should not change an honest belief as to the weight or effect of the
11 evidence solely because of the opinions of your fellow jurors or for the mere purpose of
12 returning a verdict.

13 All of you are equally honest and conscientious jurors who have heard the same
14 evidence. All of you share an equal desire to arrive at a verdict. Each of you should ask yourself
15 whether you should question the correctness of your present position.

16 I remind you that in your deliberations you are to consider the instructions I have given
17 you as a whole. You should not single out any part of any instruction, including this one, and
18 ignore others. They are all equally important.

19 You may now retire and continue your deliberations.

20
21 Comment

22
23 The committee recommends that a supplemental instruction to encourage a deadlocked
24 jury to reach a verdict should be given with great caution.

25 An earlier form of instruction for a deadlocked jury was approved by the Supreme Court
26 in *Allen v. United States*, 164 U.S. 492, 501 (1896).

27 Before giving any supplemental jury instruction to a deadlocked jury, the committee
28 recommends the court review *United States v. Wills*, 88 F.3d 704, 716-18 (9th Cir.1996), cert.

1 denied, 519 U.S. 1000 (1996); United States v. Ajiboye, 961 F.2d 892 (9th Cir.1992); United
2 States v. Nickell, 883 F.2d 824 (9th Cir.1989); United States v. Seawell, 550 F.2d 1159 (9th
3 Cir.1977), appeal after remand, 583 F.2d 416 (9th Cir.), cert. denied, 439 U.S. 991 (1978); and
4 the Jury Instructions Committee of the Ninth Circuit, A Manual on Jury Trial Procedures, § 5.4
5 (2004).

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23 Ninth Circuit Model Civil Jury Instruction, 3.5

24 Proposed by: Plaintiff

25 Given: _____

26 Given as Modified: _____

27 Withdrawn: _____

28 Refused: _____

OWW: _____

1 **INSTRUCTION NO. ____**

2 **DAMAGES—PROOF**

3 It is the duty of the Court to instruct you about the measure of damages. By instructing
4 you on damages, the Court does not mean to suggest for which party your verdict should be
5 rendered.

6 If you find for the plaintiff [on the plaintiff's ____ claim], you must determine the
7 plaintiff's damages. The plaintiff has the burden of proving damages by a preponderance of the
8 evidence. Damages means the amount of money that will reasonably and fairly compensate the
9 plaintiff for any injury you find was caused by the defendant. You should consider the
10 following:

11 [Here insert types of damages. See Instruction 5.2 (Measures of Types of Damages)]

12
13 It is for you to determine what damages, if any, have been proved.

14 Your award must be based upon evidence and not upon speculation, guesswork or
15 conjecture.

16
17 Comment

18
19 If liability is not disputed, this instruction should be modified accordingly.

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22 Ninth Circuit Model Civil Jury Instruction, 5.1

23 Proposed by: Plaintiff

24 Given: _____

25 Given as Modified: _____

26 Withdrawn: _____

27 Refused: _____

OWW: _____

1 INSTRUCTION NO. __

2 MEASURES OF TYPES OF DAMAGES

3
4 In determining the measure of damages, you should consider:

5 [The nature and extent of the injuries;]

6 [The [disability] [disfigurement] [loss of enjoyment of life] experienced [and which with
7 reasonable probability will be experienced in the future];]

8 [The [mental,] [physical,] [emotional] pain and suffering experienced [and which with
9 reasonable probability will be experienced in the future];]

10 [The reasonable value of necessary medical care, treatment, and services received to the
11 present time;]

12 [The reasonable value of necessary medical care, treatment, and services which with
13 reasonable probability will be required in the future;]

14 [The reasonable value of [wages] [earnings] [earning capacity] [salaries] [employment]
15 [business opportunities] [employment opportunities] lost to the present time;]

16 [The reasonable value of [wages] [earnings] [earning capacity] [salaries] [employment]
17 [business opportunities] [employment opportunities] which with reasonable probability will be
18 lost in the future;]

19
20 Comment

21
22 Insert only the appropriate bracketed items into Instruction 5.1 (Damages—Proof).
23 Additional paragraphs may have to be drafted to fit other types of damages. Particular claims
24 may have special rules on damages. See, e.g., Instruction 7.11 (Maintenance and Cure), 11.7A
25 (Age Discrimination—Damages—Back and Front Pay—Mitigation), and 11.7B (Age
26 Discrimination—Damages—Willful Discrimination—Liquidated Damages).

27 Punitive and compensatory damages are subject to caps in Title VII cases. See 42 U.S.C.
28 1981a(b)(3). Regarding the amount of damages available under Title VII, see *Gotthardt v. Nat'l*

1 R.R. Passenger Corp., 191 F.3d 1148 (9th Cir.1999). The cap does not apply to front pay and
2 back pay. See Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 848 (2001). See also
3 Caudle v. Bristow Optical Co., 224 F.3d 1014, 1020 (9th Cir.2000) (includes the definition of
4 front pay and back pay); Introductory Comment to Chapter 10.

5 In Title VII and ADA cases, the court, not the jury, determines the amount of back pay.
6 Lutz v. Glendale Union High School, 403 F.3d 1061, 1069 (9th Cir.2005); see also Albemarle
7 Paper Co. v. Moody, 422 U.S. 405, 415-16 (1975).

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Ninth Circuit Model Civil Jury Instruction, 5.2 (modified)

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Proposed by: Plaintiff

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Given: _____

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Given as Modified: _____

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Withdrawn: _____

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Refused: _____

OWW: _____

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INSTRUCTION No. _____
DAMAGES—MITIGATION

The plaintiff has a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or reduce damages.

The defendant has the burden of proving by a preponderance of the evidence:

1. that the plaintiff failed to use reasonable efforts to mitigate damages; and
2. the amount by which damages would have been mitigated.

Comment

As to mitigation of damages in an action under the Age Discrimination in Employment Act, see Instruction 11.7A (Age Discrimination—Damages—Back and Front Pay—Mitigation).

Ninth Circuit Model Civil Jury Instruction, 5.3

Proposed by: Plaintiff

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

OWW: _____

INSTRUCTION No. _____

DAMAGES ARISING IN THE FUTURE—DISCOUNT TO PRESENT CASH VALUE

[Any award for future economic damages must be for the present cash value of those damages.]

[Noneconomic damages [such as] [pain and suffering] [disability] [disfigurement] [and] [_____] are not reduced to present cash value.]

Present cash value means the sum of money needed now, which, when invested at a reasonable rate of return, will pay future damages at the times and in the amounts that you find the damages [will be incurred] [or] [would have been received].

The rate of return to be applied in determining present cash value should be the interest that can reasonably be expected from safe investments that can be made by a person of ordinary prudence, who has ordinary financial experience and skill. [You should also consider decreases in the value of money which may be caused by future inflation.]

Comment

There must be evidence to support this instruction. See *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 339–42 (1988). See also *Passantino v. Johnson & Johnson Consumer Prods., Inc.* 212 F.3d 493, 508–09 (9th Cir.2000).

Ninth Circuit Model Civil Jury Instruction, 5.4

Proposed by: Plaintiff

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

OWW: _____

1 **INSTRUCTION No. _____**

2 **NOMINAL DAMAGES**

3
4 The law which applies to this case authorizes an award of nominal damages. If you find
5 for the plaintiff but you find that the plaintiff has failed to prove damages as defined in these
6 instructions, you must award nominal damages. Nominal damages may not exceed one dollar.

7
8 **Comment**

9
10 Nominal damages are not available in every case. The court must determine whether
11 nominal damages are permitted. See, e.g., *Chew v. Gates*, 27 F.3d 1432, 1437 (9th Cir.1994)
12 (Section 1983 action), cert. denied, 513 U.S. 1148 (1995); *Parton v. GTE North, Inc.*, 971 F.2d
13 150, 154 (8th Cir.1992) (Title VII action).

14 Regarding cases brought under 42 U.S.C. § 1983, see *George v. City of Long Beach*, 973
15 F.2d 706 (9th Cir.1992); *Floyd v. Laws*, 929 F.2d 1390, 1401 (9th Cir.1991).

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23 Ninth Circuit Model Civil Jury Instruction, 5.6

24 Proposed by: Plaintiff

25 Given: _____

26 Given as Modified: _____

27 Withdrawn: _____

28 Refused: _____

OWW: _____

1 **INSTRUCTION No. _____**

2 **WILLFUL SUPPRESSION OF EVIDENCE**

3 You may consider whether one party intentionally concealed or destroyed evidence. If
4 you decide that a party did so, you may decide that the evidence would have been unfavorable to
5 that party.

6 **DIRECTIONS FOR USE**

7 This instruction should be given only if there is evidence of suppression. (In re Estate of
8 Moore (1919) 180 Cal. 570, 585 182 P. 285; Sprague v. Equifax, Inc. (1985) 166 Cal.App.3d
9 1012, 1051 213 Cal.Rptr. 69; County of Contra Costa v. Nulty (1965) 237 Cal.App.2d 593, 598
10 47 Cal.Rptr. 109.)

11 If there is evidence that a party improperly altered evidence (as opposed to concealing or
12 destroying it), users should consider modifying this instruction to account for that circumstance.

13 In Cedars-Sinai Medical Center v. Superior Court (1998) 18 Cal.4th 1, 12 74 Cal.Rptr.2d
14 248, 954 P.2d 511, a case concerning the tort of intentional spoliation of evidence, the Supreme
15 Court observed that trial courts are free to adapt standard jury instructions on willful suppression
16 to fit the circumstances of the case, "including the egregiousness of the spoliation and the
17 strength and nature of the inference arising from the spoliation."

18 **SOURCES AND AUTHORITY**

19 Evidence Code section 413 provides: "In determining what inferences to draw from the
20 evidence or facts in the case against a party, the trier of fact may consider, among other things,
21 the party's failure to explain or to deny by his testimony such evidence or facts in the case
22 against him, or his willful suppression of evidence relating thereto, if such be the case."

23 Former Code of Civil Procedure section 1963(5) permitted the jury to infer "that the
24 evidence willfully suppressed would be adverse if produced." Including this inference in a jury
25 instruction on willful suppression is proper because "Evidence Code section 413 was not
26 intended as a change in the law." (Bihun v. AT&T Information Systems, Inc. (1993) 13
27 Cal.App.4th 976, 994 16 Cal.Rptr.2d 787, disapproved of on other grounds in Lakin v. Watkins
28 Associated Industries (1993) 6 Cal.4th 644, 664 25 Cal.Rptr.2d 109, 863 P.2d 179.)

1 "A defendant is not under a duty to produce testimony adverse to himself, but if he fails
2 to produce evidence that would naturally have been produced he must take the risk that the trier
3 of the fact will infer, and properly so, that the evidence, had it been produced, would have been
4 adverse." (Breland v. Traylor Engineering and Manufacturing Co. (1942) 52 Cal.App.2d 415,
5 426 126 P.2d 455.)

6 Secondary Sources

7 7 Witkin, California Procedure (4th ed. 1997) Trial, § 313, p. 358
8 3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, § 115
9 48 California Forms of Pleading and Practice, Ch. 551, Trial, § 551.93 (Matthew Bender)

10 WEST'S EDITORIAL REFERENCES

11 Direct References:
12 See BAJI 2.03

13 Related References:
14 BAJI 2.22, 12.35

15 Statutory References:
16 West's Ann.Cal.Evid.Code § 413

17 Secondary References:
18 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 313(b)
19 California Practice Guide (Rutter), Civil Trials and Evidence, §§ 13:105, 13:298

20 Library References:
21 Cal.Jur. 3d, Evidence §§ 100, 129, 703, 704

22 Analytical Cross References:
23 Simons, California Evidence Manual, § 1:45

24 Research References:
25 West's Key Number Digest, Evidence k78; Trial k234(8), 211, 252(22)
26 C.J.S. Evidence §§ 163 to 165, 167; Trial §§ 501 to 504, 568, 586, 623, 631, 663, 665

27 CACI 204

28 Proposed by: Plaintiff

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

OWW: _____

1 **INSTRUCTION No. _____**

2 **DEFINITION OF MENTAL DISABILITY**

3 "Mental disability" includes, but is not limited to, all of the following:

4 (1) Having any mental or psychological disorder or condition, such as mental
5 retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities,
6 that limits a major life activity;

7 (2) Any other mental or psychological disorder or condition not described in
8 paragraph (1) that requires special education or related services.

9 (3) Having a record or history of a mental or psychological disorder or condition
10 described in paragraph (1) or (2), which is known to the County of Kern;

11 (4) Being regarded or treated by the County of Kern as having, or having had, a
12 mental or psychological disorder or condition that has no present disabling effect, but that may
13 become a mental disability as described in paragraph (1) or (2).

14
15 "Limits" shall be determined without regard to mitigating measures such as medication,
16 assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure
17 itself limits a major life activity.

18
19 "Major life activities" must be broadly construed and include physical, mental, and social
20 activities, as well as working.

21 **USE NOTE**

22
23 Government Code § 12926 provides that notwithstanding subdivisions (i) and (k) if the
24 definition of "disability" used in the ADA of 1990 would result in broader protection of the civil
25 rights of individuals with a mental disability or physical disability, as defined in subdivision (i)
26 or (k), or would include any medical condition not included within those definitions, then that
27 broader protection or coverage shall be deemed incorporated by reference into, and shall prevail
28 over conflicting provisions of, the definitions in subdivisions (i) and (k). If that situation arises in

1 a particular case, this instruction will have to be modified or revised accordingly.

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3 COMMENT

4 Government Code § 12926(h)-(j).

5 Research References:
6 West's Key Number Digest, Civil Rights k1215, 1753

7 WEST'S EDITORIAL CACI REFERENCE

8 CACI 2540
9 CACI 2542
10 CACI 3020
11 CACI 3021

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23 BAJI 12.13

24 Proposed by: Plaintiff

25 Given: _____

26 Given as Modified: _____

27 Withdrawn: _____

28 Refused: _____

OWW: _____

INSTRUCTION No. _____

REASONABLE ACCOMMODATION /ESSENTIAL FUNCTIONS EXPLAINED

A reasonable accommodation is a workplace modification so that an individual with a disability can apply for a job, perform the essential functions of the job, and enjoy the job benefits.

Reasonable accommodation may include, but is not limited to:

a. Making existing facilities used by employees readily accessible to and usable by individuals with disabilities;

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

c. Holding a job open for a disabled employee who needs time to recuperate or heal is in itself a form of reasonable accommodation and may be all that is required where it appears likely that the employee will be able to return to an existing position at some time in the foreseeable future.

While the employer has an obligation to provide a reasonable accommodation, the employee cannot require the employer to provide a specific accommodation. The employer is not required to choose the best accommodation or the accommodation the employee seeks so long as the employer provides a reasonable accommodation.

The phrase "**essential functions**" means the fundamental job duties of the employment position which the individual with disability holds or desires. The phrase "essential functions" does not include the marginal functions of the position.

1. A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following:

a. The function may be essential because the reason the position exists is to perform that function.

1 b. The function may be essential because of the limited number of employees
2 available among whom the performance of that job function can be distributed.

3 c. The function may be highly specialized, so that the incumbent in the
4 position is hired for that person's expertise or ability to perform the particular function.

5 2. Evidence of whether a particular function is essential includes, but is not limited to, the
6 following:

7 a. The employer's judgment as to whether functions are essential.

8 b. Written job descriptions prepared before advertising or interviewing
9 applicants for the job.

10 c. The amount of time spent on the job performing the functions.

11 d. The consequences of not requiring the incumbent to perform the function.

12 e. The terms of a collective bargaining agreement.

13 f. The work experiences of past incumbents in the job.

14 g. The current work experience of incumbents in similar jobs.

15 As used in this instruction, "incumbent" means the person holding the position, about to
16 hold the position, or the person who formerly held the position.

17
18 USE NOTE

19 This instruction is necessary to supplement BAJI 12.12, 12.12.5, or 12.12.6.

20 If the employer claims an inability to provide reasonable accommodations because of
21 undue hardship, use BAJI 12.15.

22 The various ways that reasonable accommodation may occur is taken from Government
23 Code § 12926(n).

24 The 2008 revision incorporates two additional bracketed paragraphs following the first
25 paragraph. The first incorporates language found in Jensen v. Wells Fargo Bank (2000) 85
26 Cal.App.4th 245, 266, 102 Cal.Rptr.2d 55. The second is based upon Hanson v. Lucky Stores,
27 Inc. (1999) 74 Cal.App.4th 215, 228, 87 Cal.Rptr.2d 487. Do not give either paragraph unless
28

1 there is evidence supporting it.

2 COMMENT

3 Government Code § 12940(a)(1).
4 2 California Code of Regulations § 7293.8(g).
5 The definition of "reasonable accommodation" is taken from the ADA Checklist C.
6 The definition of "undue hardship" is based upon Government Code § 12926(s).

7 Research References:
8 West's Key Number Digest, Civil Rights k1215, 1753

9 WEST'S EDITORIAL CACI REFERENCE

10 CACI 2543
11 CACI 2544
12 CACI 2545

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23 BAJI 12.14

24 Proposed by: Plaintiff

25 Given: _____

26 Given as Modified: _____

27 Withdrawn: _____

28 Refused: _____

OWW: _____

INSTRUCTION No. _____

EMPLOYMENT DISCRIMINATION DAMAGES

If you find that plaintiff is entitled to recover damages for unlawful employment discrimination, the damages must include: the value of any loss of compensation and benefits under the employment contract any consequential economic damages any damages for emotional distress suffered by plaintiff **(other)**, provided that you find that the harm or loss was or will be suffered by the plaintiff and was or will be caused by the act or omission upon which you base your finding of liability.

USE NOTE

Other items of damage should be added if deemed appropriate by the trial judge.

See BAJI 12.72, defining emotional distress.

If punitive damages are claimed and there is evidence to support such claim (see Civil Code §§ 3294 and 3295), BAJI 14.71 should be given. If punitive damages are sought against a principal for the acts of an agent, BAJI 14.73 should be given.

If the discrimination results in termination, plaintiff has a duty to mitigate damages. BAJI 10.16 can be modified to read, "An employee who was damaged as a result of unlawful employment discrimination resulting in termination has a duty"

The committee notes that 42 U.S.C.A. § 2000e-5(g)(2)(B) excludes the recovery of damages if the employer can establish that he, she or it would have taken the same action in the absence of the impermissible motivating factor, but permits declaratory relief, some types of injunctive relief, and attorney's fees and costs. It is unknown how this provision of law will be treated, if at all, by the California Courts. It appears to be a statutory recognition, at least in part, of the defense discussed in Price Waterhouse v. Hopkins (1989) 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268. See BAJI 12.26 and its comment.

COMMENT

In a situation where an employee following an unlawful demotion based upon age discrimination, sustained an industrial injury coupled with emotional distress, the subsequent

1 injury and damages are recoverable in the wrongful demotion or age discrimination case if the
2 discriminatory demotion was a substantial factor in producing the injury and its damages. If not,
3 it is subject to the workers compensation exclusivity provisions. Huffman v. Interstate Brands
4 Companies, (2d Dist.2004) 121 Cal.App.4th 679, 17 Cal.Rptr.3d 397.

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6 Research References:
7 West's Key Number Digest, Civil Rights k1753, 1765
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22 BAJI 12.25

23 Proposed by: Plaintiff

24 Given: _____

25 Given as Modified: _____

26 Withdrawn: _____

27 Refused: _____

28 OWW: _____

1 **INSTRUCTION No. _____**

2 **CAUSATION: SUBSTANTIAL FACTOR**

3 A substantial factor in causing harm is a factor that a reasonable person would consider to
4 have contributed to the harm. It must be more than a remote or trivial factor. It does not have to
5 be the only cause of the harm.

6 **DIRECTIONS FOR USE**

7
8 As phrased, this definition of "substantial factor" subsumes the "but for" test of causation,
9 that is, "but for" the defendant's conduct, the plaintiff's harm would not have occurred. (Mitchell
10 v. Gonzales (1991) 54 Cal.3d 1041, 1052 1 Cal.Rptr.2d 913, 819 P.2d 872; see Rest.2d Torts, §
11 431.) The optional last sentence makes this explicit, and in some cases it may be error not to give
12 this sentence. (See Soule v. GM Corp. (1994) 8 Cal.4th 548, 572-573 34 Cal.Rptr.2d 607, 882
13 P.2d 298; Rest.2d Torts § 432(1).)

14 "Conduct," in this context, refers to the culpable acts or omissions on which a claim of
15 legal fault is based, e.g., negligence, product defect, breach of contract, or dangerous condition
16 of public property. This is in contrast to an event that is not a culpable act but that happens to
17 occur in the chain of causation, e.g., that the plaintiff's alarm clock failed to go off, causing her to
18 be at the location of the accident at a time when she otherwise would not have been there. The
19 reference to "conduct" may be changed as appropriate to the facts of the case.

20 The "but for" test of the last optional sentence does not apply to concurrent independent
21 causes, which are multiple forces operating at the same time and independently, each of which
22 would have been sufficient by itself to bring about the same harm. (Viner v. Sweet (2003) 30
23 Cal.4th 1232, 1240 135 Cal.Rptr.2d 629, 70 P.3d 1046; Barton v. Owen (1977) 71 Cal.App.3d
24 484, 503-504 139 Cal.Rptr. 494; see Rest.2d Torts § 432(2).) Accordingly, do not include the
25 last sentence in a case involving concurrent independent causes.

26 In cases of multiple (concurrent dependent) causes, CACI No. 431, Causation: Multiple
27 Causes, should also be given.

1 In asbestos-related cancer cases, Rutherford v. Owens-Illinois, Inc. (1997) 16 Cal.4th
2 953, 977 67 Cal.Rptr.2d 16, 941 P.2d 1203 requires a different instruction regarding exposure to
3 a particular product. Give CACI No. 435, Causation for Asbestos-Related Cancer Claims, and do
4 not give this instruction.

5
6 SOURCES AND AUTHORITY

7 This instruction incorporates Restatement Second of Torts, section 431, comment a,
8 which provides, in part: "The word 'substantial' is used to denote the fact that the defendant's
9 conduct has such an effect in producing the harm as to lead reasonable men to regard it as a
10 cause, using that word in the popular sense, in which there always lurks the idea of
11 responsibility, rather than in the so-called 'philosophic sense' which includes every one of the
12 great number of events without which any happening would not have occurred."

13 "California has definitively adopted the substantial factor test of the Restatement Second
14 of Torts for cause-in-fact determinations. Under that standard, a cause in fact is something that is
15 a substantial factor in bringing about the injury. The substantial factor standard generally
16 produces the same results as does the 'but for' rule of causation which states that a defendant's
17 conduct is a cause of the injury if the injury would not have occurred 'but for' that conduct. The
18 substantial factor standard, however, has been embraced as a clearer rule of causation--one
19 which subsumes the 'but for' test while reaching beyond it to satisfactorily address other
20 situations, such as those involving independent or concurrent causes in fact." (Rutherford, supra,
21 16 Cal.4th at pp. 968-969, internal citations omitted.)

22 "The term 'substantial factor' has not been judicially defined with specificity, and indeed
23 it has been observed that it is 'neither possible nor desirable to reduce it to any lower terms.' This
24 court has suggested that a force which plays only an 'infinitesimal' or 'theoretical' part in bringing
25 about injury, damage, or loss is not a substantial factor. Undue emphasis should not be placed on
26 the term 'substantial.' For example, the substantial factor standard, formulated to aid plaintiffs as
27 a broader rule of causality than the 'but for' test, has been invoked by defendants whose conduct
28 is clearly a 'but for' cause of plaintiff's injury but is nevertheless urged as an insubstantial

1 contribution to the injury. Misused in this way, the substantial factor test 'undermines the
2 principles of comparative negligence, under which a party is responsible for his or her share of
3 negligence and the harm caused thereby.' " (Rutherford, supra, 16 Cal.4th at pp. 968-969,
4 internal citations omitted.)

5 "The substantial factor standard is a relatively broad one, requiring only that the
6 contribution of the individual cause be more than negligible or theoretical. Thus, 'a force which
7 plays only an "infinitesimal" or "theoretical" part in bringing about injury, damage, or loss is not
8 a substantial factor', but a very minor force that does cause harm is a substantial factor. This rule
9 honors the principle of comparative fault." (Bockrath v. Aldrich Chemical Co. (1999) 21 Cal.4th
10 71, 79 86 Cal.Rptr.2d 846, 980 P.2d 398, internal citations omitted.)

11 "The text of Restatement Torts second section 432 demonstrates how the 'substantial
12 factor' test subsumes the traditional 'but for' test of causation. Subsection (1) of section 432
13 provides: 'Except as stated in Subsection (2), the actor's negligent conduct is not a substantial
14 factor in bringing about harm to another if the harm would have been sustained even if the actor
15 had not been negligent.' ... Subsection (2) states that if 'two forces are actively operating ... and
16 each of itself is sufficient to bring about harm to another, the actor's negligence may be found to
17 be a substantial factor in bringing it about.' " (Viner, supra, 30 Cal. 4th at p. 1240, original
18 italics.)

19 "The first element of legal cause is cause in fact The 'but for' rule has traditionally
20 been applied to determine cause in fact. The Restatement formula uses the term substantial factor
21 'to denote the fact that the defendant's conduct has such an effect in producing the harm as to
22 lead reasonable men to regard it as a cause.' " (Mayes v. Bryan (2006) 139 Cal.App.4th 1075,
23 1095 44 Cal.Rptr.3d 14, internal citations omitted.)

24 " 'Whether a defendant's conduct actually caused an injury is a question of fact ... that is
25 ordinarily for the jury' 'Causation in fact is ultimately a matter of probability and common
26 sense: "A plaintiff is not required to eliminate entirely all possibility that the defendant's conduct
27 was not a cause. It is enough that he introduces evidence from which reasonable persons may
28 conclude that it is more probable that the event was caused by the defendant than that it was not.

1 The fact of causation is incapable of mathematical proof, since no person can say with absolute
2 certainty what would have occurred if the defendant had acted otherwise. If, as a matter of
3 ordinary experience, a particular act or omission might be expected to produce a particular result,
4 and if that result has in fact followed, the conclusion may be justified that the causal relation
5 exists. In drawing that conclusion, the triers of fact are permitted to draw upon ordinary human
6 experience as to the probabilities of the case." ' .

7 .. ' "A mere possibility of ... causation is not enough; and when the matter remains one of pure
8 speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of
9 the court to direct a verdict for the defendant." ' " (Raven H. v. Gamette (2007) 157 Cal.App.4th
10 1017, 1029-1030 68 Cal.Rptr.3d 897, internal citations omitted.)

11 "However the test is phrased, causation in fact is ultimately a matter of probability and
12 common sense." (Osborn v. Irwin Memorial Blood Bank (1992) 5 Cal.App.4th 234, 253 7
13 Cal.Rptr.2d 101, relying on Rest.2d Torts, § 433B, com. b.)

14 Restatement Second of Torts, section 431, provides: "The actor's negligent conduct is a
15 legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the
16 harm, and, (b) there is no rule of law relieving the actor from liability because of the manner in
17 which his negligence has resulted in the harm." This section "correctly states California law as to
18 the issue of causation in tort cases." (Wilson v. Blue Cross of Southern California (1990) 222
19 Cal.App.3d 660, 673 271 Cal.Rptr. 876.)

20 Secondary Sources

21 6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1185-1189, 1191

22 California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.13-1.15

23 1 Levy et al., California Torts, Ch. 2, Causation, § 2.02 (Matthew Bender)

24 4 California Trial Guide, Unit 90, Closing Argument, § 90.89 (Matthew Bender)

25 California Products Liability Actions, Ch. 2, Liability for Defective Products, § 2.22, Ch. 7,
26 Proof, § 7.06 (Matthew Bender)

27 33 California Forms of Pleading and Practice, Ch. 380, Negligence, § 380.71 (Matthew Bender)

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1 16 California Points and Authorities, Ch. 165, Negligence, §§ 165.260-165.263 (Matthew
2 Bender)

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CACI 430

Proposed by: Plaintiff

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

OWW: _____

1 opposed any practices forbidden under Government Code sections 12900 through 12966 or
2 because the person has filed a complaint, testified, or assisted in any proceeding under the
3 FEHA."

4 Read the second option for element 2 in cases involving a pattern of employer harassment
5 consisting of acts that might not individually be sufficient to constitute retaliation, but taken as a
6 whole establish prohibited conduct. Give both options if the employee presents evidence
7 supporting liability under both a sufficient-single-act theory or a pattern-of-harassment theory.
8 (See, e.g., *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413,
9 423-424 69 Cal.Rptr.3d 1.) Also select "conduct" in element 3 if the second option or both
10 options are included for element 2.

11 Retaliation in violation of the FEHA may be established by constructive discharge; that
12 is, that the employer intentionally created or knowingly permitted working conditions to exist
13 that were so intolerable that a reasonable person in the employee's position would have had no
14 reasonable alternative other than to resign. (See *Steele v. Youthful Offender Parole Bd.* (2008)
15 162 Cal.App.4th 1241, 1253 76 Cal.Rptr.3d 632.) If constructive discharge is alleged, replace
16 element 2 with elements 4 and 5 of CACI No. 2402, Breach of Employment Contract--
17 Unspecified Term--Constructive Discharge--Essential Factual Elements.

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SOURCES AND AUTHORITY

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

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

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

10 "Employees may establish a prima facie case of unlawful retaliation by showing that (1)
11 they engaged in activities protected by the FEHA, (2) their employers subsequently took adverse
12 employment action against them, and (3) there was a causal connection between the protected
13 activity and the adverse employment action." (Miller v. Department of Corr. (2005) 36 Cal.4th
14 446, 472 30 Cal.Rptr.3d 797, 115 P.3d 77, citing Flait v. North Am. Watch Corp. (1992) 3
15 Cal.App.4th 467, 476 4 Cal.Rptr.2d 522.)

16 "Retaliation claims are inherently fact-specific, and the impact of an employer's action in
17 a particular case must be evaluated in context. Accordingly, although an adverse employment
18 action must materially affect the terms, conditions, or privileges of employment to be actionable,
19 the determination of whether a particular action or course of conduct rises to the level of
20 actionable conduct should take into account the unique circumstances of the affected employee
21 as well as the workplace context of the claim." (Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th
22 1028, 1052 32 Cal.Rptr.3d 436, 116 P.3d 1123.)

23 "Appropriately viewed, section 12940(a) protects an employee against unlawful
24 discrimination with respect not only to so-called ultimate employment actions such as
25 termination or demotion, but also the entire spectrum of employment actions that are reasonably
26 likely to adversely and materially affect an employee's job performance or opportunity for
27 advancement in his or her career. Although a mere offensive utterance or even a pattern of social
28 slights by either the employer or coemployees cannot properly be viewed as materially affecting

1 the terms, conditions, or privileges of employment for purposes of section 12940(a) (or give rise
2 to a claim under section 12940(h)), the phrase 'terms, conditions, or privileges' of employment
3 must be interpreted liberally and with a reasonable appreciation of the realities of the workplace
4 in order to afford employees the appropriate and generous protection against employment
5 discrimination that the FEHA was intended to provide." (Yanowitz, supra, 36 Cal.4th at pp. 1053
6 -1054, footnotes omitted.)

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

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

18 "A long period between an employer's adverse employment action and the employee's
19 earlier protected activity may lead to the inference that the two events are not causally connected.
20 But if between these events the employer engages in a pattern of conduct consistent with a
21 retaliatory intent, there may be a causal connection." (Wysinger, supra, 157 Cal.App.4th at p.
22 421, internal citation omitted.)

23 "Both direct and circumstantial evidence can be used to show an employer's intent to
24 retaliate. 'Direct evidence of retaliation may consist of remarks made by decisionmakers
25 displaying a retaliatory motive.' Circumstantial evidence typically relates to such factors as the
26 plaintiff's job performance, the timing of events, and how the plaintiff was treated in comparison
27 to other workers." (Colarossi v. Coty US Inc. (2002) 97 Cal.App.4th 1142, 1153 119 Cal.Rptr.2d
28 131, internal citations omitted.)

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

10 "The retaliatory motive is 'proved by showing that plaintiff engaged in protected
11 activities, that his employer was aware of the protected activities, and that the adverse action
12 followed within a relatively short time thereafter.' 'The causal link may be established by an
13 inference derived from circumstantial evidence, "such as the employer's knowledge that the
14 employee engaged in protected activities and the proximity in time between the protected action
15 and allegedly retaliatory employment decision." ' ' (Fisher v. San Pedro Peninsula Hospital
16 (1989) 214 Cal.App.3d 590, 615 262 Cal.Rptr. 842, internal citations omitted.)

17 "An employer generally can be held liable for the retaliatory actions of its supervisors."
18 (Wysinger, supra, 157 Cal.App.4th at p. 420.)

19 "The employer is liable for retaliation under section 12940, subdivision (h), but
20 nonemployer individuals are not personally liable for their role in that retaliation." (Jones v. The
21 Lodge at Torrey Pines Partnership (2008) 42 Cal.4th 1158, 1173 72 Cal.Rptr.3d 624, 177 P.3d
22 232.)

23 "Under certain circumstances, a retaliation claim may be brought by an employee who
24 has complained of or opposed conduct, even when a court or jury subsequently determines the
25 conduct actually was not prohibited by the FEHA. Indeed, this precept is well settled. An
26 employee is protected against retaliation if the employee reasonably and in good faith believed
27 that what he or she was opposing constituted unlawful employer conduct such as sexual
28

1 harassment or sexual discrimination." (Miller, supra, 36 Cal.4th at pp. 473-474, internal citations
2 omitted.)

3 " The legislative purpose underlying FEHA's prohibition against retaliation is to prevent
4 employers from deterring employees from asserting good faith discrimination complaints ... '
5 Employer retaliation against employees who are believed to be prospective complainants or
6 witnesses for complainants undermines this legislative purpose just as effectively as retaliation
7 after the filing of a complaint. To limit FEHA in such a way would be to condone 'an absurd
8 result' that is contrary to legislative intent. We agree with the trial court that FEHA protects
9 employees against preemptive retaliation by the employer." (Steele, supra, 162 Cal.App.4th at p.
10 1255, internal citations omitted.)

11
12 Secondary Sources

13 8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 922, 940, 941
14 Chin, et al., California Practice Guide: Employment Litigation (The Rutter Group) 7:680-7:841
15 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§
2.83-2.88
16 2 Wilcox, California Employment Law, Ch. 41, Substantive Requirements Under Equal
Employment Opportunity Laws, § 41.131 (Matthew Bender)
17 11 California Forms of Pleading and Practice, Ch. 115, Civil Rights: Employment
Discrimination, §§ 115.37, 115.94 (Matthew Bender)
18 California Civil Practice: Employment Litigation (Thomson West), §§ 2:74-2:75

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22 CACI 2505 (modified & combined with FMLA retaliation claim)

23 Proposed by: Plaintiff

24 Given: _____

25 Given as Modified: _____

26 Withdrawn: _____

27 Refused: _____

OWW: _____

1 **INSTRUCTION No. _____**

2 **"MOTIVATING REASON" EXPLAINED**

3
4 A "motivating reason" is a reason that contributed to the decision to take certain
5 action, even though other reasons also may have contributed to the decision.

6
7 **DIRECTIONS FOR USE**

8
9 Read this instruction with CACI No. 2500, Disparate Treatment--Essential Factual
10 Elements, CACI No. 2505, Retaliation, or CACI No. 2540, Disability Discrimination--Disparate
11 Treatment--Essential Factual Elements.

12 **SOURCES AND AUTHORITY**

13 Government Code section 12940(a) provides:

14 It shall be an unlawful employment practice, unless based upon a bona fide
15 occupational qualification, or, except where based upon applicable security regulations
16 established by the United States or the State of California:

17 (a) For an employer, because of the race, religious creed, color, national
18 origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age,
19 or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select
20 the person for a training program leading to employment, or to bar or to discharge the person
21 from employment or from a training program leading to employment, or to discriminate against
22 the person in compensation or in terms, conditions, or privileges of employment.

23 Title 42 United States Code section 2000e-2(m) (a provision of the Civil Rights Action
24 of 1991 amending Title VII of the Civil Rights Act of 1964) provides: "Except as otherwise
25 provided in this subchapter, an unlawful employment practice is established when the
26 complaining party demonstrates that race, color, religion, sex, or national origin was a
27 motivating factor for any employment practice, even though other factors also motivated the
28 practice."

1 "Because of the similarity between state and federal employment discrimination laws,
2 California courts look to pertinent federal precedent when applying our own statutes." (Guz v.
3 Bechtel National, Inc. (2000) 24 Cal.4th 317, 354 100 Cal.Rptr.2d 352, 8 P.3d 1089.)

4 "While a complainant need not prove that discriminatory animus was the sole motivation
5 behind a challenged action, he must prove by a preponderance of the evidence that there was a
6 'causal connection' between the employee's protected status and the adverse employment
7 decision." (Mixon v. Fair Employment and Housing Com. (1987) 192 Cal.App.3d 1306, 1319
8 237 Cal.Rptr. 884.)

9 "The employee need not show 'he would have in any event been rejected or discharged
10 solely on the basis of his race, without regard to the alleged deficiencies. ... In other words,
11 'while a complainant need not prove that racial animus was the sole motivation behind the
12 challenged action, he must prove by a preponderance of the evidence that there was a "causal
13 connection" between the employee's protected status and the adverse employment decision.' "
14 (Clark v. Claremont University Center (1992) 6 Cal.App.4th 639, 665 8 Cal.Rptr.2d 151, citing
15 McDonald v. Santa Fe Trail Transp. Co. (1976) 427 U.S. 273, 282, fn. 10 96 S.Ct. 2574, 49
16 L.Ed.2d 493, 502 and Mixon, supra, 192 Cal.App.3d at p. 1319.)

17 But see Horsford v. Board of Trustees (2005) 132 Cal.App.4th 359, 377 33 Cal.Rptr.3d
18 644 ("A plaintiff's burden is ... to produce evidence that, taken as a whole, permits a rational
19 inference that intentional discrimination was a substantial motivating factor in the employer's
20 actions toward the plaintiff"), italics added.

21
22 Secondary Sources

23 Chin, et al., California Practice Guide: Employment Litigation (The Rutter Group) 7:485-7:508
24 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§
25 2.61-2.65, 2.87
26 2 Wilcox, California Employment Law, Ch. 41, Substantive Requirements Under Equal
27 Employment Opportunity Laws, § 41.111 (Matthew Bender)
28

1 11 California Forms of Pleading and Practice, Ch. 115, Civil Rights: Employment
2 Discrimination, § 115.232 (Matthew Bender)
3 1 California Civil Practice: Employment Litigation (Thomson West) Discrimination in
4 Employment, §§ 2:20-2:21, 2:75

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CACI 2507

Proposed by: Plaintiff

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

OWW: _____

1 **INSTRUCTION No. _____**

2 **DISABILITY DISCRIMINATION - DISPARATE TREATMENT**

3 **ESSENTIAL ELEMENTS [Gov't Code § 12940(a)]**

4
5 David F. Jadwin, D.O. claims that County of Kern wrongfully discriminated
6 against him based on his mental disability. To establish this claim, Dr. Jadwin must prove all of
7 the following:

8 1a. That the County of Kern knew OR thought Dr. Jadwin had a mental condition
9 (chronic depression) that limited his ability to work full-time OR enjoy life without anxiety or
10 insomnia; OR

11 1b. That County of Kern knew OR thought Dr. Jadwin had a history of having a mental
12 condition (chronic depression) that limited his ability to work full-time OR enjoy life without
13 anxiety or insomnia.

14 2. That Dr. Jadwin was able to perform the essential job duties with reasonable
15 accommodation for his condition;

16 3. That County of Kern demoted Dr. Jadwin, cut his pay, created a hostile work
17 environment, OR did not renew his employment contract;

18 4a. That Dr. Jadwin's mental condition OR history of a mental condition (chronic
19 depression) was a motivating reason for Dr. Jadwin's demotion, paycut, creation of a hostile
20 work environment, OR nonrenewal of his employment contract: OR

21 4b. That County of Kern's belief that Dr. Jadwin had mental condition OR a history of a
22 mental condition (chronic depression) was a motivating reason for the discharge/refusal to
23 hire/other adverse employment action;

24 5. That Dr. Jadwin was harmed; and

25 6. That County of Kern's decision OR conduct was a substantial factor in causing Dr.
26 Jadwin's harm.

27 CACI 2540

28 Proposed by: Plaintiff

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

OWW: _____

INSTRUCTION No. _____

INFERENCE OF BIAS FROM SUSPECT TIMING OF AN ADVERSE EMPLOYMENT ACTION

You may infer from the closeness in time between the adverse employment actions (demotion, paycut, creation of a hostile work environment, or nonrenewal) and Dr. Jadwin's protected activity (taking of medical leave, complaining internally about discrimination or retaliation, filing a charge with the Department of Fair Employment and Housing, or filing a law suit containing claim based on the Fair Employment and Housing Act, the California Family Rights Act, or the Family and Medical Leave Act) that discrimination or retaliation was a motivating factor for the County of Kern taking these adverse employment actions against Dr. Jadwin.

Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal. App. 3d 590, 615 262 Cal. Rptr. 842 ("one may infer retaliation by the "proximity in time between protected activity and the allegedly retaliatory employment decision."); *Bell v. Clackamas County* (9th Cir., 2003) 341 F.3d 858, 865 ("Temporal proximity between protected activity and an adverse employment action can by itself constitute sufficient circumstantial evidence of retaliation in some cases. (Cite) "Causation can be inferred from timing alone where an adverse employment action follows on the heels of *866 protected activity.")

Plaintiff's Special Instruction

Proposed by: Plaintiff

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

OWW: _____

INSTRUCTION No. _____

**INFERENCE OF BIAS FROM AN EMPLOYER'S SHIFTING REASONS FOR TAKING
AN ADVERSE EMPLOYMENT ACTION AGAINST AN EMPLOYEE**

You may infer that discrimination or retaliation was a motivating factor for the adverse employment actions (demotion, paycut, creation of a hostile work environment, or nonrenewal of his employment contract) that County of Kern took against Dr. Jadwin if you find that the County of Kern changed its story about why it took any of these adverse actions against Dr. Jadwin.

Payne v. Norwest Corp. (9th Cir., 1997) 113 F.3d 1079, 1080 ("A rational trier of fact could find that the employer's varying reasons shows that the stated reason was pretextual, for one who tells the truth need not recite different versions of the supposedly same event.")

Plaintiff's Special Instruction

Proposed by: Plaintiff

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

OWW: _____

1 INSTRUCTION No. _____

2 **INFERENCE OF BIAS FROM AN EMPLOYER'S FAILURE TO FOLLOW ITS OWN**
3 **POLICIES AND PROCEDURES**

4
5 You may infer that discrimination or retaliation was a motivating factor if you find that
6 the County of Kern failed to follow its own policies and procedures when taking any of the
7 adverse employment actions (demotion, paycut, nonrenewal of contract, creation of a hostile
8 work environment, or nonrenewal of his employment contract) against Dr. Jadwin.

9
10 *Village of Arlington Heights v. Met. Hous. Dev. Corp.* (1977) 429 U.S. 252, 267
11 (“Departures from the normal procedural sequence also might afford evidence that improper
12 purposes are playing a role.”); *Stewart v. Rutgers, State Univ.* (3d Cir. 1997) 120 F.3d 426
13 (“arbitrary and capricious” decision-making, coupled with “procedural errors,” constitutes
14 circumstantial evidence of discrimination.)

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22 Plaintiff's Special Instruction

23 Proposed by: Plaintiff

24 Given: _____

25 Given as Modified: _____

26 Withdrawn: _____

27 Refused: _____

OWW: _____

INSTRUCTION No. _____

**INFERENCE OF BIAS FROM AN EMPLOYER'S EVALUATION OF AN
EMPLOYEE'S JOB PERFORMANCE USING SUBJECTIVE CRITERIA**

You may infer that discrimination or retaliation was a motivating factor for any of the adverse employment actions (demotion, paycut, creation of a hostile work environment, or nonrenewal of his employment contract) that the County of Kern took against Dr. Jadwin if you find that County of Kern relied on subjective criteria when evaluating Dr. Jadwin's job performance instead of focusing on objective criteria.

Liu v. Amway Corp. (9th Cir. 2003) 347 F.3d 1125, 1136 (subjective evaluation of "soft skills" are "susceptible of abuse and more likely to mask pretext."); *Nanty v. Barrows Co.* (9th Cir., 1981) ("subjective job criteria present potential for serious abuse and should be viewed with skepticism. Use of subjective criteria...provides a convenient pretext for discriminatory practices.").

Plaintiff's Special Instruction

Proposed by: Plaintiff

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

OWW: _____

1 **INSTRUCTION No. _____**

2 **INFERENCE OF BIAS FROM AN EMPLOYER'S EVALUATION OF AN**
3 **EMPLOYEE'S JOB PERFORMANCE BASED ON STALE CRITIQUES**

4
5 You may infer that discrimination or retaliation were a motivating factor for any of the adverse
6 employment actions (demotion, paycut, creation of a hostile work environment, nonrenewal of
7 contract) that the County of Kern took against Dr. Jadwin if you find that it relied on stale
8 discipline or job performance deficiencies that it had previously tolerated.

9
10 *Giancoletto v. Amax Zinc. Co.* (7th Cir., 1992) 954 F.2d 424, 426-427 (factfinder may
11 infer discriminatory intent where an employer gives an employee good reviews despite known
12 performance issues, and then later tries to justify an adverse employment action on those same
13 performance issues); *Hassiani v. Western Missouri Medical Center* (8th Cir., 1996) (the
14 employer knew about and previously tolerated performance deficiencies); *Garrett v. Hewlett*
15 *Packard*, 305 F.3d 1210, 1218 (10th Cir. 2002) (use of stale critiques to justify discharge is
16 evidence of pretext)

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22 Plaintiff's Special Instruction

23 Proposed by: Plaintiff

24 Given: _____

25 Given as Modified: _____

26 Withdrawn: _____

27 Refused: _____

OWW: _____

INSTRUCTION No. _____

**INFERENCE OF BIAS FROM BEING TREATED WORSE THAN OTHER
SIMILARLY SITUATED CO-WORKERS**

You may infer that discrimination or retaliation was a motivating factor for any of the adverse employment actions (demotion, paycut, creation of a hostile work environment, or nonrenewal of employment contract) that the County of Kern took against Dr. Jadwin if you find that he was treated worse than similarly situated employees who were not in his protected class (individual with a disabling mental condition) or who had not engaged in any of his protected activities (taking medical leave, complaining internally about discrimination or retaliation, filing a charge with the Department of Fair Employment and Housing, or filing a law suit containing claims based on the Fair Employment and Housing Act, the California Family Rights Act, or the Family and Medical Leave Act).

An employee is "similarly situated" to another if they have the same supervisor, or are subject to the same policies and procedures, or engage in the same conduct; but do not have to be identically situated. The critical question is whether Dr. Jadwin and the other employee are similarly situated in "all material aspects." *Bowden v. Potter* (N.D. Cal. 2004) 308 F.Supp.2d 1108, 1117 (quoting *McGuinness v. Lincoln Hall* (2nd Cir. 2001) 263 F.3d 49, 53)

Plaintiff's Special Instruction

Proposed by: Plaintiff

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

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INSTRUCTION No. _____

INFERENCE OF BIAS FROM FALSE DENIALS OF KNOWLEDGE

False statements made to evade liability are evidence of a consciousness of guilt.

Donchin v. Guerrero (1995) 34 Cal. App. 4th 1832, (41 Cal. Rptr. 2d 192) ("Just as a criminal defendant's false exculpatory statement is evidence of his or her consciousness of guilt, such statements by a civil defendant can be evidence of his or her consciousness of liability, and casts doubt on his or her denial of knowledge affecting liability.")

Plaintiff's Special Instruction

Proposed by: Plaintiff

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

OWW: _____

1 INSTRUCTION No. _____

2 AN AGENT'S KNOWLEDGE IS IMPUTED TO THE PRINCIPAL

3
4 You must conclude that the County of Kern knew of information that its agents (officers,
5 managing agents, or attorneys) had a duty to tell them.

6
7 *California Fair Employment and Housing Comm'n v. Gemini Aluminium Corp.* (2004)
8 122 Cal. App. 4th 1004 18 Cal. Rptr. 3d 906 (when an agent has acquired knowledge which he
9 or she has a duty to communicate to his or her principal, a conclusive presumption arises that the
10 agent performed that duty.); *Freeman v. Superior Court* (1955) 44 Cal.2d 533 282 P.2d 857;
11 *Kimbrow v. Atlantic Richfield Co.* 889 F.2d 869 (9th Cir.1989) (Notice to Plaintiff's supervisor is
12 imputed to the person(s) who made the final decisions regarding an adverse action.)

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23 Plaintiff's Special Instruction

24 Proposed by: Plaintiff

25 Given: _____

26 Given as Modified: _____

27 Withdrawn: _____

28 Refused: _____

OWW: _____

1 INSTRUCTION No. _____

2 **BIAS AT ANY STAGE CAN INFECT THE ULTIMATE DECISION.**

3
4 You may infer that bias at any stage in the County of Kern's decision-making regarding
5 any of the adverse employment actions (demotion, payout, creation of a hostile work
6 environment, or nonrenewal of his employment contract) that it took against Dr. Jadwin may
7 have tainted the ultimate decision.

8
9 *DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 87 Cal.Rptr.3d 99 ("All but one
10 of the federal circuits have adopted the "cat's paw" principle, as have the California courts. (See
11 *552 *Reeves, supra*, 121 Cal.App.4th at pp. 114-116, 16 Cal.Rptr.3d 717.) The principle has
12 been applied, for example, in suits against educational institutions by faculty members who have
13 been denied tenure. (See, e.g., *Morgan, supra*, 88 Cal.App.4th 52, 105 Cal.Rptr.2d 652; *Clark,*
14 *supra*, 6 Cal.App.4th 639, 8 Cal.Rptr.2d 151; *Roebuck, supra*, 852 F.2d 715.) In discussing these
15 cases, the *Morgan* court stated that "in the context of the academic tenure system, in which
16 decisions and recommendations made in earlier levels of review may be available to decision
17 makers at subsequent levels, it clearly makes sense to acknowledge that the final decision may be
18 influenced by the discriminatory intent of individuals playing a role at any point in the decision
19 making process." (*Morgan, supra*, 88 Cal.App.4th at p. 74, 105 Cal.Rptr.2d 652.) In the present
20 case, it can hardly be argued that Hardcastle, as the presiding judge and the chair of the
21 Executive Committee, was not a direct and important participant in the Superior Court's
22 decisionmaking process when it decided not to retain DeJung in the full-time commissioner
23 position. In addition, the evidence supports an inference that Hardcastle was speaking at least for
24 the Executive Committee when he said that "they," and for himself and the Executive Committee
25 when he said later that "we," were "looking for someone younger" than DeJung. Moreover, as in
26 the academic tenure cases, the decisionmaking process in this case involved multiple levels
27 where the information acquired at the first level was available to later levels. In fact, Hardcastle
28 was personally involved at three pertinent levels: the Executive Committee, the interview panel,

1 and in the final decision made by the full court at the judicial business meeting on May 7, 2004.
2 Given these facts, it would be entirely reasonable for a trier of fact to infer that Hardcastle's
3 discriminatory animus influenced the process. Accordingly, the trial court erred in granting
4 summary judgment on the ground that there was no triable issue of fact as to whether age
5 discrimination played a part in the Superior Court's decision not to appoint DeJung.")
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23 Plaintiff's Special Instruction

24 Proposed by: Plaintiff

25 Given: _____

26 Given as Modified: _____

27 Withdrawn: _____

28 Refused: _____

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INSTRUCTION No. _____

CHRONIC DEPRESSION IS LISTED AS A DISABILITY IN FEHA

You must conclude that Dr. Jadwin had a disabling mental condition if you find that he had chronic depression.

“Chronic depression” is expressly recognized as a disabling condition. Gov’t C. § 12926.1(c).

Plaintiff’s Special Instruction

Proposed by: Plaintiff

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

OWW: _____

1 **INSTRUCTION No. _____**

2 **ABILITY TO PERFORM ESSENTIAL JOB FUNCTIONS WITH ACCOMMODATION**
3 **IS DETERMINED AFTER REASONABLE ACCOMMODATION IS PROVIDED**

4
5 When considering whether Dr. Jadwin was able to perform his essential job functions,
6 you must consider whether the leave of absence was likely to enable him, upon his return from
7 leave, to resume performing his essential job functions rather than his ability to do so during his
8 leave of absence.

9
10 FEHA expressly provides that part-time work is a form of reasonable accommodation.
11 Gov't C. § 12926(n); *Hanson v. Lucky Stores, Inc.*, 74 Cal. App. 4th 215, 226 (1999) (“A finite
12 leave can be a reasonable accommodation under FEHA, provided it is likely that at the end of the
13 leave, the employee would be able to perform his or her duties.”); *Humphrey v. Mem'l Hosps.*
14 *Ass'n*, 239 F.3d 1128, 1135-36 (9th Cir. 2001) (recognizing that a leave of absence may be a
15 reasonable accommodation under the ADA where it “would reasonably accommodate an
16 employee’s disability and permit him, upon his return, to perform the essential functions of the
17 job”); Working part-time while making a “gradual return to full-time work” can be a reasonable
18 accommodation. *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 498 (7th Cir. 2000)

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23 Plaintiff's Special Instruction

24 Proposed by: Plaintiff

25 Given: _____

26 Given as Modified: _____

27 Withdrawn: _____

28 Refused: _____

OWW: _____

1 **INSTRUCTION No. _____**

2 **AN EMPLOYER CANNOT FORCE AN EMPLOYEE TO TAKE MORE LEAVE THAN**
3 **IS MEDICALLY NECESSARY**

4
5 The County of Kern could not require Dr. Jadwin to take more leave that was medically
6 necessary. Dr. Jadwin had the right to take medical leave on a part-time basis if his need for
7 medical leave could best be accommodated by taking leave on a part time basis.

8
9 "An employee may not be required to take more FMLA leave than necessary to resolve
10 the circumstances that precipitated the need for leave." 29 C.F.R. § 825.311(c). To take
11 intermittent leave or leave on a reduced leave schedule, "there must be a medical need for leave
12 and it must be that such medical need can be best accommodated through an intermittent or
13 reduced leave schedule." 29 CFR § 825.202(b); *Timmons v. General Motors Corp.* 469 F.3d
14 1122, 1128 (Placing an employee on an involuntary disability leave is an adverse employment
15 action.)

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22 Plaintiff's Special Instruction

23 Proposed by: Plaintiff

24 Given: _____

25 Given as Modified: _____

26 Withdrawn: _____

27 Refused: _____

OWW: _____

INSTRUCTION No. _____

PART-TIME LEAVE MEDICAL LEAVE IS CALCULATED ON A PRO-RATA BASIS

If you find that it was medically necessary for Dr. Jadwin to take his medical leave on a part-time basis, then the County of Kern had the right to deducted only the amount of leave Dr. Jadwin actually took from his leave entitlement. To calculate the number of hours of medical leave to which Dr. Jadwin was entitled, you determine the number of hours he was expected to work during a week and multiply it by twelve.

"...When an employee takes leave on an intermittent or reduced work schedule, only the amount of leave actually taken may be counted toward the employee leave entitlement. The actual workweek is the basis of the entitlement... if a full-time employee who would otherwise work 8-hour days works 4-hour days under a reduced leave schedule, the employee would use "1/2" week of FMLA leave..." 29 C.F.R. § 825.205(b)(1).

Plaintiff's Special Instruction

Proposed by: Plaintiff

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

OWW: _____

1 INSTRUCTION No. _____

2 CONSEQUENCES OF AN EMPLOYER'S FAILURE TO NOTIFY AN EMPLOYEE OF
3 MEDICAL LEAVE RIGHTS

4
5 If Defendant notified its employees that 30 days' advance notice was required before the
6 leave was to begin, then Plaintiff must show that he gave that notice, or, if 30 days' notice was
7 not reasonably possible under the circumstances, that he gave notice as soon as possible. "Failure
8 of the employer to give or post such notice shall preclude the employer from taking any adverse
9 action against the employee, including denying CFRA leave, for failing to furnish the employer
10 with advance notice of a need to take CFRA leave." 2. C.C.R. § 7297.4(5).

11
12 If Defendant notified its employees that 30 days' advance notice was required before the
13 leave was to begin, then Plaintiff must show that he gave that notice, or, if 30 days' notice was
14 not reasonably possible under the circumstances, that he gave notice as soon as possible. "Failure
15 of the employer to give or post such notice shall preclude the employer from taking any adverse
16 action against the employee, including denying CFRA leave, for failing to furnish the employer
17 with advance notice of a need to take CFRA leave." 2. C.C.R. § 7297.4(5).

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22 Plaintiff's Special Instruction

23 Proposed by: Plaintiff

24 Given: _____

25 Given as Modified: _____

26 Withdrawn: _____

27 Refused: _____

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INSTRUCTION No. _____

"WILLFUL" VIOLATION OF FMLA EXPLAINED

If you find that the County of Kern failed to act in good faith and lacked reasonable grounds for believing that any of the adverse employment actions (demotion, paycut, creation of a hostile work environment, nonrenewal of his employment contract) that it took against Dr. Jadwin were not violations of the Family and Medical Leave Act, then you must find that the County of Kern's actions were "willful" violations of the Family and Medical Leave Act.

Defendant's violation of FMLA was willful in that Defendant failed to act in good faith and lacked reasonable grounds for believing its actions were not a violation of FMLA. 29 USC2617(a)(1)(A)(iii); *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1130 (9th Cir. Ariz. 2001).

Plaintiff's Special Instruction

Proposed by: Plaintiff

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

OWW: _____

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2 **INSTRUCTION No. _____**
3 **DISABILITY DISCRIMINATION - REASONABLE ACCOMMODATION**
4 **ESSENTIAL ELEMENTS [Gov't Code § 12940(m)]**

5 David F. Jadwin, D.O. claims that County of Kern failed to reasonably
6 accommodate his mental condition (chronic depression). To establish this claim, Dr. Jadwin
7 must prove all of the following:

- 8 1. That County of Kern knew OR thought that Dr. Jadwin had a mental condition
9 (chronic depression) that limited his ability to work full-time OR enjoy life without anxiety or
10 insomnia;
- 11 2. That County of Kern failed to provide reasonable accommodation for Dr. Jadwin's
12 mental condition (chronic depression);
- 13 3. That Dr. Jadwin was harmed; and
- 14 4. That County of Kern's failure to provide reasonable accommodation was a substantial
15 factor in causing Dr. Jadwin's harm.

16
17 In determining whether David F. Jadwin, D.O.'s condition (chronic depression) limits his
18 ability to work full-time OR enjoy life without anxiety or insomnia, you must consider the
19 condition (chronic depression) in its unmedicated state without his prescribed medication.

20
21 CACI 2541

22 Proposed by: Plaintiff

23 Given: _____

24 Given as Modified: _____

25 Withdrawn: _____

26 Refused: _____

OWW: _____

1 **INSTRUCTION No. _____**

2 **DISABILITY DISCRIMINATION**

3 **REASONABLE ACCOMMODATION EXPLAINED**

4 A reasonable accommodation is a reasonable change to the workplace that allows an
5 employee with a disability to perform the essential duties of the job;
6

7 Reasonable accommodations may include the following:

- 8 a. Making the workplace readily accessible to and usable by employees with
9 disabilities;
10 b. Changing job responsibilities or work schedules;
11 c. Reassigning the employee to a vacant position;
12 d. Modifying or providing equipment or devices;
13 e. Modifying tests or training materials;
14 f. Providing qualified interpreters or readers; or
15 g. Providing other similar accommodations for an individual with a disability.
16

17 If more than one accommodation is reasonable, an employer satisfies its
18 obligation to make a reasonable accommodation if it selects one of those accommodations in
19 good faith.
20

21 CACI 2542

22 Proposed by: Plaintiff

23 Given: _____

24 Given as Modified: _____

25 Withdrawn: _____

26 Refused: _____

OWW: _____

INSTRUCTION No. _____

**DISABILITY DISCRIMINATION - REASONABLE ACCOMMODATION -FAILURE
TO ENGAGE IN INTERACTIVE PROCESS [Gov't Code § 12940(n)]**

David F. Jadwin, D.O. contends that County of Kern failed to engage in a good faith, interactive process with him to determine whether it would be possible to implement effective reasonable accommodations so that Dr. Jadwin could work full-time. In order to establish this claim, Dr. Jadwin must prove the following:

1. That Dr. Jadwin had a mental disability that was known to County of Kern;

2. That Dr. Jadwin requested that County of Kern make reasonable accommodation for his disability so that he would be able to perform the essential job requirements;

3. That Dr. Jadwin was willing to participate in an interactive process to determine whether reasonable accommodation could be made so that he would be able to perform the essential job requirements;

4. That County of Kern failed to participate in a timely good-faith interactive process with Dr. Jadwin to determine whether reasonable accommodation could be made;

5. That Dr. Jadwin was harmed; and

6. That County of Kern's failure to engage in a good-faith interactive process was a substantial factor in causing Dr. Jadwin's harm.

New December 2007
Directions for Use

1 Modify elements 3 and 4, as necessary, if the employer perceives the employee to have a
2 disability. (See *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 61, fn. 21 [43
3 Cal.Rptr.3d 874].) In element 4, specify the position at issue and the reason why some
4 reasonable accommodation was needed. In element 5, you may add the specific accommodation
5 requested, though the focus of this cause of action is on the failure to discuss, not the failure to
6 provide. For an instruction on a cause of action for failure to make reasonable accommodation,
7 see CACI No. 2541, *Disability Discrimination—Reasonable Accommodation—Essential Factual*
8 *Elements*. For an instruction defining “reasonable accommodation,” see CACI No. 2542,
9 *Disability Discrimination—“Reasonable Accommodation” Explained*.

10 Sources and Authority

11 • Government Code section 12940(n) provides that it is an unlawful employment practice, unless
12 based on a bona fide occupational qualification or on applicable security regulations established
13 by the United States or the State of California, “[f]or an employer or other entity covered by [the
14 FEHA] to fail to engage in a timely, good faith, interactive process with the employee or
15 applicant to determine effective reasonable accommodations, if any, in response to a request for
16 reasonable accommodation by an employee or applicant with a known physical or mental
17 disability or known medical condition.”

18 • Government Code section 12926.1(e) provides that the Legislature affirms the importance of
19 the interactive process between the applicant or employee and the employer in determining a
20 reasonable accommodation, as this requirement has been articulated by the Equal Employment
21 Opportunity Commission in its interpretive guidance of the Americans with Disabilities Act of
22 1990.

23 • The Interpretive Guidance on Title I of the Americans With Disabilities Act, Title 29 Code of
24 Federal Regulations Part 1630 Appendix, provides, in part:

25 When a qualified individual with a disability has requested a reasonable
26 accommodation to assist in the performance of a job, the employer, using
27 a problem solving approach, should:

28 (1) Analyze the particular job involved and determine its purpose and essential functions;

1 (2) Consult with the individual with a disability to ascertain the precise job-related
2 limitations imposed by the individual’s disability and how those limitations could be
3 overcome with a reasonable accommodation;

4 (3) In consultation with the individual to be accommodated, identify potential
5 accommodations and assess the effectiveness each would have in enabling the individual
6 to perform the essential functions of the position; and (4) Consider the preference of the
7 individual to be accommodated and select and implement the accommodation that is most
8 appropriate for both the employee and the employer.

9 • An employee may file a civil action based on the employer’s failure to engage in the interactive
10 process. (*Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35
11 Cal.Rptr.3d 837].)

12 • “Two principles underlie a cause of action for failure to provide a reasonable accommodation.
13 First, the employee must request an accommodation. Second, the parties must engage in an
14 interactive process regarding the requested accommodation and, if the process fails,
15 responsibility for the failure rests with the party who failed to participate in good faith. While a
16 claim of failure to accommodate is independent of a cause of action for failure to engage in an
17 interactive dialogue, each necessarily implicates the other.” (*Gelfo, supra*, 140 Cal.App.4th at p.
18 54, internal citations omitted.)

19 • “FEHA’s reference to a ‘known’ disability is read to mean a disability of which the employer
20 has become aware, whether because it is obvious, the employee has brought it to the employer’s
21 attention, it is based on the employer’s own perception—mistaken or not—of the existence of a
22 disabling condition or, perhaps as here, the employer has come upon information indicating the
23 presence of a disability. (*Gelfo, supra*, 140 Cal.App.4th at p. 61, fn.21.)

24 • “[Employer] asserts that, if it had a duty to engage in the interactive process, the duty was
25 discharged. ‘If anything,’ it argues, ‘it was [employee] who failed to engage in a good faith
26 interactive process.’ [Employee] counters [employer] made up its mind before July 2002 that
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1 it would not accommodate [employee]’s limitations, and nothing could cause it reconsider that
2 decision. Because the evidence is conflicting and the issue of the parties’ efforts and good faith is
3 factual, the claim is properly left for the jury’s consideration.” (*Gelfo, supra*, 140 Cal.App.4th
4 at p. 62, fn.23.)

5 *Secondary Sources*

6 8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 936(2)
7 Chin, et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 9:2280–
8 9:2285
9 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.)
10 Discrimination Claims, § 2.79
11 2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal*
12 *Employment Opportunity Laws*, § 41.51[3][b] (Matthew Bender)
13 11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights:*
14 *Employment Discrimination*, § 115.35[1][a] (Matthew Bender)
15 1 California Civil Practice: Employment Litigation (Thomson West)
16 Discrimination in Employment, § 2:50

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23 CACI 2546

24 Given: _____

25 Given as Modified: _____

26 Withdrawn: _____

27 Refused: _____

28 OWW: _____

1 **INSTRUCTION No. _____**
2 **INTERACTIVE PROCESS EXPLAINED**

3
4 When you consider whether County of Kern and David F. Jadwin, D.O. engaged in good
5 faith in a interactive process, you should consider that when a qualified individual with a
6 disability has requested a reasonable accommodation to assist in the performance of a job, the
7 employer, using a problem solving approach, should:

- 8 (1) Analyze the particular job involved and determine its purpose and essential functions;
9 (2) Consult with the individual with a disability to ascertain the precise job-related
10 limitations imposed by the individual’s disability and how those limitations could be
11 overcome with a reasonable accommodation;
12 (3) In consultation with the individual to be accommodated, identify potential
13 accommodations and assess the effectiveness each would have in enabling the individual
14 to perform the essential functions of the position; and
15 (4) Consider the preference of the individual to be accommodated and select and
16 implement the accommodation that is most appropriate for both the employee and the
17 employer.

18
19 [The Interpretive Guidance on Title I of the Americans With Disabilities Act, Title 29 Code of
20 Federal Regulations Part 1630 Appendix]

21 Plaintiff's Special Instruction No. 1

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23
24 Proposed by: Plaintiff

25 Given: _____

26 Given as Modified: _____

27 Withdrawn: _____

28 Refused: _____

OWW: _____

INSTRUCTION No. _____

VIOLATION OF CFRA RIGHTS - ESSENTIAL FACTUAL ELEMENTS

David F. Jadwin, D.O. claims that County of Kern refused to grant him an extension of his reduced work schedule medical leave OR forced him to take more leave than was medically necessary. To establish this claim, David F. Jadwin, D.O. must prove all of the following:

1. That Dr. Jadwin requested an extension of his reduced work schedule leave to care for Dr. Jadwin's own serious health condition that made him unable to perform the functions of his job with County of Kern;
2. That Dr. Jadwin provided reasonable notice to County of Kern of his need for medical leave, including its expected timing and length. If County of Kern notified its employees that 30 days' advance notice was required before the leave was to begin, then David F. Jadwin, D.O. must show that he gave that notice or, if 30 days' notice was not reasonably possible under the circumstances, that he gave notice as soon as possible;
3. That County of Kern refused to grant Dr. Jadwin's request for an extension of his reduced work schedule medical OR forced him to take more leave than was medically necessary;
4. That Dr. Jadwin was harmed; and
5. That County of Kern's decision was a substantial factor in causing Dr. Jadwin's harm.

CACI 2600

Proposed by: Plaintiff

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

OWW: _____

VERDICT FORM

VIOLATION OF CFRA RIGHTS

We answer the questions submitted to us as follows:

1. County of Kern had admitted that David F. Jadwin, D.O. requested and was granted a reduced work schedule leave for his own serious health condition. Did David F. Jadwin, D.O. request an extension of his reduced work schedule leave for his own serious health condition?

___ Yes ___ No

2. Did Dr. Jadwin provide reasonable notice to County of Kern of his need for an extension of his reduced work schedule medical leave?

___ 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. The County of Kern has admitted that it granted David F. Jadwin's request for reduced work schedule medical leave. Did County of Kern refuse to grant Dr. Jadwin's request for an extension of his reduced work schedule medical leave OR force him to take more leave than was medically necessary?

___ 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. Was County of Kern's decision a substantial factor in causing harm to Dr. Jadwin?

___ Yes ___ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

1
2 5. What are Dr. Jadwin's damages? Go to the last page of these instructions to calculate
3 Dr. Jadwin's damages.

4
5
6 Signed: _____
7 Presiding Juror

8 Dated: _____

9 After all verdict forms have been signed, deliver this verdict form to the clerk.
10

11
12 DIRECTIONS FOR USE

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

15 This verdict form is based on CACI No. 2600, Violation of CFRA Rights--Essential
16 Factual Elements.

17 Other factual situations can be substituted in question 2 as in element 2 of CACI No.
18 2600.

19 If specificity is not required, users do not have to itemize all the damages listed in
20 question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if
21 it is not a Proposition 51 case. The breakdown of damages is optional depending on the
22 circumstances.

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

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

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28 WEST'S EDITORIAL REFERENCES

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Related References:
BAJI 7.90, 12.00 et seq., 14.10, 14.11, 14.12, 14.13

Statutory References:
West's Ann.Cal.Gov.Code § 12945.2

Secondary References:
8 Witkin, Summary of Cal. Law (9th ed. 2002 supp.) Constitutional Law, §§ 763A, 763B, 763C, 763D
California Practice Guide (Rutter) Employment Litigation, §§ 12:86 to 12:1406 to 1419

Library References:
Cal.Jur. 3d, Labor § 56

Research References:
West's Key Number Digest, Labor and Employment k390; Trial k352.1(3)
C.J.S. Trial §§ 818, 928, 957

CACI VF-2600

Proposed by: Plaintiff

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

OWW: _____

1 **INSTRUCTION No. _____**

2 **REASONABLE NOTICE OF CFRA LEAVE**

3
4 For notice of the need for leave to be reasonable, David F. Jadwin, D.O. must make
5 County of Kern aware that he needs medical leave, when the leave will begin, and how long it is
6 expected to last. The notice can be verbal or in writing and does not need to mention the law. An
7 employer cannot require disclosure of any medical diagnosis, but should ask for information
8 necessary to decide whether the employee is entitled to leave.

9
10 *New September 2003*

11 **Sources and Authority**

12 • Government Code section 12945.2(h) provides: “If the employee’s need for a leave . . . is
13 foreseeable, the employee shall provide the employer with reasonable advance notice of the need
14 for the leave.”

15 • “An employee ‘shall provide the employer with reasonable advance notice of the need for the
16 leave.’ ‘An employee shall provide at least verbal notice sufficient to make the employer aware
17 that the employee needs CFRA-qualifying leave, and the anticipated timing and duration of
18 the leave. The employee need not expressly assert rights under CFRA . . . , or even mention
19 CFRA . . . , to meet the notice requirement; however, the employee must state the reason the
20 leave is needed, such as, for example, the expected birth of a child or for medical treatment. The
21 employer should inquire further of the employee if it is necessary to have more information
22 about whether CFRA leave is being sought by the employee and obtain the necessary details of
23 the leave to be taken.’ ”

24 (*Gibbs v. American Airlines, Inc.* (1999) 74 Cal.App.4th 1, 6–7 [87 Cal.Rptr.2d 554], internal
25 citation omitted.)

26 ***Secondary Sources***

27 Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 12:852–12:853,
28 12:855–12:857

1 11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment*
2 *Discrimination*, § 115.32[6][e] (Matthew Bender)

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CACI 2602

Proposed by: Plaintiff

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

OWW: _____

1 **INSTRUCTION No. _____**

2 **VIOLATION OF FEDERAL CIVIL RIGHTS [42 U.S.C. § 1983]**

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4 David F. Jadwin, D.O. claims that County of Kern violated his civil rights. To establish
5 this claim, David F. Jadwin, D.O. must prove all of the following:

6 1. That County of Kern intentionally deprived David F. Jadwin, D.O. of "active duty" by
7 placing him on administrative leave for approximately ten months;

8 2. That County of Kern was acting or purporting to act in the performance of its official
9 duties;

10 3. That County of Kern's conduct violated David F. Jadwin, D.O.'s right to "active duty"
11 by placing him on administrative leave without affording him with adequate procedural due
12 process;

13 4. That David F. Jadwin, D.O. was harmed; and

14 5. That County of Kern's placement of David F. Jadwin, D.O. on administrative leave
15 without affording him adequate procedural due process was a substantial factor in causing David
16 F. Jadwin, D.O.'s harm.

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23 CACI 3000 (modified)

24 Proposed by: Plaintiff

25 Given: _____

26 Given as Modified: _____

27 Withdrawn: _____

28 Refused: _____

OWW: _____

1 authority to establish [local government] policy with respect to the [challenged] action’ —may
2 constitute official policy.

3 ‘Authority to make municipal policy may be granted directly by legislative enactment or may be
4 delegated by an official who possesses such authority, and of course whether an official had final
5 policymaking authority is a question of state law.’ ” (*Thompson v. City of Los Angeles*
6 (9th Cir. 1989) 885 F.2d 1439, 1443, internal citations and footnote omitted.)

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

12 • “[I]t is settled that whether an official is a policymaker for a county is dependent on an analysis
13 of state law, not fact.” (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 352 [70 Cal.Rptr.2d 823,
14 949 P.2d 920], internal citations omitted.)

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

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

26 • “The federal courts have recognized that local elected officials and appointed department heads
27 can make official policy or create official custom sufficient to impose liability under section
28

1 1983 on their governmental employers.” (*Bach, supra*, 147 Cal.App.3d at p. 570, internal
2 citations omitted.)

3 ***Secondary Sources***

4 8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 816, 819 et seq.
5 1 Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 8, *Answers*
6 *and Responsive Motions Under Rule 12*, 8.40

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CACI 3008

Proposed by: Plaintiff

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

OWW: _____

VERDICT FORM
CFRA RIGHTS RETALIATION

We answer the questions submitted to us as follows:

1. County of Kern has admitted that it demoted David F. Jadwin, D.O. and cut his pay. Did County of Kern also create a hostile work environment for Dr. Jadwin; OR not renew his employment contract?

____ Yes ____ No

2. Was Dr. Jadwin's taking of medical leave a motivating reason for County of Kern's decision to demote Dr. Jadwin, OR cut his pay, OR not renew his employment contract; OR for County of Kern's conduct in creating a hostile work environment for Dr. Jadwin?

____ 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 County of Kern's retaliatory conduct a substantial factor in causing harm to Dr. Jadwin?

____ 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 Dr. Jadwin's damages? Sign and date the verdict form, then go to the last page of these instructions to calculate Dr. Jadwin's damages.

Signed: _____
Presiding Juror

Dated: _____

1 After all verdict forms have been signed, and any damages calculated, deliver this verdict
2 form to the clerk.

3
4 *New September 2003; Revised April 2007*

5 **Directions for Use**

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

8 This verdict form is based on CACI No. 2620, *CFRA Rights Retaliation—Essential Factual*
9 *Elements*.

10 If specificity is not required, users do not have to itemize all the damages listed in question 6 and
11 do not have to categorize “economic” and “noneconomic” damages, especially if it is not a
12 Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

15 This form may be modified if the jury is being given the discretion under Civil Code section
16 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

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23 CACI VF-2602

24 Proposed by: Plaintiff

25 Given: _____

26 Given as Modified: _____

27 Withdrawn: _____

28 Refused: _____

OWW: _____

VERDICT FORM

FMLA RIGHTS RETALIATION

We answer the questions submitted to us as follows:

1. County of Kern has admitted that it demoted David F. Jadwin, D.O. and cut his pay. Did County of Kern also create a hostile work environment for Dr. Jadwin; OR not renew his employment contract?

Yes No

2. Was Dr. Jadwin's taking of medical leave a negative factor in County of Kern's decision to demote Dr. Jadwin, OR cut his pay, OR not renew his employment contract; OR for County of Kern's conduct in creating a hostile work environment for Dr. Jadwin?

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 County of Kern's retaliatory conduct a substantial factor in causing harm to Dr. Jadwin?

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. Was County of Kern's violation of FMLA rights willful?

Yes No

5. What are Dr. Jadwin's damages? Sign and date the verdict form, then go to the last page of these instructions to calculate Dr. Jadwin's damages.

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Signed: _____

Presiding Juror

Dated: _____

After all verdict forms have been signed, and any damages calculated, deliver this verdict form to the clerk.

Plaintiff's Special Instruction No. 2

Proposed by: Plaintiff

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

OWW: _____

1 **VERDICT FORM**
2 **PROCEDURAL DUE PROCESS VIOLATION**

3 We answer the questions submitted to us as follows:

4 1. Did County of Kern intentionally deprive David F. Jadwin of "active duty" by placing
5 him on administrative leave for approximately ten months?

6 Yes No

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

9
10 2. Did County of Kern violate David F. Jadwin's right to "active duty" while acting or
11 purporting to act in accordance with an official policy?

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

14
15 3. Did County of Kern afford David F. Jadwin adequate due process in connection with
16 his placement on administrative leave?

17 Yes No

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

20
21 4. Was County of Kern's enforcement of its policy without affording Dr. Jadwin
22 adequate due process a substantial factor in causing harm to David F. Jadwin, D.O.?

23 Yes No

24 If your answer to question 4 is yes, then answer question 5. If you answered no, stop
25 here, answer no further questions, and have the presiding juror sign and date this form.

26
27 5. What are David F. Jadwin, D.O.'s damages? Sign and date the verdict form, then go to
28 the last page of these instructions to calculate David F. Jadwin, D.O.'s damages.

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Signed: _____
Presiding Juror

Dated: _____

After it has been signed/After all verdict forms have been signed, and any damages calculated, deliver this verdict form to the clerk/bailiff/judge.

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CACI VF-3000 (modified)

Proposed by: Plaintiff

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

OWW: _____

VERDICT FORM

RETALIATION (Gov't Code § 12940(h))

We answer the questions submitted to us as follows:

1. Did David F. Jadwin, D.O. EITHER complaint internally about unlawful discrimination, harassment, or retaliation, OR file charges with the Department of Fair Employment and Housing, OR file a lawsuit containing claims based on the Fair Employment and Housing Act or the California Family Rights Act?

___ 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. County of Kern has admitted demoting Dr. Jadwin and cutting his pay. Did County of Kern decide not to renew Dr. Jadwin's employment contract?

___ Yes ___ No

3. Was David F. Jadwin, D.O.'s internal complaint about unlawful discrimination, harassment, or retaliation; OR his filing of charges with the Department of Fair Employment and Housing, OR his filing of a lawsuit containing claims based on the Fair Employment and Housing Act, the California Family Rights Act, or the Family and Medical Leave Act a motivating reason for County of Kern's decision to demote him, OR cut his pay, OR not renew his employment contract; OR for County of Kern's conduct in creating of a hostile work environment for him?

___ 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. Was County of Kern's conduct a substantial factor in causing harm to David F. Jadwin, D.O.?

___ Yes ___ No

1 If your answer to question 4 is yes, then answer question 5. If you answered no, stop
2 here, answer no further questions, and have the presiding juror sign and date this form.

3
4 5. What are David F. Jadwin, D.O.'s damages? Sign and date this verdict form, then go
5 to the last page of these instructions to calculate Dr. Jadwin's damages.

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9 Signed: _____

10 Presiding Juror

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12 Dated: _____

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14 After all verdict forms have been signed, and any damages calculated, deliver this
15 verdict form to the clerk.

16
17 **DIRECTIONS FOR USE**

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

20 This verdict form is based on CACI No. 2505, Retaliation.

21 Read the second option for question 2 in cases involving a pattern of employer
22 harassment consisting of acts that might not individually be sufficient to constitute retaliation,
23 but taken as a whole establish prohibited conduct. Give both options if the employee presents
24 evidence supporting liability under both a sufficient-single-act theory or a pattern-of-harassment
25 theory. Also select "conduct" in question 3 if the second option or both options are included for
26 question 2.

27 If specificity is not required, users do not have to itemize all the damages listed in
28 question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if

1 it is not a Proposition 51 case. The breakdown of damages is optional depending on the
2 circumstances.

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

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

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22 CACI VF-2504 (modified)

23 Proposed by: Plaintiff

24 Given: _____

25 Given as Modified: _____

26 Withdrawn: _____

27 Refused: _____

OWW: _____

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VERDICT FORM

DISABILITY DISCRIMINATION - DISPARATE TREATMENT

[Gov't Code § 12940(a)]

We answer the questions submitted to us as follows:

1. Did County of Kern know that Dr. Jadwin had a mental condition (chronic depression) that limited his ability to work full-time OR enjoy life without anxiety or insomnia?

___ 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 Dr. Jadwin able to perform the essential job duties with reasonable accommodation for his condition?

___ 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. County of Kern has admitted demoting Dr. Jadwin and cutting his pay. Did County of Kern decide not to renew Dr. Jadwin's employment contract?

___ Yes ___ No

4. Was Dr. Jadwin's mental condition (chronic depression) a motivating reason for County of Kern's decision to EITHER demote Dr. Jadwin, OR cut his pay, OR not renew his employment contract?

___ Yes ___ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was County of Kern's decision to EITHER demote Dr. Jadwin, OR cut his pay, OR not to renew his employment contract a substantial factor in causing harm to Dr. Jadwin?

1 circumstances.

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

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

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21 CACI VF-2508 (modified)

22 Proposed by: Plaintiff

23 Given: _____

24 Given as Modified: _____

25 Withdrawn: _____

26 Refused: _____

OWW: _____

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VERDICT FORM

DISABILITY DISCRIMINATION - REASONABLE ACCOMMODATION

[Gov't Code § 12940(m)]

We answer the questions submitted to us as follows:

1. Did Dr. Jadwin have a mental condition (chronic depression) that limited his ability to work full-time OR to enjoy life without anxiety or insomnia?

___ 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 County of Kern know of Dr. Jadwin's mental condition (chronic depression) that limited his ability to work full-time OR to enjoy life without anxiety or insomnia?

___ 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. Did County of Kern fail to provide reasonable accommodation for Dr. Jadwin's mental condition (chronic depression)?

___ 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. Was County of Kern's failure to provide reasonable accommodation a substantial factor in causing harm to Dr. Jadwin?

___ Yes ___ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

1 5. What are Dr. Jadwin's damages? Sign and date this verdict form, then go to the last
2 page of these instructions to calculate Dr. Jadwin's damages.

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7 Signed: _____

8 Presiding Juror

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10 Dated: _____

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12 After all verdict forms have been signed, and any damages calculated, deliver this verdict
13 form to the clerk.

14
15 **DIRECTIONS FOR USE**

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

18 This verdict form is based on CACI No. 2541, Disability Discrimination--Reasonable
19 Accommodation--Essential Factual Elements.

20 If specificity is not required, users do not have to itemize all the damages listed in
21 question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if
22 it is not a Proposition 51 case. The breakdown of damages is optional depending on the
23 circumstances.

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

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

28 CACI VF-2509 (modified)

Proposed by: Plaintiff

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

OWW: _____

VERDICT FORM

**DISABILITY DISCRIMINATION - FAILURE TO ENGAGE IN GOOD FAITH IN AN
INTERACTIVE PROCESS**

[Gov't Code § 12940(n)]

We answer the questions submitted to us as follows:

1. Did David F. Jadwin, D.O. have a mental condition (chronic depression) that limited his ability to work full-time OR to enjoy life without anxiety or insomnia?

___ 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 the County of Kern know of Dr. Jadwin's mental condition (chronic depression) that limited his ability to work full-time OR to enjoy life without anxiety or insomnia?

___ 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. Did Dr. Jadwin request that County of Kern accommodate his disability so that he would be able to perform his essential job functions?

___ 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. Was Dr. Jadwin willing to participate in an interactive process to determine whether reasonable accommodation could be made so that he would be able to perform his essential job functions?

___ Yes ___ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop

1 here, answer no further questions, and have the presiding juror sign and date this form.

2 5. Did County of Kern fail to participate in a timely good-faith interactive process with
3 Dr. Jadwin to determine whether reasonable accommodation could be made?

4 _____ Yes _____ No

5 If your answer to question 5 is yes, then answer question 6. If you answered no, stop
6 here, answer no further questions, and have the presiding juror sign and date this form.

7
8 6. Was County of Kern's failure to participate in a timely good-faith interactive process
9 with Dr. Jadwin a substantial factor in causing harm to Dr. Jadwin?

10 _____ Yes _____ No

11 If your answer to question 6 is yes, then answer question 7. If you answered no, stop
12 here, answer no further questions, and have the presiding juror sign and date this form.

13
14 7. What are Dr. Jadwin's damages? Sign and date this verdict form, then go to the last
15 page of these instructions to calculate Dr. Jadwin's damages.

16
17 Signed: _____

18 Presiding Juror

19 Dated: _____

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21 After all verdict forms have been signed, and any damages calculated, deliver this verdict
22 form to the clerk.

23 CACI 2546 (modified)

24 Proposed by: Plaintiff

25 Given: _____

26 Given as Modified: _____

27 Withdrawn: _____

28 Refused: _____

OWW: _____

VERDICT FORM

RETALIATION (Gov't Code § 12940(h); 29 U.S.C. § 2615(b)(1))

We answer the questions submitted to us as follows:

1. Did David F. Jadwin, D.O. EITHER complaint internally about unlawful discrimination, harassment, or retaliation, OR file charges with the Department of Fair Employment and Housing, OR file a lawsuit containing claims based on the Fair Employment and Housing Act, the California Family Rights Act or the Family and Medical Leave Act?

___ 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. County of Kern has admitted demoting David F. Jadwin, D.O. and cutting his pay. Did County of Kern also EITHER create a hostile work environment for him, OR not renew his employment contract?

___ Yes ___ No

3. Was David F. Jadwin, D.O.'s internal complaint about unlawful discrimination, harassment, or retaliation; OR his filing of charges with the Department of Fair Employment and Housing, OR his filing of a lawsuit containing claims based on the Fair Employment and Housing Act or the California Family Rights Act a motivating reason for County of Kern's decision to demote him, OR cut his pay, OR not renew his employment contract; OR for County of Kern's conduct in creating of a hostile work environment for him?

___ 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.

1 4. Was County of Kern's conduct a substantial factor in causing harm to David F. Jadwin,
2 D.O.?

3 _____ Yes _____ No

4 If your answer to question 4 is yes, then answer question 5. If you answered no, stop
5 here, answer no further questions, and have the presiding juror sign and date this form.

6
7 5. What are David F. Jadwin, D.O.'s damages? Sign and date this verdict form, then go
8 to the last page of these instructions to calculate Dr. Jadwin's damages.

9
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11
12 Signed: _____

13 Presiding Juror

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15 Dated: _____

16
17 After all verdict forms have been signed, and any damages calculated, deliver this
18 verdict form to the clerk.

19 **DIRECTIONS FOR USE**

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

22 This verdict form is based on CACI No. 2505, Retaliation.

23 Read the second option for question 2 in cases involving a pattern of employer
24 harassment consisting of acts that might not individually be sufficient to constitute retaliation,
25 but taken as a whole establish prohibited conduct. Give both options if the employee presents
26 evidence supporting liability under both a sufficient-single-act theory or a pattern-of-harassment
27 theory. Also select "conduct" in question 3 if the second option or both options are included for
28 question 2.

1 If specificity is not required, users do not have to itemize all the damages listed in
2 question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if
3 it is not a Proposition 51 case. The breakdown of damages is optional depending on the
4 circumstances.

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

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

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CACI VF-2504 (modified)

Proposed by: Plaintiff

Given: _____

Given as Modified: _____

Withdrawn: _____

Refused: _____

OWW: _____

1 **INSTRUCTION No. _____**

2 **VIOLATION OF CFRA RIGHTS**

3 We answer the questions submitted to us as follows:

4 1. Did David F. Jadwin, D.O. request an extension of his reduced work schedule leave for
5 his own serious health condition?

6 _____ Yes _____ No

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

9
10 2. Did Dr. Jadwin provide reasonable notice to County of Kern of his need for an
11 extension of his reduced work schedule medical leave?

12 _____ Yes _____ No

13
14 If your answer to question 2 is yes, then answer question 3. If you answered no, stop
15 here, answer no further questions, and have the presiding juror sign and date this form.

16
17 3. Did County of Kern refuse to grant Dr. Jadwin's request for an extension of his
18 reduced work schedule medical OR force him to take more leave than was medically necessary?

19 _____ Yes _____ No

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

22
23 4. Was County of Kern's decision a substantial factor in causing harm to Dr. Jadwin?

24 _____ Yes _____ No

25
26 If your answer to question 4 is yes, then answer question 5. If you answered no, stop
27 here, answer no further questions, and have the presiding juror sign and date this form.

1 5. What are Dr. Jadwin's damages? Sign and date this verdict form, then go to the last
2 page of these instructions to calculate Dr. Jadwin's damages.

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6 Signed: _____

7 Presiding Juror

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10 Dated: _____

11
12 After all verdict forms have been signed, and any damages calculated, deliver this verdict
13 form to the clerk.

14 DIRECTIONS FOR USE

15
16 The special verdict forms in this section are intended only as models. They may need to
17 be modified depending on the facts of the case.

18 This verdict form is based on CACI No. 2600, Violation of CFRA Rights--Essential
19 Factual Elements.

20 Other factual situations can be substituted in question 2 as in element 2 of CACI No.
21 2600.

22 If specificity is not required, users do not have to itemize all the damages listed in
23 question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if
24 it is not a Proposition 51 case. The breakdown of damages is optional depending on the
25 circumstances.

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

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

3
4 WEST'S EDITORIAL REFERENCES

5 **Related References:**

6 BAJI 7.90, 12.00 et seq., 14.10, 14.11, 14.12, 14.13

7 **Statutory References:**

8 West's Ann.Cal.Gov.Code § 12945.2

9 **Secondary References:**

10 8 Witkin, Summary of Cal. Law (9th ed. 2002 supp.) Constitutional Law, §§ 763A, 763B, 763C,
763D

11 California Practice Guide (Rutter) Employment Litigation, §§ 12:86 to 12:1406 to 1419

12 **Library References:**

13 Cal.Jur. 3d, Labor § 56

14 **Research References:**

15 West's Key Number Digest, Labor and Employment k390; Trial k352.1(3)

16 C.J.S. Trial §§ 818, 928, 957

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23 CACI VF-2600 (modified)

24 Proposed by: Plaintiff

25 Given: _____

26 Given as Modified: _____

27 Withdrawn: _____

28 Refused: _____

OWW: _____

CALCULATION OF DAVID F. JADWIN, D.O.'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

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Dated: _____

After all verdict forms have been signed, and any damages calculated,
deliver this verdict form to the clerk/bailiff/judge.

RESPECTFULLY SUBMITTED on May 11, 2009.

/s/ Joan Herrington
Attorney for Plaintiff DAVID F. JADWIN, D.O.