Instructions for Employment Claims Under the Americans With Disabilities Act

Numbering of ADA Instructions

9.0 ADA Employment Claims—Introductory Instruction

Model

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

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

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

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

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

Comment

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

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

[1] Section 12111(8) continues: "For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer

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

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

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

The ADA, Public Accommodations and Public Services

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

The Rehabilitation Act

Federal employers, federal contractors, and employers that receive federal funding are subject to the Rehabilitation Act, which is a precursor of the ADA. 29 U.S.C. § 701 et seq. The substantive standards for a claim under the Rehabilitation Act are in many respects identical to those governing a claim under the ADA. *See, e.g., Wishkin v. Potter,* 476 F.3d 180, 184 (3d Cir. 2007) ("The Rehabilitation Act expressly makes the standards set forth in the 1990 Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., applicable to federal employers and to employers receiving federal funding."); *Bragdon v. Abbott,* 524 U.S. 624, 632 (1998) (in interpreting the 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."

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

The ADA's association provision

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

Religious Entities; Ministerial Exception

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

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

Scope of Chapter

These model instructions address the elements of ADA employment claims and defenses; pertinent definitions; and questions of damages. The commentary is designed to explain the drafting of the model instructions and generally does not focus on other procedural matters.[2]

[2] Administrative-exhaustion requirements provide one example. As to employment

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.

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

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

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

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

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

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

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

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

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

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

1. "Disability." — Instruction 9.2.1

2. "Qualified" — *See* Instruction 9.2.2]

[3] See Comment for a discussion of adverse employment actions under the ADA.

[For use where defendant sets forth a "same decision" affirmative defense:[4]

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

Comment

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

In *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), 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.

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

[4] 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.

retaliation claims among those eligible for the statutory mixed-motive test set forth in 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B), *see id.* at 2529; that policy considerations support a restrictive approach to the standards of proof for retaliation claims, *see id.* at 2531-32; and that the "careful balance" that Congress set in the 1991 amendments forecloses the use of the *Price Waterhouse* mixed-motive test for Title VII retaliation claims, *id.* at 2534.[5]

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

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

The Third Circuit explained the applicability of a "mixed-motive" instruction in ADA cases in *Buchsbaum v. University Physicians Plan,* 55 Fed Appx. 40, 43 (3d Cir. 2002).[7] It noted that the "typical" case is considered under the *McDonnell-Douglas* burden-shifting analysis, but stated that

> the "mixed motive" analysis of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), may be applied instead if the plaintiff has produced "direct evidence" of the employer's discriminatory animus. Under a *Price-Waterhouse* "mixed motive" analysis, where there is strong evidence of an employer's discriminatory animus, the burden of proof shifts from

[5] *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*").

[6] *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.

[7] 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.

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

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

Statutory Definitions

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

Adverse Employment Action

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). This statutory language should

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

"Same Decision" Instruction

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

Direct Threat

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

Animus of Employee Who Was Not the Ultimate Decisionmaker

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

of this title," and Section 2000e-2(m) does not list disability discrimination among the types of violations that it bars. Section 2000e-2(m)'s "motivating factor" language does not apply to ADA claims – and it was Section 2000e-2(m) that the *Staub* Court noted as containing language similar to the USERRA language that it was construing. *See Staub*, 131 S. Ct. at 1191. Thus, it is unclear whether the ruling in *Staub* would extend to mixed-motive claims under the ADA.

9.1.2 Elements of an ADA Claim – Disparate Treatment — Pretext

Model

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

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

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

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

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

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

1. "Disability." — Instruction 9.2.1

2. "Qualified" — *See* Instruction 9.2.2]

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

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

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

[8] See Comment for a discussion of adverse employment actions under the ADA.

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

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

Comment

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

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

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

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

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

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

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

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

Adverse Employment Action

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

Business Judgment

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

Determinative Factor

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

Statutory Definitions

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

Direct Threat

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

9.1.3 Elements of an ADA Claim — Reasonable Accommodation

Model

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

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

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

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

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

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

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

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

1. "Disability." — Instruction 9.2.1

2. "Qualified" — *See* Instruction 9.2.2]

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

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

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

1. Modifying or adjusting a job application process to enable a qualified applicant with a disability to be considered for the position;

2. Making existing facilities used by employees readily accessible to and usable by [plaintiff];

3. Job restructuring;

4. Part-time or modified work schedule;

5. Reassignment to a vacant position for which [plaintiff] is qualified;

6. Acquisition or modifications of examinations, training manuals or policies;

7. Provision of qualified readers or interpreters; and

8. Other similar accommodations for individuals with [plaintiff's] disability.]

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

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

1. Change or eliminate any essential function of employment;

2. Shift any essential function of employment to other employees;

3. Create a new position for [plaintiff];

4. Promote [plaintiff];

5. Reduce productivity standards; or

6. Make an accommodation that conflicts with an established [seniority system] [other neutral employment policy], unless [plaintiff] proves by a preponderance of the evidence that "special circumstances" make an exception reasonable. For example, an exception might be reasonable (and so "special circumstances" would exist) if exceptions were often made to the policy. Another example might be where the policy already contains its own exceptions so that, under the circumstances, one more exception is not significant.]

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

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

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

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

[For use where a previous accommodation has been provided:

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

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

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

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

1. The nature and cost of the accommodation.

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

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

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

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

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

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

Comment

The basics of an action for reasonable accommodation under the ADA[9] were set forth by the Third Circuit in *Skerski v. Time Warner Cable Co.,* 257 F.3d 273 (3d Cir. 2001).

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

[9] 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").

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

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

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

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

Allocation of Burdens—Reasonable Accommodation and the Undue Hardship Defense

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

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

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

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

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

> [W]e conclude that Gaul has failed to satisfy his burden for three reasons. First, Gaul's proposed accommodation would impose a wholly impractical obligation on AT & T or any employer. Indeed, AT & T could never achieve more than temporary compliance because compliance would depend entirely on Gaul's stress level at any given moment. This, in turn, would depend on an infinite number of variables, few of which AT & T controls. Moreover, the term "prolonged and inordinate stress" is not only subject to constant change, it is also subject to tremendous abuse. The only certainty for AT & T would be its obligation to transfer Gaul to another department whenever he becomes "stressed out" by a coworker or supervisor. It is difficult to imagine a more amorphous "standard" to impose on an employer.
>
> Second, Gaul's proposed accommodation would also impose extraordinary administrative burdens on AT &T. In order to reduce Gaul's exposure to coworkers who cause him prolonged and inordinate stress, AT & T supervisors would have to consider, among other things, Gaul's stress level whenever assigning projects to workers or teams, changing work locations, or planning social events. Such considerations would require far too much oversight and are simply not required under law.
>
> Third, by asking to be transferred away from individuals who cause him prolonged and inordinate stress, Gaul is essentially asking this court to establish the conditions of his employment, most notably, with whom he will work. However, nothing in the ADA allows this shift in responsibility. . . .
>
> In sum, Gaul does not meet his burden . . . because his proposed accommodation was unreasonable as a matter of law. Therefore, Gaul is not a "qualified individual" under the ADA, and AT & T's alleged failure to investigate into reasonable accommodation is

unimportant.

Preferences

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

> The Act requires preferences in the form of "reasonable accommodations" that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy. By definition any special "accommodation" requires the employer to treat an employee with a disability differently, *i.e.,* preferentially. And the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach.
>
> Were that not so, the "reasonable accommodation" provision could not accomplish its intended objective. Neutral office assignment rules would automatically prevent the accommodation of an employee whose disability-imposed limitations require him to work on the ground floor. Neutral "break-from-work" rules would automatically prevent the accommodation of an individual who needs additional breaks from work, perhaps to permit medical visits. Neutral furniture budget rules would automatically prevent the accommodation of an individual who needs a different kind of chair or desk. Many employers will have neutral rules governing the kinds of actions most needed to reasonably accommodate a worker with a disability. See 42 U.S.C. § 12111(9)(b) (setting forth examples such as "job restructuring," "part-time or modified work schedules," "acquisition or modification of equipment or devices," "and other similar accommodations"). Yet Congress, while providing such examples, said nothing suggesting that the presence of such neutral rules would create an automatic exemption. Nor have the lower courts made any such suggestion.
>
> . . . The simple fact that an accommodation would provide a "preference" -- in the sense that it would permit the worker with a disability to violate a rule that others must obey -- cannot, *in and of itself*, automatically show that the accommodation is not "reasonable."

Seniority Plans and Other Disability-Neutral Employer Rules

While rejecting the notion that preferences were *never* reasonable, the *Barnett* Court recognized that employers have a legitimate interest in preserving seniority programs, and found that the ADA generally does not require an employer to "bump" a more senior employee in favor of a disabled one. The Court found "nothing in the statute that suggests Congress intended to undermine seniority systems in this way. And we consequently conclude that the employer's showing of violation of the rules of a seniority system is by itself ordinarily sufficient" to show that the suggested accommodation would not be reasonable. The Court held that if a proposed

accommodation would be contrary to a seniority plan, the plaintiff would have the burden of showing "special circumstances" indicating that the accommodation was reasonable. The Court explained as follows:

> The plaintiff (here the employee) nonetheless remains free to show that special circumstances warrant a finding that, despite the presence of a seniority system (which the ADA may not trump in the run of cases), the requested "accommodation" is "reasonable" on the particular facts. . . . The plaintiff might show, for example, that the employer, having retained the right to change the seniority system unilaterally, exercises that right fairly frequently, reducing employee expectations that the system will be followed -- to the point where one more departure, needed to accommodate an individual with a disability, will not likely make a difference. The plaintiff might show that the system already contains exceptions such that, in the circumstances, one further exception is unlikely to matter. We do not mean these examples to exhaust the kinds of showings that a plaintiff might make. But we do mean to say that the plaintiff must bear the burden of showing special circumstances that make an exception from the seniority system reasonable in the particular case. And to do so, the plaintiff must explain why, in the particular case, an exception to the employer's seniority policy can constitute a "reasonable accommodation" even though in the ordinary case it cannot.

535 U.S. at 404.

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

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

The Interactive Process

The ADA itself does not specifically provide that the employer has an obligation to engage in an interactive process with the employee to determine whether a reasonable accommodation can be found for the employee's disability. But the Third Circuit has established that good faith participation in an interactive process is an important factor in determining whether a reasonable

accommodation exists. The court in *Williams v. Philadelphia Hous. Auth. Police Dep't*, 380 F.3d 751, 772 (3d Cir. 2004) explained the interactive process requirement as follows:

> [W]e have repeatedly held that an employer has a duty under the ADA to engage in an "interactive process" of communication with an employee requesting an accommodation so that the employer will be able to ascertain whether there is in fact a disability and, if so, the extent thereof, and thereafter be able to assist in identifying reasonable accommodations where appropriate. "The ADA itself does not refer to the interactive process," but does require employers to "make reasonable accommodations" under some circumstances for qualified individuals. *Shapiro v. Township of Lakewood*, 292 F.3d 356, 359 (3d Cir. 2002). With respect to what consists of a "reasonable accommodation," EEOC regulations indicate that,
>
> > to determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. 29 C.F.R. § 1630.2(o)(3).

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

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

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

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

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

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

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

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

Reasonable Accommodation Requirement Inapplicable to "Regarded as" Disability

In contexts other than reasonable-accommodation claims, the ADA's definition of "disability" includes "being regarded as having" a physical or mental impairment that substantially limits one or more major life activities. 42 U.S.C. § 12102(1)(C). Prior to 2009, this "regarded as" part of the definition of disability also applied to reasonable-accommodation claims. *See Williams v. Philadelphia Hous. Auth. Police Dep't*, 380 F.3d 751, 776 (3d Cir. 2004). But in the ADA Amendments Act of 2008, Congress provided that "regarded as" disability cannot provide a basis for a reasonable-accommodation claim. *See* 42 U.S.C. § 12201(h); *see also Robinson v. First State Community Action Agency*, 2019 WL 1431924, at *3 (3d Cir. Apr. 1, 2019). Accordingly, Instruction 9.2.1, which defines "disability," has been revised to reflect that the "regarded as" option is unavailable for reasonable-accommodation claims.

Direct Threat

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

Statutory Definitions

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

Potential overlap between ADA reasonable-accommodation claims and FMLA claims

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

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

Model

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

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

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

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

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

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

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

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

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

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

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

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

9.1.4 Harassment – Hostile Work Environment –Tangible Employment Action

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

1. "Disability." — Instruction 9.2.1

2. "Qualified" — *See* Instruction 9.2.2]

Comment

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

> The Supreme Court has held that language in Title VII that is almost identical to the . . . language in the ADA creates a cause of action for a hostile work environment. See *Patterson v. McLean Credit Union,* 491 U.S. 164, 180 (1989). In addition, we have recognized that:
>
> > in the context of employment discrimination, the ADA, ADEA and Title VII all serve the same purpose--to prohibit discrimination in employment against members of certain classes. Therefore, it follows that the methods and manner of proof under one statute should inform the standards under the others as well. Indeed, we routinely use Title VII and ADEA caselaw interchangeably, when there is no material difference in the question being addressed.
>
> *Newman v. GHS Osteopathic, Inc*., 60 F.3d 153, 157 (3d Cir. 1995). This framework indicates that a cause of action for harassment exists under the ADA. However, like other courts, we will assume this cause of action without confirming it because Walton did not show that she can state a claim.

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

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

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

It should be noted that constructive discharge is the adverse employment action that is most common with claims of hostile work environment.[10] Instruction 9.2.4 provides an instruction setting forth the relevant factors for a finding of constructive discharge. That instruction can be used to amplify the term "adverse employment action" in appropriate cases. In *Spencer v. Wal-Mart Stores, Inc.,* 469 F.3d 311, 317 (3d Cir. 2006), the court held that an ADA plaintiff cannot receive back pay in the absence of a constructive discharge. "Put simply, if a hostile work environment does not rise to the level where one is forced to abandon the job, loss of pay is not an issue."

The instruction's definition of "tangible employment action" is taken from *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

Respondeat superior liability for harassment by non-supervisory employees[11] exists only

[10] 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.

[11] 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.

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

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

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

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

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

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:

1. "Disability." — Instruction 9.2.1

2. "Qualified" — *See* Instruction 9.2.2]

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

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

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

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

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

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

2. That policy was fully communicated to its employees.

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

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

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

Comment

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

9.1.5 Harassment – Hostile Work Environment – No Tangible Employment Action

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

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

Besides the affirmative defense provided by *Ellerth*, the absence of a tangible employment action also justifies requiring the plaintiff to prove a further element, in order to protect the employer from unwarranted liability for the discriminatory acts of its non-supervisor employees.[12] Respondeat superior liability for the acts of non-supervisory employees exists only where "the defendant knew or should have known of the harassment and failed to take prompt remedial action." *Andrews v. City of Philadelphia,* 895 F.2d 1469, 1486 (3d Cir. 1990). *See also Kunin v. Sears Roebuck and Co.,* 175 F.3d 289, 294 (3d Cir. 1999):

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

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

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[12] 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

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

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

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

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

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[13]

Model

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

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,[15] 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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[13] Some courts have held that there is no right to jury trial for an ADA retaliation claim. *See* the Comment to this instruction.

[14] 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.

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

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

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

Comment

The Right to Jury Trial for ADA Retaliation Claims

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

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

> The enforcement provision of the ADA is codified at 42 U.S.C. § 12117. That section provides that the available remedies under the ADA are the same as provided in the 1964 Civil Rights Act, 42 U.S.C. § 2000e-4 though e-9. Section 2000e-5(g)(1) of the Civil Rights Act limits the remedies available under that act to equitable relief, including back pay, but does not provide for compensatory or punitive damages. *Kramer,* 355 F.3d at 964. The 1991 Civil Rights Act, 42 U.S.C. § 1981a(a)(2), expanded the remedies available in section 2000e-5(g)(1) to provide for compensatory and punitive damages in certain circumstances. With respect to the ADA, section 1981a(a)(2) provided that a complaining party could recover compensatory and punitive damages for violations of section 102 or section 102(b)(5) of the ADA, codified at 42 U.S.C. §§ 12112 and 12112(b)(5). Sections 12112 and 12112(b)(5) deal with an employer's failure to make reasonable accommodations to a qualified employee with a disability [and also to disparate treatment claims], while section 12203 - not listed in section 1981a(a)(2) - establishes retaliation claims under the ADA.
>
> After reviewing the applicable statutes, the United States Court of Appeals for the Seventh Circuit concluded that the plaintiff was precluded from recovering compensatory and punitive damages under her ADA retaliation claim. The court determined that section 1981a(a)(2) permitted recovery of compensatory and punitive damages only for the claims listed in that statute, such as section 12112 of the ADA, and since the section establishing retaliation claims under the ADA (42 U.S.C. § 12203) was not listed, compensatory and

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

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

> The United States Court of Appeals for the Third Circuit offered guidance with respect to whether the right to a trial by jury exists in *Cox v. Keystone Carbon Co.*, 861 F.2d 390 (3d Cir. 1988). There, the court stated that "in determining a party's right to a jury trial it is the procedural and remedial sections of the statute creating the right which must be examined." Id. at 392. The court concluded that "where the particular remedial section in the statute provides for only equitable remedies then no right to a jury trial exists." Id. The court further cautioned that "within a particular statute a right to a jury might exist as to some of the enforcement sections and not as to others," and that courts must be careful to examine the applicable subsections at issue to determine which remedies are available. Id. *Cox*, thus, requires the court to examine the statutory provisions of the ADA concerning retaliation claims in order to determine the nature of relief that may be awarded. If the court determines that the remedy is "explicitly equitable, then there is no seventh amendment right to a jury." Id. (citing *Curtis v. Loether*, 415 U.S. 189, 194-95 (1974).
>
> As noted above, since compensatory and punitive damages are not available, the sole remedy for plaintiff's retaliation claims pursuant to the ADA is equitable relief. Under the mandate of *Cox,* because plaintiff's sole remedy under his ADA retaliation claim is equitable, plaintiff is not entitled to a jury trial on that claim. Accordingly, defendant's motion to strike [the demand for jury trial] is granted.

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

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

The Basics of a Retaliation Claim under the ADA

The ADA provides: "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge . . . under [the ADA]." 42 U.S.C. § 12203(a). "Thus, it is unlawful for an employer to retaliate against an employee based upon the employee's opposition to anything that is unlawful under the ADA." *Shellenberger v. Summit Bancorp, Inc.*, 318 F.3d 183, 188 (3d Cir. 2003).[16]

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

Protected Activity

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

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

[16] 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).

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

Standard for Actionable Retaliation

The Supreme Court in *Burlington N. & S.F. Ry. v. White,* 548 U.S. 53, 68 (2006), held that a cause of action for retaliation under Title VII lies whenever the employer responds to protected activity in such a way "that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." (internal quotation marks and citations omitted).[17] The Court elaborated on this standard in the following passage:

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

[17] 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.").

> employers. And normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence. See 2 EEOC 1998 Manual § 8, p. 8-13.
>
> We refer to reactions of a *reasonable* employee because we believe that the provision's standard for judging harm must be objective. An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings. We have emphasized the need for objective standards in other Title VII contexts, and those same concerns animate our decision here. See, *e.g.*, [*Pennsylvania State Police v.*] *Suders,* 542 U.S., at 141, 124 S. Ct. 2342, 159 L. Ed. 2d 204 (constructive discharge doctrine); *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (hostile work environment doctrine).
>
> We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. . . . A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children. A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination. Hence, a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an act that would be immaterial in some situations is material in others.
>
> Finally, we note that . . . the standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint. By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.

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

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

No Requirement That Retaliation Be Job-Related To Be Actionable

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

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

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

Time Period Between Protected Activity and the Allegedly Retaliatory Action

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

> We have held in the ADA retaliation context that "temporal proximity between the protected activity and the termination [can be itself] sufficient to establish a causal link." *Shellenberger*, *v. Summit Bancorp, Inc.*, 318 F.3d 183, 188 (3d Cir. 2003) (quoting *Woodson v. Scott Paper Co.*, 109 F.3d 913, 920 (3d Cir.1997)). However, "the timing of the alleged retaliatory action must be unusually suggestive of retaliatory motive before a causal link will be inferred." *Shellenberger*, 318 F.3d at 189 n.9. For example, two days between the protected activity engaged in and the alleged retaliation sufficed in *Jalil v. Avdel Corp*., 873 F.2d 701, 708 (3d Cir.1989), to support an inference of a causal connection between the two. Similarly, in *Shellenberger*, comments made by a supervisor suggesting retaliation ten days before termination, along with other evidence of retaliation, were sufficient to establish a prima facie showing of causation.
>
> Here, over two months elapsed between the time Williams requested a radio room assignment and the time that he was terminated. In cases like this one, "where 'the temporal proximity is not so close as to be unduly suggestive,' we have recognized that 'timing plus other evidence may be an appropriate test. . . .' " *Thomas v. Town of Hammonton*, 351 F.3d 108, 114 (3d Cir. 2003) (quoting *Estate of Smith v. Marasco*, 318 F.3d 497, 513 (3d Cir. 2003)). Williams has, however, put forth no other evidence suggesting that PHA terminated him because he requested a radio room assignment. Moreover, the evidence supporting PHA's alternative explanation is quite compelling. As Williams acknowledges, PHA had granted Williams medical leave on two prior occasions, and there was no indication that PHA would not have done so again had Williams simply [followed company procedures].

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

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

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

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

Perceived Protected Activity

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

"Determinative Effect" Instruction

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

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

(2013) ("Title VII retaliation claims must be proved according to traditional principles ofbut-for causation, not the lessened causation test stated in [42 U.S.C.] § 2000e–2(m). This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer."). The *Nassar* Court reasoned that Congress legislated against a background tort principle of "but for" causation, *see Nassar*, 133 S. Ct. at 2523; that Title VII's retaliation provision uses the word "because," which is incompatible with a mixed-motive test, *see id.* at 2528; that Congress would have structured the statutory framework differently had it wished to encompass Title VII retaliation claims among those eligible for the statutory mixed-motive test set forth in 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B), *see id.* at 2529; that policy considerations support a restrictive approach to the standards of proof for retaliation claims, *see id.* at 2531-32; and that the "careful balance" that Congress set in the Civil Rights Act of 1991 forecloses the use of the *Price Waterhouse* mixed-motive test for Title VII retaliation claims, *id.* at 2534.

The Committee has not attempted to determine what, if any, implications *Nassar* and *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009),[18] have for ADA retaliation claims,[19] but users of these instructions may wish to consider that question.

[18] 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.

[19] *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).

9.2.1 ADA Definitions — Disability

Model

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

["Physical/Mental Impairment"

The term "physical impairment" means any condition that prevents the body from functioning normally. The term "mental impairment" means any condition that prevents the mind from functioning normally.]

[Major Life Activities

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

["Substantially Limiting"

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

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

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

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

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

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

[[For use when the claim is not one for reasonable accommodation and when there is a jury question on whether plaintiff is "regarded as" having a disability. Note that "regarded as" disability is not a basis for a reasonable-accommodation claim:]

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

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

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

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

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

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

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

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

fits within the statutory definition because [he/she] has a record of disability.**]**

Concluding Instruction:

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

Comment

The ADA definition of "disability" is complex for a number of reasons: 1) there are three separate types of disability: "actual", "regarded as", and "record of" disability; 2) "regarded as" disability is unavailable as the basis for a reasonable-accommodation claim, 3) the basic definition of "disability" encompasses three separate subdefinitions, for "impairment", "substantially limited" and "major life activity"; 4) perhaps most important, the technical definition of "disability" is likely to be different from the term as it is used in the vernacular by most jurors. In most cases, however, the instruction can be streamlined because not every aspect of the definition will be disputed in the case. For example, ordinarily there will be no jury question on whether what the plaintiff suffers from is an impairment.

ADA Amendments Act of 2008

The ADA Amendments Act of 2008 (P.L. 110-325, 122 Stat. 3555) (the "Act") made a number of changes to the ADA definition of disability, and statutorily overruled some Supreme Court cases that Congress determined had "narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect." The basic thrust of the Act is to make it easier for plaintiffs to prove that they have a "disability" within the meaning of the ADA. For example, section 2(b)(5) of the Act provides that "it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations," and that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." Along the same lines, section 4(a) of the Act provides that the definition of "disability" under the ADA "shall be construed in favor of broad coverage of individuals." The concluding text of the Instruction implements these general provisions of the Act. In addition, the Act makes specific changes to the statutory definition of "disability" that are discussed below in this Comment. As discussed below, one such change narrowed the definition of "disability" for a particular type of claim. See 42 U.S.C. § 12201(h) (providing that "regarded as" disability cannot provide a basis for a reasonable-accommodation claim).

"Impairment"

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

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

> (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or
>
> (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

45 CFR § 84.3(j)(2)(i) (1997).

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

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

"Substantially Limits"

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

> (4) to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms "substantially" and "major" in the definition of disability under the ADA "need to be

> interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives";
>
> (5) to convey congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) for "substantially limits", and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis.

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

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

Use of Corrective Devices

In *Sutton v. United Air Lines,* 527 U.S. 471, 482 (1999), the Court held that the existence of a "disability" under the ADA must be determined in light of corrective measures used by the employee—in that case, the use of eyeglasses to correct severely impaired vision. The Court declared that "it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effect of those measures– both positive and negative— must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act." But the ADA Amendments Act of 2008 specifically repudiates the result in *Sutton*.[21] Section (4)(a)(E) of the Act provides that the determination of whether an impairment substantially limits a major life activity "shall be made without regard to the ameliorative effects of mitigating measures such as –

> (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices,

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[20] 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).

[21] "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).

> hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
>
> (II) use of assistive technology;
>
> (III) reasonable accommodations or auxiliary aids or services; or
>
> (IV) learned behavioral or adaptive neurological modifications.

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

"Major Life Activity"

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

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

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

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

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

Work as a Major Life Activity

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

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

"Regarded as" Having a Disability (for Purposes of Claims other than Reasonable Accommodation)

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

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

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

> Although the legislative history indicates that Congress was concerned about eliminating society's myths, fears, stereotypes, and prejudices with respect to the disabled, the EEOC's Regulations and Interpretive Guidance make clear that even an innocent misperception based on nothing more than a simple mistake of fact as to the severity, or even the very

> existence, of an individual's impairment can be sufficient to satisfy the statutory definition of a perceived disability. See 29 C.F.R. pt. 1630, app. § 1630.2(l) (describing, as one example of a "regarded as" disabled employee, an individual with controlled high blood pressure that is not substantially limiting, who nonetheless is reassigned to less strenuous work because of the employer's unsubstantiated fear that the employee will suffer a heart attack). Thus, whether or not PMC was motivated by myth, fear or prejudice is not determinative of Deane's "regarded as" claim.

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

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

> 1. A plaintiff meets the requirement of being "regarded as" having a disability if she establishes that she has been discriminated against "because of an actual or perceived impairment *whether or not the impairment limits or is perceived to limit a major life activity.*" (emphasis added).
>
> 2. A plaintiff cannot be "regarded as" having a disability if the actual or perceived impairment is "transitory and minor." A "transitory" impairment is defined as one "with an actual or expected duration of 6 months or less."

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

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

> Williams argues, inter alia, that PHA "admitted" he was disabled within the meaning of the ADA by offering him the opportunity to take an unpaid leave of absence, thereby "accommodating" him. We agree with the Sixth and Ninth Circuits, however, that an offer of accommodation does not, by itself, establish that an employer "regarded" an employee as disabled. See *Thornton v. McClatchy Newspapers, Inc*., 261 F.3d 789, 798 (9th Cir. 2001) ("When an employer takes steps to accommodate an employee's restrictions, it is not thereby conceding that the employee is disabled under the ADA or that it regards the employee as disabled. A contrary rule would discourage the amicable resolution of numerous employment disputes and needlessly force parties into expensive and time-consuming litigation."), clarified in other respects, 292 F.3d 1045 (9th Cir. 2002);

> *Plant v. Morton Int'l, Inc.*, 212 F.3d 929, 938 (6th Cir. 2000) ("The intent behind this ["regarded as"] provision, according to the EEOC, is to reach those cases in which 'myths, fears and stereotypes' affect the employer's treatment of an individual. [An employee] cannot show that this provision applies to him merely by pointing to that portion of the record in which his [employer] admitted that he was aware of [the employee's] medical restrictions and modified [the employee's] responsibilities based on them.").

Reasonable Accommodation Requirement Inapplicable to "Regarded as" Disability

As noted above, in contexts other than reasonable-accommodation claims, the ADA's definition of "disability" includes "being regarded as having" a physical or mental impairment that substantially limits one or more major life activities. 42 U.S.C. § 12102(1)(C). Prior to 2009, this "regarded as" part of the definition of disability also applied to reasonable-accommodation claims. *See Williams v. Philadelphia Hous. Auth. Police Dep't*, 380 F.3d 751, 776 (3d Cir. 2004). But in the ADA Amendments Act of 2008, Congress provided that "regarded as" disability cannot provide a basis for a reasonable-accommodation claim. *See* 42 U.S.C. § 12201(h); *see also Robinson v. First State Community Action Agency*, 2019 WL 1431924, at *3 (3d Cir. Apr. 1, 2019). Accordingly, Instruction 9.2.1's definition of disability has been revised to reflect that the "regarded as" option is unavailable for reasonable-accommodation claims.

Record of disability

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

Pregnancy-related disability

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

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

EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues, EEOC Notice No. 915.003, § II.A (June 25, 2015) (footnotes omitted), available at http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#dissta. As of spring 2016, the Court of Appeals had not addressed the status of pregnancy-related impairments under the ADA as amended in 2008.

9.2.2 ADA Definitions — Qualified Individual

Model

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

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

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

1) whether the performance of the [describe function] is the reason that the [describe job] exists;

2) the amount of time spent on the job performing [describe function];

3) whether there are a limited number of employees available to do the [describe function];

4) whether [describe function] is highly specialized;

5) whether an employee in the [describe job] is hired for his or her expertise or ability to [describe function];

6) [defendant's] judgment about what functions are essential to the [describe job];

7) written job descriptions for the [describe job] ;

8) the consequences of not requiring an employee to [describe function] in a satisfactory

manner;

9) whether others who held the position of [describe job] performed [describe function];

10) the terms of a collective bargaining agreement;

11) [*list any other factors supported by the evidence*.]

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

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

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

Comment

Under the ADA, only a "qualified individual" is entitled to recover for disparate treatment or failure to provide a reasonable accommodation. A "qualified individual" is one "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).

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

> [T]he ADA requires [plaintiff] to demonstrate that she is a "qualified individual". The ADA defines this term as 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). The Interpretive Guidance to the EEOC Regulations divides this inquiry into two prongs. First, a court must determine whether the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position that such individual holds or desires. See 29 C.F.R. pt. 1630, app. § 1630.2(m). Second, it must determine whether the individual, with or without reasonable accommodation, can perform the essential functions of the position held or sought. . . .
>
> Determining whether an individual can, with or without reasonable accommodation, perform the essential functions of the position held or sought, also a two step process, is relatively straightforward. First, a court must consider whether the

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

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

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

142 F.3d at 146-47.

"Essential Functions" of a Job

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

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

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

29 C.F.R. § 1630.2(n)(3).

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

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

> Looking to the three factors included in § 1630.2(n)(2), it is evident that two are not present in this case as installer technicians are not hired solely to climb or even because of their climbing expertise. On the other hand, [there] is evidence to suggest that Time Warner employs a limited number of installer technicians in Skerski's work area-- only 7 or 8, according to Skerski -- and that this small number hampers Time Warner's ability to allow certain technicians to avoid climbing. The significance of this factor is pointed out in the Interpretive Guidance to § 1630.2(n), which explains, "if an employer has a relatively small number of available employees for the volume of work to be performed, it may be necessary that each employee perform a multitude of different functions. Therefore, the performance of those functions by each employee becomes more critical and the options for reorganizing the work become more limited." EEOC Interpretive Guidance, 29 C.F.R. pt. 1630, App. 1630.2(n).
>
> But this is only one of the three factors. Moreover, consideration of the seven evidentiary examples included in § 1630.2(n)(3) suggests caution against any premature determination on essential functions as at least some of them lean in Skerski's favor. Of course, as required by § 1630.2(n)(3)(i), we owe some deference to Time Warner and its own judgment that climbing is essential to the installer technician position. And the written job descriptions, as the District Court noted, "clearly identify climbing as a job requirement." However, describing climbing as a requirement is not necessarily the same as denominating climbing as an essential function. In fact, the job descriptions prepared by

> both New Channels and Time Warner list various duties and responsibilities under the heading "Essential Functions," but neither identifies climbing as "essential." . . ..
>
> Among the facts and circumstances relevant to each case is, of course, the employee's actual experience as well as that of other employees. See 29 C.F.R. § 1630.2(n)(3)(iv), (vi) and (vii). It is undisputed that from the time Skerski began as an installer technician in 1982 until the time he was diagnosed with his panic disorder in 1993, a significant portion of his job responsibilities required climbing. . . . . However, for the three and a half years after his diagnosis in which he continued to work as an installer technician, Skerski performed virtually no overhead work at all. . . . Skerski testified at his deposition that there always was enough underground work to do, that he always worked 40-hour weeks and even worked enough to earn a couple thousand dollars per year in overtime, and that he had never experienced problems at work because of his panic disorder until Hanning became his supervisor in the fall of 1996. . . .
>
> Skerski argues that his own experience exemplifies that no negative consequences resulted from his failure to perform the climbing function of his job, which is another of the illustrations listed in the regulations. See 29 C.F.R. § 1630.2(n)(3)(iv). However, there is support in the record for Time Warner's contention that Skerski's inability to climb caused it considerable administrative difficulties. . . . . Hanning testified that Skerski's inability to climb "made the routing process extremely cumbersome," because the assignment process had to be done by hand instead of computer. He also claimed that Skerski's inability to climb necessitated the hiring of outside contract labor to meet demand, and that Skerski was not always as busy as he should have been due to his restricted work schedule.

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

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

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

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

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

9.2.3 ADA Definitions — Hostile or Abusive Work Environment

Model

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

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

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

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

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

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

Comment

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

9.2.4 ADA Definitions — Constructive Discharge

Model

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

Comment

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

This instruction can be used when the plaintiff was not fired but resigned, and claims that she nonetheless suffered an adverse employment action because she was constructively discharged due to an adverse action or actions that were sanctioned by her employer. This instruction is designed for use with any of Instructions 9.1.1, 9.1.2, or 9.1.4. If, instead, the plaintiff claims that she was constructively discharged based on a supervisor's or co-worker's adverse action or actions that were not sanctioned by the employer, the constructive discharge would not count as a tangible adverse employment action (for the purposes of determining whether the employer may assert an *Ellerth/Faragher* affirmative defense). *See* Comment 9.1.5. *See also Pennsylvania State Police v. Suders*, 542 U.S. 129, 140-41 (2004) ("[A]n 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.").

9.3.1 ADA Defenses — Direct Threat

Model

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

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

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

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

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

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

1) How long any risk would have lasted;

2) The nature of the potential harm and how severe the harm would be if it occurred;

3) The likelihood the harm would have occurred; and

4) Whether the harm would be likely to recur.

Comment

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

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

9.4.1 ADA Damages – Compensatory Damages — General Instruction

Model

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

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

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

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

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

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

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

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

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

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

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

Comment

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

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

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

Back pay and front pay are equitable remedies that are to be distinguished from the compensatory damages to be determined by the jury under Title VII and therefore under the ADA. *See* the Comments to Instructions 5.4.3-5.4.4. Compensatory damages may include lost future earnings over and above the front pay award. For example, the plaintiff may recover the diminution in expected earnings in all future jobs due to reputational or other injuries, independently of any front pay award. See the Comment to Instruction 5.4.1 for a more complete discussion.

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

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

Damages in ADA Retaliation Cases

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

Attorney Fees and Costs

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

9.4.2 ADA Damages — Punitive Damages

Model

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

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

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

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

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

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

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

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

Comment

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

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

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

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

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

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

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

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

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

Damages in ADA Retaliation Cases

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

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

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

[defendant] committed a similar or related unlawful employment practice with regard to discrimination in compensation on [date outside charge filing period and more than two years 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 [date two years prior to filing date of charge (hereafter "two-year date")] until the date of your verdict. In that case, back pay applies from [two-year date] rather than [prior date] because 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. 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.**]**

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

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

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

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

Comment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9.4.5 ADA Damages — Nominal Damages

Model

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

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

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

Comment

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

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

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

37 830 (3d Cir. 1976)).