10-1919 *and* **12-1361**

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

THERESA M. ELLIS, ET AL.,

Plaintiff-Appellee-Appellant,

v.

ETHICON INC., ET AL.,

Defendant-Appellant-Appellee.

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

REPLY BRIEF IN 10-1919 AND OPPOSITION BRIEF IN 12-1361 ON BEHALF OF APPELLANT-APPELLEE, ETHICON INC.

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PRELIMINARY STATEMENT

Defendant-Appellant-Appellee, Ethicon, Inc., submits this third step brief as its reply brief in support of its appeal, No. 10-1919, and its opposition to the separate appeal of Plaintiff-Appellee-Appellant, No. 12-1361. Ethicon responds to three briefs: (1) the Brief filed on December 14, 2012 by counsel appointed by the Court as *amicus* counsel on behalf of Plaintiff ("Appointed Counsel" and "Appointed Counsel Brief"), (2) the brief filed by Plaintiff *pro se* on December 17, 2012 ("Plaintiff *Pro Se* Brief"), and (3) the brief filed by the Equal Employment Opportunity Commission as *amicus curiae* on December 21, 2012 ("EEOC Brief").

The EEOC Brief addresses only the reinstatement issue set forth in Point IV of Ethicon's First Step Brief and addressed further in Point IV of this Brief. The EEOC explicitly states that it "take[s] no position with respect to any other issue presented in this appeal." (EEOC Brief at 2, n.1).

STATEMENTS RELATING TO APPEAL NO. 12-1361

A. COUNTER-STATEMENT OF APPELLATE JURISDICTION ON APPEAL NO. 12-1361

Plaintiff's appeal, No. 12-1361, is from the District Court's January 9, 2012 Order denying her September 30, 2011 "Application for Emergency Relief," which related to the enforcement of the March 1, 2010 Final Judgment and was filed

while Ethicon's appeal from the Final Judgment was pending. (DSA001-DSA004).[1] Plaintiff never appealed or cross-appealed from the March 1, 2010 Final Judgment.

On February 7, 2012, Plaintiff filed a Notice of Appeal from the January 9, 2012 Order. (DSA001-DSA004). Simultaneously, Plaintiff filed a motion for reconsideration of that Order by the District Court. (DSA035). On April 24, 2012, the District Court denied the motion for reconsideration (DSA010, DSA036), at which time the Notice of Appeal became effective. *See* Fed.R.App.P. 4(a)(4)(B)(i).

This Court has jurisdiction over Plaintiff's appeal as an appeal from the denial of a motion to enforce the Final Judgment or for contempt. *Harley-Davidson, Inc. v. Morris,* 19 F.3d 142, 145 (3rd Cir. 1994); *Union Switch & Signal v. Local 610*, 900 F.2d 608, 615 (3rd Cir. 1990); *Pittsburgh Terminal Corp. v. Baltimore & Ohio R.R.*, 824 F.2d 249, 252-53 (3d Cir.1987).

[1] "DSA" refers to Defendant's Supplemental Appendix filed with this Brief. "SA" refers to the Supplemental Appendix filed by Appointed Counsel with the Appointed Counsel Brief. "JA" refers to the Joint Appendix filed with Ethicon's First Step Brief.

B. COUNTER-STATEMENT OF THE ISSUE PRESENTED FOR REVIEW ON APPEAL NO. 12-1361

Plaintiff's application for emergent relief was based on an alleged failure to comply with the District Court's Reinstatement Order under the Final Judgment. Plaintiff's application, however, was filed after Ethicon had twice offered reinstatement to her – first on October 4, 2010, within two weeks after the District Court denied a stay of the Reinstatement Order, and next on May 23, 2011. (DSA103-107, DSA200-204). Plaintiff failed to accept either offer of reinstatement. (DSA137-139, DSA205-209). On January 9, 2012, the District Court found that Plaintiff's failure to accept reinstatement was not justified and, therefore, denied her motion. (DSA3, DSA5-9, SA0016). Plaintiff's appeal is only from the January 9, 2012 Order denying her motion for emergent relief; she did not appeal or cross appeal from the March 1, 2010 Final Judgment.

Therefore, the only question presented on Plaintiff's appeal is whether, given the District Court's unchallenged finding that Plaintiff had unjustifiably failed to accept two offers of reinstatement, the District Court abused its discretion by denying Plaintiff's application for emergency relief.

C. COUNTER-STATEMENT OF THE CASE AND FACTS ON APPEAL NO. 12-1361

Because Plaintiff's appeal, No. 12-1361, addresses the District Court's denial of her application for emergent relief based on post-judgment proceedings,

the procedural history and facts relevant to her appeal are intertwined. Ethicon, therefore, addresses the post-judgment procedural history and facts together in this section.

1. Final Judgment and the Denial of Ethicon's Motion to Stay the Reinstatement Order Pending Appeal

Final Judgment was entered on March 1, 2010. (JA0129-130). The Final Judgment included the order that Plaintiff "be reinstated to Ethicon as a quality engineer, or a comparable position" (the "Reinstatement Order"), and awarded $53,731.31 in back pay and $378,785.35 in attorneys' fees and costs. (JA0129-130). The Final Judgment denied front pay and post-2004 back pay based on the District Court's finding that Plaintiff "withdrew entirely from the employment market" in 2004. (JA0129-130). Ethicon timely filed its Notice of Appeal on March 29, 2010. (JA0092-95). Plaintiff did not file an appeal or cross appeal from the denial of front pay or any other aspect of the Final Judgment.

On September 21, 2010, the District Court denied Ethicon's motion to stay the Reinstatement Order, staying only that part of the judgment providing monetary relief. (SA0001-2).

2. Ethicon's First Offer of Reinstatement

a. Ethicon's Offer of a Comparable Position

On October 4, 2010, two weeks after the District Court denied the stay of reinstatement, Ethicon, through its Vice President of Human Resources, Luani

Alvarado, made a written offer of reinstatement to Plaintiff. (DSA103-107). The offer was for the position of Senior Quality Engineer in Ethicon's Somerville, New Jersey manufacturing facility, the same location at which Plaintiff previously had worked. (*Id.*) Plaintiff was offered an annual salary of $100,000, plus bonus. (*Id.*) The October 4, 2010 offer requested that Plaintiff respond by October 25, 2010 – a timetable that Ethicon later extended at Plaintiff's request multiple times through December 2010. (*Id*. and DSA113, DSA129). Plaintiff never accepted the offered position. (DSA137-139).

The offered position was comparable to the positions Plaintiff previously had held at Ethicon, at a salary consistent with her experience and the last position she held. (DSA094-95). Like Plaintiff's prior positions, the offered position was in the department responsible for new product development quality engineering. (DSA095). While Plaintiff's last position was Staff Quality Engineer, which is one level above Senior Quality Engineer, there was at that time no open Staff Quality Engineer position for new product development quality engineering. (*Id*.) Nonetheless, the $100,000 salary offered to Plaintiff was based on the salary for a Staff Quality Engineer (and was significantly higher than her last salary at Ethicon, $86,900). (DSA094-95, JA103-106). Specifically, it was at the mid-point of the salary range for a Staff Quality Engineer position. (DSA094-95). This salary range was the basis for setting Staff Quality Engineer salaries. (*Id*.)

The offered Senior Quality Engineer position also had a more focused scope of responsibilities, which would have helped Plaintiff to re-enter the workforce in the complex, technical, and highly regulated field from which she had been absent for many years. (DSA096). The new product development quality engineering function at Ethicon involves sophisticated medical device products. (*Id*.) In the nine years since Plaintiff had last performed the function in 2001, there had been many substantive and organizational changes affecting the function: there were, for example, different products and significant changes in FDA requirements, testing processes, and Ethicon's quality engineering organization itself. (*Id*.) The offered position was one in which Plaintiff could have been trained and assisted to get up to speed on those matters for a successful reentry into the workforce. (*Id*.)

Ms. Alvarado's October 4, 2010 letter also confirmed Ethicon's commitment to addressing any need by Plaintiff for reasonable accommodations:

> [Y]ou previously have indicated that you may need an accommodation for medical restrictions. We will address this through an appropriate interactive process consistent with the Americans with Disabilities Act. As part of this post-offer, pre-placement process, if you believe that you may need a reasonable accommodation, we request that you provide Ethicon's Medical Department with a current report from your physician setting forth your medical restrictions. We will then schedule a meeting with the appropriate persons to discuss the question of reasonable accommodation.

(DSA103). The parties later agreed – and repeatedly confirmed – that Plaintiff's request for accommodations would be discussed after Plaintiff had accepted an offer of reinstatement and provided medical information (which Plaintiff had stated she would not provide until after she was reinstated). (DSA049, DSA098-99, DSA127, DSA135).

b. Plaintiff's Demands and the Parties' Meeting to Discuss the Offer

On October 22, 2010, at Plaintiff's request, the parties scheduled a meeting to discuss the reinstatement offer. (DSA097). The purpose of this meeting was "to discuss the position that was offered to you and any request for reasonable accommodation under the ADA" to enable Plaintiff to perform the offered position. (DSA098, DSA112).

However, on October 25, 2010, before the parties were to meet, Plaintiff sent an email unilaterally demanding terms for reinstatement, including that Ethicon withdraw its pending appeal from the Final Judgment; pay $300,000 in punitive damages; pay unspecified back pay, legal fees, and interest; and coordinate reinstatement with the Social Security Administration's Ticket To Work program. (DSA097-98, DSA109-114). In later correspondence, Plaintiff stated a salary demand of $125,000, and defined her back pay demand to be $197,900, for compensation from May 2009 to January 2011. (*Id.*) These demands were imposed solely by Plaintiff and not part of the Final Judgment; in

fact, the back pay and punitive damages demands were contrary to the District Court's rulings. (*Compare* DSA097, DSA109-110 *with* JA 95-100, JA111-112, JA123-127, JA129-130).

On November 2, 2010, Plaintiff and her husband met with the manager to whom the offered position reported (Manager of Quality Engineering) and Ms. Alvarado, the Vice President of Human Resources. (DSA103-104). During the meeting, Ethicon's representatives explained the responsibilities of the offered position and structure of the quality engineering organization. (*Id.*) As part of that discussion, they explained how the offered position was comparable to the one Plaintiff held in 2001. (*Id.*) They also explained how the position would enable Plaintiff to get back up to speed on the significant technical requirements for new product quality engineering and to become familiar with changes in the products, test processes, organization, and FDA requirements that had occurred since 2001. (*Id.*) They explained that the position would provide her opportunity for growth. (*Id.*) Because Plaintiff previously had stated that she would need an accommodation for a disability, *they agreed that Plaintiff would provide medical information on her disability and the parties would discuss potential reasonable accommodations after she had accepted the position*. (*Id.*) Plaintiff requested additional information about the position, including organizational charts and a

more detailed job description. (*Id.*) That information was sent to Plaintiff on November 5, 2010. (DSA099, DSA1113-119).

c. Plaintiff's Continued Failure to Accept the Offer, and Repeated Demands for a Higher Salary and Position, Back Pay, and Other Matters Beyond the Reinstatement Order

Plaintiff had agreed at the November 2, 2010 meeting to accept or reject the offer by November 16, 2010, but she failed to do so. (DSA099). Instead, on November 18, 2010, she responded by demanding that the job title of the offered position be changed to Staff Quality Engineer and asking for information that already had been provided to her on November 5, 2010. (DSA099, DSA119-123). Ms. Alvarado responded that there was no Staff Quality Engineer position available in the department and that the offered position could not be converted to a Staff position because of its scope of responsibilities. (DSA099-100, DSA127-129). Ms. Alvarado also confirmed again Ethicon's commitment to addressing any need for reasonable accommodations, as well as "a re-entry and on-boarding plan" to help Plaintiff transition into the position:

> [I]f you accept the position, we will work with you, your physician, and the Company's Occupational Health department, to address what medical restrictions exist, what accommodations might be required, and how we might be able to meet them. We agreed that this discussion takes place after you have accepted the position and your physician has provided information about your medical restrictions to Occupational Health. Once we have that information, we can better address the specifics of a re-entry and on-boarding plan.

(DSA127-129). Lastly, Ms. Alvarado again extended the time for Plaintiff to accept the position, this time to December 13, 2010, noting that the position would be opened to other candidates if she did not accept the position by then. (*Id.*)

On December 14, 2010, Plaintiff requested another meeting with Ms. Alvarado, referred to unspecified coordination with an Employer Network in the SSA's Ticket to Work program, and stated that she was seeking a "Staff Engineer" title, a higher salary than what was offered, and "retroactive" pay to November 16, 2009. (DSA100, DSA131-133).

On December20, 2010, Ms. Alvarado stated her willingness to meet with Plaintiff about the position again, and promised to contact Plaintiff after the holiday to set up a meeting. (DSA100-101, DSA134-136). In addition, Ms. Alvarado explained to Plaintiff that, based on information from the Social Security Administration, the Ticket to Work program did not appear to work the way Plaintiff claimed or to apply to her reinstatement. (*Id.*) She also explained that, if the program were applicable, only Plaintiff could implement the program, by obtaining a "Ticket" from the Social Security Administration and engaging an "Employer Network" under the program. (*Id.*)

Ms. Alvarado also again confirmed Ethicon's commitment to addressing a "re-entry plan" and any need for accommodations:

> [W]e previously agreed that discussion of what medical restrictions you might have, what accommodations might

> be required, and how we might be able to meet them takes place after you have accepted a position and you (through your physician) have provided information about your medical restrictions. Your December 14 letter does not disagree with when that discussion should take place. And, of course, it is impossible as a practical matter to have that discussion earlier, particularly since you have advised that you will not provide your medical restrictions until after you have been reinstated. Once you accept a position and provide your medical restrictions, we can work together and develop a re-entry plan that addresses training and any reasonable accommodations you may need.

(DSA135).

d. Plaintiff's Termination of Discussions on the First Offer of Reinstatement

On January 10, 2011, Ms. Alvarado's assistant emailed Plaintiff asking for her availability for a meeting. (DSA101).

Plaintiff responded on January 14, 2011 that she would not meet with Ms. Alvarado and that "[her] next discussions with Ethicon on reinstatement will be in the presence of Federal Judge Wolfson." (DSA137). Plaintiff repeated her demands for a Staff Quality Engineer title, a $125,000 salary, and back pay of $197,500. (*Id*.)

Ms. Alvarado responded on January 19, 2011. (DSA139-140). She addressed the comparability of the position offered to Plaintiff. (*Id*.) She also reiterated her willingness to meet with Plaintiff:

> I remain willing to meet with you again to discuss this position and, if you choose to accept it, how we can work together for a successful return to employment for you.

(*Id*.) Plaintiff never accepted the position.

3. Plaintiff's Motion for Contempt

On January 28, 2011, after Plaintiff had effectively rejected the October 2010 offer of reinstatement and ended any continued discussion with Ms. Alvarado, Plaintiff *pro se*[2] filed a motion to hold Ethicon in contempt. (DSA032, DSA082-97). Plaintiff's motion claimed that Ethicon had disobeyed the Court's Order by failing to reinstate her. (*Id*.) That claim, in turn, was based primarily on the failure to meet Plaintiff's demands for a $125,000 salary and a Staff Quality Engineer title. (*Id*.; *see also* DSA160-171).

In opposition to Plaintiff's motion, Ethicon submitted uncontradicted evidence that the reinstatement offer was to a comparable position at a comparable salary to

[2] Plaintiff became *pro se* after the December 2010 withdrawal of the attorney who had been representing her on post-judgment proceedings and before this Court. Her attorney withdrew because of "conflicting positions communicated by [Plaintiff] regarding [Plaintiff's] position on the issues of reinstatement, continued mediation and potential monetary settlement… [which] led to a breakdown in communications." (DSA211, DSA213-14).

While her motion for contempt was pending, Plaintiff retained new counsel. Her new attorney represented her at the March 9, 2011 District Court hearing and settlement conference. (DSA198). Subsequently, in June 2011, this new attorney withdrew, citing "repugnant" conduct by Plaintiff as well as her failure to communicate, "refus[al] to honor promises," and "conflicting positions." (DSA217, DSA219).

Plaintiff's position in 2001, and that there had been no available Staff Quality Engineer position in the new product development function that could have been offered to her. (DSA094-95).

Plaintiff's motion was returnable on March 9, 2011 before the Honorable Freda L. Wolfson, U.S.D.J., who had presided over the trial and entered the Final Judgment. (DSA033, DSA198). After Judge Wolfson converted the hearing into a settlement conference and the parties reached a tentative settlement, the Court administratively terminated Plaintiff's contempt motion "in light of settlement negotiations." (DSA033). Plaintiff was represented by counsel at this hearing and settlement conference. (*See* p. 12, n. 2, *supra*). However, Plaintiff later declined to complete the settlement and, in April 2011, her attorney informed Ethicon that he was no longer authorized to discuss settlement. (DSA192).

4. Ethicon's Second Offer of Reinstatement

On May 23, 2011, Ethicon made a second offer of reinstatement to Plaintiff. (DSA200-204). At that time, a Staff Quality Engineer position had become available, and it was offered to Plaintiff. (*Id*.) Like the first offer of reinstatement and like the positions Plaintiff previously held, the offered position was in the new product development quality engineering department. (*Id*.) Plaintiff was offered an annual salary of $102,000 plus bonus, again, at the midpoint of the salary range

for Staff Quality Engineers. (*Id*.) The deadline for acceptance was June 1, 2011. (*Id*.)

In her letter setting forth the reinstatement offer, Ms. Alvarado again confirmed Ethicon's commitment to addressing any need for a reasonable accommodation:

> If you accept the current offer, we will address any need for accommodation through an appropriate interactive process consistent with the Americans with Disabilities Act. As part of this post-acceptance, pre-placement process, if you believe that you may need a reasonable accommodation, we request that you provide Ethicon's Medical Department with a current report from your physician setting forth your medical restrictions. We will then schedule a meeting with the appropriate persons to discuss the question of reasonable accommodation.

(DSA201).

Plaintiff emailed Ethicon on May 26, 2011, unilaterally setting conditions for discussing her return to the workforce but neither accepting nor rejecting the offer. (DSA205-209). Ethicon responded the next day, reminding Plaintiff of the June 1, 2011 acceptance date and repeating its commitment to address any need for accommodations under the ADA's requirements once Plaintiff accepted the offer:

> … you have advised that you will not provide your medical restrictions until after you have been reinstated. If you accept a position and provide your medical restrictions, we can work together and develop a re-entry plan that addresses training and any reasonable accommodations you may need.

> … If you decide to accept [the offer], we will then begin the interactive process to ascertain whether and to what extent the company can reasonably accommodate any medical restrictions you might have.

(DSA207-208). Plaintiff responded on May 31, 2011, stating that she was again engaging new counsel who would contact Ethicon before June 9, 2011. (DSA209). No new counsel appeared on her behalf. Plaintiff never accepted the May 23, 2011 reinstatement and provided no reason for not accepting the offer.

5. Plaintiff's "Application for Emergency Relief"

On September 30, 2011, without having provided any further response to the second reinstatement offer, Plaintiff again filed a motion with the District Court, entitled "Application for Emergency Relief." (DSA033). Plaintiff's application, like her previous Motion for Contempt, was based on a claimed failure by Ethicon to comply with the Reinstatement Order and sought the same relief that she had sought in the Motion for Contempt. (*Compare* DSA082-92 and DSA160-172 *with* DSA192-196 and 212).

In support of her application, Plaintiff based her failure to accept either of the two reinstatement offers on her unsupported position that she was entitled to a $125,000 salary and that she needed an interactive process to address accommodations. (DSA193-194, DSA212). Ethicon's opposition to the motion included the uncontradicted evidence that Ethicon had met with Plaintiff to address reasonable accommodations, the parties then had agreed that any further discussion

would occur after Plaintiff had accepted an offered position, and Ethicon repeatedly had reconfirmed its commitment to an interactive process to address any required reasonable accommodation. (DSA098-99, 127-29, 135, 201, 207-208; *see* pp. 4-15, *supra*). In addition, Ethicon noted that Plaintiff's application did not set forth any reason why she could not have accepted one of the reinstatement offers and, then, as the ADA contemplates, 29 C.F.R. §1630.2(o)(3), engaged in an interactive process to address any need for accommodations.

By Order entered January 9, 2012,[3] Plaintiff's application was heard by the Honorable Peter G. Sheridan, U.S.D.J., to whom the case had been reassigned from Judge Wolfson. (DSA005-009). Judge Sheridan found that Ethicon had not acted unreasonably and that Plaintiff's failures to accept the reinstatement offers were not justified. (DSA009). Specifically, the Court rejected Plaintiff's argument that her failure to accept reinstatement was justified because an interactive process would not occur until after she accepted an offered position (referred to as a "delay" despite the uncontradicted evidence that the parties had *agreed* to this timing of further interactive process discussions):

> In conclusion, it appears to me that Ethicon's analysis is not unreasonable; that is, the employer must know the job and the physical and mental condition of the

[3]Despite styling her application as seeking "emergency" relief, Plaintiff adjourned its return several times before it was heard on January 9, 2011. (DSA033, DSA007).

> proposed employee in order to evaluate accommodations that may be necessary. Moreover, Ms. Ellis' failure to accept the job based on a delay in the interactive process, seems insufficient in light of the significant job opportunity presented to her.

(*Id*.)[4]

On February 7, 2012, Plaintiff simultaneously filed a Notice of Appeal from the January 9, 2012 Order and a motion for reconsideration of that Order by the District Court. (DSA035). By Order entered April 24, 2012, the District Court denied the motion for reconsideration. (DSA010, DSA036).

REPLY ARGUMENT IN 10-1919

POINT I

APPOINTED COUNSEL'S ARGUMENT CONFIRMS THAT A NEW TRIAL IS REQUIRED BECAUSE THE MISAPPLICATION AT TRIAL OF THE ATTORNEY-CLIENT PRIVILEGE ENABLED PLAINTIFF TO MANIPULATE EVIDENCE REGARDING THE CONTINUING INTERACTIVE PROCESS DISCUSSIONS

Nothing in the opposing briefs refutes the central premise of Ethicon's argument regarding the misapplication of the attorney-client privilege: Plaintiff should not have been permitted to claim that she was unaware of her attorney representatives' interactive process discussions with Ethicon and, at the same time,

[4] On Plaintiff's appeal, Appointed Counsel now contradicts the position Plaintiff took on her Application for Emergency Relief regarding the timing of the interactive process. (*See* p. 56, n. 10, *infra*).

prevent inquiry into what her representatives did or did not tell her about those discussions. Both Plaintiff and her husband testified extensively at trial that they were not aware of a proposed accommodation by Ethicon, expressed willingness by Ethicon to discuss alternative accommodations, or request by Ethicon for clarified medical restrictions to enable continued discussions.[5] These were all matters communicated in the discussions by Ms. Warren with Plaintiff's attorney representative, Ms. Hadziosmanovic. (*See* Ethicon First Step Brief at 33-34 [summarizing discussions], 11-13, and 15-20).

Despite the extensive testimony by Plaintiff and her husband on the subject, Appointed Counsel argues that any inquiry into Plaintiff's knowledge was immaterial because her representatives' knowledge was imputed to her. (Appointed Counsel Brief at 35-36). Even if immaterial, however, the extensive testimony by Plaintiff and her husband on this matter likely confused and misled the jury – just as it was relied upon by the District Court itself. (JA0075; *see*

[5]*See*, *e.g.*, JA0780 (Plaintiff denying knowledge of any request by Ethicon for information regarding the potential for an alternative accommodation and denying that an offer of part-time employment was communicated to her by Ms. Hadziosmanovic); JA793 ("I [Plaintiff] did not think I was in dialogue with the company"); JA1040-41 (Plaintiff's husband denying knowledge that Ethicon had requested information regarding potential alternative accommodation); JA1002 (Plaintiff's husband testifying that he first heard about part time offer in April 2002); JA1051 ("We [Plaintiff and her husband] didn't have any discussions about alternative accommodations" with any lawyers at Carella Byrne about the feasibility of Ethicon's proposed alternative accommodations).

Ethicon First Step Brief at 42-44). Nonetheless, Appointed Counsel relies heavily on the jury instruction on imputed knowledge and the presumption that juries follow instructions. (Appointed Counsel Brief at 35-36). Appointed Counsel's argument fails for four reasons.

1. Like the District Court, Appointed Counsel Reasons that *the Jury Could Have Relied on Plaintiff's Testimony* that She Was Not Aware of Accommodation Efforts by Ethicon Despite any Instruction to Impute Knowledge

Appointed Counsel's argument is contradicted by both the District Court's rationalization of the jury's verdict and, ultimately, Appointed Counsel's own analysis. Both demonstrate the substantial likelihood that, despite the instruction on imputed knowledge, the jury was confused by and relied on Plaintiff's and her husband's testimony that they were not aware of accommodation efforts by Ethicon. As addressed in Ethicon's opening brief, the District Court itself upheld the verdict by reasoning that the jury relied on Plaintiff's testimony that "she was under the impression that Ethicon was unwilling to accommodate her disability." (JA0075; *see* Ethicon First Step Brief at 27-28).

Appointed Counsel admits that the "jury could have accepted this version of the facts" – that is, Plaintiff's testimony. (Appointed Counsel Brief at 39). Nonetheless, Appointed Counsel argues that the District Court's reasoning that the jury relied on Plaintiff's testimony is not "proof" that it did so and that the jury could have relied instead on other evidence. (Appointed Counsel Brief at 39).

Even if correct, these arguments apply the wrong standard. An error is not harmless unless it could not have swayed the verdict, regardless of the sufficiency of other evidence to support the verdict. *See*, *e.g.*, *O'Neal v. McAninch*, 513 U.S. 42, 437-38 (1995). Further, while Appointed Counsel refers to a "wealth" of evidence supporting the verdict (Appointed Counsel Brief at 39), there is no such evidence. The uncontradicted evidence established Ethicon's engagement in an on-going process that Plaintiff terminated. (Ethicon First Step Brief at 33-34 [summarizing discussions], 8-9, 11-13, and 15-20).

Because, the jury *could have* relied on Plaintiff's testimony about her understanding of Ethicon's position, Ethicon's attempted inquiry into what she was told about the ongoing interactive process discussions was material. The misapplication of the attorney-client privilege to foreclose that inquiry, therefore, was prejudicial and requires a new trial. *See*, *e.g.*, *U.S. v Workman*, 138 F.3d 1261, 1263-64 (8th Cir. 1998) (party cannot claim that he acted unintentionally because he relied on attorney advice without permitting adversary to explore the substance of that advice).

2. Appointed Counsel's Attempt to Distinguish Plaintiff's "Belief" from the Knowledge of Her Attorney Representatives Further Demonstrates the Likelihood that the Jury Was Misled Despite any Instruction to Impute Knowledge

Appointed Counsel's analysis also demonstrates that imputing knowledge to Plaintiff did not adequately answer the question of what Plaintiff was told about

the ongoing discussions with Ethicon. Appointed Counsel argues that Plaintiff's asserted "belief that 'Ethicon was unwilling to accommodate her disability'" did not implicate the communications between her and her attorney representatives. (Appointed Counsel Brief at 38).

Appointed Counsel draws a false and misleading distinction. Plaintiff chose to have her attorney representatives engage in discussions with Ethicon on her behalf. (JA660-61; JA756, JA761-62). Her "belief" could only have been based on what her attorney representatives did or did not tell her and her husband about those discussions. By testifying to and relying on her asserted belief, therefore, Plaintiff directly placed those communications in issue.

Further, by seeking to distinguish Plaintiff's asserted belief from her representatives' knowledge of the interactive process discussions, Appointed Counsel's own argument undercuts the effect of imputing her representative's knowledge to Plaintiff. Counsel's argument also demonstrates the likelihood of jury confusion and resulting prejudice. Just as did the District Court and now Appointed Counsel, the jury likely relied on Plaintiff's asserted belief without regard to any imputed knowledge. Once Plaintiff asserted that belief, therefore, fairness required that Ethicon's counsel be able to cross examine Plaintiff and her husband regarding the only source on which they could have relied to form that

belief – what their attorney representatives did or did not tell them about the interactive process discussions with Ethicon.

3. Appointed Counsel's Argument Demonstrates the Likelihood that the Jury Relied on Plaintiff's Testimony to Conclude Incorrectly that Ethicon Was Not Engaged in Interactive Process Discussions with Her Attorney

Even if it were presumed that the jury followed the instruction on imputed knowledge, that does not remove the impact of Plaintiff's and her husband's extensive testimony about their understanding of Ethicon's position. Under Appointed Counsel's own analysis, any imputation of the representatives' knowledge to Plaintiff likely was circular: Plaintiff's claimed understanding became evidence of what her representatives knew.

Referring to Ms. Warren's testimony about her discussions with Ms. Hadziosmanovic, Appointed Counsel argues that "Hearing this evidence, the jury did not accept Ethicon's version of the facts" – that is, Ms. Warren's testimony. (Appointed Counsel Brief at 37). Ms. Warren's testimony, however, was uncontradicted.[6] To find for Plaintiff, the jury could not simply disbelieve Ms. Warren without some evidence contradicting her testimony. (*See* Ethicon's First

[6]Ms. Warren's testimony also was corroborated by her contemporaneous notes of her discussions with Ms. Hadziosmanovic, (JA497), and by the later correspondence and trial testimony of Ms. Hadziosmanovic's colleague, Ms. Flax, that Plaintiff was asked to clarify her restrictions with her doctor. (*See*, *e.g.*, JA1277, JA499, JA1268-69).

Step Brief at 34, n. 4, citing case law). Under Appointed Counsel's analysis, therefore, the only way the jury could have rejected Ms. Warren's testimony about her discussions with Ms. Hadziosmanovic was to rely on Plaintiff's testimony to her understanding of Ethicon's position – *e.g.*, treating Plaintiff's evidence of what she was or was not told as evidence of what was or was not discussed between Ms. Hadziosmanovic and Ms. Warren.

Appointed Counsel's argument that the jury rejected Ms. Warren's testimony, therefore, places directly at issue what Ms. Hadziosmanovic and Plaintiff's other representatives told her about their ongoing discussions with Ms. Warren. Yet, while plaintiff was allowed to deny knowledge of specific and important aspects of those discussions, defense counsel was precluded from inquiring into what Plaintiff and her husband were told about those discussions.

4. Appointed Counsel's Unsupported "Settlement Discussions" Argument Underscores the Prejudice from the Misapplication of the Attorney-Client Privilege to Permit Plaintiff to Shield Communications Relating to the Interactive Process

Lastly, imputing knowledge to Plaintiff does not resolve the prejudice arising from Plaintiff's misuse of the attorney-client privilege in light of the argument that Appointed Counsel identifies as key to upholding the jury's verdict: Plaintiff's argument that her attorney representatives' discussions were "settlement" discussions rather than interactive process discussions. (*See* Point II, *infra*; Appointed Counsel Brief at 31-32; and Plaintiff's *Pro Se* Brief at 3-5,

adopting Appointed Counsel's arguments). The complete lack of support for this argument is addressed in Point II.1 and 2, *infra*. However, the argument also implicates the misapplication of the attorney-client privilege.

Plaintiff's "settlement discussions" argument places directly at issue the scope of what Plaintiff engaged Ms. Hadziosmanovic, Ms. Flax, and their firm to do and, therefore, the communications between them. Indeed, the District Court excluded from evidence the part of the December 3, 2001 email exchange and December 20, 2001 letter between Ms. Flax and Plaintiff establishing that, *at that time*, Plaintiff *changed* her engagement of Ms. Flax's law firm from the discussion of "possible alternative accommodation" to representation in an "employment matter" and "negotiat[ing] a severance/settlement package." (JA498B.1-JA498B.2 and JA499A). This excluded evidence contradicts Appointed Counsel's argument that the November discussions were about settlement rather than potential accommodations under the ADA. Similarly, the Court barred Ethicon from examining Plaintiff and her husband about the November 9, 2001 meeting addressing the interactive process subjects of Ethicon's offer of a part-time position, expressed willingness to consider other accommodations, and request that Plaintiff review her restrictions with Dr. Mahon to enable further accommodation discussions. (JA0791, JA1066-67). Even if Plaintiff's and Appointed Counsel's

"settlement discussions" argument were tenable, therefore, it establishes that the exclusion of this evidence was error and requires a new trial.

* * * *

In each of these ways, Appointed Counsel's own analysis underscores the point that the District Court misapplied the attorney-client privilege and that the jury likely was misled by the distorted presentation of evidence that resulted. *Plaintiff* chose to engage counsel to address reasonable accommodations with Ethicon rather than pursuing that discussion directly herself. Ethicon, therefore, appropriately had its counsel communicate with her chosen counsel. Plaintiff's using the fact that, by her choice, the discussions were through attorney representatives as a shield against cross examination regarding what was said and offered to her by way of accommodation was wrong. Because this error goes to the heart of the jury's finding, as reasoned by the District Court itself, it requires a new trial.

POINT II

THE OPPOSITION PAPERS DO NOT CONTRADICT THE EVIDENCE COMPELLING JUDGMENT FOR ETHICON: THE PARTIES WERE ENGAGED IN AN AGREED-UPON PROCESS TO ADDRESS POTENTIAL ACCOMMODATIONS THAT PLAINTIFF THEN ABANDONED

The opposition briefs do not – and cannot – refute the evidence that Ms. Warren and Ms. Hadziosmanovic were engaged in an agreed-upon process to

address potential reasonable accommodations for Plaintiff that Plaintiff terminated and abandoned by failing to obtain requested medical information and disclaiming any intent to return to work at Ethicon. (*See* Ethicon First Step Brief at 15-20). Nor can Appointed Counsel or Plaintiff dispute that under the law, including this Court's decisions, if Ms. Warren and Ms. Hadziosmanovic were engaged in interactive process discussions, then Plaintiff's termination of that process requires judgment for Ethicon. (*See* cases and discussion in Ethicon First Step Brief at 35-36).[7]

Faced with this undisputed evidence and law, Appointed Counsel's position depends on the argument that the jury could have disregarded the discussions between Ms. Hadziosmanovic and Ms. Warren because, he asserts, they were

[7] Appointed Counsel argues that the nature of the parties' discussions presented a fact question because (1) the District Court instructed the jury that "It is for you, the jury, to decide whether any accommodations proposed including any after October 22 were part of the interactive process" and (2) Ethicon had argued that there was a fact question in opposition to Plaintiff's *pre-trial* motion for summary judgment.

Both arguments are flawed. The fact that the jury was charged on an issue does not mean that there was conflicting evidence creating an issue of fact. Appointed Counsel identifies no conflicting evidence on the discussions between Ms. Hadziosmanovic and Ms. Warren, and there was no such evidence at trial. Similarly, Appointed Counsel mistakenly relies on the identification of a fact question on the pretrial summary judgment motion. The summary judgment motion was based on a different and more limited record than the trial record that was later developed.

"post-termination settlement discussions" rather than ADA interactive process discussions. (Appointed Counsel Brief at 30-32). Appointed Counsel's argument fails on several levels.

1. Neither the Timing of the Discussions Nor Plaintiff's Use of an Attorney Representative Transformed Them into Settlement Discussions Rather than Interactive Process Discussions

Appointed Counsel's argument that the parties' discussions transformed into settlement discussions once Plaintiff rolled into LTD status is wrong on the law. As did the District Court below (JA067, JA053-54), courts have recognized that an interactive process can continue while an employee is on long-term disability status. *See Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 642-43 (1st Cir. 2000); *Templeton v. Neodata Servs., Inc.*, 162 F.3d 617, 618 (10th Cir. 1998); *Burke v. Iowa Methodist Med. Ctr.*, No. 99-30634, 2001 U.S. Dist. LEXIS 21126, at *17-18 (S.D. Iowa Feb. 22, 2001) (cited by District Court).

Appointed Counsel's proposed contrary rule of law would conflict with the purpose of the ADA. The purpose of the ADA's reasonable accommodation requirement is to enable qualified individuals with a disability to remain at, return to, or obtain work. *See Donahue v. Consolidated Rail Corp.*, 224 F.3d 226, 233 (3rd Cir. 2000); *Conneen v. MBNA America Bank, NA*, 334 F.3d 318, 329-30 (3d Cir. 2003); 29 C.F.R. Appendix to §1630.2(m). An employer's efforts to identify a reasonable accommodation to enable a disabled individual to work address that

purpose even if they occur after the individual's employment end date. That is particularly so where, as was established without contradiction in this case, Plaintiff's LTD status would have been reversed and she would have returned to active employment status without any break in service if an accommodation were reached permitting her to return to work after she had rolled into LTD. (JA1314). Regardless of the timing and characterization of accommodation discussions, a plaintiff should not be permitted to refuse to discuss potential accommodations for a return to work – and, as in this case, even expressly reject any intent to return to work for the employer – and then sue years later to seek reinstatement or any other remedy for an alleged failure to provide accommodations.

Further, Appointed Counsel cites no authority supporting his position. None of the three cases he cites categorically excluded post-termination discussions from an interactive process – much less did they even suggest that allowing an employee to roll into LTD status must automatically and arbitrarily end accommodation discussions or transform them into "settlement" discussions outside of the ADA's interactive process framework.

Two of the three cases cited by Appointed Counsel addressed the situation where the employee did not raise the need for a reasonable accommodation until after his or her employment had been terminated for poor performance. *See Mole v. Buckhorn Rubber Prods., Inc.*, 165 F.3d 1212 (8th Cir. 1999), *cert. denied*, 528

U.S. 821 (1999); *Alexander v. Northland Inn*, 321 F.3d 723 (8th Cir. 2003). In each case, the court held that the plaintiff's claim failed because the employer's termination decision was based on lawful grounds – poor performance in *Mole*, and the failure to perform an essential job function in *Alexander*. *Mole*, 165 F.3d at 1218-19; *Alexander*, 321 F.3d at 727-28. The plaintiff's post-termination accommodation request could not change the lawfulness of a termination decision that was based on valid, nondiscriminatory performance reasons. *Mole*, *supra*; *Alexander*, *supra*. Further, while the employer was not required to *start* an interactive process after its lawful decision to terminate the plaintiff's employment, neither case held that the employer was precluded from doing so. *See Mole*, 165 F.3d at 1217-18 (discussing plaintiff's failure to show that there was a reasonable accommodation that would have enabled her to perform the job).

The third case cited by Appointed Counsel, *O'Bryan v. State of Nevada*, 2006 WL 2711550 (D. Nev. Sept. 21, 2006), also is inapposite. In that case, the defendant terminated the plaintiff's employment and then offered job search assistance. While the Court remarked that there can be no interactive process once an employee has been terminated, *id*. at *7, no other court has followed that statement. Even the *O'Bryan* Court ultimately did not rely on that statement. Instead, the Court held that there was a fact issue on whether the offered job search assistance would have been a reasonable accommodation and, looking at the

process as a whole, concluded that the issue was "whether Defendant genuinely engaged in the interactive process or, as Plaintiff characterizes the facts, 'funneled Plaintiff out the door.'" *Id*.

Similarly, Appointed Counsel's argument that the involvement of counsel somehow demonstrates that the discussions between Ms. Hadziosmanovic and Ms. Warren were settlement discussions rather than interactive process discussions is unsupported by law, and contrary to logic and the record. Appointed Counsel bases his argument on the ethical requirement that prohibited Ms. Warren from communicating directly with plaintiff because she was represented by counsel, Ms. Hadziosmanovic. (Appointed Counsel Brief at 32). But Counsel's argument is a *non sequitur*. The ethical rule simply prevents circumventing attorney representation; it does not change the nature or substance of discussions. Further, Appointed Counsel's argument is contrary to ADA authority recognizing that an interactive process can proceed through the parties' representatives – including attorneys – rather than the parties directly. *See*, *e.g.*, *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 286, 313 (3d Cir. 1999). Thus, for example, the interactive process continues when, after an employee's own attempts to identify a reasonable accommodation with the employer had reached an apparent impasse, the employee continued to seek a reasonable accommodation through an attorney representative.

See Enica v. Principi, 544 F.3d 328, 334-35, 342 (1st Cir. 2008) (the employer "certainly took part in the interactive process").

It is the substance of communications that defines whether they are part of an interactive process, not their timing or whether they are accomplished through attorneys or other representatives. Here, the discussions between Ms. Hadziosmanovic and Ms. Warren addressed Plaintiff's medical restrictions and the potential for a reasonable accommodation under the ADA – the subjects of an interactive process under the ADA. *See* 29 C.F.R. Appendix to §1630.9. There was *no* discussion between Ms. Hadziosmanovic and Ms. Warren of a settlement of claims, and at no time during their discussions or in testimony at trial referring to those discussions were they described in any way as settlement discussions – indeed, the word "settlement" was never used. Based on the established substance of the communications between Ms. Hadziosmanovic and Ms. Warren, those communications plainly constituted interactive process discussions under the ADA.

2. The Uncontradicted Evidence of the Communications Between the Parties' Representatives Established that They Were Interactive Process Discussions under the ADA

Appointed Counsel's argument is contrary to the context and content of the discussions between Plaintiff's representative, Ms. Hadziosmanovic, and Ms. Warren. Their discussions continued the process addressing Plaintiff's potential

return to work and need for accommodations that had involved Plaintiff, her husband, her doctors, Kemper's Ms. Stretch, and Ethicon representatives. (*See* Ethicon's First Step Brief at 17-19). For example, Ms. Hadziosmanovic's October 19, 2001 letter to Ms. Warren renewed Plaintiff's request for a work-at-home accommodation (JA1293-94, JA0488, JA1249-50); Ms. Warren then revisited that request with Ethicon's manager, Ms. Traver (JA1294-96); and Ms. Warren then responded to Ms. Hadziosmanovic with a proposed alternative accommodation, expressed willingness to consider other alternatives, and requested that Plaintiff review her restrictions with Dr. Mahon before a meeting of the parties to address potential accommodations. (JA1191, 1322-33, 1296-97; *see* Ethicon First Step Brief at 17-19).

These were the subjects of an interactive process for accommodation and return to work, not settlement. Indeed, there was no evidence of any discussion between Ms. Hadziosmanovic and Ms. Warren addressing a lawsuit or settlement. Instead, attempting to re-characterize the parties' communications, Appointed Counsel improperly inserts the word "settlement" in his factual assertions without any record support. For example, Appointed Counsel asserts that Ethicon's proposal of a part-time position was made, *in Appointed Counsel's words,* "in an attempt to settle this matter." (Appointed Counsel Brief at 37). However, there is absolutely no evidence of that. There was no evidence that Ms. Warren or anyone

at Ethicon described this proposal as a settlement attempt. To the contrary, Ms. Warren testified without contradiction that the part-time position was offered as a proposed alternative to the requested work-at-home accommodation, together with Ms. Warren's expressed willingness to consider other alternative accommodations and request that Plaintiff review her medical restrictions with her doctor before the parties meet to discuss accommodations. (JA1297-1301, 1303-04).

There is no basis to transform what the parties expressly understood to be interactive process discussions of potential accommodations into settlement discussions.

3. Contrary to Appointed Counsel's Unsupported Argument, There Was No Refusal by Ethicon to Communicate with Plaintiff

Lastly, Appointed Counsel's entire argument is based on a false premise: Appointed Counsel's oft-repeated but unsupported assertion that Ethicon "refused" to communicate with Plaintiff prior to Ms. Hadziosmanovic's involvement. Appointed Counsel argues that this claimed refusal to communicate with Plaintiff until she retained an attorney somehow transforms the discussions between Ms. Warren and Ms. Hadziosmanovic into settlement discussions. This argument is both illogical and contrary to the record.

There was no refusal to communicate with Plaintiff before Ms. Hadziosmanovic's involvement. To the contrary, Ethicon and Kemper repeatedly communicated with Plaintiff by email and telephone over the course of several

weeks in September and October 2011, requesting that Plaintiff provide any medical restrictions on her return to work and, on October 8, 2011, discussing medical restrictions with her treating neurologist, Dr. Watson. (*See* Ethicon's First Step Brief at 17-19; JA0393-404, JA424-26, JA438-446, JA450, JA454, JA455, JA457-65). These initial communications culminated in the October 12, 2001 letter from Plaintiff's treating physician, Dr. Mahon, expressly authorizing Plaintiff to return to work only with "permanent" restrictions that included working from home three days a week. (JA481-82, JA738-39). In addition to responding to Plaintiff by email on October 15, 2001, Ms. Stretch also tried to discuss the matter with Plaintiff and, unable to reach either Plaintiff or her husband by telephone, invited Plaintiff to call her in response to her email. (JA405, JA462, JA467, JA1171-72). Appointed Counsel simply ignores this uncontradicted evidence.

The communications up to and including the October 15, 2001 email and telephone attempts demonstrate that Ethicon was engaged in an interactive process with Plaintiff during that time. Ms. Stretch's *inability* to reach Plaintiff on October 15, 2001 to discuss the matter further cannot be transformed into a refusal to do so. Further, at that point, Ethicon was entitled to rely on the medical restrictions as clearly and explicitly stated in writing by Plaintiff's doctor, and it was up to Plaintiff to provide any additional information based on her now asserted claim that those restrictions were not permanent. *See*, *e.g.*, *Freadman v. Metropolitan*

Prop. & Cas. Ins. Co., 484 F.3d 91, 104-105 (1st Cir. 2007) (employer did not violate ADA when it responded to the request for accommodation that it thought had been made, and the employee did not clarify the requested accommodation); *Conneen v. MBNA America Bank, NA*, 334 F.3d 318, 331-32 (3d Cir. 2003) (employer not to be faulted for taking plaintiff at her word when the nature or extent of the plaintiff's disability was not obvious). Even if the parties' communications had ended at that time, therefore, Ethicon could not be held liable for failing to question the permanency of the restrictions that Plaintiff's treating doctor clearly and explicitly stated were "permanent." *Id*. *See also* cases discussed in Ethicon's First Step Brief at 32 and 35. But the parties' communications did not end on October 15, 2001.

The discussions between Ms. Hadziosmanovic and Ms. Warren that began on October 18, 2001 were an almost immediate *continuation* of the interactive process that had started before their involvement. They continued to address Plaintiff's medical restrictions and the potential accommodation of those restrictions to enable Plaintiff to return to work. This context further demonstrates that Ms. Hadziosmanovic and Ms. Warren were engaged in the continuation of the interactive process under the ADA and not, as Appointed Counsel now seeks to redefine their discussions, in settlement negotiations.

POINT III

PLAINTIFF DID NOT PROVE THAT SHE WAS DISABLED AND QUALIFIED UNDER THE ADA

A. Plaintiff Did Not Prove that She Was Disabled under the ADA "Average Person in the General Population" Standard

Appointed Counsel fails to address the point fatal to the jury's finding that Plaintiff was disabled under the ADA: Dr. Watson based her opinion that Plaintiff was disabled on a standard that does not support a finding of disability under the ADA and, applying the correct standard, Dr. Watson's testing and testimony established that Plaintiff was not disabled under the ADA. Appointed Counsel cites no testimony by Dr. Watson or other evidence that Plaintiff was substantially impaired compared to the average person in the general population – the standard under the ADA. To the contrary, Dr. Watson repeatedly acknowledged that her opinion of disability was based on comparing Plaintiff against an elite standard and, even under that standard, her only quantification of Plaintiff's impairment was that it was "mild impairment" or "minor impairment." (JA0879-JA0871, JA0886-JA0887).

While Appointed Counsel criticizes Ethicon for relying "on the tests run by Dr. Watson," (Appointed Counsel Brief at 44), these tests specifically addressed Plaintiff's alleged impairment – cognitive functioning. Further, they were the same tests on which Dr. Watson relied, as Plaintiff's expert, to testify that Plaintiff

was disabled. (JA837-38). For example, Dr. Watson testified that her recommended accommodations were based on "the specific areas of deficit *that emerged on the testing*." (JA0841, emphasis added). She repeatedly relied on this testing to testify that Plaintiff had the cognitive "deficits" on which her disability claim is based. (JA0886-87). Appointed Counsel himself cites Dr. Watson's expert testimony based on this testing as evidence of disability. (Appointed Counsel Brief at 42). The problem remains, however, that the "deficits" found by Dr. Watson and upon which her opinion of disability relies were not based on the ADA's "average person in the general population" standard. Under the ADA standard, Dr. Watson admitted that Plaintiff's tested cognitive functioning was "normal." (JA0886-JA0887).

Appointed Counsel does not dispute that Dr. Watson's own testing found that Plaintiff's cognitive abilities were within the normal range for an average person in the general population.[8] Instead, Counsel argues that Ethicon's reliance on this standard ignores the second part of the applicable regulation, which permits finding a disability based on a significant restriction as to the "condition, manner

[8] Several times, Appointed Counsel asserts incorrectly, and without record citation, that Dr. Watson testified that Plaintiff's cognitive abilities "fell between average and below average in some areas." (Appointed Counsel Brief at 44, 45). Dr. Watson did not testify that Plaintiff's cognitive functioning was below average in any area. She testified that it was "average to low average range" in some areas, and "superior to very superior" in other areas. (JA886-JA887).

or duration" of an individual's ability to perform a major life function. (Appointed Counsel Brief at 44-45, citing 29 C.F.R. §1630.2(j)(1)(ii)). However, the standard of comparison under this part of the regulation is still "the average person in the general population." 29 C.F.R. §1630.2(j)(1)(ii). Further, Dr. Watson's quantification of Plaintiff's impairment as "mild" or "minor" included any restrictions in the condition, manner or duration of Plaintiff's ability. Therefore, the same problem remains whether Plaintiff's alleged disability is addressed under the first or second part of the regulation: there was no proof that she was *unable* to cognitively function or *significantly restricted* in the condition, manner or duration of cognitive functioning *compared to the average person in the general population*. *See* 29 C.F.R. §1630.2(j)(1). To the contrary, Dr. Watson's tests and expert testimony established that Plaintiff was *not* significantly impaired under the ADA standard. (JA0886-JA0887).

Appointed Counsel cannot separate the jury's finding of liability from the cognitive function tests on which Dr. Watson and Plaintiff relied at trial to assert (under an incorrect standard) that Plaintiff had cognitive "deficits" constituting a disability. There was no other evidence sufficient to support a finding of disability – much less sufficient to overcome the objective medical evidence showing that Plaintiff's cognitive functioning was normal. Appointed Counsel relies, for example, on Dr. Watson's reference to "cognitive fatigue." (Appointed Counsel

Brief at 42). But Dr. Watson did not testify that any such fatigue created a substantial limitation in Plaintiff's ability to cognitively function compared to an average person. To the contrary, Dr. Watson testified that Plaintiff was able to compensate for any such condition by strategies such as "writing down notes [and] keeping little Post-it notes around." (JA834). Difficulties that can be addressed by measures such as making notes or reminders are not, as a matter of law, the type of "unusually restrictive limitations on cognitive functioning such that they amount to a substantial limitation." *Weisberg v. Riverside Tsp. Bd. of Ed.*, 180 Fed. Appx. 357, 363 (3d Cir. 2006).

Without support from (and, indeed, contradicted by) the objective medical testing by Dr. Watson, the anecdotal testimony by Plaintiff and her husband that Appointed Counsel cites was insufficient to support the verdict. Appointed Counsel relies on Plaintiff's testimony that she had difficulty reading, mood issues, and fatigue, and her husband's testimony about "driving, shopping, and cooking" or that Plaintiff could be "distracted." (Appointed Counsel Brief at 42, 43). Like Dr. Watson's own expert opinion of disability, Plaintiff's and her husband's testimony was a comparison to what they believed she personally should have been able to do and not the required comparison under the ADA to the average person in the general population. Further, their testimony did not establish a major impairment of ability. For example, while Appointed Counsel argues that

Plaintiff's husband was "forced" to do "most of the driving, shopping, and cooking," (Appointed Counsel Brief at 43), he did not testify he was "forced" or that Plaintiff was unable to do these things. Instead, he testified only that he performed these tasks to allow Plaintiff to focus on her rehabilitation during her STD leave. (JA965).

Appointed Counsel also implicitly recognizes the significance of Plaintiff's testimony that when she left Ethicon and started a similar job at Aventis in December 2001 – the relevant time for determining whether she was disabled – Plaintiff was able to perform her job well without any accommodation. (JA0906, JA0801, JA0679-JA0670). Specifically, he attempts to distinguish *Weisberg*, in which this Court affirmed summary judgment holding that the plaintiff was not disabled under the ADA, on the grounds that the plaintiff in that case was able to "do his job and do it well" without accommodation. (Appointed Counsel Brief at 46). Plaintiff admitted, however, that she did just that when she went to Aventis. (JA0906, JA0801, JA0679-JA0670). Just as in *Weisberg*, therefore, the evidence of impairments that did not prevent Plaintiff from performing her job without accommodation was not sufficient to establish that she was disabled under the ADA.

It is no answer to say that the jury heard the evidence and decided the issue. The evidence was not sufficient to support its finding. In any event, the jury

consideration of the issue was likely, if not inevitably, misled by the force of Dr. Watson's expert testimony repeatedly applying a standard different from the standard applicable under the ADA. Either way, judgment should not have been entered on the verdict that Plaintiff was disabled under the ADA.

B. Plaintiff Was Not a Qualified Individual under the ADA Because She Did Not Prove that There Was a Reasonable Accommodation Allowing Her to Perform the Essential Functions of the Job

The opposition briefs do not dispute that, whether on a permanent or temporary basis, Plaintiff's proposed work-at-home accommodation would have required reassigning essential functions of her job to others. This was established by the uncontradicted evidence, including Plaintiff's own testimony. (*See* Ethicon First Step Brief at 54). Nor do the opposition briefs directly address the legal errors by which the District Court upheld the jury verdict despite this uncontradicted evidence: (1) requiring only that Plaintiff could perform "a portion of [her] position" and (2) transforming Ms. Traver's testimony that she might have been *willing* to temporarily reassign essential job functions into a legal obligation to do so. (JA0078-JA0079).

Instead, Appointed Counsel's primary argument interposes another incorrect legal standard. Appointed Counsel argues that Ethicon cannot challenge whether Plaintiff was a qualified individual with a reasonable accommodation because the jury found that Ethicon had failed to engage in the interactive process. (Appointed

Counsel Brief at 48, 49, 52). This argument confuses two separate elements of Plaintiff's required proofs. Plaintiff was required to prove not only that Ethicon had failed to engage in an interactive process, but also that she was a qualified individual who could perform the job with or without a reasonable accommodation. *See*, *e.g.*, *Taylor*, 184 F.3d at 306, 311 (3d Cir. 1999); *see also* 42 U.S.C. § 12112(b)(5). Since the premise of Plaintiff's claim was that she required a reasonable accommodation, she had to prove that a reasonable accommodation existed that would have permitted her to perform the essential functions of the job. *See Donahue v. Consolidated Rail Corp.*, 224 F.3d 226, 229 (3rd Cir. 2000) ("The plaintiff must make a *prima facie* showing that reasonable accommodation is possible").

The jury's finding that Ethicon did not engage in an interactive process did not relieve Plaintiff of the burden of proving the reasonable accommodation element of her claim. As this Court has recognized:

> [W]here a plaintiff cannot demonstrate "reasonable accommodation," the employer's lack of investigation into reasonable accommodation is unimportant. . . . The ADA, as far as we are aware, is not intended to punish employers for behaving callously if, in fact, no accommodation for the employee's disability could reasonably have been made.

Mengine v. Runyon, 114 F.3d 415, 420 (3d Cir. 1997) (addressing similar element under Rehabilitation Act), *quoting Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th

Cir. 1997). *See also Rehling v. City of Chicago*, 207 F.3d 1009, 1016 (7th Cir. 2000) (plaintiff cannot base a reasonable accommodation claim solely on the allegation that the employer failed to engage in an interactive process). Thus, regardless of the jury's finding on the interactive process, Plaintiff was required to prove at trial that a reasonable accommodation existed that would have allowed her to perform the essential functions of the job. Because it is undisputed that the accommodations identified at trial would not have permitted Plaintiff to perform all of the essential functions of her job, Plaintiff failed to prove that she was a qualified individual under the ADA.

Appointed Counsel's argument addressing the temporary reassignment of job functions also is incorrect. Given the uncontradicted evidence that a work-at-home schedule would have required reassigning essential functions of Plaintiff's job to others, Appointed Counsel argues that the ADA requires temporary reassignment of even essential job functions in order to accommodate an employee. (Appointed Counsel Brief at 50-51 & n. 14). There is no other basis on which Appointed Counsel argues that Plaintiff proved that a reasonable accommodation existed.

Appointed Counsel cites no support for this argument, and there is none. Instead, he cites only the interpretative guidance addressing modifications of "*non-essential, marginal* job functions." (Appointed Counsel Brief at 50 n.14, quoting

29 C.F.R. Pt. 1630, App. 344, emphasis added). As Appointed Counsel concedes, "employers are not required to modify the *essential* functions of a job in order to accommodate an employee." (Appointed Counsel Brief at 51, quoting *Donahue v. Consolidated Rail Corp.*, 224 F.3d 226, 232 (3d Cir. 2000)). Again, Appointed Counsel seeks to create a false distinction, this time between the modification of job functions and the temporary reassignment of job functions. Reassigning essential functions of an employee's job to others, whether on a permanent or temporary basis, is by definition a modification of the job's essential functions during the period of the accommodation. *See*, *e.g.*, *Webster's Third New International Dictionary* (1981) (defining "modify" as meaning to change, without reference to whether change is temporary or permanent). That is precisely what the ADA does not require. *E.g.*, *Donahue*, *supra*. In other words, if Plaintiff's return to work required the reassignment of her essential job functions to others, then Plaintiff was not qualified under the ADA at that time.

Appointed Counsel does not cite the authority that addresses the concept of "temporary reassignment" or "reassignment" as a reasonable accommodation. That authority contradicts his argument and Plaintiff's claim. "Reassignment," whether temporary or permanent, refers to the accommodation of a disability by reassigning the employee to another, vacant position for which the employee is qualified. 42 U.S.C. §12111(9)(b); 29 C.F.R. §1630.2(o)(2)(ii). *See*, *e.g.*,

Mengine, 144 F.3d at 418; *Ozlowski v. Henderson*, 237 F.3d 837, 840-41 (7th Cir. 2001); *Parker v. Verizon Pennsylvania, Inc.*, 2009 U.S. App. Lexis 2508 (3d Cir. 2009) (unpublished); *Vitale v. Georgia Gulf Corp.*, 2003 U.S. App. Lexis 24855 (5th Cir. 2003) (unpublished). In this case, Plaintiff did not identify any vacant position to which she could have been reassigned.

Further, whether addressing a potential temporary or permanent reassignment, no authority requires an employer to create a position with modified essential functions or to modify the essential functions of an existing position to provide a reassignment. To the contrary, the EEOC itself has recognized that even temporarily "eliminating an essential function" to facilitate a reassignment would "go beyond the ADA's requirements." *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship*, No. 915.002 at n. 89 (Oct. 17, 2002).

Both the District Court's decision and now Appointed Counsel's argument confirm that the only way the jury's verdict can be rationalized is either to relieve Plaintiff of her burden to prove that a reasonable accommodation existed or to require Ethicon to have modified the essential functions of Plaintiff's position. Neither basis correctly applies the law. Because Plaintiff did not prove that a reasonable accommodation existed that would have permitted her to perform the

essential functions of her job, she did not prove that she was a qualified individual under the ADA.

POINT IV

THE DISTRICT COURT ERRED BY ORDERING REINSTATEMENT WITHOUT CONSIDERING PLAINTIFF'S ABANDONMENT OF THE WORKFORCE AND HER PROFESSION IN 2004

The EEOC concedes the central premise of Ethicon's appeal on the reinstatement issue:

> There may be extreme cases in which the plaintiff's total failure to mitigate damages amounts to an abandonment of her profession. And abandonment of one's profession may be one of the factors that a district court could, in its discretion, rely on in deciding to deny reinstatement.

(EEOC Brief at 18). This concession accords with the case law. *See McKnight v. General Motors Corp.*, 973 F.2d 1366 (7th Cir. 1992), and *Ellis v. Ringgold School District*, 832 F.2d 27 (3d Cir. 1987) (both discussed in Ethicon's First Step Brief at 60-62). It also accords with the principle that reinstatement, as an equitable remedy, is subject to equitable considerations addressing the plaintiff's own conduct. (*See* cases discussed *id*. at 58-59). And it demonstrates the fundamental error in the District Court's grant of reinstatement: the District Court categorically excluded Plaintiff's abandonment of the workforce and her profession from being a factor in the reinstatement analysis.

Neither Appointed Counsel nor the EEOC refute the fact that, based on Plaintiff's own testimony, Plaintiff completely abandoned the workforce and her profession after she left Aventis in 2004. (JA0812-JA0813). Appointed Counsel ignores the point. The EEOC argues only that Plaintiff did not abandon her profession because she worked at Aventis from 2001 to 2004. (EEOC Brief at 18). However, the EEOC's argument misses the point. Plaintiff's abandonment of the workforce and her profession did not occur in 2001. It occurred in 2004 when she left Aventis and, as the District Court found, "withdrew entirely from the employment market." (JA0092-JA0095).

Despite this uncontroverted record, both Appointed Counsel and the EEOC seek to reframe the issue on appeal as a "failure to mitigate damages." (Appointed Counsel Brief at 53, 55, 57.; EEOC Brief at 8). As the EEOC recognizes, however, there is a distinction between merely failing to mitigate damages and the "extreme case" of a plaintiff's "abandonment of her profession." (EEOC Brief at 18). For example, a failure to mitigate damages can arise from a plaintiff's failure to use reasonable diligence to find other employment despite an intent to work. *See*, *e.g.*, *Booker v. Taylor Milk Co.*, 64 F.3d 860, 865, 867 (3d Cir. 1995), on which the EEOC seeks to rely. (EEOC Brief at 17). By contrast, in this case, Plaintiff's abandonment of her profession mirrors the type of conduct that this Court and the Seventh Circuit have recognized could foreclose reinstatement. *See*

Ellis v. Ringgold School District, 832 F.2d at 30 (referring to a "voluntary withdrawal from her former profession" and "abandonment of a profession"); *McKnight*, 973 F.3d at 1372.

Appointed Counsel and the EEOC cite no authority excluding consideration of a plaintiff's abandonment of the workforce and her profession from the reinstatement analysis. Contrary to Appointed Counsel's argument, this Court has never restricted the reinstatement analysis to the two factors identified by Appointed Counsel – animosity between the parties and the availability of a comparable position. (Appointed Counsel Brief at 58, *citing Blum v. Witco Chemical Corp.*, 829 F.2d 367 (3d Cir. 1987); *Feldman v. Philadelphia Housing Authority*, 43 F.3d 823 (3d Cir. 1994)). Nowhere did the Court in *Blum* and *Feldman* even suggest that these considerations were exclusive; it identified them because they were the factors at issue. Indeed, the Court introduced these considerations with "*e.g.*" and "such as," clearly indicating that they were being identified as examples rather than an exclusive list. *Blum*, 829 F.3d at 373-74; *Feldman*, 43 F.3d at 832.

Similarly, the EEOC's statutory argument seeks to create a restriction where none exists. The EEOC argues that Plaintiff's conduct cannot impact reinstatement because Title VII's remedial provisions are "silent about the effect of a failure to mitigate on reinstatement." (EEOC Brief at 16, citing 42 U.S.C.

§2000e-5(g)(1)). There is no meaningful "silence." The statutory provision cited by the EEOC, which does not explicitly refer to a "failure to mitigate" at all, simply refers to the offset of earnings against back pay. (*Id*.) Nothing in the statute purports to identify, much less limit, the equitable factors relevant to reinstatement. Indeed, the EEOC's argument goes too far: it would preclude a court from considering *any* factors regarding reinstatement because none are addressed in the statute. Because the statute is also "silent" about the impact of a failure to mitigate on front pay, the EEOC's argument would even preclude a court from offsetting earnings against front pay. Likewise, the EEOC overreaches by relying on the statute's reference to the potential of reinstatement without a back pay award. (EEOC Brief at 18). The absence of a back pay award could result, for example, from a plaintiff having fully mitigated any economic loss by working. The possibility of reinstatement in that situation has nothing to do with whether reinstatement is appropriate in the opposite situation of the plaintiff who has completely abandoned the workforce and her profession.

The EEOC also misplaces reliance on this Court's decision in *Booker*, *supra*. The only issue in *Booker* was whether a plaintiff could recover back pay for the amount of lost earnings in excess of what he could have earned with reasonable diligence. 64 F.3d at 867. Nothing in *Booker* addressed reinstatement or a complete abandonment of the workforce.

With the exception of *Dilley*[9], which Ethicon has already addressed (Ethicon First Step Brief at 59) and which is contrary to *McKnight*, *Ellis v. Ringgold School District*, and other cases (*id*. at 58-62), Appointed Counsel and the EEOC cite no case even arguably supporting their position. *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1 (1st Cir. 1999), is inapposite because no issue was raised or discussed in that case about the effect of the plaintiff's failure to seek employment on the availability of reinstatement. Other cases are inapposite because they simply required the feasibility of reinstatement to be addressed before front pay, *Hansard v. Pepsi-Cola*, 865 F.2d 1461, 1469-70 (5th Cir. 1989), or did not address reinstatement at all on appeal. *Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269 (4th Cir. 1985). The remaining case cited by Appointed Counsel, *Hazel v. U.S. Postmaster General*, 7 F.3d 1 (1st Cir. 1993), actually supports Ethicon's position. There, after finding that the plaintiff's "failure to mitigate by reporting to work in [a] new post" precluded damages, the Court held that "granting equitable relief would be equally futile," including reinstatement. 7 F.3d at 5.

Here, the District Court's exercise of discretion to award reinstatement was flawed because the Court failed to consider relevant equitable factors. Plaintiff chose to abandon the workforce and her profession, and for years do absolutely

[9] *Dilley v. SuperValu Inc.*, 296 F.3d 958 (10th Cir. 2002).

nothing to try to participate in the workforce or her profession. Neither reinstatement nor any other equitable relief is appropriate to provide Plaintiff with what she chose to abandon. The Reinstatement Order, therefore, should be vacated.

OPPOSITION ARGUMENT IN 12-1361

THE DISTRICT COURT CORRECTLY DENIED PLAINTIFF'S APPLICATION FOR EMERGENCY RELIEF

A. Standard of Review

Because Plaintiff's Application for Emergency Relief sought relief for a claimed failure to comply with the Reinstatement Order, it was effectively a motion for contempt. *See Pittsburgh-Des Moines Steel Co. v. United Steelworkers of America*, AFL-CIO, 633 F.2d 302, 311 (3d Cir. 1980).

This Court reviews the denial of a motion for contempt or for similar relief under an abuse of discretion standard. *Harley-Davidson, Inc. v. Morris,* 19 F.3d 142, 145 (3rd Cir. 1994). "The district court may be reversed only where the denial is based on an error of law or a finding of fact that is clearly erroneous." *Id*.

B. Summary of Argument

Plaintiff's appeal is from the denial of her post-judgment application for emergency relief, which in turn was based on her claim that Ethicon had failed to comply with the Reinstatement Order under the Final Judgment. Plaintiff never appealed from the Final Judgment itself. The District Court correctly denied

Plaintiff's application for emergency relief because Ethicon twice offered reinstatement to a comparable position and, as the District Court found, Plaintiff unjustifiably failed to accept either reinstatement offer. (DSA009).

Faced with the incontrovertible fact that Plaintiff twice failed to accept reinstatement, Appointed Counsel nonetheless urges this Court to order front pay because "reinstatement has not occurred." (Appointed Counsel Brief at 60). Appointed Counsel's argument ignores the extensive record evidence of Ethicon's good faith compliance with the Final Judgment. In any event, it fails to even present a justiciable issue to this Court, for two reasons.

First, the Court does not have jurisdiction on Plaintiff's appeal to grant the relief that Appointed Counsel seeks on behalf of Plaintiff – the modification or supplementation of relief under the Final Judgment to provide front pay either in lieu of reinstatement or provisionally pending reinstatement. The front pay remedy that Plaintiff seeks not only would go beyond the scope of and change the relief granted under the Final Judgment, it would directly contradict the District Court's ruling that Plaintiff was not entitled to front pay because she had abandoned the workforce and her profession. (JA0097). That ruling is part of the Final Judgment from which Plaintiff did not appeal.

Second, neither Appointed Counsel nor Plaintiff identifies any error by the District Court in denying Plaintiff's application for emergency relief. There were

no grounds for relief. Plaintiff's application was based on the claim that Ethicon had failed to reinstate her in violation of the Final Judgment's reinstatement order. It is undisputed, however, that Ethicon had twice offered reinstatement to Plaintiff, and Plaintiff did not establish that the offered positions were not comparable or that her failure to accept the offered reinstatement was justified. Much less did she establish that Ethicon had violated the Reinstatement Order. The District Court, therefore, correctly denied Plaintiff's application.

C. Plaintiff's Appeal Cannot Be Used as a Vehicle to Modify the Final Judgment to Convert Reinstatement into Front Pay Because Plaintiff Did Not Appeal from the Final Judgment

Appointed Counsel asks the Court to modify the Final Judgment either by supplementing the award of reinstatement with a provisional award of front pay pending reinstatement or by replacing the reinstatement award with a front pay award "reinstating the jury's advisory award." (Appointed Counsel Brief at 62-63, 64). That is precisely what the Final Judgment precludes: the District Court rejected the jury's advisory front pay award and ruled that Plaintiff's abandonment of the workforce and her profession in 2004 precluded any award of front pay. (JA0092-JA0095, JA0097). Plaintiff did not appeal or cross-appeal from that ruling or any other part of the Final Judgment.

A timely appeal is a jurisdictional requirement. *E.g.*, *U.S. v. Tabor Realty Corp.*, 943 F.2d 335, 342 (3d Cir. 1991). Plaintiff cannot rely on Ethicon's appeal

to provide her a right to challenge the Final Judgment from which *she* did not appeal:

> An appellee who has not filed a cross-appeal may not "attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary."

Id. at 342, *quoting Morley Const. Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191 (1937). Nor can Plaintiff rely on her appeal from the denial of her post-judgment Application for Emergent Relief. A party cannot resurrect an expired ability to appeal from a final judgment by appealing from the denial of a post-judgment motion. *See*, *e.g.*, 15B Wright & Miller, *Federal Practice & Procedure* §3916 (2d ed. Supp. 2006) (an appeal from an order on a post-judgment motion "should not extend to revive lost opportunities to appeal the underlying judgment"). That is particularly so because, at the time plaintiff filed her Application for Emergent Relief, the District Court itself did not have jurisdiction to modify the Final Judgment as Ethicon's appeal from the Final Judgment was pending. *See*, *e.g.*, *Maine Line Federal Sav. & Loan Ass'n v. Tri-Kell*, 721 F.2d 904, 906 (3d Cir. 1983).

Because Plaintiff did not appeal from the Final Judgment, the Court does not have jurisdiction to modify the Final Judgment to grant additional or different relief to Plaintiff. Even without further addressing its merits, therefore, the relief requested on Plaintiff's appeal cannot be granted.

D. The District Court Correctly Denied Plaintiff's Application for Emergency Relief Because Plaintiff Twice Failed to Accept Reinstatement Offers Complying with the Final Judgment

Neither Plaintiff nor Appointed Counsel identifies any error in the District Court's denial of Plaintiff's Application for Emergency Relief. Plaintiff's application sought relief for an alleged failure to comply with the Reinstatement Order because, as Plaintiff claimed, the District Court had entered a judgment of reinstatement and plaintiff had not yet been "reinstated as an employee of Ethicon, Inc." (DSA192-193 ¶¶3, 14). No other basis was asserted for relief. The District Court correctly denied Plaintiff's application because Ethicon had not violated the Reinstatement Order. To the contrary, as the Court found, Plaintiff's failure to accept either of Ethicon's two offers of reinstatement was not justified. (DSA009).

Appointed Counsel does not even directly address the District Court's ruling or acknowledge the two offers of reinstatement that Plaintiff failed to accept. Much less does Counsel identify any legal error or abuse of discretion in the Court's ruling. While Counsel argues that the "real issue" on Plaintiff's appeal is "how" she should be "made whole," (Appointed Counsel Brief at 62), that question was resolved by the District Court when it denied front pay and ordered reinstatement as part of the Final Judgment. It cannot be revisited now. (*See* Point IV.C, *supra*).

Further, the only reason Plaintiff has not been "made whole" by the Reinstatement Order is Plaintiff's own unjustified failure to accept the offers of reinstatement that were made to her. Appointed Counsel cites no authority for transforming Plaintiff's own failure to accept reinstatement into a basis for additional relief or for converting reinstatement into front pay. Nor does Counsel even argue that the District Court erred by finding that Plaintiff's failures to accept reinstatement were not justified.

Without addressing the District Court's findings and contrary to the record, Appointed Counsel argues that Ethicon somehow used the need for an interactive process to prevent or delay reinstatement. (Appointed Counsel Brief at 63-64). Appointed Counsel's argument contradicts Plaintiff's position before the District Court.[10] It also contradicts what occurred with the offers for reinstatement. Ethicon's offers for reinstatement were not conditioned on or delayed by an

[10]In the District Court, *Plaintiff*, not Ethicon, argued that reinstatement could not occur until after an interactive process had been completed – a position that would have delayed reinstatement. (DSA006-007). Plaintiff made this argument on her Application for Emergency Relief (for the first time, and contrary to the uncontradicted evidence of the parties' agreement regarding the timing of the interactive process on reinstatement). (*Id*.) The District Court correctly accepted Ethicon's argument (consistent with the EEOC's interpretative guidance on the interactive process as well as the uncontradicted evidence of the parties' agreement on the timing of the interactive process) that an interactive process to address any needed accommodation to perform a job could occur after the individual had accepted reinstatement to a specific job. (DSA009). Thus, the interactive process would have occurred after reinstatement, not delaying reinstatement.

interactive process. (DSA103-107; DSA200-204). To the contrary, after *Plaintiff* raised the need for an interactive process to address accommodations, the parties agreed that any interactive process would occur *after* Plaintiff accepted an offer of reinstatement. (DSA098-099, 127-29, 135, 201, 207-208). Further, far from delaying, Ethicon repeatedly asked that Plaintiff accept or reject its offers of reinstatement by specific dates so that it could fill the position – dates that Plaintiff repeatedly extended. (*See, e.g.,* DSA113, 129, 134-135, 207-208) The only delay was due to Plaintiff's prolonged refusals to accept or reject reinstatement. (*See* pp. 4-15, *supra*).

Appointed Counsel's argument about Plaintiff's alleged concern about her Social Security Disability Income ("SSDI") benefits is a red herring. (Appointed Counsel at 61). Neither the Reinstatement Order nor the ADA required Ethicon to address Plaintiff's SSDI benefits as part of her reinstatement. The ADA's requirement for reasonable accommodation applies to "physical or mental limitations." 42 U.S.C. §12112(b)(5)(A); 29 C.F.R. §1630.9(a). It does not extend to matters "that are primarily for the personal benefit of the individual with a disability," such as an individual's ability to retain government benefits, payment of back pay, or punitive damages. *See* 29 C.F.R. Appendix to §1630.9. In any event, there was no need for Plaintiff's reinstatement to address her SSDI benefits,

because acceptance of reinstatement would not have prejudiced her SSDI rights.[11] Lastly, only Plaintiff as the SSDI beneficiary, and not Ethicon, could engage the Social Security's "Ticket to Work" program.[12]

The simple point remains that Plaintiff twice was offered and failed to accept reinstatement. She cannot now use that failure to convert the reinstatement award into front pay. Nor did she establish that Ethicon violated the Reinstatement Order. The denial of Plaintiff's Application for Emergency Relief, therefore, must be affirmed.

[11]According to the Social Security Administration, reinstatement would not have had any impact on Plaintiff's SSDI benefits for a nine-month work trial period and, if she again became unable to work up to five years after her benefits terminated, she could immediately restart her benefits. *See* SSA Publication No. 05-10095, ICN 468625: "Social Security Work Incentives At A Glance."

[12]*See* 20 C.F.R. 411.700*, et seq.* *See also* http://www.yourtickettowork.com; www.socialsecurity.gov/pubs/10061.html.

CONCLUSION

For all the foregoing reasons, and those set forth in Ethicon's First Step Brief, the Court should reverse the judgment below and direct the entry of judgment for Ethicon. Alternatively, the Court should vacate the judgment and remand the matter for a new trial on all issues, or, minimally, reverse the order of reinstatement. On Plaintiff's appeal, the Court should affirm the District Court's denial of her Application for Emergency Relief.

Respectfully submitted,

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/s/ Francis X. Dee

Francis X. Dee
Counsel of Record

Dated: January 30, 2013

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 13,059 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), as counted by the Microsoft Office Word program.

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 in 14 point Times New Roman font.

Stephen F. Payerle

Dated: January 30, 2013

CERTIFICATION OF COMPLIANCE WITH 3rd 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, ClamXav version 2.3.4, has been run on the file and no virus was detected.

Stephen F. Payerle

Dated: January 30, 2013

CERTIFICATION OF SERVICE

I certify that the original and nine copies of this Brief and for copies of Defendant's Supplemental Appendix 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 and Defendant's Supplemental Appendix are being served today on Plaintiff, Appointed Counsel, and the EEOC's Counsel of Record by Federal Express next day delivery, and that service also is being made on Appointed Counsel and the EEOC's Counsel of Record, as Filing Users, by electronic filing and service through ECF.

I certify under penalty of perjury that the foregoing statements by me are true.

Stephen F. Payerle

Dated: January 30, 2013