CASE NO. 10-1919, 12-1361

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

THERESA M. ELLIS ET. AL.,
Plaintiff-Appellee-Cross-Appellant

V.

ETHICON INC., ET AL.,
Defendant-Appellant-Cross-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF OF *AMICUS CURIAE* ON BEHALF OF THERESA M. ELLIS

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CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rules of Appellant Procedure 26.1 and 29(c), and L.A.R. 26.1.1, Amicus states that the Civil Rights Appellate Clinic is an educational component of The Pennsylvania State University, Dickinson School of Law which is not a publicly held corporation and has no parent corporation and no publicly traded stock.

Respectfully submitted,

/s/ Michael L. Foreman
Michael L. Foreman
Dated: December, 14, 2012

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Ethicon, Inc. ("Ethicon") filed an appeal from a final Order and Judgment dated November 13, 2009, and entered on the docket in this action on November 16, 2009, by the Honorable Freda L. Wolfson, U.S.D.J., and the Order and Amended Judgment entered on March 1, 2010. Ethicon's appeal was docketed at No. 10-1919. Theresa Ellis ("Ellis"), filed an appeal pro se from a final order entered on January 9, 2012, which denied emergency relief. Ellis' appeal was docketed No. 12-1361. While the two appeals are not cross-appeals, the United States Court of Appeals for the Third Circuit, by Order dated March 9, 2012, consolidated the two appeals for purposes of the briefing schedule and disposition.

By Order dated August 24, 2012, the United States Court of Appeals for the Third Circuit appointed Michael L. Foreman, Esq., as *Amicus* Counsel on behalf of Ellis. The *Amicus* appointment is for the purpose of "responding to Ethicon's brief and presenting any arguments pertinent to Ms. Ellis' appeal at No. 12-1361."

The District Court had jurisdiction under 28 U.S.C. § 1331, this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. The Americans with Disabilities Act ("ADA") requires employers to engage in an interactive process with individuals with disabilities to determine whether there are reasonable accommodations available enabling employees to perform the essential functions of their jobs. Ellis is an individual with a disability who requested reasonable accommodations from Ethicon, and the jury found that Ethicon failed to engage in the interactive process. Was it error for District Court Judge Wolfson to reject Ethicon's Rule 50 and 59 motions, which would have required her to ignore the jury's finding that Ethicon failed to engage in the interactive process, and to deny a new trial? Appellant's record designation of where this issue was preserved for appeal is at Pet. App. Br. at 1-3.

2. The Third Circuit has consistently held that reinstatement is the preferred equitable remedy to make a discrimination victim whole after a finding of intentional discrimination. Following a 10-day jury trial, and a jury finding that Ethicon engaged in intentional discrimination, the District Court ordered reinstatement rather than front pay. Was it an abuse of the District Court's equitable discretion when it ordered reinstatement and back pay of $53,731.31, rather than accepting the jury's advisory front pay award?

Appellant's record designation of where this issue was preserved for appeal is at Pet. App. Br. at 1-3.

3. After Ethicon appealed, the District Court rejected Ethicon's request to stay reinstatement. Did the District Court err when it refused to grant Ellis' motion for emergency relief to reimburse her for lost wages until she is actually reinstated as ordered by the District Court? Ms. Ellis raised this issue in post-trial motions and hearings. Order on Application for Emergency Relief, Filed January 9, 2012, District Court Docket No. 167, and Motion for Reconsideration of Denial of Emergency Relief, Filed February 7, 2012, District Court Docket No. 169, (SA0016-SA0030).[1]

STATEMENT OF THE CASE

Ellis filed a civil complaint in the United States District Court for the District of New Jersey on February 2, 2005, against her former employer, Ethicon, a subsidiary of Johnson & Johnson, Inc., alleging violations of Title VII of the Civil Rights Act of 1964 and the ADA. In particular, Ellis alleged race discrimination, harassment, retaliation, New Jersey common law claims,

[1] Simultaneously with the filing of this brief, counsel for the *amicus curiae* has filed a Motion to File a Supplemental Appendix and the SA citations are to the Supplemental Appendix. However, in the event that the motion is not granted, *amicus* has referenced the district court record by document title and docket number.

and the claim relevant to this appeal, that she was denied reasonable accommodations for her disability, Mild Traumatic Brain Injury ("MTBI").

Following eight days of testimony and two days of deliberation, the jury found that Ethicon had intentionally discriminated against Ellis by failing to engage in the interactive process and returned an advisory verdict of $1,220,250.[2] Judge Wolfson, exercising the equitable powers of the District Court, ordered reinstatement in lieu of front pay, and awarded $53,731.31 in back pay.[3]

Ethicon appealed and moved to stay both the monetary relief and the order of reinstatement. The District Court granted a stay of execution of payment of backpay and attorneys' fees, but denied Ethicon's request that the reinstatement order be stayed. Order on Motion to Stay Judgment Pending Appeal, Filed September 20, 2010, District Court Docket No. 136, (SA0001). Judge Wolfson explained that granting a stay on reinstatement would be "manifestly unfair" noting "[a] stay would only serve to continue Plaintiff's deprivation of the wages and benefits she would have as an Ethicon

[2] The Jury verdict was $734,000 in front pay, back pay of $311,200 if Ethicon was partially responsible, and $486,250 if Ethicon was fully responsible. (JA0228-29).

[3] Ellis was also awarded $378,785.35 in attorneys' fees and costs. This award is not under dispute in this appeal.

employee." Opinion on Motion to Stay Judgment Pending Appeal at page 12, Filed September 21, 2010, District Court Docket No. 135, (SA0014) (quoting *Malarkey v. Texaco, Inc*., 794 F. Supp. 1248, 1251 (S.D.N.Y. 1992)).

As of this date, Ellis has not returned to work at Ethicon. Following the denial of Ethicon's request to stay reinstatement, the parties engaged in discussions about reinstatement. Because Ellis remained unemployed by Ethicon, she initially sought contempt sanctions and then emergency relief against Ethicon to expedite her reinstatement, or in the alternative, to grant her monetary relief to cover the period of time until she is reinstated by Ethicon. Ellis withdrew the Motion For Sanctions and subsequently filed a Motion for Emergency Relief for compensation relating to the continued period of her non-employment by Ethicon. The case was reassigned to District Judge Peter Sheridan, who denied Ellis' motion for emergency relief. Ellis filed a *pro se* appeal, docket number 12-1361, appealing the denial of her request for emergency relief by Judge Sheridan.

STATEMENT OF FACTS

Ellis is a Stanford-educated engineer who was hired as a Quality Assurance Engineer at Ethicon on August 28, 1997. (JA0378). After beginning work at Ethicon, Ellis received "above-target" work evaluations and positive feedback from both peers and management. (JA0380-81). Her

evaluations lauded her computer skills, leadership ability, and communication skills. The evaluations consistently stated that "[s]he has also demonstrated the ability to analyze situations, make innovative and creative recommendations and yet still maintain compliance with the regulations." (JA0380).

On January 7, 1999, Ellis was involved in a serious car accident. (JA0571-72). Ellis has no recollection of actually being hit and had X-Rays done that same day. (JA0572; JA0575). Following the accident, Ellis suffered from wild mood swings, difficulty reading, and chronic fatigue. (JA0579). She tried to return to work in February, 1999, but was physically and mentally unable to do so and began a period of short-term disability leave. (JA0712). During her leave, she began seeing a psychiatrist. (JA0577-78). Kemper National Services, Inc. ("Kemper"), the third party administrator of Ethicon's short-term disability plan, evaluated her progress and became the middleman between Ellis' doctors and Ethicon's personnel. Ellis returned to work at Ethicon in June, 1999, on a reduced schedule. Dr. Cole, the Johnson & Johnson doctor, monitored her progress at work. (JA0581).

In July, 1999, Ellis proposed certain accommodations to Ethicon for her anticipated return to full-time work. (JA0382). Following a successful

interactive process between Ellis, Ethicon, Dr. Cole, and Kemper, reasonable accommodations were identified allowing for an abbreviated 6-hour-a-day schedule to ease Ellis back into the workplace. (JA0385-95; JA0596). Upon returning to work, her performance evaluations were again positive and in September 2000, she received a promotion to Staff Quality Engineer. (JA0387-88). She also continued to receive medical treatment. (JA0606-08). Ellis independently developed methods to cope with her disability on the job. These methods included taking an active listening course, writing down notes and keeping Post-its, saving her voice mails, acquiring a glare screen for her computer, and rereading things. (JA0834). However, Ellis' condition gradually worsened, and her problems with fatigue, memory, reading, and time management remained a serious issue. (JA0606-08).

In April, 2001, Ellis began seeing neurologist Dr. Mahon, and underwent a series of tests, including an electro encephalogram (EEG) and a magnetic resonance image (MRI). (JA0617-19). Dr. Mahon diagnosed her with mild traumatic brain injury. (JA0439). Ellis began seeing Dr. Barbara Watson, who conducted an intensive neuro-psych test evaluating memory, recall, attention, and other brain functions. (JA0430; JA0439). These tests revealed impairments regarding Ellis' problem-solving skills, reading comprehension, attention, and word retrieval. (JA0838-39). On April 23,

2001, as a result of her deteriorating condition, Ellis had no choice but to begin another short-term disability leave. (JA1240; JA0466). During this time, Ellis began cognitive retraining, speech therapy, and occupational therapy at Good Shepherd Hospital in Allentown, Pennsylvania. (JA0621; JA0641).

Ellis' short-term disability leave was due to end in October 2001, as it was limited to a combined maximum of six months. (JA0403). Kemper and Ethicon were continually kept aware of Ellis' medical appointments and progress. (JA0392; JA0395). On August 31, 2001, Ellis' husband, Scott Zukowski, sent an e-mail to Kemper explaining that Ellis would be seeing Dr. Mahon regarding her return to work plan at Ethicon. (JA0393). In anticipation of the end of short-term disability, and in consideration of the parties' successful interactive process in 1999, Ellis and her physicians began to explore potential accommodations for a return-to-work plan. (JA0393; JA0404).

Melissa Stretch, a registered nurse employed by Kemper but assigned to work with Ellis regarding her return to work for Ethicon, handled Ellis' short-term disability progress and possible return to work plan. (JA0395-96; JA0401; JA0405). Dr. Watson was contacted by Ms. Stretch about potential accommodations and recommended that Ellis be allowed to work from home

three-days a week and obtain a job coach. (JA0874; JA0438-39). These recommendations were delivered along with Dr. Mahon's return to work release on October 11. (JA0438-39). At that time no one at Ethicon or Kemper responded to Dr. Watson with any suggestions of their own. (JA0856). Ethicon unilaterally decided the proposed accommodations were unacceptable and refused to accommodate Ellis. (JA0471). On October 15, Ellis was effectively terminated in an e-mail written by Ms. Stretch, informing her that Ethicon was placing her on long-term disability beginning October 21. (JA0405-06). Ellis received a letter from ADP, Johnson & Johnson's benefits administrator, indicating that the last day of her group health coverage was on October 22, due to her termination of employment that same day. (JA0406). This decision was made without anyone from Ethicon proposing any accommodations. (JA1116; JA1108-32; JA0849).

Frightened and overwhelmed by the sudden loss of her job, and by Ethicon's failure to propose any accommodations of its own or engage in any interactive discussions as it had done in 1999, Ellis immediately contacted an attorney, Nicola Hadziosmanovic. (JA0660). Only after attorneys became involved did Ethicon begin to engage with Ellis. At that time, settlement discussions took place between Ms. Hadziosmanovic and Ms. Warren, Ethicon's attorney. (JA0490). Ethicon continued to take the position that the

proposed accommodations were unacceptable. (JA0471). Melissa Flax, a colleague of Ms. Hadziosmanovic, also represented Ellis during these post-termination settlement discussions. (JA1246). Eventually, Ethicon offered Ellis a part-time position through Ms. Hadziosmanovic, which Ellis did not accept. (JA0497).

STANDARD OF REVIEW

Ethicon contends that it was entitled to judgment as a matter of law on its argument II and III based on the evidence presented at trial. *See* Pet. App. Br. at 20-21. This Court has stated that:

> [w]e exercise plenary review over the District Court's denial of judgment as a matter of law. In so doing, we apply the same standard as the District Court; that is, whether "viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability."

Eshelman v. Agere Sys., 554 F.3d 426, 433 (3d Cir. 2009) (quoting *Lightning Lube v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir. 1993).

As to argument I of their appeal, Ethicon contends that the District Court misapplied the attorney-client privilege by allowing Ellis to testify that she was not aware whether there were ongoing talks between her lawyer and Ethicon, but then refusing to allow Ethicon to cross-examine Ellis about this

point. This Court has held that evidentiary rulings like those raised by Ethicon are subject to review for abuse of discretion. *See Donlin v. Philips Lighting N. Am. Corp.*, 581 F.3d 73, 80 (3d Cir. 2009); *Simone*, 844 F.2d at 1034. This Court has also stated that "[w]e review the District Court's evidentiary rulings, including whether opinions are admissible . . . for abuse of discretion." Moreover, "[w]e will only reverse if we find the District Court's error was not harmless." *Donlin*, 581 F.3d at 80.

In arguments I, II, and III, Ethicon also contends that it should, at a minimum, be granted a new trial. This Court reviews a District Court's denial of a new trial for abuse of discretion. *Rotindo v. Keene Corp.*, 956 F.2d 436, 438 (3d Cir. 1992). A new trial cannot be granted "merely because the court would have weighed the evidence differently and reached a different conclusion." *Simone*, 844 F.2d at 1035. "There is an abuse of discretion within the meaning of Federal Rule of Civil Procedure 59 'when the action of the trial judge is clearly contrary to reason and not justified by the evidence.'" *Id.* (citations omitted).

Finally, Ethicon in argument IV contends that the District Court erred by ordering reinstatement. This Court has stated that "[g]uided by the particular circumstances of a case, the district court has broad discretion in determining whether reinstatement is appropriate, and its determination is

reviewed under an abuse-of-discretion standard." *Feldman v. Phila. Hous. Auth.*, 43 F.3d 823, 832 (3d Cir. 1994). In ordering reinstatement, district courts are to carry out the ADA's purpose to make aggrieved plaintiffs whole "by restoring them to the position they would have been in had the discrimination never occurred." *Starceski v. Westinghouse Electric Corporation*, 54 F.3d 1089, 1103 (3d Cir. 1995).

Regarding arguments II and III, the jury verdict should be upheld on issues of fact such as the determination that Ethicon failed to engage in the interactive process and that Ellis is disabled under the ADA. In *Blakey v. Continental Airlines Inc.*, the court stated that "it is the court's obligation to uphold the jury's award, if there exists a reasonable basis to do so . . . ." 992 F.Supp. 731, 734 (D.N.J. 1998)). The Third Circuit has held that the reviewing court must "review the record in the light most favorable to the verdict winner, and affirm the denial unless the record 'is critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief.'" *Starceski* 54 F.3d. at 1095 (quoting *Rotindo*, 956 F.2d at 438).

As to the issue raised by Ms. Ellis, argument V, *infra*, the denial of emergency relief in the form of interim lost wages covering the time from the district court's order of reinstatement until she is actually reinstated, the standard of review is the abuse of discretion standard discussed above.

SUMMARY OF ARGUMENT

The District Court was correct in denying a new trial and ordering reinstatement for several reasons. First, the interactive process is critical in determining whether reasonable accommodations are available under the ADA. *See* 42 U.S.C. § 12101(b)(2). Congress, the courts, including the Third Circuit, and the ADA regulations all require employers to engage in the interactive process to determine whether reasonable accommodations are available that will allow the disabled employee to perform the essential function of their employment. *See* H.R. REP. No. 101-485, at 65-66, (1990); *Taylor v. Pheonixville Sch. Dist*., 184 F.3d 296 (3d Cir. 1999); 29 C.F.R. § 1630.2(o)(3). The jury found, after careful deliberation, that Ethicon failed to engage in the interactive process. Further, the jury specifically found that Ethicon's post termination communications did not constitute the interactive process. The District Court correctly refused to overturn the jury finding, and this decision should not be disturbed.

This jury finding also renders moot Ethicon's argument that the District Court incorrectly applied the attorney-client privilege. Since post-termination communications between counsel do not constitute the interactive process, the District Court was correct in prohibiting Ethicon from cross-examining Ellis about privileged communications with her lawyers. Even if

the post-termination communications were considered part of the interactive process, the District Court properly handled the matter by instructing the jury to impute any knowledge Ellis' lawyer had to Ellis.

Second, the jury found that Ellis was a qualified individual with a disability under the ADA. Under the ADA an individual has a disability when she has an impairment that "substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A). The jury also found that Ellis could perform the essential functions of the job with reasonable accommodations. An individual is qualified under the ADA when he "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). These jury findings should not be disturbed. Ethicon's argument that Ellis is not a qualified disabled individual, or in the alternative, that there are no reasonable accommodations available to enable Ellis to perform the essential functions of the job, ignore the abundance of evidence upon which the jury based its findings. Ethicon cannot argue that there is no reasonable accommodation available when it chose to ignore the very process that was meant to determine whether such reasonable accommodations existed.

Third, the District Court was correct in ordering reinstatement. Reinstatement is the proper equitable remedy to make discrimination victims

whole and restore them to the position they would have been in but for the discrimination. The Third Circuit has consistently held that reinstatement "is an obvious form of relief to make the plaintiff whole and to relieve the plaintiff of the effects of discrimination." *Ellis v. Ringgold School Dist.*, 832 F.2d 27, 30 (3d Cir. 1987). Reinstatement is within the discretion of the District Court. After handling this case for a number of years, and dealing with a myriad of motions, the District Court weighed all the facts, considered the advisory jury verdict, and determined that reinstatement was the proper remedy. This finding should not be disturbed.

Finally, it has been 11 years since Ellis was illegally terminated and 3 from the date of the reinstatement order. Ellis still has not been reinstated and in that span of time circumstances have changed that may impact her right of reinstatement. *Amicus* suggests two options that would properly make Ellis whole under the ADA: 1) affirming reinstatement with an order requiring Ethicon to involve all affected in the reinstatement process, and awarding damages for the period of time Ellis between the district court's order of reinstatement and Ellis's actual reinstatement; or (2) adopting the jury's advisory verdict and awarding Ellis front pay in lieu of reinstatement.

ARGUMENT

I. THE INTERACTIVE PROCESS IS CRITICAL TO DETERMINING WHEN REASONABLE ACCOMMODATIONS ARE AVAILABLE UNDER THE ADA

Congress, through the ADA, has provided "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(2). The ADA provides that an employer discriminates by

> 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 . . . .

42 U.S.C. § 12112(b)(5)(A). The Act requires the employer to make reasonable accommodations to an otherwise qualified individual with a disability and if the employer fails to do so, it may be held liable. Congress has made clear that reasonable accommodation is a broad concept. The ADA defines reasonable accommodations as including "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for

individuals with disabilities." 42 U.S.C. § 12111(9)(B). The interactive process ensures that the requirement of accommodation, and indeed the purpose of the ADA, is fulfilled. 29 C.F.R. § 1630.2(o)(3).

While the interactive process is not discussed in the ADA, the ADA's legislative history, circuit case law, and the EEOC regulations[4] demonstrate that the interactive process is essential to achieve the ADA's purpose—that individuals with disabilities, who are qualified to do the requisite job, are not discriminated against. Without the interactive process there is no mechanism for identifying whether accommodations are available and whether disabled employees can perform the essential functions of their jobs.

Congress, in its Committee Hearings and Reports, outlined a step-by-step process between the employee and the employer to explore whether a reasonable accommodation is possible. The Congressional Committee believed that the employer should consider four distinct informal steps to help identify an effective accommodation, if one is not immediately recognizable.

[4] Under the EEOC Regulations, the employee must make clear to the employer that the employee wants assistance for her disability. If the employer received such a notice, it has a duty to engage in the interactive process even if the employee did not come up with a reasonable accommodation that would prevail in litigation. 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. §§ 1630.2(o)(3), 29 C.F.R. § 1630.9; 29 C.F.R. pt. 1630 App.; *Williams v. Phila. Housing Auth. Police Dpt.*, 380 F.3d. 751, 771 (3d Cir. 2004); *Taylor*, 184 F.3d at 311-313 .

First, "identifying and distinguishing between essential and nonessential job tasks and aspects of the work environment of the relevant position(s). With the cooperation of the person with a disability, the employer must also identify the abilities and limitations of the individual with a disability . . . ," H.R. REP. No. 101-485, at 65-66 (1990). Second, both the employee and the employer must identify possible accommodations. The third step requires both parties to assess the reasonableness of each accommodation in terms of "effectiveness and equal opportunity." The final step is to implement an accommodation that is the most appropriate for the employee and one that does not impose an undue burden on the employer. *Id.* This is the interactive process.

The requirement to engage in the interactive process provides a means by which an employer and employee can discuss an accommodation that meets both parties' expectations. Here, the jury found that Ethicon failed to engage in this essential process.

A. The Jury Finding That Ethicon Failed To Engage In The Interactive Process Should Not Be Disturbed

The jury was specifically instructed to consider not only whether Ethicon engaged in the interactive process leading up to Ellis' termination, but whether Ethicon's actions after Ellis' termination constituted an effort to

engage in the interactive process. "It is for you, the jury, to decide whether any accommodations proposed including any after October 22 were part of the interactive process." (JA1630). After consideration, the jury declined to categorize Ethicon's post-termination settlement offers as good-faith participation in the interactive process. Rather, the jury found that Ellis had "proved by a preponderance of the evidence that Ethicon unreasonably failed to provide the accommodations requested by Ellis or any other reasonable accommodation." (JA0225).[5] Despite arguing throughout this litigation that whether Ethicon engaged in the interactive process was an issue of fact,[6] Ethicon now changes its stance, arguing that the question was not a factual issue for the jury to decide, or alternatively, based upon the facts presented at trial, no reasonable jury could have reached this conclusion. *See* Pet. App. Br. at 64.

The determination of whether Ethicon engaged in the interactive process is inherently a question of fact that should not turn on whether

[5] The Jury also found that Ethicon failed to prove by a preponderance of the evidence that "reasonably accommodating Ms. Ellis in her job as a staff quality engineer would be an undue hardship" and that Ellis was able to work, at the time of the discrimination and the trial, with or without reasonable accommodations. (JA0229).

[6] See Brief Submitted on Behalf of Defendant, Ethicon, Inc., in Support of Its Motion for Reconsideration ("Reconsideration is Appropriate Because . . . A Genuine Issue of Material Fact Remains on Whether There Was a Breakdown in the Interactive Process And Which Party May Have Caused It.") (JA2356).

Ethicon prevailed on that issue. Prior to trial, Ellis filed a motion for summary judgment asking the court to find as a matter of law that Ethicon failed to engage in the interactive process. The District Court originally granted Ellis' motion.[7] The District Court believed there was enough evidence to conclude that no reasonable jury could find that Ethicon engaged in the interactive process. Ethicon argued for reconsideration, stressing that "when the record is viewed without the incorrect imposition of a requirement of a meeting there is at least a fact question regarding defendant's engagement in the interactive process. . . ." (JA2353). Granting Ethicon's motion, the District Court held that the interactive process question should be determined by the jury. (JA0055).

Judge Wolfson instructed the jury that in order to prevail on her interactive process claim, Ellis must prove that she had a disability within the

[7] "[U]ndisputed facts of this case clearly indicate that Ethicon failed to properly engage in the interactive process." (JA0005). "First and foremost, no one at Ethicon met with Ellis once they received notice from Dr. Watson and Dr. Mahon that Ellis would need certain accommodations. No one from Ethicon requested information regarding Ellis' condition and the reasons for the doctors' recommendations . . . . [c]ertainly, Ethicon failed to offer alternatives when it determined that the accommodations were too burdensome. It is clear in this Circuit that 'an employer . . . cannot escape its duty to engage in the interactive process simply because the employee did not come forward with a reasonable accommodation that would prevail in litigation.'" (JA0038) (quoting *Taylor*, 184 F.3d at 317).

meaning of the ADA, that she was a "qualified individual able to perform the essential functions of her job," that Ethicon was aware of her need for accommodation, that the proposed accommodation would have been reasonable, and that Ethicon failed to provide this or any other reasonable accommodation. (JA1639-41). The jury found for Ellis on each of these points. (JA1529).

After the jury disagreed with Ethicon's version of the facts, Ethicon went back to the District Court arguing that it erred as a matter of law based upon the jury's interpretation of such evidence. The District Court rejected the request and respected the jury's finding, because "based upon the totality of the circumstances surrounding Ellis' second short-term disability period, there was sufficient evidentiary basis for the jury's determination that Ethicon failed to provide reasonable accommodations to Plaintiff and failed to engage in the interactive process to find such accommodations." (JA0076). The District Court held that the jury's finding should not be disturbed because "the question is not whether there is literally no evidence upon which a jury could properly find a verdict," but instead whether there "is a legally sufficient evidentiary basis for the verdict." (JA0062). Despite this determination, Ethicon now wants this court to act as a second fact-finder. However, when hearing an appeal of the denial of a motion for judgment as a

matter of law the reviewing court reviews de novo, and applies the same standards as the district court. *Eshelman v. Agere Sys.*, 554 F.3d 426, 433 (3d Cir. 2009) (quoting *Lightning Lube v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir. 1993). The Third Circuit has noted it must "affirm the judgment of the district court . . . unless the record is 'critically deficient of that minimum quantum of evidence from which the jury might reasonably afford relief."' *See Simone v. Golden Nugget Hotel and Casino*, 844 F.2d 1031, 1034 (3d Cir. 1988) (quoting *Link v. Mercedes-Benz of North America*, Inc., 788 F.2d 918, 921 (3d Cir.1986)). Because there was sufficient evidence for the jury to find for Ellis, concluding that Ethicon failed to engage in the interactive process, their finding should not be disturbed on appeal.

The evidence consistently shows Ethicon's failures to engage in the interactive process. It placed Ellis on long-term disability, despite being informed on numerous occasions that reasonable accommodations were needed for Ellis to be able to perform the essential functions of the job.[8] Additionally, Ellis suggested reasonable accommodations and was terminated

[8] *See* JA0392 (Email regarding T. Ellis' treatment plan and return to work date, dated May 23, 2001); JA0395 (Emails between M. Stretch and S. Zukowski regarding T. Ellis' treatment plan and return to work dated September 27, 2001); JA0503 (Email correspondence between M. Flax and S. Zukowski in September 2001 regarding T. Ellis cognitive therapy and return to work).

without a discussion about any alternative accommodations. Unlike Ellis' return to work experience in 1999, where Dr. Cole from Johnson & Johnson met with Ellis and spoke with her doctors, Ellis' interaction with Ethicon in 2001 lacked such interactivity. In 2001, no one at Ethicon met with Ellis, even though Ethicon indicated to Ellis that she would meet with Johnson & Johnson's physician to discuss her return to work plan.[9] In fact, Leslie Traver, Ellis' supervisor at the time, testified that no one at Ethicon or Kemper ever told her that they could conduct a conversation with Ellis to determine if reasonable accommodations might be available. (JA1113). Ethicon's failure to speak with, or discuss necessary accommodations with Ellis, illustrates that the interactive process never occurred. Ethicon was properly found liable for failing to engage in the interactive process and the jury's factual determination on this issue should not be disturbed.

B. The Jury Determination Is Consistent With And Compelled By The Third Circuit's Interactive Process Analysis

The Third Circuit has a body of well-developed case law discussing the interactive process. The court has adopted wholesale portions of the ADA regulations:

[9] Jean Greenhalgh, a RN for Johnson & Johnson, e-mailed Ellis on October 3, indicating that Ellis needed to provide Ethicon with her accommodations by October 12, so that Dr. Cole could review this information before Ellis' return to work appointment with her. (JA0400).

> To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of accommodation. This process should identify the precise limitations resulting from the disability and the potential reasonable accommodations that could overcome those limitations.

Hohider v. United Parcel Serv., Inc., 574 F.3d 169, 187 (3d Cir. 2009) (quoting 29 C.F.R. § 1630.2(o)(3)). Ethicon failed to engage in the interactive process when, by refusing to identify the limitations caused by Ellis' disability and to work with her to explore accommodations to overcome those limitations, it summarily dismissed Ellis' request for accommodations. Despite never having seen Dr. Watson's letter requesting the three-day work at home accommodation for Ellis, Ms. Traver rejected the plan as impossible to accommodate and Ethicon failed to discuss any alternatives with Ellis. (JA1103). After examining the facts, the jury determined that Ethicon failed to engage in the interactive process, a determination which is fully supported by Third Circuit interactive process analysis. (JA1529).

Taylor v. Phoenixville School District provided the Third Circuit the perfect vehicle to discuss the interactive process. In *Taylor*, the school principal's secretary alleged that the Phoenixville School District "failed to

provide her reasonable accommodations for her mental illness." *Taylor*, 184 F.3d at 301. The court found that "in order to trigger the school district's obligation to participate in the interactive process, Taylor or her representative only needed to request accommodation" and "if there was any further information that the school district felt it needed to justify an accommodation, it was incumbent on the school district to ask for it." *Taylor*, 184 F.3d at 314.[10]

As in *Taylor*, Ellis triggered Ethicon's duty to participate in the interactive process by requesting reasonable accommodations through her multiple interactions with Ethicon concerning her disability. (JA1103-13). Ellis and her husband provided Ethicon with various medical documents that suggested accommodations.[11] (JA0849; JA0986). After the process was triggered it was incumbent upon Ethicon to meet Ellis halfway in discussing possible accommodations and alternatives.

[10] *See also Williams* 380 F.3d at 771 (3d Cir. 2004) (quoting *Mengine v. Runyon* 114 F.3d 415, 420 (3d Cir. 1997)) ([B]oth the employer and the employee "have a duty to assist in the search for appropriate reasonable accommodation . . . .").

[11] Dr. Barbara Watson recommended that Ellis should stay at home three days a week, work two days at the office, and be provided with a job coach. (JA0849; JA0986).

The fact that Ethicon did not think the accommodations proposed by Ellis and her doctors were reasonable does not end Ethicon's obligation to engage in the interactive process. The Third Circuit has addressed this point directly. In granting summary judgment to the school district, the District Court in *Taylor* noted that the only accommodation Taylor had requested was not possible. In reversing the District Court, the Third Circuit stated: "We do not think that it is fatal to Taylor's claim . . . that Taylor's request in March of 1994 was for an accommodation that she admitted was not possible. [t]he interactive process as its name implies, requires the employer to take some initiative." *Taylor*, 184 F.3d at 315. The court went on to explain: "The interactive process would have little meaning if it was interpreted to allow employers, in the face of a request for accommodation, simply to sit back passively, offer nothing, and then, in post-termination litigation, try to knock down every specific accommodation as too burdensome. . . ." *Id.*

The court in *Taylor* summed up the employer's duty: "In short, an employer who has received proper notice cannot escape its duty to engage in the interactive process simply because the employee did not come forward with a reasonable accommodation that would prevail in litigation." *Id.* at 317. Here, Ethicon passively sat back and offered nothing when it rejected Ellis' initial proposal as unworkable. As the court in *Taylor* explained, Ethicon's

action would only "unfairly exploit[] the employee's comparative lack of information about what accommodations the employer might allow." *Id.* at 315-16. It was Ethicon's duty to participate in a conversation about such accommodations or alternatives instead of waiting for post-termination settlement disputes to discuss Ellis' return to work. *See* Section II, *infra*.

The court in *Taylor* suggested several ways in which an employer can show their good faith participation in the interactive process. Steps include: "[M]eet[ing] with the employee who requests an accommodation, . . . ask[ing] the employee what he or she specifically wants, show[ing] some sign of having considered employee's request, and offer[ing] and discuss[ing] available alternatives when the request is too burdensome." *Taylor*, 184 F.3d at 317; *see also Mengine v. Runyon*, 114 F.3d 415, 420 (3d Cir. 1997) (quoting *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996) ("A party that obstructs or delays the interactive process is not acting in good faith."); *Armstrong v. Burdette Tomlin Mem'l Hosp*., 438 F.3d 240, 246 (3d Cir. 2006) (quoting *Taylor* 184 F.3d at 312) (If an "employee could have been reasonably accommodated but for the employer's lack of good faith," the employee will win on his failure to accommodate claim). Here, Ethicon did not take any of these steps. Ethicon failed to communicate directly with Ellis. In 1999, Ethicon conducted the proper return to work meeting.

However, when Ellis' short-term disability expired in 2001, Ethicon showed no signs of "having considered" Ellis' request for accommodation. (JA0986).

The Third Circuit has also given examples of effective use of the interactive process. *Mengine v. Runyon* provided a factual scenario in stark contrast to the facts of *Taylor* and the facts presented here. In *Mengine*, the Third Circuit found that the employer and employee engaged in the interactive process. The "uncontradicted evidence [in *Mengine*] shows that parties exchanged many letters in their mutual attempt to identify a vacant, funded position for reassignment." *Mengine*, 114 F.3d at 421. In contrast to the employer in *Mengine*, Ethicon made no attempt to communicate with Ellis to identify a position that Ellis could perform with reasonable accommodations. The court in *Mengine* recognized the importance of participation of both parties in the interactive process and while the outcome is not always favorable, it is the act of good-faith participation that insulates the employer from liability:

> When the interactive process works well, it furthers the purposes of the Rehabilitation Act and the ADA. The employers will not always know what kind of work the worker with the disability can do, and conversely, the worker may not be aware of the range of available employment opportunities . . . . Thus, the interactive process may often lead to the identification of a suitable position.

Id. at 420.

The significance of the interactive process does not turn on the end result, but rather, on participation by both parties in a good-faith attempt to find a reasonable accommodation for an employee's disability. It was not Ethicon's failure to find a suitable position for Ellis that created its liability, but its failure to cooperate in good-faith to explore how Ellis' disability could be accommodated. The jury recognized this and found against Ethicon.

II. POST TERMINATION SETTLEMENT DISCUSSIONS DO NOT CONSTITUTE THE INTERACTIVE PROCESS, AND HERE THERE WAS NO ABUSE OF DISCRETION IN PROHIBITING TESTIMONY REGARDING PRIVILEGED ATTORNEY-CLIENT CONVERSATIONS

Third Circuit case law clarifies that the ADA's interactive process is not meant to include post-termination settlement negotiations between the parties' attorneys, but rather it is an informal discussion between the employee with the disability and the employer. While it is possible for the interactive process to be completed through attorneys, it is ideally conducted between the employee and employer. In *Whelan v. Teledyne Metalworking Products*, 226 Fed.Appx. 141, 147 (3d Cir. 2007), the Third Circuit reinforced the need for the employer and employee to speak with each other. Once an employee notifies her employer of her need for an accommodation for her disability, the employer must communicate with the employee and solicit

whatever information is necessary to devise a suitable accommodation. *Id.*[12] Both the ADA and the court require the parties to speak with and interact with each other to facilitate the employee's return to work.

A. The Interactive Process Is Intended To Be A Conversation Between Employer And Employee To Identify Reasonable Accommodations Before An Employee Is Terminated, Not Post-Termination Settlement Discussions Between Counsel

The timeline regarding the involvement of counsel is of critical importance in this case. Ethicon refused to engage with Ellis until after she retained counsel to assist her in her attempt to return to work. Because of Ethicon's refusal to interact with Ellis in identifying possible accommodations, contact between her attorney and Ethicon's attorney did not begin until a mere *four days* before Ellis was terminated—long past the point where an accommodation could be identified and implemented without her first being required to transition to long-term disability. (JA1293-94; JA0406). Ellis was forced into long-term disability and effectively terminated

[12] The legislative history of the ADA also makes clear that Congress intended the interactive process to be a conversation between the employer and the employee, with the goal of finding a mutually acceptable reasonable accommodation, as opposed to settlement discussions between attorneys: ". . . after a request for an accommodation has been made, employers first will consult with and involve the individual with a disability in deciding on the appropriate accommodation . . ." H.R. REP. NO. 101-485 at 65-66, (1990), reprinted in 1990 U.S.C.C.A.N. 303, 347-48.

from employment with Ethicon on October 22, 2001. (JA0406). Any communication, either between Ethicon and Ellis's attorney or Ellis and her attorney, after October 22, 2001, is communication which post-dated Ellis' employment with Ethicon.

At that point, any requests for accommodation that were made through either Ellis or her attorney were simply an employee requesting reinstatement after her termination. *See, e.g.*, *Mole v. Buckhorn Rubber Prods., Inc.*, 165 F.3d 1212, 1218 (8th Cir. 1999) (stating that post-termination requests for accommodation are not properly viewed as requests for accommodation at all but, rather, as request for reinstatement), *cert. denied* 528 U.S. 821 (1999); *Alexander v. Northland Inn*, 321 F.3d 723, 728 (8th Cir. 2003). While an offer of reinstatement may be relevant to the issue of Ellis' damages, it is not relevant to the issue of liability. "A post-termination 'accommodation' does not satisfy Defendant's obligation to reasonably accommodate a disabled employee. Once an employee has been terminated, the employer can no longer be said to be engaged in the interactive process." *O'Bryan v. State of Nevada*, No. 3:04-CV-00482-RAM, 2006 WL 2711550, at *4 (D. Nev. Sept. 21, 2006).

All of the communication Ethicon cites to illustrate its efforts to engage in the interactive process, including Ethicon's offer of a part-time job, and its

request that Ellis provide Ethicon with additional information from her doctors, occurred *after* Ellis' termination date of October 22, 2001. Therefore, such communications should rightfully be considered post-termination settlement discussions rather than part of the interactive process. These communications have no relevance at all to the interactive process.

On direct examination, Ms. Warren, Ethicon's in-house counsel, testified that she refused to communicate with Ellis' husband about Ellis' reinstatement or further accommodations because Ellis had retained counsel. (JA1308). Ms. Warren testified "[o]nce a person is represented by an attorney, then the communication -- the rules of attorney ethics prohibit me from speaking directly to the person." (JA001308). This accurate statement of legal ethics shows that once Ellis retained Ms. Hadziosmanovic, the parties were engaged in settlement discussions. Moreover, this refusal to engage in discussions with Ellis until she sought the assistance of an attorney runs counter to the intentions of the ADA, as previously discussed. *See* Section. I, *supra.* Ethicon's failure to engage with Ellis until she retained an attorney, and only a few days before Ellis was to be transitioned to long-term disability, demonstrates that their counsel's discussions with Ms. Hadziosmanovic were settlement discussions rather than an exercise of the interactive process.

B. To The Extent That Discussions Between Counsel After Ellis' Termination Could Be Considered Part Of The Interactive Process, There Was No Abuse Of Discretion In Refusing Cross Examination About Attorney Client Discussions, As The Jury Was Instructed To Impute Any Knowledge Ellis' Counsel Had To Ellis

Ethicon argues that the jury was misled because the District Court did not permit Ethicon to cross-examine witnesses regarding privileged attorney-client discussions. The judge was correct as a matter of law in foreclosing this line of questioning and instructing the jury that any information Ellis' counsel had was imputed to Ellis. Ethicon's argument is simply intended to distract this Court from the real issues before it. The jury was aware of the interactions between counsel that occurred after Ellis was terminated, and despite these facts, found that Ethicon failed to engage in the interactive process. The District Court properly refused to second-guess this factual determination and explained that the facts of this case were fully considered by the jury. Contrary to Ethicon's contention, the jury's finding is amply supported by the evidence presented at trial when viewed in the light most favorable to the verdict, and thus should not be altered by this Court. (JA0069).

Ethicon's main point hinges on the contention that its offer of part-time employment was sufficient to constitute the interactive process and Ellis' testimony that she was unaware of this offer was the only reason the jury

determined that Ethicon failed to engage in the process. Ethicon argues that, had Ellis' communications with Ms. Hadziosmanovic been examined, testimony would have shown that Ellis had knowledge of the part-time offer and the jury would have had proof that Ethicon engaged in the interactive process by offering Ellis some form of accommodation. Ethicon's argument ignores not only the law but the judge's explicit jury instructions.

A central question regarding Ellis' attorney-client communications is whether Ellis even put her communications with her attorney at issue by testifying that she was unaware of any offer made by Ethicon regarding part-time work. The short answer is no. When reviewing an application of the attorney-client privilege, the Court performs a *de novo* review of the issues of law, but as to other issues, the standard of review is abuse of discretion. *In re Impounded,* 241 F.3d 308, 312 (3d Cir. 2001).

Ethicon argues that the attorney-client privilege allowed Ellis to use the privilege as both a sword and a shield by placing communications with an attorney into issue and then preventing inquiry into those communications by using the privilege to shield them from examination. *See Berckeley Investment Group, Ltd. v. Colkitt,* 455 F.3d 195, 22 n.24 (3d Cir. 2006). However, there are no grounds for a sword and shield argument because the District Court correctly disposed of the issue. Ethicon's attempts to probe

what Ellis' then-counsel told her are without merit in light of general agency principles. The jury was correctly instructed on this point of law. Under the RESTATEMENT (THIRD) OF AGENCY § 5.03:

> For purposes of determining a principal's legal relations with a third party, notice of a fact that an agent knows or has reason to know is imputed to the principal if knowledge of the fact is material to the agent's duties to the principal, unless the agent: (a) acts adversely to the principal as stated in § 5.04, or (b) is subject to a duty to another not to disclose the fact to the principal.[13]

Since Ellis' counsel was Ellis' agent, Ellis is presumed to have knowledge of all communications between Ethicon's attorney and her own, regardless of whether she was actually informed of the communication. It is inconsequential whether or not Ellis had actual knowledge of the offer of part-time work, as agency principles impute her attorney's knowledge to her.

The trial judge made this imputed knowledge concept clear to the jury in the jury instructions:

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[13] The Supreme Court has generally cited to the RESTATEMENT (SECOND) OF AGENCY, in applying agency principles. *See generally, Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Kolstad v. ADA*, 527 U.S. 526 (1999); *Am. Soc'y of Mech. Eng'Rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982); *Meyer v. Holley*, 537 U.S. 280 (2003). However, the law as it applies to the imputation of knowledge to the principal through his agent is the same, as "(1) Unless the notifier has notice that the agent has an interest adverse to the principal, a notification given to an agent is notice to the principal if it is given: (a) to an agent authorized to receive it; (b) to an agent apparently authorized to receive it." RESTATEMENT (SECOND) OF AGENCY § 268.

> In addition to considering any of the communications between the parties regarding the accommodations in 2001, you should consider any communications between the attorneys regarding accommodations. Attorneys are agents of their client and are authorized to speak on their behalf. Communications between attorneys are treated the same as if the communications had occurred between the parties.

(JA001506). These instructions were clear, unequivocal, and Ethicon did not object. The Third Circuit presumes that juries follow the instructions given them. *See Richardson v. Marsh*, 481 U.S. 200, 211 (1987); *U.S. v. Bornman*, 559 F.3d 150, 156 (3d Cir. 2009) ("We presume that the jury follows such instructions."). Simply because the jury verdict was not favorable to Ethicon does not mean that the jury was wrong or that the District Court abused its discretion. Rather, the District Court balanced the importance of maintaining the attorney-client privilege with a jury instruction that protected Ethicon's right to have the jury hear all relevant information necessary to decide the case. Because the court's jury instructions correctly applied agency principles, the attorney-client privilege never became an issue for the jury to consider. Ethicon's argument that Ellis used privileged information as both a sword and shield distorts the issue.

Because Ellis is presumed to share her attorney's knowledge, all that is needed to prove her knowledge of Ethicon's offer is proof that her counsel

was aware of this offer. This evidence can be obtained without probing communications between Ellis and Ms. Hadziosmanovic. Ms. Warren, Ethicon's counsel, offered testimony at trial that she had a phone conversation with Ellis' attorney where both the offer of part-time employment and the request for further information was made. (JA1297). A colleague of Ms. Hadziosmanovic, Ms. Flax, also testified that she was aware of the communications between Ms. Hadziosmanovic and Ms. Warren offering this new part-time job. (JA1261). Testimony was presented to the jury on several occasions that Ethicon, in an attempt to settle this matter, offered Ellis a part time position. Hearing this evidence, the jury did not accept Ethicon's version of the facts, and instead reached the opposite conclusion: that Ethicon failed to engage in the interactive process.

The jury's factual determination should not be revisited on appeal, unless no reasonable jury could have reached that conclusion on the evidence presented. *See Simone*, 844 F.2d at 1034 (quoting *Link*, 788 F.2d at 921). The jury heard and considered all of the evidence and concluded that Ethicon did not participate in the interactive process despite being instructed on imputation of knowledge from Ellis' attorneys.

When a party places attorney-client communications at issue, the opposing party is able to probe those communications. Ethicon cites several

cases in a failed attempt to show that Ellis placed these communications at issue. They actually show the opposite. In both cases cited by Ethicon, the legal issues were the clients' understanding of matters they had been advised of by their attorneys. *Berckeley*, 455 F.3d at 221 n.24; *Livingstone v. North Belle Vernon Borough*, 91 F.3d 515, 536-37 (3d Cir. 1996). Had the opposing parties been unable to probe the attorney-client communications, it would have essentially foreclosed further inquiry into the claim and the court would have been obligated to accept the truth of the claim on its face.

In contrast to those cases, the communications between Ellis and Ms. Hadziosmanovic did not lead Ellis to take action in reliance on that advice, nor was any advice she received relevant to her conduct. The only question raised about what occurred at the meeting between Ellis and her attorneys was answered by the imputation of her attorney's knowledge to Ellis. Ellis never put the attorney-client communications between herself and Ms. Hadziosmanovic at issue, as she did not rely on attorney advice. Instead, Ellis merely asserted it was her belief that "Ethicon was unwilling to accommodate her disability." Pet. App. Br. 28.

Ethicon also argues that "the District Court's own analysis demonstrates the prejudice caused by this error and its materiality to the jury's verdict," but the logic Ethicon uses to make this point is unsound. *Id*.

at 27. Ethicon relies on a statement from Judge Wolfson that "the jury could have accepted plaintiff's testimony that she did not follow through by seeing Dr. Mahon in December 2001 because 'she was under the impression that Ethicon was unwilling to accommodate her disability.'" *Id.* at 28. The jury could have accepted this version of the facts, but they did not. Rather, given all the evidence Ellis presented at trial as to Ethicon's failure to suggest an alternative accommodation or to speak with her in person regarding her disability or limitations, the jury found that Ethicon failed to engage in the interactive process.

Ethicon argues that Judge Wolfson's statement is proof that the court and the jury were relying on Ellis' purported lack of knowledge about her attorney's conversations with Ethicon's attorney in finding that Ethicon had failed to engage in the interactive process. *Id.*. Ethicon appears to believe that the only evidence to support a verdict holding that it failed to engage in the interactive process was Ellis' testimony that she was unaware of its offer of part-time employment and its request for additional information about her disability. However, as discussed in Section I *supra*, there was a wealth of supporting evidence presented at trial that the jury considered in concluding that Ethicon failed to engage in the interactive process and was unwilling to accommodate Ellis' disability.

Given all the evidence presented to the jury, Judge Wolfson's single statement that Ethicon takes issue with is simply one version of the facts that the jury could have accepted, and not the smoking gun Ethicon alleges. *Id.* The jury took all of the evidence into account and determined that Ethicon refused to participate in the interactive process. That finding should not be disturbed.

III. ELLIS IS AN INDIVIDUAL WITH A DISABILITY WHO CAN PERFORM THE ESSENTIAL FUNCTIONS OF THE JOB WITH REASONABLE ACCOMMODATION, AND THE JURY'S FACTUAL FINDING ON THIS ISSUE SHOULD NOT BE SECOND-GUESSED

Ethicon contends that Ellis is not a qualified individual with a disability under the ADA. *Id.* at 44-56. This argument ignores not only the language of the ADA and the regulations implementing it, but also the facts considered by the jury. Ethicon's argument, resting on the contention that no reasonable jury could have determined that Ellis was an individual with a disability, stands in contrast to the abundance of evidence in the record demonstrating her limitations and ignores part of the analysis mandated by the ADA. Indeed, based on the evidence, the jury was compelled to make the finding that Ellis was a qualified individual with a disability.

A. Based Upon Uncontested And Substantial Evidence, The Jury Properly Found That Ellis Was An Individual With A Disability Under The ADA

"Disability" is defined by the ADA as an impairment that "substantially limits one or more major life activities." 42 U.S.C. 12102(1)(A). The jury heard Ellis' testimony chronicling the significant difficulties following her accident, as well as the testimony of her neuropsychiatrist Dr. Watson, her husband, and others. The jury was instructed that Ellis must prove by a preponderance of the evidence that, in October 2001, she was substantially limited in the major life activity of cognitive functioning. The jury found that this major life activity was indeed impaired by the accident, and determined Ellis was an individual with a disability. (JA0224-30). The Third Circuit may not disturb the judgment of the District Court "unless the record is critically deficient of that minimum quantum of evidence from which the jury might reasonably afford relief." *Simone*, 844 F.2d at 1033.

Ethicon's argument focuses on selective portions of the record at the expense of examining the record in its entirety. First, Ethicon points to testimony during trial in which Dr. Watson used the phrases "mild impairment" and "minor impairment," and contends that this testimony compels a legal conclusion that Ellis cannot meet the ADA standard for

disability. Pet. App. Br. at 47. Ethicon's myopic focus on use of the word "mild" ignores compelling evidence presented during trial of the debilitating effects of MTBI. Indeed, the record contains ample testimony from Ellis and others as to the struggles she faced. Ellis testified that after the accident:

> I would try to relax the way I used to relax, which was reading, and I couldn't read anything. What I mean by couldn't read is I would pick up the book and I would start it and I would think I was understanding what was happening and I would realize I didn't understand the last page, and I couldn't figure out why. I would go over it and over it, and I couldn't get into the mode of reading.

(JA0576). Ellis further testified that she could no longer control her moods, and that she suffered terrible fatigue. (JA0576-80).

Dr. Watson, admitted as an expert in neuropsychology, testified that Ellis had "severe emotional control problems," and that Ellis' cognitive fatigue constituted "the most troubling and difficult symptom a brain-injured person has to cope with." (JA0831-32). At her first meeting with Ellis, Dr. Watson concluded that Ellis "demonstrated areas of cognitive deficit or impairment and weakness that were consistent with a diagnosis of mild traumatic brain injury." (JA0825-26). Dr. Watson testified that her testing showed that Ellis was deficient in multi-tasking, as well as in problem-solving that required her to think on her feet. (JA0838-39). Ellis' troubles also

extended to memory, reading comprehension, and word retrieval. (JA0838-39). Based on these symptoms, it was Dr. Watson's expert opinion that upon a return to work Ellis would, ideally, need an expert on brain trauma to help her ease back into the workplace. (JA0840).

Ellis' husband also testified to her condition. He chronicled her blurry vision and her mood swings; over time, he was forced to take on more responsibilities to help his wife get through the workweek, including doing most of the driving, shopping, and cooking. (JA0960-63). He testified about how easily Ellis was distracted, and about the rehabilitation therapy she received at Good Shepherd Hospital during the summer of 2001. (JA0965-70). In addition to this persuasive testimony, it is notable that the District Court granted Summary Judgment to Ethicon on all of Ellis' other claims of substantial limitation and restricted the jury's determination to *only* the limitation on cognitive functioning. The District Court determined that cognitive functioning, in particular, was a question that required fact determination from a jury. Based on the weight of this foregoing testimony demonstrating that limitation, there is a clear basis from which the jury could determine, and did determine, that Ellis is substantially limited in cognitive functioning and is therefore an individual with a disability.

Second, Ethicon attempts to argue that despite the MTBI diagnosis, Ellis is not, as a matter of law, disabled because she was formerly an above-average thinker, who was reduced to merely average as a result of the accident. This is the same argument that Ethicon raised in their Motion for Judgment As a Matter of Law and their Motion for Summary Judgment, both of which the District Court correctly rejected. (JA0056). Ethicon relies heavily on Dr. Watson's testimony that Ellis' cognitive abilities fell between average to below average in some areas after her accident, arguing that she fails to show a "substantial limitation" as a matter of law. Pet. App. Br. at 48. Ethicon is wrong. This exclusive focus on the tests run by Dr. Watson ignores the additional evidence presented by multiple witnesses as to the cognitive limitations Ellis faced in her daily life. It also ignores the appropriate analysis. According to the EEOC Regulations, a substantial limitation in a major life activity exists when a person:

> (1) is unable to perform a major life activity that the average person in the general population can perform; *or* (2) is significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1) (emphasis added). Further, the factors driving this analysis are: "(1) the nature and severity and the impairment, and (2) the duration or expected duration of the impairment; and the permanent or long-term impact or the expected permanent or long term impact of or resulting from the impairment." 29 C.F.R. § 1630.2(j)(2).

As the jury found, and as the District Court pointed out in rejecting Ethicon's argument that Ellis was not disabled as a matter of law, Ethicon's rehashed contention ignores the second part of the analysis. Judge Wolfson correctly observed, in sending this question to the jury, that "the duration or expected duration of her impairment, and the permanent or long term impact or the expected permanent or long term impact resulting from the impairment" were relevant factual determinations. (JA0026). Although Ellis' testing was average in some respects, it was the opinion of both Dr. Mahon and Dr. Watson that Ellis could no longer do her work functions at the same pace she had previously, and would require a serious decrease in work days and responsibilities; in other words, Ellis was *significantly restricted as to the condition, manner or duration* under which she could utilize those average or below average cognitive skills. *See* 29 C.F.R. § 1630.2(j)(1). The jury considered this during the eight-days of trial and determined Ellis was an

individual with a disability under the ADA. This factual determination should not be disturbed.

In support of its argument, Ethicon cites case law in which persons with "average" cognitive abilities were not found to be disabled individuals under the ADA. However, none of Ethicon's cases are instructive. In *Weisberg v. Riverside Tsp. Bd. of Ed*., 180 Fed.Appx. 357 (3d Cir. 2006), the Third Circuit affirmed summary judgment for the employer, finding that the employee was not disabled as a matter a law. But, *Weisberg* is inapt. In *Weisberg*, the court found that Mr. Weisberg had "only certain narrow and relatively minor limitations," was able to work 40-hour weeks, and "do his job and do it well." *Id*. at 362. Most importantly, the Third Circuit put great weight on the fact that plaintiff in *Weisberg* had only addressed the nature and severity of his impairment and had produced "no evidence pertinent to the 'duration or expected duration of the impairment' or the 'expected permanent or long term impact of or resulting from the impairment.'" *Id*. at 363. As a result, the court found that he had failed to present a prima facie case sufficient to survive summary judgment. As outlined above, this is clearly not the case here, as there is considerable testimony as to the duration of Ellis' disability.

In *Bowen v. Income Producing Mgmt.*, 202 F.3d 1282 (10th Cir. 2000), another case Ethicon relies on, the Tenth Circuit affirmed a jury finding that

the plaintiff was not disabled under the ADA. The posture by the *Bowen* court was whether a reasonable jury could have found, as it had, that plaintiff was not disabled. This case does not stand for the proposition that certain average mental abilities would foreclose judgment in favor of Ellis. If anything, it supports *Amicus'* position that whether an employee is an individual with a disability is inherently a fact determination, and a jury's finding should not be disturbed except in extraordinary circumstances. It also further supports the District Court's ruling that the cognitive limitation inquiry is one best suited for the jury. As the *Bowen* court noted, in upholding the jury's decision, "we realize that much of the evidence in the record could lead to differing inferences regarding Mr. Bowen's ability to work and learn." *Id*. at 1288.

In G*onzalez v. Nat'l Bd. of Med. Exam'rs*, 225 F.3d 620, 627 (6th Cir. 2000), also relied on by Ethicon, the Sixth Circuit found that plaintiff was not substantially limited in the functions of reading, writing and working, but did not address the life function of cognitive ability. In contrast, the District Court here painstakingly applied the ADA standards and found that it was a jury question as to whether Ellis was substantially limited in cognitive functioning. The District Court also did a thorough review of Ellis' claims that she was substantially limited in both the life functions of working and of

caring for herself, and rejected the contention that Ellis was substantially limited in either. (JA0028-30). Instead, after its comprehensive review, the District Court *only* charged the jury on the question of cognitive thinking, and that is the *only* life function the jury considered.

The District Court correctly found that "when significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable." (JA0083) (quoting *Emory v. Astrazeneca Pharm. LP*, 401 F.3d 174, 183 (3d Cir. 2005)). Ethicon asks the court to look at this evidence and conclude that no reasonable jury could have found this to be true for plaintiff, in spite of compelling evidence to the contrary. Ethicon cannot meet this standard and its request to this Court to act as a third fact-finder, by second-guessing the factual determinations of the jury, should be rejected.

B. The Jury And Trial Judge Properly Rejected Ethicon's Circular Argument That Ellis Was Not A "Qualified" Disabled Individual When Its Refusal To Engage In The Interactive Process Prevented Any Real Analysis Of The Essential Functions Of The Job

Even more tenuous a claim than arguing that Ellis is not an individual with a disability is Ethicon's contention that even if she is an individual with a disability, she is still not a *qualified* individual with a disability under the ADA. Having already argued that Ellis is not actually disabled, Ethicon next argues that she is so impaired that she cannot perform the job, even with

reasonable accommodations. Pet. App. Br. at 52-53 The jury saw the self-serving nature of this argument because it is entirely without merit.

An individual is qualified under the ADA when she "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. 12111(8). Here, Ethicon proposes the perfect Catch-22 scenario. The heart of this case, and what the jury determined, is that Ethicon failed to engage in the "interactive process" to determine whether there was an available reasonable accommodation to permit Ellis to perform the essential functions of the job. Ethicon's argument seems to be that there is no way for Ethicon to lose. The very purpose of the interactive process is to determine those essential functions and how best to accommodate an employee to perform them. It was Ethicon's failure to engage in the interactive process, intended to identify possible accommodations, which foreclosed any critical examination of the essential functions of the job and how Ellis may be accommodated. Ethicon now seeks to use that failure as a shield. The jury, however, looked at all the evidence and found Ellis was a qualified individual. (JA0224-25). The District Court properly refused to second-guess the jury's fact determination on this point and this court should likewise refuse to disturb the jury's verdict.

The burden on Ethicon is extremely high; it must show that no reasonable jury could have found that Ellis could have performed the job with accommodations. Leslie Traver, Ellis' supervisor, testified that no one from Ethicon or Kemper indicated, after rejecting Ellis' initial proposal, that there was any opportunity for further discussions. (JA1104). Ms. Traver expressly testified that she would have been willing to make additional accommodations to get Ellis to return to work, yet Ethicon failed to make any such overture. (JA1106-09). These failures prevented any meaningful accommodations from being explored, and Ethicon cannot now hide behind these failures to defend itself from liability.

Ms. Traver testified that some of plaintiff's duties might need to be reassigned to other engineers. While Ethicon places strong emphasis on that testimony, it ignores Traver's conclusion that there may have been reasonable accommodations available.[14] Ms. Traver testified that such temporary reassignments could have been utilized to permit Ellis to return to work. To

[14] Temporary reassignment can be an accommodation. "An employer or other covered entity may restructure a job by reallocating or redistributing non-essential, marginal job functions." 29 C.F.R. Pt 1630, App. at 344. As for more "essential" functions, examine the language cited by Ethicon: "The ADA does not require an employer to 'eliminat[e] . . . any of the job's essential functions.' *Gilbert v. Frank*, 949 F.2d 637, 642 (2d Cir. 1991). Temporary reassignment of an essential function during an accommodation period does not equate to "eliminating" it.

counter that testimony, Ethicon asserts that such temporary reassignments are more than the ADA would require, but has no legal authority for that proposition. Instead Ethicon points to Third Circuit language that states "employers are not required to modify the essential functions of a job in order to accommodate an employee." *Donahue v. CONRAIL*, 224 F.3d 226, 232 (3d Cir. 2000). This language correctly states the law, but Ethicon's reliance on it misses the point because it falls short of foreclosing the availability of *temporary* reassignment of certain functions. Rather, temporary reassignment, when necessary, is very much in the spirit of the interactive process and of accommodation for disabled employees. Further, to the extent Ethicon is suggesting that this court adopt a rule of law that temporary reassignments during a transitional period for disabled employees disqualifies plaintiffs under the ADA, such a suggestion is at odds with the very purpose of these laws and should be flatly rejected.

Based upon Ethicon's failure to use the interactive process to determine the essential job functions, a jury could reasonably conclude that Ellis could perform all the essential functions of the job with reasonable accommodation. The jury deliberated for two days, carefully considered the verdict, and reached the factual determination that Ellis was a qualified individual. It is hypocritical to suggest now that Ellis cannot be qualified as a matter of law

because the initial accommodation presented by Ellis was insufficient, where Ethicon offered no possible solutions of its own through what was supposed to be a fair and substantive interactive process.

Ethicon argues that reassignment was not available here but, again, this is the employer trying to benefit from its own failure to engage in the interactive process. The jury rejected this very argument by finding that Ethicon failed to engage in the interactive process—the process which the ADA intended for employers and employees to use to explore what accommodations may be reasonable and permit an employee to perform the essential job functions.

IV. THE TRIAL JUDGE, WEIGHING ALL THE EVIDENCE AND ARGUMENTS, CORRECTLY DETERMINED THAT REINSTATEMENT WAS THE PROPER EQUITABLE REMEDY AS THE PREFERRED METHOD OF REDRESSING INTENTIONAL DISCRIMINATION

The District Court was correct in ordering reinstatement, which is universally accepted as the preferred equitable remedy for making a discrimination victim whole. *See Maxfield v. Sinclair Int'l,* 766 F.2d 788, 796 (3d Cir. 1985)*; Pollard v. E. I. du Pont de Nemours & Co.*, 532 U.S. 843, 846 (2001) (stating that front pay is awarded when reinstatement is not

available).[15] Reinstatement is the remedy that comes closest to putting an employee back to where she would have been but for the unlawful discrimination. *See Starceski*, 54 F.3d at 1103 (stating that reinstatement "is the preferred remedy to avoid future lost earnings because it is consistent with the [statute's] make-whole philosophy"). An order of reinstatement avoids the difficulty of predicting and awarding frontpay where there are two ever-present concerns; the failure to make the employee whole and the possibility of the employee getting a windfall. Furthermore, contrary to Ethicon's argument, a finding of failure to mitigate has no relevance to an equitable order of reinstatement. *See Dilley v. SuperValu*, Inc., 296 F.3d 958, 967 (10th Cir. 2002). The District Court's exercise of discretion was compelled by both the law in the Third Circuit and the facts in this case.

[15] *See also Chungchi Che v. Mass. Bay Transp. Auth.*, 342 F.3d 31, 43 (1st Cir. 2003) ('[I]n employment discrimination cases, "the overarching preference is for reinstatement."'); *Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1182 (2d Cir. 1996); *Allen v. Autauga Cnty Bd. of Educ.*, 685 F.2d 1302, 1305 (11th Cir. 1982) (stating that "reinstatement is a basic element of the appropriate remedy in wrongful employee discharge cases and, except in extraordinary cases, is required"); *EEOC v. E.I. DuPont De NeMours & Co*, 480 F.3d 724, 732 (5th Cir. 2007); *McNeil v. Econs. Lab.*, 800 F.2d 111, 118 (7th Cir. 1986); *Salitros v. Chrysler Corp.*, 306 F.3d 562, 572 (8th Cir. 2002); *Caudle v. Bristow Optical Co., Inc*., 224 F.3d 1014, 1020 (9th Cir. 2000); *Abuan v. Level 3 Commc'ns, Inc.*, 353 F.3d 1158, 1176 (10th Cir. 2003)

A. Reinstatement Is The Preferred Equitable Remedy To Make A Discrimination Victim Whole And To Prevent Future Lost Earnings

The Third Circuit has consistently held that reinstatement "is an obvious form of relief to make the plaintiff whole and to relieve the plaintiff of the effects of discrimination." *Ellis*, 832 F.2d at 30 ; *see also Starceski*, 54 F.3d at 1103. Reinstatement is also the preferred equitable remedy to prevent future lost earnings. *See, e.g.*, *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 796 (3d Cir. 1985) (stating that "[r]einstatement is the preferred remedy to avoid future lost earnings . . . ."); *Squires v. Bonser*, 54 F.3d 168, 173 (3d Cir. 1995) (stating that "reinstatement is the preferred remedy in the absence of special circumstances").

In 2009, after rejecting a frontpay remedy, the District Court found that reinstatement was the preferred equitable remedy to address the discrimination Ellis suffered. (JA0109). The court reaffirmed its position that reinstatement was the proper equitable remedy by rejecting Ethicon's motion to stay reinstatement. (JA0065).

The District Court ordered reinstatement after weighing equitable principles. The court found that Ellis was able to work with accommodations. (JA0106). The court based this finding partially on the advisory verdict of the jury, which also found that Ellis was able to work with or without

accommodations. (JA0107). The court further found that reemployment at Ethicon would provide Ellis "with the best opportunity to work again." (JA0107). The court relied on the testimony of Dr. Gross, who testified that Ellis was able to work and that the emotional stress she was feeling while at Aventis[16] stemmed from her termination at Ethicon. (JA0106). The court concluded that Ellis would not face the same emotional stress at Ethicon because she would not have to worry about disclosing her injury to her employer. (JA0107). Therefore, the District Court correctly ordered reinstatement.

B. The Mitigation Requirement Has No Relevance To Whether Reinstatement Is The Appropriate Equitable Remedy

Unlike front pay, the mitigation requirement plays no role in the determination of whether reinstatement is the most appropriate remedy. *See Dilley*, 296 F.3d at 967. Ethicon, without legal support, argues that reinstatement is not the appropriate remedy because Ellis failed to mitigate damages. Pet. App. Br. at 57. Ethicon cites case law arguing that front pay and reinstatement are "functional equivalents." *Id.* at 82. However, the key word is "functional." While the two remedies attempt to achieve the same goal—trying to make a victim of intentional discrimination whole—there are

[16] After her termination from Ethicon, Ellis started work at Aventis on December 17, 2001. *See* JA0801.

significant differences. As discussed above, reinstatement is the preferred remedy because it most closely mirrors what the employee's life would have looked like but for the discrimination. *See Feldman*, 43 F.3d at 831. Reinstatement, unlike front pay, does not require the judge to make complicated estimates of future earnings.[17] The duty to mitigate and the amount of this mitigation is relevant to a calculation of frontpay, but has no relevance as to whether reinstatement is appropriate. *See id*. at 840. Unlike frontpay, reinstatement requires a plaintiff to resume work. The plaintiff is compensated from the time of returning to work, not for previous missed work. Therefore, no purpose is served by requiring mitigation for a reinstatement order.

The District Court rejected Ethicon's argument that mitigation is a prerequisite for an order of reinstatement in its original decision. The court stated that "[w]hile an award of front pay may be foreclosed or reduced by a plaintiff's failure to mitigate, reinstatement is not." (JA0105). The court said it would order reinstatement despite the fact that it "found Plaintiff failed to mitigate her damages after leaving Aventis." (JA0106). The District Court correctly ordered reinstatement and in doing so adopted the same reasoning

[17] In order to properly award front pay, a judge must make estimates as to future earning potential as well as adjustments for time-value of money, inflation, and interest.

used by the Tenth Circuit in *Dilley*. In *Dilley*, the Tenth Circuit reversed the district court's holding denying reinstatement because the plaintiff had failed to mitigate by refusing to take another job. *Dilley*, 296 F.3d. at 967.

The *Dilley* court explained that "there is no logical link between a plaintiff's pursuit of alternative employment and whether he should be reinstated to the position from which he was wrongfully discharged." *Id.* The court further stated that "[a] plaintiff's ability to replace some of the income lost by virtue of the wrongful discharge certainly affects how much lost income he is due, but it does not bear on whether the plaintiff is entitled to the job itself." *Id.* While the Third Circuit has not addressed this issue directly, *Dilley* provides the best reasoned analysis of this issue, and this Court should adopt the Tenth Circuit's sound reasoning.

Other circuits, while not addressing this issue directly, have similarly found that a failure to mitigate does not preclude reinstatement. For example, in *Hazel v. U. S. Postmaster Gen.*, 7 F.3d 1 (1st Cir. 1993), the First Circuit found that the plaintiff cannot recover backpay because of his failure to mitigate. The court however went on to separately analyze the option of reinstatement which would not have been required if a finding of failure to mitigate as a matter of law precluded reinstatement - suggesting that mitigation plays no part in the consideration of reinstatement. *Id*. Other

circuits have reached similar conclusions. *See, e.g., Hansard v. Pepsi-Cola Metro Bottling Co.*, 865 F.2d 1461, 1470 (5th Cir. 1989); *Brady v. Thurston Motor Lines, Inc*., 753 F.2d 1269, 1271, 1280 (4th Cir. 1985).

The Third Circuit has enumerated only two restrictions on orders of reinstatement. *See Feldman*, 43 F.3d at 831 (stating that reinstatement may not be appropriate where there is animosity between the parties); *see also Blum v. Witco Chem. Corp.*, 829 F.2d 367, 373-74 (3d Cir. 1987) (stating that reinstatement would "be inappropriate where [it] is . . . unavailable because no comparable position exists"). Ethicon, without any legal support, is advocating a third restriction on orders of reinstatement. This proposed restriction has no logical link to the goal of reinstatement, and it goes against well-established case law holding that reinstatement is the preferred equitable remedy to make a discrimination victim whole.

C. The District Court's Order Of Reinstatement Was An Appropriate Exercise Of Its Discretion

"Guided by the particular circumstances of a case, the District Court has broad discretion in determining whether reinstatement is appropriate, and its determination is reviewed under an abuse-of-discretion standard." *Feldman*, 43 F.3d at 831; *see also Donlin*, 581 F.3d at 86 (stating that "[we]

will reverse [a district court's decision] only if we are left with a definite and firm conviction that a mistake has been committed").

Here, the District Court carefully considered all the factors before ordering reinstatement. At the time of these orders, the District Court had a thorough understanding of the facts and equities of the case, having handled it for four years, addressing a multitude of pretrial motions and having heard eight days of testimony. Based upon this history, the District Court, exercising its equitable powers, ordered reinstatement. This decision can only be disturbed based upon a showing of abuse of discretion. *See Feldman*, 43 F.3d at 832. "[D]eferential review is used when the matter under review was decided by someone who is thought to have a better vantage point than we on the Court of Appeals to assess the matter." *U. S. v. Mitchell*, 365 F.3d 215, 233-34 (3d Cir. 2004). Nothing in the record supports Ethicon's argument that this was an abuse of discretion.

After a jury verdict finding that Ellis was illegally terminated, the court found that Ellis was able and willing to work. Since reinstatement is the preferred equitable remedy, that is what the court ordered. Further, the court found that reinstatement was the proper remedy at that time because the relationship between Ellis and Ethicon was not so deteriorated that they

couldn't possibly coexist, and the business had not changed to the point where there are no comparable positions. (JA0106).

V. THIS COURT SHOULD AFFIRM DISTRICT JUDGE WOLFSON'S JUDGMENT THAT ELLIS WAS ENTITLED TO REINSTATEMENT AS OF MARCH 10, 2010 OR IN THE ALTERNATIVE, THIS COURT SHOULD ADOPT THE JURY'S ADVISORY DETERMINATION AND AWARD FRONT PAY

Ellis' appeal raises significant issues of how to effectuate the goal of making a plaintiff whole under the ADA when a trial court orders reinstatement pending appeal, but reinstatement has not occurred. These issues become increasingly difficult when the employer's business changes during the course of the litigation and the employee's old position no longer exists. Further complicating the issue is the possibility of an employee's disability changing in its severity and prognosis over time. In this case, Ellis was terminated from her job 11 years ago and was awarded reinstatement in 2009, but still has not returned work at Ethicon.

The essence of Ellis' appeal is that the District Court ordered her "reinstate[d] . . . at Ethicon as a quality engineer, or a comparable position" (JA0112) but she is still not employed. When Ethicon moved to stay the judgment, including reinstatement, the District Court reaffirmed that immediate reinstatement was the proper remedy. (JA0111-12). When reinstatement did not occur, Ellis asked the District Court to grant her

monetary relief to cover the period of time in which she remained unemployed at Ethicon. Ethicon argued that it offered her another position on the condition that she provide adequate medical records to determine a proper placement, as her previous position had been eliminated.

After Ellis was illegally terminated she started to receive Social Security Disability payments. After the District Court ordered immediate reinstatement, Ellis had a real concern about how the reinstatement would impact her Social Security Disability benefits. She wanted to very clear as to what her new job duties would be and what accommodations were required. Ellis was validly concerned that any acceptance of employment with Ethicon will immediately terminate her eligibility to receive Social Security Disability, even if she is removed, fired, or resigned, regardless of the reasons for the separation from her employment. Because of these concerns, she wanted representatives from Social Security Disability "Ticket to Work" to be part of the reinstatement discussions which did not occur.[18] Ultimately, Ellis' *pro se* efforts to obtain emergency relief were denied. Order on Application

[18] "Ticket to Work" is a Social Security Administration program designed to assist people with disabilities in reentering the workforce without putting them in a position of possibly losing their Social Security Disability Income if the employment opportunity, for whatever reason, is unsuccessful. *See* www.ssa.gov/work/overview.html (accessed on 12/7/2012).

for Emergency Relief, Filed January 9, 2012, District Court Docket No. 167 (SA0016).

The real issue presented in this case is the one presented by Ellis' appeal. Ellis is entitled to be made whole, but the question remains: how is that accomplished? One solution is that this court could affirm the entire judgment of the lower court, including immediate reinstatement, and remand with instructions for the trial court to calculate lost wages Ellis is entitled to from the date of the order of reinstatement until when she is actually reinstated. The *Amicus* believes that if this is the route taken, the remand order should make it clear that all parties affected by Ellis' reinstatement be part of the reinstatement discussion, including any appropriate representatives from social security disability to ensure that Ellis is not waiving or surrendering future contingent benefits.

Alternatively, this Court could determine that reinstatement is no longer the preferred remedy because of the passage of time and the changes in Ethicon's business. While reinstatement is generally the preferred remedy, this Court could find that the relationship between the parties has been poisoned, and that the changes in Ethicon's business make reinstatement no

longer preferred.[19] In such a scenario, this Court could then follow the jury's advisory opinion and order front pay as an alternative to reinstatement. The jury has already determined an amount for front pay and this Court can remand with instructions to adopt the jury's advisory determination on damages. While this Court could remand for the District Court to make a new finding on damages, *Amicus* believes that the best option would be to adopt the jury verdict as to avoid years, if not decades, of litigation. Ellis was ordered to be reinstated in 2009. The purpose and intent of the ADA remain unfulfilled so long as she remains in the courtroom.

Amicus believes that the proper rule of law lies closer to Ellis' position than Ethicon's. Ethicon was ordered by the District Court to reinstate Ellis at the conclusion of the trial notwithstanding this appeal. Despite that fact, a protracted debate arose as to how the interactive process should take place in order to ensure Ellis is properly reinstated. However, a truly bizarre conflict presents itself: Ethicon is legally bound to employ Ellis and, as a matter of law, Ellis is to be reinstated by Ethicon; yet, Ethicon does not have to pay Ellis' salary or accommodate her disability until it is satisfied with the amount

[19] *See Feldman*, 43 F.3d at 831 (stating that reinstatement may not be appropriate where there is animosity between the parties); *see also Blum*, 829 F.2d at 373-74 (stating that reinstatement would "be inappropriate where [it] is . . . unavailable because no comparable position exists")

of information provided. Here, Ethicon attempts to use the interactive process to shield itself from the very judgment ordering it to reinstate Ellis, and simultaneously seeks to use the process to find a way to ensure Ellis is not ultimately reinstated, due to medical concerns.

In sum, *Amicus* believes that this Court has two distinct options to properly make Ellis whole, either (1) affirming reinstatement and awarding damages for the period of time Ellis was not returned to work along with an order that Ethicon involve all affected by the reinstatement discussions; or (2) reinstating the jury's advisory verdict and awarding Ellis front pay. While *Amicus* believes the first option is preferable, in both instances, Ellis would be returned to the state she was in prior to this litigation and the intent and purpose of the ADA would be successfully fulfilled.

CONCLUSION

For all the foregoing reasons, the Court should affirm the judgment below, but remand with an order requiring Ellis' immediate reinstatement.

Respectfully submitted,

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Michael L. Foreman
Dated: December 14, 2012

Counsel of Record for Court Appointed Amicus Curiae

CERTIFICATION OF BAR ADMISSION

I certify that I am admitted to practice before the United States Court of Appeals for the Third Circuit.

_____
/s/ Michael L. Foreman
Michael L. Foreman
Dated: December 14, 2012

CERTIFICATION OF COMPLIANCE WITH RULE 32(a)

I certify that this brief complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains less than 16,500 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface and type style requirements of Rules 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2011 in 14 point Times New Roman font.

_____
/s/ Michael L. Foreman
Michael L. Foreman
Dated: December 14, 2012

CERTIFICATION OF COMPLIANCE WITH 3d CIR. L.A.R. 31.1(c)

In accordance with the Third Circuit Rule 31.1(c), I certify that (1) the electronic brief being filed is identical to the paper copies being submitted, and (2) that a virus protection program, Symantec EndPoint Protection, Version 12.1, has been run on the file and no virus was detected.

_____
/s/ Michael L. Foreman
Michael L. Foreman
Dated: December 14, 2012

CERTIFICATION OF SERVICE

I certify that ten copies of this Brief are being sent to the Clerk of the Court today, by Federal Express next day delivery. I further certify that two copies of this Brief are being served today on defendant, Ethicon Inc., and one copy on Plaintiff Theresa Ellis by Federal Express next day delivery and via the cm/ecf electronic filing system. I certify under penalty of perjury that the foregoing statements by me are true.

_____

/s/ Michael L. Foreman
Michael L. Foreman
Dated: December 14, 2012