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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT (AUGUST 21, 2020)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIAN BELL,

Plaintiff, Appellant,

v.

O'REILLY AUTO ENTERPRISES, LLC,
d/b/a O'Reilly Auto Parts,

Defendant, Appellee.

No. 18-2164

Appeal from the United States District
Court for the District of Maine
[Hon. Jon D. Levy, U.S. District Judge]

Before: BARRON, SELYA, and BOUDIN,
Circuit Judges.

BOUDIN, Circuit Judge.

Brian Bell alleged that O'Reilly Auto Enterprises ("O'Reilly") failed properly to accommodate his disability under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq*, and the Maine Human Rights Act ("MHRA"), 5 M.R.S. § 4551 *et seq.*

At trial, the jury found for O'Reilly. Bell now appeals.

Bell lives with Tourette's syndrome, attention-deficit/hyperactivity disorder, and major depression. He takes medication, but experiences motor tics, often accompanied by a mild verbal noise, and he cannot concentrate easily. With depression, he wakes up weary.

Despite these symptoms, Bell earned a position with O'Reilly to manage its store in Belfast, Maine. As store manager, Bell was "[r]esponsible for the sales, profitability, appearance, and overall operations of the store." Bell trained, supervised, and evaluated employees, monitored accounting, tracked inventory, and set prices. He oversaw a small team, usually about eight to twelve employees.

Bell worked as a store manager for months without incident. During this time, not counting breaks, Bell was scheduled to work slightly more than fifty hours a week and ten-and-a-half hours a day. Beyond these scheduled hours, Bell infrequently worked an additional fifteen to thirty minutes a week to complete tasks.

But work grew more intense when Bell lost two shift leaders, leaving only a few employees who could open and close the store. Unable to schedule employees for overtime, Bell made up the difference himself, working almost 100 hours a week on fifteen-hour days. He worked from around 6:30 a.m. to 9:30 p.m. almost every day, including weekends.

Bell's symptoms grew more severe and his motor tics grew more frequent and more painful. His concentration deteriorated, as did his sleep. He told his mental health provider that he felt overwhelmed.

Bell broke down soon after. At work, exhausted, he began to tremble uncontrollably, his motor tics relentless. Bell left the store to take a break, resting in his truck parked outside, but his supervisor demanded that he return. Bell went to his mental health provider to discuss his symptoms.

O'Reilly then told Bell that before he could work again, he would have to get his provider to fill out a form confirming his fitness for duty. Bell's provider indicated that he would be fit to return to work a few days later so long as he received an accommodation. She later testified that she aimed to secure an accommodation for Bell that would protect him against "overwhelming stress" by preventing O'Reilly from placing him "into the kind of working schedule that he had had, working 50 hours or more."

The two settled on the following language for the proposed accommodation: "Mr. Bell because of his mental health issues should not be scheduled for more than 9 hours 5 days a week." Bell's provider checked a box indicating that Bell's "[m]ax hours per day of work" should be restricted to nine hours. Bell faxed this form to O'Reilly.

O'Reilly denied Bell's requested accommodation. Bell's district manager said that O'Reilly understood the form to be a hard cap on his worked hours; after Bell made clear that he intended only to request a restriction on his scheduled hours, Bell's district manager directed Bell to have his provider fill out a revised form to that effect.

The provider declined to revise the form, deeming the original language adequate to convey Bell's request. Instead, she invited O'Reilly to discuss the request

with her if the company needed clarification. O'Reilly never did but eventually terminated Bell.

Bell sued O'Reilly in the federal district court in Maine. Among other claims, Bell alleged that O'Reilly violated the ADA and the MHRA when it failed to provide Bell with a reasonable accommodation. Those claims survived summary judgment and went to trial.

Bell's theory of the case was that he needed O'Reilly to accommodate his disability, he had requested a reasonable accommodation, and O'Reilly had rejected it. O'Reilly had enlisted Bell to work "close to 100 hours a week, [and] his meds couldn't keep up." With the restriction, Bell's counsel argued, Bell would have "some protection" against this enlistment. But O'Reilly denied his request.

O'Reilly answered that the requested accommodation would have prevented Bell from performing a store manager's essential job functions. O'Reilly's witnesses testified that it was essential for store managers to work at least fifty hours a week, with the flexibility to do more, and Bell's requested restriction would have left him locked into a schedule below O'Reilly's "bare minimum scheduling requirement."

Bell replied that because his accommodation restricted only scheduled hours, he would have been able to work unscheduled hours. And he had confirmed in a letter to O'Reilly that he could work unscheduled hours "on occasion . . . [i]f necessary." Bell testified that "if there were no other option, then [he] would have a found a way" to work the hours needed to get the job done.

In closing O'Reilly's counsel pivoted, telling the jury that "if he can do it, that means he doesn't need the accommodation. . . . [and] he is at least not entitled to an accommodation under the law." He emphasized that "the judge will instruct you that even if you have a disability, you're entitled to an accommodation only if you need that accommodation in order to do the essential functions of your job." The judge gave this instruction, and the jury returned a verdict for O'Reilly on all claims.

Bell timely appealed, and among other challenges argues that the district court erred in instructing the jury that to succeed on a claim that an employer failed to provide a reasonable accommodation, a plaintiff must prove that "he needed an accommodation to perform the essential functions of his job." Bell contends that a disabled employee who "experiences difficulty" due to his disability "in performing his job" may ultimately be entitled to a reasonable accommodation.

Where, as here, a motion for a new trial relies on "preserved claims of instructional error," the "questions as to whether the jury instructions capture the essence of the applicable law" are reviewed de novo. *Thomas & Betts Corp. v. New Albertson's, Inc.*, 915 F.3d 36, 49 (1st Cir. 2019) (internal quotations omitted). Following the parties, we treat the MHRA as "coextensive with the ADA in all material respects." *Richardson v. Friendly Ice Cream Corp.*, 594 F.3d 69, 74 n.2 (1st Cir. 2010).

The district court erred here when it instructed the jury that, for a disabled employee to make out a failure-to-accommodate claim, he must demonstrate that he <u>needed</u> an accommodation to perform the essential functions of his job. Giving the jury instructions their

"most natural reading," *United States v. Pizarro*, 772 F.3d 284, 300 (1st Cir. 2014), they required an employee to demonstrate that he could not perform the essential functions of his job without accommodation.

An employee who can, with some difficulty, perform the essential functions of his job without accommodation remains eligible to request and receive a reasonable accommodation. The ADA prohibits an employer from "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee." 42 U.S.C. § 12112 (b)(5)(A). A "qualified individual" is "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8) (emphasis added).

For this reason, to make out a failure to accommodate claim, a plaintiff need only show that: "(1) he is a handicapped person within the meaning of the Act; (2) he is nonetheless qualified to perform the essential functions of the job (with or without reasonable accommodation); and (3) the employer knew of the disability but declined to reasonably accommodate it upon request." *Sepúlveda-Vargas v. Caribbean Rests., LLC*, 888 F.3d 549, 553 (1st Cir. 2018). A plaintiff can make out this kind of claim even when an employer has "pronounced itself fully satisfied with [the disabled employee]'s level of performance" before a request. *Calero-Cerezo v. U.S. Dep't of Just.*, 355 F.3d 6, 23 (1st Cir. 2004).

Vacation is appropriate "only if the error is determined to have been prejudicial based on a

review of the record as a whole," *Sony BMG Music Ent. v. Tenenbaum*, 660 F.3d 487, 503 (1st Cir. 2011) (internal quotations omitted), but the error here prejudiced Bell. By instructing the jury that an employee must demonstrate that he needed an accommodation to perform the essential functions of his job, the district court wrongly limited O'Reilly's potential liability.

O'Reilly responds that there was no prejudice because the challenged instruction was "functionally equivalent" to another instruction from the district court: that an employee must demonstrate "that the proposed accommodation would enable him to perform the essential functions of the job." But this instruction does not say "by implication" whether the employee must demonstrate "that without the accommodation he was 'unable' to do" the essential functions of the job. Rather, the instruction expresses only the well-settled rule that a proposed accommodation must be "effective," leaving an employee able to perform the essential functions of the job. *Trahan v. Wayfair Me., LLC*, 957 F.3d 54, 66 (1st Cir. 2020).

O'Reilly also argues that there was no prejudice because no reasonable jury could have found that Bell would have been able to perform the essential functions of his job with O'Reilly: it was essential that O'Reilly's store managers work at least fifty hours a week, with the flexibility to do more, but Bell had requested a scheduling restriction that would have left him unable to fulfill this role. On this issue and on this record, a jury could have found for Bell.

The district court's judgment is vacated and the case is remanded for a new trial on Bell's failure-to-

accommodate claim. Costs are to be taxed in favor of Bell.

It is so ordered.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT (AUGUST 21, 2020)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIAN BELL,

Plaintiff, Appellant,

v.

O'REILLY AUTO ENTERPRISES, LLC,
d/b/a O'Reilly Auto Parts,

Defendant, Appellee.

No. 18-2164

Before: BARRON, SELYA, and BOUDIN,
Circuit Judges.

This cause came on to be heard on appeal from the United States District Court for the District of Maine and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court's judgment is vacated, and the case is remanded for a new trial on Brian Bell's failure-to-accommodate claim. Costs are taxed in favor of Brian Bell.

By the Court:

Maria R. Hamilton
Clerk

cc: Hon. Jon David Levy
Christa Berry
Clerk
United States District Court
for the District of Maine

Allan K. Townsend
Chad T. Hansen
Christopher C. Taintor
Robert W. Bower Jr

ANNOUNCEMENT OF JURY VERDICT (JULY 20, 2018)

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BRIAN BELL,

Plaintiff,

v.

O'REILLY AUTO ENTERPRISES, LLC, d/b/a O'REILLY AUTO PARTS,

Defendant.

Docket No. 1:16-cv-00501-JDL

Volume V of V

Before: Hon. Jon D. LEVY, Judge, United States District Court.

[July 20, 2018 Transcript, p. 842]

. . . closings, and the jury would be directed to retire to the jury room to deliberate.

MR. HANSEN: Okay.

THE COURT: What do you mean by address the schedule after that?

MR. HANSEN: Well, just in terms of—

THE COURT: How late we will go tonight?

MR. HANSEN: Exactly.

THE COURT: Yeah, I anticipate if we were in that circumstance going as long as we need to go to get a verdict. MR. HANSEN: Okay.

THE COURT: Within reason, of course.

All right. Please summons the jury.

(The jury entered the courtroom at 5:11 p.m.)

THE COURT: The clerk will receive the verdict form from the foreperson. Please be seated.

The clerk will publish the verdict.

THE CLERK: Ladies and gentlemen of the jury, this is your verdict as the Court has received it. In the case of Brian Bell v. O'Reilly Auto Enterprises, LLC, DBA O'Reilly Auto Parts, the case number is 1:16-cv-00501-JDL. Disability discrimination, Number 1, has Brian Bell proven to you by a preponderance of the evidence that O'Reilly Auto Enterprises, LLC is liable for disability discrimination under the Americans with Disability Act? You indicated no.

After answering question Number 1, proceed to question Number 2. Has Brian Bell proven to you by a preponderance of the evidence that O'Reilly Auto Enterprises, LLC is liable for disability discrimination under the Maine Human Rights Act? You indicated no.

After answering question Number 2, proceed to question Number 3. Failure to accommodate, Number 3, has Brian Bell proven to you by a preponderance of the evidence that O'Reilly Auto Enterprises, LLC failed to provide him with a

reasonable accommodation as required by the Americans with Disability Act? You answered no.

After answering question Number 3, proceed to question Number 4. Number 4, has Brian Bell proven to you by a preponderance of the evidence that O'Reilly Auto Enterprises, LLC failed to provide him with reasonable accommodation as required by the Maine Human Rights Act? You answered no.

If you answered question Number 3 and/or question Number 4, yes, proceed to question Number 5. If you answered both questions Number 3 and Number 4 no, do not answer question Number 5 and proceed to question Number 6. Has—the jury did not answer Number 5.

Unlawful retaliation, question Number 6. Has Brian Bell proven to you by a preponderance of the evidence that O'Reilly Auto Enterprises, LLC is liable for unlawful retaliation under the Americans with Disabilities Act? You answered no.

After answering question Number 6, proceed to question Number 7. Number 7, has Brian Bell proven to you by a preponderance of the evidence that O'Reilly Auto Enterprises, LLC is liable for unlawful retaliation under the Maine Human Rights Act? You answered no.

After answering question Number 7, answer questions Number 8 and 9 regarding damages if any one or more of the following applies, A, your answer to question Number 1 was yes; B, your answer to question Number 2 was yes; C your answer to Number 3 was yes, and your question to Number 5 was no; D your answer to question

Number 4 was yes and your answer to question Number 5 was no; E, your answer to question Number 6 was yes; or F, your answer to Number 7 was yes, otherwise do not answers questions 8 and 9 regarding damages and date and sign the jury verdict form.

The section for damages are not completed.

Madam Foreperson, is this your verdict?

THE FOREPERSON: Yes.

THE CLERK: Ladies and gentlemen of the jury, is this your verdict?

THE JUROR: Yes.

THE COURT: Thank you.

Does either party wish to have the jury polled?

MR. HANSEN: No, Your Honor.

MR. TAINTOR: No, Your Honor.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DENYING PETITION FOR REHEARING (OCTOBER 2, 2020)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIAN BELL,

Plaintiff, Appellant,

v.

O'REILLY AUTO ENTERPRISES, LLC,
d/b/a O'Reilly Auto Parts,

Defendant, Appellee.

No. 18-2164

Before: HOWARD, Chief Judge, TORRUELLA, SELYA, BOUDIN, LYNCH, THOMPSON, KAYATTA,* and BARRON, Circuit Judges.

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en

* Judge Kayatta is recused and did not participate in the consideration of this matter.

banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton
Clerk

cc: Allan K. Townsend
Chad T. Hansen
Christopher C. Taintor
Robert W. Bower Jr.

RELEVANT STATUTORY PROVISION
42 U.S.C. § 12112

42 U.S.C. § 12112—Discrimination

(a) General Rule

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a), the term "discriminate against a qualified individual on the basis of disability" includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered

entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)

(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered Entities in Foreign Countries

(1) In General

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of Corporation

(A) Presumption

If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination

For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on—

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation.

(d) Medical Examinations and Inquiries

(1) In General

The prohibition against discrimination as referred to in subsection (a)shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment Entrance Examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and Inquiry

(A) Prohibited Examinations and Inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job related and consistent with business necessity.

(B) Acceptable Examinations and Inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

PLAINTIFF'S PROPOSED JURY INSTRUCTIONS (JULY 3, 2018)

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BRIAN BELL,

Plaintiff,

v.

O'REILLY AUTO ENTERPRISES, LLC,
d/b/a O'REILLY AUTO PARTS,

Defendant.

Civil Action No. 1:16-cv-00501-JDL

Pursuant to the Court's Report of Final Pretrial Conference and Order (ECF No. 52 at 3), Plaintiff proposes the following jury instructions for this case.

I. General Instructions

A. Burden of Proof

Throughout my instructions I will use the term "preponderance of the evidence" when I instruct you on the burden of proof that either Mr. Bell or Defendant must meet. These instructions will ask you to determine whether one party or the other has proven something by a "preponderance of the evidence." To determine whether something has been proven by

a "preponderance of the evidence," you must determine whether, in light of all of the facts, you believe it is more likely true than not.[1]

B. Evidence

The evidence from which you are to decide what the facts are consists of (1) sworn testimony of witnesses, here in Court or by deposition, both on direct and cross-examination, regardless of who called the witness; (2) exhibits that have been received into evidence; and (3) stipulated facts that I have provided to you.[2]

C. What is Not Evidence

In reaching your verdict you may consider only the testimony, exhibits, and stipulated facts received into evidence. Certain things are not evidence and you may not consider them in deciding what the facts are. I will list them for you.

1. Arguments and statements by lawyers are not evidence;
2. Questions and objections by lawyers are not evidence;
3. Testimony I have instructed you to disregard is not evidence; and
4. Anything you may have seen or heard when the Court was not in session is not evidence.[3]

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[1] Adapted from jury instructions in *Prescott v. Rumford Hospital*, 2:13-cv-00460-JDL (D. Me.) (Exhibit 1).

[2] Adapted from *Prescott* jury instructions.

[3] Adapted from *Prescott* jury instructions.

D. Direct and Circumstantial Evidence

There are two kinds of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is indirect evidence, that is, proof of a fact or chain of facts from which you could draw the inference, by reason and common sense, that another fact exists, even though it has not been proven directly. You are entitled to consider both kinds of evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.[4]

E. Credibility of Witnesses

In deciding what the facts are, you must consider all of the evidence. In doing this, you must decide which testimony to believe and which testimony not to believe. You may disbelieve all or any part of any witness's testimony. You might want to take into consideration such factors as the witness's conduct and demeanor while testifying; their apparent fairness or any bias they may have displayed; any interest you may discern that they may have in the outcome of the case; any prejudice they may have shown; their opportunities for seeing and knowing the things about which they have testified; the reasonableness or unreasonableness of the events that they have related to you in their testimony; and any other facts or circumstances disclosed by the evidence that tend to corroborate or contradict their versions of the events.

In deciding whether to believe a witness, keep in mind that people sometimes forget things. You need

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[4] Adapted from *Prescott* jury instructions.

to consider therefore whether a contradiction is an innocent lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or with only a small detail.

The weight of the evidence presented by each side does not necessarily depend on the number of witnesses testifying on one side or the other. You must consider all the evidence in the case, and you may decide that the testimony of a smaller number of witnesses on one side has greater weight than that of a larger number on the other or vice versa.

All of these matters are for you to consider in deciding the facts.[5]

F. Opinion Evidence, Expert Witnesses

You have heard testimony from people described as experts. People who, by education and experience, have become expert in some field may state their opinion in that field and may also state their reasons for the opinion.

Expert opinion testimony should be judged like any other testimony. You may accept it or reject it and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.[6]

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[5] Adapted from *Prescott* jury instructions.

[6] Adapted from jury instructions given in *Warren v. United Parcel Service, Inc.*, 06-84-P-H (D. Me.) (Exhibit 2).

G. Liability of Corporations

O'Reilly Auto Enterprises, LLC is a corporation. Corporations can act only through their employees. A corporation is responsible for the acts of its employees when they are acting within their authority.

The fact that O'Reilly Auto Enterprises is a corporation and Mr. Bell is an individual should not affect your decision. All persons, whether they be corporations or individuals, are equal before the law and are entitled to the same fair and conscientious consideration by you as any other person.[7]

II. Rules of Law

A. Disability Discrimination

1. Introduction[8]

In this case, Mr. Bell makes a claim based on a federal law known as the Americans with Disabilities Act, which I will refer to as the ADA in these instructions, and a state law known as the Maine Human Rights Act, which I will refer to as the MHRA.

Under both the ADA and MHRA, an employer may not deprive a person with a disability of an employment opportunity because of that disability, if that person is able, with reasonable accommodation if necessary, to perform the essential functions of the

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[7] Adapted from *Prescott* jury instructions.

[8] This introductory instruction is adapted from the Third Circuit's Pattern Jury Instructions 9.0. *See* http://www.ca3.uscourts.gov/sites/ca3/files/9_Chap_9_2018_March.pdf (visited July 3, 2018).

job. Terms such as "disability," "qualified individual," and "reasonable accommodation" are defined by the ADA and MHRA and I will instruct you on the meaning of those terms.

Mr. Bell claims that because of his Attention-Deficit/Hyperactivity Disorder (ADHD), Tourette's syndrome, and/or Major Depressive Disorder O'Reilly Auto Enterprises (1) prohibited him from working after he made a request for a scheduling accommodation; (2) offered him less pay for certain positions; and (3) terminated his employment. Mr. Bell also claims that O'Reilly Auto Enterprises refused to provide him with a scheduling accommodation which he contends violated his right to reasonable accommodations under the ADA and MHRA. And Mr. Bell also claims that O'Reilly Auto Enterprises (1) prohibited him from working after he made a request for a scheduling accommodation; (2) offered him less pay for certain positions; and (3) terminated his employment because he requested a scheduling accommodation.

O'Reilly Auto Enterprises denies Mr. Bell's claims. Further, O'Reilly Auto Enterprises asserts that it would have been an undue hardship for it to employ Mr. Bell with the scheduling accommodation that he requested. The term "undue hardship" is another term defined by the ADA and MHRA and I will instruct you on the meaning of that term as well.

As you listen to these instructions, please keep in mind that many of the terms I will use, and you will need to apply, have a special meaning under the ADA and MHRA. So, please remember to consider the specific definitions I give you, rather than using your own opinion of what these terms mean.

2. Purpose of the ADA and MHRA

In passing the ADA, Congress found that 43 million Americans suffer from one or more physical or mental disabilities and that historically such individuals had been subjected to discrimination in critical areas such as employment. Congress further concluded that such discrimination was costing the United States billions of dollars in unnecessary expenses resulting from dependency and non-productivity. Accordingly, Congress found that the proper goal for our Nation is to assure that individuals with disabilities have the opportunity to attain economic self-sufficiency by eliminating discrimination in employment against them.[9]

It is also the policy of the State of Maine as expressed in the Maine Human Rights Act ("MHRA") to prohibit discrimination on the basis of disability in order to ensure that disabled individuals have life with dignity.[10]

3. Disability Discrimination (Disparate Treatment)[11]

Mr. Bell accuses O'Reilly Auto Enterprises of disability discrimination. Specifically, he claims that because of his disability O'Reilly Auto Enterprises (1)

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[9] 42 U.S.C. § 12101; *see Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979) (under discrimination laws, it would be useful to discuss with the jury policies underlying law and plaintiff's rights thereunder).

[10] 5 M.R.S.A. § 4552; *Loeb*, 600 F.2d at 1003.

[11] Except where indicated, this instruction is based on the Court's Pattern Jury Instruction 3.1.

prohibited him from working after he made a request for a scheduling accommodation; (2) offered him less pay for certain positions; and (3) terminated his employment. To succeed on these claims, under the ADA and MHRA, Mr. Bell must prove by a preponderance of the evidence all of the following:

- First, Mr. Bell had a disability under either the ADA or MHRA. I will instruct you on what the term "disability" means in a moment.[12]
- Second, Mr. Bell was a qualified individual, which means that he possessed the necessary skill, experience, education, and other job-related requirements for the Store Manager position in the Belfast, Maine, store and could have continued to perform the essential functions of that position if O'Reilly Auto Enterprises had granted his request for a scheduling accommodation as a reasonable accommodation for his disabilities.
- Third, O'Reilly Auto Enterprises knew that Mr. Bell had ADHD, Tourette's syndrome, or Major Depressive Disorder; and
- Fourth, that were in not for Mr. Bell's ADHD, Tourette's syndrome, or Major Depressive Disorder, O'Reilly Auto Enterprises would not have (1) prohibited him from working after he made a request for a scheduling accommodation; (2) offered him less pay for certain positions; and/or (3) terminated his employment.

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[12] This element is based on Eleventh Circuit's Pattern Jury Instruction 4.11.

In order to decide what the essential functions of a job are, you may consider the following factors:

1. Written job descriptions;
2. The employer's judgment as to which functions of the job are essential;
3. The amount of time spent on the job performing the function in question;
4. Consequences of not requiring the person to perform the function;
5. The work experience of people who have held the job;
6. The current work experience of people in similar jobs;
7. Whether the reason the position exists is to perform the function;
8. Whether there are a limited number of employees available among whom the performance of the function can be distributed; and
9. Whether the function is highly specialized and the individual in the position was hired for his or her expertise or ability to perform the function.

No one factor is necessarily controlling. You should consider all of the evidence in deciding whether a job function is essential.

Mr. Bell need not show that disability discrimination was the only or predominant factor that motivated O'Reilly Auto Enterprises. In fact, you may decide that other factors were involved as well in

O'Reilly Auto Enterprises' decision-making process. In that event, in order for you to find for Mr. Bell, you must find that he has proven that, although there were other factors, he would not have been (1) prohibited him from working after he made a request for a scheduling accommodation; (2) offered less pay for certain positions; and/or (3) terminated without disability discrimination.

An employer is free to prohibit an employee from working, offer low pay, or terminate his employment for any nondiscriminatory reason even if its business judgment seems objectively unwise. But you may consider the believability of an explanation in determining whether it is a cover-up or pretext for discrimination. In order to succeed on the discrimination claim, Mr. Bell must persuade you, by a preponderance of the evidence, that were it not for disability discrimination, he would not have been (1) prohibited him from working after he made a request for a scheduling accommodation; (2) offered less pay for certain positions; and/or (3) terminated.

Mr. Bell is not required to produce direct evidence of unlawful motive. You may infer knowledge and/or motive as a matter of reason and common sense from the existence of other evidence—for example, explanations that you find were really pretextual. "Pretextual" means false or, though true, not the real reason for the action taken.

O'Reilly Auto Enterprises contends that it did not know Mr. Bell had a disability under the ADA or MHRA. However, if O'Reilly Auto Enterprises had reason to know that Mr. Bell had a disability and he was having problems at work because of the disability, O'Reilly Auto Enterprises had to engage in discussions

with him and, if necessary, with his doctor, to decide if he was actually disabled under the ADA or MHRA.[13]

4. Definition of Disability under ADA and MHRA

The term "disability" has different meanings under the ADA and MHRA. I will first instruct you on what the term means under the ADA and then I will instruct you on what the term means under the MHRA.

a. ADA[14]

Under the ADA, a "disability" is a "physical or mental impairment" that "substantially limits" one or more "major life activities." A "physical impairment" is any condition that prevents the body from functioning normally. A "mental impairment" is any condition that prevents the mind from functioning normally.[15]

A "major life activity" is an activity that is centrally important to everyday life, including the operation of major bodily functions.[16]

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[13] This paragraph is adapted from the Seventh Circuit's Model Jury Instruction 4.08 *See* http://www.ca7.uscourts.gov/pattern-jury-instructions/7th_cir_civil_instructions.pdf. (visited July 3, 2018).

[14] Except where otherwise noted, this instruction is adapted from Eleventh Circuit Model Jury Instruction 4.11. *See* http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCivilPatternJuryInstruction.pdf. (visited July 3, 2018)

[15] 3d Circuit instruction 9.2.1

[16] Eleventh Circuit Model Jury Instruction 4.12.

Brain functioning, neurological functioning, sleeping, and the ability to concentrate are major life activities.[17]

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 Mr. Bell's ADHD, Tourette's syndrome, or Major Depressive Disorder substantially limited his brain functioning, neurological functioning, ability to concentrate, or ability to sleep, it does not matter that his ADHD, Tourette's syndrome, or Major Depressive Disorder can be corrected by the use of medication, therapy, or other medical assistance. In other words, when you consider whether these conditions are disabilities, you should consider how they would affect Mr. Bell if he was not taking any medication or receiving medical care.[18]

Furthermore, if Mr. Bell's ADHD, Tourette's syndrome, or Major Depressive Disorder are not always a problem but flare up from time to time, that can be a disability if it would substantially limit a major life activity when active.

Applying these principles, some types of impairments will, in virtually all cases, result in a determination that the individual with the impairment is disabled under the ADA. For example, it should be

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17 *See* 42 U.S.C. § 12102(2).

18 42 U.S.C. § 12102(4)(E).

easily concluded that Major Depressive Disorder substantially limits the major life activity of brain function.[19]

Mr. Bell can also establish that he had a disability under the ADA by proving that O'Reilly Auto Enterprises regarded him as having a disability. A person qualifies as disabled if, among other things, that person is regarded by the employer has having a physical or mental impairment.[20]

b. MHRA[21]

Now I will instruct you on the MHRA's definition of disability. If an individual is disabled under the ADA, he is also disabled under the MHRA. However, the MHRA is broader than the ADA and, in addition to covering individuals who had or were regarded as having impairments that substantially limit a major life activity, it also includes individuals who had or were regarded as having impairments that significantly impair physical or mental health. For an impairment to significantly impair physical or mental health, it must have an actual or expected duration of more than 6 months and impair health to a significant extent as compared to what is ordinarily experienced in the general population.

Furthermore, under the MHRA, Major Depressive Disorder is a disability regardless of how severe it is. So, if you find that Mr. Bell had Major Depressive

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[19] 29 C.F.R. § 1630.2(j)(3)(ii)-(iii)

[20] 29 C.F.R. § 1630.2(l).

[21] This instruction is based on the MHRA definition of disability at 5 M.R.S.A. § 4553-A.

Disorder, you must find that he was disabled under the MHRA.

5. Failure to Accommodate

The ADA and MHRA require employers to provide reasonable accommodations to employees who are disabled unless the accommodation would impose an undue hardship on the employer.[22]

Mr. Bell has made a claim that O'Reilly Auto Enterprises failed to provide him with a reasonable accommodation, namely a schedule of 45 hours per week with occasional work outside of scheduled hours. To succeed on his claim, Mr. Bell must prove that he had a disability under either the ADA or MHRA and also the following by a preponderance of the evidence:

- First, that the proposed accommodation would enable him to perform the essential functions of the Store Manager position in the Belfast, Maine store and that the proposed accommodation is, at least on the face of things, reasonable.
- Second, that Mr. Bell made a request for the accommodation that was sufficiently direct and specific so as to put O'Reilly Auto Enterprises on notice of the need for an accommodation; and
- Third, that O'Reilly Auto Enterprises did not reasonably accommodate his disability.[23]

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[22] Adapted from the Court's Pattern Jury Instruction 3.2.

[23] These three elements are taken from the *Prescott* jury instructions.

If Mr. Bell meets this burden, then O'Reilly Auto Enterprises bears the burden of proving that the accommodation Mr. Bell proposed would have been an undue hardship. Mr. Bell need not show that O'Reilly Auto Enterprises had discriminatory intent. In a moment, I will explain the legal definition of undue hardship but, first, I want to give you further information on the process of providing reasonable accommodations and what reasonable accommodations are.[24]

A reasonable accommodation is a modification or adjustment to the work environment or to the manner in which a job is performed. You should determine what is reasonable based on the facts as you find them. The duty to provide reasonable accommodation is a continuing one and so may require more than one effort.[25] If a reasonable accommodation turns out to be ineffective and the employee with a disability remains unable to perform an essential function, the employer is not required to continue the accommodation but must consider whether there would be an alternative reasonable accommodation that would not pose an undue hardship.[26]

By way of illustration, under the ADA and MHRA, a "reasonable accommodation" may include:

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[24] This paragraph is adapted from the Court's Pattern Jury Instruction 3.2.

[25] This paragraph, up to this point, is adapted from the *Prescott* jury instructions.

[26] EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act at 32 (https://www.eeoc.gov/policy/docs/accommodation.html#other) (visited July 3, 2018).

- Part-time or modified work schedules;
- Job restructuring;
- Making existing facilities used by employees readily accessible to and usable by individuals with disabilities;
- Acquisition or modification of equipment or devices;
- Appropriate adjustment or modifications of examinations, training materials, or policies;
- The provision of qualified readers or interpreters;
- Granting additional leave beyond that allowed by the employer's leave policy;
- Reassignment to a vacant position; and
- Other similar accommodations for individuals with disabilities.[27]

Before considering reassignment as a reasonable accommodation, employers should first consider those accommodations that would enable an employee to remain in his current position. Reassignment is the reasonable accommodation of last resort and is required only after it has been determined that: (1) there are no effective accommodations that will enable the employee to perform the essential functions of his current position, or (2) all other reasonable accommodations would impose an undue hardship.[28] Reassign-

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[27] This paragraph is adapted from the *Prescott* jury instructions.

[28] EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act

ment may not be used to limit, segregate, or otherwise discriminate against employees with disabilities by forcing reassignments to undesirable positions. If reassignment is appropriate, employers should reassign the individual to an equivalent position, in terms of pay, status, etc., if the individual is qualified, and if the position is vacant, within a reasonable amount of time.[29]

A reasonable accommodation may also include transferring non-essential job functions to another employee. However, an employer does not have to transfer essential job functions.[30]

Once an employer is aware of an employee's disability and an accommodation has been requested, the employer must discuss with the employee or, if necessary, with his doctor whether there is a reasonable accommodation that will permit him to perform the job. Both the employer and the employee must cooperate in this interactive process in good faith. Neither party can win this case simply because the other did not cooperate in an interactive process. But you may consider whether a party cooperated in this process in good faith in evaluating the merit of that party's claim that a reasonable accommodation did or

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(https://www.eeoc.gov/policy/docs/accommodation.html#reassignment) (visited July 3, 2018).

[29] Language in this paragraph was taken from the Appendix to EEOC regulation 29 C.F.R. § 1630.2(o) (https://www.gpo.gov/fdsys/pkg/CFR-2011-title29-vol4/xml/CFR-2011-title29-vol4-part1630.xml) (visited July 3, 2018).

[30] This paragraph was adapted from Seventh Circuit Model Jury Instruction 4.07.

did not exist.[31] An employer who fails to engage in such an interactive process in good faith violates a disabled employee's rights if a reasonable accommodation would have been possible.[32]

If Mr. Bell establishes that O'Reilly Auto Enterprises failed to provide him with a reasonable accommodation that would have enabled him to perform the essential functions of his Store Manager position, you must find in favor of Mr. Bell on this claim unless O'Reilly Auto Enterprises proves by a preponderance of the evidence that the reasonable accommodation would have been an undue hardship for it. An "undue hardship," under the ADA and MHRA, is an action that would create significant difficulty or expense for O'Reilly Auto Enterprises, considering

- The nature and cost of the accommodation;
- The overall financial resources of O'Reilly Auto Enterprises;
- The effect of the accommodation on expenses and resources;
- The impact of the accommodation on the operations of O'Reilly Auto Enterprises, including the impact on the ability of other employees to perform their duties and the

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[31] The language in the paragraph preceding this footnote was taken from Seventh Circuit Model Jury Instruction 4.08 and Third Circuit Model Jury Instruction 9.1.3.

[32] *See Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 317-18 (3d Cir. 1999) and *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1116 (9th Cir. 2000), *vacated sub nom. U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 122 S. Ct. 1516, 152 L. Ed. 2d 589 (2002).

impact on the employer's ability to conduct business.[33] However, O'Reilly Auto Enterprises cannot prove an undue hardship by showing that providing Mr. Bell's requested accommodation would have had a negative impact on the morale of its other employees.[34]

In assessing the cost and effect of the accommodation on expenses and resources, you may consider whether O'Reilly Auto Enterprises could have taken efforts to minimize the cost of the accommodation by spreading the costs over time.[35]

B. Retaliation[36]

Mr. Bell also accuses O'Reilly Auto Enterprises of violating the MHRA and ADA by retaliating against him for requesting an accommodation for his disability. Under the law, requesting an accommodation for a disability is a protected activity. To succeed on this claim, Mr. Bell must prove by a preponderance of the evidence that:

- First, he was engaged in a protected activity.
- Second, O'Reilly Auto Enterprises (1) prohibited him from working; (2) offered him less

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[33] The language in these bullets and the paragraph preceding the bullets, to this point, is adapted from the Court's Pattern Jury Instruction 3.2.

[34] Appendix to 29 C.F.R. § 1630.15(d) (https://www.gpo.gov/fdsys/pkg/CFR-2011-title29-vol4/xml/CFR-2011-title29-vol4-part1630.xml) (visited July 3, 2018).

[35] *See* 5 M.R.S.A. § 4553(9-B)(K).

[36] Except where specifically noted, this instruction is adapted from the *Prescott* jury instructions.

pay for certain positions; and/or (3) terminated him after he requested an accommodation for his disabilities.

- Third, but for engaging in the protected activity, he would not have been (1) prohibited from working; (2) offered less pay for certain positions; and/or (3) terminated.

Mr. Bell is not required to prove that his request for an accommodation had merit in order to prove the retaliation claim, but he must have held a good faith and objectively reasonable belief that it did.

Mr. Bell need not show that unlawful retaliation was the only or predominant factor that motivated O'Reilly Auto Enterprises. In fact, you may decide that other factors were involved as well in O'Reilly Auto Enterprises decisionmaking process. In that event, in order for you to find for Mr. Bell, you must find that he has proven that, although there were other factors, he would not have been prohibited from working or terminated but for unlawful retaliation.

Again, as I previously instructed you, an employer is free to prohibit an employee from working, offer low pay, or terminate his employment for any non-discriminatory reason even if its business judgment seems objectively unwise. But you may consider the believability of an explanation in determining whether it is a cover-up or pretext for retaliation. In order to succeed on the retaliation claim, Mr. Bell must persuade you, by a preponderance of the evidence, that were it not for his request for a scheduling accommodation, he would not have been (1) prohibited him from working after he made a request for a scheduling

accommodation; (2) offered less pay for certain positions; and/or (3) terminated.

Mr. Bell is not required to produce direct evidence of unlawful motive. You may infer knowledge and/or motive as a matter of reason and common sense from the existence of other evidence—for example, explanations that you find were really pretextual. "Pretextual" mean false, or though true, not the real reason for the action taken.

C. Damages[37]

I am now going to discuss damages issues. However, the fact that I instruct you on damages does not represent any view by me that you should or should not find against O'Reilly Auto Enterprises.

If you find that O'Reilly Auto Enterprises unlawfully violated Mr. Bell's rights by discriminating against him on account of his ADHD, Tourette's syndrome, or Major Depressive Disorder; failing to provide him with a reasonable accommodation; and/or unlawfully retaliating against him as I have explained to you, then you must determine the amount of damages, if any, that Mr. Bell has sustained. You must not make a compromise between the liability and damages issues. You must determine the liability issues first. You should proceed to the damages issues only if you have determined that Mr. Bell has proved that O'Reilly Auto Enterprises acted in violation of one or more of the laws that I have described to you today.

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[37] Except where otherwise noted, the instructions on damages are adapted from the *Prescott* jury instructions.

Mr. Bell is seeking back pay and compensatory damages against O'Reilly Auto Enterprises.

Any damages you award must be based on the evidence and on a finding by you that Mr. Bell has convinced you that he has more likely than not been damaged as he claims to have been damaged. Damages may not be awarded on the basis of guesswork or speculation, nor on the basis of passion, prejudice, or sympathy. Damages must be established to a reasonable certainty, but not to a mathematical certainty.

If you find Mr. Bell is entitled to recover damages, you must award an amount of damages that will justly and fairly compensate him for the losses resulting from the injuries sustained.

If you should find that Mr. Bell is entitled to damages, in fixing the amount of your award of back pay or compensatory damages, you may not add to an otherwise just award for back pay or compensatory damages any sum to punish O'Reilly Auto Enterprises, or to serve as an example or warning to others. Nor may you include in your award any sum for the court costs or attorneys' fees.

1. Back Pay Damages

If you find that Mr. Bell has proved by a preponderance of the evidence that O'Reilly Auto Enterprises engaged in unlawful disability discrimination; failed to reasonably accommodate Mr. Bell's ADHD, Tourette's syndrome, or Major Depressive Disorder; and/or unlawfully retaliated against him, then you may award lost wages, also called "back pay," equal to the value of salary and benefits that he would have received from O'Reilly Auto Enterprises but for

his termination up to the present, minus the value of salary and benefits actually received by Mr. Bell to the present.

Mr. Bell had a duty to mitigate his damages—that is, to take reasonable steps that would reduce the damages. If he failed to do so, then he is not entitled to recover any damages that he could reasonably have avoided incurring. O'Reilly Auto Enterprises has the burden of proving by a preponderance of the evidence that Mr. Bell failed to take such reasonable steps.[38] To meet this burden, O'Reilly Auto Enterprises must prove (1) that jobs substantially equivalent to Mr. Bell's Store Manager position were available in the geographic area where he resided and (2) Mr. Bell failed to use reasonable diligence to find one of those substantially equivalent jobs.[39] A position is only "substantially equivalent" if it provides virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status.[40]

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[38] The language in this paragraph to this point was adapted from the Court's Pattern Jury Instruction 9.1.

[39] *See Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1, 16 (1st Cir. 1999).

[40] *See West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 393 (5th Cir. 2003); *Donlin v. Philips Lighting N. Am. Corp.*, 581 F.3d 73, 85 (3d Cir. 2009); and *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 231-32 (1982)("Th[e] duty [of an employee to mitigate their damages] . . . requires the claimant to use reasonable diligence in finding other suitable employment. Although the unemployed or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position he forfeits his right to back pay if he refuses a job

2. Compensatory Damages

If you find that Mr. Bell has proved by a preponderance of the evidence that O'Reilly Auto Enterprises engaged in unlawful disability discrimination; failed to reasonably accommodate Mr. Bell's ADHD, Tourette's syndrome, or Major Depressive Disorder; and/or unlawfully retaliated against him, then you may award compensatory damages. Compensatory damages are awarded for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other noneconomic losses if you determine that Mr. Bell has proven by a preponderance of the evidence that he experienced any of these consequences as a result of O'Reilly Auto Enterprises' disability discrimination, failure to accommodate his disability, and/or unlawful retaliation. Compensatory damages are not allowed as a punishment and cannot be imposed or increased in order to penalize O'Reilly Auto Enterprises.

No evidence of the monetary value of intangible things like emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other noneconomic losses is available and there is no standard I can give you for fixing any compensation to be awarded for these injuries. Even though it is difficult to establish a standard of measurement for these damages, that difficulty is not grounds for denying recovery on this element of damages. You must, therefore, make the best and most reasonable estimate you can, not from a personal point of view, but from a fair and impartial point of view, of the

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substantially equivalent to the one he was denied.") (footnotes omitted).

amount of emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other noneconomic losses you find that Mr. Bell has undergone and can probably be expected to suffer in the future as a result of O'Reilly Auto Enterprises' conduct. And you must place a monetary value on this, attempting to come to a conclusion that will be fair and just to both of the parties. This will be difficult for you to measure in terms of dollars and cents, but there is no other rule I can give you for assessing this element of damages. If you have found in favor of Mr. Bell but find that his damages have no monetary value, you may award him nominal or token damages such as one dollar ($1.00) or some other minimal amount.

3. Punitive Damages[41]

Now that you have rendered a verdict and found O'Reilly Auto Enterprises liable, you need to consider whether to award punitive damages against O'Reilly Auto Enterprises. You may award punitive damages under federal law only if you find that Mr. Bell has proven by a preponderance of the evidence that O'Reilly Auto Enterprises has engaged in intentional discrimination and has done so with malice or reckless indifference to Mr. Bell's protected rights. "Malice" means that O'Reilly Auto Enterprises' conduct was motivated by ill will towards Mr. Bell because of his disability, his request for or his need of reasonable accommodation. "Reckless indifference" means that O'Reilly Auto Enterprises knew or should have known that Mr. Bell's rights would be violated by its actions

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[41] Except where specifically indicated, this punitive damages instruction was adapted from the *Prescott* jury instructions.

or omissions. Under state law, Mr. Bell also must prove either "malice" or "reckless indifference" by clear and convincing evidence.[42] This clear and convincing evidence standard is different than the preponderance of the evidence standard that I described earlier. To determine that something has been proven by clear and convincing evidence, you must be convinced that it is highly probable.[43]

If you decide to award punitive damages, the amount to be awarded is within your sound discretion. The purpose of a punitive damage award is to punish a defendant or to deter a defendant and others from similar conduct in the future. Thus, in deciding whether to award punitive damages, you should consider whether O'Reilly Auto Enterprises may be adequately punished by an award of compensatory damages only, or whether the conduct is so malicious or reckless that compensatory damages are inadequate to punish the wrongful conduct. The amount of punitive damages that you award must be reasonably related to the harm to Mr. Bell, including the harm caused by the reprehensibility of O'Reilly Auto Enterprises' conduct. You may consider whether punitive damages are likely to deter or prevent other persons or corporations from performing wrongful acts similar to those O'Reilly Auto Enterprises is alleged to have committed.

Other factors you may consider in determining an appropriate amount of punitive damages include, but are not limited to, whether Mr. Bell was financially

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[42] *Batchelder v. Realty Res. Hosp., LLC*, 914 A.2d 1116, 1124 (Me. 2007).

[43] *Tuttle v. Raymond*, 494 A.2d 1353, 1363 (Me. 1985).

vulnerable; whether O'Reilly Auto Enterprises' conduct involved repeated actions or was an isolated instance; and whether the harm to Mr. Bell was the result of intentional malice, trickery, deceit, or mere accident.[44] You may consider whether O'Reilly Auto Enterprises violated its obligation to, in good faith, engage in the interactive process with Mr. Bell that I described to you earlier.[45] You may also consider O'Reilly Auto Enterprises' net financial worth.[46]

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[44] *See* this Court's Pattern Jury Instruction 10.1.

[45] *See* Seventh Circuit Model Jury Instruction 4.08.

[46] *See Morse v. Southern Union Co.*, 174 F.3d 917, 925-26 (8th Cir. 1999) (defendant's financial net worth relevant for punitive damages); *E.E.O.C. v. W&O, Inc.*, 213 F.3d 600, 616-17 (11th Cir. 2000)(same); and *Deters v. Equifax Credit Information Svcs., Inc.*, 202 F.3d 1262, 1273 (10th Cir. 2000)(same).

Respectfully submitted,

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Date: July 3, 2018

DEFENDANT'S PROPOSED JURY INSTRUCTIONS (JULY 3, 2018)

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BRIAN BELL,

Plaintiff,

v.

O'REILLY AUTO ENTERPRISES, LLC, d/b/a O'REILLY AUTO PARTS,

Defendant.

1:16-cv-00501-JDL

Defendant O'Reilly Auto Enterprises, LLC, d/b/a O'Reilly Auto Parts, propose the following jury instructions for consideration by the Court, on the elements of reasonable accommodation, disparate treatment, and for punitive damages under the Maine Human Rights Act. Defendants respectfully reserve the right to submit additional jury instructions for consideration.

1. Defendant's Proposed Jury Instruction No. 1 Reasonable Accommodation

The law requires employers to provide reasonable accommodation to employees who are disabled unless

the accommodation would impose an undue hardship on the employer or pose a direct threat to the employee or others.

To succeed on a claim that the employer has failed to provide a reasonable accommodation, the employee must prove:

- First, that he was disabled. In this case Brian Bell claims that his disability was a mental impairment which substantially limited his ability to concentrate and to interact with others. In order to establish this element of his claim, Mr. Bell must prove that this limitation existed at the time he made the request for an accommodation;
- Second, that he needed an accommodation in order to perform the duties of his job;
- Third, that the proposed accommodation would enable him to perform the essential functions of the job and that the accommodation was feasible for the employer under the circumstances; and
- Fourth, that the employee made a request for the accommodation that was sufficiently direct and specific so as to put the employer on notice of the need for an accommodation.

If the employee meets this burden, then the employer bears the burden of proving that the accommodation the plaintiff proposed would have been an undue burden or direct threat.

On this claim, the employee need not show that the employer had discriminatory intent. A reasonable accommodation is a modification or adjustment to

the work environment or to the manner in which a job is performed. Under some circumstances, a reasonable accommodation may include job restructuring, a part-time or modified work schedule, or reassignment to a vacant position.

A reasonable accommodation does not include changing or eliminating any essential function of a job, shifting any of the essential functions of the job to others, or creating a new position for the disabled employee.

An essential function is one that is fundamental to a position rather than marginal. In order to decide what the essential functions of a job are, you may consider the following factors: (1) The employer's judgment as to which functions of the job are essential; (2) written job descriptions; (3) the amount of time spent on the job performing the function in question; (4) consequences of not requiring the person to perform the function; (5) the terms of a collective bargaining agreement; (6) the work experience of people who have held the job; (7) the current work experience of people in similar jobs; (8) whether the reason the position exists is to perform the function; (9) whether there are a limited number of employees available among whom the performance of the function can be distributed; (10) and whether the function is highly specialized and the individual in the position was hired for his expertise or ability to perform the function. No one factor is necessarily controlling. You should consider all of the evidence in deciding whether a job function is essential.

An employer is not required to make an accommodation which would have the effect of lowering its

standards, insofar as the quality and quantity of the work of its employees is concerned.

Additionally, the law does not require employers to provide a stress-free work environment or a work environment without aggravation.

An "undue hardship" is an action that would create significant difficulty or expense for the employer, considering the nature and cost of the accommodation, the overall financial resources of employer, the effect of the accommodation on expenses and resources, and the impact of the accommodation on the operations of employer, including the impact on the ability of other employees to perform their duties and the impact on the employer's ability to conduct business.

Authority:

Pattern Jury Instructions for Cases of Employment Discrimination for the District Courts of the United States Court of Appeals for the First Circuit, No. 3.2

Regarding Need for Accommodation:

Black v. Wayne Center, 225 F.3d 658 (6th Cir. 2000) ("[W]here plaintiff is able to perform the job without accommodation, plaintiff cannot demonstrate the objective reasonableness of any desired accommodation.")

Burnett v. Ocean Properties, Ltd., 2018 WL 2925126, at *31 (D. Me. June 11, 2018) (citing Black v. Wayne Center, supra)

Regarding Definition of Essential Function:

Jones v. Walgreen Co., 679 F.3d 9, 14 (1st Cir. 2012)

Regarding Employer's Obligation to Provide Stress-Free Environment:

Cannice v. Norwest Bank Iowa N.A., 189 F.3d 723, 728 (8th Cir. 1999)

Patterson v. McDonald, 220 F. Supp. 3d 634, 640 (M.D.N.C. 2016)

Palmerini v. Fid. Brokerage Servs. LLC, 2014 WL 3401826, at *7 (D.N.H. July 9, 2014)

Prichard v. Dominguez, 2006 WL 1836017, at *13 (N.D. Fla. June 29, 2006)

Regarding Employer's Obligation to Lower Standards:

Mulloy v. Acushnet Co., 460 F.3d 141, 147 (1st Cir. 2006)

Richardson v. Mabus, 203 F.Supp.3d 86, 156 (D. Me. 2016)

2. Defendant's Proposed Jury Instruction No. 2 Disparate Treatment

Brian Bell also accuses O'Reilly Auto Parts of discriminating against him on the basis of disability when he was placed on leave while his accommodation request was resolved.

To succeed on this claim, Mr. Bell must prove by a preponderance of the evidence all of the following:

- First, that he was disabled. In this case Brian Bell claims that his disability was a mental impairment which substantially limited his ability to concentrate and to interact with others. In order to establish this element of his claim, Mr. Bell must prove that this limitation

existed at the time he made the request for an accommodation;

- Second, Mr. Bell must prove that he was a qualified individual, which means (a) he possessed the necessary skill, experience, education, and other job-related requirements for the job of an O'Reilly Auto Parts store manager, and (b) as of June 4, 2015, when he requested a reduced work schedule, he could have performed the essential functions of a store manager if he had been given that accommodation;
- Third, Mr. Bell must prove that O'Reilly Auto Parts knew his ability to concentrate and to interact with others were substantially impaired; and
- Fourth, Mr. Bell must prove that, were it not for disability discrimination, O'Reilly Auto Parts would not have taken adverse employment action against him.

An essential function is one that is fundamental to a position rather than marginal. In order to decide what the essential functions of a job are, you may consider the following factors: (1) The employer's judgment as to which functions of the job are essential; (2) written job descriptions; (3) the amount of time spent on the job performing the function in question; (4) consequences of not requiring the person to perform the function; (5) the terms of a collective bargaining agreement; (6) the work experience of people who have held the job; (7) the current work experience of people in similar jobs; (8) whether the reason the position exists is to perform the function; (9) whether

there are a limited number of employees available among whom the performance of the function can be distributed; (10) and whether the function is highly specialized and the individual in the position was hired for his expertise or ability to perform the function. No one factor is necessarily controlling. You should consider all of the evidence in deciding whether a job function is essential.

An "adverse employment action" is one that, standing alone, actually causes damage, tangible or intangible, to an employee. A trivial harm is insufficient. The fact that an employee is unhappy with something his or her employer did or failed to do is not enough to make that act or omission an adverse employment action. An employer takes materially adverse action against an employee only if it: (1) takes something of consequence away from the employee, for example by discharging or demoting the employee, reducing his or her salary, or taking away significant responsibilities; or (2) fails to give the employee something that is a customary benefit of the employment relationship, for example, by failing to follow a customary practice of considering the employee for promotion after a particular period of service. Whether action is materially adverse should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances.

Mr. Bell need not show that disability discrimination was the only or predominant factor that motivated O'Reilly Auto Parts. In fact, you may decide that other factors were involved as well in O'Reilly Auto Parts' decisionmaking process. In that event, in order for you to find for Mr. Bell, you must

find that he has proven that, although there were other factors, he would not have been placed on leave without the disability discrimination. An employer is free to place an employee on leave for any non-discriminatory reason even if its business judgment seems objectively unwise. But you may consider the believability of an explanation in determining whether it is a cover-up or pretext for discrimination. In order to succeed on the discrimination claim, Mr. Bell must persuade you, by a preponderance of the evidence, that were it not for disability discrimination, he would not have been placed on leave. Mr. Bell is not required to produce direct evidence of unlawful motive. You may infer knowledge and/or motive as a matter of reason and common sense from the existence of other evidence—for example, explanations that you find were really pretextual. "Pretextual" means false or, though true, not the real reason for the action taken.}

> *Pattern Jury Instructions for Cases of Employment Discrimination for the District Courts of the United States Court of Appeals for the First Circuit, Nos. 3.1 & 1.1*

Regarding the Relevant Date for Evaluating the Plaintiff's Limitation:

> *Burch v. Coca-Cola Co.*, 119 F.3d 305, 315 (5th Cir. 1997)
>
> *Pritchard v. The Southern Co. Servs.*, 92 F.3d 1130, 1133 (11th Cir. 1996), *amended on other grounds on reh'g,* 102 F.3d 1118 (11th Cir. 1996), *cert. denied,* 520 U.S. 1274, 117 S.Ct. 2453, 138 L.Ed.2d 211 (1997)
>
> *Dahlman v. Tenenbaum*, 2011 WL 3511062, at *7 (D. Md. Aug. 9, 2011)

Bielek v. Allegheny Ludlum Corp., 2006 WL 2773487, at *11 (W.D. Pa. Sept. 22, 2006)

Regarding Definition of Essential Function:

Jones v. Walgreen Co., 679 F.3d 9, 14 (1st Cir. 2012)

3. Defendant's Proposed Jury Instruction No. 3 Clear and Convincing Evidence (for Punitive Damages Claim Under Maine Human Rights Act)

You will be asked to make certain findings by a preponderance of the evidence, and others by clear and convincing evidence.

The clear and convincing evidence standard is a higher standard than the preponderance of the evidence standard. To find facts proven by clear and convincing evidence, you must have an abiding conviction that it is highly probable that the facts that the plaintiff must prove are the correct view of the events at issue.

Authority:

Dubois v. Madison Paper Co., 2002 ME 1, ¶ 10, 795 A.2d 696, 699

Dated at Portland, Maine this 3rd day of July, 2018.

/s/ Christopher C. Taintor
Attorneys for Defendant

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COLLOQUY WITH COURT REGARDING FAILURE TO ACCOMMODATE INSTRUCTION (JULY 18, 2018)

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BRIAN BELL,

Plaintiff,

v.

O'REILLY AUTO ENTERPRISES, LLC,
d/b/a O'REILLY AUTO PARTS,

Defendant.

Docket No. 1:16-cv-00501-JDL

Volume III of V

Before: Hon. Jon D. LEVY, Judge,
United States District Court.

[July 18, 2018 Transcript, p. 628]

THE COURT: Seems accurate.

MR. TAINTOR: It makes sense to me.

THE COURT: All right. So that change applies across the board, not permitted to return to his store manager position.

THE COURT: Great. Page 12?

MR. TAINTOR: So I had a general concern about the failure to accommodate instruction, and I somehow have managed to leave my proposed instructions elsewhere, but I know that I had—I had requested a—I had requested that the need for an accommodation be included, and I do think that's important and cited a Sixth Circuit case for that proposition. And so my concern is that, I think, a failure to accommodate claim is different in a sense—I think the problem is because we've mixed the—I don't want to say we've mixed—because there are simultaneously a failure to accommodate claim and a disability discrimination claim, of course, a disability discrimination claim can proceed without regard to what the disability is. But on the failure to accommodate issue, the impact on the ability to work is actually essential, and so, for example, if—I think a jury can be mislead into thinking that simply because Mr. Bell had, for example, you know, a condition which interfered with his ability to sleep, that would necessarily entitle him to an accommodation. He is only entitled to an accommodation, if at all, if he can prove that he needed that accommodation in order to work, in order to do his job. And so I think that's the point of the proposal as to why there needs to be language in there that demonstrates that he—that his condition is one that makes him need an accommodation. It's not just a disability in the abstract.

THE COURT: So can you point me to language that you would like me to add?

MR. TAINTOR: It was in that proposed instruction. Sure. I apologize. This is the second time I have done that this week.

MR. TOWNSEND: Are you talking on page 2 of your proposed instruction on the second element there?

MR. TAINTOR: I had language in here. I apologize. Let me—oh, I see. I am—well, I wasn't realizing this was two-sided. Yeah, so the instruction I proposed was that—right. I said, he must prove first that he was disabled; second, that he needed an accommodation in order to perform the duties of his job.

MR. TOWNSEND: That seems to be subsumed into the second element. That's in the Court's proposed instructions, that the—the Court's—on page 13 says that the proposed accommodation would enable him to perform the essential functions of the job. It seems to be saying the same thing. He needed it. It would enable him.

MR. TAINTOR: Well, I think it—

MR. TOWNSEND: I mean, to add another—to add it in saying both ways seems to overemphasize the element.

THE COURT: All right. Well, it seems to me that proof that he needed an accommodation to perform the duties of his job is a correct statement of law, and furthermore, that the proposed accommodation would have enabled him to perform the essential functions of the job is also a correct statement of law and they're different. So I am inclined to include that sentence to add it to the second on the top of page 13. However, I note that your

proposed instruction says, duties of his job, and we have been speaking of essential functions of the job, and it seems to me that we should be consistent. Do you agree?

MR. TAINTOR: Sure. Yeah.

THE COURT: So second would be—it would be second and then after the word that we would insert that he needed an accommodation in order to perform the essential functions of his job, comma, and the proposed accommodation would have enabled—would enable him to perform the essential functions of the job, comma, and that the accommodation is feasible for the employer under the circumstances.

MR. TOWNSEND: I still think that—I still think it's saying the same thing twice, but—so I—but I understand that you disagree, Your Honor, so I would just— . . .

[. . .]

THE COURT: Well, this is a case—I'm thinking now that the—I mean, the case isn't about a hostile work environment, right?

MR. TAINTOR: Although it's being made to look that way. I mean, I think a lot of this is about—

THE COURT: So I am not going to instruct on that, but you can argue it.

MR. TAINTOR: Okay.

MR. TOWNSEND: As we were—as we were just—I just remembered another point, which I had put into my written objections to the defendant's proposed instructions regarding something we

were discussing earlier on page 13 about the plaintiff being required to prove that he needed the accommodation to do the job. It's also the case that an accommodation can make—can be required to be given to make a job easier to do, not just possible to do. And I put that in—that's in my objection to defendant's instructions. I have some case law on there regarding that.

THE COURT: Well, I'm not sure I understand that. I mean, the standard is he needed accommodation so he could perform the essential functions of the job. It's not about easier or harder, is it? It's that these accommodations would allow him to meet the requirements of the job.

MR. TOWNSEND: Right. But I think it's possible that—I think it's possible that Mr. Bell could have continued to work without this accommodation, but it would impair his health quite a bit and so to make it easier for him so his health is not impaired, he needs to do—the case I cited, Higgins talks about an example where the employee had a hearing disability and he could with difficulty hear what was going on, but he needed some accommodations to makes things louder so it would be easier for him to do. The Court found that that was a type of reasonable accommodation that's required. So it's not just that they needed to make it possible to do the job, they could also make it easier to do the job.

THE COURT: Easier seems imprecise to me.

MR. TOWNSEND: Well, I was not suggesting adding any language. I was suggesting keeping language out.

THE COURT: Which language?

MR. TOWNSEND: The language that Mr. Taintor proposed that we had talked about earlier about the plaintiff has to show that he needed the accommodation in order to perform the job.

THE COURT: Essential functions of the job?

MR. TOWNSEND: Essential functions of the job.

THE COURT: All right. And what quote is that decision from?

MR. TOWNSEND: The cases I cited were First Circuit . . . .

[. . .]

TRIAL COURT JURY INSTRUCTION (JULY 19, 2018)

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BRIAN BELL,

Plaintiff,

v.

O'REILLY AUTO ENTERPRISES, LLC, d/b/a O'REILLY AUTO PARTS,

Defendant.

Docket No. 1:16-cv-00501-JDL

Volume IV of V

Before: Hon. Jon D. LEVY, Judge, United States District Court.

[July 19, 2018 Transcript, p. 753]

. . . accommodate. Mr. Bell has also made a claim of disability discrimination based on his assertion that O'Reilly Auto failed to provide him with a reasonable accommodation. The ADA and the MHRA require employers to provide reasonable accommodation to employees who are disabled unless the accommodation would impose an undue hardship on the employer.

To succeed on his claim that O'Reilly Auto failed to provide him with reasonable accommodation, Mr. Bell must prove the following by a preponderance of the evidence, first, that Mr. Bell was disabled, as I have previously explained that term to you, second, that he needed an accommodation to perform the essential functions of the job, that the proposed accommodation would enable him to perform the essential functions of the job, and that the accommodation was, at least on the face of things, reasonable, third, that he made a request for the accommodation that was sufficiently direct and specific so as to put O'Reilly Auto on notice for the need of accommodation, and fourth, that O'Reilly Auto did not reasonably accommodate his disability. Mr. Bell need not show that O'Reilly Auto had a discriminatory intent.

If Mr. Bell meets his burden of proving each of the four elements by preponderance of the evidence, then O'Reilly Auto bears the burden of proving by preponderance of the evidence that the accommodation he proposed would have been an undue hardship. This is the only aspect of the case in which . . .

[. . .]

**DIRECT EXAMINATION OF BRIAN BELL,
RELEVANT EXCERPT
(JULY 17, 2018)**

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BRIAN BELL,

Plaintiff,

v.

O'REILLY AUTO ENTERPRISES, LLC,
d/b/a O'REILLY AUTO PARTS,

Defendant.

Docket No. 1:16-cv-00501-JDL

Volume II of V

Before: Hon. Jon D. LEVY, Judge,
United States District Court.

[July 17, 2018 Transcript, p. 461]

Q [Chad Hansen, Counsel for Bell]: How did they respond to that?

A [Brian Bell]: Basically that we would revisit the situation after I had followed up with her.

Q So when you—you met with Ms. Weitzel again?

A Yes.

Q In person?

A Yes.

Q Same practice where you'd met her the previous two times?

A Correct.

Q Same room?

A Yes.

Q So focusing on that meeting with her, was there a discussion about this request from Mr. Watters to provide a different form?

A Yes, I—I did address that with her.

Q And how did she respond about that issue?

A She felt that at the time, it would be inappropriate for her to amend the form, that she thought in doing so, it would undermine the validity of the original form, but that she was willing to discuss it with them or clarify with them after review.

Q During this third meeting with her, did you—did the two of you reiterate that the understanding was that you could work unscheduled hours on occasion?

[. . .]

**CROSS EXAMINATION OF BRIAN BELL,
REGARDING FITNESS FOR DUTY
RELEVANT EXCERPTS
(JULY 18, 2018)**

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BRIAN BELL,

Plaintiff,

v.

O'REILLY AUTO ENTERPRISES, LLC,
d/b/a O'REILLY AUTO PARTS,

Defendant.

Docket No. 1:16-cv-00501-JDL

Volume III of V

Before: Hon. Jon D. LEVY, Judge,
United States District Court.

[July 18, 2018 Transcript, p. 518]

Q [MR. TAINTOR, Defense Counsel for O'Reilly] So when—when this Fitness for Duty form was being implemented, was it your expectation that you would be free to be consulted six or seven days a week if it was just for a short time?

A [BRIAN BELL] If I was available, yes.

Q And one of the things you told Mr. Hansen yesterday was that when you went back to Judy Weitzel for clarification of the Fitness for Duty form or at least what Mr. Watters thought required clarification, she said, no, because in at least as you described it, it would undermine the validity of the original form, what did you mean by that?

A I mean that she felt she had made the restriction clear and that if there was any need for additional clarification she would want to discuss it and understand better what was needed and how to clarify that before filling it out again.

Q Would you agree with me, Mr. Bell, that under the–I will call it the revised or the more flexible Fitness for Duty form that you contend O'Reilly should have accommodated, neither you nor O'Reilly would ever know whether you could work more than nine hours in a given day until you got to the end of the ninth hour?

A I don't feel anyone could commit to that one way or another without—with any exceptional degree of certainty.

Q Well, you understood that up until you got this work restriction from Ms. Weitzel that you were expected to be available a minimum of 10 hours a day, right?

A If we're not including breaks.

Q Well, often 11 hours a day if we are not including breaks, right?

A Well, I believe what I said was from 4:—from 6:00 in the morning until 4:30 in the afternoon

or 6:30 until 5:00, which would have been much closer to 9.

Q Well, at least nine and a half and oftentimes as much as ten at a minimum, right?

A Yes.

Q Okay. And you understood that the way Ms. Weitzel and you envisioned this Fitness for Duty form working, it was going to be up to you depending on how you felt on any given day whether you could or could not work beyond those limits?

A Yes.

Q And the question was going to be whether you felt up to it, true?

A Yes.

Q And you wouldn't know whether you felt up to working 10 or 11 or 12 hours in a day until you got to the end of the 9th hour and saw how you felt, right?

A I would have done what was needed at that point.

Q Well, are you saying that you know that you were capable of working as many hours as needed to get the job done?

A I am saying that I was committed to the success of my store and if there was no other option, then I would have found a way.

Q Well, you can be committed to doing something, but if you're actually physically or emotionally disabled from doing it, your level of commitment is kind of irrelevant, isn't it?

A I think irrelevant may not be the correct term.

Q Well, the whole concept of this case, as you understand it, is that you needed an accommodation because you were not capable of doing the job the way other store managers did it, true?

A My understanding of this case is that I was not capable of doing the job the way I had been doing it at that point.

Q And you were not capable of doing it in the way that O'Reilly had told you when they hired you it needed to be done, right?

A I don't feel that's an accurate characterization, no.

Q How is that not accurate? Let me go back and start over. You were told when you were hired that you were expected to work certain hours, true?

A Correct.

Q And what you were saying in this Fitness for Duty form was, among other things, you could not work all of those expected hours, true?

A No, I was saying that I couldn't be scheduled above those hours.

Q So you're saying you could work those hours? Is this just a question of what you put on a piece of paper for the schedule? Are you saying that you could work as many hours as you ever needed to, it was just someone shouldn't put something down on a piece of paper that said it was expected of you?

A I don't think anyone can commit with surety to their physical or mental capability notice in the future, regardless of disability. If someone is sick, if someone is hurt, all of those will come into play, and I didn't want to and still don't want to say with a degree of 100-percent certainty that I would have been capable or incapable of anything at that time.

Q Okay. So you can't—and I understand what you're saying, I think, but the bottom line here is if O'Reilly had agreed to the restrictions that you and Judy Weitzel wanted to put in place—

A Correct.

Q —and you had been scheduled for nine hours a day, five days a week—

A Correct.

Q —your expectation was that if you got to the ninth hour on Wednesday—

A Yes.

Q —and O'Reilly said, Chris Watters said, you know what, . . .

[. . .]

**DIRECT EXAMINATION OF CHRIS WATTERS,
RELEVANT EXCERPT
(JULY 18, 2018)**

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BRIAN BELL,

Plaintiff,

v.

O'REILLY AUTO ENTERPRISES, LLC,
d/b/a O'REILLY AUTO PARTS,

Defendant.

Docket No. 1:16-cv-00501-JDL

Volume I of V

Before: Hon. Jon D. LEVY, Judge,
United States District Court.

[July 18, 2018 Transcript, p. 138]

Q [MR. HANSEN] Well, after you got the email, did you tell Brian that, that the email wasn't good enough because it was his word and not his medical provider's word?

A [CHRIS WATTERS] At some point in time, he was told to get an updated Fitness for Duty form

stating that he could work more than 45 hours a week.

Q After this email?

A I don't remember the time frame, somewhere during this period.

Q And you said you told him earlier that he needed to get a—the—a different fitness for duty, right?

A Yes, he needed an updated Fitness for Duty form.

Q And you can't recall one way or the other whether Brian got back to you and said, Ms. Weitzel doesn't want to change the form because she thinks that it says what the restriction is, but you can call me to clarify?

A No, again, the conversation was that he was pretty adamant that he could get the Fitness for Duty form modified to say what it needed to say to benefit him coming back, but there was never a revised one that was given.

Q All right. So it's your testimony that Brian never said, she is not going to change the form, but you can call her, it's your testimony he never told that you?

A I don't recall.

[. . .]

RE-CROSS EXAMINATION OF CHRIS WATTERS, RELEVANT EXCERPT (JULY 18, 2018)

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BRIAN BELL,

Plaintiff,

v.

O'REILLY AUTO ENTERPRISES, LLC, d/b/a O'REILLY AUTO PARTS,

Defendant.

Docket No. 1:16-cv-00501-JDL

Volume I of V

Before: Hon. Jon D. LEVY, Judge, United States District Court.

[July 18, 2018 Transcript, p. 195]

RECROSS-EXAMINATION

BY MR. TAINTOR [Defense Counsel for O'Reilly]:

Q So, Chris, Attorney Hansen has asked you about what happens when you go away. So when you go on vacation, you have coverage for your store?

A I do.

Q And do you have someone covering at the store who is prepared to deal with all of the urgent, unexpected situations that you ordinarily would have to urgently deal with if you were there?

A I would hope so, yes.

Q And that's the idea, right?

A Correct.

Q You try to have a plan in place so that there is someone there who if things get crazy, unexpected situations come up, people quit, people get sick, trucks break down, whatever it may be, there's someone there to step up and take care of business, true?

A That's true. There should be somebody there to find solutions for all those issues.

Q Okay. Now, if in contrast to that, the situation that we are talking about with Brian Bell, let's say he says he's got this arrangement that he suggests that he ought to have to work nine hours a day, five days a week, and maybe a little . . .

[. . .]

PETITION OF DEFENDANT-APPELLEE O'REILLY AUTO ENTERPRISES, LLC FOR REHEARING EN BANC (SEPTEMBER 3, 2020)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIAN BELL,

Plaintiff, Appellant,

v.

O'REILLY AUTO ENTERPRISES, LLC,
d/b/a O'Reilly Auto Parts,

Defendant, Appellee.

No. 18-2164

NOW COMES Defendant-Appellee O'Reilly Auto Enterprises, LLC (hereinafter "O'Reilly"), and petitions pursuant to Rule 35 of the Federal Rules of Appellate Procedure for rehearing *en banc*.

O'Reilly requests rehearing *en banc* on the ground that the proceeding involves a question of exceptional importance. Specifically, the panel's decision–that "[t]he district court erred here when it instructed the jury that, for a disabled employee to make out a failure-to-accommodate claim, he must demonstrate that he <u>needed</u> an accommodation to perform the essential functions of his job" (emphasis in original)–

conflicts with an authoritative decision of the Seventh Circuit Court of Appeals, *Brumfield v. City of Chicago*, 735 F.3d 619 (7th Cir. 2013). The panel decision is important, moreover, because it will impose upon employers new and unmanageable burdens.

A. The Panel Decision Produces Inter-Circuit Conflict

The panel arrived at its conclusion that the jury instruction was erroneous by examining the duty to accommodate in light of the definition of "qualified individual." Because an employer has a duty under the ADA to accommodate "the known physical or mental limitations of an otherwise qualified individual with a disability," 42 U.S.C. § 12112(b)(5)(A), and an individual is a "qualified individual" if he or she can perform the essential functions of a job "with or without reasonable accommodation," *id.* § 12111(8), the panel reasoned that there must be a duty, in some circumstances, to accommodate employees who can perform the essential functions of their jobs "without . . . accommodation."

The panel's decision, and its analysis of the law, conflict squarely with the result and analysis in *Brumfield*. Although that case was decided under the Rehabilitation Act, it analyzed the duty to accommodate under the Americans with Disabilities Act, as "the Rehabilitation Act incorporated the standards applicable to Title I of the ADA." *Id.* at 630. Furthermore, it was cited as authority in a later Seventh Circuit opinion construing Title I of the ADA. *Hooper v. Proctor Health Care*, Inc., 804 F.3d 846, 852 (7th Cir. 2015). *Brumfield*, then, is an "authoritative" pronouncement of the Seventh Circuit on what is required for an

employee to make out a failure-to-accommodate claim under the ADA.

The plaintiff in *Brumfield* was a police officer who suffered from "unspecified 'psychological problems." *Id.* at 622. She was fired after engaging in misconduct which, she said, was "a manifestation of her psychological problems." *Id.* at 623 & 630. She sued, alleging, *inter alia*, both disparate treatment and failure to accommodate under the Rehabilitation Act. The district court dismissed her action, holding that she had failed to state a cause of action under the Rehabilitation Act, and the Seventh Circuit affirmed.

The *Brumfield* Court began, as did the panel here, by listing the essential elements of a failure-to-accommodate claim under the ADA. According to the Seventh Circuit's formulation (which is worded differently from, but is substantively identical to, this Court's formulation): "(1) the plaintiff must be a qualified individual with a disability; (2) the employer must be aware of the plaintiff's disability; and (3) the employer must have failed to reasonably accommodate the disability." *Id.* at 631 (citing *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 797 (7th Cir. 2005), and *Kotwica v. Rose Packing Co.,* 637 F.3d 744, 747-48 (7th Cir. 2011)). The Court then observed that "[w]hile this formulation usually captures the essence of a failure-to-accommodate claim under the ADA and Rehabilitation Act, [Officer Brumfield's case] highlight[ed] a certain imprecision in the first element."

The *Brumfield* Court then elaborated on the "imprecise" fit between the requirement that an ADA plaintiff be "qualified individual with a disability" and the duty to accommodate. The Court explained:

We have not specifically addressed the term "otherwise qualified individual" as it appears in the reasonable-accommodation provision. However, the meaning of the term can be extrapolated from our two-part test for determining whether an individual is "qualified" within the meaning of the ADA, *see* [*Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 862 (7th Cir. 2005)], a test that tracks the applicable regulations, 29 C.F.R. § 1630.2(m); *see also id.* pt. 1630, app. at 1630.2(m) (explaining that "[t]he determination of whether an individual with a disability is 'qualified' should be made in two steps"). First, the individual must meet the employer's "legitimate selection criteri[a]." *Hammel*, 407 F.3d at 862. This means that the individual must be qualified on paper by, for example, possessing "the requisite skill, experience, education and other job-related requirements of the employment position" at issue. 29 C.F.R. § 1630.2(m). Second, the individual must be "capable of performing the job's 'essential functions' with or without reasonable accommodation from an employer." *Hammel*, 407 F.3d at 862. This second part of the test encompasses two categories of paper-qualified individuals with disabilities: those who are able to perform the essential functions of the job even without reasonable accommodation, and those who could do so if the employer were to make an accommodation for their physical or mental limitations. Since members of the first category are qualified for the position in every relevant

> respect, only the members of the latter category are individuals who have "physical or mental limitations" but are "otherwise qualified" for the position. 42 U.S.C. § 12112 (b)(5)(A) (emphasis added). Thus, an employer's accommodation duty is triggered only in situations where an individual who is qualified on paper requires an accommodation in order to be able to perform the essential functions of the job. *See id.* §§ 12111(8), 12112(b)(5)(A); *Hammel*, 407 F.3d at 862.

Id. at 632 (emphasis added).

Finally, the Seventh Circuit drew precisely the distinction O'Reilly drew in the District Court, and in its brief to this Court: the distinction between a disparate treatment claim, where a plaintiff need not show a causal connection between his disability and his job, and a failure-to-accommodate claim, where that causal connection must be shown to exist.

At trial, counsel for O'Reilly explained why it was important for the court to give the disputed instruction:

> [A] disability discrimination claim can proceed without regard to what the disability is. But on the failure to accommodate issue, the impact on the ability to work is actually essential. . . . I think a jury can be misled into thinking that simply because Mr. Bell had, for example, . . . a condition which interfered with his ability to sleep, that would necessarily entitle him to an accommodation. He is only entitled to an accommodation, if at all, if he can prove that he needed that

> accommodation in order to work, in order to do his job. And so I think that's the point of the proposal as to why there needs to be language in there that demonstrates that . . . his condition is one that makes him need an accommodation. It's not just a disability in the abstract.

App. 265-266 (quoted at page 25 of O'Reilly's Brief).

The *Brumfield* Court made exactly the same point, explaining that disabled employees who can perform the essential functions of their jobs are entitled to some protection under the ADA–"[a] disabled employee who is capable of performing the essential functions of a job in spite of her physical or mental limitations is qualified for the job, and the ADA prevents the employer from discriminating against her on the basis of her irrelevant disability"–but, since such an employee's limitations "do not affect her ability to perform those essential functions, the employer's duty to accommodate is not implicated." *Id.* at 633. Thus, the Court said, "to satisfy the first element of a failure-to-accommodate claim, the plaintiff must show that she met the employer's legitimate selection criteria and needed an accommodation to perform the essential functions of the job at issue (*i.e.*, that she was "otherwise qualified" under 42 U.S.C. § 12112 (b)(5), not merely "qualified" under § 12111(8))." *Id.* (emphasis added).

The conflict between *Brumfield* and the panel decision here could not be clearer. That conflict is highlighted in *Hooper v. Proctor Health Care*, *supra*. There, an employee who suffered from bipolar disorder sued under Title I of the ADA, arguing that his employer failed to reasonably accommodate him by

taking steps, which his psychiatrist had recommended, to "improve [his] work environment" in ways that would have "decrease[d] [his] stress level." *Hooper v. Proctor Health Care*, Inc., 804 F.3d at 850-51. But because the plaintiff's psychiatrist had cleared him to work without accommodations, the Seventh Circuit, relying on *Brumfield*, held that "these recommendations [could not] form the basis of a failure to accommodate claim." *Id.* at 852. Although the accommodations might have made it easier or more pleasant for the employee to do his job, the fact that he was capable of performing the job's essential functions even without an accommodation was fatal to his claim. *Id.*

B. The Practical Ramifications of the Panel Decision Will Be Momentous

The issue which is at the heart of the panel's decision is of "exceptional importance" not only because it conflicts with Seventh Circuit authority, but also because the panel decision may be construed to create a standard so vague as to be unmanageable.

The argument advanced by Brian Bell, first at trial and then in this Court, is that he has the right to an accommodation as long as he "'experience[d] difficulty' due to his disability 'in performing his job,'" and that "difficulty" would be relieved by an accommodation. That formulation of the duty to accommodate is both new and potentially oppressive, especially in cases (like this one) involving claims of mental and emotional disability, where the variety of circumstances that might present an employee with "difficulty" in doing his job is practically limitless.

For example, a person who suffers from anxiety or depression, but who is "otherwise qualified"—a

person who, in other words, is perfectly capable of performing every function his job requires–may nonetheless find it emotionally taxing to share a workspace with colleagues who grate on his nerves. Under the formulation of the duty to accommodate advanced by Bell, and seemingly endorsed by the panel, employers (if asked) might be obligated to create for every such employee a work environment free of potential conflict, or even personal interaction. Arguably, every employer would have an affirmative duty to minimize, if not eliminate, the "difficulties" encountered by every employee who carries a DSM-IV diagnosis.

There is a reason that the EEOC's regulations use the word "enable" throughout its guidance to employers on their duty to accommodate. 29 CFR § 1630.2(o)(1)(i-iii). That provision makes it clear that the employer must make modifications that "enable" the disabled employee to perform the essential functions of the job. Nothing more is required of employers. The panel decision, read expansively, could turn the employer into a concierge, allowing each disabled employee to demand not just a job he or she can do, but one that is comfortable–that is, not "difficult." The ADA has never been construed to impose such a broad duty to accommodate. *See, e.g., Harmer v. Virginia Elec. And Power Co.,* 831 F.Supp. 1300, 1306 (E.D. Va. 1993) (employee who suffered from pulmonary disability, and who was able to do his job despite smoke in workplace, was not entitled to accommodation of a smoke-free environment, although it had been recommended by his doctor).

"While Congress enacted the ADA to establish a 'level playing field' for our nation's disabled workers, it did not do so in the name of discriminating against

persons free from disability." *Malabarba v. Chicago Tribune Co.,* 149 F.3d 690, 700 (7th Cir. 1998) (quoting *Schmidt v. Methodist Hospital of Indiana, Inc.,* 89 F.3d 342, 344 (7th Cir. 1996)). Non-disabled employees are routinely required to perform tasks that are "difficult," physically or emotionally; that is why they are paid. If the panel decision is read as imposing a duty to alleviate every "difficulty" experienced by a disabled employee–for example, one like Brian Bell, who suffers from depression–it would provide a benefit that non-disabled workers do not enjoy. That would be a profound change in the law, as it historically has been understood and applied.

CONCLUSION

For the reasons set forth above, Defendant-Appellee O'Reilly Automotive Enterprises, LLC respectfully requests that the Court rehear the appeal *en banc*.

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U.S. COURTS PUBLICATION, JUST THE FACTS: AMERICANS WITH DISABILITIES ACT (JULY 12, 2018)

While overall civil rights cases have declined, cases brought under the Americans with Disabilities Act (ADA) have increased three-fold in recent years. Filings in three states—California, Florida, and New York—account for a significant number of the civil rights cases filed under the ADA. You can find out more in this new installment of Just the Facts, a feature by the Judiciary Data and Analysis Office of the Administrative Office of the U.S. Courts (AO) that illuminates the work of the federal Judiciary through data. Comments, questions, and suggestions can be sent to the data team (mailto: AOdb_JDAO_ datateam@ao.uscourts.gov).

Background:

The ADA prohibits discrimination against people with disabilities in areas of public life, including employment, transportation, public accommodation, communications, and governmental activities. The ADA was signed into law by President George H.W. Bush on July 26, 1990.

In 2005, the Administrative Office of the U.S. Courts began publishing statistics on civil cases filed under the ADA in the U.S. district courts. ADA cases constitute a subcategory of civil rights cases on the civil docket. The AO's ADA statistics are separated into cases raising employment discrimination claims and cases raising other claims under the ADA. Most of the other ADA claims involve public accommodation matters.

Complaints asserting a violation of the ADA are often filed in federal district courts, although state courts also have jurisdiction to hear such cases. The decision of any district court can be appealed to a circuit court of appeals, and a decision by the circuit court can be appealed to the Supreme Court of the United States. This report examines ADA cases in the district courts.

Facts and Figures:

- In the 12-month period ending Dec. 31, 2017, the number of civil rights cases filed in the district courts was 39,800, which amounted to 14.5 percent of the total civil docket. ADA cases accounted for 10,773 filings, which amounted to 4 percent of the total civil docket and 27 percent of civil rights cases.
- From 2005 to 2017, filings of civil rights cases excluding ADA cases decreased 12 percent. In contrast, during that period, filings of ADA cases increased 395 percent (see Figure 1).
- From 2005 to 2017, filings of ADA cases raising employment discrimination claims rose 196 percent to 2,494. Filings of cases raising other ADA claims grew more rapidly, increasing 521 percent to 8,279 cases. The latter category of cases includes those raising claims of limited accessibility at businesses such as restaurants, movie theaters, schools, and office buildings (see Figure 2).
- Filings in the states of California, Florida, and New York account for a significant number of ADA cases (see Figure 3).

- In 2017, more than half of ADA cases were filed in three states (see Table 1).
- The map below shows the numeric difference between ADA cases filed in 2005 and those filed in 2017 across U.S. states and territories (see Map 1).
- Map 2 shows the numeric changes in ADA filings between 2016 and 2017

Table 1. ADA and Total Civil Filings and Percentages by State, Calendar Year 2017

State	ADA Filings	Percent ADA Filings	Total Civil Filings	Percent Total Civil Filings
California	2,933	27%	28,551	10%
Florida	1,614	15%	19,098	7%
New York	1,265	12%	22,258	8%
Rest of U.S.	4,961	46%	205,640	75%

The large concentration of lawsuits in three states has been attributed to a variety of factors, according to professional journals and news outlets.

- In California, state laws (the Disabled Persons Act of 2009 and the Unruh Civil Rights Act of 1959) allow plaintiffs to add monetary claims for damages to requests for injunctive relief in lawsuits filed under the ADA. These state laws may have contributed to the large number of ADA cases filed in California.[1]

[1] Johnson, Denise (2016, October 7). Why Claims Under Americans with Disabilities Act Are Rising. Insurance journal. Retrieved

- In Florida, "testers" may be contributing to the growth in ADA case filings. A "tester" is a single plaintiff who files separate claims against multiple businesses alleging failure to comply with ADA requirements. Florida recently passed a law aimed at curbing what has been termed frivolous ADA-related lawsuits.[2]
- The large number of ADA cases in New York may have been influenced by the age of many public buildings and infrastructure across New York City that plaintiffs claim are inaccessible to people with disabilities. More recently, a class action was approved against the Metropolitan Transportation Authority of New York City, in which disability organizations and disabled residents claim that the lack of elevators at many subway stops results in ADA violations.[3]

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from https://www.insurancejournal.com/news/national/2016/10/07/428774.htm (link is external); and Cooper, Anderson (2016, December 4). What's a "Drive-By Lawsuit"? CBS News, 60 Minutes. Retrieved from: https://www.cbsnews.com/news/60-minutes-americans-with-disabilities-act-lawsuits-anderson-cooper/.

[2] Florida House Bill 727 summary, https://www.flsenate.gov/Committees/billsummaries/2017/html/1674.

[3] *Center for Independence of the Disabled, New York et al v. Metropolitan Transportation Authority et al*, U.S. District Court, Southern District of New York, No. 17-02990.

- In all states, as the baby boom population has aged, the pool of disabled persons has increased, a factor that may contribute to growth in ADA cases raising public accommodation claims.[4]
- In the case of Juan Carlos Gil v. Winn-Dixie Stores, Inc., the Southern District of Florida decided on June 13, 2017, that a retailer's website discriminated against a plaintiff who is blind. This ruling established a link between public accommodations available online and the accessibility of the retailer's physical facilities. This is reported to be the first ADA case raising a public-accommodation claim related to website accessibility. Some legal experts have speculated that the decision could open the door to filings of similar suits.[5]

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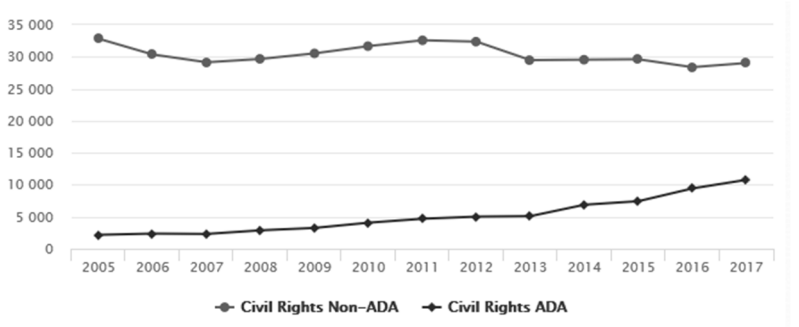
[4] Moon, Nathan; Kaplan, Shelley; Weiss, Sally (2010, May/June). ABA Business Law Section. Baby Boomers Are Turning Grey. Retrieved from: https://apps.americanbar.org/buslaw/blt/2010-05-06/moon-kaplan-weiss.shtml.

[5] Hale, Nathan (2017, June 14). Law360 (LexisNexis Company). Winn-Dixie Loses ADA Fight Over Website Accessibility. Retrieved from: https://www.law360.com/articles/934358/winn-dixie-loses-ada-fight-over-website-accessibility.

Figure 1.

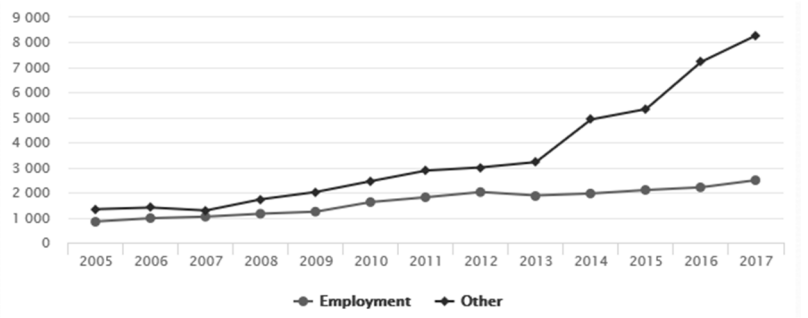
ADA and Non-ADA Civil Rights Cases, 2005–2017



Source: Table C2, 12-Month Periods Ending December 31, 2005 through 2017.

Figure 2.

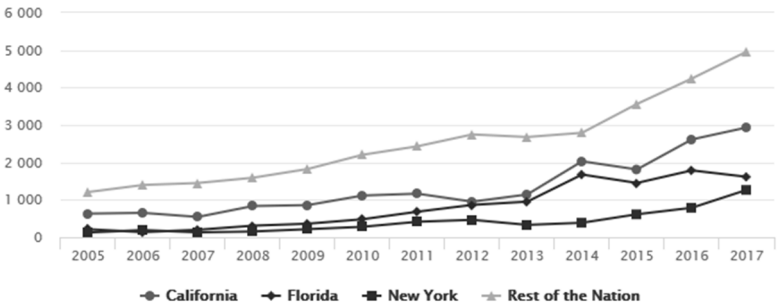
ADA Civil Rights Cases, by Type, 2005–2017



Source: Table C2, 12-Month Periods Ending December 31, 2005 through 2017.

Figure 3.

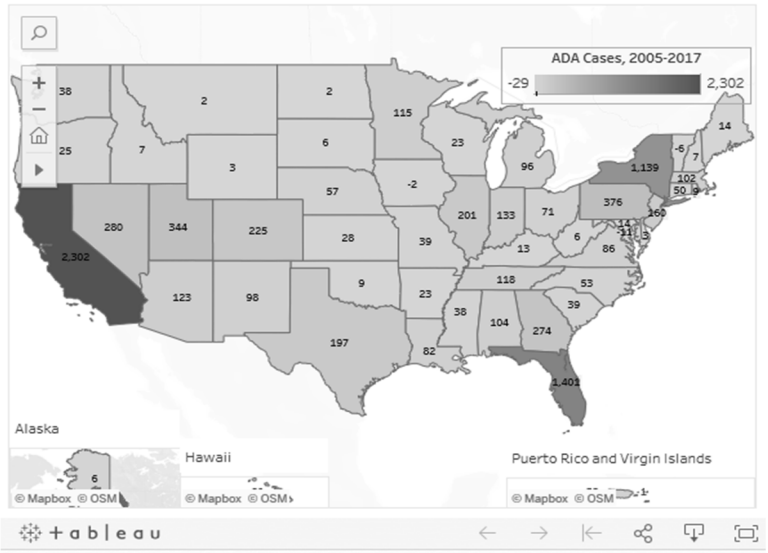
ADA Civil Rights, by State, 2005–2017



Source: Table C2, 12-Month Periods Ending December 31, 2005 through 2017, Aggregated by State.

Map 1

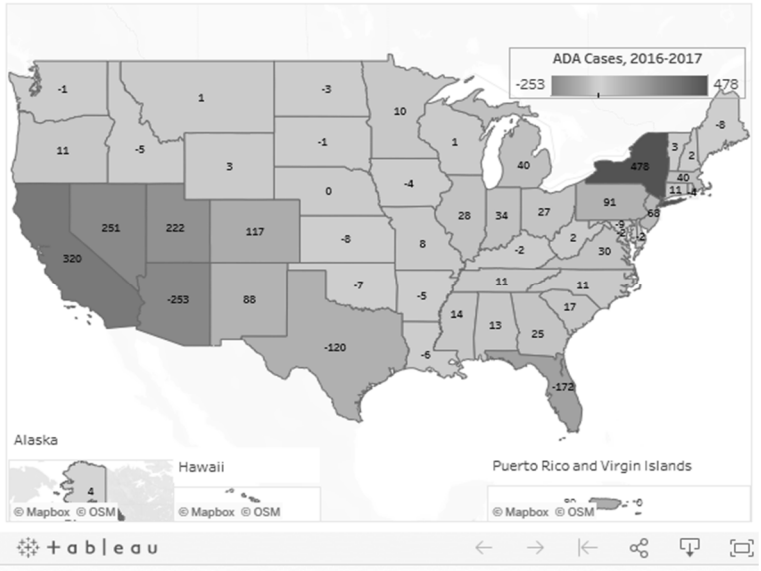
U.S. District Courts—Numeric Changes in Filings of ADA Cases, 2005–2017



Source: Table C2, 12-Month Periods Ending December 31, 2007 through 2017, Aggregated by State.

Map 1

U.S. District Courts—Numeric Changes in Filings of ADA Cases, 2016–2017



Source: Table C2, 12-Month Periods Ending December 31, 2007 through 2017, Aggregated by State.