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1 **9.0 ADA Employment Claims—Introductory Instruction**
2
3

4 **Model**
5

6 In this case the Plaintiff _____ makes a claim based on a federal law known as the
7 Americans with Disabilities Act, which will be referred to in these instructions as the ADA.
8

9 Under the ADA, an employer may not deprive a person with a disability of an
10 employment opportunity because of that disability, if that person is able, with reasonable
11 accommodation if necessary, to perform the essential functions of the job. Terms such as
12 “disability”, “qualified individual” and “reasonable accommodations” are defined by the ADA
13 and I will instruct you on the meaning of those terms.
14

15 [Plaintiff’s] claim under the ADA is that [he/she] was [describe the employment action at
16 issue] by the defendant _____ because of [plaintiff’s] [describe alleged disability].
17

18 [Defendant] denies [plaintiff’s] claims. Further, [defendant] asserts that [describe any
19 affirmative defenses].
20

21 As you listen to these instructions, please keep in mind that many of the terms I will use,
22 and you will need to apply, have a special meaning under the ADA. So please remember to
23 consider the specific definitions I give you, rather than using your own opinion of what these
24 terms mean.
25
26
27

28 **Comment**
29

30 Referring to the parties by their names, rather than solely as “Plaintiff” and “Defendant,”
31 can improve jurors’ comprehension. In these instructions, bracketed references to “[plaintiff]” or
32 “[defendant]” indicate places where the name of the party should be inserted.
33

34 “Congress enacted the ADA in 1990 in an effort to prevent otherwise qualified
35 individuals from being discriminated against in employment based on a disability.” *Gaul v.*
36 *Lucent Technologies Inc.*, 134 F.3d 576, 579 (3d Cir. 1998). The ADA provides that “[n]o
37 covered entity shall discriminate against a qualified individual on the basis of disability in regard
38 to job application procedures, the hiring, advancement, or discharge of employees, employee
39 compensation, job training, and other terms, conditions, and privileges of employment.” 42
40 U.S.C. § 12112(a). A “qualified individual” is “an individual who, with or without reasonable
41 accommodation, can perform the essential functions of the employment position that such
42 individual holds or desires.” 42 U.S.C. § 12111(8).¹ An entity discriminates against an

¹ Section 12111(8) continues: “For the purposes of this subchapter, consideration shall

1 individual on the basis of disability when, inter alia, it does “not mak[e] reasonable
2 accommodations to the known physical or mental limitations of an otherwise qualified individual
3 with a disability who is an applicant or employee, unless such covered entity can demonstrate
4 that the accommodation would impose an undue hardship on the operation of the business of
5 [the] entity.” 42 U.S.C. § 12112(b)(5)(A). Reasonable accommodations may include, inter alia,
6 “job restructuring, part-time or modified work schedules, reassignment to a vacant position,
7 acquisition or modification of equipment or devices, appropriate adjustment or modifications of
8 examinations, training materials or policies, the provision of qualified readers or interpreters, and
9 other similar accommodations for individuals with disabilities.” 42 U.S.C. § 12111(9).

10
11 “In order to make out a prima facie case of disability discrimination under the ADA, [the
12 plaintiff] must establish that she (1) has a ‘disability,’ (2) is a ‘qualified individual,’ and (3) has
13 suffered an adverse employment action because of that disability.” *Turner v. Hershey Chocolate*
14 *U.S.*, 440 F.3d 604, 611 (3d Cir. 2006).

15
16 The EEOC has provided interpretive guidance on the test for determining whether a
17 person is a qualified individual. That guidance was drafted prior to the 2008 amendments to the
18 ADA, *see* ADA Amendments Act of 2008, Pub. L. No. 110-325, Sept. 25, 2008, 122 Stat. 3553,
19 and it therefore uses outdated terminology (“qualified individuals with disabilities”), but the
20 two-step framework set forth in the guidance may still be pertinent. “The first step is to
21 determine if the individual satisfies the prerequisites for the position, such as possessing the
22 appropriate educational background, employment experience, skills, licenses, etc.The second
23 step is to determine whether or not the individual can perform the essential functions of the
24 position held or desired, with or without reasonable accommodation. The determination of
25 whether an individual with a disability is qualified is to be made at the time of the employment
26 decision.” 29 C.F.R. Pt. 1630, App.

27
28 *The ADA, Public Accommodations and Public Services*

29
30 Title I of the ADA covers claims made by employees or applicants for disparate
31 treatment, failure to make reasonable accommodations, and retaliation against protected activity.
32 Titles II and III cover public accommodations and public services for persons with disabilities.
33 These instructions are intended to cover only those cases arising under the employment
34 provisions of the ADA. For a discussion and application of the standards governing actions
35 under Titles II and III of the ADA, *see Bowers v. National Collegiate Athletic Assoc.*, 475 F.3d
36 524 (3d Cir. 2007).

37
38 *The Rehabilitation Act*

39
40 Federal employers and employers who receive federal funding are subject to the

be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.”

1 Rehabilitation Act, which is a precursor of the ADA. 29 U.S.C. § 701 et seq. The substantive
2 standards for a claim under the Rehabilitation Act are in many respects identical to those
3 governing a claim under the ADA. *See, e.g., Wishkin v. Potter*, 476 F.3d 180, 184 (3d Cir. 2007)
4 (“The Rehabilitation Act expressly makes the standards set forth in the 1990 Americans with
5 Disabilities Act, 42 U.S.C. § 12101 et seq., applicable to federal employers and to employers
6 receiving federal funding.”); *Bragdon v. Abbott*, 524 U.S. 624 (1998) (determination of
7 “disability” is the same under the ADA and the Rehabilitation Act); *Conneen v. MBNA America*
8 *Bank, N.A.*, 334 F.3d 318, 330 (3d Cir. 2003) (Rehabilitation Act cases apply “with equal force”
9 to the ADA); *Deane v. Pocono Medical Center*, 142 F.3d 138 (3d Cir. 1998) (en banc) (analysis
10 of “reasonable accommodation” is the same under the ADA and the Rehabilitation Act). These
11 ADA instructions can therefore be applied, and modified if necessary, to a claim brought under
12 the Rehabilitation Act.

13 14 *The ADA’s association provision*

15
16 Chapter 9 does not include an instruction specifically dealing with claims under 42
17 U.S.C. § 12112(b)(4), which defines “discriminat[ion] against a qualified individual on the basis
18 of disability” to include “excluding or otherwise denying equal jobs or benefits to a qualified
19 individual because of the known disability of an individual with whom the qualified individual is
20 known to have a relationship or association.” For a discussion of such claims, see *Erdman v.*
21 *Nationwide Ins. Co.*, 582 F.3d 500, 510-11 (3d Cir. 2009).

22 23 *Religious Entities; Ministerial Exception*

24
25 Religious entities sued under Subchapter I of the ADA may assert two statutory defenses
26 set out in 42 U.S.C. § 12113(d). But retaliation claims under 42 U.S.C. § 12203(a) arise under
27 Subchapter IV of the ADA, which does not contain such defenses.

28
29 Apart from those statutory defenses, the First Amendment’s religion clauses give rise to
30 an affirmative defense that “bar[s] the government from interfering with the decision of a
31 religious group to fire one of its ministers.” *Hosanna-Tabor Evangelical Lutheran Church &*
32 *Sch. v. EEOC*, 132 S. Ct. 694, 702, 709 n.4 (2012) (applying this defense to an ADA retaliation
33 claim). For further discussion of the ministerial exception, see Comment 5.0.

1 **9.1.1 Elements of an ADA Claim— Disparate Treatment — Mixed-Motive**
2
3

4 **Model**
5

6 In this case [plaintiff] is alleging that [defendant] [describe alleged disparate treatment]
7 [plaintiff]. In order for [plaintiff] to recover on this discrimination claim against [defendant],
8 [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff]. This means
9 that [plaintiff] must prove that [his/her] [disability] was a motivating factor in [defendant's]
10 decision [describe action] [plaintiff].
11

12 To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of
13 the evidence:
14

15 First: [Plaintiff] has a “disability” within the meaning of the ADA.
16

17 Second: [Plaintiff] is a “qualified individual” able to perform the essential functions of
18 [specify the job or position sought].
19

20 Third: [Plaintiff's] [disability] was a motivating factor in [defendant's] decision [describe
21 action] [plaintiff].
22

23 Although [plaintiff] must prove that [defendant] acted with the intent to discriminate on
24 the basis of a disability, [plaintiff] is not required to prove that [defendant] acted with the
25 particular intent to violate [plaintiff's] federal rights under the ADA.
26

27 In showing that [plaintiff's] [disability] was a motivating factor for [defendant's] action,
28 [plaintiff] is not required to prove that [his/her] [disability] was the sole motivation or even the
29 primary motivation for [defendant's] decision. [Plaintiff] need only prove that [the disability]
30 played a motivating part in [defendant's] decision even though other factors may also have
31 motivated [defendant].
32

33 As used in this instruction, [plaintiff's] [disability] was a “motivating factor” if [his/her]
34 [disability] played a part [or played a role] in [defendant's] decision to [state adverse
35 employment action] [plaintiff].
36

37 [I will now provide you with more explicit instructions on the following statutory terms:
38

39 1. “Disability.” — Instruction 9.2.1
40

41 2. “Qualified” — See Instruction 9.2.2]
42

1 **[For use where defendant sets forth a “same decision” affirmative defense:²**
2

3 If you find that [defendant's] treatment of [plaintiff] was motivated by both
4 discriminatory and lawful reasons, you must decide whether [plaintiff] is entitled to damages.
5 [Plaintiff] is not entitled to damages if [defendant] proves by a preponderance of the evidence
6 that [defendant] would have treated [plaintiff] the same even if [plaintiff's] [disability] had
7 played no role in the employment decision.]
8
9

10 **Comment**
11

12 The Third Circuit has held that disparate treatment discrimination cases under the ADA
13 are governed by the same standards applicable to Title VII actions. *See, e.g., Shaner v. Synthes*,
14 204 F.3d 494, 500 (3d Cir. 2000); *Walton v. Mental Health Ass’n of Southeastern Pa.*, 168 F.3d
15 661, 667-68 (3d Cir. 1999); *Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153, 156-58 (3d Cir.
16 1995). *See also Raytheon Co. v. Hernandez*, 540 U.S. 44, 50, n.3 (2003) (noting that all of the
17 courts of appeals have applied the Title VII standards to disparate treatment cases under the
18 ADA). These ADA instructions accordingly follow the “mixed-motive”/ “pretext” delineation
19 employed in Title VII discrimination actions.
20

21 In *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), the Supreme Court
22 rejected the use of a mixed-motive framework for claims under the Age Discrimination in
23 Employment Act (ADEA). The *Gross* Court reasoned that it had never held that the
24 mixed-motive framework set by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), applied to
25 ADEA claims; that the ADEA’s reference to discrimination “because of” age indicated that
26 but-for causation is the appropriate test; and that this interpretation was bolstered by the fact that
27 when Congress in 1991 provided the statutory mixed-motive framework codified at 42 U.S.C. §
28 2000e-5(g)(2)(B), that provision was not drafted so as to cover ADEA claims.
29

30 Based on similar reasoning, the Court has held that the mixed-motive proof framework is
31 unavailable for Title VII retaliation claims. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct.
32 2517, 2533 (2013) (“Title VII retaliation claims must be proved according to traditional
33 principles of but-for causation, not the lessened causation test stated in [42 U.S.C.] § 2000e–
34 2(m). This requires proof that the unlawful retaliation would not have occurred in the absence of
35 the alleged wrongful action or actions of the employer.”). The *Nassar* Court reasoned that
36 Congress legislated against a background tort principle of “but for” causation, *see Nassar*, 133 S.
37 Ct. at 2523; that Title VII’s retaliation provision – like the ADEA provision at issue in *Gross* –
38 uses the word “because,” which is incompatible with a mixed-motive test, *see id.* at 2528; that
39 Congress would have structured the statutory framework differently had it – in 1991 – wished to
40 encompass Title VII retaliation claims among those eligible for the statutory mixed-motive test
41 set forth in 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B), *see id.* at 2529; that policy

² The Committee uses the term “affirmative defense” to refer to the burden of proof, and takes no position on the burden of pleading the same-decision defense.

1 considerations support a restrictive approach to the standards of proof for retaliation claims, *see*
2 *id.* at 2531-32; and that the “careful balance” that Congress set in the 1991 amendments
3 forecloses the use of the *Price Waterhouse* mixed-motive test for Title VII retaliation claims, *id.*
4 at 2534.

5
6 The Committee has not attempted to determine what, if any, implications *Gross* and
7 *Nassar* have for ADA claims, but the Committee suggests that users of these instructions should
8 consider that question.

9
10 The distinction between “mixed-motive” cases and “pretext” cases is generally
11 determined by whether the plaintiff produces direct rather than circumstantial evidence of
12 discrimination. If the plaintiff produces direct evidence of discrimination, this is sufficient to
13 show that the defendant’s activity was motivated at least in part by discriminatory animus, and
14 therefore a “mixed-motive” instruction is given. If the evidence of discrimination is only
15 circumstantial, then defendant can argue that there was no discriminatory animus at all, and that
16 its employment decision can be explained completely by a non-discriminatory motive; it is then
17 for the plaintiff to show that the alleged non-discriminatory motive is a pretext, and accordingly
18 Instruction 9.1.2 should be given. *See generally Fakete v. Aetna, Inc.*, 308 F.3d 335 (3d Cir.
19 2002) (using “direct evidence” to describe “mixed-motive” cases and noting that pretext cases
20 arise when the plaintiff presents only indirect or circumstantial evidence of discrimination).³

21
22 The Third Circuit explained the applicability of a “mixed-motive” instruction in ADA
23 cases in *Buchsbaum v. University Physicians Plan*, 55 Fed Appx. 40, 43 (3d Cir. 2002).⁴ It noted
24 that the “typical” case is considered under the *McDonnell-Douglas* burden-shifting analysis, but
25 stated that

26
27 the “mixed motive” analysis of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), may
28 be applied instead if the plaintiff has produced “direct evidence” of the employer’s
29 discriminatory animus. Under a *Price-Waterhouse* “mixed motive” analysis, where there
30 is strong evidence of an employer’s discriminatory animus, the burden of proof shifts
31 from the plaintiff to the employer to prove that its motives for the employment action

³ *Fakete* was an ADEA case and has been overruled by *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009). However, *Fakete*’s discussion of the distinction between mixed- motive and pretext cases may still be instructive for types of claims to which *Price Waterhouse* burden-shifting may apply. *Cf.* Comment 5.1.1 (discussing treatment of analogous question concerning statutory burden-shifting framework in *Desert Palace Inc. v. Costa*, 539 U.S. 90 (2003)).

⁴ The portion of *Buchsbaum* quoted in the text cites *Armbruster* and *Starceski* – two ADEA cases. To the extent that *Armbruster* and *Starceski* approved the use of *Price Waterhouse* burden-shifting for ADEA cases, they have been overruled by *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009). But *Buchsbaum*’s discussion may still be instructive for types of claims to which *Price Waterhouse* burden-shifting may apply.

1 were "mixed" that is, while some motives were discriminatory, the employer had
2 legitimate non-discriminatory motives as well which would have resulted in the adverse
3 employment action. Thus, we have described the "direct evidence" that the employee
4 must produce . . . to warrant a "mixed motives" analysis as "so revealing of
5 discriminatory animus that it is not necessary to rely on any presumption from the prima
6 facie case to shift the burden of production. . . . The risk of non-persuasion [is] shifted to
7 the defendant who . . . must persuade the factfinder that . . . it would have made the same
8 employment decision regardless of its discriminatory animus." *Armbruster v. Unisys*
9 *Corp.*, 32 F.3d 768, 778 (3d Cir. 1994). Such direct evidence "requires 'conduct or
10 statements by persons involved in the decisionmaking process that may be viewed as
11 directly reflecting the alleged discriminatory attitude.'" *Starceski v. Westinghouse Electric*
12 *Corp.*, 54 F.3d 1089, 1096 (3d Cir. 1995) (quoting *Griffiths v. CIGNA Corp.*, 988 F.2d
13 457, 470 (3d Cir. 1993)).
14

15 *Statutory Definitions*

16
17 The ADA employs complicated and sometimes counterintuitive statutory definitions for
18 many of the important terms that govern a disparate treatment action. Instructions for these
19 statutory definitions are set forth at 9.2.1-2. They are not included in the body of the "mixed-
20 motives" instruction because not all of them will ordinarily be in dispute in a particular case, and
21 including all of them would unduly complicate the basic instruction.
22

23 *"Same Decision" Instruction*

24
25 Under Title VII, if the plaintiff proves intentional discrimination in a "mixed-motives"
26 case, the defendant can still avoid liability for money damages by demonstrating by a
27 preponderance of the evidence that the same decision would have been made even in the absence
28 of the impermissible motivating factor. If the defendant establishes this defense, the plaintiff is
29 then entitled only to declaratory and injunctive relief, attorney's fees and costs. Orders of
30 reinstatement, as well as the substitutes of back and front pay, are prohibited if a same decision
31 defense is proven. 42 U.S.C. §2000e-(5)(g)(2)(B). The ADA explicitly relies on the enforcement
32 tools and remedies described in
33 42 U.S.C. §2000e-(5). See 42 U.S.C. § 12117(a). Therefore, a plaintiff in a "mixed-motives" case
34 under the ADA is not entitled to damages if the defendant proves that the adverse employment
35 action would have been made even if disability had not been a motivating factor. But
36 Instruction 9.1.1 is premised on the assumption that the "same decision" defense is not a
37 complete defense as it is in cases where the *Price Waterhouse* burden-shifting framework
38 applies. *Compare, e.g.*, Instruction and Comment 6.1.1 (discussing the use of the *Price*
39 *Waterhouse* burden-shifting framework in Section 1981 cases).
40

41 *Direct Threat*

42
43 The ADA provides a defense if the employment or accommodation of an otherwise
44 qualified, disabled individual would pose a "direct threat" to the individual or to others. The
45 "direct threat" affirmative defense is applicable both to disparate treatment claims and reasonable

1 accommodation claims. See *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002); *Buskirk v.*
2 *Apollo Metals*, 307 F.3d 160, 168 (3d Cir. 2002). See 9.3.1 for an instruction on the “direct
3 threat” affirmative defense.

4
5 *Animus of Employee Who Was Not the Ultimate Decisionmaker*
6

7 Construing a statute that explicitly referred to discrimination as “a motivating factor,” the
8 Supreme Court ruled that “if a supervisor performs an act motivated by antimilitary animus that
9 is *intended* by the supervisor to cause an adverse employment action, and if that act is a
10 proximate cause of the ultimate employment action, then the employer is liable under [the
11 Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)]” even if
12 the ultimate employment decision is taken by one other than the supervisor with the animus.
13 *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1194 (2011) (footnotes omitted). Like the USERRA,
14 42 U.S.C. § 2000e-5(g)(2)(B) refers to discrimination as a “motivating factor.” Assuming that
15 Section 2000e-5(g)(2)(B) applies to mixed-motive claims under the ADA, there may be some
16 reason to think that *Staub’s* analysis might extend to ADA mixed-motive claims. On the other
17 hand, the argument for extending *Staub* to ADA mixed-motive claims is not as strong as the
18 argument for extending *Staub* to Title VII mixed-motive claims (*see* Comment 5.1.1). The main
19 difference is that Section 2000e-5(g)(2)(B) refers to “claim[s] in which an individual proves a
20 violation under section 2000e-2(m) of this title,” and Section 2000e-2(m) does not list disability
21 discrimination among the types of violations that it bars. Section 2000e-2(m)’s “motivating
22 factor” language does not apply to ADA claims – and it was Section 2000e-2(m) that the *Staub*
23 Court noted as containing language similar to the USERRA language that it was construing. *See*
24 *Staub*, 131 S. Ct. at 1191. Thus, it is unclear whether the ruling in *Staub* would extend to mixed-
25 motive claims under the ADA.

9.1.2 Elements of an ADA Claim – Disparate Treatment – Pretext

Model

In this case [plaintiff] is alleging that [defendant] [describe alleged disparate treatment] [plaintiff]. In order for [plaintiff] to recover on this discrimination claim against [defendant], [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff]. This means that [plaintiff] must prove that [his/her] [disability] was a determinative factor in [defendant's] decision to [describe action] [plaintiff].

To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of the evidence:

First: [Plaintiff] has a “disability” within the meaning of the ADA.

Second: [Plaintiff] is a “qualified individual” able to perform the essential functions of [specify the job or position sought].

Third: [Plaintiff's] disability was a determinative factor in [defendant's] decision [describe action] [plaintiff].

[I will now provide you with more explicit instructions on the following statutory terms:

1. “Disability.” — Instruction 9.2.1
2. “Qualified” — See Instruction 9.2.2]

Although [plaintiff] must prove that [defendant] acted with the intent to discriminate on the basis of a disability, [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate [plaintiff's] federal rights under the ADA. Moreover, [plaintiff] is not required to produce direct evidence of intent, such as statements admitting discrimination. Intentional discrimination may be inferred from the existence of other facts.

[For example, you have been shown statistics in this case. Statistics are one form of evidence from which you may find, but are not required to find, that a defendant intentionally discriminated against a plaintiff. You should evaluate statistical evidence along with all the other evidence received in the case in deciding whether [defendant] intentionally discriminated against [plaintiff].

[Defendant] has given a nondiscriminatory reason for its [describe defendant's action]. If you disbelieve [defendant's] explanations for its conduct, then you may, but need not, find that [plaintiff] has proved intentional discrimination. In determining whether [defendant's] stated reason for its actions was a pretext, or excuse, for discrimination, you may not question [defendant's] business judgment. You cannot find intentional discrimination simply because you

1 disagree with the business judgment of [defendant] or believe it is harsh or unreasonable. You
2 are not to consider [defendant's] wisdom. However, you may consider whether [defendant's]
3 reason is merely a cover-up for discrimination.
4

5 Ultimately, you must decide whether [plaintiff] has proven that [his/her] [disability] was
6 a determinative factor in [defendant's employment decision.] "Determinative factor" means that
7 if not for [plaintiff 's] [disability], the [adverse employment action] would not have occurred.
8
9

10 **Comment**

11

12 This instruction is to be used when the plaintiff's proof of discrimination on the basis of a
13 disability is circumstantial rather than direct. The Third Circuit has held that disparate treatment
14 discrimination cases under the ADA are governed by the same standards applicable to Title VII
15 actions. *See, e.g., Shaner v. Synthes*, 204 F.3d 494, 500 (3d Cir. 2000) ("We have indicated that
16 the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973),
17 applies to ADA disparate treatment and retaliation claims. *See Walton v. Mental Health Ass'n of*
18 *Southeastern Pa.*, 168 F.3d 661, 667-68 (3d Cir. 1999); *Newman v. GHS Osteopathic, Inc.*, 60
19 F.3d 153, 156-58 (3d Cir. 1995)"). *See also Raytheon Co. v. Hernandez*, 540 U.S. 44, 50, n.3
20 (2003) (noting that all of the courts of appeals have applied the Title VII standards to disparate
21 treatment cases under the ADA). Accordingly this instruction tracks the instruction for "pretext"
22 cases in Title VII actions. See Instruction 5.1.2.
23

24 The proposed instruction does not charge the jury on the complex burden-shifting
25 formula established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas*
26 *Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Under the *McDonnell Douglas*
27 formula a plaintiff who proves a prima facie case of discriminatory treatment raises a
28 presumption of intentional discrimination. The defendant then has the burden of production, not
29 persuasion, to rebut the presumption of discrimination by articulating a nondiscriminatory reason
30 for its actions. If the defendant does articulate a nondiscriminatory reason, the plaintiff must
31 prove intentional discrimination by demonstrating that the defendant's proffered reason was a
32 pretext, hiding the real discriminatory motive.
33

34 In *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 280 (3d Cir. 1998), the Third Circuit
35 declared that "the jurors must be instructed that they are entitled to infer, but need not, that the
36 plaintiff's ultimate burden of demonstrating intentional discrimination by a preponderance of the
37 evidence can be met if they find that the facts needed to make up the prima facie case have been
38 established and they disbelieve the employer's explanation for its decision." The court also
39 stated, however, that "[t]his does not mean that the instruction should include the technical
40 aspects of the *McDonnell Douglas* burden shifting, a charge reviewed as unduly confusing and
41 irrelevant for a jury." The court concluded as follows:
42

43 Without a charge on pretext, the course of the jury's deliberations will depend on whether
44 the jurors are smart enough or intuitive enough to realize that inferences of discrimination

1 may be drawn from the evidence establishing plaintiff's prima facie case and the
2 pretextual nature of the employer's proffered reasons for its actions. It does not denigrate
3 the intelligence of our jurors to suggest that they need some instruction in the
4 permissibility of drawing that inference.
5

6 *See also Pivrotto v. Innovative Systems, Inc.*, 191 F.3d 344, 347 n.1 (3d Cir. 1999),
7 where the Third Circuit gave extensive guidance on the place of the *McDonnell Douglas* test in
8 jury instructions:
9

10 The short of it is that judges should remember that their audience is composed of jurors
11 and not law students. Instructions that explain the subtleties of the *McDonnell Douglas*
12 framework are generally inappropriate when jurors are being asked to determine whether
13 intentional discrimination has occurred. To be sure, a jury instruction that contains
14 elements of the *McDonnell Douglas* framework may sometimes be required. For
15 example, it has been suggested that "in the rare case when the employer has not
16 articulated a legitimate nondiscriminatory reason, the jury must decide any disputed
17 elements of the prima facie case and is instructed to render a verdict for the plaintiff if
18 those elements are proved." *Ryther [v. KARE 11]*, 108 F.3d at 849 n.14 (Loken, J., for
19 majority of en banc court). But though elements of the framework may comprise part of
20 the instruction, judges should present them in a manner that is free of legalistic jargon. In
21 most cases, of course, determinations concerning a prima facie case will remain the
22 exclusive domain of the trial judge.
23

24 On proof of intentional discrimination, *see Sheridan v. E.I. DuPont de Nemours and*
25 *Co.*, 100 F.3d 1061, 1066-1067 (3d Cir. 1996) ("[T]he elements of the prima facie case and
26 disbelief of the defendant's proffered reasons are the threshold findings, beyond which the jury is
27 permitted, but not required, to draw an inference leading it to conclude that there was intentional
28 discrimination.") . On pretext, *see Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994) (pretext
29 may be shown by "such weaknesses, implausibilities, inconsistencies, incoherencies, or
30 contradictions in the [defendant's] proffered legitimate reasons for its action that a reasonable
31 [person] could rationally find them 'unworthy of credence,' and hence infer 'that the [defendant]
32 did not act for [the asserted] non-discriminatory reasons").
33

34 *Business Judgment* 35

36 On the "business judgment" portion of the instruction, *see Billet v. CIGNA Corp.*, 940
37 F.2d 812, 825 (3d Cir.1991), where the court stated that "[b]arring discrimination, a company has
38 the right to make business judgments on employee status, particularly when the decision involves
39 subjective factors deemed essential to certain positions." The *Billet* court noted that "[a] plaintiff
40 has the burden of casting doubt on an employer's articulated reasons for an employment decision.
41 Without some evidence to cast this doubt, this Court will not interfere in an otherwise valid
42 management decision." The *Billet* court cited favorably the First Circuit's decision in *Loeb v.*
43 *Textron, Inc.*, 600 F.2d 1003, 1012 n. 6 (1st Cir. 1979), where the court stated that "[w]hile an
44 employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant
45 question is simply whether the given reason was a pretext for illegal discrimination."

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Determinative Factor

The reference in the instruction to a “determinative factor” is taken from *Watson v. SEPTA*, 207 F.3d 207 (3d Cir. 2000) (holding that the appropriate term in pretext cases is “determinative factor”, while the appropriate term in mixed-motive cases is “motivating factor”).

Statutory Definitions

The ADA employs complicated and sometimes counterintuitive statutory definitions for many of the important terms that govern a disparate treatment action. Instructions for these statutory definitions are set forth at 9.2.1-2. They are not included in the body of the “pretext” instruction because not all of them will ordinarily be in dispute in a particular case, and including all of them would unduly complicate the basic instruction.

Direct Threat

The ADA provides a defense if the employment or accommodation of an otherwise qualified, disabled individual would pose a “direct threat” to the individual or to others. The “direct threat” affirmative defense is applicable both to disparate treatment claims and reasonable accommodation claims. See *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002); *Buskirk v. Apollo Metals*, 307 F.3d 160, 168 (3d Cir. 2002). See 9.3.1 for an instruction on the “direct threat” affirmative defense.

1 **9.1.3 Elements of an ADA Claim — Reasonable Accommodation**

2 **Model**

3 In this case [plaintiff] claims that [defendant] failed to provide a reasonable
4 accommodation for [plaintiff]. The ADA provides that an employer may not deny employment
5 opportunities to a qualified individual with a disability if that denial is based on the need of the
6 employer to make reasonable accommodations to that individual’s disability.
7

8 To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of
9 the evidence:

10
11 First: [Plaintiff] has a “disability” within the meaning of the ADA.

12
13 Second: [Plaintiff] is a “qualified individual” able to perform the essential functions of
14 [specify the job or position sought].
15

16 Third: [Defendant] was informed of the need for an accommodation of [plaintiff] due to a
17 disability. [Note that there is no requirement that a request be made for a particular or
18 specific accommodation; it is enough to satisfy this element that [defendant] was
19 informed of [plaintiff’s] basic need for an accommodation.]
20

21 Fourth: Providing [specify the accommodation(s) in dispute in the case] would have been
22 reasonable, meaning that the costs of that accommodation would not have clearly
23 exceeded its benefits.
24

25 Fifth: [Defendant] failed to provide [specify the accommodation(s) in dispute in the case]
26 or any other reasonable accommodation.
27

28 [I will now provide you with more explicit instructions on the following statutory terms:
29

30 1. “Disability.” — Instruction 9.2.1
31

32 2. “Qualified” — See Instruction 9.2.2]
33

34 [In deciding whether [plaintiff] was denied a reasonable accommodation, you must keep
35 in mind that [defendant] is not obligated to provide a specific accommodation simply because it
36 was requested by [plaintiff]. [Plaintiff] may not insist on a particular accommodation if another
37 reasonable accommodation was offered. The question is whether [defendant] failed to provide
38 any reasonable accommodation of [plaintiff’s] disability.]
39

40 Under the ADA, a reasonable accommodation may include, but is not limited to, the
41 following:
42

1 *[Set forth any of the following that are supported by the evidence:*

- 2
- 3 1. Modifying or adjusting a job application process to enable a qualified applicant with a
- 4 disability to be considered for the position;
- 5
- 6 2. Making existing facilities used by employees readily accessible to and usable by
- 7 [plaintiff];
- 8
- 9 3. Job restructuring;
- 10
- 11 4. Part-time or modified work schedule;
- 12
- 13 5. Reassignment to a vacant position for which [plaintiff] is qualified;
- 14
- 15 6. Acquisition or modifications of examinations, training manuals or policies;
- 16
- 17 7. Provision of qualified readers or interpreters; and
- 18
- 19 8. Other similar accommodations for individuals with [plaintiff's] disability.]
- 20

21 Note, however, that a “reasonable accommodation” does not require [defendant] to do any
22 of the following:

23 *[Set forth any of the following that are raised by the evidence:*

- 24
- 25
- 26 1. Change or eliminate any essential function of employment;
- 27
- 28 2. Shift any essential function of employment to other employees;
- 29
- 30 3. Create a new position for [plaintiff];
- 31
- 32 4. Promote [plaintiff];
- 33
- 34 5. Reduce productivity standards; or
- 35
- 36 6. Make an accommodation that conflicts with an established [seniority system] [other
- 37 neutral employment policy], unless [plaintiff] proves by a preponderance of the evidence
- 38 that “special circumstances” make an exception reasonable. For example, an exception
- 39 might be reasonable (and so “special circumstances” would exist) if exceptions were often
- 40 made to the policy. Another example might be where the policy already contains its own
- 41 exceptions so that, under the circumstances, one more exception is not significant.]
- 42

43 [On the other hand, [defendant's] accommodation is not “reasonable” under the ADA if
44 [plaintiff] was forced to change to a less favorable job and a reasonable accommodation could
45 have been made that would have allowed [plaintiff] to perform the essential functions of the job

1 that [he/she] already had. [Nor is an accommodation to a new position reasonable if [plaintiff] is
2 not qualified to perform the essential functions of that position.]]

3
4 **[For use where a jury question is raised about the interactive process:**

5
6 The intent of the ADA is that there be an interactive process between the employer and
7 the employee [applicant] in order to determine whether there is a reasonable accommodation that
8 would allow the employee [applicant] to perform the essential functions of a job. Both the
9 employer and the employee [applicant] must cooperate in this interactive process in good faith,
10 once the employer has been informed of the employee's [applicant's] request for a reasonable
11 accommodation.

12
13 Neither party can win this case simply because the other did not cooperate in an
14 interactive process. But you may consider whether a party cooperated in this process in good
15 faith in evaluating the merit of that party's claim that a reasonable accommodation did or did not
16 exist.]

17
18 **[For use where a previous accommodation has been provided:**

19
20 The fact that [defendant] may have offered certain accommodations to an employee or
21 employees in the past does not mean that the same accommodations must be forever extended to
22 [plaintiff] or that those accommodations are necessarily reasonable under the ADA. Otherwise,
23 an employer would be reluctant to offer benefits or concessions to disabled employees for fear
24 that, by once providing the benefit or concession, the employer would forever be required to
25 provide that accommodation. Thus, the fact that an accommodation that [plaintiff] argues for has
26 been provided by [defendant] in the past to [plaintiff], or to another disabled employee, might be
27 relevant but does not necessarily mean that the particular accommodation is a reasonable one in
28 this case. Instead, you must determine its reasonableness under all the evidence in the case.]

29
30 **[For use when there is a jury question on "undue hardship":**

31
32 If you find that [plaintiff] has proved the four elements I have described to you by a
33 preponderance of the evidence, then you must consider [defendant's] defense. [Defendant]
34 contends that providing an accommodation would cause an undue hardship on the operation of
35 [defendant's] business. Under the ADA, [defendant] does not need to accommodate [plaintiff] if
36 it would cause an "undue hardship" to its business. An "undue hardship" is something so costly or
37 so disruptive that it would fundamentally change the way that [defendant] runs its business.

38
39 Defendant must prove to you by a preponderance of the evidence that [describe
40 accommodation] would be an "undue hardship." In deciding this issue, you should consider the
41 following factors:

- 42
43 1. The nature and cost of the accommodation.
44
45 2. [Defendant's] overall financial resources. This might include the size of its business,

1 the number of people it employs, and the types of facilities it runs.
2

3 3. The financial resources of the facility where the accommodation would be made. This
4 might include the number of people who work there and the impact that the
5 accommodation would have on its operations and costs.
6

7 4. The way that [defendant] conducts its operations. This might include its workforce
8 structure; the location of its facility where the accommodation would be made compared
9 to [defendant's] other facilities; and the relationship between or among those facilities.
10

11 5. The impact of (specify accommodation) on the operation of the facility, including the
12 impact on the ability of other employees to perform their duties and the impact on the
13 facility's ability to conduct business.
14

15 *[List any other factors supported by the evidence.]*
16

17 If you find that [defendant] has proved by a preponderance of the evidence that [specify
18 accommodation] would be an undue hardship, then you must find for [defendant].]
19
20

21 **Comment**

22

23 The basics of an action for reasonable accommodation under the ADA were set forth by
24 the Third Circuit in *Skerski v. Time Warner Cable Co.*, 257 F.3d 273 (3d Cir. 2001).
25

26 [A] disabled employee may establish a prima facie case under the ADA if s/he shows that
27 s/he can perform the essential functions of the job with reasonable accommodation and
28 that the employer refused to make such an accommodation. According to the ADA, a
29 "reasonable accommodation" includes:
30

31 job restructuring, part-time or modified work schedules, reassignment to a vacant
32 position, acquisition or modification of equipment or devices, appropriate
33 adjustment or modifications of examinations, training materials or policies, the
34 provision of qualified readers or interpreters, and other similar accommodations
35 for individuals with disabilities. 42 U.S.C. § 12111(9)(B).
36

37 The relevant regulations define reasonable accommodations as "modifications or
38 adjustments to the work environment, or to the manner or circumstances under which the
39 position held or desired is customarily performed, that enable a qualified individual with
40 a disability to perform the essential functions of that position." 29 C.F.R. §
41 1630.2(o)(1)(ii).
42

43 *Skerski*, 257 F.3d at 284. See also *Colwell v. Rite Aid Corp.*, 602 F.3d 495, 505 (3d Cir. 2010)
44 ("[U]nder certain circumstances the ADA can obligate an employer to accommodate an

1 employee's disability-related difficulties in getting to work, if reasonable.”).

2
3 In *Skerski* the employee was a cable worker, and the employer’s job description for that
4 position listed climbing poles as one of the job requirements. The employee developed a fear of
5 heights and he was transferred to a warehouse position. The employer argued that this was a
6 reasonable accommodation for the employee’s disability, because he would not have to climb in
7 his new position. But the court noted that a transfer to a new position is not a reasonable
8 accommodation if the employee is not qualified to perform the essential functions of that
9 position (and there was evidence, precluding summary judgment, indicating that the plaintiff was
10 not so qualified). It further noted that reassignment "should be considered only when
11 accommodation within the individual's current position would pose an undue hardship." The
12 court relied on the commentary to the pertinent EEOC guideline, which states that "an employer
13 may reassign an individual to a lower graded position if there are no accommodations that would
14 enable the employee to remain in the current position and there are no vacant equivalent
15 positions for which the individual is qualified with or without reasonable accommodation." The
16 court concluded that there was a triable question of fact as to whether the plaintiff could have
17 been accommodated in his job as a cable worker, by the use of a bucket truck so that he would
18 not have to climb poles. The instruction is written to comport with the standards set forth in
19 *Skerski*.

20
21 *Allocation of Burdens—Reasonable Accommodation and the Undue Hardship Defense*

22
23 In *Walton v. Mental Health Ass’n of Southeastern Pa.*, 168 F.3d 661, 670 (3d Cir. 1999),
24 the Third Circuit held that, "on the issue of reasonable accommodation, the plaintiff bears only
25 the burden of identifying an accommodation, the costs of which, facially, do not clearly exceed
26 its benefits." If the plaintiff satisfies that burden, the defendant then has the burden to
27 demonstrate that the proposed accommodation creates an "undue hardship" for it. 42 U.S.C. §
28 12112(b)(5)(A). See *Turner v. Hershey Chocolate USA*, 440 F.3d 604, 614 (3d Cir. 2006)
29 ("undue hardship" is an affirmative defense). The ADA defines "undue hardship" as "an action
30 requiring significant difficulty or expense, when considered in light of" a series of factors, 42
31 U.S.C. § 12111(10)(A). The instruction sets forth the list of factors found in the ADA.

32
33 The *Walton* court justified its allocation of burdens as follows:

34
35 This distribution of burdens is both fair and efficient. The employee knows
36 whether her disability can be accommodated in a manner that will allow her to
37 successfully perform her job. The employer, however, holds the information necessary to
38 determine whether the proposed accommodation will create an undue burden for it. Thus,
39 the approach simply places the burden on the party holding the evidence with respect to
40 the particular issue.

41
42 The instruction follows the allocation of burdens set forth in *Walton*. See also *Williams v.*
43 *Philadelphia Housing Auth.*, 380 F.3d 751, 770 (3d Cir. 2004) (in a transfer case, the employee
44 must show "(1) that there was a vacant, funded position; (2) that the position was at or below the
45 level of the plaintiff's former job; and (3) that the plaintiff was qualified to perform the essential

1 duties of this job with reasonable accommodation. If the employee meets his burden, the
2 employer must demonstrate that transferring the employee would cause unreasonable
3 hardship.”).

4
5 For a case in which the employee did not satisfy his burden of showing a reasonable
6 accommodation, *see Gaul v. Lucent Technologies Inc.*, 134 F.3d 576, 581 (3d Cir. 1998). The
7 employee had an anxiety disorder, and argued essentially that he could be accommodated by
8 placement with other employees who wouldn’t stress him out. The court analyzed this contention
9 in the following passage:

10
11 [W]e conclude that Gaul has failed to satisfy his burden for three reasons. First, Gaul's
12 proposed accommodation would impose a wholly impractical obligation on AT & T or
13 any employer. Indeed, AT & T could never achieve more than temporary compliance
14 because compliance would depend entirely on Gaul's stress level at any given moment.
15 This, in turn, would depend on an infinite number of variables, few of which AT & T
16 controls. Moreover, the term "prolonged and inordinate stress" is not only subject to
17 constant change, it is also subject to tremendous abuse. The only certainty for AT & T
18 would be its obligation to transfer Gaul to another department whenever he becomes
19 "stressed out" by a coworker or supervisor. It is difficult to imagine a more amorphous
20 "standard" to impose on an employer.

21
22 Second, Gaul's proposed accommodation would also impose extraordinary
23 administrative burdens on AT & T. In order to reduce Gaul's exposure to coworkers who
24 cause him prolonged and inordinate stress, AT & T supervisors would have to consider,
25 among other things, Gaul's stress level whenever assigning projects to workers or teams,
26 changing work locations, or planning social events. Such considerations would require
27 far too much oversight and are simply not required under law.

28
29 Third, by asking to be transferred away from individuals who cause him
30 prolonged and inordinate stress, Gaul is essentially asking this court to establish the
31 conditions of his employment, most notably, with whom he will work. However, nothing
32 in the ADA allows this shift in responsibility. . . .

33
34 In sum, Gaul does not meet his burden . . . because his proposed accommodation
35 was unreasonable as a matter of law. Therefore, Gaul is not a "qualified individual" under
36 the ADA, and AT & T's alleged failure to investigate into reasonable accommodation is
37 unimportant.

38 39 *Preferences*

40
41 In *US Airways, Inc., v. Barnett*, 535 U.S. 391, 397 (2002), the Court rejected the
42 proposition that an accommodation cannot be reasonable whenever it gives *any* preference to the
43 disabled employee. The Court concluded that “preferences will sometimes prove necessary to
44 achieve the Act's basic equal opportunity goal.” It elaborated as follows:

1 The Act requires preferences in the form of "reasonable accommodations" that are
2 needed for those with disabilities to obtain the *same* workplace opportunities that those
3 without disabilities automatically enjoy. By definition any special "accommodation"
4 requires the employer to treat an employee with a disability differently, *i.e.*,
5 preferentially. And the fact that the difference in treatment violates an employer's
6 disability-neutral rule cannot by itself place the accommodation beyond the Act's
7 potential reach.

8
9 Were that not so, the "reasonable accommodation" provision could not
10 accomplish its intended objective. Neutral office assignment rules would automatically
11 prevent the accommodation of an employee whose disability-imposed limitations require
12 him to work on the ground floor. Neutral "break-from-work" rules would automatically
13 prevent the accommodation of an individual who needs additional breaks from work,
14 perhaps to permit medical visits. Neutral furniture budget rules would automatically
15 prevent the accommodation of an individual who needs a different kind of chair or desk.
16 Many employers will have neutral rules governing the kinds of actions most needed to
17 reasonably accommodate a worker with a disability. See 42 U.S.C. § 12111(9)(b)
18 (setting forth examples such as "job restructuring," "part-time or modified work
19 schedules," "acquisition or modification of equipment or devices," "and other similar
20 accommodations"). Yet Congress, while providing such examples, said nothing
21 suggesting that the presence of such neutral rules would create an automatic exemption.
22 Nor have the lower courts made any such suggestion.

23
24 . . . The simple fact that an accommodation would provide a "preference" -- in the
25 sense that it would permit the worker with a disability to violate a rule that others must
26 obey -- cannot, *in and of itself*, automatically show that the accommodation is not
27 "reasonable."

28 29 *Seniority Plans and Other Disability-Neutral Employer Rules*

30
31 While rejecting the notion that preferences were *never* reasonable, the *Barnett* Court
32 recognized that employers have a legitimate interest in preserving seniority programs, and found
33 that the ADA generally does not require an employer to "bump" a more senior employee in favor
34 of a disabled one. The Court found "nothing in the statute that suggests Congress intended to
35 undermine seniority systems in this way. And we consequently conclude that the employer's
36 showing of violation of the rules of a seniority system is by itself ordinarily sufficient" to show
37 that the suggested accommodation would not be reasonable. The Court held that if a proposed
38 accommodation would be contrary to a seniority plan, the plaintiff would have the burden of
39 showing "special circumstances" indicating that the accommodation was reasonable. The Court
40 explained as follows:

41
42 The plaintiff (here the employee) nonetheless remains free to show that special
43 circumstances warrant a finding that, despite the presence of a seniority system (which
44 the ADA may not trump in the run of cases), the requested "accommodation" is
45 "reasonable" on the particular facts. . . . The plaintiff might show, for example, that the

1 employer, having retained the right to change the seniority system unilaterally, exercises
2 that right fairly frequently, reducing employee expectations that the system will be
3 followed -- to the point where one more departure, needed to accommodate an individual
4 with a disability, will not likely make a difference. The plaintiff might show that the
5 system already contains exceptions such that, in the circumstances, one further exception
6 is unlikely to matter. We do not mean these examples to exhaust the kinds of showings
7 that a plaintiff might make. But we do mean to say that the plaintiff must bear the burden
8 of showing special circumstances that make an exception from the seniority system
9 reasonable in the particular case. And to do so, the plaintiff must explain why, in the
10 particular case, an exception to the employer's seniority policy can constitute a
11 "reasonable accommodation" even though in the ordinary case it cannot.

12
13 535 U.S. at 404.

14
15 The Third Circuit, in *Shapiro v. Township of Lakewood*, 292 F.3d 356, 361 (3d Cir.
16 2002), held that the *Barnett* analysis was applicable any time that a suggested accommodation
17 would conflict with any disability-neutral rule of the employer (in that case a job application
18 requirement). The Court summarized the *Barnett* analysis as follows:

19
20 It therefore appears that the *Barnett* Court has prescribed the following two-step approach
21 for cases in which a requested accommodation in the form of a job reassignment is
22 claimed to violate a disability-neutral rule of the employer. The first step requires the
23 employee to show that the accommodation is a type that is reasonable in the run of cases.
24 The second step varies depending on the outcome of the first step. If the accommodation
25 is shown to be a type of accommodation that is reasonable in the run of cases, the burden
26 shifts to the employer to show that granting the accommodation would impose an undue
27 hardship under the particular circumstances of the case. On the other hand, if the
28 accommodation is not shown to be a type of accommodation that is reasonable in the run
29 of cases, the employee can still prevail by showing that special circumstances warrant a
30 finding that the accommodation is reasonable under the particular circumstances of the
31 case.

32
33 *The Interactive Process*

34
35 The ADA itself does not specifically provide that the employer has an obligation to
36 engage in an interactive process with the employee to determine whether a reasonable
37 accommodation can be found for the employee's disability. But the Third Circuit has established
38 that good faith participation in an interactive process is an important factor in determining
39 whether a reasonable accommodation exists. The court in *Williams v. Philadelphia Housing*
40 *Auth.*, 380 F.3d 751, 772 (3d Cir. 2004) explained the interactive process requirement as follows:

41
42 [W]e have repeatedly held that an employer has a duty under the ADA to engage in an
43 "interactive process" of communication with an employee requesting an accommodation
44 so that the employer will be able to ascertain whether there is in fact a disability and, if
45 so, the extent thereof, and thereafter be able to assist in identifying reasonable

1 accommodations where appropriate. "The ADA itself does not refer to the interactive
2 process," but does require employers to "make reasonable accommodations" under some
3 circumstances for qualified individuals. *Shapiro v. Township of Lakewood*, 292 F.3d 356,
4 359 (3d Cir. 2002). With respect to what consists of a "reasonable accommodation,"
5 EEOC regulations indicate that,

6
7 to determine the appropriate reasonable accommodation it may be necessary for
8 the covered entity to initiate an informal, interactive process with the qualified
9 individual with a disability in need of the accommodation. This process should
10 identify the precise limitations resulting from the disability and potential
11 reasonable accommodations that could overcome those limitations. 29 C.F.R. §
12 1630.2(o)(3).

13
14 *See also Jones v. UPS*, 214 F.3d 402, 407 (3d Cir. 2000) ("Once a qualified individual with a
15 disability has requested provision of a reasonable accommodation, the employer must make a
16 reasonable effort to determine the appropriate accommodation. The appropriate reasonable
17 accommodation is best determined through a flexible, interactive process that involves both the
18 employer and the [employee] with a disability.") (quoting 29 C.F.R. Pt. 1630, App. § 1630.9).

19
20 An employee can demonstrate that an employer breached its duty to provide reasonable
21 accommodations because it failed to engage in good faith in the interactive process by showing
22 that:

23 1) the employer knew about the employee's disability; 2) the employee requested
24 accommodations or assistance for his or her disability; 3) the employer did not make a good faith
25 effort to assist the employee in seeking accommodations; and 4) the employee could have been
26 reasonably accommodated but for the employer's lack of good faith. *Taylor v. Phoenixville*
27 *School Dist.*, 184 F.3d 296, 312 (3d Cir. 1999).

28
29 The failure to engage in an interactive process is not sufficient in itself to establish a
30 claim under the ADA, however. *See Hohider v. United Parcel Service, Inc.*, 574 F.3d 169, 193
31 (3d Cir. 2009) (failure to engage in interactive process with an employee who is not a "qualified
32 individual" does not violate ADA). For one thing, a "plaintiff in a disability discrimination case
33 who claims that the defendant engaged in discrimination by failing to make a reasonable
34 accommodation cannot recover without showing that a reasonable accommodation was
35 possible." *Williams v. Philadelphia Housing Auth.*, 380 F.3d 751, 772 (3d Cir. 2004).

36
37 The employer's obligation to engage in an interactive process does not arise until the
38 employer has been informed that the employee is requesting an accommodation. *See Peter v.*
39 *Lincoln Technical Institute*, 255 F.Supp.2d 417, 437 (E.D.Pa. 2002):

40
41 The employee bears the responsibility of initiating the interactive process by providing
42 notice of her disability and requesting accommodation for it. The employee's request
43 need not be written, nor need it include the magic words "reasonable accommodation,"
44 but the notice must nonetheless make clear that the employee wants assistance for his or
45 her disability. Once the employer knows of the disability and the desire for the

1 accommodation, it has the burden of requesting any additional information that it needs,
2 and to engage in the interactive process of designing a reasonable accommodation -- the
3 employer may not in the face of a request for accommodation, simply sit back passively,
4 offer nothing, and then, in post-termination litigation, try to knock down every specific
5 accommodation as too burdensome. (citations omitted).
6

7 *See also Conneen v. MBNA America Bank, N.A.*, 334 F.3d 318, 332 (3d Cir. 2003) (“MBNA
8 cannot be held liable for failing to read Conneen’s tea leaves. Conneen had an obligation to
9 truthfully communicate any need for an accommodation, or to have her doctor do so on her
10 behalf if she was too embarrassed to respond to MBNA’s many inquiries into any reason she
11 may have had for continuing to be late.”).
12

13 It is not necessary that the employee himself or herself notify the employer of a need for
14 accommodation; the question is whether the employer has received fair notice of that need.
15 *Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 312 (3d Cir. 1999) (notice was sufficient
16 where it was supplied by a member of the employee’s family; the fundamental requirement is
17 that “the employer must know of both the disability and the employee’s desire for
18 accommodations for that disability.”).
19

20 Nor is the plaintiff required to request a particular accommodation; it is enough that the
21 employer is made aware of the basic need for accommodation. *Armstrong v. BurdetteTomlin*
22 *Memorial Hosp.*, 438 F.3d 240, 248 (3d Cir. 2006) (error to instruct the jury that the plaintiff had
23 the burden of requesting a specific reasonable accommodation “when, in fact, he only had to
24 show he requested an accommodation”).
25

26 *Reasonable Accommodation Requirement as Applied to “Regarded as” Disability*

27

28 The ADA provides protection for an employee who is erroneously “regarded as” disabled
29 by an employer. (See the Comment to Instruction 9.2.1 for a discussion of “regarded as”
30 disability). Questions have arisen about the relationship between “regarded as” disability and the
31 employer’s duty to provide a reasonable accommodation to a qualified disabled employee. In
32 *Williams v. Philadelphia Housing Auth.*, 380 F.3d 751, 770 (3d Cir. 2004), the employer argued
33 that it had no obligation to provide a reasonable accommodation to an employee it “regarded as”
34 disabled because there was no job available that would accommodate the perceived
35 disability—that is, the defendant regarded the employee as completely unable to do any job at all.
36 The court described the employer’s argument, and rejected it, in the following passage:
37

38 To the extent Williams relies upon a “regarded as” theory of disability, PHA
39 contends that a plaintiff in Williams’s position must show that there were vacant, funded
40 positions whose essential functions the employee was capable of performing *in the eyes*
41 *of the employer who misperceived the employee’s limitations*. Even if a trier of fact
42 concludes that PHA wrongly perceived Williams’s limitations to be so severe as to
43 prevent him from performing any law enforcement job, the “regarded as” claim must, in
44 PHA’s view, fail because Williams has been unable to demonstrate the existence of a

1 vacant, funded position at PHA whose functions he was capable of performing in light of
2 its misperception. . . . PHA's argument, if accepted, would make "regarded as" protection
3 meaningless. An employer could simply regard an employee as incapable of performing
4 any work, and an employee's "regarded as" failure to accommodate claim would always
5 fail, under PHA's theory, because the employee would never be able to demonstrate the
6 existence of any vacant, funded positions he or she was capable of performing in the eyes
7 of the employer. . . . Thus, contrary to PHA's suggestion, a "regarded as" disabled
8 employee need not demonstrate during litigation the availability of a position he or she
9 was capable of performing in the eyes of the misperceiving employer. . . .

10
11 To meet his litigation burden with respect to both his "actual" and "regarded as"
12 disability claims, Williams need only show (1) that there was a vacant, funded position;
13 (2) that the position was at or below the level of the plaintiff's former job; and (3) that the
14 plaintiff was qualified to perform the essential duties of this job with reasonable
15 accommodation. If the employee meets his burden, the employer must demonstrate that
16 transferring the employee would cause unreasonable hardship.

17
18 The employer in *Williams* made an alternative argument: that if an employee is "regarded
19 as" but not actually disabled, the employer should have no duty to provide a reasonable
20 accommodation because there is nothing to accommodate. In *Williams*, the plaintiff was a police
21 officer and the employer regarded him as being unable to be around firearms because of a mental
22 impairment. The court analyzed the defendant's argument that it had no duty to provide an
23 accommodation to an employee "regarded as" disabled, and rejected it, in the following passage:

24
25 PHA . . . suggests that Williams, by being "regarded as" disabled by PHA, receives a
26 "windfall" accommodation compared to a similarly situated employee who had not been
27 "regarded as" disabled and would not be entitled under the ADA to any accommodation.
28 The record in this case demonstrates that, absent PHA's erroneous perception that
29 Williams could not be around firearms because of his mental impairment, a radio room
30 assignment would have been made available to him and others similarly situated. PHA
31 refused to provide that assignment solely based upon its erroneous perception that
32 Williams's mental impairment prevented him not only from carrying a gun, but being
33 around others with, or having access to, guns - perceptions specifically contradicted by
34 PHA's own psychologist. While a similarly situated employee who was not perceived to
35 have this additional limitation would have been allowed a radio room assignment,
36 Williams was specifically denied such an assignment because of the erroneous perception
37 of his disability. The employee whose limitations are perceived accurately gets to work,
38 while Williams is sent home unpaid. This is precisely the type of discrimination the
39 "regarded as" prong literally protects from Accordingly, Williams, to the extent
40 PHA regarded him as disabled, was entitled to reasonable accommodation

41
42 Thus, an employee "regarded as" having a disability is entitled to the same accommodation that
43 he would receive were he actually disabled. *See also Kelly v. Metallics West, Inc.*, 410 F.3d 670,
44 676 (10th Cir. 2005) ("An employer who is unable or unwilling to shed his or her stereotypic
45 assumptions based on a faulty or prejudiced perception of an employee's abilities must be

1 prepared to accommodate the artificial limitations created by his or her own faulty perceptions.
2 In this sense, the ADA encourages employers to become more enlightened about their
3 employees' capabilities, while protecting employees from employers whose attitudes remain
4 mired in prejudice.”).

5

6 *Direct Threat*

7

8 The ADA provides a defense if the employment or accommodation of an otherwise
9 qualified, disabled individual would pose a “direct threat” to the individual or to others. The
10 “direct threat” affirmative defense is applicable both to disparate treatment claims and reasonable
11 accommodation claims. See *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002); *Buskirk v.*
12 *Apollo Metals*, 307 F.3d 160, 168 (3d Cir. 2002). See 9.3.1 for an instruction on the “direct
13 threat” affirmative defense.

14

15 *Statutory Definitions*

16

17 The ADA employs complicated and sometimes counterintuitive statutory definitions for
18 many of the important terms that govern a disparate treatment action. Instructions for these
19 statutory definitions are set forth at 9.2.1-2. They are not included in the body of the reasonable
20 accommodations instruction because not all of them will ordinarily be in dispute in a particular
21 case, and including all of them would unduly complicate the basic instruction.

1 **9.1.4 Elements of an ADA Claim — Harassment — Hostile Work**
2 **Environment — Tangible Employment Action**

3
4 **Model**

5
6 [Plaintiff] claims that [he/she] was subjected to harassment by [names] and that this
7 harassment was motivated by [plaintiff's] [disability/request for accommodation].

8
9 [Employer] is liable for the actions of [names] in plaintiff's claim of harassment if
10 [plaintiff] proves all of the following elements by a preponderance of the evidence:

11
12 First: [Plaintiff] has a "disability" within the meaning of the ADA;

13
14 Second: [Plaintiff] is a "qualified individual" within the meaning of the ADA;

15
16 Third: [Plaintiff] was subjected to [describe alleged conduct or conditions giving rise to
17 plaintiff's claim] by [names].

18
19 Fourth: [names] conduct was not welcomed by [plaintiff].

20
21 Fifth: [names] conduct was motivated by the fact that [plaintiff] has a "disability," as
22 defined by the ADA [or sought an accommodation for that disability].

23
24 Sixth: The conduct was so severe or pervasive that a reasonable person in [plaintiff's]
25 position would find [plaintiff's] work environment to be hostile or abusive. This element
26 requires you to look at the evidence from the point of view of the reaction of a reasonable
27 person with [plaintiff's] disability to [plaintiff's] work environment.

28
29 Seventh: [Plaintiff] believed [his/her] work environment to be hostile or abusive as a
30 result of [names] conduct.

31
32 Eighth: [Plaintiff] suffered an adverse "tangible employment action" as a result of the
33 hostile work environment; a tangible employment action is defined as a significant
34 change in employment status, such as hiring, firing, failing to promote, reassignment with
35 significantly different responsibilities, or a decision causing significant change in
36 benefits.

37
38 **[For use when the alleged harassment is by non-supervisory employees:**

39
40 Ninth: Management level employees knew, or should have known, of the abusive
41 conduct. Management level employees should have known of the abusive conduct if 1)
42 an employee provided management level personnel with enough information to raise a
43 probability of harassment on grounds of disability [or request for accommodation] in the
44 mind of a reasonable employer, or if 2) the harassment was so pervasive and open that a

1 reasonable employer would have had to be aware of it.]

2
3 [I will now provide you with more explicit instructions on the following statutory terms:

4
5 1. "Disability." — Instruction 9.2.1

6
7 2. "Qualified" — See Instruction 9.2.2]

8
9
10 **Comment**

11
12 In *Walton v. Mental Health Assoc. of Southeastern Pennsylvania*, 168 F.3d 661, 666 (3d
13 Cir. 1999), the court considered whether a cause of action for harassment/hostile work
14 environment was cognizable under the ADA. The court's analysis is as follows:

15
16 The Supreme Court has held that language in Title VII that is almost identical to
17 the . . . language in the ADA creates a cause of action for a hostile work environment.
18 See *Patterson v. McLean Credit Union*, 491 U.S. 164, 180 (1989). In addition, we have
19 recognized that:

20
21 in the context of employment discrimination, the ADA, ADEA and Title VII all
22 serve the same purpose--to prohibit discrimination in employment against
23 members of certain classes. Therefore, it follows that the methods and manner of
24 proof under one statute should inform the standards under the others as well.
25 Indeed, we routinely use Title VII and ADEA caselaw interchangeably, when
26 there is no material difference in the question being addressed.

27
28 *Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153, 157 (3d Cir. 1995). This framework
29 indicates that a cause of action for harassment exists under the ADA. However, like other
30 courts, we will assume this cause of action without confirming it because Walton did not
31 show that she can state a claim.

32
33 The *Walton* court also noted that many courts "have proceeded on the assumption that the ADA
34 creates a cause of action for a hostile work environment but avoided confirming that the claim
35 exists." See, e.g., *Wallin v. Minnesota Dept. of Corrections*, 153 F.3d 681, 687-88 (8th Cir. 1998)
36 ("We will assume, without deciding, that such a cause of action exists."); *McConathy v. Dr.*
37 *Pepper/Seven Up Corp.*, 131 F.3d 558, 563 (5th Cir. 1998) (noting that various district courts
38 have assumed the claim's existence and assuming its existence in order to dispense with appeal).
39 District courts in the Third Circuit have also assumed, without deciding, that a claim for
40 harassment exists under the ADA. See, e.g., *Vendetta v. Bell Atlantic Corp.*, 1998 WL 575111
41 (E.D. Pa. Sep. 8, 1998) (noting that because the Supreme Court has read a cause of action for
42 harassment into Title VII, the same is appropriate under the ADA). There appears to be no
43 reported case holding that a harassment claim cannot be asserted under the ADA.

1 Accordingly, instructions are included herein to cover harassment claims under the ADA;
2 these instructions conform to the instructions for harassment claims in Title VII and ADEA
3 actions. *See Walton*, 168 F.3d at 667 (“A claim for harassment based on disability, like one under
4 Title VII, would require a showing that: 1) Walton is a qualified individual with a disability
5 under the ADA; 2) she was subject to unwelcome harassment; 3) the harassment was based on
6 her disability or a request for an accommodation; 4) the harassment was sufficiently severe or
7 pervasive to alter the conditions of her employment and to create an abusive working
8 environment; and 5) that [the employer] knew or should have known of the harassment and
9 failed to take prompt effective remedial action.”).

10
11 If the court wishes to provide a more detailed instruction on what constitutes a hostile
12 work environment, such an instruction is provided in 9.2.3.

13
14 It should be noted that constructive discharge is the adverse employment action that is
15 most common with claims of hostile work environment.⁵ Instruction 9.2.4 provides an
16 instruction setting forth the relevant factors for a finding of constructive discharge. That
17 instruction can be used to amplify the term “adverse employment action” in appropriate cases. In
18 *Spencer v. Wal-Mart Stores, Inc.*, 469 F.3d 311, 317 (3d Cir. 2006), the court held that an ADA
19 plaintiff cannot receive back pay in the absence of a constructive discharge. “Put simply, if a
20 hostile work environment does not rise to the level where one is forced to abandon the job, loss
21 of pay is not an issue.”

22
23 The instruction’s definition of “tangible employment action” is taken from *Burlington*
24 *Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

25
26 Respondeat superior liability for harassment by non-supervisory employees⁶ exists only

⁵ As Comment 9.1.5 notes (by analogy to the framework for Title VII hostile environment claims) the employer may raise an affirmative defense under *Faragher v. Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), if no tangible employment action has been taken against the plaintiff. In *Pennsylvania State Police v. Suders*, 542 U.S. 129, 140-41 (2004), the Court addressed the question of constructive discharge in a Title VII case, holding “that an employer does not have recourse to the *Ellerth/ Faragher* affirmative defense when a supervisor's official act precipitates the constructive discharge; absent such a ‘tangible employment action,’ however, the defense is available to the employer whose supervisors are charged with harassment.” Assuming that the same approach applies in ADA cases, Instruction 9.1.4 is appropriate for use in cases where the evidence supports a claim that the constructive discharge resulted from an official act or acts. However, where the constructive discharge did not result from an official act, an affirmative defense is available to the employer and Instruction 9.1.5 should be used instead.

⁶ In the context of Title VII claims, the Supreme Court has held that “an employee is a ‘supervisor’ for purposes of vicarious liability . . . if he or she is empowered by the employer to take tangible employment actions against the victim...” *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013). For further discussion of *Vance*, see Comment 5.1.4.

1 where “the defendant knew or should have known of the harassment and failed to take prompt
2 remedial action.” *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990). *See also*
3 *Kunin v. Sears Roebuck and Co.*, 175 F.3d 289, 294 (3d Cir. 1999):

4
5 [T]here can be constructive notice in two situations: where an employee provides
6 management level personnel with enough information to raise a probability of sexual
7 harassment in the mind of a reasonable employer, or where the harassment is so
8 pervasive and open that a reasonable employer would have had to be aware of it. We
9 believe that these standards strike the correct balance between protecting the rights of the
10 employee and the employer by faulting the employer for turning a blind eye to overt
11 signs of harassment but not requiring it to attain a level of omniscience, in the absence of
12 actual notice, about all misconduct that may occur in the workplace.

13
14 For a discussion of the definition of “management level personnel” in a Title VII case, see
15 Comment 5.1.4 (discussing *Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 108
16 (3d Cir. 2009)).

17
18 The Supreme Court in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993), explained that
19 a hostile work environment claim has both objective and subjective components. A hostile
20 environment must be “one that a reasonable person would find hostile and abusive, and one that
21 the victim in fact did perceive to be so.” The instruction accordingly sets forth both objective and
22 subjective components.

23
24 For further commentary on hostile work environment claims, see Comment 5.1.4.

1 **9.1.5 Elements of an ADA Claim — Harassment — Hostile Work**
2 **Environment — No Tangible Employment Action**
3
4

5 **Model**
6

7 [Plaintiff] claims that [he/she] was subjected to harassment by [names] and that this
8 harassment was motivated by [plaintiff's] [disability/request for accommodation].
9

10 [Employer] is liable for the actions of [names] in [plaintiff's] claim of harassment if
11 [plaintiff] proves all of the following elements by a preponderance of the evidence:
12

13 First: [Plaintiff] has a “disability” within the meaning of the ADA;
14

15 Second: [Plaintiff] is a “qualified individual” within the meaning of the ADA;
16

17 Third: [Plaintiff] was subjected to [describe alleged conduct or conditions giving rise to
18 plaintiff's claim] by [names].
19

20 Fourth: [names] conduct was not welcomed by [plaintiff].
21

22 Fifth: [names] conduct was motivated by the fact that [plaintiff] has a “disability,” as
23 defined by the ADA [or sought an accommodation for that disability].
24

25 Sixth: The conduct was so severe or pervasive that a reasonable person in [plaintiff's]
26 position would find [plaintiff's] work environment to be hostile or abusive. This element
27 requires you to look at the evidence from the point of view of the reaction of a reasonable
28 person with [plaintiff's] disability to [plaintiff's] work environment.
29

30 Seventh: [Plaintiff] believed [his/her] work environment to be hostile or abusive as a
31 result of [names] conduct.
32

33 **[For use when the alleged harassment is by non-supervisory employees:**
34

35 Eighth: Management level employees knew, or should have known, of the abusive
36 conduct. Management level employees should have known of the abusive conduct if 1)
37 an employee provided management level personnel with enough information to raise a
38 probability of harassment on grounds of disability [or request for accommodation] in the
39 mind of a reasonable employer, or if 2) the harassment was so pervasive and open that a
40 reasonable employer would have had to be aware of it.]
41

42 [I will now provide you with more explicit instructions on the following statutory terms:
43
44

1. “Disability.” — Instruction 9.2.1

1
2 2. “Qualified” — See Instruction 9.2.2]
3
4

5 If any of the above elements has not been proved by a preponderance of the evidence,
6 your verdict must be for [defendant] and you need not proceed further in considering this claim.
7 If you find that the elements have been proved, then you must consider [defendant’s] affirmative
8 defense. I will instruct you now on the elements of that affirmative defense.
9

10 You must find for [defendant] if you find that [defendant] has proved both of the
11 following elements by a preponderance of the evidence:
12

13 First: That [defendant] exercised reasonable care to prevent harassment in the workplace
14 on the basis of a disability [or request for accommodation], and also exercised reasonable
15 care to promptly correct any harassing behavior that does occur.
16

17 Second: That [plaintiff] unreasonably failed to take advantage of any preventive or
18 corrective opportunities provided by [defendant].
19

20 Proof of the following facts will be enough to establish the first element that I just
21 referred to, concerning prevention and correction of harassment:
22

23 1. [Defendant] had established an explicit policy against harassment in the
24 workplace on the basis of disability [or request for accommodation].
25

26 2. That policy was fully communicated to its employees.
27

28 3. That policy provided a reasonable way for [plaintiff] to make a claim of
29 harassment to higher management.
30

31 4. Reasonable steps were taken to correct the problem, if raised by [plaintiff].
32

33 On the other hand, proof that [plaintiff] did not follow a reasonable complaint procedure
34 provided by [defendant] will ordinarily be enough to establish that [plaintiff] unreasonably failed
35 to take advantage of a corrective opportunity.
36
37

38 **Comment**
39

40 As discussed in the Comment to Instruction 9.1.4, the Third Circuit has assumed that the
41 ADA provides a cause of action for harassment/hostile work environment, and that such a cause
42 of action (assuming it exists) is to be governed by the same standards applicable to a hostile
43 work environment claim under Title VII. *Walton v. Mental Health Assoc. of Southeastern*
44 *Pennsylvania*, 168 F.3d 661, 666 (3d Cir. 1999).

1
2 This instruction is substantively identical to Instruction 5.1.5, covering hostile work
3 environment claims with no tangible employment action under Title VII. Like Title VII — and
4 unlike Section 1981 — the ADA regulates employers only, and not individual employees.
5 Therefore, the instruction is written in terms of employer liability for the acts of its employees.
6

7 This instruction is to be used in discriminatory harassment cases where the plaintiff did
8 not suffer any “tangible” employment action such as discharge or demotion or constructive
9 discharge, but rather suffered “intangible” harm flowing from harassment that is “sufficiently
10 severe or pervasive to create a hostile work environment.” *Faragher v. Boca Raton*, 524 U.S.
11 775, 808 (1998). In *Faragher* and in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998),
12 the Court held that an employer is strictly liable for supervisor harassment that “culminates in a
13 tangible employment action, such as discharge, demotion, or undesirable reassignment.” *Ellerth*,
14 524 U.S. at 765. But when no such tangible action is taken, the employer may raise an
15 affirmative defense to liability. To prevail on the basis of the defense, the employer must prove
16 that “(a) [it] exercised reasonable care to prevent and correct promptly any sexually harassing
17 behavior,” and that (b) the employee “unreasonably failed to take advantage of any preventive or
18 corrective opportunities provided by the employer or to avoid harm otherwise.” *Ellerth*, 524
19 U.S. at 751 (1998).
20

21 Besides the affirmative defense provided by *Ellerth*, the absence of a tangible
22 employment action also justifies requiring the plaintiff to prove a further element, in order to
23 protect the employer from unwarranted liability for the discriminatory acts of its non-supervisor
24 employees.⁷ Respondeat superior liability for the acts of non-supervisory employees exists only
25 where “the defendant knew or should have known of the harassment and failed to take prompt
26 remedial action.” *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990). *See also*
27 *Kunin v. Sears Roebuck and Co.*, 175 F.3d 289, 294 (3d Cir. 1999):
28

29 [T]here can be constructive notice in two situations: where an employee provides
30 management level personnel with enough information to raise a probability of sexual
31 harassment in the mind of a reasonable employer, or where the harassment is so
32 pervasive and open that a reasonable employer would have had to be aware of it. We
33 believe that these standards strike the correct balance between protecting the rights of the
34 employee and the employer by faulting the employer for turning a blind eye to overt
35 signs of harassment but not requiring it to attain a level of omniscience, in the absence of
36 actual notice, about all misconduct that may occur in the workplace.
37

38 For a discussion of the definition of “management level personnel” in a Title VII case, see
39 Comment 5.1.4 (discussing *Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 108
40 (3d Cir. 2009)).

⁷ In the context of Title VII claims, the Supreme Court has held that “an employee is a ‘supervisor’ for purposes of vicarious liability . . . if he or she is empowered by the employer to take tangible employment actions against the victim.” *Vance v. Ball State University*, 133 S. Ct. 2434, 2439 (2013). For further discussion of *Vance*, see Comment 5.1.5.

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The Supreme Court in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993), explained that a hostile work environment claim has both objective and subjective components. A hostile environment must be “one that a reasonable person would find hostile and abusive, and one that the victim in fact did perceive to be so.” The instruction accordingly sets forth both objective and subjective components.

In *Spencer v. Wal-Mart Stores, Inc.*, 469 F.3d 311, 317 (3d Cir. 2006), the court held that an ADA plaintiff cannot receive back pay in the absence of a constructive discharge. “Put simply, if a hostile work environment does not rise to the level where one is forced to abandon the job, loss of pay is not an issue.”

If the court wishes to provide a more detailed instruction on what constitutes a hostile work environment, such an instruction is provided in 9.2.3.

For further commentary on hostile work environment claims, see Instructions 5.1.4 and 5.1.5.

1 **9.1.6 Elements of an ADA Claim — Disparate Impact**

2
3
4 *No Instruction*

5
6
7 **Comment**

8
9 Disparate impact claims are cognizable under the ADA. *Raytheon Co. v. Hernandez*, 540
10 U.S. 44, 50 (2003) (“Both disparate-treatment and disparate-impact claims are cognizable under
11 the ADA.”). See 42 U.S.C. § 12112(b) (defining "discriminate" to include "utilizing standards,
12 criteria, or methods of administration . . . that have the effect of discrimination on the basis of
13 disability" and "using qualification standards, employment tests or other selection criteria that
14 screen out or tend to screen out an individual with a disability"). No instruction is provided on
15 disparate impact claims, however, because a right to jury trial is not provided under the ADA for
16 such claims. 42 U.S.C.A. § 1981a(a)(1) provides that in an action brought under 42 U.S.C. §
17 2000e-5 (Title VII), a plaintiff may recover compensatory and punitive damages, *but not* if the
18 allegation is that an employment practice is unlawful “because of its disparate impact.” Thus
19 under Title VII, disparate impact claimants cannot recover damages, and therefore there is no
20 right to jury trial for such claims. See *Pollard v. Wawa Food Market*, 366 F.Supp.2d 247
21 (E.D.Pa. 2005) (striking a demand for a jury trial on a disparate impact claim brought under Title
22 VII). The same result is mandated for ADA disparate impact claims, because the enforcement
23 provision of the ADA, 42 U.S.C. § 12117 specifically provides for the same recovery in ADA
24 actions as in Title VII actions: “The powers, remedies and procedures set forth in . . . [42 U.S.C.
25 § 2000e-5] shall be the powers, remedies and procedures this title provides to . . . any person
26 alleging discrimination on the basis of disability in violation of any provision of this Act . . .
27 concerning employment.”

28
29 In *Smith v. City of Jackson*, 544 U.S. 228 (2005), the Supreme Court held that disparate
30 impact claims are cognizable under the Age Discrimination in Employment Act. The ADEA
31 provides a right to jury trial in such claims. See 29 U.S.C. § 626(c)(2) (“[A] person shall be
32 entitled to a trial by jury of any issue of fact in any [ADEA] action . . . regardless of whether
33 equitable relief is sought by any party in such action.”) If an ADEA disparate impact claim is
34 tried together with an ADA disparate impact claim, the parties or the court may decide to refer
35 the ADA claim to the jury. In that case, the instruction provided for ADEA disparate impact
36 claims (see Instruction 8.1.5) can be modified to apply to the ADA claim. Care must be taken,
37 however, to instruct separately on the ADA disparate impact claim, as the substantive standards
38 of recovery under the ADA in disparate impact cases may be different from those applicable to
39 the ADEA. See the Comment to Instruction 8.1.5 for a more complete discussion.

1 **9.1.7 Elements of an ADA Claim — Retaliation**⁸

2
3 **Model**

4
5 [Plaintiff] claims that [defendant] discriminated against [him/her] because of [plaintiff's]
6 [describe protected activity].⁹

7
8 To prevail on this claim, [plaintiff] must prove all of the following by a preponderance
9 of the evidence:

10
11 First: [Plaintiff] [describe activity protected by the ADA].

12
13 Second: [Plaintiff] was subjected to a materially adverse action at the time, or after, the
14 protected conduct took place.

15
16 Third: There was a causal connection between [describe challenged activity] and
17 [plaintiff's] [describe protected activity].

18
19 Concerning the first element, [plaintiff] need not prove the merits of [describe conduct],
20 but only that [plaintiff] was acting under a good faith belief that [plaintiff's] [or someone else's]
21 right to be [free from discrimination on the basis of a disability] [free to request an
22 accommodation for a disability] was violated.

23
24 Concerning the second element, the term “materially adverse” means that [plaintiff] must
25 show [describe alleged retaliatory activity] was serious enough that it well might have
26 discouraged a reasonable worker from [describe protected activity]. [The activity need not be
27 related to the workplace or to [plaintiff's] employment.]

28
29 Concerning the third element, that of causal connection, that connection may be shown in
30 many ways. For example, you may or may not find that there is a sufficient connection through
31 timing, that is [defendant's] action followed shortly after [defendant] became aware of [describe
32 activity]. Causation is, however, not necessarily ruled out by a more extended passage of time.
33 Causation may or may not be proven by antagonism shown toward [plaintiff] or a change in
34 demeanor toward [plaintiff].

35
36 [Plaintiff] can recover for retaliation even if [plaintiff] did not have a “disability” within

⁸ Some courts have held that there is no right to jury trial for an ADA retaliation claim. See the Comment to this instruction.

⁹ In some cases, an employer might retaliate against a plaintiff for the protected activity of another employee. As Comment 9.1.7 discusses, Instruction 9.1.7 can be modified to address such third-party retaliation claims.

1 the meaning of the ADA. The question is not whether there was a “disability” but whether
2 [defendant] retaliated for the [describe protected activity of plaintiff].
3

4 Ultimately, you must decide whether [plaintiff's] [protected activity] had a determinative
5 effect on [describe alleged retaliatory activity]. “Determinative effect” means that if not for
6 [plaintiff's] [protected activity], [describe alleged retaliatory activity] would not have occurred.
7

8 **Comment**

9 *The Right to Jury Trial for ADA Retaliation Claims*

10
11
12 At least one court in the Third Circuit has held that a plaintiff's recovery for retaliation
13 under the ADA is limited to equitable relief, and accordingly there is no right to jury trial on an
14 ADA retaliation claim. The court in *Sabbrese v. Lowe's Home Centers, Inc.*, 320 F.Supp.2d 311,
15 331 (W.D.Pa. 2004), considered a defendant's claim that the plaintiff did not have a right to a
16 jury trial on his ADA retaliation claim. The plaintiff argued that because compensatory and
17 punitive damages are available for retaliation actions under Title VII, they likewise are available
18 for an ADA retaliation claim.
19

20 The *Sabbrese* court agreed with the defendant, finding persuasive the Seventh Circuit's
21 analysis in *Kramer v. Banc of America Securities LLC*, 355 F.3d 961 (7th Cir. 2004). The
22 *Sabbrese* court's analysis on the jury trial question is as follows:
23

24 The enforcement provision of the ADA is codified at 42 U.S.C. § 12117. That section
25 provides that the available remedies under the ADA are the same as provided in the 1964
26 Civil Rights Act, 42 U.S.C. § 2000e-4 through e-9. Section 2000e-5(g)(1) of the Civil
27 Rights Act limits the remedies available under that act to equitable relief, including back
28 pay, but does not provide for compensatory or punitive damages. *Kramer*, 355 F.3d at
29 964. The 1991 Civil Rights Act, 42 U.S.C. § 1981a(a)(2), expanded the remedies
30 available in section 2000e-5(g)(1) to provide for compensatory and punitive damages in
31 certain circumstances. With respect to the ADA, section 1981a(a)(2) provided that a
32 complaining party could recover compensatory and punitive damages for violations of
33 section 102 or section 102(b)(5) of the ADA, codified at 42 U.S.C. §§ 12112 and
34 12112(b)(5). Sections 12112 and 12112(b)(5) deal with an employer's failure to make
35 reasonable accommodations to a qualified employee with a disability [and also to
36 disparate treatment claims], while section 12203 - not listed in section 1981a(a)(2) -
37 establishes retaliation claims under the ADA.
38

39 After reviewing the applicable statutes, the United States Court of Appeals for the
40 Seventh Circuit concluded that the plaintiff was precluded from recovering compensatory
41 and punitive damages under her ADA retaliation claim. The court determined that section
42 1981a(a)(2) permitted recovery of compensatory and punitive damages only for the
43 claims listed in that statute, such as section 12112 of the ADA, and since the section
44 establishing retaliation claims under the ADA (42 U.S.C. § 12203) was not listed,

1 compensatory and punitive damages were unavailable. This court adopts the persuasive
2 rationale of *Kramer* and accordingly holds that compensatory and punitive damages are
3 not available.
4

5 After finding that only equitable relief was available for a claim of retaliation under the
6 ADA, the *Sabbrese* court referred to Third Circuit authority to determine that the plaintiff had no
7 right to jury trial on the claim:
8

9 The United States Court of Appeals for the Third Circuit offered guidance with
10 respect to whether the right to a trial by jury exists in *Cox v. Keystone Carbon Co.*, 861
11 F.2d 390 (3d Cir. 1988). There, the court stated that "in determining a party's right to a
12 jury trial it is the procedural and remedial sections of the statute creating the right which
13 must be examined." *Id.* at 392. The court concluded that "where the particular remedial
14 section in the statute provides for only equitable remedies then no right to a jury trial
15 exists." *Id.* The court further cautioned that "within a particular statute a right to a jury
16 might exist as to some of the enforcement sections and not as to others," and that courts
17 must be careful to examine the applicable subsections at issue to determine which
18 remedies are available. *Id.* *Cox*, thus, requires the court to examine the statutory
19 provisions of the ADA concerning retaliation claims in order to determine the nature of
20 relief that may be awarded. If the court determines that the remedy is "explicitly
21 equitable, then there is no seventh amendment right to a jury." *Id.* (citing *Curtis v.*
22 *Loether*, 415 U.S. 189, 194-95 (1974).
23

24 As noted above, since compensatory and punitive damages are not available, the
25 sole remedy for plaintiff's retaliation claims pursuant to the ADA is equitable relief.
26 Under the mandate of *Cox*, because plaintiff's sole remedy under his ADA retaliation
27 claim is equitable, plaintiff is not entitled to a jury trial on that claim. Accordingly,
28 defendant's motion to strike [the demand for jury trial] is granted.
29

30 The *Sabbrese* court noted that "[n]either the court nor any of the parties were able to
31 locate any decisions in which the United States Court of Appeals for the Third Circuit implicitly
32 upheld an award of compensatory or punitive damages for ADA retaliation claims." It should be
33 noted that courts in other circuits have found that damages (and a right to jury trial) are available
34 in retaliation actions under the ADA. *See, e.g., Foster v. Time Warner Entertainment Co.*, 250
35 F.3d 1189 (8th Cir. 2001); *Lovejoy-Wilson v. Noco Motor Fuels, Inc.*, 242 F.Supp.2d 236
36 (W.D.N.Y. 2003) (citing cases).
37

38 A pattern instruction for retaliation actions under the ADA is included here for two
39 reasons. First, the Third Circuit has not yet considered whether there is a right to jury trial in
40 ADA retaliation actions, and other courts are in disagreement on the question. Second, even if it
41 is determined that there is no right to jury trial for ADA retaliation claims, the parties or the
42 court may wish to have a jury render an advisory verdict on a plaintiff's ADA retaliation claim.
43 *See* Fed. R.Civ.P. 39(c). Alternatively, the parties may wish to stipulate to a jury's resolution of a
44 retaliation claim. Use of an advisory or a stipulated jury may especially be useful in cases where
45 a retaliation claim is joined with an ADA disparate treatment or accommodation claim, as there

1 is a right to jury trial for those claims and many of the issues to be decided by the jury for those
2 claims might overlap with the retaliation claim.

3 4 *The Basics of a Retaliation Claim under the ADA*

5
6 The ADA provides: "No person shall discriminate against any individual because such
7 individual has opposed any act or practice made unlawful by [the ADA] or because such
8 individual made a charge . . . under [the ADA]." 42 U.S.C. § 12203(a). "Thus, it is unlawful for
9 an employer to retaliate against an employee based upon the employee's opposition to anything
10 that is unlawful under the ADA." *Shellenberger v. Summit Bancorp, Inc.*, 318 F.3d 183, 188 (3d
11 Cir. 2003).

12
13 Unlike a claim for discrimination, accommodation or harassment, an ADA retaliation
14 claim does not require that a plaintiff show that he or she is "disabled" within the meaning of the
15 ADA. *Shellenberger, v. Summit Bancorp, Inc.*, 318 F.3d 183, 188 (3d Cir. 2003) ("we note that
16 Shellenberger's failure to establish that she was disabled does not prevent her from recovering if
17 she can establish that her employer terminated her because she engaged in activity protected
18 under the ADA."). This is because the text of the ADA retaliation provision protects "any
19 individual" who has opposed any act or practice made unlawful by the ADA or who has made a
20 charge under the ADA. This differs from the scope of the ADA disability discrimination
21 provision, 42 U.S.C. § 12112(a), which may be invoked only by a "qualified individual with a
22 disability."

23 24 *Protected Activity*

25
26 Activity protected from retaliation under the ADA includes not only bringing or
27 participating in formal actions to enforce ADA rights, but also informal activity such as
28 requesting an accommodation for a disability. *Shellenberger, v. Summit Bancorp, Inc.*, 318 F.3d
29 183, 188 (3d Cir. 2003). The plaintiff must have had a good faith belief in the merits of an
30 accommodation request in order for the activity to be protected against retaliation. *Id.* ("the
31 protection from retaliation afforded under the ADA does not extend to an employee whose
32 request is motivated by something other than a good faith belief that he/she needs an
33 accommodation"). *See also Sulima v. Tobyhanna Army Depot*, 602 F.3d 177, 189 (3d Cir. 2010)
34 ("Sulima could not have had a good faith belief that these side effects were anything but
35 temporary, and therefore he could not have had a good faith belief that he was disabled within
36 the meaning of the ADA.").

37 38 *Standard for Actionable Retaliation*

39
40 The Supreme Court in *Burlington N. & S.F. Ry. v. White*, 126 S.Ct. 2405, 2415 (2006),
41 held that a cause of action for retaliation under Title VII lies whenever the employer responds to
42 protected activity in such a way "that a reasonable employee would have found the challenged
43 action materially adverse, which in this context means it well might have dissuaded a reasonable
44 worker from making or supporting a charge of discrimination." (citations omitted). The Court

1 elaborated on this standard in the following passage:
2

3 We speak of *material* adversity because we believe it is important to separate
4 significant from trivial harms. Title VII, we have said, does not set forth "a general
5 civility code for the American workplace." *Oncala v. Sundowner Offshore Services, Inc.*,
6 523 U.S. 75, 80, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998). An employee's decision to
7 report discriminatory behavior cannot immunize that employee from those petty slights
8 or minor annoyances that often take place at work and that all employees experience. See
9 1 B. Lindemann & P. Grossman, *Employment Discrimination Law* 669 (3d ed. 1996)
10 (noting that "courts have held that personality conflicts at work that generate antipathy"
11 and "'snubbing' by supervisors and co-workers" are not actionable under § 704(a)). The
12 anti-retaliation provision seeks to prevent employer interference with "unfettered access"
13 to Title VII's remedial mechanisms. It does so by prohibiting employer actions that are
14 likely "to deter victims of discrimination from complaining to the EEOC," the courts, and
15 their employers. And normally petty slights, minor annoyances, and simple lack of good
16 manners will not create such deterrence. See 2 EEOC 1998 Manual § 8, p. 8-13.
17

18 We refer to reactions of a *reasonable* employee because we believe that the
19 provision's standard for judging harm must be objective. An objective standard is
20 judicially administrable. It avoids the uncertainties and unfair discrepancies that can
21 plague a judicial effort to determine a plaintiff's unusual subjective feelings. We have
22 emphasized the need for objective standards in other Title VII contexts, and those same
23 concerns animate our decision here. See, *e.g.*, [*Pennsylvania State Police v.*] *Suders*, 542
24 U.S., at 141, 124 S. Ct. 2342, 159 L. Ed. 2d 204 (constructive discharge doctrine); *Harris*
25 *v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993)
26 (hostile work environment doctrine).

27 We phrase the standard in general terms because the significance of any given act
28 of retaliation will often depend upon the particular circumstances. Context matters. . . . A
29 schedule change in an employee's work schedule may make little difference to many
30 workers, but may matter enormously to a young mother with school age children. A
31 supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable
32 petty slight. But to retaliate by excluding an employee from a weekly training lunch that
33 contributes significantly to the employee's professional advancement might well deter a
34 reasonable employee from complaining about discrimination. Hence, a legal standard
35 that speaks in general terms rather than specific prohibited acts is preferable, for an act
36 that would be immaterial in some situations is material in others.

37 Finally, we note that . . . the standard is tied to the challenged retaliatory act, not
38 the underlying conduct that forms the basis of the Title VII complaint. By focusing on the
39 materiality of the challenged action and the perspective of a reasonable person in the
40 plaintiff's position, we believe this standard will screen out trivial conduct while
41 effectively capturing those acts that are likely to dissuade employees from complaining or
42 assisting in complaints about discrimination.

43 126 S.Ct. at 2415 (some citations omitted).

1
2 The anti-retaliation provision of Title VII, construed by the Court in *White*, is
3 substantively identical to the ADA provision on retaliation, *supra*. This instruction therefore
4 follows the guidelines of the Supreme Court's decision in *White*.

5
6 *No Requirement That Retaliation Be Job-Related To Be Actionable*
7

8 The Supreme Court in *Burlington N. & S.F. Ry. v. White*, 126 S.Ct. 2405, 2413 (2006),
9 held that retaliation need not be job-related to be actionable under Title VII. In doing so, the
10 Court rejected authority from the Third Circuit (and others) requiring that the plaintiff suffer an
11 adverse employment action in order to recover for retaliation. The Court distinguished Title VII's
12 retaliation provision from its basic anti-discrimination provision, which does require an adverse
13 employment action. The Court noted that unlike the basic anti-discrimination provision, which
14 refers to conditions of employment, the anti-retaliation provision is broadly worded to prohibit
15 *any* discrimination by an employer in response to protected activity.
16

17 Because the ADA anti-retaliation provision is substantively identical to the Title VII
18 provision construed in *White* — it broadly prohibits discrimination without reference to
19 employment-related decisions — this instruction contains bracketed material to cover a
20 plaintiff's claim for retaliation that is not job-related. For further discussion of *White*, see the
21 Comment to Instruction 5.1.7.
22

23 *Time Period Between Protected Activity and the Allegedly Retaliatory Action*
24

25 On the relevance of the length of time between protected activity and an alleged
26 retaliatory act, *see Williams v. Philadelphia Housing Auth. Police Dept.*, 380 F.3d 751, 757 (3d
27 Cir. 2004), a case involving termination:
28

29 We have held in the ADA retaliation context that "temporal proximity between
30 the protected activity and the termination [can be itself] sufficient to establish a causal
31 link." *Shellenberger, v. Summit Bancorp, Inc.*, 318 F.3d 183, 188 (3d Cir. 2003) (quoting
32 *Woodson v. Scott Paper Co.*, 109 F.3d 913, 920 (3d Cir.1997)). However, "the timing of
33 the alleged retaliatory action must be unusually suggestive of retaliatory motive before a
34 causal link will be inferred." *Shellenberger*, 318 F.3d at 189 n.9. For example, two days
35 between the protected activity engaged in and the alleged retaliation sufficed in *Jalil v.*
36 *Avdel Corp.*, 873 F.2d 701, 708 (3d Cir.1989), to support an inference of a causal
37 connection between the two. Similarly, in *Shellenberger*, comments made by a supervisor
38 suggesting retaliation ten days before termination, along with other evidence of
39 retaliation, were sufficient to establish a prima facie showing of causation.
40

41 Here, over two months elapsed between the time Williams requested a radio room
42 assignment and the time that he was terminated. In cases like this one, "where 'the
43 temporal proximity is not so close as to be unduly suggestive,' we have recognized that
44 'timing plus other evidence may be an appropriate test. . ..'" *Thomas v. Town of*
45 *Hammonton*, 351 F.3d 108, 114 (3d Cir. 2003) (quoting *Estate of Smith v. Marasco*, 318

1 F.3d 497, 513 (3d Cir. 2003)). Williams has, however, put forth no other evidence
2 suggesting that PHA terminated him because he requested a radio room assignment.
3 Moreover, the evidence supporting PHA's alternative explanation is quite compelling. As
4 Williams acknowledges, PHA had granted Williams medical leave on two prior
5 occasions, and there was no indication that PHA would not have done so again had
6 Williams simply [followed company procedures].
7

8 *Protection Against Retaliation For the Protected Activity of Another Person Under the ADA* 9

10 In *Fogleman v. Mercy Hospital, Inc.*, 283 F.3d 561, 562 (3d Cir. 2002), the plaintiff was
11 employed in the same facility as his father. His father engaged in protected activity under the
12 ADA, and the plaintiff alleged that the employer retaliated against the plaintiff. The court held
13 that the plaintiff's third-party retaliation claim could proceed under 42 U.S.C. § 12203(b), which
14 provides:
15

16 It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the
17 exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on
18 account of his or her having aided or encouraged any other individual in the exercise or
19 enjoyment of, any right granted or protected by this chapter.
20

21 In a case involving a third-party retaliation claim, the instruction can be modified to accord with
22 the holding in *Fogleman*. For a discussion of third-party retaliation claims under Title VII and
23 *Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (2011), see Comment 5.1.7.
24

25 *Perceived Protected Activity* 26

27 The court in *Fogleman* also held that the ADA protected an employee against retaliation
28 for "perceived" protected activity. "Because the statutes forbid an employer's taking adverse
29 action against an employee for discriminatory reasons, it does not matter whether the factual
30 basis for the employer's discriminatory animus was correct and that, so long as the employer's
31 specific intent was discriminatory, the retaliation is actionable." 283 F.3d at 562. If the fairly
32 unusual case arises in which the employer is alleged to have retaliated for perceived rather than
33 actual protected activity, then the instruction can be modified consistently with the court's
34 directive in *Fogleman*.
35

36 *"Determinative Effect" Instruction* 37

38 Instruction 9.1.7 requires the plaintiff to show that the plaintiff's protected activity had a
39 "determinative effect" on the allegedly retaliatory activity. Prior to 2013, a distinction between
40 pretext and mixed-motive cases had on occasion been recognized as relevant for both Title VII
41 retaliation claims and ADA retaliation claims: "[W]e analyze ADA retaliation claims under the
42 same framework we employ for retaliation claims arising under Title VII... This framework will
43 vary depending on whether the suit is characterized as a 'pretext' suit or a 'mixed motives' suit."
44 *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 500 (3d Cir. 1997). For Title VII retaliation
45 claims that proceeded on a "pretext" theory, the "determinative effect" standard applied. *See*

1 *Woodson*, 109 F.3d at 935 (holding that it was error, in a case that proceeded on a “pretext”
2 theory, not to use the “determinative effect” language). The same was true for ADA retaliation
3 claims. *See Krouse*, 126 F.3d at 501. Writing in an ADA retaliation case that proceeded on a
4 pretext theory, and citing *Woodson* and *Krouse*, the court of appeals stated in *Shaner v. Synthes*,
5 204 F.3d 494, 501 (3d Cir. 2000), that “[w]e recently have made clear that a plaintiff’s ultimate
6 burden in a retaliation case is to convince the factfinder that retaliatory intent had a
7 ‘determinative effect’ on the employer’s decision.” *Shaner* did not appear, however, to foreclose
8 the use of a mixed-motive framework in an appropriate case, because the court of appeals later
9 held that an ADA retaliation plaintiff had sufficient evidence to justify the use of such a
10 framework: “The evidentiary framework of Shellenberger’s claim will vary depending on
11 whether the suit is characterized as a ‘pretext’ suit or a ‘mixed-motives’ suit. Shellenberger
12 argues that her evidence was sufficient to survive judgment as a matter of law under either
13 theory, and we agree.” *Shellenberger v. Summit Bancorp, Inc.*, 318 F.3d 183, 187 (3d Cir. 2003)
14 (footnote omitted).
15

16 In 2013, the Supreme Court held that the mixed-motive proof framework is unavailable
17 for Title VII retaliation claims. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S.Ct. 2517, 2533
18 (2013) (“Title VII retaliation claims must be proved according to traditional principles of but-for
19 causation, not the lessened causation test stated in [42 U.S.C.] § 2000e–2(m). This requires proof
20 that the unlawful retaliation would not have occurred in the absence of the alleged wrongful
21 action or actions of the employer.”). The *Nassar* Court reasoned that Congress legislated against
22 a background tort principle of “but for” causation, *see Nassar*, 133 S. Ct. at 2523; that Title VII’s
23 retaliation provision uses the word “because,” which is incompatible with a mixed-motive test,
24 *see id.* at 2528; that Congress would have structured the statutory framework differently had it
25 wished to encompass Title VII retaliation claims among those eligible for the statutory mixed-
26 motive test set forth in 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B), *see id.* at 2529; that
27 policy considerations support a restrictive approach to the standards of proof for retaliation
28 claims, *see id.* at 2531-32; and that the “careful balance” that Congress set in the Civil Rights
29 Act of 1991 forecloses the use of the *Price Waterhouse* mixed-motive test for Title VII
30 retaliation claims, *id.* at 2534.
31

32 The Committee has not attempted to determine what, if any, implications *Nassar* and
33 *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009),¹⁰ have for ADA retaliation claims,
34 but users of these instructions may wish to consider that question.

10 The Court in *Nassar* relied upon its prior decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009). In *Gross*, the Supreme Court rejected the use of a mixed-motive framework for claims under the Age Discrimination in Employment Act (ADEA). The *Gross* Court reasoned that it had never held that the mixed-motive framework set by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), applied to ADEA claims; that the ADEA’s reference to discrimination “because of” age indicated that but-for causation is the appropriate test; and that this interpretation was bolstered by the fact that when Congress in 1991 provided the statutory mixed-motive framework codified at 42 U.S.C. § 2000e-5(g)(2)(B), that provision was not drafted so as to cover ADEA claims.

1 **9.2.1 ADA Definitions — Disability**

2
3 **Model**

4
5 Under the ADA, the term “disability” means a [physical/mental] impairment that
6 “substantially limits” a “major life activity.” I will now define some of these terms in more detail.
7 Again, I remind you to consider the specific definitions I give you, and not to use your own
8 opinions as to what these terms mean.

9
10 [“Physical/Mental Impairment”

11
12 The term “physical impairment” means any condition that prevents the body from
13 functioning normally. The term “mental impairment” means any condition that prevents the mind
14 from functioning normally.]

15
16 [Major Life Activities

17
18 Under the ADA, the term “disability” includes a [physical/mental] impairment that
19 substantially limits a major life activity. Major life activities are activities that are of central
20 importance to everyday life. Major life activities include the operation of major bodily functions.
21 I instruct you that [describe activity] is a major life activity within the meaning of the ADA.]

22
23
24 [“Substantially Limiting”

25
26
27 Under the ADA, an impairment “substantially limits” a person’s ability to [describe
28 relevant major life activity] if it prevents or restricts him from [relevant activity] compared to the
29 average person in the general population.

30
31 To decide if [plaintiff’s] [alleged] impairment substantially limits [plaintiff’s] ability to
32 [relevant activity], you should consider the nature of the impairment and how severe it is, how
33 long it is expected to last, and its expected long-term impact.

34
35 [If you find that [plaintiff’s] impairment is a substantial limitation, it does not matter that
36 it can be corrected by the use of such devices as a hearing aid, medication, or prosthetics. [You
37 may, however, consider whether [plaintiff’s] eyesight could be corrected by the use of ordinary
38 eyeglasses or contact lenses.]].

39
40 Only impairments with a permanent or long-term impact are disabilities under the ADA.
41 Temporary injuries and short-term impairments are not disabilities. [Even so, some disabilities
42 are permanent, but only appear from time to time. For example, if a person has a mental or
43 physical disease that usually is not a problem, but flares up from time to time, that can be a
44 disability if it would substantially limit a major life activity when active.]

1
2 [If you find that [plaintiff's] impairment substantially limits one major life activity, you
3 must find that it is a disability even if it does not limit any other major life activity.]
4

5 The name of the impairment or condition is not determinative. What matters is the
6 specific effect of an impairment or condition on the life of [plaintiff].]
7

8
9 **[For use when there is a jury question on whether plaintiff is “regarded as” disabled:**

10
11 The ADA’s definition of “disability” includes not only those persons who are actually
12 disabled, but also those who are “regarded as” having a disability by their employer. The reason
13 for this inclusion is to protect employees from being stereotyped by employers as unable to
14 perform certain activities when in fact they are able to do so. [Plaintiff] is “regarded as” disabled
15 within the meaning of the ADA if [he/she] proves any of the following by a preponderance of the
16 evidence: *[Instruct on any alternative supported by the evidence]*
17

18 1. [Plaintiff] had a physical or mental impairment that did not substantially limit
19 [his/her] ability to perform [describe activity], but was treated by [defendant] as having
20 an impairment that did so limit [his/her] ability to perform the activity; or
21

22 2. [Plaintiff] had an impairment that was substantially limiting in [his/her] ability
23 to perform [describe activity] only because of the attitudes of others toward the
24 impairment; or
25

26 3. [Plaintiff] did not have any impairment, but [defendant] treated [him/her] as
27 having an impairment that substantially limited [plaintiff's] ability to perform [describe
28 activity].
29

30 Also, [Plaintiff] can meet the requirement of being “regarded as” disabled if [he/she] was
31 discriminated against because of an actual or perceived impairment, even if the impairment did
32 not, or was not perceived to, limit a major life activity.”
33

34 [However, [plaintiff] cannot be “regarded as” disabled if [his/her] impairment is
35 temporary and minor. Under the ADA, a temporary impairment is one with an actual or expected
36 duration of six months or less.]]
37

38
39 **[For use when there is a jury question on whether plaintiff has a record of disability:**

40
41 The ADA definition of “disability” includes not only those persons who persons who are
42 actually disabled, but also those who have a “a record of disability.” [Plaintiff] has a “record of
43 disability” if [he/she] proves by a preponderance of the evidence that [he/she] has a record of a
44 “physical or mental impairment” that “substantially limited” [his/her] ability to perform a

1 [describe activity], as I have defined those terms for you. [This means that if [plaintiff] had a
2 disability within the meaning of the ADA [but has now recovered] [but that disability is in
3 remission], [he/she] still fits within the statutory definition because [he/she] has a record of
4 disability.]
5
6

7 **Concluding Instruction:**

8

9 Please keep in mind that the definition of “disability” is to be construed in favor of broad
10 coverage of individuals. The primary question for you to decide is whether [defendant] has
11 complied with its obligations under the ADA.
12
13

14 **Comment**

15

16 The ADA definition of “disability” is complex for a number of reasons: 1) there are three
17 separate types of disability: “actual”, “regarded as”, and “record of” disability; 2) the basic
18 definition of “disability” encompasses three separate subdefinitions, for “impairment”,
19 “substantially limited” and “major life activity”; 3) perhaps most important, the technical
20 definition of “disability” is likely to be different from the term as it is used in the vernacular by
21 most jurors. In most cases, however, the instruction can be streamlined because not every aspect
22 of the definition will be disputed in the case. For example, ordinarily there will be no jury
23 question on whether what the plaintiff suffers from is an impairment.
24

25 *ADA Amendments Act of 2008*

26

27 The ADA Amendments Act of 2008 (P.L. 110-325, 122 Stat. 3555) (the “Act”) made a
28 number of changes to the ADA definition of disability, and statutorily overruled some Supreme
29 Court cases that Congress determined had “narrowed the broad scope of protection intended to
30 be afforded by the ADA, thus eliminating protection for many individuals whom Congress
31 intended to protect.” The basic thrust of the Act is to make it easier for plaintiffs to prove that
32 they are “disabled” within the meaning of the ADA. For example, section 2(b)(5) of the Act
33 provides that “it is the intent of Congress that the primary object of attention in cases brought
34 under the ADA should be whether entities covered under the ADA have complied with their
35 obligations,” and that “the question of whether an individual’s impairment is a disability under
36 the ADA should not demand extensive analysis.” Along the same lines, section 4(a) of the Act
37 provides that the definition of “disability” under the ADA “shall be construed in favor of broad
38 coverage of individuals.” The concluding text of the Instruction implements these general
39 provisions of the Act. In addition, the Act makes specific changes to the statutory definition of
40 “disability” that are discussed below in this Comment.
41

42 *“Impairment”*

43

44 In *Bragdon v. Abbott*, 524 U.S. 624, 632 (1998), the Court determined that an employee

1 with HIV had a physical “impairment” within the meaning of the ADA. The Court noted that the
2 pertinent regulations interpreting the term “impairment” provide as follows:

3
4 (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss
5 affecting one or more of the following body systems: neurological; musculoskeletal;
6 special sense organs; respiratory, including speech organs; cardiovascular; reproductive,
7 digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or

8
9 (B) any mental or psychological disorder, such as mental retardation, organic brain
10 syndrome, emotional or mental illness, and specific learning disabilities.

11
12 45 CFR § 84.3(j)(2)(i) (1997).

13
14 The *Bragdon* Court noted that in issuing these regulations, “HEW decided against
15 including a list of disorders constituting physical or mental impairments, out of concern that any
16 specific enumeration might not be comprehensive.” The Court relied on the commentary
17 accompanying the regulations, which “contains a representative list of disorders and conditions
18 constituting physical impairments, including such diseases and conditions as orthopedic, visual,
19 speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple
20 sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and . . . drug
21 addiction and alcoholism.” After reviewing these sources, the Court concluded that HIV did
22 constitute an impairment within the meaning of the ADA.

23
24 “[S]ide effects from medical treatment may themselves constitute an impairment under
25 the ADA.” *Sulima v. Tobyhanna Army Depot*, 602 F.3d 177, 187 (3d Cir. 2010). But in order
26 for such side effects to constitute an impairment, “it is not enough to show just that the
27 potentially disabling medication or course of treatment was prescribed or recommended by a
28 licensed medical professional. Instead ... the medication or course of treatment must be required
29 in the ‘prudent judgment of the medical profession,’ and there must not be an available
30 alternative that is equally efficacious that lacks similarly disabling side effects.” *Id.* (quoting
31 *Christian v. St. Anthony Med. Ctr.*, 117 F.3d 1051, 1052 (7th Cir. 1997)).

32
33 “*Substantially Limits*”

34
35 The Supreme Court has held that for impairment to “substantially limit” a major life
36 activity, it must “significantly restrict” the plaintiff as compared to the general population. The
37 Court in *Toyota Motor Mfg v. Williams*, 534 U.S. 184, 198 (2002), held that to fall within the
38 definition of “substantially limited” the plaintiff “must have an impairment that prevents or
39 severely restricts the individual from doing activities that are of central importance to most
40 people's daily lives.” But the ADA Amendments Act of 2008 specifically overrules *Toyota* and
41 cases following it. Section (2)(b)(4) and (5) describe the purposes of the Act as follows:

42
43 (4) to reject the standards enunciated by the Supreme Court in *Toyota Motor*
44 *Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms

1 “substantially” and “major” in the definition of disability under the ADA “need to be
2 interpreted strictly to create a demanding standard for qualifying as disabled,” and that to
3 be substantially limited in performing a major life activity under the ADA “an individual
4 must have an impairment that prevents or severely restricts the individual from doing
5 activities that are of central importance to most people's daily lives”;

6
7 (5) to convey congressional intent that the standard created by the Supreme Court in the
8 case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) for
9 “substantially limits”, and applied by lower courts in numerous decisions, has created an
10 inappropriately high level of limitation necessary to obtain coverage under the ADA, to
11 convey that it is the intent of Congress that the primary object of attention in cases
12 brought under the ADA should be whether entities covered under the ADA have
13 complied with their obligations, and to convey that the question of whether an
14 individual's impairment is a disability under the ADA should not demand extensive
15 analysis.

16
17 Furthermore, section 4(a)(4) of the Act provides that the term “substantially limits” “shall be
18 interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.”

19
20 Accordingly, the text of the Instruction does not include any restrictions on the term
21 “substantially limits” such as “severe” or “significant”; and the conclusion to the Instruction
22 provides, consistently with Congressional intent, that the statutory definition of “disability”
23 (including the term “substantially limits”) is to be construed broadly.¹¹

24 25 *Use of Corrective Devices*

26
27 In *Sutton v. United Air Lines*, 527 U.S. 471, 482 (1999), the Court held that the existence
28 of a “disability” under the ADA must be determined in light of corrective measures used by the
29 employee—in that case, the use of eyeglasses to correct severely impaired vision. The Court
30 declared that “it is apparent that if a person is taking measures to correct for, or mitigate, a
31 physical or mental impairment, the effect of those measures— both positive and negative— must
32 be taken into account when judging whether that person is ‘substantially limited’ in a major life
33 activity and thus ‘disabled’ under the Act.” But the ADA Amendments Act of 2008 specifically
34 repudiates the result in *Sutton*.¹² Section (4)(a)(E) of the Act provides that the determination of
35 whether an impairment substantially limits a major life activity “shall be made without regard to
36 the ameliorative effects of mitigating measures such as –

¹¹ In a case involving events that occurred prior to the enactment of the ADA Amendments Act of 2008, the Court of Appeals held that inability to drive at night is relevant to the question whether monocular vision substantially limits the major life activity of seeing. See *Colwell v. Rite Aid Corp.*, 602 F.3d 495, 502 (3d Cir. 2010).

¹² “The resulting statutory section only prohibits the consideration of *ameliorative* mitigatory measures, and does not address potentially negative side effects of medical treatment.” *Sulima v. Tobyhanna Army Depot*, 602 F.3d 177, 186 n.3 (3d Cir. 2010).

1
2 (I) medication, medical supplies, equipment, or appliances, low-vision devices
3 (which do not include ordinary eyeglasses or contact lenses), prosthetics including
4 limbs and devices, hearing aids and cochlear implants or other implantable
5 hearing devices, mobility devices, or oxygen therapy equipment and supplies;

6
7 (II) use of assistive technology;

8
9 (III) reasonable accommodations or auxiliary aids or services; or

10
11 (IV) learned behavioral or adaptive neurological modifications.
12

13 The Act does provide, however, that the “ameliorative effects of the mitigating measures of
14 ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment
15 substantially limits a major life activity.” The text of the Instruction contains a bracketed
16 alternative on corrective devices that comports with the Act.
17

18 *“Major Life Activity”*
19

20 The question of whether the plaintiff is substantially limited in performing a “major life
21 activity” is a question for the jury. *Williams v. Philadelphia Housing Auth. Police Dept.*, 380
22 F.3d 751, 7633d Cir. 2004) (“The question of whether an individual is substantially limited in a
23 major life activity is a question of fact.”). But whether a certain activity rises to the level of a
24 “major life activity” is usually treated as a legal question. For example, in *Bragdon v. Abbott*, 524
25 U.S. 624, 637 (1998), the Court held as a matter of law that reproduction is a major life activity
26 within the meaning of the ADA. Similarly the Third Circuit has held that a number of activities
27 constitute major life activities. *See, e.g., Gagliardo v. Connaught Laboratories, Inc.*, 311 F.3d
28 565, 573 (3d Cir. 2002) (concentrating and remembering are major life activities); *Taylor v.*
29 *Phoenixville School Dist.*, 184 F.3d 296, 305 (3d Cir. 1999) (holding that thinking is a major life
30 activity, as it is “inescapably central to anyone’s life”). Accordingly, the instruction does not
31 leave to the jury the determination of whether the plaintiff’s claimed impairment is one that
32 affects a major life activity. Rather, the jury must decide whether the plaintiff is substantially
33 limited in performing the major life activity found to be at issue by the court.
34

35 An activity need not be related to employment to constitute a “major life activity.” Thus
36 in *Bragdon v. Abbott*, 524 U.S. 624, 637 (1998), the Court held that reproduction was a “major
37 life activity” within the meaning of the ADA (and the Rehabilitation Act). The employer argued
38 that Congress intended the ADA only to cover those aspects of a person’s life that have a public,
39 economic, or daily character. But the Court declared that nothing in the ADA’s statutory
40 definition “suggests that activities without a public, economic, or daily dimension may somehow
41 be regarded as so unimportant or insignificant as to fall outside the meaning of the word ‘major.’”
42

43 The ADA Amendments Act of 2008 sets forth a number of activities, and bodily
44 functions, that constitute “major life activities” within the meaning of the ADA. Section 4(a) of

1 the Act provides the following definition of “major life activities”:
2

3 (A) In general. * * * major life activities include, but are not limited to, caring for
4 oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing,
5 lifting, bending, speaking, breathing, learning, reading, concentrating, thinking,
6 communicating, and working.
7

8 (B) Major bodily functions. * * * a major life activity also includes the operation of a
9 major bodily function, including but not limited to, functions of the immune system,
10 normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory,
11 circulatory, endocrine, and reproductive functions.
12

13 *Work as a Major Life Activity*

14

15 The Supreme Court has expressed unease with the concept of working as a major life
16 activity under the ADA. In *Sutton v. United Air Lines*, 527 U.S. 471, 492 (1999), the Court noted
17 that “there may be some conceptual difficulty in defining ‘major life activities’ to include work,
18 for it seems to argue in a circle to say that if one is excluded, for instance, by reason of an
19 impairment, from working with others then that exclusion constitutes an impairment, when the
20 question you're asking is, whether the exclusion itself is by reason of handicap.” The *Sutton*
21 Court assumed without deciding that working was a major life activity. It declared, however, that
22 if the major life activity at issue is working, then the plaintiff would have to show an inability to
23 work in a “broad range of jobs,” rather than a specific job.
24

25 The ADA Amendments Act of 2008 specifically lists “working” as a major life activity,
26 and imposes no special showing on “working” as distinct from other life activities. Nothing in the
27 Act requires the plaintiff to prove an inability to perform a broad range of jobs, as had been
28 required by *Sutton*. Moreover, one of the major purposes of the Act is to reject the “holdings” of
29 *Sutton* on the ground that the case “narrowed the broad scope of protection intended to be
30 afforded by the ADA.” Accordingly, the Instruction contains no special provision or limitation
31 on proof of working as a major life activity.
32

33 *“Regarded as” Disabled*

34

35 The rationale behind “regarded as” disability was described by the Third Circuit in *Deane*
36 *v. Pocono Medical Center*, 142 F.3d 138, 143 n.5 (3d Cir. 1998) (en banc):
37

38 With the “regarded as” prong, Congress chose to extend the protections of the ADA to
39 individuals who have no actual disability. The primary motivation for the inclusion of
40 misperceptions of disabilities in the statutory definition was that society's accumulated
41 myths and fears about disability and diseases are as handicapping as are the physical
42 limitations that flow from actual impairment.
43

44 The *Deane* court emphasized that the plaintiff does not need to show that the employer
45 acted with bad intent in regarding the plaintiff as disabled:

1
2 Although the legislative history indicates that Congress was concerned about eliminating
3 society's myths, fears, stereotypes, and prejudices with respect to the disabled, the
4 EEOC's Regulations and Interpretive Guidance make clear that even an innocent
5 misperception based on nothing more than a simple mistake of fact as to the severity, or
6 even the very existence, of an individual's impairment can be sufficient to satisfy the
7 statutory definition of a perceived disability. See 29 C.F.R. pt. 1630, app. § 1630.2(l)
8 (describing, as one example of a "regarded as" disabled employee, an individual with
9 controlled high blood pressure that is not substantially limiting, who nonetheless is
10 reassigned to less strenuous work because of the employer's unsubstantiated fear that the
11 employee will suffer a heart attack). Thus, whether or not PMC was motivated by myth,
12 fear or prejudice is not determinative of Deane's "regarded as" claim.
13

14 142 F.3d at 144. Nor is "regarded as" disability dependent on plaintiff having any impairment.
15 The question is not the plaintiff's actual condition, but whatever condition was perceived by the
16 employer. See *Kelly v. Drexel University*, 94 F.3d 102, 108 (3d Cir. 1996) ("Our analysis of this
17 ["regarded as"] claim focuses not on Kelly and his actual abilities but on the reactions and
18 perceptions of the persons interacting or working with him.").
19

20 In section 4 of the ADA Amendments Act of 2008, Congress clarified two points about
21 "regarded as" disability:
22

23 1. A plaintiff meets the requirement of being "regarded as" disabled if she establishes that
24 she has been discriminated against "because of an actual or perceived impairment
25 *whether or not the impairment limits or is perceived to limit a major life activity.*"
26 (emphasis added).
27

28 2. A plaintiff cannot be "regarded as" disabled if the actual or perceived impairment is
29 "transitory and minor." A "transitory" impairment is defined as one "with an actual or
30 expected duration of 6 months or less."
31

32 The text of the Instruction is intended to incorporate these statutory clarifications.
33

34 The mere fact that the employer offered an accommodation does not mean that the
35 employee was "regarded as" disabled. *Williams v. Philadelphia Housing Auth.*, 380 F.3d 751,
36 773 n.20 (3d Cir. 2004):
37

38 Williams argues, inter alia, that PHA "admitted" he was disabled within the
39 meaning of the ADA by offering him the opportunity to take an unpaid leave of absence,
40 thereby "accommodating" him. We agree with the Sixth and Ninth Circuits, however,
41 that an offer of accommodation does not, by itself, establish that an employer "regarded"
42 an employee as disabled. See *Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789,
43 798 (9th Cir. 2001) ("When an employer takes steps to accommodate an employee's
44 restrictions, it is not thereby conceding that the employee is disabled under the ADA or

1 that it regards the employee as disabled. A contrary rule would discourage the amicable
2 resolution of numerous employment disputes and needlessly force parties into expensive
3 and time-consuming litigation."), clarified in other respects, 292 F.3d 1045 (9th Cir.
4 2002); *Plant v. Morton Int'l, Inc.*, 212 F.3d 929, 938 (6th Cir. 2000) ("The intent behind
5 this ["regarded as"] provision, according to the EEOC, is to reach those cases in which
6 'myths, fears and stereotypes' affect the employer's treatment of an individual. [An
7 employee] cannot show that this provision applies to him merely by pointing to that
8 portion of the record in which his [employer] admitted that he was aware of [the
9 employee's] medical restrictions and modified [the employee's] responsibilities based on
10 them.").

11
12 *Reasonable Accommodation Requirement as Applied to "Regarded as" Disability*

13
14 In *Williams v. Philadelphia Housing Auth.*, 380 F.3d 751, 770 (3d Cir. 2004), the
15 employer argued that it had no obligation to provide a reasonable accommodation to an
16 employee it "regarded as" disabled because there was no job available that would accommodate
17 the perceived disability—that is, the defendant regarded the employee as completely unable to do
18 any job at all. The court described the employer's argument, and rejected it, in the following
19 passage:
20

21 To the extent Williams relies upon a "regarded as" theory of disability, PHA contends
22 that a plaintiff in Williams's position must show that there were vacant, funded positions whose
23 essential functions the employee was capable of performing *in the eyes of the employer who*
24 *misperceived the employee's limitations*. Even if a trier of fact concludes that PHA wrongly
25 perceived Williams's limitations to be so severe as to prevent him from performing any law
26 enforcement job, the "regarded as" claim must, in PHA's view, fail because Williams has been
27 unable to demonstrate the existence of a vacant, funded position at PHA whose functions he was
28 capable of performing in light of its misperception. . . . PHA's argument, if accepted, would
29 make "regarded as" protection meaningless. An employer could simply regard an employee as
30 incapable of performing any work, and an employee's "regarded as" failure to accommodate
31 claim would always fail, under PHA's theory, because the employee would never be able to
32 demonstrate the existence of any vacant, funded positions he or she was capable of performing in
33 the eyes of the employer. . . . Thus, contrary to PHA's suggestion, a "regarded as" disabled
34 employee need not demonstrate during litigation the availability of a position he or she was
35 capable of performing in the eyes of the misperceiving employer. . . .
36

37 The employer in *Williams* made an alternative argument: that if an employee is "regarded
38 as" but not actually disabled, the employer should have no duty to provide a reasonable
39 accommodation because there is nothing to accommodate. In *Williams*, the plaintiff was a police
40 officer and the employer regarded him as being unable to be around firearms because of a mental
41 impairment. The court analyzed the defendant's argument that it had no duty to provide an
42 accommodation to an employee "regarded as" disabled, and rejected it, in the following passage:
43

44 PHA . . . suggests that Williams, by being "regarded as" disabled by PHA, receives a
45 "windfall" accommodation compared to a similarly situated employee who had not been

1 "regarded as" disabled and would not be entitled under the ADA to any accommodation.
2 The record in this case demonstrates that, absent PHA's erroneous perception that
3 Williams could not be around firearms because of his mental impairment, a radio room
4 assignment would have been made available to him and others similarly situated. PHA
5 refused to provide that assignment solely based upon its erroneous perception that
6 Williams's mental impairment prevented him not only from carrying a gun, but being
7 around others with, or having access to, guns - perceptions specifically contradicted by
8 PHA's own psychologist. While a similarly situated employee who was not perceived to
9 have this additional limitation would have been allowed a radio room assignment,
10 Williams was specifically denied such an assignment because of the erroneous perception
11 of his disability. The employee whose limitations are perceived accurately gets to work,
12 while Williams is sent home unpaid. This is precisely the type of discrimination the
13 "regarded as" prong literally protects from Accordingly, Williams, to the extent
14 PHA regarded him as disabled, was entitled to reasonable accommodation
15

16 Thus, an employee "regarded as" having a disability is entitled to the same accommodation that
17 he would receive were he actually disabled.
18

19 *Record of disability*
20

21 For a discussion of "record of" disability claims, see *Eshelman v. Agere Systems, Inc.*,
22 554 F.3d 426, 436-39 (3d Cir. 2009).

9.2.2 ADA Definitions — Qualified Individual

Model

Under the ADA, [plaintiff] must establish that [he/she] was a “qualified individual.” This means that [plaintiff] must show that [he/she] had the skill, experience, education, and other requirements for the [describe job] and could do the job’s “essential functions”, either with or without [describe requested accommodation]. If [plaintiff] cannot establish that [he/she] is qualified to perform the essential functions of [describe job] even with a [describe accommodation], then [plaintiff] is not a qualified individual under the ADA. If [plaintiff] is not a qualified individual within the meaning of the ADA, you must return a verdict for [defendant], even if the reason [plaintiff] is not qualified is solely as a result of [his/her] disability. The ADA does not require an employer to hire or retain an individual who cannot perform the job with or without an accommodation.

In this case, [plaintiff] claims that [he/she] was able to perform the essential functions of [describe job] [with [describe accommodation]]. [Defendant] contends that [plaintiff] was unable to perform [describe function(s)] and that [this/these] function(s) were essential to the [describe job]. It is [plaintiff’s] burden to prove by a preponderance of the evidence that [he/she] was able to perform the essential functions of [describe job]. If [plaintiff] could not perform [describe function] then it is [plaintiff’s] burden to show that [describe function], that this was not essential to the [describe job].

In determining whether [plaintiff] could perform the essential functions of [describe job], you should keep in mind that not all job functions are “essential.” The term “essential functions” does not include the marginal functions of the position. Essential functions are a job’s fundamental duties. In deciding whether [describe function] is essential to [describe job], some factors you may consider include the following:

- 1) whether the performance of the [describe function] is the reason that the [describe job] exists;
- 2) the amount of time spent on the job performing [describe function];
- 3) whether there are a limited number of employees available to do the [describe function];
- 4) whether [describe function] is highly specialized;
- 5) whether an employee in the [describe job] is hired for his or her expertise or ability to [describe function];
- 6) [defendant’s] judgment about what functions are essential to the [describe job];

- 1 7) written job descriptions for the [describe job] ;
- 2
- 3 8) the consequences of not requiring an employee to [describe function] in a satisfactory
- 4 manner;
- 5
- 6 9) whether others who held the position of [describe job] performed [describe function];
- 7
- 8 10) the terms of a collective bargaining agreement;
- 9
- 10 11) [*list any other factors supported by the evidence.*]
- 11

12 No one factor is necessarily controlling. You should consider all of the evidence in
13 deciding whether [describe function] is essential to [describe job].

14
15 [In addition to specific job requirements, an employer may have general requirements for
16 all employees. For example, an employer may expect employees to refrain from abusive or
17 threatening conduct toward others, or may require a regular level of attendance. These may be
18 considered essential functions of any job.]

19
20 In assessing whether [plaintiff] was qualified to perform the essential functions of
21 [describe job] you should consider [plaintiff's] abilities as they existed at the time when [describe
22 challenged employment action].

23 24 25 **Comment**

26
27 Under the ADA, only a "qualified individual" is entitled to recover for disparate treatment
28 or failure to provide a reasonable accommodation. A "qualified individual" is one "who, with or
29 without reasonable accommodation, can perform the essential functions of the employment
30 position that such individual holds or desires." 42 U.S.C. § 12111(8).

31
32 The Third Circuit set forth the basic approach to determining whether a plaintiff is a
33 "qualified individual" in *Deane v. Pocono Medical Center*, 142 F.3d 138, 145-146 (3d Cir. 1998)
34 (en banc):

35
36 [T]he ADA requires [plaintiff] to demonstrate that she is a "qualified individual". The
37 ADA defines this term as an individual "who, with or without reasonable
38 accommodation, can perform the essential functions of the employment position that such
39 individual holds or desires." 42 U.S.C. § 12111(8). The Interpretive Guidance to the
40 EEOC Regulations divides this inquiry into two prongs. First, a court must determine
41 whether the individual satisfies the requisite skill, experience, education and other job-
42 related requirements of the employment position that such individual holds or desires.
43 See 29 C.F.R. pt. 1630, app. § 1630.2(m). Second, it must determine whether the
44 individual, with or without reasonable accommodation, can perform the essential

1 functions of the position held or sought. . . .

2
3 Determining whether an individual can, with or without reasonable
4 accommodation, perform the essential functions of the position held or sought, also a two
5 step process, is relatively straightforward. First, a court must consider whether the
6 individual can perform the essential functions of the job without accommodation. If so,
7 the individual is qualified (and, a fortiori, is not entitled to accommodation). If not, then a
8 court must look to whether the individual can perform the essential functions of the job
9 with a reasonable accommodation. If so, the individual is qualified. If not, the individual
10 has failed to set out a necessary element of the prima facie case.

11
12 The court in *Deane* emphasized that the plaintiff need not prove the ability to perform *all*
13 the functions of the job requested:

14
15 Section 12111(8) is plain and unambiguous. The first sentence of that section,
16 makes it clear that the phrase "with or without reasonable accommodation" refers directly
17 to "essential functions". Indeed, there is nothing in the sentence, other than "essential
18 functions", to which "with or without reasonable accommodation" could refer. Moreover,
19 nowhere else in the Act does it state that, to be a "qualified individual", an individual
20 must prove his or her ability to perform all of the functions of the job, and nowhere in
21 the Act does it distinguish between actual or perceived disabilities in terms of the
22 threshold showing of qualifications. Therefore, if an individual can perform the essential
23 functions of the job without accommodation as to those functions, regardless of whether
24 the individual can perform the other functions of the job (with or without
25 accommodation), that individual is qualified under the ADA.

26
27 142 F.3d at 146-47.

28
29 *"Essential Functions" of a Job*

30
31 In *Skerski v. Time Warner Cable Co.*, 257 F.3d 273, 278 (3d Cir. 2001), the court
32 provided an extensive analysis of the meaning of the term "essential functions" of a job. The
33 plaintiff in *Skerski* was a cable installer technician, and he developed a fear of heights. One of
34 the defendant's arguments was that he was no longer qualified for the position because climbing
35 was one of the "essential functions" of the job of cable installer technician. The trial court agreed
36 with the defendant, finding as a matter of law that climbing was an essential job function, and
37 therefore that plaintiff could not recover because he could not perform that function even with an
38 accommodation. The Third Circuit began its analysis by looking at the relevant agency
39 regulations:

40
41 A job's "essential functions" are defined in 29 C.F.R. § 1630.2(n)(1) as those that are
42 "fundamental," not "marginal." The regulations list several factors for consideration in
43 distinguishing the fundamental job functions from the marginal job functions, including:
44 (1) whether the performance of the function is "the reason the position exists;" (2)
45 whether there are a "limited number of employees available among whom the

1 performance of that job function can be distributed;" and (3) whether the function is
2 "highly specialized so that the incumbent in the position is hired for his or her expertise."
3 29 C.F.R. § 1630.2(n)(2). The regulations further set forth a non-exhaustive list of seven
4 examples of evidence that are designed to assist a court in identifying the "essential
5 functions" of a job. They include:

- 6
- 7 (i) The employer's judgment as to which functions are essential;
 - 8
 - 9 (ii) Written job descriptions prepared before advertising or interviewing
10 applicants for the job;
 - 11
 - 12 (iii) The amount of time spent on the job performing the function;
 - 13
 - 14 (iv) The consequences of not requiring the incumbent to perform the function;
 - 15
 - 16 (v) The terms of a collective bargaining agreement;
 - 17
 - 18 (vi) The work experience of past incumbents in the jobs; and/or
 - 19
 - 20 (vii) The current work experience of incumbents in similar jobs.
- 21

22
23 29 C.F.R. § 1630.2(n)(3).

24
25 As is apparent, "whether a particular function is essential is a factual
26 determination that must be made on a case by case basis." EEOC Interpretive Guidance
27 on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630, App. 1630.2(n)
28 (2000) [hereafter "EEOC Interpretive Guidance"]. It follows that none of the factors nor
29 any of the evidentiary examples alone are necessarily dispositive.

30
31 Applying these standards to the facts, the court found that the district court erred in
32 concluding as a matter of law that climbing was not an essential function for the position of cable
33 installer technician:

34
35 Looking to the three factors included in § 1630.2(n)(2), it is evident that two are
36 not present in this case as installer technicians are not hired solely to climb or even
37 because of their climbing expertise. On the other hand, [there] is evidence to suggest that
38 Time Warner employs a limited number of installer technicians in Skerski's work area--
39 only 7 or 8, according to Skerski -- and that this small number hampers Time Warner's
40 ability to allow certain technicians to avoid climbing. The significance of this factor is
41 pointed out in the Interpretive Guidance to § 1630.2(n), which explains, "if an employer
42 has a relatively small number of available employees for the volume of work to be
43 performed, it may be necessary that each employee perform a multitude of different
44 functions. Therefore, the performance of those functions by each employee becomes
45 more critical and the options for reorganizing the work become more limited." EEOC

1 Interpretive Guidance, 29 C.F.R. pt. 1630, App. 1630.2(n).
2

3 But this is only one of the three factors. Moreover, consideration of the seven
4 evidentiary examples included in § 1630.2(n)(3) suggests caution against any premature
5 determination on essential functions as at least some of them lean in Skerski's favor. Of
6 course, as required by § 1630.2(n)(3)(i), we owe some deference to Time Warner and its
7 own judgment that climbing is essential to the installer technician position. And the
8 written job descriptions, as the District Court noted, "clearly identify climbing as a job
9 requirement." However, describing climbing as a requirement is not necessarily the same
10 as denominating climbing as an essential function. In fact, the job descriptions prepared
11 by both New Channels and Time Warner list various duties and responsibilities under the
12 heading "Essential Functions," but neither identifies climbing as "essential." . . .

13
14 Among the facts and circumstances relevant to each case is, of course, the
15 employee's actual experience as well as that of other employees. See 29 C.F.R. §
16 1630.2(n)(3)(iv), (vi) and (vii). It is undisputed that from the time Skerski began as an
17 installer technician in 1982 until the time he was diagnosed with his panic disorder in
18 1993, a significant portion of his job responsibilities required climbing. . . . However,
19 for the three and a half years after his diagnosis in which he continued to work as an
20 installer technician, Skerski performed virtually no overhead work at all. . . . Skerski
21 testified at his deposition that there always was enough underground work to do, that he
22 always worked 40-hour weeks and even worked enough to earn a couple thousand dollars
23 per year in overtime, and that he had never experienced problems at work because of his
24 panic disorder until Hanning became his supervisor in the fall of 1996. . . .

25
26 Skerski argues that his own experience exemplifies that no negative consequences
27 resulted from his failure to perform the climbing function of his job, which is another of
28 the illustrations listed in the regulations. See 29 C.F.R. § 1630.2(n)(3)(iv). However,
29 there is support in the record for Time Warner's contention that Skerski's inability to
30 climb caused it considerable administrative difficulties. . . . Hanning testified that
31 Skerski's inability to climb "made the routing process extremely cumbersome," because
32 the assignment process had to be done by hand instead of computer. He also claimed that
33 Skerski's inability to climb necessitated the hiring of outside contract labor to meet
34 demand, and that Skerski was not always as busy as he should have been due to his
35 restricted work schedule.

36
37 The *Skerski* court found that the relevant factors cut both ways, so that the question of
38 whether climbing was an essential function of the cable installer technician position was a
39 question for the jury:
40

41 We do not suggest that the District Court here had no basis for its conclusion that
42 climbing is an essential function of Skerski's position as installer technician or even that,
43 if we were the triers of fact, we would not so hold. But upon reviewing the three factors
44 listed in 29 C.F.R. § 1630.2(n)(2) and the seven evidentiary examples provided by 29
45 C.F.R. § 1630.2(n)(3), it is apparent that a genuine issue of material fact exists as to

1 whether climbing is an essential function of the job of installer technician at Time
2 Warner. Although the employer's judgment and the written job descriptions may warrant
3 some deference, Skerski has put forth considerable evidence that contradicts Time
4 Warner's assertions, particularly the uncontradicted fact that following his 1993 diagnosis
5 he worked for more than three years as an installer technician for Time Warner without
6 ever having to perform over head work.

7
8 *See also Walton v. Mental Health Assoc. of Southeastern Pennsylvania*, 168 F.3d 661, 666 (3d
9 Cir. 1999) (employee's inability to appear in a promotional video because she was obese was not
10 a substantial limitation on essential function of a job; any such appearance would have been only
11 a minor aspect of her job); *Conneen v. MBNA America Bank, N.A.*, 334 F.3d 318, 327 (3d Cir.
12 2003) (promptness was not an essential function merely because the employer thought it
13 necessary for the employee to set an example for lower-level employees).

14
15 The Third Circuit has held that whether a particular function is an "essential function" of
16 a job under the ADA is a question best left for the jury. *Turner v. Hershey Chocolate USA*, 440
17 F.3d 604, 613 (3d Cir. 2006).

9.2.3 ADA Definitions — Hostile or Abusive Work Environment

Model

In determining whether a work environment is "hostile" you must look at all of the circumstances, which may include:

- The total physical environment of [plaintiff's] work area.
- The degree and type of language and insult that filled the environment before and after [plaintiff] arrived.
- The reasonable expectations of [plaintiff] upon entering the environment.
- The frequency of the offensive conduct.
- The severity of the conduct.
- The effect of the working environment on [plaintiff's] mental and emotional well-being.
- Whether the conduct was unwelcome, that is, conduct [plaintiff] regarded as unwanted or unpleasant.
- Whether the conduct was pervasive.
- Whether the conduct was directed toward [plaintiff].
- Whether the conduct was physically threatening or humiliating.
- Whether the conduct was merely a tasteless remark.
- Whether the conduct unreasonably interfered with [plaintiff's] work performance.

Conduct that amounts only to ordinary socializing in the workplace, such as occasional horseplay, occasional use of abusive language, tasteless jokes, and occasional teasing, does not constitute an abusive or hostile work environment. A hostile work environment can be found only if there is extreme conduct amounting to a material change in the terms and conditions of employment. Moreover, isolated incidents, unless extremely serious, will not amount to a hostile work environment.

It is not enough that the work environment was generally harsh, unfriendly, unpleasant, crude or vulgar to all employees. In order to find a hostile work environment, you must find that [plaintiff] was harassed because of [his/her] disability [or request for accommodation]. The harassing conduct may, but need not be specifically directed at [plaintiff's] disability [or request for accommodation]. The key question is whether [plaintiff], as a person with [plaintiff's disability] was subjected to harsh employment conditions to which employees without a disability were not.

It is important to understand that, in determining whether a hostile work environment existed at the [employer's workplace] you must consider the evidence from the perspective of a reasonable person with [plaintiff's disability] in the same position. That is, you must determine whether a reasonable person with [plaintiff's disability] would have been offended or harmed by the conduct in question. You must evaluate the total circumstances and determine whether the

1 alleged harassing behavior could be objectively classified as the kind of behavior that would
2 seriously affect the psychological or emotional well-being of a reasonable person with [plaintiff's
3 disability]. The reasonable person with [plaintiff's disability] is simply one of normal sensitivity
4 and emotional make-up.
5
6

7 **Comment**
8

9 This instruction can be used if the court wishes to provide a more detailed instruction on
10 what constitutes a hostile work environment than those set forth in Instructions 9.1.4 and 9.1.5.
11 This instruction is substantively identical to the definition of hostile work environment in Title
12 VII cases. See Instruction 5.2.1.

1 **9.2.4 ADA Definitions — Constructive Discharge**

2 3 **Model**

4
5 In this case, to show that [he/she] was subjected to an adverse “tangible employment
6 action,” [plaintiff] claims that [he/she] was forced to resign due to conduct that discriminated
7 against [him/her] on the basis of [plaintiff’s] disability. Such a forced resignation, if proven, is
8 called a “constructive discharge.” To prove that [he/she] was subjected to a constructive
9 discharge, [plaintiff] must prove that working conditions became so intolerable that a reasonable
10 person in the employee's position would have felt compelled to resign.
11

12 13 **Comment**

14
15 This instruction is substantively identical to the constructive discharge instruction for
16 Title VII actions. See Instruction 5.2.2. *See also Spencer v. Wal-Mart Stores, Inc.*, 469 F.3d 311,
17 316 & n.4 (3d Cir. 2006) (discussing constructive discharge in the context of ADA claims).
18

19 This instruction can be used when the plaintiff was not fired but resigned, and claims that
20 she nonetheless suffered an adverse employment action because she was constructively
21 discharged due to an adverse action or actions that were sanctioned by her employer. This
22 instruction is designed for integration into Instruction 9.1.4 (with respect to the instruction’s
23 eighth element). If, instead, the plaintiff claims that she was constructively discharged based on
24 a supervisor’s or co-worker’s adverse action or actions that were not sanctioned by the employer,
25 the constructive discharge would not count as a tangible adverse employment action (for the
26 purposes of determining whether the employer may assert an *Ellerth / Faragher* affirmative
27 defense). *See* Comment 9.1.5. *See also Pennsylvania State Police v. Suders*, 542 U.S. 129,
28 140-41 (2004) (“[A]n employer does not have recourse to the *Ellerth/ Faragher* affirmative
29 defense when a supervisor's official act precipitates the constructive discharge; absent such a
30 ‘tangible employment action,’ however, the defense is available to the employer whose
31 supervisors are charged with harassment.”).

1 **9.3.1 ADA Defenses — Direct Threat**
2

3 In this case, [defendant] claims that it [describe employment action] [plaintiff] because
4 [plaintiff] would have created a significant risk of substantial harm to [plaintiff] [others in the
5 workplace].
6

7 Your verdict must be for [defendant] if [defendant] has proved both of the following by a
8 preponderance of the evidence:
9

10 First: [Defendant] [specify actions taken with respect to plaintiff] because [plaintiff]
11 posed a direct threat to the health or safety of [plaintiff] [others in the workplace]; and
12

13 Second: This direct threat could not be eliminated by providing a reasonable
14 accommodation, as I have previously defined that term for you.
15

16 A direct threat means a significant risk of substantial harm to the health or safety of the
17 person or other persons that cannot be eliminated by reasonable accommodation. The
18 determination that a direct threat exists must have been based on a specific personal assessment
19 of [plaintiff's] ability to safely perform the essential functions of the job. This assessment of
20 [plaintiff's] ability must have been based on either a reasonable medical judgment that relied on
21 the most current medical knowledge, or on the best available objective evidence.
22

23 In determining whether [plaintiff] would have created a significant risk of substantial
24 harm, you should consider the following factors:
25

- 26 1) How long any risk would have lasted;
27
28 2) The nature of the potential harm and how severe the harm would be if it occurred;
29
30 3) The likelihood the harm would have occurred; and
31
32 4) Whether the harm would be likely to recur.
33
34

35 **Comment**
36

37 The ADA provides an affirmative defense where accommodation of, hiring or retaining
38 an employee would constitute a “direct threat.” 42 U.S.C. § 12113(b). “Direct threat” is defined
39 as “a significant risk to the health or safety of others that cannot be eliminated by reasonable
40 accommodation.” 42 U.S.C. § 12111(3). The regulations extend this definition to include a direct
41 threat to the health or safety of the plaintiff as well. In *Chevron U.S.A., Inc., v. Echazabal*, 536
42 U.S. 73, 79 (2002), the Court upheld those regulations and held that the “direct threat” defense
43 applied to a direct threat of harm to the plaintiff as well as to others. The Court specifically
44 noted that direct threat is an “affirmative defense” to the ADA qualification standards. Thus a

- 1 plaintiff does not have the burden of proving that she did not pose a direct threat to the health
- 2 and safety of herself or others in the workplace.

9.4.1 ADA Damages – Compensatory Damages – General Instruction

Model

I am now going to instruct you on damages. Just because I am instructing you on how to award damages does not mean that I have any opinion on whether or not [defendant] should be held liable.

If you find by a preponderance of the evidence that [defendant] violated [plaintiff's] rights under the ADA by [describe conduct], then you must consider the issue of compensatory damages. You must award [plaintiff] an amount that will fairly compensate [him/her] for any injury [he/she] actually sustained as a result of [defendant's] conduct. The damages that you award must be fair compensation, no more and no less. The award of compensatory damages is meant to put [plaintiff] in the position [he/she] would have occupied if the discrimination had not occurred. [Plaintiff] has the burden of proving damages by a preponderance of the evidence.

[Plaintiff] must show that the injury would not have occurred without [defendant's] act [or omission]. Plaintiff must also show that [defendant's] act [or omission] played a substantial part in bringing about the injury, and that the injury was either a direct result or a reasonably probable consequence of [defendant's] act [or omission]. This test — a substantial part in bringing about the injury — is to be distinguished from the test you must employ in determining whether [defendant's] actions [or omissions] were motivated by discrimination. In other words, even assuming that [defendant's] actions [or omissions] were motivated by discrimination, [plaintiff] is not entitled to damages for an injury unless [defendant's] discriminatory actions actually played a substantial part in bringing about that injury.

[There can be more than one cause of an injury. To find that [defendant's] act [or omission] caused [plaintiff's] injury, you need not find that [defendant's] act [or omission] was the nearest cause, either in time or space. However, if [plaintiff's] injury was caused by a later, independent event that intervened between [defendant's] act [or omission] and [plaintiff's] injury, [defendant] is not liable unless the injury was reasonably foreseeable by [defendant].]

In determining the amount of any damages that you decide to award, you should be guided by common sense. You must use sound judgment in fixing an award of damages, drawing reasonable inferences from the facts in evidence. You may not award damages based on sympathy, speculation, or guesswork.

You may award damages for any pain, suffering, inconvenience, mental anguish, or loss of enjoyment of life that [plaintiff] experienced as a consequence of [defendant's] [allegedly unlawful act or omission]. No evidence of the monetary value of such intangible things as pain and suffering has been, or need be, introduced into evidence. There is no exact standard for fixing the compensation to be awarded for these elements of damage. Any award you make should be fair in light of the evidence presented at the trial.

1
2 I instruct you that in awarding compensatory damages, you are not to award damages for
3 the amount of wages that [plaintiff] would have earned, either in the past or in the future, if
4 [he/she] had continued in employment with [defendant]. These elements of recovery of wages
5 that [plaintiff] would have received from [defendant] are called “back pay” and “front pay”.
6 [Under the applicable law, the determination of “back pay” and “front pay” is for the court.]
7 [“Back pay” and “front pay” are to be awarded separately under instructions that I will soon give
8 you, and any amounts for “back pay”and “front pay” are to be entered separately on the verdict
9 form.]

10
11 You may award damages for monetary losses that [plaintiff] may suffer in the future as a
12 result of [defendant’s] [allegedly unlawful act or omission]. [For example, you may award
13 damages for loss of earnings resulting from any harm to [plaintiff’s] reputation that was suffered
14 as a result of [defendant’s] [allegedly unlawful act or omission]. Where a victim of
15 discrimination has been terminated by an employer, and has sued that employer for
16 discrimination, [he/she] may find it more difficult to be employed in the future, or may have to
17 take a job that pays less than if the act of discrimination had not occurred. That element of
18 damages is distinct from the amount of wages [plaintiff] would have earned in the future from
19 [defendant] if [he/she] had retained the job.]

20
21 As I instructed you previously, [plaintiff] has the burden of proving damages by a
22 preponderance of the evidence. But the law does not require that [plaintiff] prove the amount of
23 [his/her] losses with mathematical precision; it requires only as much definiteness and accuracy
24 as circumstances permit.

25
26 [You are instructed that [plaintiff] has a duty under the law to "mitigate" [his/her]
27 damages--that means that [plaintiff] must take advantage of any reasonable opportunity that may
28 have existed under the circumstances to reduce or minimize the loss or damage caused by
29 [defendant]. It is [defendant’s] burden to prove that [plaintiff] has failed to mitigate. So if
30 [defendant] persuades you by a preponderance of the evidence that [plaintiff] failed to take
31 advantage of an opportunity that was reasonably available to [him/her], then you must reduce the
32 amount of [plaintiff’s] damages by the amount that could have been reasonably obtained if
33 [he/she] had taken advantage of such an opportunity.]

34
35 [In assessing damages, you must not consider attorney fees or the costs of litigating this
36 case. Attorney fees and costs, if relevant at all, are for the court and not the jury to determine.
37 Therefore, attorney fees and costs should play no part in your calculation of any damages.]
38
39

40 **Comment**

41
42 ADA remedies are the same as provided in Title VII. The enforcement provision of the
43 ADA, 42 U.S.C. § 12117, specifically provides for the same recovery in ADA actions as in Title
44 VII actions: “The powers, remedies and procedures set forth in . . . [42 U.S.C. § 2000e-5, the

1 Title VII remedies provision] shall be the powers, remedies and procedures this title provides to .
2 . . any person alleging discrimination on the basis of disability in violation of any provision of
3 this Act . . . concerning employment.” Accordingly, this instruction on compensatory damages is
4 substantively identical to that provided for Title VII actions. See Instruction 5.4.1.
5

6 For a discussion of the standards applicable to an award of emotional distress damages
7 under the ADA, see *Gagliardo v. Connaught Laboratories, Inc.*, 311 F.3d 565, 573 (3d Cir.
8 2002) (“To recover emotional damages a plaintiff must show a reasonable probability rather than
9 a mere possibility that damages due to emotional distress were in fact incurred as a result of an
10 unlawful act.”).
11

12 Back pay and front pay are equitable remedies that are to be distinguished from the
13 compensatory damages to be determined by the jury under Title VII and therefore under the
14 ADA. See the Comments to Instructions 5.4.3 -4. Compensatory damages may include lost
15 future earnings over and above the front pay award. For example, the plaintiff may recover the
16 diminution in expected earnings in all future jobs due to reputational or other injuries,
17 independently of any front pay award. See the Comment to Instruction 5.4.1 for a more
18 complete discussion.
19

20 The pattern instruction contains bracketed material that would instruct the jury not to
21 award back pay or front pay. The jury may, however, enter an award of back pay and front pay
22 as advisory, or by consent of the parties. In those circumstances, the court should refer to
23 instructions 9.4.3 for back pay and 9.4.4 for front pay. In many cases it is commonplace for back
24 pay issues to be submitted to the jury. The court may think it prudent to consult with counsel on
25 whether the issues of back pay or front pay should be submitted to the jury (on either an advisory
26 or stipulated basis) or are to be left to the court’s determination without reference to the jury.
27

28 In *Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108, 1121-22 (3d Cir.1988), the Court
29 held that under 42 U.S.C. § 1981 and Title VII, a plaintiff cannot recover pain and suffering
30 damages without first presenting evidence of actual injury. The court stated that “[t]he
31 justifications that support presumed damages in defamation cases do not apply in § 1981 and
32 Title VII cases. Damages do not follow of course in § 1981 and Title VII cases and are easier to
33 prove when they do.” Because ADA damages awards are subject to the same strictures
34 applicable to Title VII, the limitations set forth in *Gunby* apply to recovery of pain and suffering
35 damages under the ADA as well.
36

37 *Damages in ADA Retaliation Cases*

38

39 At least one court in the Third Circuit has held that a plaintiff’s recovery for retaliation
40 under the ADA is limited to equitable relief. See *Sabbrese v. Lowe’s Home Centers, Inc.*, 320 F.
41 Supp.2d 311, 331 (W.D.Pa. 2004). The *Sabbrese* court relied on the Seventh Circuit’s analysis in
42 *Kramer v. Banc of America Securities LLC*, 355 F.3d 961 (7th Cir. 2004). The Seventh Circuit
43 parsed the 1991 Civil Rights Act and found that while it provided for damages in ADA
44 discrimination and accommodation cases, it made no similar provision for ADA retaliation cases.

1 The Third Circuit has not decided whether damages are available in ADA retaliation cases. See
2 the discussion in the Comment to Instruction 9.1.7.

3
4 *Attorney Fees and Costs*

5
6 There appears to be no uniform practice regarding the use of an instruction that warns the
7 jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d
8 652 (3d Cir. 2006), the district court gave the following instruction: “You are instructed that if
9 plaintiff wins on his claim, he may be entitled to an award of attorney fees and costs over and
10 above what you award as damages. It is my duty to decide whether to award attorney fees and
11 costs, and if so, how much. Therefore, attorney fees and costs should play no part in your
12 calculation of any damages.” *Id.* at 656-57. The Court of Appeals held that the plaintiff had not
13 properly objected to the instruction, and, reviewing for plain error, found none: “We need not
14 and do not decide now whether a district court commits error by informing a jury about the
15 availability of attorney fees in an ADEA case. Assuming *arguendo* that an error occurred, such
16 error is not plain, for two reasons.” *Id.* at 657. First, “it is not ‘obvious’ or ‘plain’ that an
17 instruction directing the jury *not* to consider attorney fees” is irrelevant or prejudicial; “it is at
18 least arguable that a jury tasked with computing damages might, absent information that the
19 Court has discretion to award attorney fees at a later stage, seek to compensate a sympathetic
20 plaintiff for the expense of litigation.” *Id.* Second, it is implausible “that the jury, in order to
21 eliminate the chance that Collins might be awarded attorney fees, took the disproportionate step
22 of returning a verdict against him even though it believed he was the victim of age
23 discrimination, notwithstanding the District Court’s clear instructions to the contrary.” *Id.*; *see*
24 *also id.* at 658 (distinguishing *Fisher v. City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and
25 *Brooks v. Cook*, 938 F.2d 1048, 1051 (9th Cir. 1991)).

1 **9.4.2 ADA Damages — Punitive Damages**
2
3

4 **Model**
5

6 [Plaintiff] claims the acts of [defendant] were done with malice or reckless indifference
7 to the plaintiff's federally protected rights and that as a result there should be an award of what
8 are called "punitive" damages. A jury may award punitive damages to punish a defendant, or to
9 deter the defendant and others like the defendant from committing such conduct in the future.
10 [Where appropriate, the jury may award punitive damages even if the plaintiff suffered no actual
11 injury, and so received nominal rather than compensatory damages.]
12

13 An award of punitive damages is permissible in this case only if you find by a
14 preponderance of the evidence that a management official of [defendant] personally acted with
15 malice or reckless indifference to [plaintiff's] federally protected rights. An action is with malice
16 if a person knows that it violates the federal law prohibiting discrimination and does it anyway.
17 An action is with reckless indifference if taken with knowledge that it may violate the law.
18
19

20 **[For use where the defendant raises a jury question on good-faith attempt to comply**
21 **with the law:**
22

23 But even if you make a finding that there has been an act of discrimination with malice or
24 reckless disregard of [plaintiff's] federal rights, you cannot award punitive damages if
25 [defendant] proves by a preponderance of the evidence that it made a good-faith attempt to
26 comply with the law, by adopting policies and procedures designed to prevent unlawful
27 discrimination such as that suffered by [plaintiff].
28
29

30 An award of punitive damages is discretionary; that is, if you find that the legal
31 requirements for punitive damages are satisfied [and that [defendant] has not proved that it made
32 a good-faith attempt to comply with the law], then you may decide to award punitive damages,
33 or you may decide not to award them. I will now discuss some considerations that should guide
34 your exercise of this discretion.
35

36 If you have found the elements permitting punitive damages, as discussed in this
37 instruction, then you should consider the purposes of punitive damages. The purposes of
38 punitive damages are to punish a defendant for a malicious or reckless disregard of federal rights,
39 or to deter a defendant and others like the defendant from doing similar things in the future, or
40 both. Thus, you may consider whether to award punitive damages to punish [defendant]. You
41 should also consider whether actual damages standing alone are sufficient to deter or prevent
42 [defendant] from again performing any wrongful acts it may have performed. Finally, you
43 should consider whether an award of punitive damages in this case is likely to deter others from
44 performing wrongful acts similar to those [defendant] may have committed.

1
2 If you decide to award punitive damages, then you should also consider the purposes of
3 punitive damages in deciding the amount of punitive damages to award. That is, in deciding the
4 amount of punitive damages, you should consider the degree to which [defendant] should be
5 punished for its wrongful conduct, and the degree to which an award of one sum or another will
6 deter [defendant] or others from committing similar wrongful acts in the future.
7

8 [The extent to which a particular amount of money will adequately punish a defendant,
9 and the extent to which a particular amount will adequately deter or prevent future misconduct,
10 may depend upon the defendant's financial resources. Therefore, if you find that punitive
11 damages should be awarded against [defendant], you may consider the financial resources of
12 [defendant] in fixing the amount of such damages.]
13
14

15 **Comment**

16
17 ADA remedies are the same as provided in Title VII. The enforcement provision of the
18 ADA, 42 U.S.C. § 12117 specifically provides for the same recovery in ADA actions as in Title
19 VII actions: "The powers, remedies and procedures set forth in . . . [42 U.S.C. § 2000e-5, the
20 Title VII remedies provision] shall be the powers, remedies and procedures this title provides to .
21 . . any person alleging discrimination on the basis of disability in violation of any provision of
22 this Act . . . concerning employment." Accordingly, this instruction on punitive damages is
23 substantively identical to that provided for Title VII actions. See Instruction 5.4.2.
24

25 42 U.S.C.A. § 1981a(b)(1) provides that "[a] complaining party may recover punitive
26 damages under this section [Title VII] against a respondent (other than a government,
27 government agency or political subdivision) if the complaining party demonstrates that the
28 respondent engaged in a discriminatory practice or discriminatory practices with malice or with
29 reckless indifference to the federally protected rights of an aggrieved individual." Punitive
30 damages are available only in cases of intentional discrimination, i.e., cases that do not rely on
31 the disparate impact theory of discrimination.
32

33 In *Kolstad v. American Dental Association*, 527 U.S. 526, 534-35 (1999), the Supreme
34 Court held that plaintiffs are not required to show egregious or outrageous discrimination in
35 order to recover punitive damages under Title VII. The Court read 42 U.S.C.A. § 1981a to
36 mean, however, that proof of intentional discrimination is not enough in itself to justify an
37 award of punitive damages, because the statute suggests a congressional intent to authorize
38 punitive awards "in only a subset of cases involving intentional discrimination." Therefore, "an
39 employer must at least discriminate in the face of a perceived risk that its actions will violate
40 federal law to be liable in punitive damages." *Kolstad*, 527 U.S. at 536. *See also Gagliardo v.*
41 *Connaught Laboratories, Inc.*, 311 F.3d 565, 573 (3d Cir. 2002) ("Punitive damages are
42 available under the ADA when 'the complaining party demonstrates that the respondent engaged
43 in a discriminatory practice . . . with malice or with reckless indifference.' 42 U.S.C. §
44 1981a(b)(1) (2000). These terms focus on the employer's state of mind and require that 'an

1 employer must at least discriminate in the face of a perceived risk that its actions will violate
2 federal law.”) (quoting *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535-36 (1999)).
3

4 The *Kolstad* Court further held that an employer may be held liable for a punitive damage
5 award for the intentionally discriminatory conduct of its employee only if the employee served
6 the employer in a managerial capacity, committed the intentional discrimination at issue while
7 acting in the scope of employment, and the employer did not engage in good faith efforts to
8 comply with federal law. *Kolstad*, 527 U.S. at 545-46. In determining whether an employee is in
9 a managerial capacity, a court should review the type of authority that the employer has given to
10 the employee and the amount of discretion that the employee has in what is done and how it is
11 accomplished. *Id.*, 527 U.S. at 543.
12

13 The Court in *Kolstad* established an employer’s good faith as a defense to punitive
14 damages, but it did not specify whether it was an affirmative defense or an element of the
15 plaintiff’s proof for punitive damages. The instruction sets out the employer’s good faith attempt
16 to comply with anti-discrimination law as an affirmative defense. The issue has not yet been
17 decided in the Third Circuit, but the weight of authority in the other circuits establishes that the
18 defendant has the burden of showing a good-faith attempt to comply with laws prohibiting
19 discrimination. See *Medcalf v. Trustees of University of Pennsylvania*, 71 Fed. Appx. 924, 933
20 n.3 (3d Cir. 2003) (noting that “the Third Circuit has not addressed the issue of whether the good
21 faith compliance standard set out in *Kolstad* is an affirmative defense for which the defendant
22 bears the burden of proof, or whether the plaintiff must disprove the defendant’s good faith
23 compliance with Title VII by a preponderance of the evidence”; but also noting that. “[a] number
24 of other circuits have determined that the defense is an affirmative one.”).
25

26 Punitive damages are subject to caps in ADA actions. See 42 U.S.C. § 1981a (b)(3). But
27 42 U.S.C. §1981a(c)(2) provides that the court shall not inform the jury of the statutory
28 limitations on recovery of punitive damages.
29

30 The Supreme Court has imposed some due process limits on both the size of punitive
31 damages awards and the process by which those awards are determined and reviewed. In
32 performing the substantive due process review of the size of punitive awards, a court must
33 consider three factors: “the degree of reprehensibility of” the defendant’s conduct; “the disparity
34 between the harm or potential harm suffered by” the plaintiff and the punitive award; and the
35 difference between the punitive award “and the civil penalties authorized or imposed in
36 comparable cases.” *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996).
37

38 For a complete discussion of the applicability of the *Gore* factors to a jury instruction on
39 punitive damages, see the Comment to Instruction 4.8.3.
40

41 *Damages in ADA Retaliation Cases* 42

43 At least one court in the Third Circuit has held that a plaintiff’s recovery for retaliation
44 under the ADA is limited to equitable relief. See *Sabbrese v. Lowe’s Home Centers, Inc.*, 320 F.

1 Supp.2d 311, 331 (W.D.Pa. 2004). The *Sabbrese* court relied on the Seventh Circuit's analysis in
2 *Kramer v. Banc of America Securities LLC*, 355 F.3d 961 (7th Cir. 2004). The Seventh Circuit
3 parsed the 1991 Civil Rights Act and found that while it provided for damages in ADA
4 discrimination and accommodation cases, it made no similar provision for ADA retaliation cases.
5 The Third Circuit has not decided whether damages are available in ADA retaliation cases. See
6 the discussion in the Comment to Instruction 9.1.7.

1 **9.4.3 ADA Damages – Back Pay— For Advisory or Stipulated Jury**

2
3
4 **Model**

5
6 If you find that [defendant] has violated [plaintiff's] rights under the ADA, then you
7 must determine the amount of damages that [defendant's] actions have caused [plaintiff].
8 [Plaintiff] has the burden of proving damages by a preponderance of the evidence.
9

10 You may award as actual damages an amount that reasonably compensates [plaintiff] for
11 any lost wages and benefits, taking into consideration any increases in salary and benefits,
12 including pension, that [plaintiff] would have received from [defendant] had [plaintiff] not
13 been the subject of [defendant's conduct].
14

15 *[[Alternative One – for use when plaintiff does not seek back pay from periods earlier*
16 *than the date that the unlawful employment practice occurred within the charge filing period:]*
17 Back pay damages, if any, apply from the time [plaintiff] was [describe employment action] until
18 the date of your verdict. [However, federal law limits a plaintiff's recovery for back pay to a
19 maximum of a two year period before the plaintiff filed [his/her] discrimination charge with the
20 Equal Employment Opportunity Commission. Therefore the back pay award in this case must be
21 determined only for the period between [specify dates]].]
22

23 *[[Alternative Two – for use when plaintiff alleging pay discrimination seeks back pay*
24 *from periods earlier than the date that the unlawful employment practice occurred within the*
25 *charge filing period but starting two years or less before the filing of the charge:]* In this case,
26 [plaintiff] claims that [defendant] intentionally discriminated against [plaintiff] in [describe
27 employment action] [plaintiff] on [date within the charge filing period]. [Plaintiff] also claims
28 that [defendant] committed a similar or related unlawful employment practice with regard to
29 discrimination in compensation on [date outside charge filing period but two years or less before
30 the filing of the charge (hereafter "prior date")]. If you find that [defendant] intentionally
31 discriminated against [plaintiff] in [describe employment action] on [date within the charge filing
32 period], and that [defendant] committed unlawful pay discrimination with respect to [plaintiff]
33 on [prior date], and that the unlawful employment practice, if any, on [prior date] was similar or
34 related to [defendant's] [describe employment action] on [date within the charge filing period],
35 then back pay damages, if any, apply from [prior date] until the date of your verdict. If you find
36 that [defendant] intentionally discriminated against [plaintiff] in [describe employment action]
37 on [date within the charge filing period], but you do not find that [defendant] committed a
38 similar or related unlawful employment practice with regard to discrimination in compensation
39 on [prior date], then back pay damages, if any, apply from [date within the charge filing period]
40 until the date of your verdict.]
41

42 *[[Alternative Three – for use when plaintiff alleging pay discrimination seeks back pay*
43 *from periods earlier than the date that the unlawful employment practice occurred within the*
44 *charge filing period based on an act more than two years before the filing of the charge:]* In

1 this case, [plaintiff] claims that [defendant] intentionally discriminated against [plaintiff] in
2 [describe employment action] [plaintiff] on [date within the charge filing period]. [Plaintiff] also
3 claims that [defendant] committed a similar or related unlawful employment practice with regard
4 to discrimination in compensation on [date outside charge filing period and more than two years
5 before the filing of the charge (hereafter “prior date”)]. If you find that [defendant] intentionally
6 discriminated against [plaintiff] in [describe employment action] on [date within the charge filing
7 period], and that [defendant] committed unlawful pay discrimination with respect to [plaintiff]
8 on [prior date], and that the unlawful employment practice, if any, on [prior date] was similar or
9 related to [defendant’s] [describe employment action] on [date within the charge filing period],
10 then back pay damages, if any, apply from [date two years prior to filing date of charge
11 (hereafter “two-year date”)] until the date of your verdict. In that case, back pay applies from
12 [two-year date] rather than [prior date] because federal law limits a plaintiff’s recovery for back
13 pay to a maximum of a two year period before the plaintiff filed [his/her] discrimination charge
14 with the Equal Employment Opportunity Commission. If you find that [defendant] intentionally
15 discriminated against [plaintiff] in [describe employment action] on [date within the charge filing
16 period], but you do not find that [defendant] committed a similar or related unlawful
17 employment practice with regard to discrimination in compensation on [prior date], then back
18 pay damages, if any, apply from [date within the charge filing period] until the date of your
19 verdict.]
20

21 You must reduce any award by the amount of the expenses that [plaintiff] would have
22 incurred in making those earnings.
23

24 If you award back pay, you are instructed to deduct from the back pay figure whatever
25 wages [plaintiff] has obtained from other employment during this period. However, please note
26 that you should not deduct social security benefits, unemployment compensation and pension
27 benefits from an award of back pay.
28

29 [You are further instructed that [plaintiff] has a duty to mitigate [his/her] damages--that
30 is [plaintiff] is required to make reasonable efforts under the circumstances to reduce [his/her]
31 damages. It is [defendant’s] burden to prove that [plaintiff] has failed to mitigate. So if
32 [defendant] persuades you, by a preponderance of the evidence, that [plaintiff] failed to obtain
33 substantially equivalent job opportunities that were reasonably available to [him/ her], you must
34 reduce the award of damages by the amount of the wages that [plaintiff] reasonably would have
35 earned if [he/she] had obtained those opportunities.]
36
37

38 **[Add the following instruction if defendant claims “after-acquired evidence” of misconduct
39 by the plaintiff:**
40

41 [Defendant] contends that it would have made the same decision to [describe
42 employment decision] [plaintiff] because of conduct that it discovered after it made the
43 employment decision. Specifically, [defendant] claims that when it became aware of the
44 [describe the after-discovered misconduct], it would have made the decision at that point had it
45 not been made previously.

1
2 If [defendant] proves by a preponderance of the evidence that it would have made the
3 same decision and would have [describe employment decision] [plaintiff] because of [describe
4 after-discovered evidence], you must limit any award of back pay to the date [defendant] would
5 have made the decision to [describe employment decision] [plaintiff] as a result of the after-
6 acquired information.]
7
8

9 **Comment**

10
11 ADA remedies are the same as provided in Title VII. The enforcement provision of the
12 ADA, 42 U.S.C. § 12117, specifically provides for the same recovery in ADA actions as in Title
13 VII actions: “The powers, remedies and procedures set forth in . . . [42 U.S.C. § 2000e-5, the
14 Title VII remedies provision] shall be the powers, remedies and procedures this title provides to .
15 . . any person alleging discrimination on the basis of disability in violation of any provision of
16 this Act . . . concerning employment.” Accordingly, this instruction on back pay is substantively
17 identical to that provided for Title VII actions. See Instruction 5.4.3.
18

19 An award of back pay is an equitable remedy; thus there is no right to jury trial on a
20 claim for back pay. See 42 U.S.C. §1981(b)(2) (“Compensatory damages awarded under this
21 section shall not include backpay, interest on backpay, or any other type of relief authorized
22 under section 706(g) of the Civil Rights Act of 1964 [42 USCS § 2000e5(g)].”); 42 U.S.C. §
23 2000e-5(g)(1) (“If the court finds that the respondent has intentionally engaged in or is
24 intentionally engaging in an unlawful employment practice charged in the complaint, the court
25 may enjoin the respondent from engaging in such unlawful employment practice, and order such
26 affirmative action as may be appropriate, which may include, but is not limited to, reinstatement
27 or hiring of employees, with or without back pay . . . or any other equitable relief as the court
28 deems appropriate.”). *See also Spencer v. Wal-Mart Stores, Inc.*, 469 F.3d 311, 316 (3d Cir.
29 2006) (relying on the statutory language of Title VII, which applies to damages recovery under
30 the ADA, the court holds in an ADA action that “back pay remains an equitable remedy to be
31 awarded within the discretion of the court”). “[A] district court may, pursuant to its broad
32 equitable powers granted by the ADA, award a prevailing employee an additional sum of money
33 to compensate for the increased tax burden a back pay award may create.” *Eshelman v. Agere*
34 *Systems, Inc.*, 554 F.3d 426, 441-42 (3d Cir. 2009).
35

36 An instruction on back pay is nonetheless included because the parties or the court may
37 wish to empanel an advisory jury—especially given the fact that in most cases the plaintiff will be
38 seeking compensatory damages and the jury will be sitting anyway. See Fed. R.Civ.P. 39(c).
39 Alternatively, the parties may agree to a jury determination on back pay, in which case this
40 instruction would also be appropriate. In many cases it is commonplace for back pay issues to be
41 submitted to the jury. The court may think it prudent to consult with counsel on whether the
42 issues of back pay or front pay should be submitted to the jury (on either an advisory or
43 stipulated basis) or are to be left to the court's determination without reference to the jury.
44 Instruction 5.4.1, on compensatory damages, instructs the jury in such cases to provide separate

1 awards for compensatory damages, back pay, and front pay.
2

3 The appropriate standard for measuring a back pay award is “to take the difference
4 between the actual wages earned and the wages the individual would have earned in the position
5 that, but for discrimination, the individual would have attained.” *Gunby v. Pennsylvania Elec.*
6 *Co.*, 840 F.2d 1108, 1119-20 (3d Cir. 1988).
7

8 42 U.S.C. § 2000e-5(g)(1) provides that “[b]ack pay liability shall not accrue from a date
9 more than two years prior to the filing of a charge with the Commission.” The court of appeals
10 has explained that “[t]his constitutes a limit on liability, not a statute of limitations, and has been
11 interpreted as a cap on the amount of back pay that may be awarded under Title VII.” *Bereda v.*
12 *Pickering Creek Indus. Park, Inc.*, 865 F.2d 49, 54 (3d Cir. 1989). The *Bereda* court held that it
13 was plain error to fail to instruct the jury on an analogous cap under Pennsylvania law (which set
14 the relevant limit under the circumstances of the case). *See id.* Accordingly, when the facts of
15 the case make Section 2000e-5's cap relevant, the court should instruct the jury on it.
16

17 Section 2000e-5's current framework for computing a back pay award for Title VII pay
18 discrimination claims reflects Congress's response to the Supreme Court's decision in *Ledbetter*
19 *v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007). The effect of the Lilly Ledbetter Fair
20 Pay Act of 2009 (LLFPA), Pub. L. No. 111-2, § 2, January 29, 2009, 123 Stat. 5, which amended
21 42 U.S.C. § 2000e-5(e), is discussed in Comment 5.4.3.
22

23 In *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77, 82 (3d Cir. 1983), the court held that
24 unemployment benefits should not be deducted from a back pay award. That holding is reflected
25 in the instruction.
26

27 In *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 362 (1995), the Court
28 held that if an employer discharges an employee for a discriminatory reason, later-discovered
29 evidence that the employer could have used to discharge the employee for a legitimate reason
30 does not immunize the employer from liability. However, the employer in such a circumstance
31 does not have to offer reinstatement or front pay and only has to provide back pay "from the date
32 of the unlawful discharge to the date the new information was discovered." 513 U.S. at 362. See
33 also *Mardell v. Harleysville Life Ins. Co.*, 65 F.3d 1072, 1073 (3d Cir. 1995) (stating that “after-
34 acquired evidence may be used to limit the remedies available to a plaintiff where the employer
35 can first establish that the wrongdoing was of such severity that the employee in fact would have
36 been terminated on those grounds alone if the employer had known of it at the time of the
37 discharge.”). Both *McKennon* and *Mardell* observe that the defendant has the burden of showing
38 that it would have made the same employment decision when it became aware of the post-
39 decision evidence of the employee's misconduct.

1 **9.4.4 ADA Damages – Front Pay – For Advisory or Stipulated Jury**
2
3

4 **Model**
5

6 You may determine separately a monetary amount equal to the present value of any
7 future wages and benefits that [plaintiff] would reasonably have earned from [defendant] had
8 [plaintiff] not [describe adverse employment action] for the period from the date of your verdict
9 through a reasonable period of time in the future. From this figure you must subtract the amount
10 of earnings and benefits [plaintiff] will receive from other employment during that time.
11 [Plaintiff] has the burden of proving these damages by a preponderance of the evidence.
12

13 [If you find that [plaintiff] is entitled to recovery of future earnings from [defendant],
14 then you must reduce any award by the amount of the expenses that [plaintiff] would have
15 incurred in making those earnings.]
16

17 You must also reduce any award to its present value by considering the interest that
18 [plaintiff] could earn on the amount of the award if [he/she] made a relatively risk-free
19 investment. The reason you must make this reduction is because an award of an amount
20 representing future loss of earnings is more valuable to [plaintiff] if [he/she] receives it today
21 than if it were received at the time in the future when it would have been earned. It is more
22 valuable because [plaintiff] can earn interest on it for the period of time between the date of the
23 award and the date [he/she] would have earned the money. Thus you should decrease the
24 amount of any award for loss of future earnings by the amount of interest that [plaintiff] can
25 earn on that amount in the future.
26

27
28 **[Add the following instruction if defendant claims “after-acquired evidence” of misconduct**
29 **by the plaintiff:**
30

31 [Defendant] contends that it would have made the same decision to [describe
32 employment decision] [plaintiff] because of conduct that it discovered after it made the
33 employment decision. Specifically, [defendant] claims that when it became aware of the
34 [describe the after-discovered misconduct], it would have made the decision at that point had it
35 not been made previously.
36

37 If [defendant] proves by a preponderance of the evidence that it would have made the
38 same decision and would have [describe employment decision] [plaintiff] because of [describe
39 after-discovered evidence], then you may not award [plaintiff] any amount for wages that would
40 have been received from [defendant] in the future.]
41

42
43 **Comment**
44

1 ADA remedies are the same as provided in Title VII. The enforcement provision of the
2 ADA, 42 U.S.C. § 12117, specifically provides for the same recovery in ADA actions as in Title
3 VII actions: “The powers, remedies and procedures set forth in . . . [42 U.S.C. § 2000e-5, the
4 Title VII remedies provision] shall be the powers, remedies and procedures this title provides to .
5 . . any person alleging discrimination on the basis of disability in violation of any provision of
6 this Act . . . concerning employment.” Accordingly, this instruction on front pay is substantively
7 identical to that provided for Title VII actions. See Instruction 5.4.4.
8

9 There is no right to jury trial under Title VII (or by extension the ADA) for a claim for
10 front pay. See *Pollard v. E. I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001) (holding that
11 front pay under Title VII is not an element of compensatory damages). See also *Marinelli v. City*
12 *of Erie*, 25 F. Supp.2d 674, 675 (W.D.Pa. 1998) (“The ADA provides for all remedies available
13 under Title VII, which includes backpay and front pay or reinstatement. [Front pay relief] is
14 equitable in nature, and thus within the sound discretion of the trial court.”), *judgment vacated on*
15 *other grounds*, 216 F.3d 354 (3d Cir. 2000).
16

17 An instruction on front pay is nonetheless included because the parties or the court may
18 wish to empanel an advisory jury—especially given the fact that in most cases the plaintiff will be
19 seeking compensatory damages and the jury will be sitting anyway. See Fed. R.Civ.P. 39(c).
20 Alternatively, the parties may agree to a jury determination on front pay, in which case this
21 instruction would also be appropriate. Instruction 9.4.1, on compensatory damages, instructs the
22 jury in such cases to provide separate awards for compensatory damages, back pay, and front
23 pay.
24

25 Front pay is considered a remedy that substitutes for reinstatement, and is awarded when
26 reinstatement is not viable under the circumstances. See *Berndt v. Kaiser Aluminum & Chemical*
27 *Sales, Inc.*, 789 F.2d 253, 260-61 (3d Cir. 1986) (noting that “when circumstances prevent
28 reinstatement, front pay may be an alternate remedy”).
29

30 In *Monessen S.R. Co. v. Morgan*, 486 U.S. 330, 339 (1988), the Court held that “damages
31 awarded in suits governed by federal law should be reduced to present value.” (Citing *St. Louis*
32 *Southwestern R. Co. v. Dickerson*, 470 U.S. 409, 412 (1985)). The “self-evident” reason is that “a
33 given sum of money in hand is worth more than the like sum of money payable in the future.”
34 The Court concluded that a “failure to instruct the jury that present value is the proper measure
35 of a damages award is error.” *Id.* Accordingly, the instruction requires the jury to reduce the
36 award of front pay to present value. It should be noted that where damages are determined under
37 state law, a present value instruction may not be required under the law of certain states. See,
38 e.g., *Kaczowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (Pa. 1980) (advocating the “total
39 offset” method, under which no reduction is necessary to determine present value, as the value of
40 future income streams is likely to be offset by inflation).

9.4.5 ADA Damages — Nominal Damages

Model

If you return a verdict for [plaintiff], but [plaintiff] has failed to prove actual injury and therefore is not entitled to compensatory damages, then you must award nominal damages of \$ 1.00.

A person whose federal rights were violated is entitled to a recognition of that violation, even if [he/she] suffered no actual injury. Nominal damages (of \$1.00) are designed to acknowledge the deprivation of a federal right, even where no actual injury occurred.

However, if you find actual injury, you must award compensatory damages (as I instructed you), rather than nominal damages.

Comment

ADA remedies are the same as provided in Title VII. The enforcement provision of the ADA, 42 U.S.C. § 12117, specifically provides for the same recovery in ADA actions as in Title VII actions: “The powers, remedies and procedures set forth in . . . [42 U.S.C. § 2000e-5, the Title VII remedies provision] shall be the powers, remedies and procedures this title provides to . . . any person alleging discrimination on the basis of disability in violation of any provision of this Act . . . concerning employment.” Accordingly, this instruction on nominal damages is substantively identical to that provided for Title VII actions. See Instruction 5.4.5.

An instruction on nominal damages is proper when the plaintiff has failed to present evidence of actual injury. However, when the plaintiff has presented evidence of actual injury and that evidence is undisputed, it is error to instruct the jury on nominal damages, at least if the nominal damages instruction is emphasized to the exclusion of appropriate instructions on compensatory damages. Thus, in *Pryer v. C.O. 3 Slavic*, 251 F.3d 448, 452 (3d Cir. 2001), the district court granted a new trial, based partly on the ground that because the plaintiff had presented “undisputed proof of actual injury, an instruction on nominal damages was inappropriate.” In upholding the grant of a new trial, the Court of Appeals noted that “nominal damages may only be awarded in the absence of proof of actual injury.” *See id.* at 453. The court observed that the district court had “recognized that he had erroneously instructed the jury on nominal damages and failed to inform it of the availability of compensatory damages for pain and suffering.” *Id.* Accordingly, the court held that “[t]he court’s error in failing to instruct as to the availability of damages for such intangible harms, coupled with its emphasis on nominal damages, rendered the totality of the instructions confusing and misleading.” *Id.* at 454.

Nominal damages may not exceed one dollar. *See Mayberry v. Robinson*, 427 F. Supp. 297, 314 (M.D.Pa.1977) (“It is clear that the rule of law in the Third Circuit is that nominal

1 damages may not exceed \$1.00.") (citing *United States ex rel. Tyrrell v. Speaker*, 535 F.2d 823,
2 830 (3d Cir.1976)).