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2           **Disabilities Act**

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## 9.0 ADA Employment Claims – Introductory Instruction

### 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).<sup>1</sup> An entity discriminates against an individual

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<sup>1</sup> 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

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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, federal contractors, and employers that receive federal funding are  
61 subject to the Rehabilitation Act, which is a precursor of the ADA. 29 U.S.C. § 701 et seq. The  
62 substantive standards for a claim under the Rehabilitation Act are in many respects identical to  
63 those governing a claim under the ADA. See, e.g., *Wishkin v. Potter*, 476 F.3d 180, 184 (3d Cir.  
64 2007) (“The Rehabilitation Act expressly makes the standards set forth in the 1990 Americans  
65 with Disabilities Act, 42 U.S.C. § 12101 et seq., applicable to federal employers and to employers  
66 receiving federal funding.”); *Bragdon v. Abbott*, 524 U.S. 624, 632 (1998)\_(in interpreting the  
67 ADA’s definition of “disability” by reference to interpretations of the Rehabilitation Act’s

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has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.”

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68 definition of “handicapped individual,” observing that 42 U.S.C. § 12201(a) directs the courts “to  
69 construe the ADA to grant at least as much protection as provided by the regulations implementing  
70 the Rehabilitation Act”); *Conneen v. MBNA America Bank, N.A.*, 334 F.3d 318, 330 n.13 (3d Cir.  
71 2003)\_(noting that a precedent concerning the duty under the Rehabilitation Act of the employer  
72 and employee to engage in an interactive process “applies with equal force to accommodations  
73 under the ADA”); *Deane v. Pocono Medical Center*, 142 F.3d 138, 149 n.13 (3d Cir. 1998) (en  
74 banc) (explaining in an ADA employment-discrimination case that “interpretations of the  
75 Rehabilitation Act’s ‘reasonable accommodation’ provisions are relevant to our analysis of the  
76 ADA and vice versa because in 1992, Congress amended the section of the Rehabilitation Act  
77 defining ‘reasonable accommodation’ to incorporate the standards of the ADA” (citing *Mengine*  
78 *v. Runyon*, 114 F.3d 415, 420 & n.4 (3d Cir. 1997) (in Rehabilitation Act case brought against a  
79 federal employer, quoting 29 U.S.C. § 794(d))). These ADA instructions can therefore be adapted  
80 for use in a case involving an employment-discrimination claim brought under the Rehabilitation  
81 Act.

### 82 *The ADA’s association provision*

83 Chapter 9 does not include an instruction specifically dealing with claims under 42 U.S.C.  
84 § 12112(b)(4), which defines “discriminat[ion] against a qualified individual on the basis of  
85 disability” to include “excluding or otherwise denying equal jobs or benefits to a qualified  
86 individual because of the known disability of an individual with whom the qualified individual is  
87 known to have a relationship or association.” For a discussion of such claims, see *Erdman v.*  
88 *Nationwide Ins. Co.*, 582 F.3d 500, 510-11 (3d Cir. 2009).

### 89 *Religious Entities; Ministerial Exception*

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

93 Apart from those statutory defenses, the First Amendment’s religion clauses give rise to an  
94 affirmative defense that “bar[s] the government from interfering with the decision of a religious  
95 group to fire one of its ministers.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*,  
96 132 S. Ct. 694, 702, 709 n.4 (2012) (applying this defense to an ADA retaliation claim). For  
97 further discussion of the ministerial exception, see Comment 5.0.

### 98 *Scope of Chapter*

99 These model instructions address the elements of ADA employment claims and defenses;  
100 pertinent definitions; and questions of damages. The commentary is designed to explain the  
101 drafting of the model instructions and generally does not focus on other procedural matters.<sup>2</sup>

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<sup>2</sup> Administrative-exhaustion requirements provide one example. As to employment

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claims, the ADA incorporates a number of remedies and procedures from Title VII. *See* 42 U.S.C. § 12117(a) (“The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.”). Among those procedures is a requirement of administrative exhaustion. *See* 42 U.S.C. § 2000e-5; *see also* 1 MERRICK T. ROSSEIN, EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 11:1.50 (online edition updated June 2018) (discussing the plaintiff’s option to await the outcome of the administrative proceeding or to obtain a “right-to-sue” letter prior to that outcome); *Williams v. Pennsylvania Human Relations Comm’n*, 870 F.3d 294, 298 (3d Cir. 2017) (discussing administrative-exhaustion requirement as applied to ADA employment-discrimination and Title VII claims).

“In Title VII actions, failure to exhaust administrative remedies is an affirmative defense in the nature of statute of limitations.... Because failure to exhaust administrative remedies is an affirmative defense, the defendant bears the burden of pleading and proving that the plaintiff has failed to exhaust administrative remedies.” *Williams v. Runyon*, 130 F.3d 568, 573 (3d Cir. 1997). In *Williams*, which involved the distinctive exhaustion requirement set by 29 C.F.R. § 1614.105 for suits by federal employees, the Court of Appeals evinced the view that the question of exhaustion could properly be submitted to the jury. *See id.* (“By failing to offer any evidence to the jury on an issue upon which he carried the burden of proof, the Postmaster effectively waived his affirmative defense.”). The Court of Appeals has not applied *Williams* to address the judge/jury division of labor in a case involving the more general exhaustion provisions in Section 2000e-5, but at least one other Court of Appeals has held that the questions to which a jury trial right attaches include “the defense in a Title VII case of having failed to file a timely administrative complaint.” *Begolli v. Home Depot U.S.A., Inc.*, 701 F.3d 1158, 1160 (7th Cir. 2012). *Compare Small v. Camden Cty.*, 728 F.3d 265, 269, 271 (3d Cir. 2013) (holding that compliance with the exhaustion requirement set by the Prison Litigation Reform Act presents a question that can be resolved by the judge).

In the event that a dispute over exhaustion presents a jury question, the court may wish to submit relevant interrogatories to the jury. As of this time, the Committee has not prepared a model instruction on exhaustion. The Committee welcomes feedback from users of the model instructions concerning the need for, and appropriate nature of, such a model instruction.

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 to [describe action]<sup>3</sup> [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 ]  
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<sup>3</sup> See Comment for a discussion of adverse employment actions under the ADA.

### 9.1.1 Disparate Treatment – Mixed-Motive

30 [For use where defendant sets forth a “same decision” affirmative defense:<sup>4</sup>

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 rejected  
47 the use of a mixed-motive framework for claims under the Age Discrimination in Employment  
48 Act (ADEA). The *Gross* Court reasoned that it had never held that the mixed-motive framework  
49 set by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), applied to ADEA claims; that the  
50 ADEA’s reference to discrimination “because of” age indicated that but-for causation is the  
51 appropriate test; and that this interpretation was bolstered by the fact that when Congress in 1991  
52 provided the statutory mixed-motive framework codified at 42 U.S.C. § 2000e-5(g)(2)(B), that  
53 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

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<sup>4</sup> 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.



### 9.1.1 Disparate Treatment – Mixed-Motive

64 retaliation claims among those eligible for the statutory mixed-motive test set forth in 42 U.S.C.  
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.<sup>5</sup>

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 A number of past cases have relied upon the distinction between direct and circumstantial  
73 evidence of discrimination when determining the availability of a mixed-motive instruction. If the  
74 plaintiff produces direct evidence of discrimination, this is sufficient to show that the defendant’s  
75 activity was motivated at least in part by discriminatory animus, and therefore a “mixed-motive”  
76 instruction is given. If the evidence of discrimination is only circumstantial, then defendant can  
77 argue that there was no discriminatory animus at all, and that its employment decision can be  
78 explained completely by a non-discriminatory motive; a number of decisions indicate that it is then  
79 for the plaintiff to show that the alleged non-discriminatory motive is a pretext, and accordingly  
80 Instruction 9.1.2 should be given. *See generally Fakeete v. Aetna, Inc.*, 308 F.3d 335 (3d Cir. 2002)  
81 (using “direct evidence” to describe “mixed-motive” cases and noting that pretext cases arise when  
82 the plaintiff presents only indirect or circumstantial evidence of discrimination).<sup>6</sup>

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).<sup>7</sup> 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

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<sup>5</sup> *See also DiFiore v. CSL Behring, LLC*, 879 F.3d 71, 78 (3d Cir. 2018) (holding that a mixed-motive framework is unavailable for False Claims Act retaliation claims because “the language of the FCA anti-retaliation provision uses the same ‘because of’ language that compelled the Supreme Court to require ‘but-for’ causation in *Nassar* and *Gross*”).

<sup>6</sup> *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.

<sup>7</sup> 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.

### 9.1.1 Disparate Treatment – Mixed-Motive

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 . . .  
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.” *Arnbruster 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  
103 (3d Cir. 1995) (quoting *Griffiths v. CIGNA Corp.*, 988 F.2d 457, 470 (3d Cir. 1993)).

104 In the context of Title VII, the Supreme Court has ruled that direct evidence of  
105 discrimination is not required for a plaintiff to employ the mixed-motive framework set by 42  
106 U.S.C. § 2000e-2(m). See *Desert Palace Inc. v. Costa*, 539 U.S. 90 (2003). The *Desert Palace*  
107 Court held that in order to be entitled to a mixed-motive instruction, a Title VII plaintiff “need  
108 only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the  
109 evidence, that ‘race, color, religion, sex, or national origin was a motivating factor for any  
110 employment practice.’ ” *Id.* at 101 (quoting 42 U.S.C. § 2000e-2(m)). More recently, in *Egan v.*  
111 *Delaware River Port Authority*, 851 F.3d 263, 274 (3d Cir. 2017), the Court of Appeals applied  
112 the reasoning of *Desert Palace* to FMLA retaliation-for-exercise claims, and held “that direct  
113 evidence is not required to obtain a mixed-motive instruction under the FMLA.” The *Egan* court  
114 explained that, if a mixed-motive instruction is requested, the court “should . . . determine[]  
115 whether there [i]s evidence from which a reasonable jury could conclude that the [defendant] had  
116 legitimate and illegitimate reasons for its employment decision and that [the plaintiff’s] use of  
117 FMLA leave was a negative factor in the employment decision”; if so, the mixed-motive  
118 instruction is available. *Id.* at 275. The Committee has not attempted to determine whether *Egan*  
119 undermines any requirement of direct evidence for ADA mixed-motive claims.

#### 120 *Statutory Definitions*

121 The ADA employs complicated and sometimes counterintuitive statutory definitions for  
122 many of the important terms that govern a disparate treatment action. Instructions for these  
123 statutory definitions are set forth at 9.2.1-9.2.2. They are not included in the body of the “mixed-  
124 motives” instruction because not all of them will ordinarily be in dispute in a particular case, and  
125 including all of them would unduly complicate the basic instruction.

#### 126 *Adverse Employment Action*

127 The ADA provides that “[n]o covered entity shall discriminate against a qualified  
128 individual on the basis of disability in regard to job application procedures, the hiring,  
129 advancement, or discharge of employees, employee compensation, job training, and other terms,  
130 conditions, and privileges of employment.” 42 U.S.C. § 12112(a). This statutory language should

### 9.1.1 Disparate Treatment – Mixed-Motive

131 shape decisions concerning what counts as an adverse employment action for purposes of ADA  
132 discrimination claims. *Cf.* Comment 5.1.1 (discussing the adverse employment action element in  
133 Title VII cases).

#### 134 “Same Decision” Instruction

135 Under Title VII, if the plaintiff proves intentional discrimination in a “mixed-motives”  
136 case, the defendant can still avoid liability for money damages by demonstrating by a  
137 preponderance of the evidence that the same decision would have been made even in the absence  
138 of the impermissible motivating factor. If the defendant establishes this defense, the plaintiff is  
139 then entitled only to declaratory and injunctive relief, attorney’s fees and costs. Orders of  
140 reinstatement, as well as the substitutes of back and front pay, are prohibited if a same decision  
141 defense is proven. 42 U.S.C. §2000e-(5)(g)(2)(B). The ADA explicitly relies on the enforcement  
142 tools and remedies described in 42 U.S.C. § 2000e-(5). *See* 42 U.S.C. § 12117(a). Therefore, a  
143 plaintiff in a “mixed-motives” case under the ADA is not entitled to damages if the defendant  
144 proves that the adverse employment action would have been made even if disability had not been  
145 a motivating factor. But Instruction 9.1.1 is premised on the assumption that the “same decision”  
146 defense is not a complete defense as it is in cases where the *Price Waterhouse* burden-shifting  
147 framework applies. *Compare, e.g.*, Instruction and Comment 6.1.1 (discussing the use of the *Price*  
148 *Waterhouse* burden-shifting framework in Section 1981 cases).

#### 149 *Direct Threat*

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

#### 156 *Animus of Employee Who Was Not the Ultimate Decisionmaker*

157 Construing a statute that explicitly referred to discrimination as “a motivating factor,” the  
158 Supreme Court ruled that “if a supervisor performs an act motivated by antimilitary animus that is  
159 *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate  
160 cause of the ultimate employment action, then the employer is liable under [the Uniformed  
161 Services Employment and Reemployment Rights Act of 1994 (USERRA)]” even if the ultimate  
162 employment decision is taken by one other than the supervisor with the animus. *Staub v. Proctor*  
163 *Hosp.*, 131 S. Ct. 1186, 1194 (2011) (footnotes omitted). Like the USERRA, 42 U.S.C. § 2000e-  
164 5(g)(2)(B) refers to discrimination as a “motivating factor.” Assuming that Section 2000e-  
165 5(g)(2)(B) applies to mixed-motive claims under the ADA, there may be some reason to think that  
166 *Staub*’s analysis might extend to ADA mixed-motive claims. On the other hand, the argument for  
167 extending *Staub* to ADA mixed-motive claims is not as strong as the argument for extending *Staub*  
168 to Title VII mixed-motive claims (*see* Comment 5.1.1). The main difference is that Section 2000e-  
169 5(g)(2)(B) refers to “claim[s] in which an individual proves a violation under section 2000e-2(m)

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170 of this title,” and Section 2000e-2(m) does not list disability discrimination among the types of  
171 violations that it bars. Section 2000e-2(m)’s “motivating factor” language does not apply to ADA  
172 claims – and it was Section 2000e-2(m) that the *Staub* Court noted as containing language similar  
173 to the USERRA language that it was construing. *See Staub*, 131 S. Ct. at 1191. Thus, it is unclear  
174 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]<sup>8</sup> [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 You should weigh all the evidence received in the case in deciding whether [defendant]  
24 intentionally discriminated against [plaintiff]. [For example, you have been shown statistics in this  
25 case. Statistics are one form of evidence that you may consider when deciding whether a defendant  
26 intentionally discriminated against a plaintiff. You should evaluate statistical evidence along with  
27 all the other evidence.]

28 [Defendant] has given a nondiscriminatory reason for its [describe defendant’s action]. If  
29 you believe [defendant’s] stated reason and if you find that the [adverse employment action] would  
30 have occurred because of defendant’s stated reason regardless of [plaintiff’s] [disability], then you  
31 must find for [defendant]. If you disbelieve [defendant’s] stated reason for its conduct, then you  
32 may, but need not, find that [plaintiff] has proved intentional discrimination. In determining

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<sup>8</sup> See Comment for a discussion of adverse employment actions under the ADA.

## 9.1.2 Disparate Treatment – Pretext

33 whether [defendant’s] stated reason for its actions was a pretext, or excuse, for discrimination, you  
34 may not question [defendant’s] business judgment. You cannot find intentional discrimination  
35 simply because you disagree with the business judgment of [defendant] or believe it is harsh or  
36 unreasonable. You are not to consider [defendant’s] wisdom. However, you may consider whether  
37 [plaintiff] has proven that [defendant’s] reason is merely a cover-up for discrimination.

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

41

### 42 **Comment**

43 See Comment 9.1.1 for discussion of the choice between mixed-motive and pretext  
44 instructions. The Third Circuit has held that disparate treatment discrimination cases under the  
45 ADA are governed by the same standards applicable to Title VII actions. *See, e.g., Shaner v.*  
46 *Synthes*, 204 F.3d 494, 500 (3d Cir. 2000) (“We have indicated that the burden-shifting framework  
47 of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applies to ADA disparate treatment  
48 and retaliation claims. *See Walton v. Mental Health Ass’n of Southeastern Pa.*, 168 F.3d 661, 667-  
49 68 (3d Cir. 1999); *Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153, 156-58 (3d Cir. 1995)”). *See*  
50 *also Raytheon Co. v. Hernandez*, 540 U.S. 44, 50, n.3 (2003) (noting that all of the courts of appeals  
51 have applied the Title VII standards to disparate treatment cases under the ADA). Accordingly this  
52 instruction tracks the instruction for “pretext” cases in Title VII actions. *See* Instruction 5.1.2.

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

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

70 Without a charge on pretext, the course of the jury’s deliberations will depend on whether

## 9.1.2 Disparate Treatment – Pretext

71 the jurors are smart enough or intuitive enough to realize that inferences of discrimination  
72 may be drawn from the evidence establishing plaintiff's prima facie case and the pretextual  
73 nature of the employer's proffered reasons for its actions. It does not denigrate the  
74 intelligence of our jurors to suggest that they need some instruction in the permissibility of  
75 drawing that inference.

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

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

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

### 101 *Adverse Employment Action*

102 The ADA provides that "[n]o covered entity shall discriminate against a qualified  
103 individual on the basis of disability in regard to job application procedures, the hiring,  
104 advancement, or discharge of employees, employee compensation, job training, and other terms,  
105 conditions, and privileges of employment." 42 U.S.C. § 12112(a). This statutory language should  
106 shape decisions concerning what counts as an adverse employment action for purposes of ADA  
107 discrimination claims. *Cf.* Comment 5.1.1 (discussing the adverse employment action element in  
108 Title VII cases).

### 109 *Business Judgment*

## 9.1.2 Disparate Treatment – Pretext

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

### 120 *Determinative Factor*

121 The reference in the instruction to a “determinative factor” is taken from *Watson v. SEPTA*,  
122 207 F.3d 207 (3d Cir. 2000) (holding that the appropriate term in pretext cases is “determinative  
123 factor”, while the appropriate term in mixed-motive cases is “motivating factor”).

### 124 *Statutory Definitions*

125 The ADA employs complicated and sometimes counterintuitive statutory definitions for  
126 many of the important terms that govern a disparate treatment action. Instructions for these  
127 statutory definitions are set forth at 9.2.1-9.2.2. They are not included in the body of the “pretext”  
128 instruction because not all of them will ordinarily be in dispute in a particular case, and including  
129 all of them would unduly complicate the basic instruction.

### 130 *Direct Threat*

131 The ADA provides a defense if the employment or accommodation of an otherwise  
132 qualified, disabled individual would pose a “direct threat” to the individual or to others. The “direct  
133 threat” affirmative defense is applicable both to disparate treatment claims and reasonable  
134 accommodation claims. See *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002); *Buskirk v.*  
135 *Apollo Metals*, 307 F.3d 160, 168 (3d Cir. 2002). See 9.3.1 for an instruction on the “direct threat”  
136 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.

### 9.1.3 Reasonable Accommodation

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<sup>9</sup> 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:

---

<sup>9</sup> Congress has provided that the same standards govern employment-discrimination claims under the ADA and the Rehabilitation Act. *See* 29 U.S.C. § 791(f) (Rehabilitation Act claims relating to federal-sector employment); *see also id.* § 793(d) (Rehabilitation Act claims relating to employment by federal contractors); *id.* § 794(d) (Rehabilitation Act claims against employers that receive federal financial assistance). Accordingly, employment-discrimination precedents concerning reasonable accommodation (or reasonable modification) under the Rehabilitation Act are equally relevant to ADA employment-discrimination reasonable-accommodation claims. More broadly, precedents concerning reasonable modifications under Titles II and III of the ADA, and non-employment-related Rehabilitation Act precedents concerning reasonable accommodation, may also be informative. *See Berardelli v. Allied Servs. Inst. of Rehab. Med.*, 900 F.3d 104, 118 (3d Cir. 2018) (holding that Department of Justice regulations (concerning service animals) under Titles II and III of the ADA governed a Rehabilitation Act claim against a private children's school, and stating that, based on the "intertwined histories" of the Rehabilitation Act and the ADA, "[t]he reasonableness of an accommodation or modification is the same under the RA and the ADA").

### 9.1.3 Reasonable Accommodation

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  
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:

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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  
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

### 9.1.3 Reasonable Accommodation

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.

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

### 9.1.3 Reasonable Accommodation

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  
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



### 9.1.3 Reasonable Accommodation

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  
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):

### 9.1.3 Reasonable Accommodation

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.”).

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*

### 9.1.3 Reasonable Accommodation

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  
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

### 9.1.3 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. Metallics 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.

#### 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 9.2.1-9.2.2. 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.

#### 410 *Potential overlap between ADA reasonable-accommodation claims and FMLA claims*

411 Regulations and caselaw recognize the possibility that the same facts might (in certain  
412 circumstances) ground both a reasonable-accommodation claim under the Americans With  
413 Disabilities Act and a claim under Family and Medical Leave Act. “If an employee is a qualified  
414 individual with a disability within the meaning of the ADA, the employer must make reasonable  
415 accommodations, etc., barring undue hardship, in accordance with the ADA. At the same time, the  
416 employer must afford an employee his or her FMLA rights. ADA’s ‘disability’ and FMLA’s  
417 ‘serious health condition’ are different concepts, and must be analyzed separately.” 29 C.F.R.  
418 § 825.702(b). “[A] request for FMLA leave may qualify, under certain circumstances, as a request  
419 for a reasonable accommodation under the ADA.” *Capps v. Mondelez Glob., LLC*, 847 F.3d 144,  
420 156-57 (3d Cir. 2017) (upholding grant of summary judgment to defendant because, “even  
421 assuming, *arguendo*, that Capps’ requests for intermittent FMLA leave constituted requests for a  
422 reasonable accommodation under the ADA as well, Mondelez continued to approve Capps’  
423 requested leave, and indeed, Capps took the requested leave,” with the result that “Capps received  
424 the accommodation he asked for”).

## 9.1.4 Harassment – Hostile Work Environment –Tangible Employment Action

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

#### 3 Model

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

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

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

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

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

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

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

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

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

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

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

26 Ninth: Management level employees knew, or should have known, of the abusive conduct.  
27 Management level employees should have known of the abusive conduct if 1) an employee  
28 provided management level personnel with enough information to raise a probability of  
29 harassment on grounds of disability [or request for accommodation] in the mind of a  
30 reasonable employer, or if 2) the harassment was so pervasive and open that a reasonable  
31 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.<sup>10</sup> 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 employees<sup>11</sup> exists only

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<sup>10</sup> 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.

<sup>11</sup> 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.<sup>12</sup>  
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)).

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<sup>12</sup> 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. § 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 — Retaliation<sup>13</sup>

### Model

[Plaintiff] claims that [defendant] discriminated against [him/her] because of [plaintiff's] [describe protected activity].<sup>14</sup>

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,<sup>15</sup> 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

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<sup>13</sup> Some courts have held that there is no right to jury trial for an ADA retaliation claim. See the Comment to this instruction.

<sup>14</sup> 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.

<sup>15</sup> 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

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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.



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### 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).<sup>16</sup>

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

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<sup>16</sup> 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).<sup>17</sup> 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

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<sup>17</sup> 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

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282 (2013) (“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),<sup>18</sup> have for ADA retaliation claims,<sup>19</sup> but  
297 users of these instructions may wish to consider that question.

---

<sup>18</sup> 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.

<sup>19</sup> *Cf. DiFiore v. CSL Behring, LLC*, 879 F.3d 71, 78 (3d Cir. 2018) (holding that a mixed-motive framework is unavailable for False Claims Act retaliation claims because “the language of the FCA anti-retaliation provision uses the same ‘because of’ language that compelled the Supreme Court to require ‘but-for’ causation in *Nassar* and *Gross*”); *id.* at 76 (holding that *Nassar* and *Gross* “undermine[d],” and thus justified panel reconsideration of, a prior Third Circuit opinion indicating that a “motivating factor” analysis was appropriate for False Claims Act retaliation 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.]

## 9.2.1 Disability

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.<sup>20</sup>

### 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*.<sup>21</sup> 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;

---

<sup>20</sup> 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).

<sup>21</sup> “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, § II.A (June 25, 2015) (footnotes omitted), available at  
355 [http://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm#dissta](http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#dissta). As of spring 2016, 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

## 9.2.2 Qualified Individual

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

## 9.2.2 Qualified Individual

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;

## 9.2.2 Qualified Individual

- 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

## 9.2.2 Qualified Individual

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 For additional cases discussing the essential functions concept, see *Walton v. Mental Health Ass'n*  
181 *of Southeastern Pa.*, 168 F.3d 661, 666 (3d Cir. 1999) (employee's inability to appear in a  
182 promotional video because she was obese was not a substantial limitation on essential function of

## 9.2.2 Qualified Individual

183 a job; any such appearance would have been only a minor aspect of her job); *Conneen v. MBNA*  
184 *America Bank, N.A.*, 334 F.3d 318, 327 (3d Cir. 2003) (promptness was not an essential function  
185 merely because the employer thought it necessary for the employee to set an example for lower-  
186 level employees); *McNelis v. Pennsylvania Power & Light Co.*, 867 F.3d 411, 413, 415 (3d Cir.  
187 2017) (plaintiff – who was fired from his job as an armed security officer at a nuclear power plant  
188 after he “experienced personal and mental health problems” and failed a fitness for duty exam  
189 conducted by a psychologist – could not perform the “essential functions” of his job because  
190 “[Nuclear Regulatory Commission] regulations require Nuclear Security Officers to be fit for duty  
191 ... and to maintain unescorted security clearance” and the plaintiff “did not satisfy either legally  
192 mandated requirement at the time he was fired”); *id.* at 416 n.2 (reasoning in the alternative that  
193 even if the plaintiff had stated a prima facie case, the NRC’s regulatory requirements would  
194 provide a defense (citing 29 C.F.R. § 1630.15(e)).

195 The Third Circuit has held that whether a particular function is an “essential function” of a  
196 job under the ADA is a question best left for the jury. *Turner v. Hershey Chocolate USA*, 440 F.3d  
197 604, 613 (3d Cir. 2006). However, where the function is an essential function because it is a  
198 legally-defined requirement, that presents a question of law for the court. *See McNelis*, 867 F.3d  
199 at 415 (in affirming grant of summary judgment dismissing plaintiff’s claims, citing Nuclear  
200 Regulatory Commission requirements and “the well-settled proposition that ‘a legally-defined job  
201 qualification is by its very nature an essential function under [the ADA]’ ” (quoting *Brickers v.*  
202 *Cleveland Bd. of Educ.*, 145 F.3d 846, 850 (6th Cir. 1998))).

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 use with any of Instructions 9.1.1, 9.1.2, or 9.1.4. If, instead, the plaintiff claims that  
18 she was constructively discharged based on a supervisor’s or co-worker’s adverse action or actions  
19 that were not sanctioned by the employer, the constructive discharge would not count as a tangible  
20 adverse employment action (for the purposes of determining whether the employer may assert an  
21 *Ellerth/Faragher* affirmative defense). *See* Comment 9.1.5. *See also Pennsylvania State Police*  
22 *v. Suders*, 542 U.S. 129, 140-41 (2004) (“[A]n employer does not have recourse to the  
23 *Ellerth/Faragher* affirmative defense when a supervisor's official act precipitates the constructive  
24 discharge; absent such a ‘tangible employment action,’ however, the defense is available to the  
25 employer whose supervisors are charged with 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.]

#### 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 5.4.3-5.4.4. 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  
108 in *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. § 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. § 1981a to mean, however,  
66 that proof of intentional discrimination is not enough in itself to justify an award of punitive  
67 damages, because the statute suggests a congressional intent to authorize punitive awards “in only  
68 a subset of cases involving intentional discrimination.” Therefore, “an employer must at least  
69 discriminate in the face of a perceived risk that its actions will violate federal law to be liable in  
70 punitive damages.” *Kolstad*, 527 U.S. at 536. *See also* *Gagliardo v. Connaught Laboratories, Inc.*,  
71 311 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  
113 in *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.

### 9.4.3 Back Pay – For Advisory or Stipulated Jury

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  
44 Title VII, which includes backpay and front pay or reinstatement. [Front pay relief] is equitable  
45 in 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)).