

12.0 Introductory Comment

This chapter provides jury instructions for actions brought under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.* The ADA was first enacted in 1990 and became effective July 26, 1992. The ADA Amendments Act of 2008 (ADAA) became effective January 1, 2009. The ADAA reflected Congress’s view that the Supreme Court had interpreted the ADA in an unduly narrow fashion in *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002), and *Sutton v. United Air Lines*, 527 U.S. 471 (1999). *See Weaving v. City of Hillsboro*, 763 F.3d 1106 (9th Cir. 2014). The jury instructions in this chapter are consistent with the ADAA, which is not retroactive. *Becerril v. Pima Cnty. Assessor’s Off.*, 587 F.3d 1162, 1164 (9th Cir. 2009).

The legislative purposes of, and findings for, the ADA are set forth in § 12101 and are very broad. Essentially, the ADA provides a national mandate for the elimination of discrimination against individuals with disabilities in critical areas such as employment, housing, public accommodations, education, and access to public services. § 12101(a)(3), (b).

As the Supreme Court has observed, “[t]o effectuate its sweeping purpose, the ADA forbids discrimination against disabled individuals in major areas of public life, among them employment (Title I of the Act) [42 U.S.C. §§ 12111–12117], public services (Title II) [§§ 12131–12165], and public accommodations (Title III) [§§ 12181–12189].” *PGA Tour, Inc. v. Martin*, 432 U.S. 661, 675 (2001). Title I protects only employees of employers with 15 or more employees. 42 U.S.C. § 12111(5)(A); *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 444-51 (2003) (defining “employee”); *Castle v. Eurofresh*, 731 F.3d 901 (9th Cir. 2013) (analyzing whether prisoner can be deemed an “employee”).

Under the ADA, a “disability” is defined as: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. 42 U.S.C. § 12102(2).

Because a substantial majority of the reported Supreme Court and Ninth Circuit decisions arise under the employment provisions of the ADA, these instructions focus on employment claims under the ADA. In the employment context, a qualified individual with a disability may show an ADA discrimination primarily in either of two ways: by presenting evidence of disparate treatment or by showing a failure to accommodate. *See Dunlap v. Liberty Natural Prods., Inc.*, 878 F.3d 794, 798 (9th Cir. 2017) (“We have recognized that a failure-to-accommodate claim is ‘analytically distinct from a claim of disparate treatment or impact under the ADA.’”) (quoting *Johnson v. Bd. of Trustees of Boundary Cnty. Sch. Dist.*, 666 F.3d 561, 567 (9th Cir. 2011)).

“Both disparate-treatment and disparate-impact claims are cognizable under the ADA.” *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003); *Lopez v. Pacific Maritime Ass’n*, 657 F.3d

762, 767 (9th Cir. 2011) (leaving open the question of how § 12112(b)(6) applies to a disparate impact claim). For a case involving a pre-employment claim under the ADA, see *EEOC v. BNSF Rwy. Co.*, 902 F.3d 916 (9th Cir. 2018).

In *Mattioda v. Nelson*, 98 F.4th 1164, 1174 (9th Cir. 2024), the Ninth Circuit held that disability-based claims for hostile work environment are actionable under the ADA, joining all other circuits that have addressed the issue.

In *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002), the Supreme Court expanded the business necessity defense based on EEOC regulations. *Chevron* involved the propriety of a worker with a liver condition being laid off by his employer due to the unavoidable exposure to toxins at a refinery creating health risks for the worker. There exists under the ADA, 42 U.S.C. §§ 12112(b)(6), 12113(a), an affirmative defense for an employment action under a qualification standard “shown to be job-related and consistent with business necessity,” which “may include a requirement that an individual should not pose a direct threat to the health or safety of other individuals in the workplace.” The unanimous opinion in *Chevron* held that it was reasonable for the EEOC, through the enactment of a regulation (29 C.F.R. § 1630.15(b)(2) (2001)) to carry “the defense one step further, in allowing an employer to screen out a potential worker with a disability not only for risks that he would pose to others in the workplace but for risks on the job to his own health or safety as well” *Id.* at 78-79, 86-87; *Hutton v. Elf Atochem North America, Inc.*, 273 F.3d 884, 892-94 (9th Cir. 2001) (applying the “direct threat” affirmative defense factors in EEOC regulations to the analysis of qualification standards).

In *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 368 (2001), the Supreme Court held that the Eleventh Amendment barred claims for money damages against a State under Title I of the ADA, which addresses disability discrimination in employment. And in *United States v. Georgia*, 546 U.S. 151 (2006), the Court articulated a three-part inquiry for courts to apply to determine whether sovereign immunity has been abrogated as to claims against States under Title II of the ADA, which addresses disability discrimination as to services, programs, or activities of a public entity.

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*, 565 U.S. 171, 181, 195 n.4 (2012) (applying this defense to an ADA retaliation claim); see also *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 738, 756 (2020) (foreclosing discrimination claims by employees of religious organizations under the ADEA and the ADA).

A plaintiff’s remedies in employment actions under the ADA are generally the same remedies available under Title VII governing employment discrimination. 42 U.S.C. § 12117(a). See Introductory Comment to Chapter 10 (“Civil Rights—Title VII—Employment Discrimination; Harassment; Retaliation”) for a summary of available remedies under Title

VII. Compensatory and punitive damages are not available, however, in a retaliation claim under the ADA. *Alvarado v. Cajun Operating Co.*, 588 F.3d 1261, 1270 (9th Cir. 2009) (“Because we conclude that ADA retaliation claims are redressable only by equitable relief, no jury trial is available.”).

The Committee recommends that Chapter 10 be consulted to instruct a jury on hostile work environment, definition of common terms, constructive discharge, or defenses such as bona fide occupational qualification, bona fide seniority system, or after-acquired evidence.

The Committee notes, as stated above, that these instructions focus on employment claims under Title I of the ADA, and not Title III, which addresses public accommodations. In *Lopez v. Catalina Channel Express, Inc.*, 974 F.3d 1030 (9th Cir. 2020), the Ninth Circuit explained that discrimination under Title III of the ADA specifically includes a failure to remove architectural barriers in existing facilities of public accommodation when such removal is readily achievable. Announcing a new rule of burden-shifting in the Ninth Circuit, the Court stated, “only if the plaintiff first makes a plausible showing that the barrier removal is readily achievable, does the defendant then have to negate that showing and prove that the removal is not readily achievable.” *Id.* at 1036; *see also Gilbert v. 7-Eleven, Inc.*, 157 F.4th 1057, 1062-63

(9th Cir. 2025) (reaffirming the burden-shifting rule). Even if a defendant can demonstrate that the removal of a barrier is not readily achievable, the defendant may still be liable under the ADA if it fails to make its goods, services, facilities, privileges, advantages, or accommodations available through alternative methods so long as such methods are readily achievable.

In *Gilbert*, the Court concluded that where a defendant fixes the property by removing the barriers to access, the voluntary remodeling demonstrates that barrier removal was readily achievable, and no further evidence is required of the plaintiff to prove his claim. *Id.*

In *Langer v. Kiser*, 57 F.4th 1085 (9th Cir. 2023), the Ninth Circuit held it was legal error to base a credibility determination on a plaintiff’s history of ADA litigation, on a plaintiff’s status as an accessibility advocate or “tester,” or on the plaintiff’s decision to forego claims against neighboring businesses, because past litigation history is not “a basis for questioning the sincerity” of a plaintiff’s intent to return to a facility, and “there is no past patronage or bona fide customer requirement to bring an ADA claim.” *Id.* at 1095-99. A court “may still make a credibility determination against a serial litigant, but there must be something other than the fact that the litigant files a lot of ADA cases to instill doubt in [their] testimony.” *Id.* at 1097.

The Ninth Circuit explained in *Langer* that “the actual usage of the facility in question” is determinative of whether it is open to the public such that compliance with Title III of the ADA is mandated. *Langer*, 57 F.4th at 1102. “Absent information about actual usage,

considerations such as the nature of the entity and the facility, as well as the public’s reasonable expectations regarding use of the facility, may further guide a court’s analysis.” *Id.*

A retaliation instruction has been withdrawn based on the Ninth Circuit’s decision in *Alvarado v. Cajun Operating Co.*, 588 F.3d 1261, 1270 (9th Cir. 2009) (“Because we conclude that ADA retaliation claims are redressable only by equitable relief, no jury trial is available.”). A district court, however, may award nominal damages as equitable relief in an ADA retaliation claim. *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 874 (9th Cir. 2017).

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12.1 ADA Employment Actions—Actual Disability—Elements

The plaintiff [name] claims that [his] [her] [other pronoun] disability was the reason for the defendant [name]’s decision to [discharge] [not hire] [not promote] [demote] [state other adverse action] [him] [her] [other pronoun]. To succeed on this claim, the plaintiff [name] has the burden of proving each of the following four elements by a preponderance of the evidence:

First, the plaintiff [name] has a physical or mental impairment;

Second, such physical or mental impairment substantially limited one or more major life activities;

Third, the plaintiff [name] was a qualified individual as that term is later defined in these instructions; and

Fourth, the plaintiff [name] was [discharged] [not hired] [not promoted] [demoted] [state other adverse action] because of [his] [her] [other pronoun] physical or mental impairment.

If you find that the plaintiff [name] has proved each of these elements, your verdict should be for the plaintiff [name]. If, on the other hand, the plaintiff [name] has failed to prove any of these elements, your verdict should be for the defendant [name].

Major life activities are the normal activities of living that a nondisabled person can do with little or no difficulty, such as [specify applicable major life activities].

Comment

Major life activities are defined in 42 U.S.C. § 12102(2)(A)-(B) and include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working, and the operation of a major bodily function such as the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and

reproductive functions. The Ninth Circuit has recognized interacting with others as a major life activity. *Weaving v. City of Hillsboro*, 763 F.3d 1106, 1112 (9th Cir. 2014). Whether obesity without an underlying physiological cause is an impairment under the ADA is unclear. See *Valtierra v. Medtronic, Inc.*, 934 F.3d 1089 (9th Cir. 2019).

“[A]lthough the ‘duration of an impairment’ remains ‘one factor that is relevant in determining whether the impairment substantially limits a major life activity,’” *Shields v. Credit One Bank, N.A.*, 32 F.4th 1218, 1225 (9th Cir. 2022) (citation omitted), a plaintiff need not establish permanent or long-term effects, *id.* at 1224.

The term “substantially limits” must be interpreted consistently with the ADAA. *Id.* at § 1227. “An impairment is a disability . . . if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.” *Weaving v. City of Hillsboro*, 763 F.3d 1106, 1111 (9th Cir. 2014) (quoting 29 C.F.R. § 1630.2(j)(1)(ii)).

The ADA places on the plaintiff the burden of showing that the plaintiff is qualified. The plaintiff must show the ability to perform the essential functions of the job either with or without a reasonable accommodation. 42 U.S.C. §§ 12112(b)(5)(A), 12111(8); *Smith v. Clark Cnty. Sch. Dist.*, 727 F.3d 950, 955 (9th Cir. 2013); *Cooper v. Neiman Marcus Grp.*, 125 F.3d 786, 790 (9th Cir. 1997) (stating elements).

An employee who commits an act of misconduct may be fired, regardless of whether he or she is disabled within the meaning of the ADA. *Newland v. Dalton*, 81 F.3d 904, 906 (9th Cir. 1996) (holding that while alcoholism is a “disability” under the ADA, an employee’s arrest for criminal assault while intoxicated was a nondiscriminatory reason for termination).

In *Raytheon v. Hernandez*, 540 U.S. 44 (2003), the Supreme Court addressed an employer’s policy not to re-hire employees who left the company for violating personal conduct rules such as illegal drug use. *Id.* at 46. Under a disparate treatment theory, a neutral “no-rehire” policy was a legitimate, nondiscriminatory reason under the ADA. *Id.* at 53-55. Because the plaintiff had failed to raise a disparate impact claim on a timely basis, *id.* at 49, the Court held that the question of whether the neutral no-rehire policy fell more harshly on drug addicts who were successfully rehabilitated could not be considered. *Id.* at 52, 55.

Title I provides that “[n]o covered entity shall discriminate against a qualified individual with a disability *because of* the disability of such individual.” 42 U.S.C. § 12112(a) (emphasis added). An ADA discrimination plaintiff bringing a claim under 42 U.S.C. § 12112 must show that the adverse employment action would not have occurred but for the disability. *Murray v.*

Mayo Clinic, 934 F.3d 1101, 1105 (9th Cir. 2019).

The Supreme Court has held that in a retaliation claim under Title VII, a plaintiff “must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer.” *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 362 (2013). The Court explained that the “because” language in the anti-retaliation provision (42 U.S.C. § 2000e3(a)) lacked any meaningful textual difference from the statutory provision at issue in *Gross*. *Nassar*, 570 U.S. at 351-53; *see also Burrage v. United States*, 571 U.S. 204, 210-13 (2014) (defining “results from” in the Controlled Substances Act to mean “but for” causation). The Ninth Circuit has applied “but for” causation in retaliation claims under the ADA. *T.B. v. San Diego Unified Sch. Dist.*, 795 F.3d 1067, 1088 (9th Cir. 2015). For further discussion of “but-for” causation, see Instruction 10.3 (Civil Rights—Title VII—Disparate Treatment—“Because of” Defined).

The regulations contain examples of impairments whose inherent nature “virtually always [will] be found to impose a substantial limitation on a major life activity” and, therefore, involve “simple and straightforward” individualized assessment. 29 C.F.R. § 1630.2(j)(3)(ii). The examples include: intellectual disability, which substantially limits brain function; cancer, which substantially limits normal cell growth; diabetes, which substantially limits endocrine function; and HIV, which substantially limits immune function. *Id.* § 1630.2(j)(3)(iii).

“An 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(4)(D).

In general, “[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures” such as medication, medical equipment, prosthetics, hearing aids, low-vision devices, oxygen therapy equipment or assistive technology. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered. 42 U.S.C. § 12102(4)(E)(i)-(ii); 29 C.F.R. § 1630.2(j)(1)(vi). The distinction between low-vision devices and ordinary eyeglasses or contact lenses is that glasses or lenses correct visual acuity or eliminate refractive error, whereas low-vision devices magnify or enhance a visual image. 42 U.S.C. § 12102(4)(E)(iii).

In an appropriate case, the trial court must instruct the jury that conduct resulting from a disability is part of the disability and is not a separate basis for termination. *See Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087, 1093 (9th Cir. 2007) (in case brought under the FMLA and Washington law by a plaintiff terminated after engaging in profanity-laced outburst allegedly caused by bipolar disorder, the Ninth Circuit held that it was error to refuse an instruction stating that conduct resulting from a disability is part of the disability and not a separate basis for termination, citing the ADA case of *Humphrey v. Memorial Hospitals Ass’n*, 239 F.3d 1128, 1139-40 (9th Cir. 2001)). However, *Gambini* did not preclude the employer from arguing that the plaintiff was not a qualified individual or raising a business necessity or direct threat defense. *Id.* at 1095-96. In *Mayo v. PCC Structural, Inc.*, 795 F.3d 941, 944 (9th Cir. 2015), the Ninth Circuit held that an employee who makes serious and credible threats to

kill coworkers is not a qualified individual regardless of whether the threats stemmed from mental illness. See Instruction 12.10 (ADA—Defenses—Business Necessity); Instruction 12.11 (ADA—Defenses—Direct Threat).

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12.2 ADA Employment Actions—Record of Disability—Elements

The plaintiff [name] claims that [his] [her] [other pronoun] record of disability was the reason for the defendant [name]’s decision to [[discharge] [not hire] [not promote] [demote] [state other adverse action]] [[him] [her] [other pronoun]]. To succeed on this claim, the plaintiff [name] has the burden of proving each of the following four elements by a preponderance of the evidence:

First, the plaintiff [name] has a record of a physical or mental impairment;

Second, such physical or mental impairment substantially limited one or more major life activities;

Third, the plaintiff [name] was a qualified individual as that term is later defined in these instructions; and

Fourth, the plaintiff [name] was [discharged] [not hired] [not promoted] [demoted] [state other adverse action] because of [his] [her] [other pronoun] record of a physical or mental impairment].

If you find that the plaintiff [name] has proved each of these elements, your verdict should be for the plaintiff [name]. If, on the other hand, the plaintiff [name] has failed to prove any of these elements, your verdict should be for the defendant [name].

See Comment to Instruction 12.1 (ADA Employment Action—Actual Disability—Elements).

“[A]lthough the ‘duration of an impairment’ remains ‘one factor that is relevant in determining whether the impairment substantially limits a major life activity,’” *Shields v. Credit One Bank, N.A.*, 32 F.4th 1218, 1225 (9th Cir. 2022) (citation omitted), a plaintiff need not establish permanent or long-term effects, *id.* at 1224.

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12.3 ADA Employment Actions—Regarded as Disability—Elements

The plaintiff [name] claims that because the defendant [name] regarded [him] [her] [other pronoun] as disabled, the defendant [name] [[discharged] [did not hire] [did not promote] [demoted] [state other adverse action]] [[him] [her] [other pronoun]]. To succeed on

this claim, the plaintiff [name] has the burden of proving each of the following three elements by a preponderance of the evidence:

First, the plaintiff [name] was regarded as having a physical or mental impairment;

Second, the plaintiff [name] was a qualified individual as that term is later defined in these instructions; and

Third, the plaintiff [name] was [discharged] [not hired] [not promoted] [demoted] [state other adverse action] because [he] [she] [other pronoun] was regarded as having a physical or mental impairment.

If you find that the plaintiff [name] has proved each of these elements, your verdict should be for the plaintiff [name]. If, on the other hand, the plaintiff [name] has failed to prove any of these elements, your verdict should be for the defendant [name].

See Comment to Instruction 12.1 (ADA Employment Action—Actual Disability—Elements).

This instruction is intended to address the ADA Amendments Act of 2008, which clarified two points about “regarded as” disability claims:

> 1. A plaintiff meets the requirements of being “regarded as” having a disability if he establishes that he 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). 42 U.S.C. § 12102(3)(A).

> 2. A plaintiff cannot be “regarded” as having a disability if the actual or perceived impairment is “transitory and minor.” 42 U.S.C. § 12102(3)(B). A “transitory” impairment is defined as one “with an actual or expected duration of 6 months or less.” *Id.*; *Shields v. Credit One Bank, N.A.*, 32 F.4th 1218, 1224 (9th Cir. 2022).

The “transitory and minor” exception is an affirmative defense, and the employer bears the burden of establishing that defense. *Nunies v. HIE Holdings, Inc.*, 908 F.3d 428, 435 (9th Cir. 2018).

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12.4 ADA—Physical or Mental Impairment

The first element of the ADA claim that the plaintiff must prove is that the plaintiff has a recognized disability under the ADA. A “disability” under the ADA is [a physical or mental impairment] [a record of physical or mental impairment] [being regarded as having a physical or mental impairment] that substantially limits one or more of the major life activities of such

individual.

The terms “disability” and “physical or mental impairment” include [(1) 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] [(2) any mental or psychological disorder such as] [intellectual disability,] [organic brain syndrome,] [emotional or mental illnesses,] [and] [learning disabilities]].

Some form of this instruction should be given when a claim involves a theory of actual or record disability. Whether this instruction or a modified version should be given when a claim involves only a theory that the plaintiff was “regarded as” having a disability may require further analysis. *See Nunies v. HIE Holdings, Inc.*, 908 F.3d 428, 434 (9th Cir. 2018).

See 42 U.S.C. § 12102(1). The definition of disability in the first paragraph is taken from § 12102(1)(A)-(C). The definition of physical or mental impairment in the second paragraph is taken from 29 C.F.R. § 1630.2(h)(1)-(2).

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12.5 ADA—Work as a Major Life Activity

When the major life activity under consideration is that of working, the plaintiff must prove, by a preponderance of the evidence, that the plaintiff was substantially limited in [his] [her] [*other pronoun*] ability to work compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity to be considered substantially limiting. Factors that you may consider include the condition, manner, or duration under which the plaintiff performs the work as compared to most people in the general population.

See Weaving v. City of Hillsboro, 763 F.3d 1106, 1112 (9th Cir. 2014) (discussing the ADAA’s relaxed standard for determining whether a plaintiff is substantially limited in engaging in a major life activity). The ADA lists working as a major life activity. 42 U.S.C. § 12102(2)(A). The definition of “substantially limited” is taken from 29 C.F.R. § 1630.2(j)(1)(ii). The factors are taken from 29 C.F.R. § 1630.2(j)(4).

“Consideration of facts such as condition, manner, or duration may include, among other things, consideration of the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function. In addition, the non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual’s impairment

substantially limits a major life activity.” *Id.* § 1630.2(j)(4)(ii). The focus is not necessarily on what a disabled individual can achieve. For example, “someone with a learning disability may achieve a high level of academic success but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population.” *Id.* § 1630.2(j)(4)(iii).

This instruction may be modified according to the major life activity alleged by the plaintiff.

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12.6 ADA—Interacting with Others as Major Life Activity

When the major life activity under consideration is the ability to interact with others, the plaintiff must prove, by a preponderance of the evidence, that [he] [she] [other pronoun] was substantially limited compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity to be considered substantially limiting.

Difficulty getting along with others is not enough. A plaintiff must show that [his] [her] [other pronoun] interactions with others were characterized on a regular basis by severe problems, such as consistently high levels of hostility, social withdrawal, or failure to communicate when necessary.

The Ninth Circuit has recognized interacting with others as a major life activity. *Weaving v. City of Hillsboro*, 763 F.3d 1106, 1112 (9th Cir. 2014).

The wording of this instruction was taken from *McAlindin v. County of San Diego*, 192 F.3d 1226, 1235 (9th Cir. 1999) (“Recognizing interacting with others as a major life activity of course does not mean that any cantankerous person will be deemed substantially limited in a major life activity.”). *See also Weaving*, 763 F.3d at 1114 (noting that interacting with others is not the same as getting along with others: “One who is able to communicate with others, though his communications may at time be offensive, ‘inappropriate, ineffective, or unsuccessful,’ is not substantially limited in his ability to interact with others within the meaning of the ADA.”) (citation omitted). The definition of “substantially limited” is taken from 29 C.F.R. § 1630.2(j)(1)(ii).

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12.7 ADA—Qualified Individual

The second element of the ADA claim that the plaintiff must prove is that the plaintiff is a qualified individual under the ADA.

The term “qualified individual” means an individual with a disability who, either with or without a reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. The individual must satisfy the requisite skill, experience, education, and other job-related requirements of the employment position.

See 42 U.S.C. § 12111 (employment-related definitions); 29 C.F.R. § 1630.2(m) (qualified individual). For a definition of “disability,” see Instruction 12.2 (ADA—Physical or Mental Impairment).

An individual who fails to satisfy job prerequisites, such as having a license, cannot be considered qualified within the meaning of the ADA unless he or she can show that the prerequisite is itself discriminatory. *Johnson v. Bd. of Trustees*, 666 F.3d 561, 567 (9th Cir. 2011) (noting that a law firm that requires lawyers to have graduated from an accredited law school and passed a bar examination need not provide an accommodation to a disabled individual who does not meet this selection criteria).

“[O]ne must be able to perform the essential functions of employment at the time that one is discriminated against in order to bring suit.” *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1112 (9th Cir. 2000); see *Stanley v. City of Sanford*, ___ U.S. ___, 145 S. Ct. 2058, 2063-65, 2071 (2025) (holding that “to prevail under [42 U.S.C.] § 12112(a), a plaintiff must plead and prove that she held or desired a job, and could perform its essential functions with or without reasonable accommodation, at the time of an employer’s alleged act of disability-based discrimination” and that a retired employee who does not hold or seek a job is not a “qualified individual” under Title I); *Johnson*, 666 F.3d at 564. A disabled employee or applicant who engaged in the use of illegal drugs at the time of the discriminatory incident will not be considered a “qualified individual with a disability” when the covered entity acts on the basis of such use. 42 U.S.C. § 12114(a); *Lopez v. Pacific Maritime Ass’n*, 657 F.3d 762, 764-68 (9th Cir. 2011) (rejecting discrimination claim challenging one-strike rule that permanently eliminated candidates who tested positive for drug use; leaving open the question of how disparate impact claim might be affected by 42 U.S.C. § 12112(b)(6), governing selection criteria that tends to screen out individuals with a disability). See also *Mayo v. PCC Structural, Inc.*, 795 F.3d 941, 944 (9th Cir. 2015) (holding that under Oregon disability law, which is interpreted consistently with the ADA, an employee who makes serious and credible threats to kill coworkers is not a qualified individual, regardless of whether the threats stem from mental illness; ADA regulations do not require an employer to analyze separately whether an employee poses a direct threat to health or safety of others in workplace under 42 U.S.C. § 12113).

The phrase “holds or desires” has been interpreted by the Ninth Circuit to apply in situations when employees request reassignment “even if they cannot perform the essential functions of the current position.” *Barnett v. U. S. Air, Inc.*, 228 F.3d 1105, 1111 (9th Cir. 2000), *vacated on other grounds*, 535 U.S. 391 (2002).

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12.8 ADA—Ability to Perform Essential Functions—Factors

“An essential function of an employment position” means the fundamental job duties of the employment position that the plaintiff holds or desires. It does not include the marginal functions that may occur through the course of a job.

You must consider the employer’s judgment as to what functions of a job are essential. If any employer has prepared a written description before advertising or interviewing applicants for the job, this description is evidence of the essential functions of the job.

Other factors that may bear upon whether a job function is essential include, but are not limited to:

- (1) [whether the reason the position exists is to perform that function][;]
- (2) [whether there are a limited number of employees available among whom the performance of that job function can be distributed][;]
- (3) [whether the job function is highly specialized, and the person in that particular position is hired for [his] [her] [other pronoun] expertise or ability to perform the particular function][;]
- (4) [the amount of time spent performing the job function][;]
- (5) [the consequences of not requiring the individual holding the position to perform the function][;]
- (6) [the terms of any collective bargaining agreement][;]
- (7) [the work experience of past employees who have held the position][;] [and]
- (8) [the work experience of current employees who hold similar positions].

The second paragraph is based on 42 U.S.C. § 12111(8). The term “marginal functions” in the first paragraph and the factors in the third paragraph are in 29 C.F.R. § 1630.2(n) (1999). *See Dark v. Curry County*, 451 F.3d 1078, 1084-85 (9th Cir. 2006) (discussing essential functions and marginal functions); *see, e.g., Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1238 (9th Cir. 2012) (holding that attendance is an essential job function of neo-natal intensive care nurse).

The phrase “holds or desires” has been interpreted by the Ninth Circuit to refer to situations when employees request reassignment “even if they cannot perform the essential functions of the current position.” *Barnett v. U. S. Air, Inc.*, 228 F.3d 1105, 1111 (9th Cir.

2000), *vacated on other grounds*, 535 U.S. 391 (2002). A disabled individual who can no longer perform the essential functions of her position may be entitled to relief if reassignment is found to be a “reasonable accommodation.”

In *Kaplan v. City of North Las Vegas*, 323 F.3d 1226, 1232-33 (9th Cir. 2003), the court held that an employer had no duty to accommodate a deputy marshal when it was undisputed that he could not perform the essential function of restraining prisoners through hand-to-hand combat, even though the cause of hand pain had been misdiagnosed.

In *Cripe v. City of San Jose*, 261 F.3d 877, 887 (9th Cir. 2001), the court observed that “an employer may not turn every condition of employment which it elects to adopt into a job function, let alone an essential job function, merely by including it in a job description.” (quoting *Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063, 1071 (9th Cir. 2000)). In *Cripe*, the Ninth Circuit held that the issue of whether the ability of all specialized police officers to make a forcible arrest constituted an essential function of the job presented a factual question under the circumstances of that case. *Id.* at 888-89.

In *Bates v. UPS, Inc.*, 511 F.3d 974, 990 (9th Cir. 2007) (en banc), the court emphasized that “essential functions” are not to be confused with “qualification standards” established by an employer for a certain position. “Whereas ‘essential functions’ are ‘basic duties,’ 29 C.F.R. § 1630.2(n)(1), ‘qualification standards’ are ‘personal and professional attributes’ that may include ‘physical, medical [and] safety’ requirements. *Id.* § 1630.2(q).” *Bates*, 511 F.3d at 990.

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12.9 ADA—Reasonable Accommodation

To establish the plaintiff [name]’s claim that the defendant [name] discriminated against the plaintiff [name] in violation of the ADA by failing to provide a reasonable accommodation, the plaintiff [name] must prove, by a preponderance of the evidence, each of the following three elements:

First, the plaintiff [name] is a “qualified individual”;

Second, the defendant [name] received adequate notice of the plaintiff [name]’s disability and desire for a reasonable accommodation; and

Third, a reasonable accommodation is available that would have enabled the plaintiff [name] to [apply or qualify for] [perform the essential functions of] the job.

Under the ADA, [an] accommodation[s] by the defendant may include, but [is] [are] not limited to:

> (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 individuals with disabilities][;]

> (3) [job restructuring][;]

> (4) [part-time or modified work schedule][;]

> (5) [reassignment to a vacant position][;]

> (6) [acquisition or modifications of examinations, training materials, or policies][;]

> (7) [provision of qualified readers and interpreters][;] [or]

> (8) [other similar accommodations for individuals with plaintiff's disabilities].

It is for you to determine whether the accommodation[s] requested by the plaintiff [name] [is] [are] reasonable.

A reasonable accommodation does not include changing or eliminating any essential function of employment, shifting any of the essential functions of the employment to others, or creating a new position for the disabled employee.

[If the plaintiff rejects a reasonable accommodation that could enable the plaintiff to perform the essential functions of the position, the plaintiff cannot be considered qualified for the position.]

[An accommodation is generally not reasonable when it consists of a request to be reassigned to another job position that would be in violation of an employer's seniority system. This general rule, however, does not apply if the plaintiff has proved, by a preponderance of the evidence, special circumstances such as [the seniority system provides for exceptions] [the employer has exercised changes to the seniority system] [state other special circumstance].]

See Snapp v. United Transp. Union, 889 F.3d 1088, 1095 (9th Cir. 2018) ("The ADA treats the failure to provide a reasonable accommodation as an act of discrimination if the employee is a 'qualified individual,' the employer receives adequate notice, and a reasonable accommodation is available that would not place an undue hardship on the operation of the employer's business."); *see also Dunlap v. Liberty Nat. Prods., Inc.*, 878 F.3d 794, 798 (9th Cir. 2017) ("Liberty was aware of or had reason to be aware of Dunlap's desire for a reasonable accommodation. Such awareness triggered Liberty's duty to engage in the interactive process.") (internal citation omitted).

The bracketed words about special circumstances at the end of the instruction have been added based on *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 405-06 (2002).

The factors listed in this instruction are derived from 42 U.S.C. § 12111(9) and 29 C.F.R. §§ 1630.2(o)(1)(i), (3), 1630.9(d); *see also Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1112-14 (9th Cir. 2000) (en banc) (holding that the interactive process is a mandatory, not permissive, duty of the employer, and the employer has a duty to initiate the interactive process in some circumstances), *vacated on other grounds*, 535 U.S. 391 (2002).

In *Barnett*, the Supreme Court addressed a requested accommodation (reassignment from the position of cargo handler to that of mailroom worker) that conflicted with a seniority system. 535 U.S. at 393-95. The Supreme Court recognized that while a proposed accommodation that would otherwise be reasonable typically becomes unreasonable when it conflicts with a seniority system, an employee should have an opportunity to establish any special circumstances that may constitute an exception to the general rule. *Id.* at 394, 405; *see also Willis v. Pac. Mar. Ass'n*, 244 F.3d 675, 679 (9th Cir. 2001) (holding that an employee's proposed accommodation was per se unreasonable because it directly conflicted with bona fide seniority system established under a collective bargaining agreement).

In *PGA Tour v. Martin*, 532 U.S. 661 (2001), the Supreme Court held that the petitioner's use of a golf cart that is normally prohibited during professional tour events is a reasonable accommodation for a professional golfer disabled by a degenerative circulatory disorder impairing the ability to walk a golf course in a golf tournament. The Supreme Court found that such an accommodation would not "fundamentally alter" a tournament. *Id.* at 690.

Unpaid medical leave may be a reasonable accommodation. "Even an extended medical leave, or an extension of an existing leave period, may be a reasonable accommodation if it does not pose an undue hardship on the employer." *Dark v. Curry County*, 451 F.3d 1078, 1090 (9th Cir. 2006). However, "recovery time of unspecified duration may not be a reasonable accommodation (primarily where the employee will not be able to return to his former position and cannot state when and under what conditions he could return to work at all)." *Id.* In those jobs for which performance requires attendance at the job, "irregular attendance compromises essential job functions." *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1237-40 (9th Cir. 2012) (holding unreasonable an accommodation request that would allow a neo-natal intensive care unit nurse to miss work whenever that nurse felt missing work was needed and for so long as that nurse felt was needed).

In *Josephs v. Pacific Bell*, 443 F.3d 1050, 1060 (9th Cir. 2006), the court joined other circuits in expressly recognizing a discriminatory failure to reinstate as a separately actionable claim under the ADA.

The ADA does not impose a duty to create a new position to accommodate a disabled employee. *Wellington v. Lyon Cnty. Sch. Dist.*, 187 F.3d 1150, 1155-56 (9th Cir. 1999).

“Title II of the ADA applies to arrests.” *Hyer v. City & County of Honolulu*, 118 F.4th 1044, 1065 (9th Cir. 2024) (internal brackets omitted) (quoting *Sheehan v. City & County of San Francisco*, 743 F.3d 1211, 1232 (9th Cir. 2014), *rev’d in part on other grounds*, 575 U.S. 600 (2015)). A reasonable accommodation in the context of an arrest of a person with a mental illness could include the use of a throw phone or a crisis negotiation team. *Id.* at 1066. In the context of an arrest of a deaf person, “there is no per se obligation to provide ‘an on-site interpreter every time’ one is requested; ‘[r]ather, the test is whether an individual has received an auxiliary aid sufficient to prevent any “real hindrance” in her ability to exchange information.’” *Mayfield v. City of Mesa*, 131 F.4th 1100, 1110 (9th Cir. 2025) (quoting *Bax v. Doctors Med. Ctr. Of Modesto, Inc.*, 52 F.4th 858, 867 (9th Cir. 2022)). “Assessing whether an entity provided appropriate auxiliary aids where necessary to afford effective communication is a fact-intensive exercise. The trier of fact must weigh several factors, including the method of communication used by the individual; the nature, length, and complexity of the communication involved;” and “in the specific context of *arrests*, . . . whether any ‘exigent circumstances’ surrounding the plaintiff’s encounter with law enforcement would render a proposed reasonable accommodation impracticable.” *Id.* (citations omitted).

The ADA applies to inmates in prisons who need accommodations for transportation. *Weldeyohannes v. Washington*, 162 F.4th 972, 976 (9th Cir. 2025) (citing *Bell v. Williams*, 108 F.4th 809, 824 (9th Cir. 2024)). If a public entity receives a request for accommodation, the entity must make a “fact-specific investigation to determine what constitutes a reasonable accommodation.” *Duvall v. County. of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001). To obtain monetary damages, a plaintiff must show “deliberate indifference” to his need for accommodation.” *Id.* at 1138.

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12.10 ADA—Defenses—Undue Hardship

The defendant [name] has asserted the affirmative defense of “undue hardship.” A defendant is not required to provide an accommodation that will impose an undue hardship on the operation of the defendant [name]’s business. If the defendant [name] proves by a preponderance of the evidence that providing an accommodation will impose an undue hardship on the operation of the defendant [name]’s business, the defendant [name] is not liable under the ADA for failure to provide that accommodation.

The term “undue hardship” means an action requiring significant difficulty or expense. It considers the financial realities of the particular defendant and refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business.

The factors you should consider in deciding whether an accommodation would cause undue hardship include:

> (1) [the nature and net cost of the accommodation, accounting for tax credits or deductions and other outside funding][;]

> (2) [the overall financial resources of the defendant [name]’s facility involved in the provision of the reasonable accommodation, the number of persons employed at such facility, the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility][;]

> (3) [the overall financial resources of the defendant [name]’s facility, the overall size of the business of a defendant’s facility with respect to the number of its employees, the number, type, and location of its facilities][;]

> (4) [the number of persons employed by the defendant [name] and the effect of accommodation][;]

> (5) [the type of operations the defendant [name] is involved in and the composition, structure, and functions of the work force][;]

> (6) [the geographic separateness and administrative or fiscal relationship of the facility in question to the defendant [name]][;] [and]

> (7) [the overall impact of the proposed accommodation on the operation of the defendant [name]’s facilities, including the impact on other employees and the ability to conduct business].

A defendant has the burden of proving the defense of undue hardship. *See* 42 U.S.C. § 12112(b)(5)(A) (noting that disability discrimination includes “not making 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 such covered entity*”) (emphasis added); *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 402 (2002) (“Once the plaintiff has made this showing [that an accommodation seems reasonable on its face], the defendant/employer then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances.”).

The factors in this instruction are derived from 42 U.S.C. § 12111(10) and 29 C.F.R. § 1630.2(p), App. 1630.2(p).

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12.11 ADA—Defenses—Business Necessity

Business necessity is a defense to a claim of discrimination under the ADA.

If you find that the defendant [name]’s application of a standard, criterion, or policy has [the effect of screening out or otherwise denying a job or benefit to individuals with plaintiff [name]’s disability] [a disparate impact on individuals with plaintiff [name]’s disability], the defendant [name] must prove, by a preponderance of the evidence, each of the following four elements regarding that standard, criterion, or policy:

First, it is uniformly applied;

Second, it is job-related;

Third, it is consistent with business necessity; and

Fourth, it cannot be met by a person with plaintiff [name]’s disability even with a reasonable accommodation.

If you find that each of the elements on which the plaintiff [name] has the burden of proof has been proved, your verdict should be for the plaintiff [name], unless you also find that the defendant [name] has proved each of the elements of this affirmative defense, in which event your verdict should be for the defendant [name].

See 42 U.S.C. § 12113(a) (describing defenses and terms); 29 C.F.R. § 1630.15(b) (1999) (describing the four elements a defendant must prove to satisfy its burden). For a discussion of the business necessity defense as it applies to an across-the-board employer qualification standard (hearing test for package car drivers), see *Bates v. UPS, Inc.*, 511 F.3d 974, 994-98 (9th Cir. 2007) (*en banc*). For an analysis of business necessity as it applies when an employer requires an employee to undergo a medical examination under 42 U.S.C. § 12112(d)(4)(A), see *Brownfield v. City of Yakima*, 612 F.3d 1140, 1146 (9th Cir. 2010) (holding that the standard may be met even before an employee’s work performance declines if the employer has significant evidence that could cause a reasonable person to inquire whether the employee is still capable of performing the job; finding police officer exhibiting erratic behavior could be referred for fitness for duty examination); see also *Indergard v. Georgia-Pacific Corp.*, 582 F.3d 1049 (9th Cir. 2009) (defining medical examination).

The Supreme Court has recognized that the “direct threat” affirmative defense (*i.e.*, whether an employee poses a threat to others or to the employee himself or herself) is consistent with the “business necessity” principles encompassed in the ADA (§ 12113) and the EEOC regulations (29 C.F.R. § 1630.15(b)(2) (2001)). *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 76-77 (2002).

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12.12 ADA—Defenses—Direct Threat

It is a defense to the plaintiff's ADA claim if the plaintiff [name] posed a direct threat to the health and safety of others [or if the requirements of the job would pose a direct threat to the plaintiff [name]]. The defendant [name] may require, as a qualification for the position, that an individual not pose a "direct threat" to the health or safety of [others] [himself] [herself] [other pronoun] in the workplace. A health or safety risk can only be considered if it is a significant risk of substantial harm. Assessment of the existence of a direct threat must be based on valid and objective evidence and not speculation.

The defendant [name] claiming the "direct threat" defense must prove by a preponderance of the evidence that the plaintiff [name] posed a direct threat to the health or safety of [others] [himself] [herself] [other pronoun] that could not be eliminated by a reasonable accommodation.

Factors that you should consider in determining whether an individual poses a direct threat to the health and safety of [others] [himself] [herself] [other pronoun] are:

- > (1) the nature and severity of the potential harm;
- > (2) the duration of the potential harm;
- > (3) the imminence of the potential harm; and
- > (4) the probability of the harm occurring.

If you find that each of the elements on which the plaintiff [name] has the burden of proof has been proved, your verdict should be for the plaintiff [name], unless you also find that the defendant [name] has proved this affirmative defense, in which event your verdict should be for the defendant [name].

See 42 U.S.C. §§ 12111(3) (defining "direct threat"); 12113(b) (providing that a qualification standard can include the condition that a person not pose a direct threat); *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273 (1987) (addressing a claim under the Rehabilitation Act and providing criteria for what is considered a direct threat).

Because an employee who makes serious and credible threats to kill coworkers is not a qualified individual, an employer is not required to invoke the direct threat defense. See Instruction 12.5 (ADA—Qualified Individual); *Mayo v. PCC Structural, Inc.*, 795 F.3d 941, 945 (9th Cir. 2015). Similarly, an employer who terminates an employee based on past threats of violence against coworkers may show a legitimate nondiscriminatory reason for the termination without invoking the direct threat defense. *Curley v. City of North Las Vegas*, 772 F.3d 629, 632-33 (9th Cir. 2014).

This defense applies when the direct threat is to the disabled individual. See *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 76-77 (2002) (recognizing the availability of a "direct

threat” defense when toxins at an oil refinery would exacerbate the plaintiff’s liver condition).

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12.13 ADA—Defenses—Good Faith in Interactive Process

Good faith is a defense to a claim seeking damages for discrimination under the ADA where the alleged discriminatory practice involves the provision of a reasonable accommodation.

To prevail on this defense, the defendant [*name*] must prove, by a preponderance of the evidence, that the defendant [*name*] demonstrated good faith efforts, in consultation with the person who informed the defendant [*name*] that accommodation is needed, to identify and make a reasonable accommodation that would provide that person with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

If you find that each of the elements on which the plaintiff [*name*] has the burden of proof has been proved, your verdict should be for the plaintiff [*name*], unless you also find that the defendant [*name*] has proved each of the elements of this affirmative defense, in which event your verdict should be for the defendant [*name*].

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 or regulations implementing section 791 of Title 29, damages may not be awarded under this section 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(a)(3).

12.14 ADA—Damages

See Chapter 5 (“Damages”) for damage instructions. See also 42 U.S.C. § 12117(a) (applying powers, remedies, and enforcement provisions of Title VII to any person alleging employment discrimination on basis of disability).

See 42 U.S.C. § 1981a (b) (providing for recovery of compensatory and punitive damages). Indeed,

[a] complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or

discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

42 U.S.C. § 1981a (b)(1). In addition, a district court may award nominal damages in an ADA retaliation claim as equitable relief. *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 874 (9th Cir. 2017).

See 42 U.S.C. § 1981a(b)(3) (limiting the amount of damages recoverable based on a defendant’s employee base). These limits do not apply to back pay or front pay, which are awarded under 42 U.S.C. § 2000e-5(g)(1), not 42 U.S.C. § 1981a. See *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 848 (2001).

See 42 U.S.C. § 1981a(c)(2) (requiring that limits on damages not be disclosed to the jury).

The Ninth Circuit has held in the ADA context that back pay constitutes equitable relief within the discretion of the court, not the jury. See *Lutz v. Glendale Union High Sch.*, 403 F.3d 1061, 1069 (9th Cir. 2005) (holding that under the ADA, “there is no right to have a jury determine the appropriate amount of back pay,” which “remains an equitable remedy to be awarded by the district court in its discretion”). Although the Ninth Circuit has not directly addressed the issue, precedent indicates that front pay is also within the discretion of the court, not the jury. In the ADA context, front pay constitutes equitable relief. See *Bayer*, 861 F.3d at 866 (citing *Pollard*, 532 U.S. at 849-51) (stating in the ADA context that “money damages in the form of front pay are equitable when awarded in lieu of injunctive reinstatement”). Further, in a related context, the Ninth Circuit has indicated that front pay must be decided by the court, not the jury. See *Traxler v. Multnomah County*, 596 F.3d 1007, 1011-12 (9th Cir. 2010) (explaining in the context of an FMLA case that “front pay is an equitable remedy that must be determined by the court, both as to the availability of the remedy and the amount of any award” and that front pay is different from compensatory damages). A court may, however, empanel an advisory jury. See *id.* at 1013; Fed. R. Civ. P. 39(c).

See also Introductory Comment to Chapter 10 (“Civil Rights—Title VII—Employment Discrimination; Harassment; Retaliation”); Introductory Comment to this chapter.

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