**4.11 Americans with Disabilities Act – Disparate-Treatment Claim –**

**42 U.S.C. §§ 12101-12117**

In this case, [name of plaintiff] claims that [name of defendant] discriminated against [name of plaintiff] by [refusing to hire [him/her]/terminating [his/her] employment/failing to promote [him/her]] because [he/she] had a “disability” within the meaning of the Americans with Disabilities Act (the ADA).

[Name of defendant] denies [name of plaintiff]’s claim and asserts that [describe the defendant’s defense].

Under the ADA, if a person is qualified to do the job, it is unlawful for an employer to [refuse to employ/discharge/fail to promote] the person because of that person’s disability.

To succeed on [his/her] claim, [name of plaintiff] must prove all the following facts by a preponderance of the evidence:

First: [Name of plaintiff] had a disability;

Second: [Name of plaintiff] was a qualified individual;

Third: [Name of defendant] [refused to employ/discharged/failed to promote] [name of plaintiff]; and

Fourth: [Name of defendant] took that action because of [name of plaintiff]’s disability.

[In the verdict form that I will explain in a moment, you will be asked to answer questions about these factual issues.]

Definition of “Disability”

The first element requires that [name of plaintiff] prove by a preponderance of the evidence that [he/she] had a disability. A “disability” is a physical or mental impairment that substantially limits one or more major life activities.

A “physical impairment” is a condition that prevents the body from functioning normally. A “mental impairment” is a condition that prevents the mind from functioning normally.

A “major life activity” is an activity that is centrally important to everyday life, including the operation of major bodily functions.

[[Activity at issue] is a major life activity.]

[[Name of plaintiff] claims that [activity at issue] is a major life activity, and you must decide whether it is. Major life activities include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. Major life activities also include functions of the immune system; normal cell growth; and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.]

An impairment “substantially limits” a major life activity if it prevents or significantly restricts a person from performing the activity, compared to an average person in the general population. An impairment that substantially limits one major life activity is a disability even if it does not limit any other major life activity.

To decide whether [name of plaintiff]’s [describe impairment] substantially limits [his/her] ability to [activity at issue], you should consider, as compared to most people in the general population:

 the condition under which [name of plaintiff] performs [activity at issue];

 the manner in which [name of plaintiff] performs [activity at issue]; and

 how long [it takes [name of plaintiff] to/[name of plaintiff] can] perform [activity at issue].

[**Mitigating measures:** To decide whether [name of plaintiff]’s [describe impairment] substantially limits [his/her] ability to [activity at issue], it does not matter that [his/her] [describe impairment] can be corrected by the use of [medication/hearing aids/prosthetics/assistive technology/describe other mitigating measure]. [But you can consider whether [name of plaintiff]’s eyesight could be corrected by the use of ordinary eyeglasses or contact lenses.]

[**Episodic impairment:** If [name of plaintiff]’s impairment is not always 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.]

[**When there is a jury question on “record of” disability:** [Name of plaintiff] also can establish that [he/she] had a disability by proving that [he/she] had a record of a disability. [Name of plaintiff] had a record of a disability if [he/she] had a history of, or had been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. Put another way, if [name of plaintiff] had a disability but [has now recovered/the disability is in remission], [he/she] is still considered to have a disability within the meaning of the ADA.]

[**When there is a jury question on “regarded as”:** [Name of plaintiff] can also establish that [he/she] had a disability by proving that [name of defendant] regarded [him/her] as having a disability. [Name of plaintiff] is “regarded as” having a disability if [he/she] proves that [name of defendant] [describe adverse employment action] [him/her] because of an actual or perceived impairment – even if the actual or perceived impairment did not limit a major life activity and even if [name of defendant] did not think that the actual or perceived impairment limited a major life activity. [But [name of plaintiff] cannot be “regarded as” disabled if [his/her] impairment is transitory and minor. A “transitory” impairment is one that’s expected to last six months or less.]]

Definition of “Qualified Individual”

The second element requires that [name of plaintiff] prove by a preponderance of the evidence that [he/she] was “qualified” for the job at the time of the challenged employment decision. This means that [name of plaintiff] must show that [he/she] had the skill, experience, education, and other job-related requirements for [describe job], and could do the essential functions of the job – with or without reasonable accommodation.

In this case, [name of plaintiff] claims that [he/she] was able to perform the essential functions of [describe job] [with [describe accommodation provided]]. [Name of defendant] claims that [name of plaintiff] was unable to perform [describe functions] [– even with [describe accommodation provided] –] and that [this function/these functions] [was/were] essential to [describe job]. To the extent that [name of plaintiff] claims that a particular function is not essential to the job, [he/she] must prove that the function is not essential.

The essential functions of a position are the fundamental duties of that position. The term “essential functions” does not include the position’s marginal functions. To decide whether a function is essential to a particular position, you may consider the following factors:

 whether the function’s performance is the reason the position exists;

 whether there are a limited number of employees available to perform the function;

 whether the function is highly specialized so that an employee in the position is hired for the ability to perform the function;

 [name of defendant]’s judgment about which functions are essential to the position;

 written job descriptions for the position;

 the amount of time an employee in the position spends performing the function;

 the consequences of not requiring an employee in the position to perform the function;

 [the terms of a collective-bargaining agreement]; or

 whether others who held the position were required to perform the function.

No single factor controls your decision. You should consider all the evidence to decide whether a function is essential to the job. [To decide whether [name of plaintiff] was qualified to perform the essential job functions, you should consider [his/her] abilities as they existed when [name of defendant] [describe adverse employment action].

**Direct Threat:** [Name of Defendant] contends that [name of plaintiff] is not a “qualified individual” because [name of plaintiff]’s [employment/continued employment] [posed/would have posed] a direct threat to [name of plaintiff] [and/or] to [name of defendant]’s other employees. A “direct threat” is a significant risk to the health or safety of [name of plaintiff] or others that cannot be eliminated by a reasonable accommodation. Therefore, you must decide whether [name of plaintiff] could safely perform the essential functions of [his/her] job with or without a reasonable accommodation. In determining whether [name of plaintiff] [posed/would have posed] a direct threat, you may consider:

 the nature of the risk of [plaintiff’s condition];

 the severity of the risk of [plaintiff’s condition];

 the duration of the risk of [plaintiff’s condition];

 how likely it is that harm will occur due to [plaintiff’s condition]; and

 whether the potential harm due to [plaintiff’s condition] is likely to occur in the near future.

[Name of plaintiff] has the burden to prove that [he/she] [did not pose/would not have posed] a direct threat to [himself/herself] [and/or] to [name of defendant]’s other employees. If you find that [name of plaintiff] could not safely perform the essential functions of [his/her] job with or without a reasonable accommodation, then [name of plaintiff] is not a “qualified individual.”]

Definition of “Because of Plaintiff’s Disability”

Finally, if you find that [name of plaintiff] had a “disability,” was a “qualified individual,” and that [name of defendant] [describe adverse employment action], you must decide whether [name of defendant] took that action “because of” [name of plaintiff]’s disability. Put another way, you must decide whether [name of plaintiff]’s disability was the main reason for [name of defendant]’s decision.

To determine that [name of defendant] [describe adverse employment action] because of [name of plaintiff]’s disability, you must decide that [name of defendant] would not have [describe adverse employment action] if [name of plaintiff] had not had a disability but everything else had been the same.

[Name of defendant] denies that [he/she/it] [describe adverse employment action] because of [name of plaintiff]’s disability and claims that [he/she/it] made the decision for [another reason, other reasons].

An employer may not discriminate against an employee because of the employee’s disability, but an employer may [describe adverse employment action] an employee for any other reason, good or bad, fair or unfair. If you believe [name of defendant]’s reason[s] for [his/her/its] decision and find that [his/her/its] decision was not because of [name of plaintiff]’s disability, you must not second guess that decision, and you must not substitute your own judgment for [name of defendant]’s judgment – even if you do not agree with it.

[**Pretext (optional, see annotations):** As I have explained [name of plaintiff] has the burden to prove that [name of defendant]’s decision to [describe adverse employment action] was because of [name of plaintiff]’s disability. I have explained to you that evidence can be direct or circumstantial. To decide whether [name of defendant]’s decision [describe adverse employment action] was because of [name of plaintiff]’s disability, you may consider the circumstances of [name of defendant]’s decision. For example, you may consider whether you believe the reason[s] [name of defendant] gave for the decision. If you do not believe the reason[s] [he/she/it] gave for the decision, you may consider whether the reason[s] [was/were] so unbelievable that [it was/they were] a cover-up to hide the true discriminatory reason for the decision.]

If you find that [name of plaintiff] has proved each of the elements [he/she] must prove, you must decide the issue of [his/her] compensatory damages.

When considering the issue of [name of plaintiff]’s compensatory damages, you should determine what amount, if any, has been proven by [name of plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [name of plaintiff]’s damages as a result of [describe adverse employment action], no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [name of defendant]. Also, compensatory damages must not be based on speculation or guesswork.

You should consider the following elements of damage, to the extent you find that [name of plaintiff] has proved them by a preponderance of the evidence, and no others:

 net lost wages and benefits from the date of the [describe adverse employment action] to the date of your verdict; and

 emotional pain and mental anguish.

To determine the amount of [name of plaintiff]’s net lost wages and benefits, you should consider evidence of the actual wages [he/she] lost and the monetary value of any benefits [he/she] lost.

To determine whether and how much [name of plaintiff] should recover for emotional pain and mental anguish, you may consider both the mental and physical aspects of injury – tangible and intangible. [Name of plaintiff] does not have to introduce evidence of a monetary value for intangible things like mental anguish. You must determine what amount will fairly compensate [him/her] for those claims. There is no exact standard to apply, but the award should be fair in light of the evidence.

[**Mitigation of Damages:** You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to “mitigate” those damages. For purposes of this case, the duty to mitigate damages requires [name of plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [name of defendant]. To prove that [name of plaintiff] failed to mitigate damages, [name of defendant] must prove by a preponderance of the evidence that: work comparable to the position [name of plaintiff] held with [name of defendant] was available, and [name of plaintiff] did not make reasonably diligent efforts to obtain it. If, however, [name of defendant] shows that [name of plaintiff] did not make reasonable efforts to obtain any work, then [name of defendant] does not have to prove that comparable work was available.

If you find that [name of defendant] proved by a preponderance of the evidence that [name of plaintiff] failed to mitigate damages, then you should reduce the amount of [name of plaintiff]’s damages by the amount that could have been reasonably realized if [name of plaintiff] had taken advantage of an opportunity for substantially equivalent employment.]

[**Punitive Damages:** [Name of plaintiff] also asks you to award punitive damages. The purpose of punitive damages is not to compensate [name of plaintiff] but, instead, to punish [name of defendant] for wrongful conduct and to deter similar wrongful conduct. You will only reach the issue of punitive damages if you find for [name of plaintiff] and award [him] [her] compensatory damages.

To be entitled to an award of punitive damages [name of plaintiff] must prove by a preponderance of the evidence that [name of defendant] acted with either malice or with reckless indifference toward [name of plaintiff]’s federally protected rights. Specifically, [name of plaintiff] must show that an employee of [name of defendant], acting in a managerial capacity, either acted with malice or with reckless indifference to [name of plaintiff]’s federally protected rights.

There is no bright-line rule about which employees act in a managerial capacity. You must determine whether an employee acted in a “managerial capacity” based upon the type of authority [name of defendant] gave the employee and the amount of discretion that the employee has in what is done and how it is accomplished.

To show that [name of defendant] acted with malice, [name of plaintiff] must show that an employee acting in a managerial capacity knew that federal law prohibits discrimination and discriminated against [name of plaintiff] anyway. To show that [name of defendant] acted with reckless indifference to [name of plaintiff]’s federally protected rights, [name of plaintiff] must show that an employee acting in a managerial capacity acted with serious disregard for whether the conduct violated federal law. Either malice or reckless indifference is sufficient to entitle [name of plaintiff] to an award of punitive damages; [name of plaintiff] need not prove both.

An employer may not be held liable for punitive damages because of discriminatory acts on the part of its managerial employees where the managerial employees’ acts are contrary to the employer’s good faith efforts to comply with the law by implementing policies and programs designed to prevent unlawful discrimination in the workplace. However, the mere existence of policies prohibiting discrimination does not preclude punitive damages if the policies are ineffective.

There is no single factor that determines whether [name of defendant] acted with malice or with reckless indifference to [name of plaintiff]’s federally protected rights. In determining whether to award punitive damages, you may consider factors such as: [ whether [name of defendant] engaged in a pattern of discrimination toward its employees]; [ whether [name of defendant] acted spitefully or malevolently]; [ whether [name of defendant] showed a blatant disregard for civil legal obligations]; [ whether [name of defendant] failed to investigate reports of discrimination]; [ whether [name of defendant] failed to take corrective action concerning discriminatory acts or comments by its employees]; and [ whether the person accused of discrimination was included in the employer’s decision making process concerning [name of plaintiff]’s [discharge] [denied promotion].]

If you find that punitive damages should be assessed against [name of defendant], you may consider the evidence regarding [name of defendant]’s financial resources in fixing the amount of such damages.]

**Special Interrogatories To The Jury**

**Do you find from a preponderance of the evidence:**

 That [name of plaintiff] had a “disability?”

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

 That [name of plaintiff] was a “qualified individual?”

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

 That [name of defendant] [describe adverse employment action]?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

 That [name of defendant] took that action because of [name of plaintiff]’s disability?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer is “No,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “Yes,” go to the next question.

 That [name of plaintiff] should be awarded damages to compensate for a net loss of wages and benefits to the date of your verdict?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer is “Yes,”

in what amount? $\_\_\_\_\_\_\_\_\_\_\_\_\_

 That [name of plaintiff] should be awarded damages to compensate for emotional pain and mental anguish?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer is “Yes,”

in what amount? $\_\_\_\_\_\_\_\_\_\_\_\_\_

[If you did not award damages in response to either Question Nos. 5 or 6, this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If you awarded damages in response to Question Nos. 5 or 6 (or both), go to the next question.]

[ That punitive damages should be assessed against [name of defendant]?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

If your answer is “Yes,”

in what amount? $\_\_\_\_\_\_\_\_\_\_\_\_\_]

So Say We All.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Foreperson’s Signature

Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_