

4 PJI 12 | AMERICANS WITH DISABILITIES ACT - REASONABLE ACCOMMODATION CLAIM - 42 USC §12101-12117

In this case, [Plaintiff] claims that [Defendant] discriminated against [Plaintiff] because of [his/her] disability by failing to provide a reasonable accommodation for [his/her] disability within the meaning of the Americans with Disabilities Act (the ADA).

[Defendant] denies [Plaintiff]'s claim and asserts that [describe the defendant's defense].

Under the ADA, if an employer knows that an employee has a disability and needs [a] reasonable accommodation[s] to perform the essential functions of [his/her] job, the employer must provide [a] reasonable accommodation[s].

To succeed on [his/her] claim, [Plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Plaintiff] had a disability;

Second: [Plaintiff] was a qualified individual;

Third: [Defendant] knew of [Plaintiff]'s disability;

Fourth: [Plaintiff] requested an accommodation;

Fifth: A reasonable accommodation existed that would have allowed [Plaintiff] to perform the essential functions of the job; and

Sixth: [Defendant] failed to provide a reasonable accommodation.

[In the verdict form that I will explain in a moment, you will be asked to answer questions about these factual issues.]

Definition of "Disability"

The first element requires that [Plaintiff] prove by a preponderance of the evidence that [he/she] had a disability. A "disability" is a physical or mental impairment that substantially limits one or more major life activities.

A "physical impairment" is a condition that prevents the body from functioning normally. A "mental impairment" is a condition that prevents the mind from functioning normally.

A "major life activity" is an activity that is centrally important to everyday life, including the operation of major bodily functions.



[[Activity at issue] is a major life activity.]

[[Plaintiff] claims that [activity at issue] is a major life activity, and you must decide whether it is. Major life activities include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. Major life activities also include functions of the immune system; normal cell growth; and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.]

An impairment “substantially limits” a major life activity if it prevents or significantly restricts a person from performing the activity, compared to an average person in the general population. An impairment that substantially limits one major life activity is a disability even if it does not limit any other major life activity.

To decide whether [Plaintiff]’s [describe impairment] substantially limits [his/her] ability to [activity at issue], you should consider, as compared to most people in the general population:

- (a) the condition under which [Plaintiff] performs [activity at issue];
- (b) the manner in which [Plaintiff] performs [activity at issue]; and
- (c) how long [it takes [Plaintiff] to/[Plaintiff] can] perform [activity at issue].

[Mitigating measures: To decide whether [Plaintiff]’s [describe impairment] substantially limits [his/her] ability to [activity at issue], it does not matter that [his/her] [describe impairment] can be corrected by the use of [medication/hearing aids/prosthetics/assistive technology/describe other mitigating measure]. [But you can consider whether [Plaintiff]’s eyesight could be corrected by the use of ordinary eyeglasses or contact lenses.]

[Episodic impairment: If [Plaintiff]’s impairment is not always a problem but flares up from time to time, that can be a disability if it would substantially limit a major life activity when active.]

[When there is a jury question on "record of" disability: [Plaintiff] also can establish that [he/she] had a disability by proving that [he/she] had a record of a disability. [Plaintiff] had a "record of" a disability if [he/she] had a history of, or had been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. Put another way, if [Plaintiff] had a disability but [has now recovered/the disability is in remission], [he/she] is still considered to have a disability within the meaning of the ADA.]

Definition of "Qualified Individual"

The second element requires that [Plaintiff] prove by a preponderance of the evidence that [he/she] was "qualified" for the job when [Defendant] [describe adverse employment action]. This means that [Plaintiff] must show that [he/she] had the skill, experience, education, and other job-related requirements for [describe job], and could do the essential functions of the job - with or without reasonable accommodation.

The essential functions of a position are the fundamental duties of that position. The term "essential functions" does not include the position's marginal functions. To decide whether a function is essential to a particular position, you may consider the following factors:

- (a) whether the function's performance is the reason the position exists;
- (b) whether there are a limited number of employees available to perform the function;
- (c) whether the function is highly specialized so that an employee in the position is hired for the ability to perform the function;
- (d) [Defendant]'s judgment about which functions are essential to the position;
- (e) written job descriptions for the position;
- (f) the amount of time an employee in the position spends performing the function;
- (g) the consequences of not requiring an employee in the position to perform the function;



- (h) [the terms of a collective-bargaining agreement;] or
- (i) whether others who held the position were required to perform the function.

No single factor controls your decision. You should consider all the evidence to decide whether a function is essential to the job. [To decide whether [Plaintiff] was qualified to perform the essential job functions, you should consider [his/her] abilities as they existed when [Defendant] [describe adverse employment action].

Direct Threat: [Defendant] contends that [Plaintiff] is not a "qualified individual" because [Plaintiff]'s [employment/continued employment] [posed/would have posed] a direct threat to [Plaintiff] [and/or] to [Defendant]'s other employees. A "direct threat" is a significant risk to the health or safety of [Plaintiff] or others that cannot be eliminated by a reasonable accommodation. Therefore, you must decide whether [Plaintiff] could safely perform the essential functions of [his/her] job with or without a reasonable accommodation. In determining whether [Plaintiff] [posed/would have posed] a direct threat, you may consider:

- (a) the nature of the risk of [plaintiff's condition];
- (b) the severity of the risk of [plaintiff's condition];
- (c) the duration of the risk of [plaintiff's condition];
- (d) how likely it is that harm will occur due to [plaintiff's condition]; and
- (e) whether the potential harm due to [plaintiff's condition] is likely to occur in the near future.

[Plaintiff] has the burden to prove that [he/she] [did not pose/would not have posed] a direct threat to [himself/herself] [and/or] to [Defendant]'s other employees. If you find that [Plaintiff] could not safely perform the essential functions of [his/her] job with or without a reasonable accommodation, then [Plaintiff] is not a "qualified individual."]

For the third element, [Plaintiff] must prove by a preponderance of the evidence that [Defendant] knew about [his/her] disability.



For the fourth element, [Plaintiff] must prove by a preponderance of the evidence that [he/she] requested an accommodation.

Put another way, the third and fourth elements require [Plaintiff] to prove that [he/she] informed [Defendant] of both the substantial limitations [his/her] disability created and the need for an accommodation.

For the fifth element, [Plaintiff] must prove by a preponderance of the evidence that a reasonable accommodation existed that would have allowed [him/her] to perform the essential functions of the job.

For the sixth element, [Plaintiff] must prove by a preponderance of the evidence that [Defendant] failed to provide a reasonable accommodation.

In this case, [Plaintiff] claims that [he/she] would have been able to perform the essential functions of [describe job] with a reasonable accommodation. [Defendant] claims that [[Plaintiff] was unable to perform the essential job functions - even with a reasonable accommodation/[Defendant] offered [Plaintiff] a reasonable accommodation, and [he/she] refused it/the accommodation [Plaintiff] requested would have imposed an undue hardship on [Defendant]].

A "reasonable accommodation" is a modification or adjustment of the employer's ordinary work rules, facilities, or terms and conditions of employment that the employer can make without causing an undue hardship.

A reasonable accommodation may include:

- (a) making existing facilities readily accessible to, and usable for, [Plaintiff];
- (b) job restructuring;
- (c) part-time or modified work schedules;
- (d) reassignment to a vacant position;
- (e) acquiring or modifying equipment or devices;
- (f) adjusting or modifying examinations, training materials, or policies;
- (g) providing qualified readers or interpreters; or



(h) other similar accommodations for individuals with disabilities.

[In this case, [Plaintiff] claims that [Defendant] should have accommodated [Plaintiff] by reassigning [him/her] to another position. Reassignment may be a reasonable accommodation under certain circumstances - but an employer is not required to create or reestablish a job where one would not otherwise exist. Also, an employer is not required to promote an employee with a disability as an accommodation. To show that reassignment to another job would have been a reasonable accommodation, [Plaintiff] must prove that the job was vacant or available and that [he/she] was qualified for it.]

[In this case, [Plaintiff] claims that [Defendant] should have accommodated [Plaintiff] by requiring another employee to perform certain duties of [his/her] job that [Plaintiff] could not perform because of [his/her] disability. Reallocation of marginal job duties can be a reasonable accommodation - but an employer does not have to transfer any essential job duties to another employee. If the duties [Plaintiff] wanted [Defendant] to reallocate were essential functions of [Plaintiff]'s job, then that is not a reasonable accommodation. If [Plaintiff] wanted [Defendant] to reallocate only marginal job duties to another employee, then that reallocation may be a reasonable accommodation - but only if the reallocation would not impose an excessive burden on the employer or the other employee.]

[In this case, [Plaintiff] claims that [Defendant] should have accommodated [Plaintiff] by modifying [his/her] work schedule. Modification of a work schedule can be a reasonable accommodation - but only if [Plaintiff] shows that the modified work schedule would have enabled [him/her] to perform the essential job functions and shows that it would have been reasonable under the circumstances. An employer's duty to provide a reasonable accommodation to a disabled employee does not require the employer to burden other employees excessively.]

[In this case, [Plaintiff] claims that [Defendant] should have [explain suggested reasonable accommodation].]

To decide whether [Defendant] denied [Plaintiff] a reasonable accommodation, you should keep in mind that while an employer



is required to provide [a] reasonable accommodation[s] that would allow [Plaintiff] to perform the essential job functions, the employer is not required to provide the particular accommodation that [Plaintiff] prefers or requests. There may be more than one reasonable accommodation available under the circumstances, and if [Plaintiff] refused to accept an accommodation offered by [Defendant] that would have allowed [him/her] to perform the essential job functions, [Plaintiff] has not proved that [Defendant] failed to provide a reasonable accommodation.

[Also, just because [Defendant] may have offered a certain accommodation to [Plaintiff] or another employee in the past does not mean that [Defendant] must forever extend the same accommodation to [Plaintiff] or that the accommodation is necessarily reasonable under the ADA. Otherwise, an employer would be reluctant to offer benefits or concessions to disabled employees for fear that by providing the benefit or concession one time, the employer would be required to provide that accommodation in the future. Because [Plaintiff] has requested an accommodation that [Defendant] has provided to [Plaintiff] or another employee in the past does not necessarily mean that the particular accommodation is a reasonable one. Instead, you must determine its reasonableness under all the evidence.]

[Good Faith Defense: If you find that [Plaintiff] has proved each element [he/she] must prove, you must decide whether [Defendant] has established [his/her/its] affirmative defense.

[Defendant] claims that after [Plaintiff] informed [Defendant] of [his/her] disability and requested an accommodation, [Defendant] made good faith efforts to consult with [Plaintiff] in order to identify and make a reasonable accommodation [that would not cause an undue hardship on the operation of [Defendant]'s business].

[Defendant] must prove by a preponderance of the evidence that [he/she/it] made good faith efforts to identify and make a reasonable accommodation for [Plaintiff].

If you find by a preponderance of the evidence that [Defendant] made good faith efforts to identify and make a reasonable accommodation for [Plaintiff], then you have found that [Defendant] established its affirmative defense, and you



will not decide the issue of [Plaintiff]'s damages. But if you find that [Defendant] has not established [his/her/its] affirmative defense, you must decide the damages issue.]

[Undue-Hardship Defense: If you find that [Plaintiff] has proved each element [he/she] must prove, you must decide whether [Defendant] has established [his/her/its] affirmative defense.

[Defendant] claims that the accommodation that [Plaintiff] requested would have imposed an undue hardship on the operation of [his/her/its] business. Under the ADA, [Defendant] is not required to accommodate [Plaintiff] if the accommodation would cause an undue hardship to its business. An accommodation would cause an "undue hardship" if it would cause [Defendant] significant difficulty or expense.

[Defendant] must prove by a preponderance of the evidence that the accommodation [Plaintiff] requested would be an undue hardship.

To decide this issue, you should consider the following factors:

- (a) the nature and cost of the accommodation;
- (b) [Defendant]'s overall financial resources, including the size of [Defendant]'s business, the number of employees, and the type of facilities [Defendant] operates;
- (c) the financial resources of the facility where the accommodation would be made, including the number of employees at that facility and the accommodation's impact on the facility's operations and costs; and
- (d) the way that [Defendant] conducts the business's operations, including [Defendant]'s workforce structure, the location of the facility where the accommodation would be made compared to [Defendant]'s other facilities, and the relationship between or among those facilities.

If you find by a preponderance of the evidence that the accommodation [Plaintiff] requested would have imposed an undue hardship on the operation of [Defendant]'s business, then you have found that [Defendant] established its affirmative defense, and you will not decide the issue of



[Plaintiff]'s damages. But if you find that [Defendant] has not established [his/her/its] affirmative defense, you must decide the damages issue.]

[Without Affirmative Defense: If you find that [Plaintiff] has proved each element [he/she] must prove, you must decide the issue of [his/her] compensatory damages.]

When considering the issue of [Plaintiff]'s compensatory damages, you should determine what amount, if any, has been proven by [Plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [Plaintiff]'s damages as a result of [Defendant]'s failure to provide [Plaintiff] with a reasonable accommodation, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [Defendant]. Also, compensatory damages must not be based on speculation or guesswork.

You should consider the following elements of damage, to the extent you find that [Plaintiff] has proved them by a preponderance of the evidence, and no others:

- (a) net lost wages and benefits to the date of your verdict; and
- (b) emotional pain and mental anguish.

To determine the amount of [Plaintiff]'s net lost wages and benefits, you should consider evidence of the actual wages [he/she] lost and the monetary value of any benefits [he/she] lost.

To determine whether and how much [Plaintiff] should recover for emotional pain and mental anguish, you may consider both the mental and physical aspects of injury - tangible and intangible. [Plaintiff] does not have to introduce evidence of a monetary value for intangible things like mental anguish. You must determine what amount will fairly compensate [him/her] for those claims. There is no exact standard to apply, but the award should be fair in light of the evidence.

[Mitigation of Damages: You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages. For purposes of this case, the duty to mitigate damages requires [Plaintiff] to be reasonably diligent in



seeking substantially equivalent employment to the position [he] [she] held with [Defendant]. To prove that [Plaintiff] failed to mitigate damages, [Defendant] must prove by a preponderance of the evidence that:

- (1) work comparable to the position [Plaintiff] held with [Defendant] was available, and
- (2) [Plaintiff] did not make reasonably diligent efforts to obtain it.

If, however, [Defendant] shows that [Plaintiff] did not make reasonable efforts to obtain any work, then [Defendant] does not have to prove that comparable work was available.

If you find that [Defendant] proved by a preponderance of the evidence that [Plaintiff] failed to mitigate damages, then you should reduce the amount of [Plaintiff]'s damages by the amount that could have been reasonably realized if [Plaintiff] had taken advantage of an opportunity for substantially equivalent employment.]

[Punitive Damages: [Plaintiff] also asks you to award punitive damages. The purpose of punitive damages is not to compensate [Plaintiff] but, instead, to punish [Defendant] for wrongful conduct and to deter similar wrongful conduct. You will only reach the issue of punitive damages if you find for [Plaintiff] and award [him] [her] compensatory damages.

To be entitled to an award of punitive damages [Plaintiff] must prove by a preponderance of the evidence that [Defendant] acted with either malice or with reckless indifference toward [Plaintiff]'s federally protected rights. Specifically, [Plaintiff] must show that an employee of [Defendant], acting in a managerial capacity, either acted with malice or with reckless indifference to [Plaintiff]'s federally protected rights.

There is no bright-line rule about which employees act in a managerial capacity. You must determine whether an employee acted in a "managerial capacity" based upon the type of authority [Defendant] gave the employee and the amount of discretion that the employee has in what is done and how it is accomplished.

To show that [Defendant] acted with malice, [Plaintiff] must show that an employee acting in a managerial capacity knew



that federal law prohibits discrimination and discriminated against [Plaintiff] anyway. To show that [Defendant] acted with reckless indifference to [Plaintiff]'s federally protected rights, [Plaintiff] must show that an employee acting in a managerial capacity acted with serious disregard for whether the conduct violated federal law. Either malice or reckless indifference is sufficient to entitle [Plaintiff] to an award of punitive damages; [Plaintiff] need not prove both.

An employer may not be held liable for punitive damages because of discriminatory acts on the part of its managerial employees where the managerial employees' acts are contrary to the employer's good faith efforts to comply with the law by implementing policies and programs designed to prevent unlawful discrimination in the workplace. However, the mere existence of policies prohibiting discrimination does not preclude punitive damages if the policies are ineffective.

There is no single factor that determines whether [Defendant] acted with malice or with reckless indifference to [Plaintiff]'s federally protected rights. In determining whether to award punitive damages, you may consider factors such as:

[(1) whether [Defendant] engaged in a pattern of discrimination toward its employees];

[(2) whether [Defendant] acted spitefully or malevolently];

[(3) whether [Defendant] showed a blatant disregard for civil legal obligations];

[(4) whether [Defendant] failed to investigate reports of discrimination];

[(5) whether [Defendant] failed to take corrective action concerning discriminatory acts or comments by its employees]; and

[(6) whether the person accused of discrimination was included in the employer's decision making process concerning [Plaintiff]'s [discharge] [denied promotion].]

If you find that punitive damages should be assessed against [Defendant], you may consider the evidence regarding



[Defendant]'s financial resources in fixing the amount of such damages.]

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [Plaintiff] had a "disability?"

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

2. That [Plaintiff] was a "qualified individual?"

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

3. That [Defendant] knew of [Plaintiff]'s disability?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

4. That [Plaintiff] requested an accommodation?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.¹⁹

5. That a reasonable accommodation existed that would have allowed [Plaintiff] to perform the essential functions of the job?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

6. That [Defendant] failed to provide a reasonable accommodation?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

[7. That [Defendant] made good faith efforts to identify and make a reasonable accommodation for [Plaintiff]?

Answer Yes or No _____]

If your answer is "Yes," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "No," go to the next question.]20

[8. That [Plaintiff]'s requested accommodation would have imposed an undue hardship on the operation of [Defendant]'s business?

Answer Yes or No _____

If your answer is "Yes," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "No," go to the next question.]

9. That [Plaintiff] should be awarded damages to compensate for a net loss of wages and benefits to the date of your verdict?



Answer Yes or No _____

If your answer is "Yes," in what amount?
\$ _____

10. That [Plaintiff] should be awarded damages to compensate for emotional pain and mental anguish?

Answer Yes or No _____

If your answer is "Yes," in what amount?
\$ _____

[If you did not award damages in response to either Question Nos. 9 or 10, this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If you awarded damages in response to Question Nos. 9 or 10 (or both), go to the next question.]

[11. That punitive damages should be assessed against [Defendant]?

Answer Yes or No _____

If your answer is "Yes," in what amount?
\$ _____

SO SAY WE ALL.

DATE: _____

Foreperson's Signature

((Rev. 03/2022) | *Judicial Council of the United States Eleventh Judicial Circuit*)



Annotations and Comments

I. Cause of Action

The Americans with Disabilities Act, 42 U.S.C. §12101 et seq. (“ADA”), prohibits employment discrimination on the basis of a disability. Under the ADA, prohibited discrimination includes failure to provide a reasonable accommodation. 42 U.S.C. §12112(b)(5). Pattern Instruction 4.12 is meant to be used for an ADA discrimination claim based on a failure to accommodate a disability. This Pattern Instruction is to be used for claims arising under the ADA Amendments Act of 2008 (“ADAAA”), Pub. L. No. 110-325, 122 Stat. 3553 (2008), which became effective on January 1, 2009. At the time of this publication, the Eleventh Circuit had not squarely addressed the question whether the ADAAA applies retroactively, but it has suggested that it does not. Tarmas v. Sec’y of Navy, 433 F. App’x 754, 762 n.9 (11th Cir. 2011) (per curiam) (noting that Eleventh Circuit has never held that the ADAAA is retroactively applicable and that other circuits have concluded that the ADAAA is not retroactively applicable). Accordingly, in the absence of an Eleventh Circuit decision holding that the ADAAA is retroactively applicable, the ADA as it existed prior to the ADAAA applies to claims based on conduct that occurred before January 1, 2009, and the court should use 2005 Pattern Instruction 4.12 for such claims.

II. Elements and Defenses

A. “Regarded As” Disabled

Pattern Instruction 4.12 is not to be used in cases where the plaintiff is proceeding only under a “regarded as” theory of disability. The ADAAA provides that an employer must provide a reasonable accommodation to employees who have an actual disability or a record of disability but not to employees who are merely “regarded as” being disabled. 42 U.S.C. §12201(h); see also 29 C.F.R. §1630.2(o)(4). This provision abrogates the Eleventh Circuit case law obligating employers to provide reasonable accommodations to employees “regarded as” being disabled. D’Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1235 (11th Cir. 2005).

B. Essential Function

The portion of Pattern Instruction 4.12 defining “essential function” tracks the language explaining that term in 29 C.F.R. §1630.2(n)(2).

C. “Qualified Individual” – Direct Threat

An individual is not a “qualified individual” if, by performing the duties of a given position, he would pose a “direct threat” to himself or others. Pinckney v. Potter, 186 F. App’x 919, 925 (11th Cir. 2006) (per curiam). A “direct threat” is “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” 42 U.S.C. §12111(3). “The employee retains at all times the burden of persuading the jury either that he was not a direct threat or that



reasonable accommodations were available.” Moses v. Am. Nonwovens, Inc., 97 F.3d 446, 447 (11th Cir. 1996) (per curiam). The “Definition of ‘Qualified Individual’” section contains an optional “direct threat” instruction that should be used if there is a fact question on this issue.

A “direct threat” may include an infectious disease. In Waddell v. Valley Forge Dental Associates, Inc., 276 F.3d 1275 (11th Cir. 2001), the Eleventh Circuit held that where a person poses a significant risk of communicating an infectious disease to others in the workplace and where a reasonable accommodation will not eliminate that risk, the person will not be otherwise qualified for his or her job and thus is not a “qualified individual” under the ADA. *Id.* at 1280. To determine whether a person who carries an infectious disease poses a significant risk to others, the Eleventh Circuit noted that the following evidence should be considered:

[findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk, (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.

Id. (alteration in original) (quoting Sch. Bd. of Nassau Cnty. v. Arline, 480 U.S. 273, 288 (1987)). Where there is a factual dispute on this issue, the jury should be given the “direct threat” instruction, and the court should tailor the “reasonable accommodation” portion of the instruction to address this issue.

There is a circuit split on the issue of who has the burden on the “direct threat” issue. In some circuits, “direct threat” is an affirmative defense, so the employer has the burden to establish that the plaintiff was a direct threat. Wurzel v. Whirlpool Corp., 482 F. App’x 1, 9 n.14 (6th Cir. 2012) (discussing different approaches to burden of proof in direct threat cases). In the Eleventh Circuit, however, “[t]he employee retains at all times the burden of persuading the jury either that he was not a direct threat or that reasonable accommodations were available.” Moses v. Am. Nonwovens, Inc., 97 F.3d 446, 447 (11th Cir. 1996) (per curiam).

D. Reasonable Accommodation

Pattern Instruction 4.12 contains three bracketed sample reasonable accommodation instructions that are intended to instruct on three common accommodation requests: (1) reassignment to another position, (2) reassignment of marginal job duties, and (3) modification of work schedule. The jury should be instructed with the language that best fits the facts of the case. If one of the three samples does not apply, then the court should fashion its own reasonable accommodation instruction.

II. Remedies



Pattern Instruction 4.12 instructs that a plaintiff cannot prevail if the plaintiff refused to accept a reasonable accommodation offered by the employer. See Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1286-87 (11th Cir. 1997) (finding that ADA liability did not arise where the employee rejected five proposed accommodations but did not provide employer with substantive reasons why the proffered reasons were unreasonable).

In a similar vein, 42 U.S.C. §1981a provides a defense to employers: compensatory and punitive damages may not be awarded on an ADA reasonable accommodation claim “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). Therefore, where an employee shows that he requested an accommodation, the employer may avoid damages by demonstrating that it in good faith engaged in the interactive process required by the ADA and tried to find a reasonable accommodation for the employee. The employer has the burden of proof on this defense. Pattern Instruction 4.12 provides an instruction on this defense that should be included if there is a fact dispute on this issue. In some cases, this instruction may need to be combined with the “undue burden” affirmative defense instruction.

For additional discussion of the damages that may be awarded in ADA reasonable accommodation cases, see the Annotations and Comments following Pattern Instruction 4.11, *supra*.

