

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].

Comment

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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