

1 **Instructions for Employment Claims Under the Americans With**
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9.0 ADA Employment Claims—Introductory Instruction

Model

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

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

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

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

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

Comment

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

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

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

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32 on the basis of disability when, inter alia, it does “not mak[e] reasonable accommodations to the
33 known physical or mental limitations of an otherwise qualified individual with a disability who is
34 an applicant or employee, unless such covered entity can demonstrate that the accommodation
35 would impose an undue hardship on the operation of the business of [the] entity.” 42 U.S.C. §
36 12112(b)(5)(A). Reasonable accommodations may include, inter alia, “job restructuring, part-time
37 or modified work schedules, reassignment to a vacant position, acquisition or modification of
38 equipment or devices, appropriate adjustment or modifications of examinations, training materials
39 or policies, the provision of qualified readers or interpreters, and other similar accommodations
40 for individuals with disabilities.” 42 U.S.C. § 12111(9).

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

45 The EEOC’s interpretive guidance articulates a two-step test for determining whether a
46 person is a qualified individual. “The first step is to determine if the individual satisfies the
47 prerequisites for the position, such as possessing the appropriate educational background,
48 employment experience, skills, licenses, etc.The second step is to determine whether or not the
49 individual can perform the essential functions of the position held or desired, with or without
50 reasonable accommodation. The determination of whether an individual with a disability is
51 qualified is to be made at the time of the employment decision.” 29 C.F.R. Pt. 1630, App.

52 *The ADA, Public Accommodations and Public Services*

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

59 *The Rehabilitation Act*

60 Federal employers and employers who receive federal funding are subject to the
61 Rehabilitation Act, which is a precursor of the ADA. 29 U.S.C. § 701 et seq. The substantive
62 standards for a claim under the Rehabilitation Act are in many respects identical to those governing
63 a claim under the ADA. See, e.g., *Wishkin v. Potter*, 476 F.3d 180, 184 (3d Cir. 2007) (“The
64 Rehabilitation Act expressly makes the standards set forth in the 1990 Americans with Disabilities
65 Act, 42 U.S.C. § 12101 et seq., applicable to federal employers and to employers receiving federal
66 funding.”); *Bragdon v. Abbott*, 524 U.S. 624 (1998) (determination of “disability” is the same
67 under the ADA and the Rehabilitation Act); *Conneen v. MBNA America Bank, N.A.*, 334 F.3d 318,
68 330 (3d Cir. 2003) (Rehabilitation Act cases apply “with equal force” to the ADA); *Deane v.*

description shall be considered evidence of the essential functions of the job.”

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69 *Pocono Medical Center*, 142 F.3d 138 (3d Cir. 1998) (en banc) (analysis of “reasonable
70 accommodation” is the same under the ADA and the Rehabilitation Act). These ADA instructions
71 can therefore be applied, and modified if necessary, to a claim brought under the Rehabilitation
72 Act.

73 *The ADA’s association provision*

74 Chapter 9 does not include an instruction specifically dealing with claims under 42 U.S.C.
75 § 12112(b)(4), which defines “discriminat[ion] against a qualified individual on the basis of
76 disability” to include “excluding or otherwise denying equal jobs or benefits to a qualified
77 individual because of the known disability of an individual with whom the qualified individual is
78 known to have a relationship or association.” For a discussion of such claims, see *Erdman v.*
79 *Nationwide Ins. Co.*, 582 F.3d 500, 510-11 (3d Cir. 2009).

80 *Religious Entities; Ministerial Exception*

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

84 Apart from those statutory defenses, the First Amendment’s religion clauses give rise to an
85 affirmative defense that “bar[s] the government from interfering with the decision of a religious
86 group to fire one of its ministers.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*,
87 132 S. Ct. 694, 702, 709 n.4 (2012) (applying this defense to an ADA retaliation claim). For
88 further discussion of the ministerial exception, see Comment 5.0.

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

2 **Model**

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

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

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

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

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

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

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

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

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

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

9.1.1 Disparate Treatment – Mixed-Motive

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

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

36

37 **Comment**

38 The Third Circuit has held that disparate treatment discrimination cases under the ADA are
39 governed by the same standards applicable to Title VII actions. *See, e.g., Shaner v. Synthes*, 204
40 F.3d 494, 500 (3d Cir. 2000); *Walton v. Mental Health Ass'n of Southeastern Pa.*, 168 F.3d 661,
41 667-68 (3d Cir. 1999); *Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153, 156-58 (3d Cir. 1995). *See*
42 *also Raytheon Co. v. Hernandez*, 540 U.S. 44, 50, n.3 (2003) (noting that all of the courts of appeals
43 have applied the Title VII standards to disparate treatment cases under the ADA). These ADA
44 instructions accordingly follow the “mixed-motive”/ “pretext” delineation employed in Title VII
45 discrimination actions.

46 In *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), the Supreme Court
47 rejected the use of a mixed-motive framework for claims under the Age Discrimination in
48 Employment Act (ADEA). The *Gross* Court reasoned that it had never held that the mixed-motive
49 framework set by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), applied to ADEA claims;
50 that the ADEA’s reference to discrimination “because of” age indicated that but-for causation is
51 the appropriate test; and that this interpretation was bolstered by the fact that when Congress in
52 1991 provided the statutory mixed-motive framework codified at 42 U.S.C. § 2000e-5(g)(2)(B),
53 that provision was not drafted so as to cover ADEA claims.

54 Based on similar reasoning, the Court has held that the mixed-motive proof framework is
55 unavailable for Title VII retaliation claims. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct.
56 2517, 2533 (2013) (“Title VII retaliation claims must be proved according to traditional principles
57 of but-for causation, not the lessened causation test stated in [42 U.S.C.] § 2000e–2(m). This
58 requires proof that the unlawful retaliation would not have occurred in the absence of the alleged
59 wrongful action or actions of the employer.”). The *Nassar* Court reasoned that Congress legislated
60 against a background tort principle of “but for” causation, *see Nassar*, 133 S. Ct. at 2523; that Title
61 VII’s retaliation provision – like the ADEA provision at issue in *Gross* – uses the word “because,”
62 which is incompatible with a mixed-motive test, *see id.* at 2528; that Congress would have
63 structured the statutory framework differently had it – in 1991 – wished to encompass Title VII
64 retaliation claims among those eligible for the statutory mixed-motive test set forth in 42 U.S.C.

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.

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65 §§ 2000e-2(m) and 2000e-5(g)(2)(B), *see id.* at 2529; that policy considerations support a
66 restrictive approach to the standards of proof for retaliation claims, *see id.* at 2531-32; and that the
67 “careful balance” that Congress set in the 1991 amendments forecloses the use of the *Price*
68 *Waterhouse* mixed-motive test for Title VII retaliation claims, *id.* at 2534.

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

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

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

87 the "mixed motive" analysis of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), may
88 be applied instead if the plaintiff has produced "direct evidence" of the employer's
89 discriminatory animus. Under a *Price-Waterhouse* "mixed motive" analysis, where there
90 is strong evidence of an employer's discriminatory animus, the burden of proof shifts from
91 the plaintiff to the employer to prove that its motives for the employment action were
92 "mixed" that is, while some motives were discriminatory, the employer had legitimate non-
93 discriminatory motives as well which would have resulted in the adverse employment
94 action. Thus, we have described the "direct evidence" that the employee must produce . . .

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.

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95 to warrant a "mixed motives" analysis as "so revealing of discriminatory animus that it is
96 not necessary to rely on any presumption from the prima facie case to shift the burden of
97 production. . . . The risk of non-persuasion [is] shifted to the defendant who . . . must
98 persuade the factfinder that . . . it would have made the same employment decision
99 regardless of its discriminatory animus." *Armbruster v. Unisys Corp.*, 32 F.3d 768, 778 (3d
100 Cir. 1994). Such direct evidence "requires 'conduct or statements by persons involved in
101 the decisionmaking process that may be viewed as directly reflecting the alleged
102 discriminatory attitude.'" *Starceski v. Westinghouse Electric Corp.*, 54 F.3d 1089, 1096 (3d
103 Cir. 1995) (quoting *Griffiths v. CIGNA Corp.*, 988 F.2d 457, 470 (3d Cir. 1993)).

104 *Statutory Definitions*

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

110 *"Same Decision" Instruction*

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

125 *Direct Threat*

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

132 *Animus of Employee Who Was Not the Ultimate Decisionmaker*

9.1.1 Disparate Treatment – Mixed-Motive

133 Construing a statute that explicitly referred to discrimination as “a motivating factor,” the
134 Supreme Court ruled that “if a supervisor performs an act motivated by antimilitary animus that is
135 *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate
136 cause of the ultimate employment action, then the employer is liable under [the Uniformed
137 Services Employment and Reemployment Rights Act of 1994 (USERRA)]” even if the ultimate
138 employment decision is taken by one other than the supervisor with the animus. *Staub v. Proctor*
139 *Hosp.*, 131 S. Ct. 1186, 1194 (2011) (footnotes omitted). Like the USERRA, 42 U.S.C. § 2000e-
140 5(g)(2)(B) refers to discrimination as a “motivating factor.” Assuming that Section 2000e-
141 5(g)(2)(B) applies to mixed-motive claims under the ADA, there may be some reason to think that
142 *Staub*’s analysis might extend to ADA mixed-motive claims. On the other hand, the argument for
143 extending *Staub* to ADA mixed-motive claims is not as strong as the argument for extending *Staub*
144 to Title VII mixed-motive claims (*see* Comment 5.1.1). The main difference is that Section 2000e-
145 5(g)(2)(B) refers to “claim[s] in which an individual proves a violation under section 2000e-2(m)
146 of this title,” and Section 2000e-2(m) does not list disability discrimination among the types of
147 violations that it bars. Section 2000e-2(m)’s “motivating factor” language does not apply to ADA
148 claims – and it was Section 2000e-2(m) that the *Staub* Court noted as containing language similar
149 to the USERRA language that it was construing. *See Staub*, 131 S. Ct. at 1191. Thus, it is unclear
150 whether the ruling in *Staub* would extend to mixed-motive claims under the ADA.

1 **9.1.2 Elements of an ADA Claim – Disparate Treatment — Pretext**

2 **Model**

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

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

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

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

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

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

16 1. “Disability.” — Instruction 9.2.1

17 2. “Qualified” — See Instruction 9.2.2]

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

23 [For example, you have been shown statistics in this case. Statistics are one form of
24 evidence that you may consider when deciding whether a defendant intentionally discriminated
25 against a plaintiff. You should evaluate statistical evidence along with all the other evidence
26 received in the case in deciding whether [defendant] intentionally discriminated against
27 [plaintiff]].

28 [Defendant] has given a nondiscriminatory reason for its [describe defendant’s action]. If
29 you disbelieve [defendant’s] explanations for its conduct, then you may, but need not, find that
30 [plaintiff] has proved intentional discrimination. In determining whether [defendant’s] stated
31 reason for its actions was a pretext, or excuse, for discrimination, you may not question
32 [defendant’s] business judgment. You cannot find intentional discrimination simply because you
33 disagree with the business judgment of [defendant] or believe it is harsh or unreasonable. You are
34 not to consider [defendant’s] wisdom. However, you may consider whether [defendant’s] reason is

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35 merely a cover-up for discrimination.

36 Ultimately, you must decide whether [plaintiff] has proven that [his/her] [disability] was a
37 determinative factor in [defendant’s employment decision.] “Determinative factor” means that if
38 not for [plaintiff 's] [disability], the [adverse employment action] would not have occurred.

39

40 **Comment**

41 This instruction is to be used when the plaintiff’s proof of discrimination on the basis of a
42 disability is circumstantial rather than direct. The Third Circuit has held that disparate treatment
43 discrimination cases under the ADA are governed by the same standards applicable to Title VII
44 actions. *See, e.g., Shaner v. Synthes*, 204 F.3d 494, 500 (3d Cir. 2000) (“We have indicated that
45 the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973),
46 applies to ADA disparate treatment and retaliation claims. *See Walton v. Mental Health Ass'n of*
47 *Southeastern Pa.*, 168 F.3d 661, 667-68 (3d Cir. 1999); *Newman v. GHS Osteopathic, Inc.*, 60
48 F.3d 153, 156-58 (3d Cir. 1995)”). *See also Raytheon Co. v. Hernandez*, 540 U.S. 44, 50, n.3
49 (2003) (noting that all of the courts of appeals have applied the Title VII standards to disparate
50 treatment cases under the ADA). Accordingly this instruction tracks the instruction for “pretext”
51 cases in Title VII actions. *See* Instruction 5.1.2.

52 The proposed instruction does not charge the jury on the complex burden-shifting formula
53 established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dept. of*
54 *Community Affairs v. Burdine*, 450 U.S. 248 (1981). Under the *McDonnell Douglas* formula a
55 plaintiff who proves a prima facie case of discriminatory treatment raises a presumption of
56 intentional discrimination. The defendant then has the burden of production, not persuasion, to
57 rebut the presumption of discrimination by articulating a nondiscriminatory reason for its actions.
58 If the defendant does articulate a nondiscriminatory reason, the plaintiff must prove intentional
59 discrimination by demonstrating that the defendant’s proffered reason was a pretext, hiding the
60 real discriminatory motive.

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

69 Without a charge on pretext, the course of the jury’s deliberations will depend on whether
70 the jurors are smart enough or intuitive enough to realize that inferences of discrimination
71 may be drawn from the evidence establishing plaintiff’s prima facie case and the pretextual
72 nature of the employer’s proffered reasons for its actions. It does not denigrate the

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73 intelligence of our jurors to suggest that they need some instruction in the permissibility of
74 drawing that inference.

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

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

91 On proof of intentional discrimination, *see Sheridan v. E.I. DuPont de Nemours and Co.*,
92 100 F.3d 1061, 1066-1067 (3d Cir. 1996) ("[T]he elements of the prima facie case and disbelief
93 of the defendant's proffered reasons are the threshold findings, beyond which the jury is permitted,
94 but not required, to draw an inference leading it to conclude that there was intentional
95 discrimination.") . On pretext, *see Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994) (pretext
96 may be shown by "such weaknesses, implausibilities, inconsistencies, incoherencies, or
97 contradictions in the [defendant's] proffered legitimate reasons for its action that a reasonable
98 [person] could rationally find them 'unworthy of credence,' and hence infer 'that the [defendant]
99 did not act for [the asserted] non-discriminatory reasons").

100 *Business Judgment*

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

111 *Determinative Factor*

9.1.2 Disparate Treatment – Pretext

112 The reference in the instruction to a “determinative factor” is taken from *Watson v. SEPTA*,
113 207 F.3d 207 (3d Cir. 2000) (holding that the appropriate term in pretext cases is “determinative
114 factor”, while the appropriate term in mixed-motive cases is “motivating factor”).

115 *Statutory Definitions*

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

121 *Direct Threat*

122 The ADA provides a defense if the employment or accommodation of an otherwise
123 qualified, disabled individual would pose a “direct threat” to the individual or to others. The “direct
124 threat” affirmative defense is applicable both to disparate treatment claims and reasonable
125 accommodation claims. See *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002); *Buskirk v.*
126 *Apollo Metals*, 307 F.3d 160, 168 (3d Cir. 2002). See 9.3.1 for an instruction on the “direct threat”
127 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 To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of
8 the evidence:

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

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

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

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

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

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

22 1. “Disability.” — Instruction 9.2.1

23 2. “Qualified” — See Instruction 9.2.2]

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

29 Under the ADA, a reasonable accommodation may include, but is not limited to, the
30 following:

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

9.1.3 Reasonable Accommodation

- 32 1. Modifying or adjusting a job application process to enable a qualified applicant with a
33 disability to be considered for the position;
- 34 2. Making existing facilities used by employees readily accessible to and usable by
35 [plaintiff];
- 36 3. Job restructuring;
- 37 4. Part-time or modified work schedule;
- 38 5. Reassignment to a vacant position for which [plaintiff] is qualified;
- 39 6. Acquisition or modifications of examinations, training manuals or policies;
- 40 7. Provision of qualified readers or interpreters; and
- 41 8. Other similar accommodations for individuals with [plaintiff's] disability.]

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

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

- 45 1. Change or eliminate any essential function of employment;
- 46 2. Shift any essential function of employment to other employees;
- 47 3. Create a new position for [plaintiff];
- 48 4. Promote [plaintiff];
- 49 5. Reduce productivity standards; or
- 50 6. Make an accommodation that conflicts with an established [seniority system] [other
51 neutral employment policy], unless [plaintiff] proves by a preponderance of the evidence
52 that “special circumstances” make an exception reasonable. For example, an exception
53 might be reasonable (and so “special circumstances” would exist) if exceptions were often
54 made to the policy. Another example might be where the policy already contains its own
55 exceptions so that, under the circumstances, one more exception is not significant.]

56 [On the other hand, [defendant's] accommodation is not “reasonable” under the ADA if
57 [plaintiff] was forced to change to a less favorable job and a reasonable accommodation could
58 have been made that would have allowed [plaintiff] to perform the essential functions of the job
59 that [he/she] already had. [Nor is an accommodation to a new position reasonable if [plaintiff] is
60 not qualified to perform the essential functions of that position.]]

9.1.3 Reasonable Accommodation

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

63 The intent of the ADA is that there be an interactive process between the employer and the
64 employee [applicant] in order to determine whether there is a reasonable accommodation that
65 would allow the employee [applicant] to perform the essential functions of a job. Both the
66 employer and the employee [applicant] must cooperate in this interactive process in good faith,
67 once the employer has been informed of the employee’s [applicant’s] request for a reasonable
68 accommodation.

69 Neither party can win this case simply because the other did not cooperate in an interactive
70 process. But you may consider whether a party cooperated in this process in good faith in
71 evaluating the merit of that party’s claim that a reasonable accommodation did or did not exist.]

72

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

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

83

84 **[For use when there is a jury question on “undue hardship”:**

85 If you find that [plaintiff] has proved the four elements I have described to you by a
86 preponderance of the evidence, then you must consider [defendant’s] defense. [Defendant]
87 contends that providing an accommodation would cause an undue hardship on the operation of
88 [defendant’s] business. Under the ADA, [defendant] does not need to accommodate [plaintiff] if
89 it would cause an “undue hardship” to its business. An “undue hardship” is something so costly or
90 so disruptive that it would fundamentally change the way that [defendant] runs its business.

91 Defendant must prove to you by a preponderance of the evidence that [describe
92 accommodation] would be an “undue hardship.” In deciding this issue, you should consider the
93 following factors:

94 1. The nature and cost of the accommodation.

95 2. [Defendant’s] overall financial resources. This might include the size of its business, the
96 number of people it employs, and the types of facilities it runs.

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

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

103 5. The impact of (specify accommodation) on the operation of the facility, including the
104 impact on the ability of other employees to perform their duties and the impact on the
105 facility's ability to conduct business.

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

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

109

110 **Comment**

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

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

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

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

126 *Skerski*, 257 F.3d at 284. See also *Colwell v. Rite Aid Corp.*, 602 F.3d 495, 505 (3d Cir. 2010)
127 ("[U]nder certain circumstances the ADA can obligate an employer to accommodate an
128 employee's disability-related difficulties in getting to work, if reasonable.").

129 In *Skerski* the employee was a cable worker, and the employer's job description for that
130 position listed climbing poles as one of the job requirements. The employee developed a fear of

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131 heights and he was transferred to a warehouse position. The employer argued that this was a
132 reasonable accommodation for the employee's disability, because he would not have to climb in
133 his new position. But the court noted that a transfer to a new position is not a reasonable
134 accommodation if the employee is not qualified to perform the essential functions of that position
135 (and there was evidence, precluding summary judgment, indicating that the plaintiff was not so
136 qualified). It further noted that reassignment "should be considered only when accommodation
137 within the individual's current position would pose an undue hardship." The court relied on the
138 commentary to the pertinent EEOC guideline, which states that "an employer may reassign an
139 individual to a lower graded position if there are no accommodations that would enable the
140 employee to remain in the current position and there are no vacant equivalent positions for which
141 the individual is qualified with or without reasonable accommodation." The court concluded that
142 there was a triable question of fact as to whether the plaintiff could have been accommodated in
143 his job as a cable worker, by the use of a bucket truck so that he would not have to climb poles.
144 The instruction is written to comport with the standards set forth in *Skerski*.

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

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

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

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

161 The instruction follows the allocation of burdens set forth in *Walton*. See also *Williams v.*
162 *Philadelphia Hous. Auth. Police Dep't*, 380 F.3d 751, 770 (3d Cir. 2004) (in a transfer case, the
163 employee must show "(1) that there was a vacant, funded position; (2) that the position was at or
164 below the level of the plaintiff's former job; and (3) that the plaintiff was qualified to perform the
165 essential duties of this job with reasonable accommodation. If the employee meets his burden, the
166 employer must demonstrate that transferring the employee would cause unreasonable hardship.").

167 For a case in which the employee did not satisfy his burden of showing a reasonable
168 accommodation, see *Gaul v. Lucent Technologies Inc.*, 134 F.3d 576, 581 (3d Cir. 1998). The
169 employee had an anxiety disorder, and argued essentially that he could be accommodated by

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170 placement with other employees who wouldn't stress him out. The court analyzed this contention
171 in the following passage:

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

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

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

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

196 *Preferences*

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

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

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

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

225 *Seniority Plans and Other Disability-Neutral Employer Rules*

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

236 The plaintiff (here the employee) nonetheless remains free to show that special
237 circumstances warrant a finding that, despite the presence of a seniority system (which the
238 ADA may not trump in the run of cases), the requested "accommodation" is "reasonable"
239 on the particular facts. . . . The plaintiff might show, for example, that the employer,
240 having retained the right to change the seniority system unilaterally, exercises that right
241 fairly frequently, reducing employee expectations that the system will be followed -- to the
242 point where one more departure, needed to accommodate an individual with a disability,
243 will not likely make a difference. The plaintiff might show that the system already contains
244 exceptions such that, in the circumstances, one further exception is unlikely to matter. We
245 do not mean these examples to exhaust the kinds of showings that a plaintiff might make.
246 But we do mean to say that the plaintiff must bear the burden of showing special
247 circumstances that make an exception from the seniority system reasonable in the particular

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248 case. And to do so, the plaintiff must explain why, in the particular case, an exception to
249 the employer's seniority policy can constitute a "reasonable accommodation" even though
250 in the ordinary case it cannot.

251 535 U.S. at 404.

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

256 It therefore appears that the *Barnett* Court has prescribed the following two-step approach
257 for cases in which a requested accommodation in the form of a job reassignment is claimed
258 to violate a disability-neutral rule of the employer. The first step requires the employee to
259 show that the accommodation is a type that is reasonable in the run of cases. The second
260 step varies depending on the outcome of the first step. If the accommodation is shown to
261 be a type of accommodation that is reasonable in the run of cases, the burden shifts to the
262 employer to show that granting the accommodation would impose an undue hardship under
263 the particular circumstances of the case. On the other hand, if the accommodation is not
264 shown to be a type of accommodation that is reasonable in the run of cases, the employee
265 can still prevail by showing that special circumstances warrant a finding that the
266 accommodation is reasonable under the particular circumstances of the case.

267 *The Interactive Process*

268 The ADA itself does not specifically provide that the employer has an obligation to engage
269 in an interactive process with the employee to determine whether a reasonable accommodation can
270 be found for the employee's disability. But the Third Circuit has established that good faith
271 participation in an interactive process is an important factor in determining whether a reasonable
272 accommodation exists. The court in *Williams v. Philadelphia Hous. Auth. Police Dep't*, 380 F.3d
273 751, 772 (3d Cir. 2004) explained the interactive process requirement as follows:

274 [W]e have repeatedly held that an employer has a duty under the ADA to engage in an
275 "interactive process" of communication with an employee requesting an accommodation
276 so that the employer will be able to ascertain whether there is in fact a disability and, if so,
277 the extent thereof, and thereafter be able to assist in identifying reasonable
278 accommodations where appropriate. "The ADA itself does not refer to the interactive
279 process," but does require employers to "make reasonable accommodations" under some
280 circumstances for qualified individuals. *Shapiro v. Township of Lakewood*, 292 F.3d 356,
281 359 (3d Cir. 2002). With respect to what consists of a "reasonable accommodation," EEOC
282 regulations indicate that,

283 to determine the appropriate reasonable accommodation it may be necessary for the
284 covered entity to initiate an informal, interactive process with the qualified
285 individual with a disability in need of the accommodation. This process should

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286 identify the precise limitations resulting from the disability and potential reasonable
287 accommodations that could overcome those limitations. 29 C.F.R. § 1630.2(o)(3).

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

293 An employee can demonstrate that an employer breached its duty to provide reasonable
294 accommodations because it failed to engage in good faith in the interactive process by showing
295 that "1) the employer knew about the employee's disability; 2) the employee requested
296 accommodations or assistance for his or her disability; 3) the employer did not make a good faith
297 effort to assist the employee in seeking accommodations; and 4) the employee could have been
298 reasonably accommodated but for the employer's lack of good faith." *Taylor v. Phoenixville*
299 *School Dist.*, 184 F.3d 296, 319-20 (3d Cir. 1999).

300 The failure to engage in an interactive process is not sufficient in itself to establish a claim
301 under the ADA, however. *See Hohider v. United Parcel Service, Inc.*, 574 F.3d 169, 193 (3d Cir.
302 2009) (failure to engage in interactive process with an employee who is not a "qualified individual"
303 does not violate ADA). For one thing, a "plaintiff in a disability discrimination case who claims
304 that the defendant engaged in discrimination by failing to make a reasonable accommodation
305 cannot recover without showing that a reasonable accommodation was possible." *Williams v.*
306 *Philadelphia Hous. Auth. Police Dep't*, 380 F.3d 751, 772 (3d Cir. 2004).

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

310 The employee bears the responsibility of initiating the interactive process by providing
311 notice of her disability and requesting accommodation for it. The employee's request need
312 not be written, nor need it include the magic words "reasonable accommodation," but the
313 notice must nonetheless make clear that the employee wants assistance for his or her
314 disability. Once the employer knows of the disability and the desire for the accommodation,
315 it has the burden of requesting any additional information that it needs, and to engage in
316 the interactive process of designing a reasonable accommodation -- the employer may not
317 in the face of a request for accommodation, simply sit back passively, offer nothing, and
318 then, in post-termination litigation, try to knock down every specific accommodation as
319 too burdensome. (citations omitted).

320 *See also Conneen v. MBNA America Bank, N.A.*, 334 F.3d 318, 332 (3d Cir. 2003) ("MBNA cannot
321 be held liable for failing to read Conneen's tea leaves. Conneen had an obligation to truthfully
322 communicate any need for an accommodation, or to have her doctor do so on her behalf if she was
323 too embarrassed to respond to MBNA's many inquiries into any reason she may have had for
324 continuing to be late.").

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

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

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

337 The ADA provides protection for an employee who is erroneously “regarded as” disabled
338 by an employer. (See the Comment to Instruction 9.2.1 for a discussion of “regarded as” disability).
339 Questions have arisen about the relationship between “regarded as” disability and the employer’s
340 duty to provide a reasonable accommodation to a qualified disabled employee. In *Williams v.*
341 *Philadelphia Hous. Auth. Police Dep’t*, 380 F.3d 751, 770 (3d Cir. 2004), the employer argued
342 that it had no obligation to provide a reasonable accommodation to an employee it “regarded as”
343 disabled because there was no job available that would accommodate the perceived disability—
344 that is, the defendant regarded the employee as completely unable to do any job at all. The court
345 described the employer’s argument, and rejected it, in the following passage:

346 To the extent Williams relies upon a "regarded as" theory of disability, PHA
347 contends that a plaintiff in Williams's position must show that there were vacant, funded
348 positions whose essential functions the employee was capable of performing *in the eyes of*
349 *the employer who misperceived the employee's limitations*. Even if a trier of fact concludes
350 that PHA wrongly perceived Williams's limitations to be so severe as to prevent him from
351 performing any law enforcement job, the "regarded as" claim must, in PHA's view, fail
352 because Williams has been unable to demonstrate the existence of a vacant, funded position
353 at PHA whose functions he was capable of performing in light of its misperception. . . .
354 PHA's argument, if accepted, would make "regarded as" protection meaningless. An
355 employer could simply regard an employee as incapable of performing any work, and an
356 employee's "regarded as" failure to accommodate claim would always fail, under PHA's
357 theory, because the employee would never be able to demonstrate the existence of any
358 vacant, funded positions he or she was capable of performing in the eyes of the employer.
359 . . . Thus, contrary to PHA's suggestion, a "regarded as" disabled employee need not
360 demonstrate during litigation the availability of a position he or she was capable of
361 performing in the eyes of the misperceiving employer. . . .

362 To meet his litigation burden with respect to both his "actual" and "regarded as"
363 disability claims, Williams need only show (1) that there was a vacant, funded position; (2)
364 that the position was at or below the level of the plaintiff's former job; and (3) that the

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365 plaintiff was qualified to perform the essential duties of this job with reasonable
366 accommodation. If the employee meets his burden, the employer must demonstrate that
367 transferring the employee would cause unreasonable hardship.

368 The employer in *Williams* made an alternative argument: that if an employee is “regarded
369 as” but not actually disabled, the employer should have no duty to provide a reasonable
370 accommodation because there is nothing to accommodate. In *Williams*, the plaintiff was a police
371 officer and the employer regarded him as being unable to be around firearms because of a mental
372 impairment. The court analyzed the defendant’s argument that it had no duty to provide an
373 accommodation to an employee “regarded as” disabled, and rejected it, in the following passage:

374 PHA . . . suggests that Williams, by being "regarded as" disabled by PHA, receives a
375 "windfall" accommodation compared to a similarly situated employee who had not been
376 "regarded as" disabled and would not be entitled under the ADA to any accommodation.
377 The record in this case demonstrates that, absent PHA's erroneous perception that Williams
378 could not be around firearms because of his mental impairment, a radio room assignment
379 would have been made available to him and others similarly situated. PHA refused to
380 provide that assignment solely based upon its erroneous perception that Williams's mental
381 impairment prevented him not only from carrying a gun, but being around others with, or
382 having access to, guns - perceptions specifically contradicted by PHA's own psychologist.
383 While a similarly situated employee who was not perceived to have this additional
384 limitation would have been allowed a radio room assignment, Williams was specifically
385 denied such an assignment because of the erroneous perception of his disability. The
386 employee whose limitations are perceived accurately gets to work, while Williams is sent
387 home unpaid. This is precisely the type of discrimination the "regarded as" prong literally
388 protects from Accordingly, Williams, to the extent PHA regarded him as disabled,
389 was entitled to reasonable accommodation

390 Thus, an employee “regarded as” having a disability is entitled to the same accommodation that
391 he would receive were he actually disabled. *See also Kelly v. Metallica West, Inc.*, 410 F.3d 670,
392 676 (10th Cir. 2005) (“An employer who is unable or unwilling to shed his or her stereotypic
393 assumptions based on a faulty or prejudiced perception of an employee’s abilities must be prepared
394 to accommodate the artificial limitations created by his or her own faulty perceptions. In this sense,
395 the ADA encourages employers to become more enlightened about their employees’ capabilities,
396 while protecting employees from employers whose attitudes remain mired in prejudice.”).

397 *Direct Threat*

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

9.1.3 Reasonable Accommodation

404 *Statutory Definitions*

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

9.1.4 Harassment – Hostile Work Environment –Tangible Employment Action

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

Model

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

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

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

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

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

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

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

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

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

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

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

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

9.1.4 Harassment – Hostile Work Environment –Tangible Employment Action

32

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

34 1. “Disability.” — Instruction 9.2.1

35 2. “Qualified” — See Instruction 9.2.2]

36

37 **Comment**

38 In *Walton v. Mental Health Ass’n of Southeastern Pa.*, 168 F.3d 661, 666 (3d Cir. 1999),
39 the court considered whether a cause of action for harassment/hostile work environment was
40 cognizable under the ADA. The court’s analysis is as follows:

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

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

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

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

9.1.4 Harassment – Hostile Work Environment –Tangible Employment Action

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

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

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

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

87 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.

9.1.4 Harassment – Hostile Work Environment –Tangible Employment Action

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

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

99 For a discussion of the definition of “management level personnel” in a Title VII case, see
100 Comment 5.1.4 (discussing *Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 108
101 (3d Cir. 2009)).

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

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

9.1.5 Harassment – Hostile Work Environment – No Tangible Employment Action

9.1.5 Elements of an ADA Claim — Harassment — Hostile Work Environment — No Tangible Employment Action

Model

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

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

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

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

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

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

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

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

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

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

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

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

9.1.5 Harassment – Hostile Work Environment – No Tangible Employment Action

31 1. “Disability.” — Instruction 9.2.1

32 2. “Qualified” — See Instruction 9.2.2]

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

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

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

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

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

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

48 2. That policy was fully communicated to its employees.

49 3. That policy provided a reasonable way for [plaintiff] to make a claim of
50 harassment to higher management.

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

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

55

56 **Comment**

57 As discussed in the Comment to Instruction 9.1.4, the Third Circuit has assumed that the
58 ADA provides a cause of action for harassment/hostile work environment, and that such a cause
59 of action (assuming it exists) is to be governed by the same standards applicable to a hostile work
60 environment claim under Title VII. *Walton v. Mental Health Ass’n of Southeastern Pa.*, 168 F.3d
61 661, 666 (3d Cir. 1999).

9.1.5 Harassment – Hostile Work Environment – No Tangible Employment Action

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

66 This instruction is to be used in discriminatory harassment cases where the plaintiff did
67 not suffer any "tangible" employment action such as discharge or demotion or constructive
68 discharge, but rather suffered "intangible" harm flowing from harassment that is "sufficiently
69 severe or pervasive to create a hostile work environment." *Faragher v. Boca Raton*, 524 U.S. 775,
70 808 (1998). In *Faragher* and in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), the
71 Court held that an employer is strictly liable for supervisor harassment that "culminates in a
72 tangible employment action, such as discharge, demotion, or undesirable reassignment." *Ellerth*,
73 524 U.S. at 765. But when no such tangible action is taken, the employer may raise an affirmative
74 defense to liability. To prevail on the basis of the defense, the employer must prove that "(a) [it]
75 exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and
76 that (b) the employee "unreasonably failed to take advantage of any preventive or corrective
77 opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 751
78 (1998).

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

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

94 For a discussion of the definition of "management level personnel" in a Title VII case, see
95 Comment 5.1.4 (discussing *Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 108
96 (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.

9.1.5 Harassment – Hostile Work Environment – No Tangible Employment Action

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

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

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

108 For further commentary on hostile work environment claims, see Instructions 5.1.4 and
109 5.1.5.

9.1.6 Elements of an ADA Claim — Disparate Impact

No Instruction

Comment

Disparate impact claims are cognizable under the ADA. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 50 (2003) (“Both disparate-treatment and disparate-impact claims are cognizable under the ADA.”). See 42 U.S.C. § 12112(b) (defining “discriminate” to include “utilizing standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability” and “using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability”). No instruction is provided on disparate impact claims, however, because a right to jury trial is not provided under the ADA for such claims. 42 U.S.C.A. § 1981a(a)(1) provides that in an action brought under 42 U.S.C. § 2000e-5 (Title VII), a plaintiff may recover compensatory and punitive damages, *but not* if the allegation is that an employment practice is unlawful “because of its disparate impact.” Thus under Title VII, disparate impact claimants cannot recover damages, and therefore there is no right to jury trial for such claims. See *Pollard v. Wawa Food Market*, 366 F.Supp.2d 247 (E.D.Pa. 2005) (striking a demand for a jury trial on a disparate impact claim brought under Title VII). The same result is mandated for ADA disparate impact claims, because 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] 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.”

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

9.1.7 Elements of an ADA Claim — Retaliation⁸

Model

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

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

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

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

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

Concerning the first element, [plaintiff] need not prove the merits of [describe conduct], but only that [plaintiff] was acting under a reasonable,¹⁰ good faith belief that [plaintiff's] [or someone else's] right to be [free from discrimination on the basis of a disability] [free to request an accommodation for a disability] was violated.

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

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

[Plaintiff] can recover for retaliation even if [plaintiff] did not have a “disability” within the meaning of the ADA. The question is not whether there was a “disability” but whether

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.

¹⁰ See the Comment for a discussion of the allocation of responsibility for determining the reasonableness of the plaintiff's belief.

28 [defendant] retaliated for the [describe protected activity of plaintiff].

29 Ultimately, you must decide whether [plaintiff's] [protected activity] had a determinative
30 effect on [describe alleged retaliatory activity]. "Determinative effect" means that if not for
31 [plaintiff's] [protected activity], [describe alleged retaliatory activity] would not have occurred.

32

33 **Comment**

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

35 At least one court in the Third Circuit has held that a plaintiff's recovery for retaliation
36 under the ADA is limited to equitable relief, and accordingly there is no right to jury trial on an
37 ADA retaliation claim. The court in *Sabbrese v. Lowe's Home Centers, Inc.*, 320 F.Supp.2d 311,
38 331 (W.D.Pa. 2004), considered a defendant's claim that the plaintiff did not have a right to a jury
39 trial on his ADA retaliation claim. The plaintiff argued that because compensatory and punitive
40 damages are available for retaliation actions under Title VII, they likewise are available for an
41 ADA retaliation claim.

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

45 The enforcement provision of the ADA is codified at 42 U.S.C. § 12117. That section
46 provides that the available remedies under the ADA are the same as provided in the 1964
47 Civil Rights Act, 42 U.S.C. § 2000e-4 through e-9. Section 2000e-5(g)(1) of the Civil
48 Rights Act limits the remedies available under that act to equitable relief, including back
49 pay, but does not provide for compensatory or punitive damages. *Kramer*, 355 F.3d at 964.
50 The 1991 Civil Rights Act, 42 U.S.C. § 1981a(a)(2), expanded the remedies available in
51 section 2000e-5(g)(1) to provide for compensatory and punitive damages in certain
52 circumstances. With respect to the ADA, section 1981a(a)(2) provided that a complaining
53 party could recover compensatory and punitive damages for violations of section 102 or
54 section 102(b)(5) of the ADA, codified at 42 U.S.C. §§ 12112 and 12112(b)(5). Sections
55 12112 and 12112(b)(5) deal with an employer's failure to make reasonable
56 accommodations to a qualified employee with a disability [and also to disparate treatment
57 claims], while section 12203 - not listed in section 1981a(a)(2) - establishes retaliation
58 claims under the ADA.

59 After reviewing the applicable statutes, the United States Court of Appeals for the
60 Seventh Circuit concluded that the plaintiff was precluded from recovering compensatory
61 and punitive damages under her ADA retaliation claim. The court determined that section
62 1981a(a)(2) permitted recovery of compensatory and punitive damages only for the claims
63 listed in that statute, such as section 12112 of the ADA, and since the section establishing
64 retaliation claims under the ADA (42 U.S.C. § 12203) was not listed, compensatory and

9.1.7 Retaliation

65 punitive damages were unavailable. This court adopts the persuasive rationale of *Kramer*
66 and accordingly holds that compensatory and punitive damages are not available.

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

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

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

88 The *Sabbrese* court noted that "[n]either the court nor any of the parties were able to locate
89 any decisions in which the United States Court of Appeals for the Third Circuit implicitly upheld
90 an award of compensatory or punitive damages for ADA retaliation claims." It should be noted
91 that courts in other circuits have found that damages (and a right to jury trial) are available in
92 retaliation actions under the ADA. *See, e.g., Foster v. Time Warner Entertainment Co.*, 250 F.3d
93 1189 (8th Cir. 2001); *Lovejoy-Wilson v. Noco Motor Fuels, Inc.*, 242 F.Supp.2d 236 (W.D.N.Y.
94 2003) (citing cases).

95 A pattern instruction for retaliation actions under the ADA is included here for two reasons.
96 First, the Third Circuit has not yet considered whether there is a right to jury trial in ADA
97 retaliation actions, and other courts are in disagreement on the question. Second, even if it is
98 determined that there is no right to jury trial for ADA retaliation claims, the parties or the court
99 may wish to have a jury render an advisory verdict on a plaintiff's ADA retaliation claim. *See Fed.*
100 *R.Civ.P.* 39(c). Alternatively, the parties may wish to stipulate to a jury's resolution of a retaliation
101 claim. Use of an advisory or a stipulated jury may especially be useful in cases where a retaliation
102 claim is joined with an ADA disparate treatment or accommodation claim, as there is a right to
103 jury trial for those claims and many of the issues to be decided by the jury for those claims might
104 overlap with the retaliation claim.

105 *The Basics of a Retaliation Claim under the ADA*

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

111 Unlike a claim for discrimination, accommodation or harassment, an ADA retaliation claim
 112 does not require that a plaintiff show that he or she has a “disability” within the meaning of the
 113 ADA. *Shellenberger, v. Summit Bancorp, Inc.*, 318 F.3d 183, 188 (3d Cir. 2003) (“we note that
 114 Shellenberger's failure to establish that she was disabled does not prevent her from recovering if
 115 she can establish that her employer terminated her because she engaged in activity protected under
 116 the ADA.”). This is because the text of the ADA retaliation provision protects “any individual”
 117 who has opposed any act or practice made unlawful by the ADA or who has made a charge under
 118 the ADA. This differs from the scope of the ADA disability discrimination provision, 42 U.S.C.
 119 § 12112(a), which may be invoked only by a “qualified individual with a disability.”

120 *Protected Activity*

121 Activity protected from retaliation under the ADA includes not only bringing or
 122 participating in formal actions to enforce ADA rights, but also informal activity such as requesting
 123 an accommodation for a disability. *Shellenberger, v. Summit Bancorp, Inc.*, 318 F.3d 183, 188 (3d
 124 Cir. 2003). The plaintiff must have had a reasonable, good faith belief in the merits of an
 125 accommodation request in order for the activity to be protected against retaliation. *Id.* (“the
 126 protection from retaliation afforded under the ADA does not extend to an employee whose request
 127 is motivated by something other than a good faith belief that he/she needs an accommodation”);
 128 *Sulima v. Tobyhanna Army Depot*, 602 F.3d 177, 188 (3d Cir. 2010) (“[U]nlike a general ADA
 129 discrimination claim, an ADA retaliation claim does not require that the plaintiff demonstrate a
 130 disability within the meaning of the ADA, but only that the plaintiff has a ‘reasonable, good faith
 131 belief that [he] was entitled to request the reasonable accommodation [he] requested.’”) (quoting
 132 *Williams v. Philadelphia Hous. Auth. Police Dep't*, 380 F.3d 751, 759 n.2 (3d Cir. 2004)).

133 In accord with instructions from other circuits concerning retaliation under various
 134 employment discrimination statutes, Instruction 9.1.7 directs the jury to determine both the good

¹¹ Where an employer conditioned its conversion of terminated at-will employees into independent contractors on the employees’ signing releases of all existing claims (including but not limited to discrimination claims), an employee’s refusal to sign that release did not constitute opposition within the meaning of the ADA’s anti-retaliation provision: “[R]efusing to sign a release . . . does not communicate opposition sufficiently specific to qualify as protected employee activity. . . . Because Allstate's Release barred its signatories from bringing *any* claims against Allstate concerning their employment or termination, employee agents who refused to sign it might have done so for any number of reasons unrelated to discrimination.” *E.E.O.C. v. Allstate Ins. Co.*, 778 F.3d 444, 452 (3d Cir. 2015).

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135 faith and the reasonableness of the plaintiff's belief that he or she was entitled to request a
136 reasonable accommodation. *See* Fifth Circuit Committee Note to Instruction 11.6.1 (Title VII
137 retaliation); Seventh Circuit Committee Comment to Instruction 3.02 (retaliation instruction for
138 use in Title VII, § 1981, and ADEA cases); Eleventh Circuit Instruction 4.21 (Section 1981
139 retaliation); Eleventh Circuit Instruction 4.22 (retaliation claims under Title VII, ADEA, ADA,
140 and FLSA); *see also* Eighth Circuit Instruction 10.41 (retaliation claim (regarding opposition to
141 harassment or discrimination) under Title VII and other federal discrimination laws; instruction
142 uses phrase "reasonably believed"); *id.* Notes on Use, Note 5 (using phrase "reasonably and in
143 good faith believe"); *compare* Ninth Circuit Instruction & Comment 10.3 (Title VII retaliation)
144 (discussing reasonableness requirement in the comment but not in the model instruction). In cases
145 where the protected nature of the plaintiff's activity is not in dispute, this portion of the instruction
146 can be modified and the court can simply instruct the jury that specified actions by the plaintiff
147 constituted protected activity.

148 *Standard for Actionable Retaliation*

149 The Supreme Court in *Burlington N. & S.F. Ry. v. White*, 548 U.S. 53, 68 (2006), held that
150 a cause of action for retaliation under Title VII lies whenever the employer responds to protected
151 activity in such a way "that a reasonable employee would have found the challenged action
152 materially adverse, which in this context means it well might have dissuaded a reasonable worker
153 from making or supporting a charge of discrimination." (internal quotation marks and citations
154 omitted).¹² The Court elaborated on this standard in the following passage:

155 We speak of *material* adversity because we believe it is important to separate
156 significant from trivial harms. Title VII, we have said, does not set forth "a general civility
157 code for the American workplace." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S.
158 75, 80, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998). An employee's decision to report
159 discriminatory behavior cannot immunize that employee from those petty slights or minor
160 annoyances that often take place at work and that all employees experience. *See* 1 B.
161 Lindemann & P. Grossman, *Employment Discrimination Law* 669 (3d ed. 1996) (noting
162 that "courts have held that personality conflicts at work that generate antipathy" and
163 "'snubbing' by supervisors and co-workers" are not actionable under § 704(a)). The anti-
164 retaliation provision seeks to prevent employer interference with "unfettered access" to
165 Title VII's remedial mechanisms. It does so by prohibiting employer actions that are likely
166 "to deter victims of discrimination from complaining to the EEOC," the courts, and their

¹² Where an employer terminated at-will employees but offered them a chance to serve as independent contractors if they signed releases of all existing claims (including but not limited to discrimination claims), the employer's denial of the independent-contractor arrangement to terminated employees who refused to sign that release did not constitute an adverse action for purposes of the ADA's anti-retaliation provision. *E.E.O.C. v. Allstate Ins. Co.*, 778 F.3d 444, 452 (3d Cir. 2015) ("[T]he terminated agents were not entitled to convert to independent contractor status.... And the [EEOC] has cited no legal authority for the proposition that an employer commits an adverse action by denying an employee an unearned benefit on the basis of the employee's refusal to sign a release.").

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167 employers. And normally petty slights, minor annoyances, and simple lack of good
168 manners will not create such deterrence. See 2 EEOC 1998 Manual § 8, p. 8-13.

169 We refer to reactions of a *reasonable* employee because we believe that the
170 provision's standard for judging harm must be objective. An objective standard is judicially
171 administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial
172 effort to determine a plaintiff's unusual subjective feelings. We have emphasized the need
173 for objective standards in other Title VII contexts, and those same concerns animate our
174 decision here. See, *e.g.*, [Pennsylvania State Police v.] *Suders*, 542 U.S., at 141, 124 S. Ct.
175 2342, 159 L. Ed. 2d 204 (constructive discharge doctrine); *Harris v. Forklift Systems, Inc.*,
176 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (hostile work environment
177 doctrine).

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

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

194 548 U.S. at 68-70 (some citations omitted).

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

198 *No Requirement That Retaliation Be Job-Related To Be Actionable*

199 The Supreme Court in *Burlington N. & S.F. Ry. v. White*, 126 S.Ct. 2405, 2413 (2006),
200 held that retaliation need not be job-related to be actionable under Title VII. In doing so, the Court
201 rejected authority from the Third Circuit (and others) requiring that the plaintiff suffer an adverse
202 employment action in order to recover for retaliation. The Court distinguished Title VII's
203 retaliation provision from its basic anti-discrimination provision, which does require an adverse
204 employment action. The Court noted that unlike the basic anti-discrimination provision, which

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205 refers to conditions of employment, the anti-retaliation provision is broadly worded to prohibit *any*
206 discrimination by an employer in response to protected activity.

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

212 *Time Period Between Protected Activity and the Allegedly Retaliatory Action*

213 On the relevance of the length of time between protected activity and an alleged retaliatory
214 act, see *Williams v. Philadelphia Hous. Auth. Police Dep't*, 380 F.3d 751, 757 (3d Cir. 2004), a
215 case involving termination:

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

227 Here, over two months elapsed between the time Williams requested a radio room
228 assignment and the time that he was terminated. In cases like this one, "where 'the temporal
229 proximity is not so close as to be unduly suggestive,' we have recognized that 'timing plus
230 other evidence may be an appropriate test. . ..'" *Thomas v. Town of Hammonton*, 351 F.3d
231 108, 114 (3d Cir. 2003) (quoting *Estate of Smith v. Marasco*, 318 F.3d 497, 513 (3d Cir.
232 2003)). Williams has, however, put forth no other evidence suggesting that PHA terminated
233 him because he requested a radio room assignment. Moreover, the evidence supporting
234 PHA's alternative explanation is quite compelling. As Williams acknowledges, PHA had
235 granted Williams medical leave on two prior occasions, and there was no indication that
236 PHA would not have done so again had Williams simply [followed company procedures].

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

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

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

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

250 *Perceived Protected Activity*

251 The court in *Fogleman* also held that the ADA protected an employee against retaliation
252 for “perceived” protected activity. “Because the statutes forbid an employer’s taking adverse action
253 against an employee for discriminatory reasons, it does not matter whether the factual basis for the
254 employer’s discriminatory animus was correct and that, so long as the employer’s specific intent
255 was discriminatory, the retaliation is actionable.” 283 F.3d at 562. If the fairly unusual case arises
256 in which the employer is alleged to have retaliated for perceived rather than actual protected
257 activity, then the instruction can be modified consistently with the court’s directive in *Fogleman*.

258 “Determinative Effect” Instruction

259 Instruction 9.1.7 requires the plaintiff to show that the plaintiff’s protected activity had a
260 “determinative effect” on the allegedly retaliatory activity. Prior to 2013, a distinction between
261 pretext and mixed-motive cases had on occasion been recognized as relevant for both Title VII
262 retaliation claims and ADA retaliation claims: “[W]e analyze ADA retaliation claims under the
263 same framework we employ for retaliation claims arising under Title VII... This framework will
264 vary depending on whether the suit is characterized as a ‘pretext’ suit or a ‘mixed motives’ suit.”
265 *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 500 (3d Cir. 1997). For Title VII retaliation
266 claims that proceeded on a “pretext” theory, the “determinative effect” standard applied. *See*
267 *Woodson*, 109 F.3d at 935 (holding that it was error, in a case that proceeded on a “pretext” theory,
268 not to use the “determinative effect” language). The same was true for ADA retaliation claims.
269 *See Krouse*, 126 F.3d at 501. Writing in an ADA retaliation case that proceeded on a pretext
270 theory, and citing *Woodson* and *Krouse*, the court of appeals stated in *Shaner v. Synthes*, 204 F.3d
271 494, 501 (3d Cir. 2000), that “[w]e recently have made clear that a plaintiff’s ultimate burden in a
272 retaliation case is to convince the factfinder that retaliatory intent had a ‘determinative effect’ on
273 the employer’s decision.” *Shaner* did not appear, however, to foreclose the use of a mixed-motive
274 framework in an appropriate case, because the court of appeals later held that an ADA retaliation
275 plaintiff had sufficient evidence to justify the use of such a framework: “The evidentiary
276 framework of Shellenberger’s claim will vary depending on whether the suit is characterized as a
277 ‘pretext’ suit or a ‘mixed-motives’ suit. Shellenberger argues that her evidence was sufficient to
278 survive judgment as a matter of law under either theory, and we agree.” *Shellenberger v. Summit*
279 *Bancorp, Inc.*, 318 F.3d 183, 187 (3d Cir. 2003) (footnote omitted).

280 In 2013, the Supreme Court held that the mixed-motive proof framework is unavailable for
281 Title VII retaliation claims. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S.Ct. 2517, 2533 (2013)

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282 (“Title VII retaliation claims must be proved according to traditional principles of but-for
283 causation, not the lessened causation test stated in [42 U.S.C.] § 2000e–2(m). This requires proof
284 that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action
285 or actions of the employer.”). The *Nassar* Court reasoned that Congress legislated against a
286 background tort principle of “but for” causation, *see Nassar*, 133 S. Ct. at 2523; that Title VII’s
287 retaliation provision uses the word “because,” which is incompatible with a mixed-motive test, *see*
288 *id.* at 2528; that Congress would have structured the statutory framework differently had it wished
289 to encompass Title VII retaliation claims among those eligible for the statutory mixed-motive test
290 set forth in 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B), *see id.* at 2529; that policy
291 considerations support a restrictive approach to the standards of proof for retaliation claims, *see*
292 *id.* at 2531-32; and that the “careful balance” that Congress set in the Civil Rights Act of 1991
293 forecloses the use of the *Price Waterhouse* mixed-motive test for Title VII retaliation claims, *id.*
294 at 2534.

295 The Committee has not attempted to determine what, if any, implications *Nassar* and *Gross*
296 *v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009),¹³ have for ADA retaliation claims, but users
297 of these instructions may wish to consider that question.

¹³ 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 **Model**

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

7 [“Physical/Mental Impairment”

8 The term “physical impairment” means any condition that prevents the body from
9 functioning normally. The term “mental impairment” means any condition that prevents the mind
10 from functioning normally.]

11 [Major Life Activities

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

16 [“Substantially Limiting”

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

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

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

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

32 [If you find that [plaintiff’s] impairment substantially limits one major life activity, you
33 must find that it is a disability even if it does not limit any other major life activity.]

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

36

37 **[For use when there is a jury question on whether plaintiff is “regarded as” having a**
38 **disability:**

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

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

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

51 3. [Plaintiff] did not have any impairment, but [defendant] treated [him/her] as
52 having an impairment that substantially limited [plaintiff’s] ability to perform [describe
53 activity].

54 Also, [Plaintiff] can meet the requirement of being “regarded as” having a disability if
55 [he/she] was discriminated against because of an actual or perceived impairment, even if the
56 impairment did not, or was not perceived to, limit a major life activity.”

57 [However, [plaintiff] cannot be “regarded as” having a disability if [his/her] impairment is
58 temporary and minor. Under the ADA, a temporary impairment is one with an actual or expected
59 duration of six months or less.]]

60

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

62 The ADA definition of “disability” includes not only those persons who persons who are
63 actually disabled, but also those who have a “record of” disability. [Plaintiff] has a “record of”
64 disability if [he/she] proves by a preponderance of the evidence that [he/she] has a record of a
65 “physical or mental impairment” that “substantially limited” [his/her] ability to perform a [describe
66 activity], as I have defined those terms for you. [This means that if [plaintiff] had a disability within
67 the meaning of the ADA [but has now recovered] [but that disability is in remission], [he/she] still
68 fits within the statutory definition because [he/she] has a record of disability.]

69

70 **Concluding Instruction:**

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

74

75 **Comment**

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

84 *ADA Amendments Act of 2008*

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

99 *“Impairment”*

100 In *Bragdon v. Abbott*, 524 U.S. 624, 632 (1998), the Court determined that an employee
101 with HIV had a physical “impairment” within the meaning of the ADA. The Court noted that the
102 pertinent regulations interpreting the term “impairment” provide as follows:

103 (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss
104 affecting one or more of the following body systems: neurological; musculoskeletal;

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105 special sense organs; respiratory, including speech organs; cardiovascular; reproductive,
106 digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or

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

109 45 CFR § 84.3(j)(2)(i) (1997).

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

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

127 “*Substantially Limits*”

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

135 (4) to reject the standards enunciated by the Supreme Court in *Toyota Motor*
136 *Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms
137 “substantially” and “major” in the definition of disability under the ADA “need to be
138 interpreted strictly to create a demanding standard for qualifying as disabled,” and that to
139 be substantially limited in performing a major life activity under the ADA “an individual
140 must have an impairment that prevents or severely restricts the individual from doing
141 activities that are of central importance to most people's daily lives”;

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

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

152 Accordingly, the text of the Instruction does not include any restrictions on the term
153 “substantially limits” such as “severe” or “significant”; and the conclusion to the Instruction
154 provides, consistently with Congressional intent, that the statutory definition of “disability”
155 (including the term “substantially limits”) is to be construed broadly.¹⁴

156 *Use of Corrective Devices*

157 In *Sutton v. United Air Lines*, 527 U.S. 471, 482 (1999), the Court held that the existence
158 of a “disability” under the ADA must be determined in light of corrective measures used by the
159 employee—in that case, the use of eyeglasses to correct severely impaired vision. The Court
160 declared that “it is apparent that if a person is taking measures to correct for, or mitigate, a physical
161 or mental impairment, the effect of those measures— both positive and negative— must be taken
162 into account when judging whether that person is ‘substantially limited’ in a major life activity and
163 thus ‘disabled’ under the Act.” But the ADA Amendments Act of 2008 specifically repudiates the
164 result in *Sutton*.¹⁵ Section (4)(a)(E) of the Act provides that the determination of whether an
165 impairment substantially limits a major life activity “shall be made without regard to the
166 ameliorative effects of mitigating measures such as –

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

171 (II) use of assistive technology;

¹⁴ 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).

¹⁵ “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).

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172 (III) reasonable accommodations or auxiliary aids or services; or

173 (IV) learned behavioral or adaptive neurological modifications.

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

178 “*Major Life Activity*”

179 The question of whether the plaintiff is substantially limited in performing a “major life
180 activity” is a question for the jury. *Williams v. Philadelphia Hous. Auth. Police Dep’t*, 380 F.3d
181 751, 763 (3d Cir. 2004) (“The question of whether an individual is substantially limited in a major
182 life activity is a question of fact.”). But whether a certain activity rises to the level of a “major life
183 activity” is usually treated as a legal question. For example, in *Bragdon v. Abbott*, 524 U.S. 624,
184 637 (1998), the Court held as a matter of law that reproduction is a major life activity within the
185 meaning of the ADA. Similarly the Third Circuit has held that a number of activities constitute
186 major life activities. *See, e.g., Gagliardo v. Connaught Laboratories, Inc.*, 311 F.3d 565, 573 (3d
187 Cir. 2002) (concentrating and remembering are major life activities); *Taylor v. Phoenixville School*
188 *Dist.*, 184 F.3d 296, 305 (3d Cir. 1999) (holding that thinking is a major life activity, as it is
189 “inescapably central to anyone’s life”). Accordingly, the instruction does not leave to the jury the
190 determination of whether the plaintiff’s claimed impairment is one that affects a major life activity.
191 Rather, the jury must decide whether the plaintiff is substantially limited in performing the major
192 life activity found to be at issue by the court.

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

200 The ADA Amendments Act of 2008 sets forth a number of activities, and bodily functions,
201 that constitute “major life activities” within the meaning of the ADA. Section 4(a) of the Act
202 provides the following definition of “major life activities”:

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

207 (B) Major bodily functions. * * * a major life activity also includes the operation of a
208 major bodily function, including but not limited to, functions of the immune system,

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209 normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory,
210 endocrine, and reproductive functions.

211 *Work as a Major Life Activity*

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

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

228 *“Regarded as” Having a Disability*

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

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

236 The *Deane* court emphasized that the plaintiff does not need to show that the employer
237 acted with bad intent in regarding the plaintiff as having a disability:

238 Although the legislative history indicates that Congress was concerned about eliminating
239 society's myths, fears, stereotypes, and prejudices with respect to the disabled, the EEOC's
240 Regulations and Interpretive Guidance make clear that even an innocent misperception
241 based on nothing more than a simple mistake of fact as to the severity, or even the very
242 existence, of an individual's impairment can be sufficient to satisfy the statutory definition
243 of a perceived disability. See 29 C.F.R. pt. 1630, app. § 1630.2(l) (describing, as one
244 example of a “regarded as” disabled employee, an individual with controlled high blood
245 pressure that is not substantially limiting, who nonetheless is reassigned to less strenuous

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246 work because of the employer's unsubstantiated fear that the employee will suffer a heart
247 attack). Thus, whether or not PMC was motivated by myth, fear or prejudice is not
248 determinative of Deane's "regarded as" claim.

249 142 F.3d at 144. Nor is "regarded as" disability dependent on plaintiff having any impairment. The
250 question is not the plaintiff's actual condition, but whatever condition was perceived by the
251 employer. *See Kelly v. Drexel University*, 94 F.3d 102, 108 (3d Cir. 1996) ("Our analysis of this
252 ["regarded as"] claim focuses not on Kelly and his actual abilities but on the reactions and
253 perceptions of the persons interacting or working with him.").

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

256 1. A plaintiff meets the requirement of being "regarded as" having a disability if she
257 establishes that she has been discriminated against "because of an actual or perceived
258 impairment *whether or not the impairment limits or is perceived to limit a major life*
259 *activity.*" (emphasis added).

260 2. A plaintiff cannot be "regarded as" having a disability if the actual or perceived
261 impairment is "transitory and minor." A "transitory" impairment is defined as one "with
262 an actual or expected duration of 6 months or less."

263 The text of the Instruction is intended to incorporate these statutory clarifications. *See Budhun v.*
264 *Reading Hospital & Medical Center*, 765 F.3d 245, 260 (3d Cir. 2014) (broken fifth metacarpal,
265 which "resulted in the 'lost use of three fingers for approximately two months,'" was "objectively
266 transitory and minor").

267 The mere fact that the employer offered an accommodation does not mean that the
268 employee was "regarded as" having a disability. *Williams v. Philadelphia Hous. Auth. Police*
269 *Dep't*, 380 F.3d 751, 776 n.20 (3d Cir. 2004):

270 Williams argues, inter alia, that PHA "admitted" he was disabled within the
271 meaning of the ADA by offering him the opportunity to take an unpaid leave of absence,
272 thereby "accommodating" him. We agree with the Sixth and Ninth Circuits, however, that
273 an offer of accommodation does not, by itself, establish that an employer "regarded" an
274 employee as disabled. *See Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789, 798
275 (9th Cir. 2001) ("When an employer takes steps to accommodate an employee's
276 restrictions, it is not thereby conceding that the employee is disabled under the ADA or
277 that it regards the employee as disabled. A contrary rule would discourage the amicable
278 resolution of numerous employment disputes and needlessly force parties into expensive
279 and time-consuming litigation."), clarified in other respects, 292 F.3d 1045 (9th Cir. 2002);
280 *Plant v. Morton Int'l, Inc.*, 212 F.3d 929, 938 (6th Cir. 2000) ("The intent behind this
281 ["regarded as"] provision, according to the EEOC, is to reach those cases in which 'myths,
282 fears and stereotypes' affect the employer's treatment of an individual. [An employee]
283 cannot show that this provision applies to him merely by pointing to that portion of the

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284 record in which his [employer] admitted that he was aware of [the employee's] medical
285 restrictions and modified [the employee's] responsibilities based on them.").

286 *Reasonable Accommodation Requirement as Applied to "Regarded as" Disability*

287 In *Williams v. Philadelphia Hous. Auth. Police Dep't*, 380 F.3d 751 (3d Cir. 2004), the
288 employer argued that it had no obligation to provide a reasonable accommodation to an employee
289 it "regarded as" having a disability because there was no job available that would accommodate
290 the perceived disability—that is, the defendant regarded the employee as completely unable to do
291 any job at all. The court described the employer's argument, and rejected it, in the following
292 passage:

293 To the extent Williams relies upon a "regarded as" theory of disability, PHA
294 contends that a plaintiff in Williams's position must show that there were vacant,
295 funded positions whose essential functions the employee was capable of
296 performing *in the eyes of the employer who misperceived the employee's*
297 *limitations*. Even if a trier of fact concludes that PHA wrongly perceived Williams's
298 limitations to be so severe as to prevent him from performing any law enforcement
299 job, the "regarded as" claim must, in PHA's view, fail because Williams has been
300 unable to demonstrate the existence of a vacant, funded position at PHA whose
301 functions he was capable of performing in light of its misperception. . . . PHA's
302 argument, if accepted, would make "regarded as" protection meaningless. An
303 employer could simply regard an employee as incapable of performing any work,
304 and an employee's "regarded as" failure to accommodate claim would always fail,
305 under PHA's theory, because the employee would never be able to demonstrate the
306 existence of any vacant, funded positions he or she was capable of performing in
307 the eyes of the employer. . . . Thus, contrary to PHA's suggestion, a "regarded as"
308 disabled employee need not demonstrate during litigation the availability of a
309 position he or she was capable of performing in the eyes of the misperceiving
310 employer. . . .

311 *Williams*, 380 F.3d at 769-70.

312 The employer in *Williams* made an alternative argument: that if an employee is "regarded
313 as" having a disability but actually does not, the employer should have no duty to provide a
314 reasonable accommodation because there is nothing to accommodate. In *Williams*, the plaintiff
315 was a police officer and the employer regarded him as being unable to be around firearms because
316 of a mental impairment. The court analyzed, and rejected, the defendant's argument that it had no
317 duty to provide an accommodation to an employee "regarded as" having a disability:

318 PHA . . . suggests that Williams, by being "regarded as" disabled by PHA, receives a
319 "windfall" accommodation compared to a similarly situated employee who had not been
320 "regarded as" disabled and would not be entitled under the ADA to any accommodation.
321 The record in this case demonstrates that, absent PHA's erroneous perception that Williams
322 could not be around firearms because of his mental impairment, a radio room assignment

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323 would have been made available to him and others similarly situated. PHA refused to
324 provide that assignment solely based upon its erroneous perception that Williams's mental
325 impairment prevented him not only from carrying a gun, but being around others with, or
326 having access to, guns - perceptions specifically contradicted by PHA's own psychologist.
327 While a similarly situated employee who was not perceived to have this additional
328 limitation would have been allowed a radio room assignment, Williams was specifically
329 denied such an assignment because of the erroneous perception of his disability. The
330 employee whose limitations are perceived accurately gets to work, while Williams is sent
331 home unpaid. This is precisely the type of discrimination the "regarded as" prong literally
332 protects from Accordingly, Williams, to the extent PHA regarded him as disabled,
333 was entitled to reasonable accommodation

334 *Id.* at 775-76. Thus, an employee “regarded as” having a disability is entitled to the same
335 accommodation that he would receive if he actually had a disability. *See also id.* at 776 n.19 (noting
336 that “even where an employer mistakenly regards an employee as so disabled that the employee
337 cannot work at all, the employer still must accommodate a ‘regarded as’ employee by seeking to
338 determine, in good faith, the extent of the employee’s actual limitations”).

339 *Record of disability*

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

342 *Pregnancy-related disability*

343 The Supreme Court has noted in dictum the possibility that pregnancy-related impairments
344 come within the ambit of the ADA. *See Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338,
345 1348 (2015). Enforcement guidance provided by the EEOC states:

346 Although pregnancy itself is not an impairment within the meaning of the ADA,
347 and thus is never on its own a disability, some pregnant workers may have
348 impairments related to their pregnancies that qualify as disabilities under the ADA,
349 as amended. An impairment’s cause is not relevant in determining whether the
350 impairment is a disability. Moreover, under the amended ADA, it is likely that a
351 number of pregnancy-related impairments that impose work-related restrictions
352 will be substantially limiting, even though they are only temporary.

353 EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues, EEOC Notice No.
354 915.003 (July 14, 2014) (footnotes omitted), available at
355 http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#dissta. As of summer 2015, the
356 Court of Appeals had not addressed the status of pregnancy-related impairments under the ADA
357 as amended in 2008.

1 **9.2.2 ADA Definitions — Qualified Individual**

2 **Model**

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

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

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

- 25 1) whether the performance of the [describe function] is the reason that the [describe job]
26 exists;
- 27 2) the amount of time spent on the job performing [describe function];
- 28 3) whether there are a limited number of employees available to do the [describe function];
- 29 4) whether [describe function] is highly specialized;
- 30 5) whether an employee in the [describe job] is hired for his or her expertise or ability to
31 [describe function];
- 32 6) [defendant’s] judgment about what functions are essential to the [describe job];
- 33 7) written job descriptions for the [describe job] ;
- 34 8) the consequences of not requiring an employee to [describe function] in a satisfactory

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- 35 manner;
- 36 9) whether others who held the position of [describe job] performed [describe function];
- 37 10) the terms of a collective bargaining agreement;
- 38 11) [list any other factors supported by the evidence.]

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

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

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

48

49 **Comment**

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

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

57 [T]he ADA requires [plaintiff] to demonstrate that she is a "qualified individual". The ADA
58 defines this term as an individual "who, with or without reasonable accommodation, can
59 perform the essential functions of the employment position that such individual holds or
60 desires." 42 U.S.C. § 12111(8). The Interpretive Guidance to the EEOC Regulations
61 divides this inquiry into two prongs. First, a court must determine whether the individual
62 satisfies the requisite skill, experience, education and other job-related requirements of the
63 employment position that such individual holds or desires. See 29 C.F.R. pt. 1630, app. §
64 1630.2(m). Second, it must determine whether the individual, with or without reasonable
65 accommodation, can perform the essential functions of the position held or sought. . . .

66 Determining whether an individual can, with or without reasonable
67 accommodation, perform the essential functions of the position held or sought, also a two
68 step process, is relatively straightforward. First, a court must consider whether the

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69 individual can perform the essential functions of the job without accommodation. If so, the
70 individual is qualified (and, a fortiori, is not entitled to accommodation). If not, then a court
71 must look to whether the individual can perform the essential functions of the job with a
72 reasonable accommodation. If so, the individual is qualified. If not, the individual has failed
73 to set out a necessary element of the prima facie case.

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

76 Section 12111(8) is plain and unambiguous. The first sentence of that section,
77 makes it clear that the phrase "with or without reasonable accommodation" refers directly
78 to "essential functions". Indeed, there is nothing in the sentence, other than "essential
79 functions", to which "with or without reasonable accommodation" could refer. Moreover,
80 nowhere else in the Act does it state that, to be a "qualified individual", an individual must
81 prove his or her ability to perform all of the functions of the job, and nowhere in the Act
82 does it distinguish between actual or perceived disabilities in terms of the threshold
83 showing of qualifications. Therefore, if an individual can perform the essential functions
84 of the job without accommodation as to those functions, regardless of whether the
85 individual can perform the other functions of the job (with or without accommodation),
86 that individual is qualified under the ADA.

87 142 F.3d at 146-47.

88 “*Essential Functions*” of a Job

89 In *Skerski v. Time Warner Cable Co.*, 257 F.3d 273, 278 (3d Cir. 2001), the court provided
90 an extensive analysis of the meaning of the term “essential functions” of a job. The plaintiff in
91 *Skerski* was a cable installer technician, and he developed a fear of heights. One of the defendant’s
92 arguments was that he was no longer qualified for the position because climbing was one of the
93 “essential functions” of the job of cable installer technician. The trial court agreed with the
94 defendant, finding as a matter of law that climbing was an essential job function, and therefore
95 that plaintiff could not recover because he could not perform that function even with an
96 accommodation. The Third Circuit began its analysis by looking at the relevant agency regulations:

97 A job's "essential functions" are defined in 29 C.F.R. § 1630.2(n)(1) as those that are
98 "fundamental," not "marginal." The regulations list several factors for consideration in
99 distinguishing the fundamental job functions from the marginal job functions, including:
100 (1) whether the performance of the function is "the reason the position exists;" (2) whether
101 there are a "limited number of employees available among whom the performance of that
102 job function can be distributed;" and (3) whether the function is "highly specialized so that
103 the incumbent in the position is hired for his or her expertise." 29 C.F.R. § 1630.2(n)(2).
104 The regulations further set forth a non-exhaustive list of seven examples of evidence that
105 are designed to assist a court in identifying the "essential functions" of a job. They include:

106 (i) The employer's judgment as to which functions are essential;

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- 107 (ii) Written job descriptions prepared before advertising or interviewing applicants
108 for the job;
- 109 (iii) The amount of time spent on the job performing the function;
- 110 (iv) The consequences of not requiring the incumbent to perform the function;
- 111 (v) The terms of a collective bargaining agreement;
- 112 (vi) The work experience of past incumbents in the jobs; and/or
- 113 (vii) The current work experience of incumbents in similar jobs.

114 29 C.F.R. § 1630.2(n)(3).

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

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

123 Looking to the three factors included in § 1630.2(n)(2), it is evident that two are
124 not present in this case as installer technicians are not hired solely to climb or even because
125 of their climbing expertise. On the other hand, [there] is evidence to suggest that Time
126 Warner employs a limited number of installer technicians in Skerski's work area-- only 7
127 or 8, according to Skerski -- and that this small number hampers Time Warner's ability to
128 allow certain technicians to avoid climbing. The significance of this factor is pointed out
129 in the Interpretive Guidance to § 1630.2(n), which explains, "if an employer has a
130 relatively small number of available employees for the volume of work to be performed, it
131 may be necessary that each employee perform a multitude of different functions. Therefore,
132 the performance of those functions by each employee becomes more critical and the
133 options for reorganizing the work become more limited." EEOC Interpretive Guidance, 29
134 C.F.R. pt. 1630, App. 1630.2(n).

135 But this is only one of the three factors. Moreover, consideration of the seven
136 evidentiary examples included in § 1630.2(n)(3) suggests caution against any premature
137 determination on essential functions as at least some of them lean in Skerski's favor. Of
138 course, as required by § 1630.2(n)(3)(i), we owe some deference to Time Warner and its
139 own judgment that climbing is essential to the installer technician position. And the written
140 job descriptions, as the District Court noted, "clearly identify climbing as a job
141 requirement." However, describing climbing as a requirement is not necessarily the same
142 as denominating climbing as an essential function. In fact, the job descriptions prepared by

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143 both New Channels and Time Warner list various duties and responsibilities under the
144 heading "Essential Functions," but neither identifies climbing as "essential." . . .

145 Among the facts and circumstances relevant to each case is, of course, the
146 employee's actual experience as well as that of other employees. See 29 C.F.R. §
147 1630.2(n)(3)(iv), (vi) and (vii). It is undisputed that from the time Skerski began as an
148 installer technician in 1982 until the time he was diagnosed with his panic disorder in 1993,
149 a significant portion of his job responsibilities required climbing. . . . However, for the
150 three and a half years after his diagnosis in which he continued to work as an installer
151 technician, Skerski performed virtually no overhead work at all. . . . Skerski testified at his
152 deposition that there always was enough underground work to do, that he always worked
153 40-hour weeks and even worked enough to earn a couple thousand dollars per year in
154 overtime, and that he had never experienced problems at work because of his panic disorder
155 until Hanning became his supervisor in the fall of 1996. . . .

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

166 The *Skerski* court found that the relevant factors cut both ways, so that the question of
167 whether climbing was an essential function of the cable installer technician position was a question
168 for the jury:

169 We do not suggest that the District Court here had no basis for its conclusion that
170 climbing is an essential function of Skerski's position as installer technician or even that,
171 if we were the triers of fact, we would not so hold. But upon reviewing the three factors
172 listed in 29 C.F.R. § 1630.2(n)(2) and the seven evidentiary examples provided by 29
173 C.F.R. § 1630.2(n)(3), it is apparent that a genuine issue of material fact exists as to
174 whether climbing is an essential function of the job of installer technician at Time Warner.
175 Although the employer's judgment and the written job descriptions may warrant some
176 deference, Skerski has put forth considerable evidence that contradicts Time Warner's
177 assertions, particularly the uncontradicted fact that following his 1993 diagnosis he worked
178 for more than three years as an installer technician for Time Warner without ever having
179 to perform over head work.

180 *See also Walton v. Mental Health Ass'n of Southeastern Pa.*, 168 F.3d 661, 666 (3d Cir. 1999)
181 (employee's inability to appear in a promotional video because she was obese was not a substantial
182 limitation on essential function of a job; any such appearance would have been only a minor aspect

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183 of her job); *Conneen v. MBNA America Bank, N.A.*, 334 F.3d 318, 327 (3d Cir. 2003) (promptness
184 was not an essential function merely because the employer thought it necessary for the employee
185 to set an example for lower-level employees).

186 The Third Circuit has held that whether a particular function is an “essential function” of a
187 job under the ADA is a question best left for the jury. *Turner v. Hershey Chocolate USA*, 440 F.3d
188 604, 613 (3d Cir. 2006).

1 **9.2.3 ADA Definitions — Hostile or Abusive Work Environment**

2 **Model**

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

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

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

25 It is not enough that the work environment was generally harsh, unfriendly, unpleasant,
26 crude or vulgar to all employees. In order to find a hostile work environment, you must find that
27 [plaintiff] was harassed because of [his/her] disability [or request for accommodation]. The
28 harassing conduct may, but need not be specifically directed at [plaintiff's] disability [or request
29 for accommodation]. The key question is whether [plaintiff], as a person with [plaintiff's]

9.2.3 Hostile or Abusive Work Environment

30 disability] was subjected to harsh employment conditions to which employees without a disability
31 were not.

32 It is important to understand that, in determining whether a hostile work environment
33 existed at the [employer's workplace] you must consider the evidence from the perspective of a
34 reasonable person with [plaintiff's disability] in the same position. That is, you must determine
35 whether a reasonable person with [plaintiff's disability] would have been offended or harmed by
36 the conduct in question. You must evaluate the total circumstances and determine whether the
37 alleged harassing behavior could be objectively classified as the kind of behavior that would
38 seriously affect the psychological or emotional well-being of a reasonable person with [plaintiff's
39 disability]. The reasonable person with [plaintiff's disability] is simply one of normal sensitivity
40 and emotional make-up.

41

42 **Comment**

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

1 **9.2.4 ADA Definitions — Constructive Discharge**

2 **Model**

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

9

10 **Comment**

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

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

1 **9.3.1 ADA Defenses — Direct Threat**

2 **Model**

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

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

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

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

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

- 20 1) How long any risk would have lasted;
- 21 2) The nature of the potential harm and how severe the harm would be if it occurred;
- 22 3) The likelihood the harm would have occurred; and
- 23 4) Whether the harm would be likely to recur.

24
25 **Comment**

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

9.3.1 Direct Threat

33 that direct threat is an “affirmative defense” to the ADA qualification standards. Thus a plaintiff
34 does not have the burden of proving that she did not pose a direct threat to the health and safety of
35 herself or others in the workplace.

9.4.1 Compensatory Damages – General Instruction

1 9.4.1 ADA Damages – Compensatory Damages — General Instruction

2 Model

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

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

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

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

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

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

9.4.1 Compensatory Damages – General Instruction

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

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

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

57 [You are instructed that [plaintiff] has a duty under the law to "mitigate" [his/her]
58 damages--that means that [plaintiff] must take advantage of any reasonable opportunity that may
59 have existed under the circumstances to reduce or minimize the loss or damage caused by
60 [defendant]. It is [defendant's] burden to prove that [plaintiff] has failed to mitigate. So if
61 [defendant] persuades you by a preponderance of the evidence that [plaintiff] failed to take
62 advantage of an opportunity that was reasonably available to [him/her], then you must reduce the
63 amount of [plaintiff’s] damages by the amount that could have been reasonably obtained if [he/she]
64 had taken advantage of such an opportunity.]

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

68

69 **Comment**

70 ADA remedies are the same as provided in Title VII. The enforcement provision of the
71 ADA, 42 U.S.C. § 12117, specifically provides for the same recovery in ADA actions as in Title
72 VII actions: “The powers, remedies and procedures set forth in . . . [42 U.S.C. § 2000e-5, the Title
73 VII remedies provision] shall be the powers, remedies and procedures this title provides to . . . any
74 person alleging discrimination on the basis of disability in violation of any provision of this Act .

9.4.1 Compensatory Damages – General Instruction

75 . . . concerning employment.” Accordingly, this instruction on compensatory damages is
76 substantively identical to that provided for Title VII actions. See Instruction 5.4.1.

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

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

88 The pattern instruction contains bracketed material that would instruct the jury not to award
89 back pay or front pay. The jury may, however, enter an award of back pay and front pay as
90 advisory, or by consent of the parties. In those circumstances, the court should refer to instructions
91 9.4.3 for back pay and 9.4.4 for front pay. In many cases it is commonplace for back pay issues to
92 be submitted to the jury. The court may think it prudent to consult with counsel on whether the
93 issues of back pay or front pay should be submitted to the jury (on either an advisory or stipulated
94 basis) or are to be left to the court’s determination without reference to the jury.
95

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

104 *Damages in ADA Retaliation Cases*

105 At least one court in the Third Circuit has held that a plaintiff’s recovery for retaliation
106 under the ADA is limited to equitable relief. See *Sabbrese v. Lowe’s Home Centers, Inc.*, 320 F.
107 Supp.2d 311, 331 (W.D.Pa. 2004). The *Sabbrese* court relied on the Seventh Circuit’s analysis in
108 *Kramer v. Banc of America Securities LLC*, 355 F.3d 961 (7th Cir. 2004). The Seventh Circuit
109 parsed the 1991 Civil Rights Act and found that while it provided for damages in ADA
110 discrimination and accommodation cases, it made no similar provision for ADA retaliation cases.
111 The Third Circuit has not decided whether damages are available in ADA retaliation cases. See
112 the discussion in the Comment to Instruction 9.1.7.

113 *Attorney Fees and Costs*

9.4.1 Compensatory Damages – General Instruction

114 There appears to be no uniform practice regarding the use of an instruction that warns the
115 jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d 652
116 (3d Cir. 2006), the district court gave the following instruction: “You are instructed that if plaintiff
117 wins on his claim, he may be entitled to an award of attorney fees and costs over and above what
118 you award as damages. It is my duty to decide whether to award attorney fees and costs, and if so,
119 how much. Therefore, attorney fees and costs should play no part in your calculation of any
120 damages.” *Id.* at 656-57. The Court of Appeals held that the plaintiff had not properly objected
121 to the instruction, and, reviewing for plain error, found none: “We need not and do not decide now
122 whether a district court commits error by informing a jury about the availability of attorney fees
123 in an ADEA case. Assuming *arguendo* that an error occurred, such error is not plain, for two
124 reasons.” *Id.* at 657. First, “it is not ‘obvious’ or ‘plain’ that an instruction directing the jury *not*
125 to consider attorney fees” is irrelevant or prejudicial; “it is at least arguable that a jury tasked with
126 computing damages might, absent information that the Court has discretion to award attorney fees
127 at a later stage, seek to compensate a sympathetic plaintiff for the expense of litigation.” *Id.*
128 Second, it is implausible “that the jury, in order to eliminate the chance that Collins might be
129 awarded attorney fees, took the disproportionate step of returning a verdict against him even
130 though it believed he was the victim of age discrimination, notwithstanding the District Court’s
131 clear instructions to the contrary.” *Id.*; *see also id.* at 658 (distinguishing *Fisher v. City of*
132 *Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and *Brooks v. Cook*, 938 F.2d 1048, 1051 (9th Cir.
133 1991)).

1 **9.4.2 ADA Damages — Punitive Damages**

2 **Model**

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

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

14
15 **[For use where the defendant raises a jury question on good-faith attempt to comply**
16 **with the law:**

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

22
23 An award of punitive damages is discretionary; that is, if you find that the legal
24 requirements for punitive damages are satisfied [and that [defendant] has not proved that it made
25 a good-faith attempt to comply with the law], then you may decide to award punitive damages, or
26 you may decide not to award them. I will now discuss some considerations that should guide your
27 exercise of this discretion.

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

9.4.2 Punitive Damages

37 If you decide to award punitive damages, then you should also consider the purposes of
38 punitive damages in deciding the amount of punitive damages to award. That is, in deciding the
39 amount of punitive damages, you should consider the degree to which [defendant] should be
40 punished for its wrongful conduct, and the degree to which an award of one sum or another will
41 deter [defendant] or others from committing similar wrongful acts in the future.

42 [The extent to which a particular amount of money will adequately punish a defendant, and
43 the extent to which a particular amount will adequately deter or prevent future misconduct, may
44 depend upon the defendant’s financial resources. Therefore, if you find that punitive damages
45 should be awarded against [defendant], you may consider the financial resources of [defendant] in
46 fixing the amount of such damages.]

47 48 **Comment**

49 ADA remedies are the same as provided in Title VII. The enforcement provision of the
50 ADA, 42 U.S.C. § 12117 specifically provides for the same recovery in ADA actions as in Title
51 VII actions: “The powers, remedies and procedures set forth in . . . [42 U.S.C. § 2000e-5, the Title
52 VII remedies provision] shall be the powers, remedies and procedures this title provides to . . . any
53 person alleging discrimination on the basis of disability in violation of any provision of this Act .
54 . . . concerning employment.” Accordingly, this instruction on punitive damages is substantively
55 identical to that provided for Title VII actions. See Instruction 5.4.2.

56 42 U.S.C.A. § 1981a(b)(1) provides that “[a] complaining party may recover punitive
57 damages under this section [Title VII] against a respondent (other than a government, government
58 agency or political subdivision) if the complaining party demonstrates that the respondent engaged
59 in a discriminatory practice or discriminatory practices with malice or with reckless indifference
60 to the federally protected rights of an aggrieved individual.” Punitive damages are available only
61 in cases of intentional discrimination, i.e., cases that do not rely on the disparate impact theory of
62 discrimination.

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

9.4.2 Punitive Damages

76 527 U.S. 526, 535-36 (1999)).

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

85 The Court in *Kolstad* established an employer's good faith as a defense to punitive
86 damages, but it did not specify whether it was an affirmative defense or an element of the plaintiff's
87 proof for punitive damages. The instruction sets out the employer's good faith attempt to comply
88 with anti-discrimination law as an affirmative defense. The issue has not yet been decided in the
89 Third Circuit, but the weight of authority in the other circuits establishes that the defendant has the
90 burden of showing a good-faith attempt to comply with laws prohibiting discrimination. *See*
91 *Medcalf v. Trustees of University of Pennsylvania*, 71 Fed. Appx. 924, 933 n.3 (3d Cir. 2003)
92 (noting that "the Third Circuit has not addressed the issue of whether the good faith compliance
93 standard set out in *Kolstad* is an affirmative defense for which the defendant bears the burden of
94 proof, or whether the plaintiff must disprove the defendant's good faith compliance with Title VII
95 by a preponderance of the evidence"; but also noting that. "[a] number of other circuits have
96 determined that the defense is an affirmative one.").

97 Punitive damages are subject to caps in ADA actions. See 42 U.S.C. § 1981a (b)(3). But
98 42 U.S.C. §1981a(c)(2) provides that the court shall not inform the jury of the statutory limitations
99 on recovery of punitive damages.

100 The Supreme Court has imposed some due process limits on both the size of punitive
101 damages awards and the process by which those awards are determined and reviewed. In
102 performing the substantive due process review of the size of punitive awards, a court must consider
103 three factors: "the degree of reprehensibility of" the defendant's conduct; "the disparity between
104 the harm or potential harm suffered by" the plaintiff and the punitive award; and the difference
105 between the punitive award "and the civil penalties authorized or imposed in comparable cases."
106 *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996).

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

109 *Damages in ADA Retaliation Cases*

110 At least one court in the Third Circuit has held that a plaintiff's recovery for retaliation
111 under the ADA is limited to equitable relief. *See Sabbrese v. Lowe's Home Centers, Inc.*, 320 F.
112 Supp.2d 311, 331 (W.D.Pa. 2004). The *Sabbrese* court relied on the Seventh Circuit's analysis in
113 *Kramer v. Banc of America Securities LLC*, 355 F.3d 961 (7th Cir. 2004). The Seventh Circuit

9.4.2 Punitive Damages

114 parsed the 1991 Civil Rights Act and found that while it provided for damages in ADA
115 discrimination and accommodation cases, it made no similar provision for ADA retaliation cases.
116 The Third Circuit has not decided whether damages are available in ADA retaliation cases. See
117 the discussion in the Comment to Instruction 9.1.7.

9.4.3 Back Pay – For Advisory or Stipulated Jury

9.4.3 ADA Damages — Back Pay— For Advisory or Stipulated Jury

Model

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

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

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

[Alternative Two – for use when plaintiff alleging pay discrimination seeks back pay from periods earlier than the date that the unlawful employment practice occurred within the charge filing period but starting two years or less before the filing of the charge:] In this case, [plaintiff] claims that [defendant] intentionally discriminated against [plaintiff] in [describe employment action] [plaintiff] on [date within the charge filing period]. [Plaintiff] also claims that [defendant] committed a similar or related unlawful employment practice with regard to discrimination in compensation on [date outside charge filing period but two years or less before the filing of the charge (hereafter “prior date”)]. If you find that [defendant] intentionally discriminated against [plaintiff] in [describe employment action] on [date within the charge filing period], and that [defendant] committed unlawful pay discrimination with respect to [plaintiff] on [prior date], and that the unlawful employment practice, if any, on [prior date] was similar or related to [defendant's] [describe employment action] on [date within the charge filing period], then back pay damages, if any, apply from [prior date] until the date of your verdict. If you find that [defendant] intentionally discriminated against [plaintiff] in [describe employment action] on [date within the charge filing period], but you do not find that [defendant] committed a similar or related unlawful employment practice with regard to discrimination in compensation on [prior date], then back pay damages, if any, apply from [date within the charge filing period] until the date of your verdict.]

[Alternative Three – for use when plaintiff alleging pay discrimination seeks back pay from periods earlier than the date that the unlawful employment practice occurred within the charge filing period based on an act more than two years before the filing of the charge:] In this case, [plaintiff] claims that [defendant] intentionally discriminated against [plaintiff] in [describe employment action] [plaintiff] on [date within the charge filing period]. [Plaintiff] also claims that

9.4.3 Back Pay – For Advisory or Stipulated Jury

40 [defendant] committed a similar or related unlawful employment practice with regard to
41 discrimination in compensation on [date outside charge filing period and more than two years
42 before the filing of the charge (hereafter “prior date”)]. If you find that [defendant] intentionally
43 discriminated against [plaintiff] in [describe employment action] on [date within the charge filing
44 period], and that [defendant] committed unlawful pay discrimination with respect to [plaintiff] on
45 [prior date], and that the unlawful employment practice, if any, on [prior date] was similar or
46 related to [defendant’s] [describe employment action] on [date within the charge filing period],
47 then back pay damages, if any, apply from [date two years prior to filing date of charge (hereafter
48 “two-year date”)] until the date of your verdict. In that case, back pay applies from [two-year date]
49 rather than [prior date] because federal law limits a plaintiff’s recovery for back pay to a maximum
50 of a two year period before the plaintiff filed [his/her] discrimination charge with the Equal
51 Employment Opportunity Commission. If you find that [defendant] intentionally discriminated
52 against [plaintiff] in [describe employment action] on [date within the charge filing period], but
53 you do not find that [defendant] committed a similar or related unlawful employment practice with
54 regard to discrimination in compensation on [prior date], then back pay damages, if any, apply
55 from [date within the charge filing period] until the date of your verdict.]

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

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

62 [You are further instructed that [plaintiff] has a duty to mitigate [his/her] damages--that is
63 [plaintiff] is required to make reasonable efforts under the circumstances to reduce [his/her]
64 damages. It is [defendant's] burden to prove that [plaintiff] has failed to mitigate. So if [defendant]
65 persuades you, by a preponderance of the evidence, that [plaintiff] failed to obtain substantially
66 equivalent job opportunities that were reasonably available to [him/ her], you must reduce the
67 award of damages by the amount of the wages that [plaintiff] reasonably would have earned if
68 [he/she] had obtained those opportunities.]

69
70 **[Add the following instruction if defendant claims “after-acquired evidence” of misconduct**
71 **by the plaintiff:**

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

76 If [defendant] proves by a preponderance of the evidence that it would have made the same
77 decision and would have [describe employment decision] [plaintiff] because of [describe after-

9.4.3 Back Pay – For Advisory or Stipulated Jury

78 discovered evidence], you must limit any award of back pay to the date [defendant] would have
79 made the decision to [describe employment decision] [plaintiff] as a result of the after-acquired
80 information.]

81

82 **Comment**

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

90 An award of back pay is an equitable remedy; thus there is no right to jury trial on a claim
91 for back pay. See 42 U.S.C. §1981(b)(2) (“Compensatory damages awarded under this section
92 shall not include backpay, interest on backpay, or any other type of relief authorized under section
93 706(g) of the Civil Rights Act of 1964 [42 USCS § 2000e5(g)].”); 42 U.S.C. § 2000e-5(g)(1) (“If
94 the court finds that the respondent has intentionally engaged in or is intentionally engaging in an
95 unlawful employment practice charged in the complaint, the court may enjoin the respondent from
96 engaging in such unlawful employment practice, and order such affirmative action as may be
97 appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with
98 or without back pay . . . or any other equitable relief as the court deems appropriate.”). *See also*
99 *Spencer v. Wal-Mart Stores, Inc.*, 469 F.3d 311, 316 (3d Cir. 2006) (relying on the statutory
100 language of Title VII, which applies to damages recovery under the ADA, the court holds in an
101 ADA action that “back pay remains an equitable remedy to be awarded within the discretion of
102 the court”). “[A] district court may, pursuant to its broad equitable powers granted by the ADA,
103 award a prevailing employee an additional sum of money to compensate for the increased tax
104 burden a back pay award may create.” *Eshelman v. Agere Systems, Inc.*, 554 F.3d 426, 441-42 (3d
105 Cir. 2009).

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

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116 The appropriate standard for measuring a back pay award is “to take the difference between
117 the actual wages earned and the wages the individual would have earned in the position that, but
118 for discrimination, the individual would have attained.” *Gunby v. Pennsylvania Elec. Co.*, 840 F.2d
119 1108, 1119-20 (3d Cir. 1988).

120 42 U.S.C. § 2000e-5(g)(1) provides that “[b]ack pay liability shall not accrue from a date
121 more than two years prior to the filing of a charge with the Commission.” The court of appeals
122 has explained that “[t]his constitutes a limit on liability, not a statute of limitations, and has been
123 interpreted as a cap on the amount of back pay that may be awarded under Title VII.” *Bereda v.*
124 *Pickering Creek Indus. Park, Inc.*, 865 F.2d 49, 54 (3d Cir. 1989). The *Bereda* court held that it
125 was plain error to fail to instruct the jury on an analogous cap under Pennsylvania law (which set
126 the relevant limit under the circumstances of the case). *See id.* Accordingly, when the facts of the
127 case make Section 2000e-5's cap relevant, the court should instruct the jury on it.

128 Section 2000e-5's current framework for computing a back pay award for Title VII pay
129 discrimination claims reflects Congress's response to the Supreme Court's decision in *Ledbetter*
130 *v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007). The effect of the Lilly Ledbetter Fair
131 Pay Act of 2009 (LLFPA), Pub. L. No. 111-2, § 2, January 29, 2009, 123 Stat. 5, which amended
132 42 U.S.C. § 2000e-5(e), is discussed in Comment 5.4.3.

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

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

9.4.4 Front Pay – For Advisory or Stipulated Jury

9.4.4 ADA Damages – Front Pay — For Advisory or Stipulated Jury

Model

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

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

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

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

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

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

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

9.4.4 Front Pay – For Advisory or Stipulated Jury

35 VII actions: “The powers, remedies and procedures set forth in . . . [42 U.S.C. § 2000e-5, the Title
36 VII remedies provision] shall be the powers, remedies and procedures this title provides to . . . any
37 person alleging discrimination on the basis of disability in violation of any provision of this Act .
38 . . . concerning employment.” Accordingly, this instruction on front pay is substantively identical
39 to that provided for Title VII actions. See Instruction 5.4.4.

40 There is no right to jury trial under Title VII (or by extension the ADA) for a claim for
41 front pay. See *Pollard v. E. I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001) (holding that front
42 pay under Title VII is not an element of compensatory damages). See also *Marinelli v. City of Erie*,
43 25 F. Supp.2d 674, 675 (W.D.Pa. 1998) (“The ADA provides for all remedies available under Title
44 VII, which includes backpay and front pay or reinstatement. [Front pay relief] is equitable in
45 nature, and thus within the sound discretion of the trial court.”), *judgment vacated on other*
46 *grounds*, 216 F.3d 354 (3d Cir. 2000).

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

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

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

1 **9.4.5 ADA Damages — Nominal Damages**

2 **Model**

3 If you return a verdict for [plaintiff], but [plaintiff] has failed to prove actual injury and
4 therefore is not entitled to compensatory damages, then you must award nominal damages of \$
5 1.00.

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

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

11

12 **Comment**

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

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

34 Nominal damages may not exceed one dollar. *See Mayberry v. Robinson*, 427 F. Supp.
35 297, 314 (M.D.Pa.1977) (“It is clear that the rule of law in the Third Circuit is that nominal
36 damages may not exceed \$1.00.”) (citing *United States ex rel. Tyrrell v. Speaker*, 535 F.2d 823,

37 830 (3d Cir.1976)).