**ANNOTATIONS AND COMMENTS**

 **Cause of Action**

The Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (“ADA”), prohibits employment discrimination on the basis of a disability. Pattern Instruction 4.11 is meant to be used for an ADA discrimination claim based on any adverse employment action, such as failure to hire, failure to promote, discharge, reduction in force, and elimination of position. This Pattern Instruction is to be used for claims arising under the ADA Amendments Act of 2008 (“ADAAA”), Pub. L. No 110-325, 122 Stat. 3553 (2008), which became effective on January 1, 2009. At the time of this publication, the Eleventh Circuit had not squarely addressed the question whether the ADAAA applies retroactively, but it has suggested that it does not. *Tarmas v. Sec’y of Navy*, 433 F. App’x 754, 762 n.9 (11th Cir. 2011) (per curiam) (noting that Eleventh Circuit has never held that the ADAAA is retroactively applicable and that other circuits have concluded that the ADAAA is not retroactively applicable). Accordingly, in the absence of an Eleventh Circuit decision holding that the ADAAA *is* retroactively applicable, the ADA as it existed prior to the ADAAA applies to claims based on conduct that occurred before January 1, 2009, and the court should use 2005 Pattern Instruction 4.11 for such claims.

Pattern Instruction 4.11 is not intended to be used for ADA retaliation claims. Pattern Instruction 4.22, *infra*, may be adapted to address such claims. An instruction on ADA retaliation should incorporate the damages instructions of Pattern Instruction 4.11.

At the time of this publication, the Eleventh Circuit had not decided whether the ADA provides a cause of action for hostile work environment, though other circuits have recognized such a claim. *E.g., Flowers v. S. Reg’l Physician Servs. Inc.*, 247 F.3d 229, 234-35 (5th Cir. 2001). Pattern Instruction 4.11 is not intended to be used for hostile work environment claims that do not involve a tangible employment action; Pattern Instructions 4.6 and 4.7, *infra*, may be adapted to address claims for a disability-based hostile work environment.

 **Disability Element**

To state a claim under the ADA, a plaintiff must prove that the plaintiff has a disability, which is a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. 42 U.S.C. § 12102. Pattern Instruction 4.11 is intended to guide the jury through the elements of a “disability.”

 **“Major Life Activity”**

A non-exhaustive list of “major life activities” is codified at 42 U.S.C. § 12102. In some cases, it is undisputed that the activity at issue is a “major life activity,” and in such cases the jury should be instructed accordingly. Where the jury is to decide whether a major life activity is limited by a physical or mental impairment, the bracketed charge defining “major life activity” should be used.

 **Mitigating Measures**

The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures except for “ordinary eyeglasses or contact lenses.” 42 U.S.C. § 12102(E)-. Examples of mitigating measures which may not be considered are set forth in 42 U.S.C. § 12102(E) and 29 C.F.R. § 1630.2. In most cases, this issue will be decided as a matter of law and will not need to be submitted to the jury. Therefore, the pattern instruction does not include a “mitigating measures” charge. In the rare cases where there is a fact question on this issue, the court should include a mitigating measures instruction that is tailored to the alleged disability and mitigating measures at issue.

 **Episodic Impairment**

Under the ADAAA, “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.” 42 U.S.C. § 12102(D). The bracketed instruction defining episodic impairment should be provided to the jury where the parties dispute the existence of an episodic impairment.

 **“Record of” Disability and “Regarded As” Disabled**

Pattern Instruction 4.11 contains bracketed instructions to be used when there is a jury question on whether the plaintiff had a “record of” a disability or was “regarded as” disabled. These charges are based on the statutory language of the ADAAA, including the new rule that a plaintiff cannot be “regarded as” disabled based on a “transitory and minor” impairment, meaning a minor impairment “with an actual or expected duration of 6 months or less.” 42 U.S.C. § 12102(B).

 **“Qualified Individual” – Direct Threat**

An individual is not a “qualified individual” if, by performing the duties of a given position, he would pose a “direct threat” to himself or others. *Pinckney v. Potter*, 186 F. App’x 919, 925 (11th Cir. 2006) (per curiam). A “direct threat” is “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” 42 U.S.C. § 12111. “The employee retains at all times the burden of persuading the jury either that he was not a direct threat or that reasonable accommodations were available.” *Moses v. Am. Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996) (per curiam). The “Definition of ‘Qualified Individual’” section contains an optional “direct threat” instruction that should be used if there is a fact question on this issue. If there is a fact question as to whether the risk could have been eliminated by a reasonable accommodation, the court should tailor the “reasonable accommodation” portion Pattern Instruction 4.12, *infra*, to address this issue.

A “direct threat” may include an infectious disease. In *Waddell v. Valley Forge Dental Associates, Inc.*, 276 F.3d 1275 (11th Cir. 2001), the Eleventh Circuit held that where a person poses a significant risk of communicating an infectious disease to others in the workplace and where a reasonable accommodation will not eliminate that risk, the person will not be otherwise qualified for his or her job and thus is not a “qualified individual” under the ADA. *Id*. at 1280. To determine whether a person who carries an infectious disease poses a significant risk to others, the Eleventh Circuit noted that the following evidence should be considered:

[findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about the nature of the risk (how the disease is transmitted), the duration of the risk (how long is the carrier infectious), the severity of the risk, (what is the potential harm to third parties) and the probabilities the disease will be transmitted and will cause varying degrees of harm.

*Id*. (alteration in original) (quoting *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 288 (1987)).

There is a circuit split on the issue of who has the burden on the “direct threat” issue. In some circuits, “direct threat” is an affirmative defense, so the employer has the burden to establish that the plaintiff was a direct threat. *Wurzel v. Whirlpool Corp.*, 482 F. App’x 1, 9 n.14 (6th Cir. 2012) (discussing different approaches to burden of proof in direct threat cases). In the Eleventh Circuit, however, “[t]he employee retains at all times the burden of persuading the jury either that he was not a direct threat or that reasonable accommodations were available.” *Moses v. Am. Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996) (per curiam).

 **Causation Element**

The ADA prohibits discrimination “on the basis of” or “because of” disability. 42 U.S.C. § 12112. It also prohibits retaliation “because” an employee has opposed a practice made unlawful by the ADA. 42 U.S.C. § 12203. The causation language is the same as the causation language in the Age Discrimination in Employment Act, which prohibits discrimination “because of” age, 29 U.S.C. § 623, and retaliation “because” an employee has opposed an employment practice made unlawful by the ADEA, 29 U.S.C. § 623.

In *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), the Supreme Court held that, based on the statutory language of the ADEA, a plaintiff must prove that “age was the ‘but-for’ cause of the employer’s adverse decision,” not merely a motivating factor in the decision. *Gross*, 557 U.S. at 176-77. The Court also rejected the mixed motive defense (also known as the same decision defense) in the context of the ADEA, noting that unlike under Title VII, a mixed motive defense was not incorporated into the ADEA. *Id*. at 173-75. In *University of Texas Southwestern Medical Center v. Nassar*, No. 12-484, 2013 WL 3155234 (U.S. June 24, 2013), *Nassar*, the Supreme Court extended the rationale of *Gross* to Title VII retaliation claims “[g]iven the lack of any meaningful textual difference between the text in” Title VII’s anti-retaliation provision and the ADEA’s anti-retaliation provision. *Nassar*, 2013 WL 3155234, at \*10. Therefore, “Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in [42 U.S.C.] § 2000e-2.” Id. at \*14. Although the Eleventh Circuit has not, at the time of this publication, issued an opinion on this matter, the Committee believes that the rationale of *Gross* and *Nassar* may extend to the ADA because the statutory causation language is the same in the ADA and the ADEA. Accordingly, Pattern Instruction 4.11 instructs that the adverse employment action must be “because of” the plaintiff’s disability.

The model instruction includes in brackets an optional charge discussing the inference of pretext. The basis for this charge is explained in further detail in the annotations following Pattern Instruction 4.5, *supra*.

 **Remedies**

A plaintiff prevailing on an ADA discrimination claim may recover back pay, other past and future pecuniary losses, damages for pain and suffering, punitive damages, and reinstatement or front pay. 42 U.S.C. § 12117 (stating that the remedies and enforcement procedures available in Title VII of the Civil Rights Act of 1964 – including 42 U.S.C. §§ 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 – apply to actions for disability discrimination under the ADA). For annotations and comments regarding Title VII remedies, please see the annotations and comments following Pattern Instruction 4.5, *supra*.

A prevailing ADA plaintiff may also recover compensatory (emotional pain and suffering) and punitive damages (exclusive of back pay and interest on back pay) pursuant to 42 U.S.C. § 1981a. The statutory caps on total damages provided in 42 U.S.C. § 1981a apply to ADA employment discrimination actions. A further limitation on the recovery of punitive damages is that few awards exceeding a single-digit ratio between punitive and compensatory damages satisfy due process. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

Either party may demand trial by jury when the complainant seeks compensatory or punitive damages. 42 U.S.C. § 1981a.

The court may award a reasonable attorney’s fee, litigation expenses, and costs to the prevailing party. 42 U.S.C. § 12205. This is a question for the court, not a jury.