**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. Under the ADA, prohibited discrimination includes failure to provide a reasonable accommodation. 42 U.S.C. § 12112. Pattern Instruction 4.12 is meant to be used for an ADA discrimination claim based on a failure to accommodate a disability. 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 4.12 for such claims.

 **Elements and Defenses**

 **“Regarded As” Disabled**

Pattern Instruction 4.12 is not to be used in cases where the plaintiff is proceeding only under a “regarded as” theory of disability. The ADAAA provides that an employer must provide a reasonable accommodation to employees who have an actual disability or a record of disability but not to employees who are merely “regarded as” being disabled. 42 U.S.C. § 12201; *see also* 29 C.F.R. § 1630.2. This provision abrogates the Eleventh Circuit case law obligating employers to provide reasonable accommodations to employees “regarded as” being disabled. *D’Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1235 (11th Cir. 2005).

 **Essential Function**

The portion of Pattern Instruction 4.12 defining “essential function” tracks the language explaining that term in 29 C.F.R. § 1630.2.

 **“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.

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)). Where there is a factual dispute on this issue, the jury should be given the “direct threat” instruction, and the court should tailor the “reasonable accommodation” portion of the instruction to address this issue.

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).

 **Reasonable Accommodation**

Pattern Instruction 4.12 contains three bracketed sample reasonable accommodation instructions that are intended to instruct on three common accommodation requests: reassignment to another position, reassignment of marginal job duties, and modification of work schedule. The jury should be instructed with the language that best fits the facts of the case. If one of the three samples does not apply, then the court should fashion its own reasonable accommodation instruction.

 **Remedies**

Pattern Instruction 4.12 instructs that a plaintiff cannot prevail if the plaintiff refused to accept a reasonable accommodation offered by the employer. *See Stewart v. Happy Herman’s Cheshire Bridge, Inc.*, 117 F.3d 1278, 1286-87 (11th Cir. 1997) (finding that ADA liability did not arise where the employee rejected five proposed accommodations but did not provide employer with substantive reasons why the proffered reasons were unreasonable).

In a similar vein, 42 U.S.C. § 1981a provides a defense to employers: compensatory and punitive damages may not be awarded on an ADA reasonable accommodation claim “where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.” 42 U.S.C. § 1981a. Therefore, where an employee shows that he requested an accommodation, the employer may avoid damages by demonstrating that it in good faith engaged in the interactive process required by the ADA and tried to find a reasonable accommodation for the employee. The employer has the burden of proof on this defense. Pattern Instruction 4.12 provides an instruction on this defense that should be included if there is a fact dispute on this issue. In some cases, this instruction may need to be combined with the “undue burden” affirmative defense instruction.

For additional discussion of the damages that may be awarded in ADA reasonable accommodation cases, see the Annotations and Comments following Pattern Instruction 4.11, *supra*.