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## 9.0 ADA Employment Claims – Introductory Instruction

### 9.0 ADA Employment Claims—Introductory Instruction

#### Model

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

**[For use in cases not involving the “regarded as” prong of the definition of disability:]<sup>1</sup>**  
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” and “reasonable accommodation” 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

This instruction is derived from 42 U.S.C. § 12102; *id.* § 12111; *id.* § 12112; and *id.* § 12201.

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

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<sup>1</sup> See Comment for discussion of considerations specific to “regarded as” disability.

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32 accommodation, can perform the essential functions of the employment position that such  
33 individual holds or desires.” 42 U.S.C. § 12111(8).<sup>2</sup> An entity discriminates against an individual  
34 on the basis of disability when, inter alia, it does “not mak[e] reasonable accommodations to the  
35 known physical or mental limitations of an otherwise qualified individual with a disability who is  
36 an applicant or employee, unless such covered entity can demonstrate that the accommodation  
37 would impose an undue hardship on the operation of the business of [the] entity.” 42 U.S.C. §  
38 12112(b)(5)(A). Reasonable accommodations may include, inter alia, “job restructuring, part-time  
39 or modified work schedules, reassignment to a vacant position, acquisition or modification of  
40 equipment or devices, appropriate adjustment or modifications of examinations, training materials  
41 or policies, the provision of qualified readers or interpreters, and other similar accommodations  
42 for individuals with disabilities.” 42 U.S.C. § 12111(9).

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

47 The EEOC’s interpretive guidance articulates a two-step test for determining whether a  
48 person is a qualified individual. “The first step is to determine if the individual satisfies the  
49 prerequisites for the position, such as possessing the appropriate educational background,  
50 employment experience, skills, licenses, etc. ....The second step is to determine whether or not the  
51 individual can perform the essential functions of the position held or desired, with or without  
52 reasonable accommodation. .... The determination of whether an individual with a disability is  
53 qualified is to be made at the time of the employment decision.” 29 C.F.R. pt. 1630, App.  
54 1630.2(m) (2019).

55 As discussed in Comment 9.2.1, Congress has defined “disability” to mean, “with respect  
56 to an individual— (A) a physical or mental impairment that substantially limits one or more major  
57 life activities of such individual; (B) a record of such an impairment; or (C) being regarded as  
58 having such an impairment (as described in paragraph (3)).” 42 U.S.C. § 12102(1). This chapter  
59 refers to these three prongs of the definition as “actual” disability, “record of” disability, and  
60 “regarded as” disability, respectively. A plaintiff might choose to proceed under one or more than  
61 one of these prongs in a given case. As Comment 9.2.1 explains, “regarded as” disability is in  
62 some ways easier to show than “actual” disability or “record of” disability – but under the ADA  
63 as amended in 2008, there is a significant limit on “regarded as” disability claims: “A covered  
64 entity ... need not provide a reasonable accommodation or a reasonable modification to policies,  
65 practices, or procedures to an individual who meets the definition of disability in section 12102(1)  
66 of this title solely under subparagraph (C) of such section.” 42 U.S.C. § 12201(h). This limitation  
67 will require tailoring of instructions in cases where a plaintiff relies in whole or in part on the  
68 “regarded as” prong. Among other possible effects of the limitation on “regarded as” disability,

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<sup>2</sup> Section 12111(8) continues: “For the purposes of this subchapter, consideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.”

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69 there arises a question concerning the definition of a “qualified individual.” As noted above, the  
70 statute defines “qualified individual” as one who can perform the position’s essential functions  
71 “with or without reasonable accommodation.” 42 U.S.C. § 12111(8). But because Section  
72 12201(h) absolves employers from any duty to provide reasonable accommodations to one who  
73 shows disability solely under the “regarded as” prong, it seems possible that the operative  
74 definition of “qualified individual” should be revised, for a “regarded as” claim, to omit a reference  
75 to reasonable accommodations.<sup>3</sup> Thus, the Instruction specifies that its second paragraph (which  
76 refers to reasonable accommodations) is for use in cases not involving the “regarded as” prong.  
77 Other adjustments are noted elsewhere in the commentary.

### 78 *The ADA, Public Accommodations and Public Services*

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

### 85 *The Rehabilitation Act*

86 Federal employers, federal contractors, and employers that receive federal funding are  
87 subject to the Rehabilitation Act, which is a precursor of the ADA. 29 U.S.C. § 701 et seq. The  
88 substantive standards for a claim under the Rehabilitation Act are in many respects identical to  
89 those governing a claim under the ADA. See, e.g., *Wishkin v. Potter*, 476 F.3d 180, 184 (3d Cir.  
90 2007) (“The Rehabilitation Act expressly makes the standards set forth in the 1990 Americans  
91 with Disabilities Act, 42 U.S.C. § 12101 et seq., applicable to federal employers and to employers  
92 receiving federal funding.”); *Bragdon v. Abbott*, 524 U.S. 624, 632 (1998) (in interpreting the  
93 ADA’s definition of “disability” by reference to interpretations of the Rehabilitation Act’s  
94 definition of “handicapped individual,” observing that 42 U.S.C. § 12201(a) directs the courts “to  
95 construe the ADA to grant at least as much protection as provided by the regulations implementing  
96 the Rehabilitation Act”); *Conneen v. MBNA America Bank, N.A.*, 334 F.3d 318, 330 n.13 (3d Cir.  
97 2003) (noting that a precedent concerning the duty under the Rehabilitation Act of the employer  
98 and employee to engage in an interactive process “applies with equal force to accommodations  
99 under the ADA”); *Deane v. Pocono Medical Center*, 142 F.3d 138, 149 n.13 (3d Cir. 1998) (en

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<sup>3</sup> As of spring 2019, the Court of Appeals has not addressed this issue, but lower-court caselaw has taken the view expressed in the text. See, e.g., *Hanson v. N. Pines Mental Health Ctr., Inc.*, No. CV 16-2932 (DWF/LIB), 2018 WL 1440333, at \*8 (D. Minn. Mar. 22, 2018); *McNelis v. Pennsylvania Power & Light, Susquehanna, LLC*, No. 4:13-CV-02612, 2016 WL 5019199, at \*26 (M.D. Pa. Mar. 23, 2016), report and recommendation adopted, No. 4:13-CV-02612, 2016 WL 4991440 (M.D. Pa. Sept. 19, 2016), aff’d sub nom. *McNelis v. Pennsylvania Power & Light Co.*, 867 F.3d 411 (3d Cir. 2017); *Wiseman v. Convention Ctr. Auth. of the Metro. Gov’t of Nashville & Davidson Cty.*, No. 3:14 C 01911, 2016 WL 54922, at \*12 (M.D. Tenn. Jan. 5, 2016).

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100 banc) (explaining in an ADA employment-discrimination case that “interpretations of the  
101 Rehabilitation Act’s ‘reasonable accommodation’ provisions are relevant to our analysis of the  
102 ADA and vice versa because in 1992, Congress amended the section of the Rehabilitation Act  
103 defining ‘reasonable accommodation’ to incorporate the standards of the ADA” (citing *Mengine*  
104 *v. Runyon*, 114 F.3d 415, 420 & n.4 (3d Cir. 1997) (in Rehabilitation Act case brought against a  
105 federal employer, quoting 29 U.S.C. § 794(d))). These ADA instructions can therefore be adapted  
106 for use in a case involving an employment-discrimination claim brought under the Rehabilitation  
107 Act.

### 108 *The ADA’s Association Provision*

109 Chapter 9 does not include an instruction specifically dealing with claims under 42 U.S.C.  
110 § 12112(b)(4), which defines “discriminat[ion] against a qualified individual on the basis of  
111 disability” to include “excluding or otherwise denying equal jobs or benefits to a qualified  
112 individual because of the known disability of an individual with whom the qualified individual is  
113 known to have a relationship or association.” For a discussion of such claims, see *Erdman v.*  
114 *Nationwide Ins. Co.*, 582 F.3d 500, 510-11 (3d Cir. 2009).

### 115 *Religious Entities; Ministerial Exception*

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

119 Apart from those statutory defenses, the First Amendment’s religion clauses give rise to an  
120 affirmative defense that “bar[s] the government from interfering with the decision of a religious  
121 group to fire one of its ministers.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*,  
122 132 S. Ct. 694, 702, 709 n.4 (2012) (applying this defense to an ADA retaliation claim). For  
123 further discussion of the ministerial exception, see Comment 5.0.

### 124 *Scope of Chapter*

125 These model instructions address the elements of ADA employment claims and defenses;  
126 pertinent definitions; and questions of damages. The commentary is designed to explain the  
127 drafting of the model instructions and generally does not focus on other procedural matters.<sup>4</sup>

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<sup>4</sup> 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

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129 *Note to Users*

130 Users of Chapter Nine should be aware that, in drafting the Model Instructions and  
131 Commentary, the Committee has relied upon applicable regulations as well as the statute and  
132 caselaw. While the Committee will make every effort, at its periodic meetings, to keep the  
133 instructions and commentary updated as these authorities may change over time, users should be  
134 sure to check for any updates that might require adjustments in one or more instructions.

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those procedures is a requirement of administrative exhaustion. *See* 42 U.S.C. § 2000e-5; *see also* 1 MERRICK T. ROSSEIN, EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 11:1.50 (online edition updated June 2018) (discussing the plaintiff’s option to await the outcome of the administrative proceeding or to obtain a “right-to-sue” letter prior to that outcome); *Williams v. Pennsylvania Human Relations Comm’n*, 870 F.3d 294, 298 (3d Cir. 2017) (discussing administrative-exhaustion requirement as applied to ADA employment-discrimination and Title VII claims).

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

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

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

2 **Model**

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

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

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

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

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

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

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

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

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

- 27 1. “Disability.” — Instruction 9.2.1  
28 2. “Qualified” — *See* Instruction 9.2.2 ]  
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<sup>5</sup> See Comment for a discussion of adverse employment actions under the ADA.

### 9.1.1 Disparate Treatment – Mixed-Motive

30 [For use where defendant sets forth a “same decision” affirmative defense:<sup>6</sup>

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

36

#### 37 **Comment**

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

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

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

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<sup>6</sup> The Committee uses the term “affirmative defense” to refer to the burden of proof, and takes no position on the burden of pleading the same-decision defense.

### 9.1.1 Disparate Treatment – Mixed-Motive

64 retaliation claims among those eligible for the statutory mixed-motive test set forth in 42 U.S.C.  
65 §§ 2000e-2(m) and 2000e-5(g)(2)(B), *see id.* at 2529; that policy considerations support a  
66 restrictive approach to the standards of proof for retaliation claims, *see id.* at 2531-32; and that the  
67 “careful balance” that Congress set in the 1991 amendments forecloses the use of the *Price*  
68 *Waterhouse* mixed-motive test for Title VII retaliation claims, *id.* at 2534.<sup>7</sup>

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

72 A number of past cases have relied upon the distinction between direct and circumstantial  
73 evidence of discrimination when determining the availability of a mixed-motive instruction. If the  
74 plaintiff produces direct evidence of discrimination, this is sufficient to show that the defendant’s  
75 activity was motivated at least in part by discriminatory animus, and therefore a “mixed-motive”  
76 instruction is given. If the evidence of discrimination is only circumstantial, then defendant can  
77 argue that there was no discriminatory animus at all, and that its employment decision can be  
78 explained completely by a non-discriminatory motive; a number of decisions indicate that it is then  
79 for the plaintiff to show that the alleged non-discriminatory motive is a pretext, and accordingly  
80 Instruction 9.1.2 should be given. *See generally Fakete v. Aetna, Inc.*, 308 F.3d 335 (3d Cir. 2002)  
81 (using “direct evidence” to describe “mixed-motive” cases and noting that pretext cases arise when  
82 the plaintiff presents only indirect or circumstantial evidence of discrimination).<sup>8</sup>

83 The Third Circuit explained the applicability of a “mixed-motive” instruction in ADA  
84 cases in *Buchsbaum v. University Physicians Plan*, 55 Fed Appx. 40, 43 (3d Cir. 2002).<sup>9</sup> It noted  
85 that the “typical” case is considered under the *McDonnell-Douglas* burden-shifting analysis, but  
86 stated that

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

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<sup>7</sup> *See also DiFiore v. CSL Behring, LLC*, 879 F.3d 71, 78 (3d Cir. 2018) (holding that a mixed-motive framework is unavailable for False Claims Act retaliation claims because “the language of the FCA anti-retaliation provision uses the same ‘because of’ language that compelled the Supreme Court to require ‘but-for’ causation in *Nassar* and *Gross*”).

<sup>8</sup> *Fakete* was an ADEA case and has been overruled by *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009). However, *Fakete*’s discussion of the distinction between mixed-motive and pretext cases may still be instructive for types of claims to which *Price Waterhouse* burden-shifting may apply.

<sup>9</sup> The portion of *Buchsbaum* quoted in the text cites *Armbruster* and *Starceski* – two ADEA cases. To the extent that *Armbruster* and *Starceski* approved the use of *Price Waterhouse* burden-shifting for ADEA cases, they have been overruled by *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009). But *Buchsbaum*’s discussion may still be instructive for types of claims to which *Price Waterhouse* burden-shifting may apply.

### 9.1.1 Disparate Treatment – Mixed-Motive

91 the plaintiff to the employer to prove that its motives for the employment action were  
92 “mixed” that is, while some motives were discriminatory, the employer had legitimate non-  
93 discriminatory motives as well which would have resulted in the adverse employment  
94 action. Thus, we have described the “direct evidence” that the employee must produce . . .  
95 to warrant a “mixed motives” analysis as “so revealing of discriminatory animus that it is  
96 not necessary to rely on any presumption from the prima facie case to shift the burden of  
97 production. . . . The risk of non-persuasion [is] shifted to the defendant who . . . must  
98 persuade the factfinder that . . . it would have made the same employment decision  
99 regardless of its discriminatory animus.” *Arnbruster v. Unisys Corp.*, 32 F.3d 768, 778 (3d  
100 Cir. 1994). Such direct evidence “requires ‘conduct or statements by persons involved in  
101 the decisionmaking process that may be viewed as directly reflecting the alleged  
102 discriminatory attitude.’ ” *Starceski v. Westinghouse Electric Corp.*, 54 F.3d 1089, 1096  
103 (3d Cir. 1995) (quoting *Griffiths v. CIGNA Corp.*, 988 F.2d 457, 470 (3d Cir. 1993)).

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

#### 120 *Statutory Definitions*

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

#### 126 *Adverse Employment Action*

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

## 9.1.1 Disparate Treatment – Mixed-Motive

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

### 134 “Same Decision” Instruction

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

### 149 *Direct Threat*

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

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

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

### 9.1.1 Disparate Treatment – Mixed-Motive

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

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

2 **Model**

3 In this case [plaintiff] is alleging that [defendant] [describe alleged disparate treatment]  
4 [plaintiff]. In order for [plaintiff] to recover on this discrimination claim against [defendant],  
5 [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff]. This means  
6 that [plaintiff] must prove that [his/her] [disability] was a determinative factor in [defendant’s]  
7 decision to [describe action]<sup>10</sup> [plaintiff].

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

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

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

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

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

16 1. “Disability.” — Instruction 9.2.1

17 2. “Qualified” — *See* Instruction 9.2.2 ]

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

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

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

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<sup>10</sup> See Comment for a discussion of adverse employment actions under the ADA.

## 9.1.2 Disparate Treatment – Pretext

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

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

41

### 42 **Comment**

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

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

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

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

## 9.1.2 Disparate Treatment – Pretext

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

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

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

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

### 101 *Adverse Employment Action*

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

### 109 *Business Judgment*

## 9.1.2 Disparate Treatment – Pretext

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

### 120 *Determinative Factor*

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

### 124 *Statutory Definitions*

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

### 130 *Direct Threat*

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

1 **9.1.3 Elements of an ADA Claim — Reasonable Accommodation<sup>11</sup>**

2 **Model**

3 In this case [plaintiff] claims that [defendant] failed to provide a reasonable  
4 accommodation for [plaintiff]. The ADA provides that an employer [may not deny employment  
5 opportunities to a qualified individual with a disability if that denial is based on the need of the  
6 employer to make reasonable accommodations to that individual’s disability] [must make  
7 reasonable accommodations to the known physical or mental limitations of an otherwise qualified  
8 individual with a disability who is an applicant or employee, unless the employer can demonstrate  
9 that the accommodation would impose an undue hardship on the operation of its business].

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

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

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

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

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

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

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

25 1. “Disability.” — *See* Instruction 9.2.1

26 2. “Qualified” — *See* Instruction 9.2.2 ]

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

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<sup>11</sup> See Comment for discussion of the fact that this claim is unavailable where disability is established solely on the basis of “regarded as” disability.

### 9.1.3 Reasonable Accommodation

31 reasonable accommodation of [plaintiff's] disability.]

32 In general, an accommodation is a change in the work environment or in the way things  
33 are customarily done that enables an individual with a disability to enjoy equal employment  
34 opportunities. In the context of this case, this means [set forth any of these three definitions that  
35 are relevant in light of the evidence] [accommodations that are required to ensure equal opportunity  
36 in the application process;] [accommodations that enable the employer's employees with  
37 disabilities to perform the essential functions of the position held or desired] [accommodations  
38 that enable the employer's employees with disabilities to enjoy equal benefits and privileges of  
39 employment as are enjoyed by employees without disabilities]. Examples of such reasonable  
40 accommodations include, but are not limited to, the following:

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

- 42 ● Modifying or adjusting a job application process to enable a qualified applicant with a  
43 disability to be considered for the position;
- 44 ● Making existing facilities used by employees readily accessible to and usable by  
45 [plaintiff];
- 46 ● Job restructuring;
- 47 ● Part-time or modified work schedule;
- 48 ● Reassignment to a vacant position for which [plaintiff] is qualified;
- 49 ● Acquisition or modifications of equipment or devices;
- 50 ● Appropriate adjustment or modifications of examinations, training materials, or policies;
- 51 ● Provision of qualified readers or interpreters; and
- 52 ● Other similar accommodations for individuals with [plaintiff's] disability.]

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

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

- 56 ● Change or eliminate any essential function of employment;
- 57 ● Shift any essential function of employment to other employees;
- 58 ● Create a new position for [plaintiff];
- 59 ● Promote [plaintiff];

### 9.1.3 Reasonable Accommodation

- 60           • Reduce productivity standards; or
- 61           • Make an accommodation that conflicts with an established [seniority system] [other  
62 neutral employment policy], unless [plaintiff] proves by a preponderance of the evidence  
63 that “special circumstances” make an exception reasonable. For example, an exception  
64 might be reasonable (and so “special circumstances” would exist) if exceptions were often  
65 made to the policy. Another example might be where the policy already contains its own  
66 exceptions so that, under the circumstances, one more exception is not significant.]

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

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

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

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

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

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

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

93           If you find that [plaintiff] has proved the five elements I have described to you by a  
94 preponderance of the evidence, then you must consider [defendant’s] defense. [Defendant]  
95 contends that providing an accommodation would cause an undue hardship on the operation of  
96 [defendant’s] business. Under the ADA, [defendant] does not need to accommodate [plaintiff] if

### 9.1.3 Reasonable Accommodation

97 it would cause an “undue hardship” to its business.

98 Defendant must prove to you by a preponderance of the evidence that [describe  
99 accommodation] would be an “undue hardship.” The term “undue hardship” means an action  
100 requiring significant difficulty or expense, when considered in light of the following factors [list  
101 all of the factors set out below that are relevant in light of the evidence]:

- 102 ● The nature and cost of the accommodation.<sup>12</sup>
- 103 ● [Defendant’s] overall financial resources. This might include the size of its business, the  
104 number of people it employs, and the number, type and location of its facilities.
- 105 ● The financial resources of the facility where the accommodation would be made, the  
106 number of people who work there and the effect on expenses and resources.
- 107 ● The way that [defendant] conducts its operations. This might include its workforce  
108 structure; the location of its facility where the accommodation would be made compared  
109 to [defendant’s] other facilities; and the relationship between or among those facilities.
- 110 ● The impact of (specify accommodation) on the operation of the facility, including the  
111 impact on the ability of other employees to perform their duties and the impact on the  
112 facility’s ability to conduct business.

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

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

#### 116 **Comment**

117 This instruction is derived from 42 U.S.C. § 12111; *id.* § 12112; 29 C.F.R. § 1630.2 (2019);  
118 U.S. Equal Emp. Opportunity Comm’n, Interpretive Guidance on Title I of the Americans with  
119 Disabilities Act, 29 C.F.R. pt. 1630, App. 1630.2; caselaw as discussed below; and 3C Kevin F.  
120 O’Malley, et al., Fed. Jury Prac. & Instr. § 172:21 (6th ed.).

121 The basics of an action for reasonable accommodation under the ADA<sup>13</sup> were set forth by

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<sup>12</sup> Where warranted, more detail can be given, e.g.: “The nature and net cost of the accommodation..., taking into consideration the availability of tax credits and deductions, and/or outside funding.” 29 C.F.R. § 1630.2(p)(2)(i) (2019).

<sup>13</sup> Congress has provided that the same standards govern employment-discrimination claims under the ADA and the Rehabilitation Act. *See* 29 U.S.C. § 791(f) (Rehabilitation Act claims relating to federal-sector employment); *see also id.* § 793(d) (Rehabilitation Act claims relating to employment by federal contractors); *id.* § 794(d) (Rehabilitation Act claims against employers that receive federal financial assistance). Accordingly, employment-discrimination

### 9.1.3 Reasonable Accommodation

122 the Third Circuit in *Skerski v. Time Warner Cable Co.*, 257 F.3d 273 (3d Cir. 2001).

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

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

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

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

139 In *Skerski* the employee was a cable worker, and the employer's job description for that  
140 position listed climbing poles as one of the job requirements. The employee developed a fear of  
141 heights and he was transferred to a warehouse position. The employer argued that this was a  
142 reasonable accommodation for the employee's disability, because he would not have to climb in  
143 his new position. But the court noted that a transfer to a new position is not a reasonable  
144 accommodation if the employee is not qualified to perform the essential functions of that position  
145 (and there was evidence, precluding summary judgment, indicating that the plaintiff was not so  
146 qualified). It further noted that reassignment "should be considered only when accommodation  
147 within the individual's current position would pose an undue hardship." The court relied on the  
148 commentary to the pertinent EEOC guideline, which states that "an employer may reassign an  
149 individual to a lower graded position if there are no accommodations that would enable the  
150 employee to remain in the current position and there are no vacant equivalent positions for which

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precedents concerning reasonable accommodation (or reasonable modification) under the Rehabilitation Act are equally relevant to ADA employment-discrimination reasonable-accommodation claims. More broadly, precedents concerning reasonable modifications under Titles II and III of the ADA, and non-employment-related Rehabilitation Act precedents concerning reasonable accommodation, may also be informative. *See Berardelli v. Allied Servs. Inst. of Rehab. Med.*, 900 F.3d 104, 118 (3d Cir. 2018) (holding that Department of Justice regulations (concerning service animals) under Titles II and III of the ADA governed a Rehabilitation Act claim against a private children's school, and stating that, based on the "intertwined histories" of the Rehabilitation Act and the ADA, "[t]he reasonableness of an accommodation or modification is the same under the RA and the ADA").

### 9.1.3 Reasonable Accommodation

151 the individual is qualified with or without reasonable accommodation." The court concluded that  
152 there was a triable question of fact as to whether the plaintiff could have been accommodated in  
153 his job as a cable worker, by the use of a bucket truck so that he would not have to climb poles.  
154 The instruction is written to comport with the standards set forth in *Skerski*. In defining the concept  
155 of "reasonable accommodation," the Instruction draws from the implementing regulation, 29  
156 C.F.R. § 1630.2(o)(1) & (2) (2019), and the EEOC's interpretive guidance, 29 C.F.R. § Pt. 1630,  
157 App. 1630.2(o) (2019). The Instruction's optional discussion for use where a previous  
158 accommodation has been provided is modeled loosely on 3C Kevin F. O'Malley, et al., Fed. Jury  
159 Prac. & Instr. § 172:21 (6th ed.).

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

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

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

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

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

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

187 [W]e conclude that Gaul has failed to satisfy his burden for three reasons. First, Gaul's  
188 proposed accommodation would impose a wholly impractical obligation on AT & T or any

### 9.1.3 Reasonable Accommodation

189 employer. Indeed, AT & T could never achieve more than temporary compliance because  
190 compliance would depend entirely on Gaul's stress level at any given moment. This, in  
191 turn, would depend on an infinite number of variables, few of which AT & T controls.  
192 Moreover, the term "prolonged and inordinate stress" is not only subject to constant  
193 change, it is also subject to tremendous abuse. The only certainty for AT & T would be its  
194 obligation to transfer Gaul to another department whenever he becomes "stressed out" by  
195 a coworker or supervisor. It is difficult to imagine a more amorphous "standard" to impose  
196 on an employer.

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

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

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

#### 211 *Preferences*

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

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

222 Were that not so, the "reasonable accommodation" provision could not accomplish  
223 its intended objective. Neutral office assignment rules would automatically prevent the  
224 accommodation of an employee whose disability-imposed limitations require him to work  
225 on the ground floor. Neutral "break-from-work" rules would automatically prevent the  
226 accommodation of an individual who needs additional breaks from work, perhaps to permit

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227 medical visits. Neutral furniture budget rules would automatically prevent the  
228 accommodation of an individual who needs a different kind of chair or desk. Many  
229 employers will have neutral rules governing the kinds of actions most needed to reasonably  
230 accommodate a worker with a disability. See 42 U.S.C. § 12111(9)(b) (setting forth  
231 examples such as "job restructuring," "part-time or modified work schedules," "acquisition  
232 or modification of equipment or devices," "and other similar accommodations"). Yet  
233 Congress, while providing such examples, said nothing suggesting that the presence of  
234 such neutral rules would create an automatic exemption. Nor have the lower courts made  
235 any such suggestion.

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

#### 240 *Seniority Plans and Other Disability-Neutral Employer Rules*

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

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

266 535 U.S. at 404.

### 9.1.3 Reasonable Accommodation

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

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

#### 282 *The Interactive Process*

283 The ADA itself does not specifically provide that the employer has an obligation to engage  
284 in an interactive process with the employee to determine whether a reasonable accommodation can  
285 be found for the employee's disability. But the Third Circuit has established that good faith  
286 participation in an interactive process is an important factor in determining whether a reasonable  
287 accommodation exists. The court in *Williams v. Philadelphia Hous. Auth. Police Dep't*, 380 F.3d  
288 751, 772 (3d Cir. 2004) explained the interactive process requirement as follows:

289 [W]e have repeatedly held that an employer has a duty under the ADA to engage in an  
290 "interactive process" of communication with an employee requesting an accommodation  
291 so that the employer will be able to ascertain whether there is in fact a disability and, if so,  
292 the extent thereof, and thereafter be able to assist in identifying reasonable  
293 accommodations where appropriate. "The ADA itself does not refer to the interactive  
294 process," but does require employers to "make reasonable accommodations" under some  
295 circumstances for qualified individuals. *Shapiro v. Township of Lakewood*, 292 F.3d 356,  
296 359 (3d Cir. 2002). With respect to what consists of a "reasonable accommodation," EEOC  
297 regulations indicate that,

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

303 *See also Jones v. UPS*, 214 F.3d 402, 407 (3d Cir. 2000) ("Once a qualified individual with a  
304 disability has requested provision of a reasonable accommodation, the employer must make a  
305 reasonable effort to determine the appropriate accommodation. The appropriate reasonable

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306 accommodation is best determined through a flexible, interactive process that involves both the  
307 employer and the [employee] with a disability.") (quoting 29 C.F.R. Pt. 1630, App. § 1630.9).

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

315 The failure to engage in an interactive process is not sufficient in itself to establish a claim  
316 under the ADA, however. *See Hohider v. United Parcel Service, Inc.*, 574 F.3d 169, 193 (3d Cir.  
317 2009) (failure to engage in interactive process with an employee who is not a "qualified individual"  
318 does not violate ADA). For one thing, a "plaintiff in a disability discrimination case who claims  
319 that the defendant engaged in discrimination by failing to make a reasonable accommodation  
320 cannot recover without showing that a reasonable accommodation was possible." *Williams v.*  
321 *Philadelphia Hous. Auth. Police Dep't*, 380 F.3d 751, 772 (3d Cir. 2004).

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

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

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

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

### 9.1.3 Reasonable Accommodation

345 disability.”).

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

#### 351 *Reasonable Accommodation Requirement Inapplicable to “Regarded as” Disability*

352 In contexts other than reasonable-accommodation claims, the ADA’s definition of  
353 “disability” includes “being regarded as having” a physical or mental impairment that substantially  
354 limits one or more major life activities. 42 U.S.C. § 12102(1)(C). Prior to 2009, this “regarded  
355 as” part of the definition of disability also applied to reasonable-accommodation claims. *See*  
356 *Williams v. Philadelphia Hous. Auth. Police Dep’t*, 380 F.3d 751, 776 (3d Cir. 2004). But in the  
357 ADA Amendments Act of 2008, Congress provided that “regarded as” disability cannot provide a  
358 basis for a reasonable-accommodation claim. *See* 42 U.S.C. § 12201(h); *see also Robinson v. First*  
359 *State Cmty. Action Agency*, 920 F.3d 182, 186 (3d Cir. 2019). Accordingly, Instruction 9.2.1,  
360 which defines “disability,” has been revised to reflect that the “regarded as” option is unavailable  
361 for reasonable-accommodation claims.

#### 362 *Direct Threat*

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

#### 369 *Statutory Definitions*

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

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

376 Regulations and caselaw recognize the possibility that the same facts might (in certain  
377 circumstances) ground both a reasonable-accommodation claim under the Americans With  
378 Disabilities Act and a claim under Family and Medical Leave Act. “If an employee is a qualified  
379 individual with a disability within the meaning of the ADA, the employer must make reasonable  
380 accommodations, etc., barring undue hardship, in accordance with the ADA. At the same time, the  
381 employer must afford an employee his or her FMLA rights. ADA’s ‘disability’ and FMLA’s

### 9.1.3 Reasonable Accommodation

382 ‘serious health condition’ are different concepts, and must be analyzed separately.” 29 C.F.R.  
383 § 825.702(b). “[A] request for FMLA leave may qualify, under certain circumstances, as a request  
384 for a reasonable accommodation under the ADA.” *Capps v. Mondelez Glob., LLC*, 847 F.3d 144,  
385 156-57 (3d Cir. 2017) (upholding grant of summary judgment to defendant because, “even  
386 assuming, *arguendo*, that Capps’ requests for intermittent FMLA leave constituted requests for a  
387 reasonable accommodation under the ADA as well, Mondelez continued to approve Capps’  
388 requested leave, and indeed, Capps took the requested leave,” with the result that “Capps received  
389 the accommodation he asked for”).

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

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

#### Model

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

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

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

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

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

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

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

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

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

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

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

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

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

32

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

34 1. “Disability.” — Instruction 9.2.1

35 2. “Qualified” — *See* Instruction 9.2.2]

36

#### 37 **Comment**

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

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

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

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

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

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

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

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

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

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

87 Respondeat superior liability for harassment by non-supervisory employees<sup>15</sup> exists only

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<sup>14</sup> As Comment 9.1.5 notes (by analogy to the framework for Title VII hostile environment claims) the employer may raise an affirmative defense under *Faragher v. Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), if no tangible employment action has been taken against the plaintiff. In *Pennsylvania State Police v. Suders*, 542 U.S. 129, 140-41 (2004), the Court addressed the question of constructive discharge in a Title VII case, holding “that an employer does not have recourse to the *Ellerth/Faragher* affirmative defense when a supervisor's official act precipitates the constructive discharge; absent such a ‘tangible employment action,’ however, the defense is available to the employer whose supervisors are charged with harassment.” Assuming that the same approach applies in ADA cases, Instruction 9.1.4 is appropriate for use in cases where the evidence supports a claim that the constructive discharge resulted from an official act or acts. However, where the constructive discharge did not result from an official act, an affirmative defense is available to the employer and Instruction 9.1.5 should be used instead.

<sup>15</sup> In the context of Title VII claims, the Supreme Court has held that “an employee is a ‘supervisor’ for purposes of vicarious liability . . . if he or she is empowered by the employer to take tangible employment actions against the victim...” *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013). For further discussion of *Vance*, see Comment 5.1.4.

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

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

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

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

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

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

## 9.1.5 Harassment – Hostile Work Environment – No Tangible Employment Action

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

#### Model

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

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

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

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

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

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

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

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

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

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

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

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

### 9.1.5 Harassment – Hostile Work Environment – No Tangible Employment Action

31 1. “Disability.” — Instruction 9.2.1

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

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

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

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

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

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

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

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

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

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

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

55

#### 56 **Comment**

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

### 9.1.5 Harassment – Hostile Work Environment – No Tangible Employment Action

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

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

79 Besides the affirmative defense provided by *Ellerth*, the absence of a tangible employment  
80 action also justifies requiring the plaintiff to prove a further element, in order to protect the  
81 employer from unwarranted liability for the discriminatory acts of its non-supervisor employees.<sup>16</sup>  
82 Respondeat superior liability for the acts of non-supervisory employees exists only where "the  
83 defendant knew or should have known of the harassment and failed to take prompt remedial  
84 action." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990). See also *Kunin v.*  
85 *Sears Roebuck and Co.*, 175 F.3d 289, 294 (3d Cir. 1999):

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

94 For a discussion of the definition of "management level personnel" in a Title VII case, see  
95 Comment 5.1.4 (discussing *Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 108  
96 (3d Cir. 2009)).

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<sup>16</sup> In the context of Title VII claims, the Supreme Court has held that "an employee is a 'supervisor' for purposes of vicarious liability . . . if he or she is empowered by the employer to take tangible employment actions against the victim." *Vance v. Ball State University*, 133 S. Ct. 2434, 2439 (2013). For further discussion of *Vance*, see Comment 5.1.5.

### **9.1.5 Harassment – Hostile Work Environment – No Tangible Employment Action**

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

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

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

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

## 9.1.6 Elements of an ADA Claim — Disparate Impact

### *No Instruction*

### **Comment**

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

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

## 9.1.7 Elements of an ADA Claim — Retaliation<sup>17</sup>

### Model

[Plaintiff] claims that [defendant] discriminated against [him/her] because of [plaintiff's] [describe protected activity].<sup>18</sup>

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

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

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

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

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

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

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

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

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<sup>17</sup> Some courts have held that there is no right to jury trial for an ADA retaliation claim. See the Comment to this instruction.

<sup>18</sup> In some cases, an employer might retaliate against a plaintiff for the protected activity of another employee. As Comment 9.1.7 discusses, Instruction 9.1.7 can be modified to address such third-party retaliation claims.

<sup>19</sup> See the Comment for a discussion of the allocation of responsibility for determining the reasonableness of the plaintiff's belief.

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

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

32

33 **Comment**

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

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

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

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

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

## 9.1.7 Retaliation

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

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

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

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

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

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

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

106 The ADA provides: “No person shall discriminate against any individual because such  
107 individual has opposed any act or practice made unlawful by [the ADA] or because such individual  
108 made a charge . . . under [the ADA].” 42 U.S.C. § 12203(a). “Thus, it is unlawful for an employer  
109 to retaliate against an employee based upon the employee's opposition to anything that is unlawful  
110 under the ADA.” *Shellenberger v. Summit Bancorp, Inc.*, 318 F.3d 183, 188 (3d Cir. 2003).<sup>20</sup>

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

### 120 *Protected Activity*

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

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

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<sup>20</sup> Where an employer conditioned its conversion of terminated at-will employees into independent contractors on the employees’ signing releases of all existing claims (including but not limited to discrimination claims), an employee’s refusal to sign that release did not constitute opposition within the meaning of the ADA’s anti-retaliation provision: “[R]efusing to sign a release . . . does not communicate opposition sufficiently specific to qualify as protected employee activity. . . . Because Allstate's Release barred its signatories from bringing *any* claims against Allstate concerning their employment or termination, employee agents who refused to sign it might have done so for any number of reasons unrelated to discrimination.” *E.E.O.C. v. Allstate Ins. Co.*, 778 F.3d 444, 452 (3d Cir. 2015).

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

### 148 *Standard for Actionable Retaliation*

149 The Supreme Court in *Burlington N. & S.F. Ry. v. White*, 548 U.S. 53, 68 (2006), held that  
150 a cause of action for retaliation under Title VII lies whenever the employer responds to protected  
151 activity in such a way "that a reasonable employee would have found the challenged action  
152 materially adverse, which in this context means it well might have dissuaded a reasonable worker  
153 from making or supporting a charge of discrimination." (internal quotation marks and citations  
154 omitted).<sup>21</sup> The Court elaborated on this standard in the following passage:

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

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<sup>21</sup> Where an employer terminated at-will employees but offered them a chance to serve as independent contractors if they signed releases of all existing claims (including but not limited to discrimination claims), the employer's denial of the independent-contractor arrangement to terminated employees who refused to sign that release did not constitute an adverse action for purposes of the ADA's anti-retaliation provision. *E.E.O.C. v. Allstate Ins. Co.*, 778 F.3d 444, 452 (3d Cir. 2015) ("[T]he terminated agents were not entitled to convert to independent contractor status.... And the [EEOC] has cited no legal authority for the proposition that an employer commits an adverse action by denying an employee an unearned benefit on the basis of the employee's refusal to sign a release.").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### 250 *Perceived Protected Activity*

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

### 258 “Determinative Effect” Instruction

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

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

## 9.1.7 Retaliation

282 (2013) (“Title VII retaliation claims must be proved according to traditional principles of but-for  
283 causation, not the lessened causation test stated in [42 U.S.C.] § 2000e–2(m). This requires proof  
284 that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action  
285 or actions of the employer.”). The *Nassar* Court reasoned that Congress legislated against a  
286 background tort principle of “but for” causation, *see Nassar*, 133 S. Ct. at 2523; that Title VII’s  
287 retaliation provision uses the word “because,” which is incompatible with a mixed-motive test, *see*  
288 *id.* at 2528; that Congress would have structured the statutory framework differently had it wished  
289 to encompass Title VII retaliation claims among those eligible for the statutory mixed-motive test  
290 set forth in 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B), *see id.* at 2529; that policy  
291 considerations support a restrictive approach to the standards of proof for retaliation claims, *see*  
292 *id.* at 2531-32; and that the “careful balance” that Congress set in the Civil Rights Act of 1991  
293 forecloses the use of the *Price Waterhouse* mixed-motive test for Title VII retaliation claims, *id.*  
294 at 2534.

295 The Committee has not attempted to determine what, if any, implications *Nassar* and *Gross*  
296 *v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009),<sup>22</sup> have for ADA retaliation claims,<sup>23</sup> but  
297 users of these instructions may wish to consider that question.

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

<sup>23</sup> *Cf. DiFiore v. CSL Behring, LLC*, 879 F.3d 71, 78 (3d Cir. 2018) (holding that a mixed-motive framework is unavailable for False Claims Act retaliation claims because “the language of the FCA anti-retaliation provision uses the same ‘because of’ language that compelled the Supreme Court to require ‘but-for’ causation in *Nassar* and *Gross*”); *id.* at 76 (holding that *Nassar* and *Gross* “undermine[d],” and thus justified panel reconsideration of, a prior Third Circuit opinion indicating that a “motivating factor” analysis was appropriate for False Claims Act retaliation claims).

## 9.2.1 ADA Definitions — Disability

### Model

Under the ADA, the term “disability” [means]<sup>24</sup> [includes]<sup>25</sup> a physical or mental impairment that “substantially limits” a “major life activity.” **[[Option One:]** I will now define some of these terms in more detail.<sup>26</sup> **[[Option Two:]** Thus, a person has a disability if they actually have a physical or mental impairment that substantially limits a major life activity. But a person also has a disability if they have a “record of” disability, or if they are “regarded as” having a disability. I am about to tell you more about [each of] [both of] these ways of showing a disability.<sup>27</sup> I remind you to consider the specific definitions I give you. You are 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. *[Note that this simplified definition may be under-inclusive compared with the definition supplied by the relevant regulation; see the Comment for suggestions on tailoring this paragraph in a given case.]*

#### [Major Life Activities

Under the ADA, the term “disability” includes a [physical/mental] impairment that substantially limits a major life activity. [Major life activities include the operation of major bodily functions.]<sup>28</sup> I instruct you that [describe activity] is a major life activity within the meaning of the ADA.]

#### [“Substantially Limiting”

As I mentioned, to be a disability, a physical or mental impairment must substantially limit [plaintiff’s] ability to perform a major life activity as compared to most people in the general population.

[[For use when there is no jury question as to whether the impairment substantially limits

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<sup>24</sup> Use this alternative with Option One.

<sup>25</sup> Use this alternative with Option Two.

<sup>26</sup> Use Option One if the plaintiff is relying only on the “actual disability” prong of the definition of disability.

<sup>27</sup> Use Option Two, adjusted as necessary, if the plaintiff is relying on the “record of” and/or “regarded as” prongs in addition to or instead of the “actual” disability prong.

<sup>28</sup> This bracketed sentence should be omitted if the major life activity at issue is not a major bodily function. See the Comment for discussion of the statutory definition of “major life activities.”

## 9.2.1 Disability

27 a major life activity:] I instruct you that [plaintiff's] [name of condition – e.g., cancer] is a  
28 disability because it limits the major life activity of [name of major life activity – e.g., normal cell  
29 growth].]

30 [[For use when there is a jury question as to whether the impairment substantially limits a  
31 major life activity:] So long as an impairment substantially limits one major life activity of  
32 [plaintiff], it is a disability even if it does not substantially limit any other of [plaintiff's] major life  
33 activities. An impairment need not prevent, or significantly or severely restrict, [plaintiff] from  
34 performing a major life activity in order to be considered substantially limiting. Nonetheless, not  
35 every impairment is a disability; you should compare [plaintiff's] performance of the major life  
36 activity to the performance of the same major life activity by most people in the general population.

37 [You should make this comparison without regard to the ameliorative effects of mitigating  
38 measures such as [list relevant mitigating measures; see Comment for discussion]. [But you must  
39 consider the ameliorative effects of ordinary eyeglasses or contact lenses. In other words, if  
40 [plaintiff's] visual impairment does not substantially limit any major life activity once you consider  
41 [plaintiff's] use of ordinary eyeglasses or contact lenses, then [plaintiff's] visual impairment is not  
42 a disability.]]

43 [If an impairment is episodic or in remission, it can still be a disability; the question is  
44 whether that impairment would substantially limit a major life activity of [plaintiff] when the  
45 impairment is active.]

46 In determining whether [plaintiff] is substantially limited in a major life activity, you may  
47 find it helpful to consider, as compared to most people in the general population, the condition  
48 under which [plaintiff] performs the major life activity; the manner in which [plaintiff] performs  
49 the major life activity; and/or the duration of time it takes [plaintiff] to perform the major life  
50 activity, or for which [plaintiff] can perform the major life activity. In thinking about these factors,  
51 you might consider, among other things [list any of the following that are warranted by the  
52 evidence:]

- 53 • the difficulty, effort, or time required to perform a major life activity;
- 54 • pain experienced when performing a major life activity;
- 55 • the length of time a major life activity can be performed;
- 56 • the way an impairment affects the operation of a major bodily function
- 57 • negative effects of measures that [plaintiff] takes to mitigate the impairment – such as  
58 side effects of medication or burdens associated with following a particular treatment  
59 regimen.<sup>29</sup>

60 [You should focus on whether the impairment substantially limits a major life activity,  
61 rather than on what outcomes [plaintiff] can achieve. For example, someone with a learning  
62 disability may achieve a high level of academic success, but may nevertheless be substantially

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<sup>29</sup> See the Comment for discussion of this factor and possible tension between Third Circuit caselaw and the applicable regulation.

## 9.2.1 Disability

63 limited in the major life activity of learning because of the additional time or effort he or she must  
64 spend to read, write, or learn compared to most people in the general population.]

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

66 The ADA definition of “disability” includes not only those persons who actually have a  
67 disability, but also those who have a “record of” disability. [Plaintiff] has a “record of” disability  
68 if [he/she] [has a history of] [has been misclassified as having] [has a history of, or has been  
69 misclassified as having,] a “physical or mental impairment” that “substantially limits” a major life  
70 activity, as I have defined those terms for you. [This means that if [plaintiff] had a physical or  
71 mental impairment that substantially limited a major life activity [but has now recovered] [but that  
72 condition is in remission], [he/she] still fits within the statutory definition because [he/she] has a  
73 record of disability.] [This means that if [plaintiff] was misclassified as having a physical or mental  
74 impairment that substantially limits a major life activity, [he/she] still fits within the statutory  
75 definition even if [he/she] did not actually have such an impairment.]]

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

79 The ADA’s definition of “disability” includes not only those persons who actually have a  
80 disability, but also those who are “regarded as” having a disability by their employer.

81 To prove that [he/she] was regarded as having a disability, [plaintiff] must prove that  
82 [defendant] [describe prohibited conduct] [plaintiff] because [defendant] believed [plaintiff] had a  
83 physical or mental impairment. [Plaintiff] need not prove that the impairment limited a major life  
84 activity or that [defendant] thought the impairment limited a major life activity.]

85 **[[For use when defendant asserts the defense (to a “regarded as” claim) that the  
86 impairment was transitory and minor:]** As I mentioned, [plaintiff] claims that [defendant]  
87 regarded him/her as having a disability. It is a defense to this claim that the impairment [plaintiff]  
88 was regarded as having [is [use this alternative in the case of an actual impairment]] [would be  
89 [use this alternative in the case of a perceived impairment]] “transitory and minor.” To establish  
90 this defense, [defendant] must prove<sup>30</sup> that [name the impairment] is both transitory and minor. It  
91 is not enough for [defendant] to prove that [defendant] believed [name the impairment] was  
92 transitory and minor. Rather, [defendant] must prove that [name the impairment] actually [is]  
93 [would be] both transitory and minor. An impairment is transitory if it [lasts] [would be expected  
94 to last] six months or less.]

95 **Concluding Instruction:**

96 Please keep in mind that the definition of “disability” is to be construed in favor of broad

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<sup>30</sup> See Comment for a discussion of the burden of proof as to the “transitory and minor” defense.

## 9.2.1 Disability

97 coverage of individuals. The primary question for you to decide is whether [defendant] has  
98 complied with its obligations under the ADA.

### 99 **Comment**

100 This instruction is derived from 42 U.S.C. § 12102; *id.* § 12201; Section 2 of the ADA  
101 Amendments Act of 2008; 29 C.F.R. § 1630.2 (2019); *id.* § 1630.15; Seventh Circuit Pattern Jury  
102 Instructions (Civil Cases) § 4.04 (rev. 2017); and Eleventh Circuit Pattern Jury Instructions (Civil  
103 Cases) §§ 4.11-4.12 (rev. 2019).

104 The ADA’s definition of “disability” (codified at 42 U.S.C. § 12102(1)) is complex for a  
105 number of reasons: 1) there are three separate types of disability: “actual”, “regarded as”, and  
106 “record of” disability; 2) “regarded as” disability is unavailable as the basis for a reasonable-  
107 accommodation claim, 3) the basic definition of “disability” encompasses three separate  
108 subdefinitions, for “impairment”, “substantially limited” and “major life activity”; 4) perhaps most  
109 important, the technical definition of “disability” is likely to be different from the term as it is used  
110 in the vernacular by most jurors. In most cases, however, the instruction can be streamlined  
111 because not every aspect of the definition will be disputed in the case. For example, ordinarily  
112 there will be no jury question on whether what the plaintiff suffers from is an impairment.

### 113 *ADA Amendments Act of 2008*

114 The ADA Amendments Act of 2008 (Pub. L. No. 110-325, 122 Stat. 3553) (the  
115 “ADAAA”) made a number of changes to the ADA’s definition of disability, and statutorily  
116 overruled some Supreme Court cases that Congress determined had “narrowed the broad scope of  
117 protection intended to be afforded by the ADA, thus eliminating protection for many individuals  
118 whom Congress intended to protect.” The basic thrust of the ADAAA is to make it easier for  
119 plaintiffs to prove that they have a “disability” within the meaning of the ADA. For example,  
120 Section 2(b)(5) of the ADAAA provides that “it is the intent of Congress that the primary object  
121 of attention in cases brought under the ADA should be whether entities covered under the ADA  
122 have complied with their obligations,” and that “the question of whether an individual’s  
123 impairment is a disability under the ADA should not demand extensive analysis.” Along the same  
124 lines, Section 4(a) of the ADAAA provides that the definition of “disability” under the ADA “shall  
125 be construed in favor of broad coverage of individuals.” The concluding text of the Instruction  
126 implements these general provisions of the ADAAA. In addition, the ADAAA makes specific  
127 changes to the statutory definition of “disability” that are discussed below in this Comment. As  
128 discussed below, one such change narrowed the definition of “disability” for a particular type of  
129 claim. See 42 U.S.C. § 12201(h) (providing that “regarded as” disability cannot provide a basis  
130 for a reasonable-accommodation claim). The ADAAA also authorized the relevant regulators to  
131 promulgate regulations “implementing the definitions of” key terms, including “disability.”<sup>31</sup>

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<sup>31</sup> 42 U.S.C. § 12205a provides: “The authority to issue regulations granted to the Equal Employment Opportunity Commission, the Attorney General, and the Secretary of

132 “Impairment”

133 Instruction 9.2.1’s definitions of “mental impairment” and “physical impairment” are  
 134 streamlined definitions that parallel those in some other sets of model instructions. *See* Seventh  
 135 Circuit Pattern Jury Instructions (Civil Cases) § 4.04 nn. 3 & 8 (rev. 2017) (“The term ‘physical  
 136 impairment’ means any conditions that prevents the body from functioning normally. The term  
 137 ‘mental impairment’ means any condition that prevents the mind from functioning normally.”);  
 138 Eleventh Circuit Pattern Jury Instructions (Civil Cases) §§ 4.11-4.12 (rev. 2019) (“A ‘physical  
 139 impairment’ is a condition that prevents the body from functioning normally. A ‘mental  
 140 impairment’ is a condition that prevents the mind from functioning normally.”). There is no  
 141 statutory definition of those terms that applies to the ADA. Applicable regulations, however,  
 142 provide a different definition. Under those regulations:

143 Physical or mental impairment means—

144 (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical  
 145 loss affecting one or more body systems, such as neurological, musculoskeletal,  
 146 special sense organs, respiratory (including speech organs), cardiovascular,  
 147 reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic,  
 148 skin, and endocrine; or

149 (2) Any mental or psychological disorder, such as an intellectual disability  
 150 (formerly termed “mental retardation”), organic brain syndrome, emotional or  
 151 mental illness, and specific learning disabilities.

152 29 C.F.R. § 1630.2(h) (2019).

153 The instruction’s definition can be modified as appropriate in a particular case. In a case  
 154 where the plaintiff’s physical or mental impairment is not in dispute, the instruction might say, for  
 155 instance, “The parties agree that [plaintiff’s] [describe condition] is a physical impairment.” In a  
 156 case where the classification of a particular condition as a physical or mental impairment is  
 157 established by the court as a matter of law, the instruction might say, for instance, “The term  
 158 ‘physical impairment’ includes neurological disorders such as Parkinson’s disease,” or “I instruct  
 159 you that [plaintiff’s] Parkinson’s disease is a physical impairment.”

160 In *Bragdon v. Abbott*, 524 U.S. 624, 632-33 (1998), the Court determined that an employee

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Transportation under this chapter includes the authority to issue regulations implementing the definitions of disability in section 12102 of this title (including rules of construction) and the definitions in section 12103 of this title, consistent with the ADA Amendments Act of 2008.” By enacting Section 12205a, Congress rendered moot the doubts the Supreme Court had previously expressed concerning the authoritativeness of such regulations. *See, e.g., Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 479-80 (1999) (stating that the EEOC had not been granted authority to promulgate its regulations interpreting the term “disability” and that the Court had “no occasion to consider what deference [those regulations] are due, if any”).

## 9.2.1 Disability

161 with HIV had a physical “impairment” within the meaning of the ADA. In reaching this  
162 determination, the Court relied upon the then-applicable version of the regulation quoted above.  
163 *See id.* at 632 (quoting 45 CFR § 84.3(j)(2)(i) (1997)).

164 Applying the pre-ADAAA version of the ADA, the Court of Appeals held that “side effects  
165 from medical treatment may themselves constitute an impairment under the ADA.” *Sulima v.*  
166 *Tobyhanna Army Depot*, 602 F.3d 177, 185 n.2, 187 (3d Cir. 2010). But the court ruled that in  
167 order for such side effects to constitute an impairment, “it is not enough to show just that the  
168 potentially disabling medication or course of treatment was prescribed or recommended by a  
169 licensed medical professional. Instead ... the medication or course of treatment must be required  
170 in the ‘prudent judgment of the medical profession,’ and there must not be an available alternative  
171 that is equally efficacious that lacks similarly disabling side effects.” *Id.* (quoting *Christian v. St.*  
172 *Anthony Med. Ctr.*, 117 F.3d 1051, 1052 (7th Cir. 1997)). The current regulations (which postdate  
173 *Sulima* and implement the ADAAA) take a somewhat different approach; they appear to consider  
174 the side effects of treatment as a factor that can affect *whether the condition that is being treated*  
175 *substantially limits a major life activity.* *See* 29 C.F.R. § 1630.2(j)(4)(ii) (2019) (“[T]he non-  
176 ameliorative effects of mitigating measures, such as negative side effects of medication or burdens  
177 associated with following a particular treatment regimen, may be considered when determining  
178 whether an individual’s impairment substantially limits a major life activity.”). The Committee  
179 has not determined whether the regulation alters or supersedes the test adopted in *Sulima* for cases  
180 where the substantial limitation arises from treatment side effects.

181 “Major Life Activity”

182 As amended by the ADAAA, the statute explains the term “major life activity” as follows:

183 (2) Major life activities

184 (A) In general

185 For purposes of paragraph (1) [i.e., the definition of “disability”], major life  
186 activities include, but are not limited to, caring for oneself, performing manual  
187 tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending,  
188 speaking, breathing, learning, reading, concentrating, thinking, communicating,  
189 and working.

190 (B) Major bodily functions

191 For purposes of paragraph (1), a major life activity also includes the  
192 operation of a major bodily function, including but not limited to, functions of the  
193 immune system, normal cell growth, digestive, bowel, bladder, neurological, brain,  
194 respiratory, circulatory, endocrine, and reproductive functions.

195 42 U.S.C. § 12102(2).<sup>32</sup>

196 As of 2019, the implementing regulation largely echoes these illustrative lists, and adds a  
 197 few other examples to each list (“sitting, reaching, [and] interacting with others,” and “functions  
 198 of the ... special sense organs and skin; ... and ... genitourinary ... cardiovascular ... hemic,  
 199 lymphatic, [and] musculoskeletal ... functions”). See 29 C.F.R. § 1630.2(i)(1) (2019). The  
 200 regulation also specifies that “[t]he operation of a major bodily function includes the operation of  
 201 an individual organ within a body system.” *Id.*

202 Any of the activities or bodily functions in the statutory list (or, presumably, the regulatory  
 203 list) quoted above constitutes a major life activity as a matter of law. The lists are explicitly non-  
 204 exhaustive; in a case where the activity or bodily function is not listed, the Committee expects that  
 205 the question whether the activity or function constitutes a major life activity will likely be decided  
 206 by the court as a matter of statutory interpretation.<sup>33</sup>

207 The approach to that interpretive question will be guided both by the statute and by the  
 208 regulation. As noted above, the ADAAA sought to overturn a number of judicial interpretations  
 209 of the ADA that Congress regarded as unduly narrow. One such case was *Toyota Motor Mfg.,*  
 210 *Kentucky, Inc. v. Williams*, 534 U.S. 184, 197 (2002), in which the Supreme Court had ruled that  
 211 “[m]ajor life activities’ ... refers to those activities that are of central importance to daily life.”  
 212 The ADAAA specifically mentioned that aspect of *Toyota* with disapproval – listing as one of the  
 213 Act’s purposes

214 to reject the standards enunciated by the Supreme Court in *Toyota Motor*  
 215 *Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms  
 216 “substantially” and “major” in the definition of disability under the ADA “need to  
 217 be interpreted strictly to create a demanding standard for qualifying as disabled,”  
 218 and that to be substantially limited in performing a major life activity under the  
 219 ADA “an individual must have an impairment that prevents or severely restricts the  
 220 individual from doing activities that are of central importance to most people’s

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<sup>32</sup> As these lists illustrate, an activity or bodily function need not be employment-related to count as a “major life activity.” Cf. *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998) (interpreting pre-ADAAA version of the ADA to encompass reproduction as a major life activity and observing that “[n]othing in the [then-applicable 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’”).

<sup>33</sup> Prior to the ADAAA’s enactment, courts had ruled as a matter of law on whether a number of activities counted as major life activities. See, e.g., *Bragdon v. Abbott*, 524 U.S. 624, 639 (1998) (holding that “reproduction is a major life activity for the purposes of the ADA”); *Gagliardo v. Connaught Laboratories, Inc.*, 311 F.3d 565, 569 (3d Cir. 2002) (same, as to “concentrating and remembering”); *Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 307 (3d Cir. 1999) (same, as to “thinking”). Though the ADAAA alters the criteria for determining what counts as a major life activity, that legislation does not seem to make the task any less suitable for the court. Accordingly, the Instruction treats this as a question of law for the court.

221 daily lives” ....

222 ADAAA § 2(b)(4), 122 Stat. at 3554. As noted above, the ADAAA added a definition of “major  
 223 life activities” and this definition eschews any use of the term “central importance.” The  
 224 implementing regulation, after listing examples of major life activities, continues: “[i]n  
 225 determining other examples of major life activities, the term ‘major’ shall not be interpreted strictly  
 226 to create a demanding standard for disability. ADAAA section 2(b)(4) (Findings and Purposes).  
 227 Whether an activity is a ‘major life activity’ is not determined by reference to whether it is of  
 228 ‘central importance to daily life.’” 29 C.F.R. § 1630.2(i)(2) (2019).

229 *Work as a Major Life Activity*

230 Prior to the ADAAA’s enactment, the Supreme Court had expressed unease with the  
 231 concept of working as a major life activity under the ADA. In *Sutton v. United Air Lines, Inc.*, 527  
 232 U.S. 471 (1999), the Court noted that “there may be some conceptual difficulty in defining ‘major  
 233 life activities’ to include work, for it seems to argue in a circle to say that if one is excluded, for  
 234 instance, by reason of an impairment, from working with others then that exclusion constitutes an  
 235 impairment, when the question you’re asking is, whether the exclusion itself is by reason of  
 236 handicap.” *Sutton*, 527 U.S. at 492 (internal quotation marks and alterations omitted). The *Sutton*  
 237 Court “[a]ssum[ed] without deciding that working [wa]s a major life activity.” *Id.* It declared,  
 238 however, that “[w]hen the major life activity under consideration is that of working, the statutory  
 239 phrase ‘substantially limits’ requires, at a minimum, that plaintiffs allege they are unable to work  
 240 in a broad class of jobs” rather than just “one type of job, a specialized job, or a particular job of  
 241 choice.” *Id.* at 491.

242 The ADAAA specifically lists “working” as a major life activity, and imposes no special  
 243 showing on “working” as distinct from other life activities. *See* ADAAA § 4(a), *codified in*  
 244 *relevant part at* 42 U.S.C. § 12102(2)(A). Nothing in the statute expressly requires the plaintiff to  
 245 prove an inability to perform a broad range of jobs. Moreover, one of the major purposes of the  
 246 ADAAA was to reject the “holdings” of *Sutton* on the ground that the case “narrowed the broad  
 247 scope of protection intended to be afforded by the ADA.” ADAAA § 2(a)(4). Accordingly, the  
 248 Instruction contains no special provision or limitation on working as a major life activity.

249 However, it should be noted that the EEOC’s interpretive guidance endorses the  
 250 requirement that a person seeking to rely on work as the major life activity must show that his or  
 251 her impairment “substantially limits his or her ability to perform a class of jobs or broad range of  
 252 jobs in various classes as compared to most people having comparable training, skills, and  
 253 abilities,” and states that “[d]emonstrating a substantial limitation in performing the unique aspects  
 254 of a single specific job is not sufficient to establish that a person is substantially limited in the  
 255 major life activity of working.” U.S. Equal Emp. Opportunity Comm’n, Interpretive Guidance on  
 256 Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630, App. 1630.2 (2019) (“EEOC  
 257 Interpretive Guidance”). The interpretive guidance also suggests that few people will need to rely  
 258 on the idea of work as a major life activity, because “impairments that substantially limit a person’s  
 259 ability to work usually substantially limit one or more other major life activities.” *Id.*

260 “Substantially Limits”

261 The statute, as amended by the ADAAA, both provides some specific directives on  
262 whether an impairment “substantially limits” a major life activity and also sets an overall  
263 interpretive approach. The implementing regulations provide additional guidance.

264 As to specific directives, the statute provides in part:

265 (C) An impairment that substantially limits one major life activity need not limit  
266 other major life activities in order to be considered a disability.

267 (D) An impairment that is episodic or in remission is a disability if it would  
268 substantially limit a major life activity when active.

269 (E)(i) The determination of whether an impairment substantially limits a major life  
270 activity shall be made without regard to the ameliorative effects of mitigating measures ...

271 (ii) The ameliorative effects of the mitigating measures of ordinary  
272 eyeglasses or contact lenses shall be considered in determining whether an  
273 impairment substantially limits a major life activity.

274 42 U.S.C. § 12102(4).<sup>34</sup>

275 The statute’s overall interpretive approach implements the ADAAA’s goal (noted above)  
276 of reversing a number of judicial interpretations that Congress regarded as overly restrictive. 42

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<sup>34</sup> The statute lists, as examples of mitigating measures that are not to be considered, the following:

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

42 U.S.C. § 12102(4)(E)(i).

To explain the difference between “low-vision devices” (which must not be considered when assessing substantial limitation) and “ordinary eyeglasses or contact lenses” (which must be considered when assessing substantial limitation) the statute provides:

(I) the term “ordinary eyeglasses or contact lenses” means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

(II) the term “low-vision devices” means devices that magnify, enhance, or otherwise augment a visual image.

*Id.* § 12102(4)(E)(iii).

## 9.2.1 Disability

277 U.S.C. § 12102(4)(B) directs that “[t]he term ‘substantially limits’ shall be interpreted consistently  
278 with the findings and purposes of the ADA Amendments Act of 2008.” The ADAAA’s findings  
279 state in part:

280 (3) while Congress expected that the definition of disability under the ADA  
281 would be interpreted consistently with how courts had applied the definition of a  
282 handicapped individual under the Rehabilitation Act of 1973, that expectation has  
283 not been fulfilled;

284 (4) the holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*,  
285 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of  
286 protection intended to be afforded by the ADA, thus eliminating protection for  
287 many individuals whom Congress intended to protect;

288 (5) the holding of the Supreme Court in *Toyota Motor Manufacturing,  
289 Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) further narrowed the broad scope  
290 of protection intended to be afforded by the ADA;

291 (6) as a result of these Supreme Court cases, lower courts have incorrectly  
292 found in individual cases that people with a range of substantially limiting  
293 impairments are not people with disabilities;

294 (7) in particular, the Supreme Court, in the case of *Toyota Motor  
295 Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), interpreted the  
296 term “substantially limits” to require a greater degree of limitation than was  
297 intended by Congress; and

298 (8) Congress finds that the current Equal Employment Opportunity  
299 Commission ADA regulations defining the term “substantially limits” as  
300 “significantly restricted” are inconsistent with congressional intent, by expressing  
301 too high a standard.

302 ADAAA § 2(a). The ADAAA’s purposes, in turn, include the following:

303 ... (2) to reject the requirement enunciated by the Supreme Court in *Sutton  
304 v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases that whether  
305 an impairment substantially limits a major life activity is to be determined with  
306 reference to the ameliorative effects of mitigating measures;

307 ...

308 (4) to reject the standards enunciated by the Supreme Court in *Toyota Motor  
309 Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms  
310 “substantially” and “major” in the definition of disability under the ADA “need to  
311 be interpreted strictly to create a demanding standard for qualifying as disabled,”  
312 and that to be substantially limited in performing a major life activity under the

## 9.2.1 Disability

313 ADA “an individual must have an impairment that prevents or severely restricts the  
314 individual from doing activities that are of central importance to most people’s  
315 daily lives”;

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

325 (6) to express Congress’ expectation that the Equal Employment  
326 Opportunity Commission will revise that portion of its current regulations that  
327 defines the term “substantially limits” as “significantly restricted” to be consistent  
328 with this Act, including the amendments made by this Act.

329 *Id.* § 2(b).

330 Accordingly, the text of the Instruction does not include any restrictions on the term  
331 “substantially limits” such as “severe” or “significant”; nor does it require that the impairment be  
332 permanent or long-term.<sup>35</sup> The conclusion to the Instruction provides, consistently with  
333 Congressional intent, that the statutory definition of “disability” is to be construed broadly.<sup>36</sup>

334 In some cases, the substantial-limitation issue may not present a jury question. *Cf., e.g.*, 29

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<sup>35</sup> Prior to the enactment of the ADAAA, the Supreme Court had ruled that impairments had to be long-term in order to count as disabilities under the ADA. *See Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 198 (2002) (“We ... hold that to be substantially limited in performing manual tasks, 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. The impairment's impact must also be permanent or long term.”). As noted in the text, the ADAAA’s stated goals included overturning *Toyota*’s “inappropriately high level of limitation necessary to obtain coverage under the ADA”; and the implementing regulations make clear that “[t]he effects of an impairment lasting or expected to last fewer than six months can be substantially limiting ....” 29 C.F.R. § 1630.2(j)(1)(ix) (2019). On the other hand, the EEOC’s interpretive guidance states that an impairment’s duration is a factor that can be considered when determining whether the impairment substantially limits a major life activity. *See EEOC Interpretive Guidance*, 29 C.F.R. pt. 1630, App. 1630.2(j)(1) (2019).

<sup>36</sup> In a case involving events that occurred prior to the enactment of the ADAAA, 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).

## 9.2.1 Disability

335 C.F.R. § 1630.2(j)(3)(ii)-(iii) (2019) (discussing application of the substantial-limitation test to  
336 various scenarios). The Instruction includes a bracketed alternative for use in cases where  
337 substantial limitation is conceded or established as a matter of law. For cases where the  
338 substantial-limitation issue instead presents a jury question, the Instruction draws heavily upon the  
339 implementing regulation’s language in outlining matters for the jury to consider. *See id.* §  
340 1630.2(j)(1), (4)-(5).

### 341 *Record of Disability*

342 As noted above, the statute’s definition of “disability” includes instances when there is “a  
343 record of” an individual’s having “a physical or mental impairment that substantially limits one or  
344 more major life activities of such individual.” 42 U.S.C. § 12102(1). The applicable regulation  
345 explains that “[a]n individual has a record of a disability if the individual has a history of, or has  
346 been misclassified as having, a mental or physical impairment that substantially limits one or more  
347 major life activities.” 29 C.F.R. § 1630.2(k)(1) (2019). The regulation stresses that the “record of”  
348 provision “shall be construed broadly,” and it directs that the substantial-limitation analysis should  
349 follow the same principles as those that apply when a claim of disability relies on the first statutory  
350 alternative (i.e., the substantial-limitation alternative discussed in the preceding paragraphs of this  
351 Comment). *Id.* § 1630.2(k)(2). The regulation also notes that, under the statute, reasonable-  
352 accommodation claims are available for “record of” disability claims.<sup>37</sup>

353 The EEOC’s interpretive guidance notes that the same set of facts might ground both an  
354 actual-disability claim and a record-of disability claim:

355 [A]n individual with an impairment that is episodic or in remission can be protected  
356 under the first prong if the impairment would be substantially limiting when active.  
357 See 42 U.S.C. 12102(4)(D); § 1630.2(j)(1)(vii). Thus, an individual who has cancer  
358 that is currently in remission is an individual with a disability under the “actual  
359 disability” prong because he has an impairment that would substantially limit  
360 normal cell growth when active. He is also covered by the “record of” prong based  
361 on his history of having had an impairment that substantially limited normal cell  
362 growth.

363 29 C.F.R. pt. 1630, App. 1630.2(k) (2019).

364 For a discussion of “record of” disability claims under the pre-ADAAA version of the

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<sup>37</sup> The regulation explains: “An individual with a record of a substantially limiting impairment may be entitled, absent undue hardship, to a reasonable accommodation if needed and related to the past disability. For example, an employee with an impairment that previously limited, but no longer substantially limits, a major life activity may need leave or a schedule change to permit him or her to attend follow-up or ‘monitoring’ appointments with a health care provider.” 29 C.F.R. § 1630.2(k)(3) (2019).

## 9.2.1 Disability

365 statute, see *Eshelman v. Agere Systems, Inc.*, 554 F.3d 426, 436-39 (3d Cir. 2009).<sup>38</sup>

366 “Regarded as” Having a Disability (for Purposes of Claims other than Reasonable  
367 Accommodation)

368 As noted above, the statute’s definition of “disability” includes instances when an  
369 individual is “regarded as having” “a physical or mental impairment that substantially limits one  
370 or more major life activities of such individual.” 42 U.S.C. § 12102(1). The statute’s focus is on  
371 whether prohibited action was taken because the individual was regarded as having the  
372 impairment, not on whether the individual actually had that impairment or on whether that  
373 impairment actually does substantially limit a major life activity: “An individual meets the  
374 requirement of ‘being regarded as having such an impairment’ if the individual establishes that he  
375 or she has been subjected to an action prohibited under this chapter because of an actual or  
376 perceived physical or mental impairment whether or not the impairment limits or is perceived to  
377 limit a major life activity.” *Id.* § 12102(3)(A). In that sense, “regarded as” disability can be easier  
378 to establish than the other two prongs of the disability definition.

379 But Congress imposed two limits on “regarded as” disability. First, “regarded as” disability  
380 cannot be founded on “impairments that are transitory and minor. A transitory impairment is an  
381 impairment with an actual or expected duration of 6 months or less.” *Id.* § 12102(3)(B). Second,  
382 as discussed below, “regarded as” disability cannot provide a basis for a reasonable-  
383 accommodation claim. *See id.* § 12201(h).

384 The statute does not explicitly couch the “transitory and minor” exception as a defense.  
385 But the implementing regulations do so:

386 It may be a defense to a charge of discrimination by an individual claiming  
387 coverage under the “regarded as” prong of the definition of disability that the  
388 impairment is (in the case of an actual impairment) or would be (in the case of a  
389 perceived impairment) “transitory and minor.” To establish this defense, a covered  
390 entity must demonstrate that the impairment is both “transitory” and “minor.”  
391 Whether the impairment at issue is or would be “transitory and minor” is to be  
392 determined objectively. A covered entity may not defeat “regarded as” coverage of  
393 an individual simply by demonstrating that it subjectively believed the impairment  
394 was transitory and minor; rather, the covered entity must demonstrate that the  
395 impairment is (in the case of an actual impairment) or would be (in the case of a

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<sup>38</sup> As discussed elsewhere in this Comment, the ADAAA made significant changes, a number of which affect the treatment of “record of” disability claims. *See, e.g.*, 42 U.S.C. § 12102(4)(A) (setting rule of construction that “[t]he definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter”). Care should be taken, in applying *Eshelman*’s teaching on “record of” disability claims, to assess the extent to which given aspects of the court’s reasoning survive the changes wrought by the ADAAA.

396 perceived impairment) both transitory and minor.

397 29 C.F.R. § 1630.15(f) (2019).<sup>39</sup> By saying that the defendant “must demonstrate” the transitory  
 398 and minor nature of the impairment, the regulation appears to assign the burden of proof on this  
 399 issue to the defendant. Because Congress granted the EEOC (among others) the authority to issue  
 400 regulations implementing Section 12102’s definitions of “disability,” *see* 42 U.S.C. § 12205a,  
 401 Section 1630.15(f) is entitled to deference so long as Section 12102(3)(B) is ambiguous on the  
 402 question of who has the burden of proof (on the “transitory and minor” issue) and so long as the  
 403 regulation’s assignment of that burden to the defendant is a reasonable interpretation of the statute.  
 404 *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see also*  
 405 *Budhun v. Reading Hosp. & Med. Ctr.*, 765 F.3d 245, 259 (3d Cir. 2014) (noting that “[t]he ADA  
 406 regulations list being ‘transitory and minor’ as a defense to an ADA claim,” and treating the  
 407 transitory-and-minor issue as an “affirmative defense[.]”). Instruction 9.2.1 presents the “transitory  
 408 and minor” exception as a defense on which the defendant has the burden of proof.

#### 409 *Reasonable Accommodation Requirement Inapplicable to “Regarded as” Disability*

410 As noted above, in contexts other than reasonable-accommodation claims, the ADA’s  
 411 definition of “disability” includes “being regarded as having” a physical or mental impairment that  
 412 substantially limits one or more major life activities. 42 U.S.C. § 12102(1)(C). Prior to 2009, this  
 413 “regarded as” part of the definition of disability also applied to reasonable-accommodation claims.  
 414 *See Williams v. Philadelphia Hous. Auth. Police Dep’t*, 380 F.3d 751, 776 (3d Cir. 2004). But in  
 415 the ADAAA, Congress provided that “regarded as” disability cannot provide a basis for a  
 416 reasonable-accommodation claim. *See* 42 U.S.C. § 12201(h); *see also Robinson v. First State*  
 417 *Cnty. Action Agency*, 920 F.3d 182, 186 (3d Cir. 2019). Accordingly, Instruction 9.2.1’s definition  
 418 of disability has been revised to reflect that the “regarded as” option is unavailable for reasonable-  
 419 accommodation claims.

#### 420 *Pregnancy-related disability*

421 The Supreme Court has noted in dictum the possibility that pregnancy-related impairments  
 422 come within the ambit of the ADA. *See Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338,  
 423 1348 (2015). Enforcement guidance provided by the EEOC states that

424 conditions, such as pregnancy, that are not the result of a physiological disorder are  
 425 ... not impairments [for purposes of the definition of “disability”]. However, a  
 426 pregnancy-related impairment that substantially limits a major life activity is a  
 427 disability under the first prong of the definition. Alternatively, a pregnancy-related  
 428 impairment may constitute a “record of” a substantially limiting impairment,” or  
 429 may be covered under the “regarded as” prong if it is the basis for a prohibited

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<sup>39</sup> On the objective nature of the transitory-and-minor inquiry, *see, e.g., 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”).

## 9.2.1 Disability

430 employment action and is not “transitory and minor.”

431 29 C.F.R. § Pt. 1630, App (2019).

432 As of spring 2019, the Court of Appeals had not addressed (in a precedential opinion) the  
433 status of pregnancy-related impairments under the ADA as amended in 2008.

1 **9.2.2 ADA Definitions — Qualified Individual**

2 **Model**

3 Under the ADA, [plaintiff] must establish that [he/she] was a “qualified individual.” This  
4 means that [plaintiff] must prove two elements:

5 First, that [he/she] had the skill, experience, education, and other job-related  
6 requirements for the [describe job],<sup>40</sup> and

7 Second, that [he/she] could do the job’s “essential functions” [, either with or  
8 without [describe requested accommodation]].<sup>41</sup>

9 If [plaintiff] cannot prove both elements, then [plaintiff] is not a qualified individual under  
10 the ADA. If [plaintiff] is not a qualified individual within the meaning of the ADA, you must  
11 return a verdict for [defendant], even if the reason [plaintiff] is not qualified is solely as a result of  
12 [his/her] disability. The ADA does not require an employer to hire or retain an individual who  
13 cannot perform the job [with or without an accommodation].<sup>42</sup>

14 In this case, [plaintiff] claims that [he/she] was able to perform the essential functions of  
15 [describe job] [with [describe accommodation]].<sup>43</sup> [Defendant] contends that [plaintiff] was unable  
16 to perform [describe function(s)] and that [this/these] function(s) were essential to the [describe  
17 job]. It is [plaintiff’s] burden to prove by a preponderance of the evidence that [he/she] was able  
18 to perform the essential functions of [describe job]. If [plaintiff] could not perform [describe  
19 function] then it is [plaintiff’s] burden to show that [describe function], that this was not essential  
20 to the [describe job].

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

- 26 • whether the performance of the [describe function] is the reason that the [describe job]

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<sup>40</sup> As discussed in the Comment, this element is derived from the applicable regulation, and the regulation appears to present this element as one that is not modified by the “with or without reasonable accommodation” concept that modifies the second element.

<sup>41</sup> If “qualified individual” is being defined for purposes of a “regarded as” disability claim, the references to “reasonable accommodation” should likely be omitted. See Comment.

<sup>42</sup> If “qualified individual” is being defined for purposes of a “regarded as” disability claim, the references to “reasonable accommodation” should likely be omitted. See Comment.

<sup>43</sup> If “qualified individual” is being defined for purposes of a “regarded as” disability claim, the references to “reasonable accommodation” should likely be omitted. See Comment.

## 9.2.2 Qualified Individual

- 27 exists;
- 28 ● whether there are a limited number of employees available to do the [describe function];
- 29 ● whether [describe function] is highly specialized so that the person in the position is hired  
30 for his or her expertise or ability to perform the particular function;
- 31 ● [defendant’s] judgment about which functions are essential to the [describe job];
- 32 ● written job descriptions prepared before advertising or interviewing applicants for the  
33 [describe job];
- 34 ● the amount of time spent on the job performing [describe function];
- 35 ● the consequences of not requiring [plaintiff] to [describe function];
- 36 ● the terms of a collective bargaining agreement;
- 37 ● whether others who held the position of [describe job] performed [describe function];
- 38 ● whether those holding similar jobs also [describe function];
- 39 ● *[list any other factors supported by the evidence.]*

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

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

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

### 49 **Comment**

50 This instruction is derived from 42 U.S.C. § 12102; *id.* § 12111; *id.* § 12201; 29 C.F.R. §  
51 1630.2 (2019); *id.* § 1630.3; caselaw as discussed below; and Seventh Circuit Pattern Jury  
52 Instructions (Civil Cases) § 4.05.

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

## 9.2.2 Qualified Individual

57 regulations elaborate on this definition by articulating two requirements: “[t]he term ‘qualified,’  
58 with respect to an individual with a disability, means that the individual satisfies the requisite skill,  
59 experience, education and other job-related requirements of the employment position such  
60 individual holds or desires and, with or without reasonable accommodation, can perform the  
61 essential functions of such position.” 29 C.F.R. § 1630.2(m) (2019); *see also id.* § 1630.3 (listing  
62 exceptions to the definition of “qualified”). The Instruction accordingly opens by listing these two  
63 requirements as elements that the plaintiff must prove. Because the placement of the phrase “with  
64 or without reasonable accommodation” in the regulation indicates that this phrase modifies only  
65 the essential-functions element and not the job-related-requirements element, *see id.* § 1630.2(m),  
66 the Instruction includes the reasonable-accommodation concept only in that second element.

67 This definition may require modification in the case of “regarded as” disability. As  
68 discussed in Comment 9.2.1, Congress has defined “disability” to mean, “with respect to an  
69 individual— (A) a physical or mental impairment that substantially limits one or more major life  
70 activities of such individual; (B) a record of such an impairment; or (C) being regarded as having  
71 such an impairment (as described in paragraph (3)).” 42 U.S.C. § 12102(1). As Comment 9.2.1  
72 explains, under the ADA as amended in 2008, there is a significant limit on “regarded as” disability  
73 claims: “A covered entity ... need not provide a reasonable accommodation or a reasonable  
74 modification to policies, practices, or procedures to an individual who meets the definition of  
75 disability in section 12102(1) of this title solely under subparagraph (C) of such section.” 42  
76 U.S.C. § 12201(h). As noted above, the statute defines “qualified individual” as one who can  
77 perform the position’s essential functions “with or without reasonable accommodation.” 42 U.S.C.  
78 12111(8). But because Section 12201(h) absolves employers from any duty to provide reasonable  
79 accommodations to one who shows disability solely under the “regarded as” prong, it seems  
80 possible that the operative definition of “qualified individual” should be revised, for a “regarded  
81 as” claim, to omit a reference to reasonable accommodations.<sup>44</sup> Thus, in the Instruction, the  
82 references to “reasonable accommodations” are bracketed, with notations that these references  
83 should be omitted if “qualified” is being defined for purposes of a “regarded as” disability claim.

84 The EEOC’s interpretive guidance explains the application of the “qualified individual”  
85 test as follows:

86 The determination of whether an individual with a disability is “qualified”  
87 should be made in two steps. The first step is to determine if the individual satisfies  
88 the prerequisites for the position, such as possessing the appropriate educational

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<sup>44</sup> As of spring 2019, the Court of Appeals has not addressed this issue, but lower-court caselaw has taken the view expressed in the text. *See, e.g.,* *Hanson v. N. Pines Mental Health Ctr., Inc.*, No. CV 16-2932 (DWF/LIB), 2018 WL 1440333, at \*8 (D. Minn. Mar. 22, 2018); *McNelis v. Pennsylvania Power & Light, Susquehanna, LLC*, No. 4:13-CV-02612, 2016 WL 5019199, at \*26 (M.D. Pa. Mar. 23, 2016), *report and recommendation adopted*, No. 4:13-CV-02612, 2016 WL 4991440 (M.D. Pa. Sept. 19, 2016), *aff’d sub nom. McNelis v. Pennsylvania Power & Light Co.*, 867 F.3d 411 (3d Cir. 2017); *Wiseman v. Convention Ctr. Auth. of the Metro. Gov’t of Nashville & Davidson Cty.*, No. 3:14 C 01911, 2016 WL 54922, at \*12 (M.D. Tenn. Jan. 5, 2016).

## 9.2.2 Qualified Individual

89 background, employment experience, skills, licenses, etc. For example, the first  
90 step in determining whether an accountant who is paraplegic is qualified for a  
91 certified public accountant (CPA) position is to examine the individual's credentials  
92 to determine whether the individual is a licensed CPA. ...

93 The second step is to determine whether or not the individual can perform  
94 the essential functions of the position held or desired, with or without reasonable  
95 accommodation. The purpose of this second step is to ensure that individuals with  
96 disabilities who can perform the essential functions of the position held or desired  
97 are not denied employment opportunities because they are not able to perform  
98 marginal functions of the position. ...

99 The determination of whether an individual with a disability is qualified is  
100 to be made at the time of the employment decision....

101 29 C.F.R. pt. 1630, App. 1630.2(m) (2019); *see also Deane v. Pocono Med. Ctr.*, 142 F.3d 138,  
102 145 (3d Cir. 1998) (en banc) (citing the then-applicable version of the interpretive guidance).

103 The *Deane* court set forth “a two step process” for determining “whether an individual can,  
104 with or without reasonable accommodation, perform the essential functions of the position”:

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

111 *Deane*, 142 F.3d at 146 (footnote omitted).

112 “*Essential Functions*” of a Job

113 The court of appeals has stressed that whether a particular duty is an essential function of  
114 a particular job is “for the jury to decide.” *Turner v. Hershey Chocolate U.S.*, 440 F.3d 604, 613  
115 (3d Cir. 2006).<sup>45</sup> The statute does not define “essential functions,” but the regulations fill that gap.  
116 They open with the general statement that the term “means the fundamental job duties of the  
117 employment position .... [and] does not include the marginal functions of the position.” 29 C.F.R.

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<sup>45</sup> 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 v. Pennsylvania Power & Light Co.*, 867 F.3d 411, 415 (3d Cir. 2017) (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))).

## 9.2.2 Qualified Individual

118 § 1630.2(n)(1) (2019). The regulations list, as examples of reasons that a job function may be  
119 essential, the following:

120 (i) The function may be essential because the reason the position exists is to  
121 perform that function;

122 (ii) The function may be essential because of the limited number of  
123 employees available among whom the performance of that job function can be  
124 distributed; and/or

125 (iii) The function may be highly specialized so that the incumbent in the  
126 position is hired for his or her expertise or ability to perform the particular function.

127 *Id.* § 1630.2(n)(2). The regulations then provide a non-exhaustive list of “[e]vidence of whether a  
128 particular function is essential”:

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

130 (ii) Written job descriptions prepared before advertising or interviewing applicants  
131 for the job;

132 (iii) The amount of time spent on the job performing the function;

133 (iv) The consequences of not requiring the incumbent to perform the function;

134 (v) The terms of a collective bargaining agreement;

135 (vi) The work experience of past incumbents in the job; and/or

136 (vii) The current work experience of incumbents in similar jobs.

137 *Id.* § 1630.2(n)(3); *see also Skerski v. Time Warner Cable Co.*, 257 F.3d 273, 279 (3d Cir. 2001)  
138 (quoting the regulations (and the EEOC’s interpretive guidance) and stating that “none of the  
139 factors nor any of the evidentiary examples alone are necessarily dispositive”). The Instruction  
140 relies heavily on language from the regulations.

141 The EEOC’s interpretive guidance addresses the connection between the essential-  
142 functions test and job criteria: “[T]he inquiry into essential functions is not intended to second  
143 guess an employer's business judgment with regard to production standards, whether qualitative  
144 or quantitative, nor to require employers to lower such standards.” 29 C.F.R. § Pt. 1630, App  
145 (2019). On the other hand, the regulations provide that covered entities may not “use qualification  
146 standards, employment tests or other selection criteria that screen out or tend to screen out an  
147 individual with a disability or a class of individuals with disabilities, on the basis of disability,  
148 unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be  
149 job related for the position in question and is consistent with business necessity.” 29 C.F.R. §  
150 1630.10(a) (2019).

## 9.2.2 Qualified Individual

151 The penultimate paragraph of the Instruction (which notes that general requirements such  
152 as refraining from abusive or threatening conduct toward others, or maintaining a regular level of  
153 attendance, may be considered essential functions of any job), parallels the Seventh Circuit's  
154 model instruction. *See* Seventh Circuit Pattern Jury Instructions (Civil Cases) § 4.05.

### 155 *Cases Applying the "Essential Functions" Test*

156 The Court of Appeals has addressed the application of the "essential functions" test in a  
157 number of cases. In *Skerski v. Time Warner Cable Co.*, 257 F.3d 273, 278 (3d Cir. 2001), the court  
158 provided an extensive analysis of the meaning of the term "essential functions" of a job. The  
159 plaintiff in *Skerski* was a cable installer technician, and he developed a fear of heights. One of the  
160 defendant's arguments was that he was no longer qualified for the position because climbing was  
161 one of the "essential functions" of the job of cable installer technician. The trial court agreed with  
162 the defendant, finding as a matter of law that climbing was an essential job function, and therefore  
163 that plaintiff could not recover because he could not perform that function even with an  
164 accommodation. The Third Circuit began its analysis by looking to the relevant agency regulations  
165 for the definition of "essential functions." *See id.* at 279 (quoting 29 C.F.R. § 1630.2(n) and the  
166 EEOC's interpretive guidance, 29 C.F.R. pt. 1630, App. 1630.2(n)).

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

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

182 But this is only one of the three factors. Moreover, consideration of the seven  
183 evidentiary examples included in § 1630.2(n)(3) suggests caution against any premature  
184 determination on essential functions as at least some of them lean in Skerski's favor. Of  
185 course, as required by § 1630.2(n)(3)(i), we owe some deference to Time Warner and its  
186 own judgment that climbing is essential to the installer technician position. And the written  
187 job descriptions, as the District Court noted, "clearly identify climbing as a job  
188 requirement." However, describing climbing as a requirement is not necessarily the same  
189 as denominating climbing as an essential function. In fact, the job descriptions prepared by  
190 both New Channels and Time Warner list various duties and responsibilities under the

## 9.2.2 Qualified Individual

191 heading "Essential Functions," but neither identifies climbing as "essential." . . .

192 Among the facts and circumstances relevant to each case is, of course, the  
193 employee's actual experience as well as that of other employees. See 29 C.F.R. §  
194 1630.2(n)(3)(iv), (vi) and (vii). It is undisputed that from the time Skerski began as an  
195 installer technician in 1982 until the time he was diagnosed with his panic disorder in 1993,  
196 a significant portion of his job responsibilities required climbing. . . . However, for the  
197 three and a half years after his diagnosis in which he continued to work as an installer  
198 technician, Skerski performed virtually no overhead work at all. . . . Skerski testified at his  
199 deposition that there always was enough underground work to do, that he always worked  
200 40-hour weeks and even worked enough to earn a couple thousand dollars per year in  
201 overtime, and that he had never experienced problems at work because of his panic disorder  
202 until Hanning became his supervisor in the fall of 1996. . . .

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

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

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

227 For additional cases discussing the essential functions concept, see *Turner v. Hershey*  
228 *Chocolate U.S.*, 440 F.3d 604, 613 (3d Cir. 2006) (summary judgment not warranted where  
229 plaintiff's evidence would justify a reasonable jury in finding that rotating among three locations  
230 in the factory was not an essential function of the plaintiff's job); *Walton v. Mental Health Ass'n*

## 9.2.2 Qualified Individual

231 *of Southeastern Pa.*, 168 F.3d 661, 666 (3d Cir. 1999) (employee’s inability to appear in a  
232 promotional video because she was obese was not a substantial limitation on essential function of  
233 a job; any such appearance would have been only a minor aspect of her job); *Conneen v. MBNA*  
234 *America Bank, N.A.*, 334 F.3d 318, 327 (3d Cir. 2003) (promptness was not an essential function  
235 merely because the employer thought it necessary for the employee to set an example for lower-  
236 level employees); *McNelis v. Pennsylvania Power & Light Co.*, 867 F.3d 411, 413, 415 (3d Cir.  
237 2017) (plaintiff – who was fired from his job as an armed security officer at a nuclear power plant  
238 after he “experienced personal and mental health problems” and failed a fitness for duty exam  
239 conducted by a psychologist – could not perform the “essential functions” of his job because  
240 “[Nuclear Regulatory Commission] regulations require Nuclear Security Officers to be fit for duty  
241 ... and to maintain unescorted security clearance” and the plaintiff “did not satisfy either legally  
242 mandated requirement at the time he was fired”); *id.* at 416 n.2 (reasoning in the alternative that  
243 even if the plaintiff had stated a prima facie case, the NRC’s regulatory requirements would  
244 provide a defense (citing 29 C.F.R. § 1630.15(e)).

### 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]

### 9.2.3 Hostile or Abusive Work Environment

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

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

41

#### 42 **Comment**

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

1 **9.2.4 ADA Definitions — Constructive Discharge**

2 **Model**

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

9

10 **Comment**

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

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

1 **9.3.1 ADA Defenses — Direct Threat**

2 **Model**

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

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

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

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

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

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

- 20 1) How long any risk would have lasted;
- 21 2) The nature of the potential harm and how severe the harm would be if it occurred;
- 22 3) The likelihood the harm would have occurred; and
- 23 4) Whether the potential harm was imminent, that is, whether it was about to happen soon.

24 **Comment**

25 This instruction is derived from 42 U.S.C. § 12111; *id.* § 12113; 29 C.F.R. § 1630.15  
26 (2019); U.S. Equal Emp. Opportunity Comm’n, Interpretive Guidance on Title I of the Americans  
27 with Disabilities Act, 29 C.F.R. pt. 1630, App. 1630.2; and caselaw as discussed below.

28 The ADA provides an affirmative defense where accommodation of, hiring or retaining an  
29 employee would constitute a “direct threat.” 42 U.S.C. § 12113(b).<sup>46</sup> “Direct threat” is defined as

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<sup>46</sup> 42 U.S.C. § 12113(a) provides: “It may be a defense to a charge of discrimination

### 9.3.1 Direct Threat

30 “a significant risk to the health or safety of others that cannot be eliminated by reasonable  
31 accommodation.” 42 U.S.C. § 12111(3).<sup>47</sup> The regulations, which extend the idea of threat to  
32 encompass threats to the individual himself or herself as well as to others, *see* 29 C.F.R. §  
33 1630.15(b)(2) (2019),<sup>48</sup> provide:

34 Direct Threat means a significant risk of substantial harm to the health or  
35 safety of the individual or others that cannot be eliminated or reduced by reasonable  
36 accommodation. The determination that an individual poses a “direct threat” shall  
37 be based on an individualized assessment of the individual's present ability to safely  
38 perform the essential functions of the job. This assessment shall be based on a  
39 reasonable medical judgment that relies on the most current medical knowledge  
40 and/or on the best available objective evidence. In determining whether an  
41 individual would pose a direct threat, the factors to be considered include:

- 42 (1) The duration of the risk;
- 43 (2) The nature and severity of the potential harm;
- 44 (3) The likelihood that the potential harm will occur; and
- 45 (4) The imminence of the potential harm.

46 29 C.F.R. § 1630.2(r) (2019).

47 The EEOC’s interpretive guidance provides further detail on the level of risk that  
48 constitutes a direct threat: “[T]he employer must determine whether a reasonable accommodation

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under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.” Section 12113(b) specifies that “[t]he term ‘qualification standards’ may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.” *See also Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 78 (2002) (terming the qualification-standards defense, including the direct-threat defense, an “affirmative defense”).

<sup>47</sup> *See Turner v. Hershey Chocolate U.S.*, 440 F.3d 604, 615 (3d Cir. 2006) (addressing case in which employer had required its employees to rotate among three production lines due to concerns over repetitive stress injuries, and refusing to “conclude as a matter of law” that plaintiff’s proposal that she not be required to rotate among all three lines “would pose a ‘direct threat’ to [defendant’s] employees”).

<sup>48</sup> The Supreme Court has held that Section 1630.15(b)(2)’s extension of the concept of threat to encompass threats to the employee himself or herself does not exceed the scope of permissible rulemaking under the ADA. *See Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 87 (2002).

### 9.3.1 Direct Threat

49 would either eliminate the risk or reduce it to an acceptable level.... An employer ... is not  
50 permitted to deny an employment opportunity to an individual with a disability merely because of  
51 a slightly increased risk. The risk can only be considered when it poses a significant risk, i.e., high  
52 probability, of substantial harm; a speculative or remote risk is insufficient.” 29 C.F.R. § Pt. 1630,  
53 App. 1630.2(r) (2019).

## 9.4.1 Compensatory Damages – General Instruction

### 1 9.4.1 ADA Damages – Compensatory Damages — General Instruction

#### 2 Model

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

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

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

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

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

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

### 9.4.1 Compensatory Damages – General Instruction

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

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

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

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

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

#### 69 **Comment**

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

### 9.4.1 Compensatory Damages – General Instruction

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

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

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

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

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

#### 104 *Damages in ADA Retaliation Cases*

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

#### 113 *Attorney Fees and Costs*

### 9.4.1 Compensatory Damages – General Instruction

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

1 **9.4.2 ADA Damages — Punitive Damages**

2 **Model**

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

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

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

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

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

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

## 9.4.2 Punitive Damages

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

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

### 47 48 **Comment**

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

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

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

## 9.4.2 Punitive Damages

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

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

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

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

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

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

### 109 *Damages in ADA Retaliation Cases*

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

## 9.4.2 Punitive Damages

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

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

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

##### Model

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

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

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

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

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

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

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

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

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

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

69

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

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

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

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

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

81

#### 82 **Comment**

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

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

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

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

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

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

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

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

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

## 9.4.4 Front Pay – For Advisory or Stipulated Jury

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

#### Model

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

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

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

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

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

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

#### Comment

ADA remedies are the same as provided in Title VII. The enforcement provision of the ADA, 42 U.S.C. § 12117, specifically provides for the same recovery in ADA actions as in Title

#### 9.4.4 Front Pay – For Advisory or Stipulated Jury

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

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

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

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

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

1 **9.4.5 ADA Damages — Nominal Damages**

2 **Model**

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

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

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

11  
12 **Comment**

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

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

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

37 830 (3d Cir. 1976)).