# 4. EMPLOYMENT DISCRIMINATION: AMERICANS WITH DISABILITIES ACT

## 4.01 NATURE OF ADA CLAIM AND DEFENSE

Plaintiff has brought this lawsuit under a federal law called the Americans with Disabilities Act, as amended, which is often referred to by its initials, "ADA." Under the ADA, it is unlawful for an employer to discriminate against a person with a disability if that person is qualified to do the essential functions of [his/her] job and the employer is aware of [his/her] physical or mental disability.

In this case, Plaintiff claims that Defendant discriminated against [him/her] by [[not accommodating their disability] [not hiring/not promoting/firing/other adverse employment action against them]] on the basis of [his/her] disability. Defendant denies that it discriminated against Plaintiff [and says that [*Defendant's theory of defense*]].

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

### COMMITTEE COMMENTS

*See* 42 U.S.C. § 12101(b)(i); 42 U.S.C. § 12112(a); 42 U.S.C. § 12112(b)(5). This instruction is based upon Eleventh Circuit Civil Pattern Jury Instructions 4.11 ("Disparate-Treatment Claim") and 4.12 ("Reasonable Accommodation Claim") (2013). The instruction also conforms with *Weigel v. Target Stores*, 122 F.3d 461, 463-65 (7th Cir. 1997).

## 4.02 ELEMENTS OF AN ADA CLAIM—DISPARATE TREATMENT

To succeed in this case, Plaintiff must prove the following things by a preponderance of the evidence:

1. [Plaintiff had/Defendant regarded Plaintiff as having/Plaintiff had a record of] a disability. I will define "disability" and several other important terms for you later in these instructions;

2. Plaintiff was "qualified" to perform the job, with or without a reasonable accommodation;

3. Defendant [*adverse employment action*] Plaintiff; and

4. Defendant took this action on the basis of Plaintiff's disability [or need for accommodation], which does not mean that Plaintiff's disability [or need for accommodation] had to be the sole or primary cause for [*adverse employment action*].

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, you should turn to the issue of Plaintiff's damages. If you find that Plaintiff has failed to prove any of these things by a preponderance of the evidence, your verdict must be for Defendant.

### Committee Comments

**a. General authority.** Parts of this instruction are drawn from 42 U.S.C. § 12111(8) (definition of "qualified individual"). The instruction conforms with Seventh Circuit authority. *See, e.g.*, *Tonyan v. Dunham's Athleisure Corp.*, 966 F.3d 681, 687-88 (7th Cir. 2020); *Majors v. Gen. Elec. Co.*, 714 F.3d 527, 533-34 (7th Cir. 2013); *Hoffman v. Caterpillar, Inc.*, 256 F.3d 568, 572-76 (7th Cir. 2001); *see also* Eighth Circuit Manual of Model Civil Jury Instructions 9.40 ("Disparate Treatment (Actual Disability)") & 9.41 ("Disparate Treatment (Perceived Disability)") (2023); Ninth Circuit Manual of Model Civil Jury Instructions 12.1 ("ADA Employment Actions—Actual Disability—Elements") (2017); Eleventh Circuit Civil Pattern Jury Instructions 4.11 ("Disparate-Treatment Claim") (2013).

**b. Disparate treatment.** This instruction for disparate treatment cases is separate from a similar instruction for reasonable accommodation cases because in *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1283-84 (7th Cir. 1996), the Seventh Circuit explained that disparate treatment and reasonable accommodation claims must be "analyzed differently." *Accord Mlsna v. Union Pacific R.R. Co.*, 975 F.3d 629, 638 (7th Cir. 2020); *Foster v. Arthur Andersen LLP*, 168 F.3d 1029, 1032 (7th Cir. 1999); *Weigel v. Target Stores*, 122 F.3d 461, 464 (7th Cir. 1997).

**c. Causation.** The causation requirement in the fourth element is based on *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 958-62 (7th Cir. 2010) and *Bostock v. Clayton Cnty.*, 590 U.S. 644, 656 (2020).

Following the Supreme Court's fractured opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), that failed to settle whether the more lenient motivating-factor causation standard governs Title VII's disparate-treatment provision in lieu of but-for causation, Congress amended the law to resolve any ambiguity by permitting mixed-motive claims. *See* 42 U.S.C. § 2000e-2(m) ("[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."). The Seventh Circuit then applied the motivating-factor causation standard to ADA claims. *See Foster v. Arthur Andersen, LLP*, 168 F.3d 1029, 1033-34 (7th Cir. 1999); *McNutt v. Bd. of Trs. of Univ. of Ill.*, 141 F.3d 706, 707 (7th Cir. 1998); *Weigel v. Target Stores*, 122 F.3d 461, 465 (7th Cir. 1997).

More recently though, the Supreme Court rejected motivating-factor causation for age-discrimination and Title VII retaliation claims. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013). It emphasized that neither law used the words "motivating factor," and Congress altered the causation standard for disparate-treatment Title VII claims without adjusting any other antidiscrimination provision.

After *Gross* and *Nassar*, the Seventh Circuit reexamined its prior opinions and suggested, without holding, that ADA disparate-treatment claims require but-for causation. *See, e.g.*, *Serwatka*, 591 F.3d at 958; *McCann v. Badger Mining Corp.*, 965 F.3d 578, 588 n.46 (7th Cir. 2020) (whether the statute permits mixed-motive claims is technically an open question in the Seventh Circuit but "[t]here seems little doubt that our sister circuits' approach [finding that the ADAAA only allows but-for claims] is the correct one"). *See also Kurtzhals v. Cnty. of Dunn*, 969 F.3d 725, 728 (7th Cir. 2020) (discussing the ADA's change in statutory language from "because of" to "on the basis of," and stating: "Nearly 12 years later, it remains an open question in this circuit whether that change affects the 'but for' causation standard we apply in these cases." (citations omitted)); *A.H. by Holzmueller v. Ill. High Sch. Ass'n*, 881 F.3d 587, 593 (7th Cir. 2018) ("We have consistently held that the statutory language in both the Rehabilitation Act and the ADA requires proof of causation. As noted above, both statutes prohibit discrimination against individuals 'by reason of' the disability, or 'on the basis of' the disability. This language requires A.H. to prove 'that, 'but for' his disability, he would have been able to access the services or benefits desired.'") (internal citations omitted).

Four circuits have agreed in holdings. *Natofsky v. City of New York*, 921 F.3d 337, 349-50 (2d Cir. 2019) ("We conclude that 'on the basis of' in the ADA requires a but-for causation standard."); *Gentry v. E.W. Partners Club Mgmt. Co.*, 816 F.3d 228,

234 (4th Cir. 2016) ("The Supreme Court's analysis in Gross dictates the outcome here. The ADA's text does not provide that a plaintiff may establish liability by showing that disability was a motivating factor in an adverse employment decision."); *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 321 (6th Cir. 2012) ("*Gross* points the way. The ADEA and the ADA bar discrimination 'because of' an employee's age or disability, meaning that they prohibit discrimination that is a 'but-for' cause of the employer's adverse decision. The same standard applies to both laws." (cleaned up)); *Murray v. Mayo Clinic*, 934 F.3d 1101, 1106 n.6 (9th Cir. 2019) ("Title I of the ADA was amended in 2008 to prohibit discrimination 'on the basis of' disability, rather than 'because of' disability. We find no meaningful textual difference in the two phrases with respect to causation.").

Consistent with the Seventh Circuit's suggestion that the ADA's "on the basis of" standard means the same thing as the "because of" standard in Title VII and the ADEA, it is also appropriate to instruct the jury in accord with the Supreme Court's guidance regarding the "because of" standard in Title VII in *Bostock v. Clayton Cnty.*, 590 U.S. 644, 656 (2020). As the Court explained, but-for causation "can be a sweeping standard. Often, events have multiple but-for causes. So, for example, if a car accident occurred *both* because the defendant ran a red light *and* because the plaintiff failed to signal his turn at the intersection, we might call each a but for cause of the collision When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law." *Id.* at 656 (citations omitted).

*See* Ninth Circuit Manual of Model Civil Jury Instructions 10.3 ("Civil Rights—Title VII—Disparate Treatment—'Because of' Defined").

**d. Association with a person with a disability.** The ADA also prohibits discrimination on the basis of association with someone with a disability. If an associational discrimination claim is alleged, this instruction could be modified to reflect that the relationship with a person with a disability was the basis for the disparate treatment. *Magnus v. St. Mark United Methodist Church*, 688 F.3d 331, 337 (7th Cir. 2012) ("Although an employer does not have to accommodate an employee because of her association with a disabled person, the employer cannot terminate the employee for unfounded assumptions about the need to care for a disabled person.").

**e. Affirmative defense.** If the defendant has raised an affirmative defense to liability, a court may replace the final paragraph with the following language:

If you find that Plaintiff has failed to prove any of these things by a preponderance of the evidence, your verdict must be for Defendant. If you find that Plaintiff has proved each of these things by a preponderance of the evidence, you must

then consider Defendant's argument that [*describe affirmative defense*]. If Defendant has proved this by a preponderance of the evidence, your verdict must be for Defendant. If Defendant has not proved this by a preponderance of the evidence, you should turn to the issue of Plaintiffs damages.

The ADA specifically provides for the following affirmative defenses: direct threat, 42 U.S.C. § 12113(b); religious entity, 42 U.S.C. § 12113(d)(1); infectious or communicable disease, 42 U.S.C. § 12113(e)(2); illegal use of drugs, 42 U.S.C. § 12114(a); undue hardship, 42 U.S.C. § 12112(b)(5)(A); and employment qualification standard, test, or selection criterion that is job-related and consistent with business necessity, 42 U.S.C. § 12113(a).

## 4.03 ELEMENTS OF AN ADA CLAIM—CONSTRUCTIVE DISCHARGE

To succeed in this case, Plaintiff must prove the following things by a preponderance of the evidence:

1. [Plaintiff had/Defendant regarded Plaintiff as having/Plaintiff had a record of] a disability. I will define "disability" and several other important terms for you in a few minutes;

2. Plaintiff was "qualified" to perform the job, with or without a reasonable accommodation;

3. Plaintiff's working conditions were so intolerable that a reasonable person in [his/her] position would have had to quit or Defendant acted in a manner to communicate to a reasonable person that [he/she] would be terminated; and

4. Defendant caused Plaintiff's intolerable working conditions on the basis of Plaintiff's disability [or Defendant acted on the basis of Plaintiff's disability when Defendant communicated that Plaintiff would be terminated].

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, you should turn to the issue of Plaintiff's damages. If you find that Plaintiff has failed to prove any of these things by a preponderance of the evidence, your verdict must be for Defendant.

### Committee Comments

**a. General authority.** *Wright v. Ill. Dep't of Child. & Fam. Servs.*, 798 F.3d 513, 527 (7th Cir. 2015). Constructive discharge can come in one of two forms. *See id.*

> In the first form, an employee resigns due to alleged discriminatory harassment. Such cases require a plaintiff to show working conditions even more egregious than that required for a hostile work environment claim because employees are generally expected to remain employed while seeking redress, thereby allowing an employer to address a situation before it causes the employee to quit.

*Id.* (citation omitted). "The second form of constructive discharge occurs when an employer acts in a manner so as to have communicated to a reasonable employee that she will be terminated." *Id.* (quoting *Chapin v. Fort-Rohr Motors, Inc.*, 621 F.3d 673, 679 (7th Cir. 2010)) (cleaned up); *cf. Pa. State Police v. Suders*, 542 U.S. 129, 147 (2004); *Roby v. CWI, Inc.*, 579 F.3d 779, 785 (7th Cir. 2009); *Cigan v. Chippewa Falls Sch. Dist.*, 388 F.3d 331, 332-33 (7th Cir. 2004); *E.E.O.C. v. Univ. of Chi. Hosps.*, 276 F.3d 326, 331-32 (7th Cir. 2002). Constructive discharge "occurs when [a] plaintiff shows that he was forced to resign because his working conditions, from the

standpoint of the reasonable employee, had become unbearable." *Chapin v. Fort-Rohr Motors, Inc.*, 621 F.3d 673, 679 (7th Cir. 2010). Constructive discharge "requires evidence that quitting was the only way the plaintiff could extricate herself from the intolerable conditions." *Gawley v. Ind. Univ.*, 276 F.3d 301, 315 (7th Cir. 2001). "Whether the plaintiff's work environment meets that standard is determined from the viewpoint of a reasonable employee." *Saxton v. Am. Tel. & Tel. Co.*, 10 F.3d 526, 537 (7th Cir. 1993).

**b. Denial of a reasonable accommodation as a basis for constructive discharge.** In addition to the two forms of constructive discharge described above, the denial of an accommodation that makes an employee's working conditions intolerable may also support a constructive discharge instruction. *See E.E.O.C. v. Sears, Roebuck & Co.*, 233 F.3d 432, 440-41 (7th Cir. 2000) (assuming without deciding that in appropriate cases the denial of an accommodation could provide the basis for a constructive discharge claim).

The denial of an accommodation may, for example, result in a safety threat to the Plaintiff, which has long been a consideration in assessing a claim of constructive discharge. *Cf. Chapin v. Fort-Rohr Motors, Inc.*, 621 F.3d 673, 679-80 (7th Cir. 2010) ("egregious" working conditions that go beyond a hostile working environment and result in constructive discharge frequently include threats to personal safety) (citing *Porter v. Erie Foods, Int'l, Inc.*, 576 F.3d 629, 640 (7th Cir. 2009) (claim for constructive discharge possible where harassment included repeated use of noose and implied threats of physical violence)). Where the denial of an accommodation forms the basis for Plaintiff's constructive discharge claim, the court will want to add elements 3 and 4 from this instruction to Instruction 4.04.

## 4.04 ELEMENTS OF AN ADA CLAIM—REASONABLE ACCOMMODATION

In this case, Plaintiff claims that Defendant unlawfully refused to give [him/her] a "reasonable accommodation." To succeed, Plaintiff must prove the following things by a preponderance of the evidence:

1. Plaintiff had a disability. I will define "disability" and several other important terms for you later in these instructions;

2. Plaintiff was qualified to perform the job, with or without a reasonable accommodation;

3. Defendant was aware or should have been aware that Plaintiff needed an accommodation;

4. Defendant was aware or should have been aware of Plaintiff's disability at the time of Plaintiff's request or when Plaintiff's need for accommodation was obvious; and

5. Defendant failed to provide Plaintiff with a reasonable accommodation.

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, you should turn to the issue of Plaintiff's damages. If you find that Plaintiff has failed to prove any of these things by a preponderance of the evidence, your verdict must be for Defendant.

### Committee Comments

**a. General authority.** This instruction is drawn from 42 U.S.C. §§ 12111(9) and 12112(a), and from Ninth Circuit Manual of Model Civil Jury Instructions 12.9 (2017) ("ADA—Reasonable Accommodation"); Eleventh Circuit Civil Pattern Jury Instructions 4.12 (2013) ("Reasonable Accommodation Claim"); and Eight Circuit Manual of Model Civil Jury Instructions 9.42 (2023) ("Reasonable Accommodation"); *see also Youngman v. Peoria Cnty.*, 947 F.3d 1037, 1042 (7th Cir. 2020); *Rowlands v. United Parcel Service–Fort Wayne*, 901 F.3d 792, 798 (7th Cir. 2018).

**b. Employer's awareness of disability and need for accommodation**. If a disability and the need to accommodate it are obvious, the law does not always require an applicant or employee to expressly ask for a reasonable accommodation. *See Hedberg v. Ind. Bell Tel., Inc.*, 47 F.3d 928, 934 (7th Cir. 1995) ("[I]t may be that some symptoms are so obviously manifestations of an underlying disability that it would be reasonable to infer that an employer actually knew of the disability. . . . [D]eliberate ignorance [should not] insulate an employer from liability."); *see also Jovanovic v. In-Sink-Erator Div. of Emerson Elec. Co.*, 201 F.3d 894, 899 (7th Cir. 2000) ("[T]here will be exceptions to the general rule that an

employee must request an accommodation.") (citing *Bultemeyer v. Fort Wayne Cmty. Schs.*, 100 F.3d 1281, 1285 (7th Cir. 1996), and 29 C.F.R. § 1630.2(o)(3)); *see also Sandefur v. Dart*, 979 F.3d 1145, 1152-53 (7th Cir. 2020) ("[T]here is a line of cases under the ADA in which courts have held that an employer had a duty to consider whether an employee needed an accommodation even where the employee had not asked for one. The apparent tension between applying for a physically demanding job such as a police officer and using a handicapped parking placard based on an inability to walk without assistance might induce a reasonable employer to look into the matter." (citation omitted)).

Similarly, if the disability makes it difficult for the applicant or employee to communicate his/her needs, an employer must make a reasonable effort to understand those needs, even if they are not clearly communicated. For example, an employer cannot always expect a mentally disabled employee to know that he/she should ask for an accommodation. Instead, the employer should start communicating with an employee if it knows that he/she might be mentally disabled. *See Bultemeyer,* 100 F.3d at 1285-86; *Jovanovic v. In-Sink-Erator Div.*, 201 F.3d at 899; *Hedberg v. Ind. Bell. Tel.*, 47 F.3d at 934 & n.7; 29 C.F.R. § 1630.2(o)(3). *See also Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 315 (3d Cir. 1999) ("Another reason for placing some burden on the employer is that, as the Seventh Circuit recognized in *Bultemeyer*, an employee with a mental illness may have difficulty effectively relaying medical information about his or her condition, particularly when the symptoms are flaring and reasonable accommodations are needed.").

Once the employer is aware of the possible need for an accommodation, it must discuss that possibility with the applicant or employee as part of an interactive process. *Igasaki v. Ill. Dep't of Fin. & Pro. Regul.*, 988 F.3d 948, 961 (7th Cir. 2021); *Hansen v. Henderson*, 233 F.3d 521, 523 (7th Cir. 2000); *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996). *See also* Instruction 4.08, comment b. An applicant or employee, however, need not discuss a disability with an employer until he/she needs a reasonable accommodation.

In all of the circumstances described in this comment, a court may need to tailor the language of the elements instruction to take account of a case's particular facts.

**c. Affirmative defense.** If the defendant has raised an affirmative defense to liability, a court may replace the final paragraph with the following language:

If you find that Plaintiff has failed to prove any of these things by a preponderance of the evidence, your verdict must be for Defendant. If you find that Plaintiff has proved each of these things by a preponderance of the evidence, you must then consider Defendant's argument that [*describe affirmative defense*]. If Defendant has proved this by a preponderance of the evidence, your verdict must be for

Defendant. If Defendant has not proved this by a preponderance of the evidence, you should turn to the issue of Plaintiff's damages.

The ADA specifically provides for the following affirmative defenses: direct threat, 42 U.S.C. § 12113(b); religious entity, 42 U.S.C. § 12113(d)(1); infectious or communicable disease, 42 U.S.C. § 12113(e)(2); illegal use of drugs, 42 U.S.C. § 12114(a); undue hardship, 42 U.S.C. § 12112(b)(5)(A); and employment qualification standard, test or selection criterion that is job-related and consistent with business necessity, 42 U.S.C. § 12113(a).

## 4.05—DEFINITION OF "DISABILITY"

Under the ADA, an individual has a "disability" if they:

1. Have a physical or mental impairment that substantially limits one or more major life activities;

2. Have a record of such an impairment; or

3. Are regarded as having an actual or perceived physical or mental impairment, whether or not the impairment is perceived to limit a major life activity.

In considering whether Plaintiff has a disability, disability shall be construed broadly in favor of expansive coverage. The primary object of attention in this case is whether Defendant complied with their obligations and whether discrimination has occurred, not whether the Plaintiff meets the definition of disability.

[[*Activity at issue*] is a major life activity.] / [Plaintiff claims that [*activity at issue*] is a major life activity. You must decide whether it is. "Major life activities" include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The term also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.). An impairment is a disability if it would substantially limit even one major life activity.]

In determining whether [*Plaintiff's claimed impairment*] is substantially limiting, you should compare Plaintiff's performance of [*activity at issue*] to the performance of [*activity at issue*] by the general population. Among the factors you may consider are the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time in which/for which a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function. An impairment need not prevent, or significantly or severely restrict, Plaintiff from performing [*major life activity*] to be considered substantially limiting.

[*Episodic impairment:* If Plaintiff's impairment is not always a problem but flares up from time to time, it is a disability if it substantially limits a major life activity when active.]

[*Temporary Impairment: Where an employee alleges an actual disability or a record of a disability, the court may instruct the jury that:* There is no duration requirement for an impairment to be a disability. A temporary impairment may be a disability if it substantially limits a major life activity.]

[*Mitigating measures:* To decide whether [*Plaintiff's claimed impairment*] substantially limits [his/her] ability to [*activity at issue*], it does not matter that [his/her] [*claimed impairment*] can be corrected by using [*describe applicable mitigating measure*]. [But you can consider whether Plaintiff's eyesight could be corrected by using ordinary eyeglasses or contact lenses.]]

[*Record of such impairment:* Plaintiff can also show that [he/she] has a disability by proving that [he/she] had a record of such an impairment. Plaintiff has a record of such an impairment if the individual has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population or was misclassified as having had such an impairment.]

[*Regarded as having such an impairment:* Plaintiff can also show that [he/she] has a disability by showing that [he/she] was regarded as having such an impairment. Plaintiff was regarded as having such an impairment if Plaintiff establishes that [he/she] was subjected to discrimination because of an actual or perceived physical or mental impairment—even if the actual or perceived impairment did not substantially limit a major life activity and even if Defendant did not think the actual or perceived impairment substantially limited a major life activity. [However, Plaintiff was not regarded as having such an impairment if you find that Defendant believed [he/she] did not have the impairment at the time of the [*alleged act of discrimination*].] [Plaintiff cannot be regarded as having such an impairment if the impairment is transitory and minor, meaning that it is expected to last six months or less.]

**Committee Comments**

**a. Format.** The basic format for this instruction is taken from the Eleventh Circuit Civil Pattern Jury Instructions 4.11 ("Disparate-Treatment Claim") (2013).

**b. Statutory and regulatory definitions.** Statutory and regulatory definitions of various terms used in this instruction, including "disability" and "major life activity," are found at 42 U.S.C. § 12102 and 29 C.F.R. § 1630.2.

**c. Physical or mental impairment.** 29 C.F.R. § 1630.2(h) defines "physical impairment" as "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine," and "mental impairment" as "any mental or psychological disorder, such as an intellectual disability (formerly termed "mental retardation"), organic brain syndrome, emotional or mental illness, and specific learning disabilities." The Committee suggests that these definitions be used, as applicable, to help a jury in resolving a dispute regarding whether a physical or mental impairment exists.

**d. Medical evidence.** The court may add the following language where the Plaintiff is not presenting medical evidence:

Medical evidence is not necessary to establish a disability. An individual's testimony about their injury or illness and how it affects their life may be sufficient to establish that the individual has a disability.

*E.E.O.C. v. AutoZone, Inc.*, 630 F.3d 635, 643-44 (7th Cir. 2010) ("We do not read either the statute or our prior case law as imposing a requirement that the plaintiff provide medical testimony in all cases, or in this one." Expert testimony is not necessary where "a lay-person can understand an injury or condition.").

**e. Episodic impairment.** *Gogos v. AMS Mechanical Systems*, 737 F.3d 1170, 1172-73 (7th Cir. 2013) (holding that episodic and short-term disabilities can be covered under the ADA); *E.E.O.C. v. AutoZone, Inc.*, 630 F.3d 635, 642-43 (7th Cir. 2010) (holding a reasonable jury could find substantially limiting condition that was episodic but permanent).

**f. Temporary impairment.** *Sneed v. City of Harvey, Ill.*, 598 Fed. Appx. 442, 446 (7th Cir. 2015) (temporary condition may qualify as a disability). The court stated that the plaintiff's "PTSD might have constituted a physical or mental impairment that substantially limited a major life activity even though the condition was temporary . . . ." *Id.*

**g. Regarded as having such an impairment.** *See* 42 U.S.C. § 12102(3); 29 C.F.R. § 1630.2(g)(1)(iii); *Shell v. Burlington N. Santa Fe Ry. Co.*, 941 F.3d 331, 336-37 (7th Cir. 2019). For the sixth-month requirement, see 42 U.S.C. § 12102(3)(B).

## 4.06 DEFINITION OF "QUALIFIED"

Under the ADA, Plaintiff was "qualified" if [he/she] had the skill, experience, education, and other requirements for the job and could do the job's essential functions, either with or without reasonable accommodation. You should only consider Plaintiff's ability at the time when [*employment decision*].

Not all job functions are "essential." Essential functions are a job's fundamental duties. In deciding whether a function is essential, you may consider the reasons the job exists, the number of employees Defendant has to do that kind of work, the degree of specialization the job requires, Defendant's judgment about what is required, the consequences of not requiring an employee to satisfy that function, the amount of time spent performing the functions, and the work experience of others who held the position.

Although the employer's judgment is an important factor, it is not controlling. You should also consider the employer's actual practice in the workplace.

[In addition to specific job requirements, an employer may have general requirements for all employees. [For example, the employer may expect employees to refrain from abusive or threatening conduct toward others or may require a regular level of attendance.] In evaluating these general requirements, you may consider whether the general rule is consistently enforced and the consequences of relaxing the requirement.]

### Committee Comments

**a. General authority.** *See* 42 U.S.C. §§ 12111(8) (definition of "qualified individual with a disability") and 12111 (employment-related definitions); 29 C.F.R. Pt. 1630, App. § 1630.2(m) (qualified individual).

**b. Skill, experience, education.** *See Ozlowski v. Henderson*, 237 F.3d 837, 841 (7th Cir. 2001) (citing 29 C.F.R. Pt. 1630, App.); *Bay v. Cassens Transp. Co.*, 212 F.3d 969, 973-74 (7th Cir. 2000); *Haschmann v. Time Warner Ent. Co.*, 151 F.3d 591, 599 (7th Cir. 1998); *Dalton v. Subaru-Isuzu Auto., Inc.*, 141 F.3d 667, 676 (7th Cir. 1998) (citing *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 563 (7th Cir. 1996), and 29 C.F.R. Pt. 1630, App. § 1630.2(m)); *Duda v. Bd. of Educ. of Franklin Park*, 133 F.3d 1054, 1058-59 (7th Cir. 1998); *Bultemeyer v. Fort Wayne Cmty. Schs.*, 100 F.3d 1281, 1284-85 (7th Cir. 1996).

**c. Time of relevant employment decision.** *See Ammons v. Aramark Uniform Servs., Inc.*, 368 F.3d 809, 818 (7th Cir. 2004); *Bay v. Cassens Transp. Co.*, 212 F.3d 969, 974 (7th Cir. 2000) ("Whether or not an individual meets the definition of a qualified individual with a disability is to be determined as of the time the employment decision was made.") (citing *Weiler v. Household Fin. Corp.*, 101 F.3d 519, 524 (7th Cir. 1996)).

**d. Determining essential job functions.** *See* 42 U.S.C. § 12111(8); 29 C.F.R. Pt. 1630, App. § 1630.2(n)(3); *Winfrey v. City of Chicago*, 259 F.3d 610, 615-17 (7th Cir. 2001); *Ozlowski v. Henderson*, 237 F.3d 837, 841 (7th Cir. 2001); *Hansen v. Henderson*, 233 F.3d 521, 523-24 (7th Cir. 2000); *Malabarba v. Chi. Trib. Co.*, 149 F.3d 690, 700 (7th Cir. 1998); *Duda v. Bd. of Educ. of Franklin Park*, 133 F.3d 1054, 1058-59 (7th Cir. 1998); *Miller v. Ill. Dep't of Corr.*, 107 F.3d 483, 485 (7th Cir. 1997); *Cochrum v. Old Ben Coal Co.*, 102 F.3d 908, 912 (7th Cir. 1996). Under 29 C.F.R. § 1630.2(n)(3), evidence of whether a particular function is essential can include—but is not limited to—the employer's own judgment about which functions are essential; a job description written before the employer advertised or interviewed applicants for the job; how much time was spent on the job performing the function; the consequences of not requiring the person in the job to perform the function; the terms of a union contract, if there was one; the work experience of employees who held the job in the past; and the current work experience of persons holding similar jobs. *See Winfrey*, 259 F.3d at 615-17 (showing that not all employees perform at a particular time all the essential job functions does not make those functions non-essential); *Malabarba*, 149 F.3d at 700 (same); *Miller*, 107 F.3d at 485 ("[I]f an employer has a legitimate reason for specifying multiple duties for a particular job classification, duties the occupant of the position is expected to rotate through, a disabled employee will not be qualified for the position unless he can perform enough of these duties to enable a judgment that he can perform its *essential* duties."); *Shell v. Smith*, 789 F.3d 715, 718 (7th Cir. 2015); *Brown v. Smith*, 827 F.3d 609, 614 (7th Cir. 2016) (finding federal regulations include consideration of time spent performing function in determining if a function is essential); *E.E.O.C. v. United Airlines, Inc.*, 693 F.3d 760, 762-63 (7th Cir. 2012) (disability-neutral rules do not create an exemption to the accommodation requirements of the ADA).

**e. General job requirements.** The optional language in brackets about general job requirements conforms with *Taylor-Novotny v. Health All. Med. Plans, Inc.*, 772 F.3d 478, 489 (7th Cir. 2014) (holding "an employer is generally permitted to treat regular attendance as an essential job requirement and need not accommodate erratic or unreliable attendance." (citation omitted)). *See also Palmer v. Cir. Ct. of Cook Cnty.*, 117 F.3d 351, 352 (7th Cir. 1997) ("The Act protects only 'qualified' employees, that is, employees qualified to do the job for which they were hired; and threatening other employees disqualifies one."); *Bilinsky v. Am. Airlines, Inc.*, 928 F.3d 565, 570 (7th Cir. 2019) (warning that although an employer's judgment is an important factor in determining essential functions, "it is not controlling"). As with essential functions, an employer must demonstrate its actual practice as to these requirements and then reasonable accommodations must be considered.

**f. Revisions for cases involving "regarded as" disability.** Because a "regarded as" disability cannot provide a basis for a reasonable accommodation claim, it may be appropriate to remove the reference to a reasonable accommodation in the

definition of "qualified individual." 42 U.S.C. §12201(h); Third Circuit Model Civil Jury Instructions 9.2.1 & 9.2.2 (2024).

**g. Employer's judgment.** *Stern v. St. Anthony's Health Ctr.*, 788 F.3d 276, 285-86 (7th Cir. 2015) ("[T]he employer's judgment is an important factor, but it is not controlling. . . . [W]e also look to evidence of the employer's actual practices in the workplace."); *DePaoli v. Abbott Lab'ys*, 140 F.3d 668, 674 (7th Cir. 1998) (noting that while "we do not otherwise second-guess the employer's judgment in describing the essential requirements for the job," we do look to see if "the employer actually requires all employees in a particular position to perform the allegedly essential functions.").

## 4.07 REASONABLE ACCOMMODATION: GENERAL INSTRUCTION

The ADA requires an employer to make reasonable accommodations for an [employee/applicant] with a disability [absent an undue hardship on the employee's operations].

A reasonable accommodation is any change in the work environment or in the way things are customarily done that [enables an individual with a disability who is qualified to perform the essential functions of that position] [enables a qualified applicant with a disability to be considered for the position or allows an employee with a disability to enjoy the same benefits and privileges as a similarly situated employee without a disability.]

A reasonable accommodation may include, but is not necessarily limited to:

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

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

[The fact that an accommodation would provide a "preference"—in the sense that it would permit the worker with a disability to violate a rule that others must obey—does not mean the accommodation is not "reasonable."]

### Committee Comments

42 U.S.C. § 12111(9); 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.2(o)(1)(ii).

*E.E.O.C. v. Charter Commc'ns, LLC*, 75 F.4th 729, 734-35 (7th Cir. 2023); *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 784 (7th Cir. 2002) (citations omitted); *Hart v. Prestress Servs. Indus.*, *LLC*, 2020 WL 1033302, * 4 (N.D. Ind. Mar. 2, 2020).

## 4.07A REASONABLE ACCOMMODATION: SUPPLEMENTAL INSTRUCTION FOR SPECIFIC ACCOMMODATION ISSUES

*(a) Choice between alternate accommodations*

The ADA does not entitle Plaintiff to the accommodation of [his/her] choice. Rather, the law entitles [him/her] to a reasonable accommodation in view of [his/her] disability and Defendant's needs.

The ADA requires Defendant to engage with Plaintiff in an interactive process in order to determine the appropriate accommodation under the circumstances. The interactive process imposes a duty upon Defendant to engage in a flexible process with Plaintiff so that, together, they might identify Plaintiff's precise limitations and discuss accommodations which might enable Plaintiff to continue working.

Although Defendant should consider Plaintiff's request for a particular accommodation, it is the Defendant's prerogative to choose a reasonable accommodation so long as the accommodation is equally effective.

*(b) Effect of continuing duty; past attempts to accommodate*

Defendant's duty to provide a reasonable accommodation is a continuing duty. You must evaluate the reasonableness of Plaintiff's accommodation at the time that Plaintiff requested an accommodation or when the need for an accommodation was apparent or should have been apparent to Defendant.

*(c) Reassignment as a reasonable accommodation*

The ADA may require Defendant to reassign Plaintiff to a different position as a reasonable accommodation where Plaintiff can no longer perform the essential functions of [his/her] current position.

However, Defendant is not required to create a new job or to give a promotion to Plaintiff.

*(d) Reassignment where there is a union contract or seniority system*

An accommodation is not reasonable if it conflicts with an established seniority system, unless Plaintiff proves by a preponderance of the evidence that "special circumstances" make an exception reasonable. For example, an exception might be reasonable if exceptions were often made to the seniority policy. Another example might be where the seniority system already contains its own exceptions so that, under the circumstances, one more exception is not significant.

*(e) Reallocating job duties*

A reasonable accommodation may include transferring Plaintiff's non-essential job duties to another employee. However, Defendant does not have to transfer essential job duties to comply with the ADA.

(f) *Intermittent time off or a leave of absence*

Intermittent time off from work or a limited leave of absence may be a reasonable accommodation.

(g) *Work from home or remote work*

Work from home or remote work may be a reasonable accommodation depending on a context specific inquiry.

**Committee Comments**

*Rehling v. City of Chicago*, 207 F.3d 1009, 1014 (7th Cir. 2000); *Ford v. Marion Cnty. Sheriff's Off.*, 942 F.3d 839, 861 (7th Cir. 2019); *E.E.O.C. v. Sears, Roebuck & Co.*, 417 F.3d 789, 802 (7th Cir. 2005); *Hendricks–Robinson v. Excel Corp.*, 154 F.3d 685, 693 (7th Cir. 1998); *Stern v. St. Anthony's Health Ctr.*, 788 F.3d 276, 291 (7th Cir. 2015); *US Airways, Inc. v. Barnett*, 535 U.S. 391, 394 (2002); *Tate v. Dart*, 51 F.4th 789, 798 (7th Cir. 2022); *Dunderdale v. United Airlines, Inc.*, 807 F.3d 849, 854 (7th Cir. 2015); *Eckles v. Consol. Rail Corp.*, 94 F.3d 1041, 1051 (7th Cir. 1996).

> If more than one of these accommodations will enable the individual to perform the essential functions or if the individual would prefer to provide his or her own accommodation, the preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.

29 C.F.R. Pt. 1630, App. § 1630.9, Process of Determining a Reasonable Accommodation.

An accommodation to telework requires a context-specific inquiry, and a "general consensus [exists] among courts" that jobs "often require face-to-face collaboration." *See Bilinsky v. Am. Airlines, Inc.*, 928 F.3d 565, 573 (7th Cir. 2019); *Yochim v. Carson*, 935 F.3d 586, 592 (7th Cir. 2019).

> We offer a note of caution to future ADA litigants. We once said that "[a]n employer is not required to allow disabled workers to work at home, where their productivity inevitably would be greatly reduced. . . .

> [I]t would take a very extraordinary case for the employee to be able to create a triable issue of the employer's failure to allow the employee to work at home." *Vande Zande v. State of Wis. Dep't of Admin.*, 44 F.3d 538, 545 (7th Cir. 1995). But we also acknowledged that "[t]his will no doubt change as communications technology advances." *Id.* at 544. Technological development and the expansion of telecommuting in the twenty-four years since *Vande Zande* likely mean that such an accommodation is not quite as extraordinary as it was then. That inquiry is context-specific; a work-from-home arrangement might be reasonable for a software engineer but not for a construction worker.
>
> "[T]here is general consensus among courts . . . that regular work-site attendance is an essential function of most jobs." *Credeur v. Louisiana*, 860 F.3d 785, 793 (5th Cir. 2017) (collecting cases). The position's nature will often require face-to-face collaboration. *EEOC v. Yellow Freight Sys., Inc.*, 253 F.3d 943, 948 (7th Cir. 2001) (en banc). But not in every instance. *See, e.g.*, *Mosby-Meachem v. Memphis Light, Gas & Water Div.*, 883 F.3d 595, 603-05 (6th Cir. 2018).

*Bilinsky v. Am. Airlines, Inc.*, 928 F.3d 565, 573 (7th Cir. 2019), as amended (Aug. 9, 2019). *See id.* ("Here, the parties agree that telecommuting was reasonable for years before intervening events transformed Bilinsky's duties so that physical presence became an essential function of her job. Litigants (and courts) in ADA cases would do well to assess what's reasonable under the statute under current technological capabilities, not what was possible years ago.").

## 4.08 INTERACTIVE PROCESS

Once an employer is aware of an [employee's/applicant's] disability and an accommodation has been requested, the employer is to discuss with the [employee/applicant] [or, if necessary, with [his/her] doctor] whether there is a reasonable accommodation that will permit them to perform the essential functions of the job.

An employee is not required to use any specific language to initiate the discussion. Both the employer and the [employee/applicant] must cooperate in this interactive process in good faith.

Neither party can win this case simply because the other did not cooperate in this process, but you may consider whether a party cooperated in this process when deciding whether [[a reasonable accommodation existed] [to award punitive damages]].

[Where the employer has authorized an agent to act on its behalf in communicating with an employee or applicant, information collected by the agent can be attributed to the employer, which means that the employer can be held responsible for knowing the information because they had the opportunity to be aware of it, regardless of whether they actually knew it or not.]

[An agent is a person who performs services for another person under an express or implied agreement and who is subject to the other's control or right to control the manner and means of performing the services. The other person is called a principal. [One may be an agent without receiving compensation for services.] [The agency agreement may be oral or written.]]

### Committee Comments

**a. Usage.** Courts should use this instruction only in cases where the "interactive process" is at issue. The instruction conforms with *Hansen v. Henderson*, 233 F.3d 521, 523 (7th Cir. 2000); *Rehling v. City of Chicago*, 207 F.3d 1009, 1015 (7th Cir. 2000); *Bultemeyer v. Fort Wayne Cmty. Schs.*, 100 F.3d 1281, 1285-86 (7th Cir. 1996); *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996); 29 C.F.R. § 1630.2(o)(3); 29 C.F.R. Pt. 1630.2, App. § 1630.9. It was most recently held to be a proper instruction by *Sansone v. Brennan*, 917 F.3d 975, 979-80 (7th Cir. 2019). By itself, the interactive process requirement is not an element of an ADA claim, and "a plaintiff cannot base a reasonable accommodation claim solely on the allegation that the employer failed to engage in an interactive process." *Rehling v. City of Chicago*, 207 F.3d at 1016; *see also Stern v. St. Anthony's Health Ctr.*, 788 F.3d 276 (7th Cir. 2015). "[T]he interactive process is a means and not an end in itself." *Rehling v. City of Chicago*, 207 F.3d at 1016 (quoting *Sieberns v. Wal-Mart Stores, Inc.*, 125 F.3d 1019, 1023 (7th Cir. 1997)); *Williams v. Bd. of Educ. of City of Chi.*, 982 F.3d 495, 503-05 (7th Cir. 2020), *petition for reh'g denied*, 2021 U.S. App. LEXIS 446

(7th Cir. 2021). *See also Basden v. Pro. Transp.*, 714 F.3d 1034, 1039 (7th Cir. 2013) (holding employer not liable, even though it did not engage in interactive process because employee did not show requested accommodation would have allowed performance of essential functions of job). Nonetheless, the Seventh Circuit has made it clear that "[t]he appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability." *Bultemeyer v. Fort Wayne Cmty. Schs.*, 100 F.3d at 1285-86 (citing 29 C.F.R. Pt.1630, App.; *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d at 1135).

**b. Mutual obligation.** *Yochim v. Carson,* 935 F.3d 586, 590 (7th Cir. 2019) ("The accommodation obligation . . . brings with it a requirement that both the employer and the employee engage in a flexible 'interactive process' and make a 'good faith effort' to determine what accommodations are necessary.") (citing *Lawler v. Peoria Sch. Dist. No. 150*, 837 F.3d 779, 786 (7th Cir. 2016)).

**c. Employer's awareness of disability.** In the unusual case where an employer contends that it was not aware of a disability, and the plaintiff alleges that the employer knew or should have known, the court should consider adding the following language to the instruction:

If the employer has reason to know that the [applicant/employee] has a disability and the [applicant/employee] is having problems [at work/applying for the job] because of the disability, it must engage in discussions with [him/her] and, if necessary, with [his/her] doctor, to decide if he is actually disabled.

**d. Role of agents.** Because many employers rely on third parties to engage in communication with their employees and applicants, the instruction includes optional language to clarify that the employer is responsible for the knowledge of those agents. This is consistent with the statutory definition of an employer in the ADA. 42 U.S.C. § 12111(5).

**e. Futile gesture.** In appropriate cases, the court may include a "futile gesture" instruction as follows:

An [employee/applicant] is not required to request accommodation for a disability or otherwise demonstrate that the employer is on notice of the need for accommodation if the [employee/applicant] demonstrates that the employer had a policy of not providing accommodation, or not allowing the particular form of accommodation the [employee/applicant] needed.

*Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 365-66 (1977) ("A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection. . . . When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through

the motions of submitting an application."); *Davoll v. Webb*, 194 F.3d 1116, 1133 (10th Cir. 1999) ("The logic of *Teamsters* similarly applies to ADA cases in which an employer has a set policy against a particular type of reasonable accommodation, or against such accommodation generally.").

For further elaboration on the importance of a Defendant's awareness a Plaintiff's disability, see Instruction 4.04, comment b.

## 4.09 UNDUE HARDSHIP DEFENSE

Under the ADA, Defendant does not need to accommodate Plaintiff if it would cause an "undue hardship" to its business. An "undue hardship" is something too costly or something that is so disruptive that it would fundamentally change the nature of Defendant's business or how Defendant runs its business.

The Defendant bears the burden of proof, which means that Defendant must prove to you by a preponderance of the evidence that Plaintiff's proposed accommodation would be an "undue hardship." In deciding this issue, you should consider the following factors:

1. The nature and cost of the accommodation;

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

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

4. The way that Defendant conducts its operations. This might include the composition and functions of its workforce structure; the geographic location of its facility where the accommodation would be made compared to Defendant's other facilities; and the administrative or fiscal relationship between these facilities and the Defendant's other facilities.

### Committee Comments

**a. General authority.** This instruction is derived from Eighth Circuit Manual of Model Civil Jury Instructions 9.60 (2023) ("'Undue Hardship'—Statutory Defense") and Ninth Circuit Manual of Model Civil Jury Instructions 12.10 (2017) ("Undue Hardship"), which, in turn, conform to 42 U.S.C. §§ 12111(9) and (10), 29 C.F.R. § 1630.2(p), 29 C.F.R. Pt. 1630, App. § 1630.2(p), *US Airways, Inc. v. Barnett*, 535 U.S. 391, 403-04 (2002). The instruction also conforms to 42 U.S.C. § 12112(b)(5)(A); *Hoffman v. Caterpillar, Inc.*, 256 F.3d 568, 577 (7th Cir. 2001); *Malabarba v. Chi. Trib. Co.*, 149 F.3d 690, 699 (7th Cir. 1998); *Baert v. Euclid Beverage Co.*, 149 F.3d 626, 633 (7th Cir. 1998); *Gile v. United Airlines, Inc.*, 95 F.3d 492, 499 (7th Cir. 1996); *Miranda v. Wis. Power & Light Co.*, 91 F.3d 1011, 1016-17 (7th Cir. 1996); *Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538, 542-43 (7th Cir. 1995); 29 C.F.R. § 1630.9(a). See more recent discussion about an undue hardship jury instruction in *E.E.O.C. v. Wal-Mart Stores*, 503 F. Supp. 3d 801, 811-12 (W.D. Wis. 2020).

**b. Regulatory guidance.** The regulations provide additional guidance that may be appropriate to share with the jury in certain cases. For example, with regard to factor 1, the regulations explain that the nature and cost of the accommodation, include "taking into consideration the availability of tax credits and deductions, and/or outside funding." 29 C.F.R. § 1630.2(p)(2)(i).

**c. Relationship to determination of accommodation's reasonableness.** *See also Conners v. Wilkie*, 984 F.3d 1255, 1260-61 (7th Cir. 2021).

**d. Consideration of the cost of accommodation as an element of undue hardship.** Whether the cost of a reasonable accommodation imposes an undue hardship depends on the employer's resources, not on the individual's salary, position, or status (*e.g.*, full-time versus part-time, salary versus hourly wage, permanent versus temporary). The ADA's definition of undue hardship does not include any consideration of a cost-benefit analysis. *See* 42 U.S.C. § 12111(10); *see also* H.R. Rep. No. 101-485, pt. 2, at 69 ("[T]he committee wishes to make clear that the fact that an accommodation is used by only one employee should not be used as a negative factor counting in favor of a finding of undue hardship."). Furthermore, the House of Representatives rejected a cost-benefit approach by defeating an amendment which would have presumed undue hardship if a reasonable accommodation cost more than 10% of the employee's annual salary. *See* 136 Cong. Rec. H2475 (1990); *see also* H.R. Rep. No. 101-485, pt. 3, at 41; 29 C.F.R. Pt. 1630, App. § 1630.15(d).

## 4.10 DIRECT THREAT DEFENSE

In this case, Defendant says that it [did not accommodate/did not hire/fired] Plaintiff because [accommodating/hiring/retaining] [him/her] would have created a significant risk of substantial harm to [Plaintiff and/or others in the workplace]. [Defendant must have based this decision on a reasonable medical judgment that relied on [[the most current medical knowledge] [the best available objective evidence]] about whether Plaintiff could safely perform the essential functions of the job at the time.] If Defendant proves this to you by a preponderance of the evidence, you must find for Defendant.

In deciding if this is true, you should consider the following factors: (1) how long the risk will last; (2) the nature and severity of the potential harm; (3) how likely it is that the harm will occur; and (4) whether the potential harm is likely to occur in the near future.

Defendant must prove that there was no reasonable accommodation that it could make which would eliminate the risk or reduce it so that it was no longer a significant risk of substantial harm.

### Committee Comments

The format of the instruction is taken from Eighth Circuit Manual of Model Civil Jury Instructions 9.61 (2023) ("'Direct Threat'—Statutory Defense") and Ninth Circuit Manual of Model Civil Jury Instructions 12.12 (2017) ("Defenses—Direct Threat"). The instruction conforms with 42 U.S.C. § 12111(3) (definition of direct threat), 42 U.S.C. § 12113(b) (a qualification standard can include a condition that a person not pose a direct threat), and *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 84-87 (2002) ("direct threat" includes a threat to the employee himself). *See also Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273 (1987) (criteria for direct threat under analogous Rehabilitation Act of 1973); *Emerson v. N. States Power Co.*, 256 F.3d 506, 513-14 (7th Cir. 2001); *Pontinen v. U.S. Steel Corp.*, 26 F.4th 401, 405-07 (7th Cir. 2022); *Felix v. Wis. Dep't of Transp.*, 828 F.3d 560, 569-70 (7th Cir. 2016); *Stragapede v. City of Evanston, Ill.*, 865 F.3d 861, 866-67 (7th Cir. 2017); *Bekker v. Humana Health Plan, Inc.*, 229 F.3d 662, 671-72 (7th Cir. 2000); *E.E.O.C. v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1283-84 (7th Cir. 1995).

As to the burden of proof, see *Pontinen*, 26 F.4th at 406; *Branham v. Snow*, 392 F.3d 896, 905-07 (7th Cir. 2004).

As to the distinction between job "qualification standards" and the direct threat defense, see *Felix*, 828 F.3d at 569.

The court may also wish to review 29 C.F.R. Pt. 1630(r), App. for helpful interpretive guidance.

## 4.11 DAMAGES—BACK PAY

[See Instruction 3.19.]

### Committee Comments

Damages instructions are not distinct among Title VII and the ADA because the law is the same. *See* 42 U.S.C. §§ 1981a(a)(1), 1981a(b) (Title VII plaintiff "may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964"); 42 U.S.C. §§ 1981a(a)(2), 1981a(b); 42 U.S.C. § 12117(a) (same as to ADA plaintiff).

## 4.12 DAMAGES—MITIGATION

[See Instruction 3.20.]

### Committee Comments

Damages instructions are not distinct among Title VII and the ADA because the law is the same. *See* 42 U.S.C. §§ 1981a(a)(1), 1981a(b) (Title VII plaintiff "may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964"); 42 U.S.C. §§ 1981a(a)(2), 1981a(b); 42 U.S.C. § 12117(a) (same as to ADA plaintiff).

## 4.13 COMPENSATORY DAMAGES

[See Instruction 3.18.]

### Committee Comments

Damages instructions are not distinct among Title VII and the ADA because the law is the same. *See* 42 U.S.C. §§ 1981a(a)(1), 1981a(b) (Title VII plaintiff "may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964"); 42 U.S.C. §§ 1981a(a)(2), 1981a(b); 42 U.S.C. § 12117(a) (same as to ADA plaintiff).

## 4.14 PUNITIVE DAMAGES

[See Instruction 3.21.]

### Committee Comments

Damages instructions are not distinct among Title VII and the ADA because the law is the same. *See* 42 U.S.C. §§ 1981a(a)(1), 1981a(b) (Title VII plaintiff "may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964"); 42 U.S.C. §§ 1981a(a)(2), 1981a(b); 42 U.S.C. § 12117(a) (same as to ADA plaintiff).

## 4.15 SPECIAL VERDICT FORM—REASONABLE ACCOMMODATION CLAIM

1. Did Plaintiff have a disability? Answer Yes or No.

(If you answered "Yes," answer Question 2; otherwise, sign, and return this verdict form)

2. Was Plaintiff qualified to perform [his/her job] [the job he/she sought]? Answer Yes or No.

(If you answered "Yes," then answer Question 3; otherwise, sign and return this verdict form.)

3. Did Plaintiff request an accommodation? Answer Yes or No.

(If you answered "Yes," then answer Question 4; otherwise, sign and return this verdict form.)

4. Was Defendant aware of Plaintiff's disability at the time of Plaintiff's request? Answer Yes or No.

(If you answered "Yes," then answer Question 5; otherwise, sign and return this verdict form.)

5. Did Defendant fail to provide Plaintiff with a reasonable accommodation? Answer Yes or No.

(If you answered "Yes," then answer Question 6; otherwise, sign and return this verdict form.)

6. Would giving Plaintiff a reasonable accommodation have been an undue hardship on Defendant's business? Answer Yes or No.

(If you answered "Yes," sign and return this verdict form; otherwise, answer Question 7.)

7. Has Plaintiff suffered a net loss of wages and benefits as a result of [*adverse action*]? Answer Yes or No.

(If you answered "Yes," then answer Question 8; otherwise sign, and return this verdict form.)

8. What was the net amount of wages and benefits that Plaintiff lost up to the time of trial? Answer: $

(Answer Question 9.)

9. Has Plaintiff suffered emotional pain and mental anguish as a result of [*adverse action*]? Answer Yes or No.

(If you answered "Yes," then answer Question 10; if you answered "No," then answer Question 11.)

10. What amount will fairly compensate Plaintiff for his emotional pain and mental anguish as a result of [*adverse action*]? Answer: $

(Answer Question 11.)

11. Did [Name] act with reckless disregard of Plaintiff's rights under ADA? Answer Yes or No.

(If you answered "Yes," then answer Question 12; otherwise, sign and return this verdict form.)

12. Did Defendant act in good faith to attempt to comply with ADA by implementing policies and procedures to prohibit discrimination in violation of ADA? Answer Yes or No.

(If you answered "Yes," sign and return this verdict form; otherwise, answer Question 13.)

13. What amount of punitive damages, if any, should be assessed against Defendant? Answer: $

**Committee Comments**

**a. Scope.** This instruction provides the questions that may be used in a separate special verdict form. Use of a special verdict is discretionary. In some cases, it may increase rather than decrease jury confusion, and careful consideration should be given on its use. There is no requirement to do so. Where the questions on the form do not mirror key elements of the instructions, use of a form is not error. *See Hirlston v. Costco Wholesale Corp.*, 81 F.4th 744, 749-750 (7th Cir. 2023) ("A question on a verdict form need not define or explain again terms that have already been adequately defined or explained in the jury instructions.") (citing *EEOC v. Management Hospitality of Racine, Inc.,* 666 F.3d 422, 440 (7th Cir. 2012)).

These questions track the elements of a reasonable accommodations claim, to which an undue hardship affirmative defense has been asserted. *See* Instructions 4.04 & 4.09. The court should modify the questions to track the issues in each particular case.

**b. Disparate treatment cases.** In a disparate treatment case involving a perceived disability or a record of disability, Question 1 must be modified to reflect

Instruction 4.02. In a disparate treatment case not involving a mixed motive, Questions 3-5 should be replaced with the following two questions:

3. Did Defendant [*adverse action*] Plaintiff?

4. Would Defendant have [*adverse action*] if Plaintiff had not had a disability, but everything else remained the same.

**c. Mixed motive cases.** For mixed motive cases, see Instruction 4.02, comment c.

**d. Request for accommodation.** Where appropriate, Question 3 may be modified to read, "Was Defendant aware that Plaintiff required an accommodation?" *See* Instruction 4.08, comment c.

**e. Managerial employee.** If the parties dispute whether the person was a managerial employee within the meaning of Instruction 3.21, the following question should be inserted between interrogatories 10 and 11: "Was [Name] a managerial employee of Defendant?"

**f. Punitive damages.** This form assumes punitive damages are available in ADA cases in the absence of compensatory damages. *Hertzberg v. SRAM Corp.*, 261 F.3d 651, 656, n.3 (7th Cir. 2001) (Title VII) ("The fact that [Plaintiff] did not recover compensatory damages does not affect the jury's award of punitive damages.") (citing *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1010 (7th Cir.1998) (holding that there was "no legal flaw[ ]" in a jury's award of punitive damages in the absence of a compensatory damage award.")); *Paciorek v. Mich. Consol. Gas Co.*, 179 F.R.D. 216, 220-22 (E.D. Mich. 1998) (concluding "the plain language in § 1981a(b)(1) of the 1991 Civil Rights Act" controls an ADA plaintiff's access to punitive damages) (noting that nothing in Section 1981 "conditions the imposition of punitive damages upon an award of compensatory or nominal damages").