**12.12 ADA—Defenses—Direct Threat**

 It is a defense to the plaintiff’s ADA claim if the plaintiff 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]. The defendant 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 claiming the “direct threat” defense must prove by a preponderance of the evidence that the plaintiff 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 has the burden of proof has been proved, your verdict should be for the plaintiff, unless you also find that the defendant has proved this affirmative defense, in which event your verdict should be for the defendant.

**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); *School 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 Structurals, 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 oil refinery would exacerbate the plaintiff’s liver condition).

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