**4.12 Americans with Disabilities Act: – Reasonable Accommodation Claim –**

**42 U.S.C. §§ 12101-12117**

In this case, [name of plaintiff] claims that [name of defendant] discriminated against [name of plaintiff] because of [his/her] disability by failing to provide a reasonable accommodation for [his/her] 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 an employer knows that an employee has a disability and needs [a] reasonable accommodation[s] to perform the essential functions of [his/her] job, the employer must provide [a] reasonable accommodation[s].

To succeed on [his/her] claim, [name of plaintiff] must prove each of 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] knew of [name of plaintiff]’s disability;

Fourth: [Name of plaintiff] requested an accommodation;

Fifth: A reasonable accommodation existed that would have allowed [name of plaintiff] to perform the essential functions of the job; and

Sixth: [Name of defendant] failed to provide a reasonable accommodation.

[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.]

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 when [name of defendant] [describe adverse employment action]. 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.

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.”]

For the third element, [name of plaintiff] must prove by a preponderance of the evidence that [name of defendant] knew about [his/her] disability.

For the fourth element, [name of plaintiff] must prove by a preponderance of the evidence that [he/she] requested an accommodation.

Put another way, the third and fourth elements require [name of plaintiff] to prove that [he/she] informed [name of defendant] of both the substantial limitations [his/her] disability created and the need for an accommodation.

For the fifth element, [name of plaintiff] must prove by a preponderance of the evidence that a reasonable accommodation existed that would have allowed [him/her] to perform the essential functions of the job.

For the sixth element, [name of plaintiff] must prove by a preponderance of the evidence that [name of defendant] failed to provide a reasonable accommodation.

In this case, [name of plaintiff] claims that [he/she] would have been able to perform the essential functions of [describe job] with a reasonable accommodation. [Name of defendant] claims that [[name of plaintiff] was unable to perform the essential job functions – even with a reasonable accommodation/[name of defendant] offered [name of plaintiff] a reasonable accommodation, and [he/she] refused it/the accommodation [name of plaintiff] requested would have imposed an undue hardship on [name of defendant]].

A “reasonable accommodation” is a modification or adjustment of the employer’s ordinary work rules, facilities, or terms and conditions of employment that the employer can make without causing an undue hardship.

A reasonable accommodation may include:

 making existing facilities readily accessible to, and usable for, [name of plaintiff];

 job restructuring;

 part-time or modified work schedules;

 reassignment to a vacant position;

 acquiring or modifying equipment or devices;

 adjusting or modifying examinations, training materials, or policies;

 providing qualified readers or interpreters; or

 other similar accommodations for individuals with disabilities.

[In this case, [name of plaintiff] claims that [name of defendant] should have accommodated [name of plaintiff] by reassigning [him/her] to another position. Reassignment may be a reasonable accommodation under certain circumstances – but an employer is not required to create or reestablish a job where one would not otherwise exist. Also, an employer is not required to promote an employee with a disability as an accommodation. To show that reassignment to another job would have been a reasonable accommodation, [name of plaintiff] must prove that the job was vacant or available and that [he/she] was qualified for it.]

[In this case, [name of plaintiff] claims that [name of defendant] should have accommodated [name of plaintiff] by requiring another employee to perform certain duties of [his/her] job that [name of plaintiff] could not perform because of [his/her] disability. Reallocation of marginal job duties can be a reasonable accommodation – but an employer does not have to transfer any essential job duties to another employee. If the duties [name of plaintiff] wanted [name of defendant] to reallocate were essential functions of [name of plaintiff]’s job, then that is not a reasonable accommodation. If [name of plaintiff] wanted [name of defendant] to reallocate only marginal job duties to another employee, then that reallocation may be a reasonable accommodation – but only if the reallocation would not impose an excessive burden on the employer or the other employee.]

[In this case, [name of plaintiff] claims that [name of defendant] should have accommodated [name of plaintiff] by modifying [his/her] work schedule. Modification of a work schedule can be a reasonable accommodation – but only if [name of plaintiff] shows that the modified work schedule would have enabled [him/her] to perform the essential job functions and shows that it would have been reasonable under the circumstances. An employer’s duty to provide a reasonable accommodation to a disabled employee does not require the employer to burden other employees excessively.]

[In this case, [name of plaintiff] claims that [name of defendant] should have [explain suggested reasonable accommodation].]

To decide whether [name of defendant] denied [name of plaintiff] a reasonable accommodation, you should keep in mind that while an employer is required to provide [a] reasonable accommodation[s] that would allow [name of plaintiff] to perform the essential job functions, the employer is not required to provide the particular accommodation that [name of plaintiff] prefers or requests. There may be more than one reasonable accommodation available under the circumstances, and if [name of plaintiff] refused to accept an accommodation offered by [name of defendant] that would have allowed [him/her] to perform the essential job functions, [name of plaintiff] has not proved that [name of defendant] failed to provide a reasonable accommodation.

[Also, just because [name of defendant] may have offered a certain accommodation to [name of plaintiff] or another employee in the past does not mean that [name of defendant] must forever extend the same accommodation to [name of plaintiff] or that the accommodation is necessarily reasonable under the ADA. Otherwise, an employer would be reluctant to offer benefits or concessions to disabled employees for fear that by providing the benefit or concession one time, the employer would be required to provide that accommodation in the future. Because [name of plaintiff] has requested an accommodation that [name of defendant] has provided to [name of plaintiff] or another employee in the past does not necessarily mean that the particular accommodation is a reasonable one. Instead, you must determine its reasonableness under all the evidence.]

[Good Faith Defense: If you find that [name of plaintiff] has proved each element [he/she] must prove, you must decide whether [name of defendant] has established [his/her/its] affirmative defense.

[Name of defendant] claims that after [name of plaintiff] informed [name of defendant] of [his/her] disability and requested an accommodation, [name of defendant] made good faith efforts to consult with [name of plaintiff] in order to identify and make a reasonable accommodation [that would not cause an undue hardship on the operation of [name of defendant]’s business].

[Name of defendant] must prove by a preponderance of the evidence that [he/she/it] made good faith efforts to identify and make a reasonable accommodation for [name of plaintiff].

If you find by a preponderance of the evidence that [name of defendant] made good faith efforts to identify and make a reasonable accommodation for [name of plaintiff], then you have found that [name of defendant] established its affirmative defense, and you will not decide the issue of [name of plaintiff]’s damages. But if you find that [name of defendant] has not established [his/her/its] affirmative defense, you must decide the damages issue.]

[Undue-Hardship Defense: If you find that [name of plaintiff] has proved each element [he/she] must prove, you must decide whether [name of defendant] has established [his/her/its] affirmative defense.

[Name of defendant] claims that the accommodation that [name of plaintiff] requested would have imposed an undue hardship on the operation of [his/her/its] business. Under the ADA, [name of defendant] is not required to accommodate [name of plaintiff] if the accommodation would cause an undue hardship to its business. An accommodation would cause an “undue hardship” if it would cause [name of defendant] significant difficulty or expense.

[Name of defendant] must prove by a preponderance of the evidence that the accommodation [name of plaintiff] requested would be an undue hardship.

To decide this issue, you should consider the following factors:

 the nature and cost of the accommodation;

 [name of defendant]’s overall financial resources, including the size of [name of defendant]’s business, the number of employees, and the type of facilities [name of defendant] operates;

 the financial resources of the facility where the accommodation would be made, including the number of employees at that facility and the accommodation’s impact on the facility’s operations and costs; and

 the way that [name of defendant] conducts the business’s operations, including [name of defendant]’s workforce structure, the location of the facility where the accommodation would be made compared to [name of defendant]’s other facilities, and the relationship between or among those facilities.

If you find by a preponderance of the evidence that the accommodation [name of plaintiff] requested would have imposed an undue hardship on the operation of [name of defendant]’s business, then you have found that [name of defendant] established its affirmative defense, and you will not decide the issue of [name of plaintiff]’s damages. But if you find that [name of defendant] has not established [his/her/its] affirmative defense, you must decide the damages issue.]

[**Without Affirmative Defense:** If you find that [name of plaintiff] has proved each element [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 [name of defendant]’s failure to provide [name of plaintiff] with a reasonable accommodation, 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 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] knew 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] requested an accommodation?

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 a reasonable accommodation existed that would have allowed [name of plaintiff] to perform the essential functions of the job?

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] failed to provide a reasonable accommodation?

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] made good faith efforts to identify and make a reasonable accommodation for [name of plaintiff]?

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

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

[ That [name of plaintiff]’s requested accommodation would have imposed an undue hardship on the operation of [name of defendant]’s business?

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

If your answer is “Yes,” this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is “No,” 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. 9 or 10, 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. 9 or 10 (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: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_