4.02 ELEMENTS OF AN ADA CLAIM – DISPARATE TREATMENT (NON-ACCOMMODATION) CASES

To succeed in this case, Plaintiff must prove four things by a preponderance of the evidence:

1. [Plaintiff had/ Defendant regarded Plaintiff as having/ Plaintiff had a record of] a disability. I will define "disability" and several other important terms for you in a few minutes;

2. Plaintiff was "qualified" to perform the job;

3. Defendant [*describe adverse employment action*] Plaintiff;

4. Defendant would not have [*taken action*] if Plaintiff had not had a disability, but everything else had been the same.

[If you find that Plaintiff has proved each of these things by a preponderance of the evidence, you should turn to the issue of Plaintiff's damages. If you find that Plaintiff has failed to prove any of these things by a preponderance of the evidence, your verdict should be for Defendant.][1]

Committee Comments

a. **General Authority:** Parts of this instruction are drawn from 42 U.S.C. § 12111(8) (definition of "qualified individual"). The instruction conforms with Seventh Circuit authority. *See Hoffman v. Caterpillar, Inc.*, 256 F.3d 568, 572-576 (7th Cir. 2001); *Lawson v. CSX Transp., Inc.*, 245 F.3d 916, 922-923 (7th Cir. 2001); *Foster v. Arthur Andersen LLP*, 168 F.3d 1029, 1032-1033 (7th Cir. 1999); *Duda v. Board of Educ. of Franklin Park*, 133 F.3d 1054, 1058-1059 (7th Cir.

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[1] If the defendant has raised an affirmative defense, a court may replace this paragraph with the following language:

> If you find that Plaintiff has failed to prove any of these things by a preponderance of the evidence, your verdict should be for Defendant. If you find that Plaintiff has proved each of these things by a preponderance of the evidence, you must then consider Defendant's argument that [*describe affirmative defense*]. If Defendant has proved this by a preponderance of the evidence, your verdict should be for Defendant. If Defendant has not proved this by a preponderance of the evidence, you should turn to the issue of Plaintiff's damages.

A court may also wish to address these issues through the use of a special verdict form.

1998). *See also* EIGHTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS—CIVIL § 5.51A ("ADA – Disparate Treatment – Essential Elements (Actual Disability)") and § 5.51B ("ADA – Disparate Treatment – Essential Elements (Perceived Disability)") (2001); NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS —CIVIL § 15.2 ("Elements of ADA Employment Action") (2001); ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS—CIVIL § 1.5.1 ("Disparate Treatment Claim") (2000).

b. **Disparate Treatment:** This instruction for disparate treatment cases is separate from a similar instruction for reasonable accommodation cases because in *Bultemeyer v. Fort Wayne Cmty. Schools*, 100 F.3d 1281, 1283-1284 (7th Cir. 1996), the Seventh Circuit explained that disparate treatment and reasonable accommodation claims must be "analyzed differently":

> Bultemeyer is not complaining that FWCS treated him differently and less favorably than other, non-disabled employees. He is not comparing his treatment to that of any other FWCS employee. His complaint relates solely to FWCS' failure to reasonably accommodate his disability. Because this is not a disparate treatment case, the *McDonnell-Douglas* burden-shifting method of proof is unnecessary and inappropriate here.

Accord, Foster v. Arthur Andersen LLP, 168 F.3d 1029, 1032 (7th Cir. 1999) (*citing Sieberns v. Wal-Mart Stores, Inc.*, 125 F.3d 1019, 1021-1022 (7th Cir. 1997)); *Weigel v. Target Stores*, 122 F.3d 461, 464 (7th Cir. 1997) (*citing Bultemeyer v. Fort Wayne Schs.*, 100 F.3d at 1284). *See Hoffman v. Caterpillar, Inc.*, 256 F.3d 568, 574 (7th Cir. 2001) ("It would be redundant to require a plaintiff to utilize the [*McDonnell-Douglas*] burden shifting method to raise a presumption of discrimination if he or she possesses direct evidence of discrimination").

c. **Causation:** The causation requirement in the fourth element is based on *Foster v. Arthur Andersen LLP*, 168 F.3d 1029, 1032-1033 (7th Cir. 1999), and *Weigel v. Target Stores*, 122 F.3d 461, 465 (7th Cir. 1997), both citing 42 U.S.C. § 12112(a) ("No covered entity shall discriminate against a qualified individual with a disability *because of* the disability. . . .") (italics added).

d. **Mixed Motive:** As in other types of employment discrimination cases, the Committee recognizes that an employer's decision might be based on mixed motives. If a court believes that it is appropriate to instruct the jury on mixed motive, the Committee recommends replacing the fourth element with the following language:

> Plaintiff must prove by a preponderance of the evidence that his disability was a motivating factor in Defendant's decision to [*adverse action*] him. A motivating factor is something that contributed to Defendant's decision.
>
> If you find that Plaintiff has proved that his disability contributed to Defendant's decision to [*adverse action*] him, you must then decide whether Defendant proved by a preponderance of the evidence that it would have [*adverse action*] him even if

> Plaintiff did not have a disability. If so, Plaintiff is not entitled to an award of damages.

See Instruction No. 3.01, comment c, for further discussion on mixed motive in employment discrimination cases.

e. **Constructive Discharge:** If the plaintiff alleges that the defendant constructively discharged him because of his disability, the court should replace the third and fourth elements of the instruction with the following language:

> 3. He was forced to quit his job because Defendant purposely made his working conditions so intolerable that a reasonable person in his position would have had to quit.
>
> 4. Defendant would not have forced him to quit if he had not had a disability, but everything else was the same.

See EEOC v. Sears, Roebuck & Co., 233 F.3d 432, 440-441 (7th Cir. 2000), and *Miranda v. Wisconsin Power & Light Co.*, 91 F.3d 1011, 1017 (7th Cir. 1996); *see also* Instruction 3.01, comment d.