

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].

Comment

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).

Revised March 2024