**12.1A ADA Employment Actions—**

**Actual Disability—Elements**

 The plaintiff claims that [his] [her] disability was the reason for the defendant’s decision to [discharge] [not hire] [not promote] [demote] [*state other adverse action*] [him] [her]. To succeed on this claim the plaintiff has the burden of proving the following by a preponderance of the evidence:

 1. the plaintiff has a physical or mental impairment;

 2. such physical or mental impairment substantially limited one or more major life activities;

 3. the plaintiff was a qualified individual as that term is later defined in these instructions; and

 4. the plaintiff was [[discharged] [not hired] [not promoted] [demoted] [state other adverse action] because of [his/her] physical or mental impairment.

 If you find that the plaintiff has proved all of these elements, your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed to prove any one of these elements, your verdict should be for the defendant.

 Major life activities are the normal activities of living that a nondisabledperson can do with little or no difficulty, such as [*specify applicable major life activities*].

**Comment**

 Major life activities are defined in § 12102(2)(A)-(B) and include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working and the operation of a major bodily function such as the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions. The Ninth Circuit has recognized interacting with others as a major life activity. *Weaving v. City of Hillsboro*, 763 F.3d 1106, 1112 (9th Cir. 2014). Whether obesity without an

underlying physiological cause is an impairment under the ADA is unclear. *See Valtierra v.*

*Medtronic, Inc*., 934 F.3d 1089 (9th Cir. 2019).

“[A]lthough the ‘duration of an impairment’ remains ‘one factor that is relevant in determining whether the impairment substantially limits a major life activity,’” *Shields v. Credit One* *Bank, N.A.*, 32 F.4th 1218, 1225 (9th Cir. 2022) (citation omitted), a plaintiff need not establish permanent or long-term effects, *id.* at 1224.

 The term “substantially limits” must be interpreted consistently with the ADAA. *Id.* § 12102(4)(B). “‘An impairment is a disability . . . if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.’” *Weaving v. City of Hillsboro*, 763 F.3d 1106, 1111 (9th Cir. 2014) (quoting 29 C.F.R. § 1630.2(j)(1)(ii)).

 The ADA places on the plaintiff the burden of showing that the plaintiff is qualified. The plaintiff must show the ability to perform the essential functions of the job with or without a reasonable accommodation. 42 U.S.C. § 12112(b)(5)(A), 12111(8); *Smith v. Clark Cnty. Sch. Dist.*, 727 F.3d 950, 955 (9th Cir. 2013); *Cooper v. Neiman Marcus Group*, 125 F.3d 786, 790 (9th Cir. 1997) (stating elements).

 An employee who commits an act of misconduct may be fired, regardless of whether he or she is disabled within the meaning of the ADA. *Newland v. Dalton*, 81 F.3d 904, 906 (9th Cir. 1996) (holding that while alcoholism is “disability” under ADA, employee’s arrest for criminal assault while intoxicated was nondiscriminatory reason for termination).

 In *Raytheon v. Hernandez*, 540 U.S. 44 (2003), the Supreme Court addressed an employer policy not to re-hire employees who left the company for violating personal conduct rules such as illegal drug use. *Id.* at 46. Under a disparate treatment theory, a neutral no-rehire policy was a legitimate, nondiscriminatory reason under the ADA. *Id.* at 53-55. Because the plaintiff had failed to raise a disparate impact claim on a timely basis, *id.* at 49, the Court held that the question of whether the neutral no-rehire policy fell more harshly on drug addicts who were successfully rehabilitated could not be considered. *Id.* at 52, 55.

 Title I provides that “[n]o covered entity shall discriminate against a qualified individual with a disability *because of* the disability of such individual.” 42 U.S.C. § 12112(a) (emphasis added). An ADA discrimination plaintiff bringing a claim under 42 U.S.C. § 12112 must show

that the adverse employment action would not have occurred but for the disability. *Murray v.*

*Mayo Clinic*, 934 F.3d 1101, 1105 (9th Cir. 2019).

 The Supreme Court has held that in a retaliation claim under Title VII, a plaintiff “must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer.” *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2534 (2013). The Court found that the “because” language in the anti-retaliation provision (42 U.S.C. § 2000e3(a)) lacked any meaningful textual difference from the statutory provision at issue in *Gross*. 133 S. Ct. at 2528; *see also Burrage v. United States*, 134 S. Ct. 881, 887-889 (2014) (defining “results from” in Controlled Substances Act to mean “but for” causation). The Ninth Circuit has applied “but for” causation in retaliation claims under the ADA. *T.B. v. San Diego Unified Sch. Dist.*, 795 F.3d 1067, 1088 (9th Cir. 2015).

 The regulations contain examples of impairments whose inherent nature “virtually always [will] be found to impose a substantial limitation on a major life activity” and, therefore, involve “simple and straightforward” individualized assessment. 29 C.F.R. § 1630.2(j)(3)(ii). The examples include: intellectual disability substantially limits brain function, cancer substantially limits normal cell growth, diabetes substantially limits endocrine function, and HIV substantially limits immune function. *Id.* § 1630.2(j)(3)(iii).

 “An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.” 42 U.S.C. § 12102(4)(D).

 In general, “[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures” such as medication, medical equipment, prosthetics, hearing aids, low-vision devices, oxygen therapy equipment or assistive technology. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered. 42 U.S.C. § 12102(4)(E)(i)-(ii); 29 C.F.R. § 1630.2(j)(1)(vi). The distinction between low-vision devices and ordinary eyeglasses or contact lenses is that glasses or lenses correct visual acuity or eliminate refractive error, whereas low-vision devices magnify or enhance a visual image. 42 U.S.C. § 12102(4)(E)(iii).

 In an appropriate case, the trial court must instruct the jury that conduct resulting from a disability is part of the disability and is not a separate basis for termination. *See Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087, 1093 (9th Cir. 2007) (in case brought under FMLA and Washington Law Against Discrimination by plaintiff terminated after engaging in profanity-laced outburst allegedly caused by bipolar disorder, Ninth Circuit held it was error to refuse instruction stating that conduct resulting from disability is part of disability and not separate basis for termination, citing ADA case of *Humphrey v. Memorial Hospitals Ass’n*, 239 F.3d 1128, 1139-40 (9th Cir. 2001)). However, *Gambini* did not preclude the employer from arguing that the plaintiff was not a qualified individual or raising a business necessity or direct threat defense. *Id.* at 1095-96. In *Mayo v. PCC Structurals, Inc.*, 795 F.3d 941, 944 (9th Cir. 2015), the Ninth Circuit held that an employee who makes serious and credible threats to kill coworkers is not a qualified individual regardless of whether the threats stemmed from mental illness. *See* Instruction 12.10 (ADA—Defenses—Business Necessity) and Instruction 12.11 (ADA—Defenses—Direct Threat).

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