

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. ex rel. Brenneise v. San Diego Unified Sch. Dist.*, 806 F.3d 451, 473 (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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