9.0 ADA Employment Claims – Introductory Instruction

The text that follows shows April 2019 changes to Third Circuit pattern instructions 9.0, 9.1.3, and 9.2.1 that went into effect in April 2019 in redline ~~strikeout~~.

9.0 ADA Employment Claims—Introductory Instruction

Model

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

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

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

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

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

Comment

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

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

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

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

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

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

The ADA, Public Accommodations and Public Services

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

The Rehabilitation Act

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

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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."

to employers receiving federal funding."); ~~–~~*Bragdon v. Abbott*, 524 U.S. 624, 632 (1998) (~~determination~~in interpreting the ADA's definition of "disability" ~~is the same under the~~ by reference to interpretations of the Rehabilitation Act's definition of "handicapped individual," observing that 42 U.S.C. § 12201(a) directs the courts "to construe the ADA ~~and~~ to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act~~);~~"); *Conneen v. MBNA America Bank, N.A.*, 334 F.3d 318, 330 n.13 (3d Cir. 2003) (noting that a precedent concerning the duty under the Rehabilitation Act ~~cases apply "~~of the employer and employee to engage in an interactive process "applies with equal force~~"~~ to accommodations under the ADA~~);~~"); *Deane v. Pocono Medical Center*, 142 F.3d 138, 149 n.13 (3d Cir. 1998) (en banc) (explaining in an ADA employment-discrimination case that "interpretations of the Rehabilitation Act's 'reasonable accommodation' provisions are relevant to our analysis of ~~"reasonable accommodation" is the same under~~ the ADA and vice versa because in 1992, Congress amended the section of the Rehabilitation Act~~).~~ defining 'reasonable accommodation' to incorporate the standards of the ADA" (citing *Mengine v. Runyon*, 114 F.3d 415, 420 & n.4 (3d Cir. 1997) (in Rehabilitation Act case brought against a federal employer, quoting 29 U.S.C. § 794(d))). These ADA instructions can therefore be ~~applied, and modified if necessary, to a~~adapted for use in a case involving an employment-discrimination claim brought under the Rehabilitation Act.

The ADA's association provision

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

Religious Entities; Ministerial Exception

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

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

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9.0 ADA Employment Claims – Introductory Instruction

Scope of Chapter

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

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

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

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

9.1.3 Elements of an ADA Claim — Reasonable Accommodation

Model

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

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

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

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

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

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

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

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

1. "Disability." — Instruction 9.2.1

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

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

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

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

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

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

3. Job restructuring;

4. Part-time or modified work schedule;

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

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

7. Provision of qualified readers or interpreters; and

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

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

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

1. Change or eliminate any essential function of employment;

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

3. Create a new position for [plaintiff];

4. Promote [plaintiff];

5. Reduce productivity standards; or

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

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

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9.1.3 Reasonable Accommodation

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

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

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

[For use where a previous accommodation has been provided:

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

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

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

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

1. The nature and cost of the accommodation.

2. [Defendant's] overall financial resources. This might include the size of its business,

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the number of people it employs, and the types of facilities it runs.

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

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

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

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

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

Comment

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

[A] disabled employee may establish a prima facie case under the ADA if s/he shows that s/he can perform the essential functions of the job with reasonable accommodation and

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

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that the employer refused to make such an accommodation. According to the ADA, a "reasonable accommodation" includes:

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

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

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

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

Allocation of Burdens—Reasonable Accommodation and the Undue Hardship Defense

In *Walton v. Mental Health Ass'n of Southeastern Pa.*, 168 F.3d 661, 670 (3d Cir. 1999), the Third Circuit held that, "on the issue of reasonable accommodation, the plaintiff bears only the burden of identifying an accommodation, the costs of which, facially, do not clearly exceed its benefits." If the plaintiff satisfies that burden, the defendant then has the burden to demonstrate that the proposed accommodation creates an "undue hardship" for it. 42 U.S.C. § 12112(b)(5)(A). *See Turner v. Hershey Chocolate USA*, 440 F.3d 604, 614 (3d Cir. 2006)

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("undue hardship" is an affirmative defense). The ADA defines "undue hardship" as "an action requiring significant difficulty or expense, when considered in light of" a series of factors, 42 U.S.C. § 12111(10)(A). The instruction sets forth the list of factors found in the ADA.

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

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

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

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

> [W]e conclude that Gaul has failed to satisfy his burden for three reasons. First, Gaul's proposed accommodation would impose a wholly impractical obligation on AT & T or any employer. Indeed, AT & T could never achieve more than temporary compliance because compliance would depend entirely on Gaul's stress level at any given moment. This, in turn, would depend on an infinite number of variables, few of which AT & T controls. Moreover, the term "prolonged and inordinate stress" is not only subject to constant change, it is also subject to tremendous abuse. The only certainty for AT & T would be its obligation to transfer Gaul to another department whenever he becomes "stressed out" by a coworker or supervisor. It is difficult to imagine a more amorphous "standard" to impose on an employer.
>
> Second, Gaul's proposed accommodation would also impose extraordinary administrative burdens on AT &T. In order to reduce Gaul's exposure to coworkers who cause him prolonged and inordinate stress, AT & T supervisors would have to consider, among other things, Gaul's stress level whenever assigning projects to workers or teams, changing work locations, or planning social events. Such considerations would require far too much oversight and are simply not required under law.

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> Third, by asking to be transferred away from individuals who cause him prolonged and inordinate stress, Gaul is essentially asking this court to establish the conditions of his employment, most notably, with whom he will work. However, nothing in the ADA allows this shift in responsibility. . . .
>
> In sum, Gaul does not meet his burden . . . because his proposed accommodation was unreasonable as a matter of law. Therefore, Gaul is not a "qualified individual" under the ADA, and AT & T's alleged failure to investigate into reasonable accommodation is unimportant.

Preferences

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

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

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Seniority Plans and Other Disability-Neutral Employer Rules

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

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

535 U.S. at 404.

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

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

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of cases, the employee can still prevail by showing that special circumstances warrant a finding that the accommodation is reasonable under the particular circumstances of the case.

The Interactive Process

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

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

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

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

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9.1.3 Reasonable Accommodation

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

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

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

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

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

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

Reasonable Accommodation Requirement ~~as Applied~~Inapplicable to "Regarded as" Disability

~~The ADA provides protection for an employee who is erroneously "regarded as" disabled~~

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~~by an employer. (See the Comment to Instruction 9.2.1 for a discussion of "regarded as" disability). Questions have arisen about the relationship between "regarded as" disability and the employer's duty to provide a~~ In contexts other than reasonable accommodation ~~to a qualified disabled employee. In~~claims, the ADA's definition of "disability" includes "being regarded as having" a physical or mental impairment that substantially limits one or more major life activities. 42 U.S.C. § 12102(1)(C). Prior to 2009, this "regarded as" part of the definition of disability also applied to reasonable-accommodation claims. *See* *Williams v. Philadelphia Hous. Auth. Police Dep't*, 380 F.3d 751, ~~770~~776 (3d Cir. 2004~~), the employer argued that it had no obligation to provide a reasonable accommodation to an employee it "regarded as" disabled because there was no job available that would accommodate the perceived disability – that is, the defendant regarded the employee as completely unable to do any job at all. The court described the employer's argument, and rejected it,~~). But in the ~~following passage:~~

> ~~To the extent Williams relies upon a "regarded as" theory of disability, PHA contends that a plaintiff in Williams's position must show that there were vacant, funded positions whose essential functions the employee was capable of performing *in the eyes*~~ADA Amendments Act of ~~*the employer who misperceived the employee's limitations*~~. ~~Even if a trier of fact concludes that PHA wrongly perceived Williams's limitations to be so severe as to prevent him from performing any law enforcement job, the "regarded as" claim must, in PHA's view, fail because Williams has been unable to demonstrate the existence of a vacant, funded position at PHA whose functions he was capable of performing in light of its misperception. . . . PHA's argument, if accepted, would make "regarded as" protection meaningless. An employer could simply regard an employee as incapable of performing any work, and an employee's "regarded as" failure to accommodate claim would always fail, under PHA's theory, because the employee would never be able to demonstrate the existence of any vacant, funded positions he or she was capable of performing in the eyes of the employer. . . . Thus, contrary to PHA's suggestion, a "regarded as" disabled employee need not demonstrate during litigation the availability of a position he or she was capable of performing in the eyes of the misperceiving employer. . . .~~
>
> ~~To meet his litigation burden with respect to both his "actual" and "regarded as" disability claims, Williams need only show (1) that there was a vacant, funded position; (2) that the position was at or below the level of the plaintiff's former job; and (3) that the plaintiff was qualified to perform the essential duties of this job with~~ 2008, Congress provided that "regarded as" disability cannot provide a basis for a reasonable accommodation~~. If the employee meets his burden, the employer must demonstrate that transferring the employee would cause unreasonable hardship.~~

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

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

~~Thus, an employee "regarded as" having a disability is entitled to the same accommodation that he would receive were he actually disabled~~ claim. *See* 42 U.S.C. § 12201(h); *see also* ~~*Kelly*~~*Robinson* *v.* ~~*Metallics West, Inc.*, 410 F.~~*First State Community Action Agency*, 2019 WL 1431924, at *3 (3d ~~670, 676 (10th~~ Cir. ~~2005) ("An employer who is unable or unwilling to shed his or her stereotypic assumptions based on a faulty or prejudiced perception of an employee's abilities must be prepared to accommodate the artificial limitations created by his or her own faulty perceptions. In this sense, the ADA encourages employers to become more enlightened about their employees' capabilities, while protecting employees from employers whose attitudes remain mired in prejudice.").~~Apr. 1, 2019). Accordingly, Instruction 9.2.1, which defines "disability," has been revised to reflect that the "regarded as" option is unavailable for reasonable-accommodation claims.

Direct Threat

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

Statutory Definitions

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

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9.1.3 Reasonable Accommodation

Potential overlap between ADA reasonable-accommodation claims and FMLA claims

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

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9.2.1 ADA Definitions — Disability

Model

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

["Physical/Mental Impairment"

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

[Major Life Activities

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

["Substantially Limiting"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Concluding Instruction:

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

Comment

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

ADA Amendments Act of 2008

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

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"Impairment"

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

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

45 CFR § 84.3(j)(2)(i) (1997).

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

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

"Substantially Limits"

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

> (4) to reject the standards enunciated by the Supreme Court in *Toyota Motor*

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Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives";

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

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

Accordingly, the text of the Instruction does not include any restrictions on the term "substantially limits" such as "severe" or "significant"; and the conclusion to the Instruction provides, consistently with Congressional intent, that the statutory definition of "disability" (including the term "substantially limits") is to be construed broadly.[4]

Use of Corrective Devices

In *Sutton v. United Air Lines*, 527 U.S. 471, 482 (1999), the Court held that the existence of a "disability" under the ADA must be determined in light of corrective measures used by the employee—in that case, the use of eyeglasses to correct severely impaired vision. The Court declared that "it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effect of those measures– both positive and negative— must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act." But the ADA Amendments Act of 2008 specifically repudiates the result in *Sutton*.[5] Section (4)(a)(E) of the Act provides that the determination of whether an impairment substantially limits a major life activity "shall be made without regard to

[4] In a case involving events that occurred prior to the enactment of the ADA Amendments Act of 2008, the Court of Appeals held that inability to drive at night is relevant to the question whether monocular vision substantially limits the major life activity of seeing. *See Colwell v. Rite Aid Corp.*, 602 F.3d 495, 502 (3d Cir. 2010).

[5] "The resulting statutory section only prohibits the consideration of *ameliorative* mitigatory measures, and does not address potentially negative side effects of medical treatment." *Sulima v. Tobyhanna Army Depot*, 602 F.3d 177, 186 n.3 (3d Cir. 2010).

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the ameliorative effects of mitigating measures such as –

> (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
>
> (II) use of assistive technology;
>
> (III) reasonable accommodations or auxiliary aids or services; or
>
> (IV) learned behavioral or adaptive neurological modifications.

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

"Major Life Activity"

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

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

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

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the Act provides the following definition of "major life activities":

> (A) In general. * * * major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
>
> (B) Major bodily functions. * * * a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Work as a Major Life Activity

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

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

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

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

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

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

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> Although the legislative history indicates that Congress was concerned about eliminating society's myths, fears, stereotypes, and prejudices with respect to the disabled, the EEOC's Regulations and Interpretive Guidance make clear that even an innocent misperception based on nothing more than a simple mistake of fact as to the severity, or even the very existence, of an individual's impairment can be sufficient to satisfy the statutory definition of a perceived disability. See 29 C.F.R. pt. 1630, app. § 1630.2(l) (describing, as one example of a "regarded as" disabled employee, an individual with controlled high blood pressure that is not substantially limiting, who nonetheless is reassigned to less strenuous work because of the employer's unsubstantiated fear that the employee will suffer a heart attack). Thus, whether or not PMC was motivated by myth, fear or prejudice is not determinative of Deane's "regarded as" claim.

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

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

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

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

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

> Williams argues, inter alia, that PHA "admitted" he was disabled within the meaning of the ADA by offering him the opportunity to take an unpaid leave of absence, thereby "accommodating" him. We agree with the Sixth and Ninth Circuits, however, that an offer of accommodation does not, by itself, establish that an employer "regarded" an employee as disabled. See *Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789, 798 (9th Cir. 2001) ("When an employer takes steps to accommodate an employee's

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restrictions, it is not thereby conceding that the employee is disabled under the ADA or that it regards the employee as disabled. A contrary rule would discourage the amicable resolution of numerous employment disputes and needlessly force parties into expensive and time-consuming litigation."), clarified in other respects, 292 F.3d 1045 (9th Cir. 2002); *Plant v. Morton Int'l, Inc.*, 212 F.3d 929, 938 (6th Cir. 2000) ("The intent behind this ["regarded as"] provision, according to the EEOC, is to reach those cases in which 'myths, fears and stereotypes' affect the employer's treatment of an individual. [An employee] cannot show that this provision applies to him merely by pointing to that portion of the record in which his [employer] admitted that he was aware of [the employee's] medical restrictions and modified [the employee's] responsibilities based on them.").

Reasonable Accommodation Requirement ~~as Applied~~Inapplicable to "Regarded as" Disability

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

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

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

~~The employer in *Williams* made an alternative argument: that if an employee is "regarded as" having a disability but actually does not, the employer should have no duty to provide a reasonable accommodation because there is nothing to accommodate. In *Williams*, the plaintiff~~

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~~was a police officer and the employer regarded him as being unable to be around firearms because of a mental impairment. The court analyzed, and rejected, the defendant's argument that it had no duty to provide an accommodation to an employee "regarded as" having a disability:~~

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

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

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

Record of disability

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

Pregnancy-related disability

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9.4.5 Nominal Damages

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

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

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

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